REPORT

The Political Constitution

An Idea Worth Protecting?

Daniel Skeffington

THE CONSTITUTION SOCIETY

About the Author

Daniel Skeffington is a Research Fellow at The Constitution Society.

Daniel holds a BSc in Politics and International Relations from the University of Bath and an MSc in Political Theory from the London School of Economics and Political Science.

Contents

Abstract

This report examines the extent to which 'the political constitution' is an idea worth protecting in British and comparative constitutional discourse. The term is ambiguous, with various 'images' of what the political constitution is finding purchase in academic and political debate. The tensions inherent in our understanding of this amorphous concept have recently come to the fore during the political uncertainty in the United Kingdom since the 2016 referendum and the constitutional questions this has provoked, sharpening the divide between advocates of so-called legal and political constitutions equally. By examining the tension between three important images of the political constitution – the historical, the analytical, and the political – this report asks what is so valuable about the concept in the modern British system. Revisiting the political constitution in light of ongoing debates, exposing the various competing meanings it has taken on, the paper presents the case for retaining the concept whilst highlighting its strengths and drawbacks for British political thought, public policymaking, and constitutional scholarship in general.

Executive Summary

1. When studying the constitution we should be more aware – and seek to be more aware – of the kind of analysis we are undertaking, and also more transparent about the kind of analysis we are engaged in. The political constitution is a contested idea with several distinct, interconnected meanings, each of which provides only a partial understanding of its conceptual totality. The report examines three of these understandings – or 'images' – of 'the political constitution' in contemporary political theory: the historical, the analytical, and the political. It argues that more care should be taken by scholars and actors when considering which aspect of the concept they are invoking or exploring in discussions, helping to improve the quality of these debates and reduce the conceptual confusion around the idea of the political constitution.

2. Richard Ekins – whose writings have been particularly influential on the UK government's own thinking about this subject in recent years – is one among many who conflate these three images. We should speak with more care and caution about the political constitution, and for that we need to couch its specific aims, histories, and analytical insights within a wider model of how constitutions work. The political image of the constitution is important, but also limited: it drives forwards particular constitutional changes but cannot be a substitute for analytical understanding or historical depth. There is ample room in constitutional theory for a pragmatic classical conservatism in the vein of Anne Twomey's vision of constitutional change and amendment. Ekins does, in some areas, sketch a more radical vision of the constitution; his basic points are fairly orthodox, but in areas his theory lacks substance, often due to a lack of engagement with the wider literature on constitutional theory. Others, such as Timothy Endicott or Martin Loughlin, point to a more robust theory of constitutional conservatism which may find more purchase; more rigorous self-reflection is required of these visions to understand where their value lies in maintaining the constitution.

3. We should reclaim the various images of the political constitution within a wider homeodynamic model of the constitution. The theory of 'constitutional homeodynamics' outlined at the end of this report provides a broad, overarching framework to reconcile Martin Loughlin's more historical view (that the legal/political divide in scholarship is meaningless, and we should speak of constitutions in general) with Aileen Kavanagh's analytical, institutional view (that Parliament, the executive, and the judiciary have a shared responsibility for upholding the constitution), while recognising the value that weaponised concepts (such as Ekins' reading of the political constitution) have for sustaining political discourse and the constitution in general. The homeodynamic model understands the constitution as dualist to a degree, recognising the tension between internal stability, balance, and healthy discourse and the outward-facing, dynamic aspect of constitutions, termed the 'Janus-faced' nature of the constitution. Within the homeodynamic constitution we can use the analytical image of the legal/political divide to assess what sort of accountability and authority structures exist and how they ought to be structured, while recognising the various roles institutions have to play in this, turning the political image into a specific and limited tool centred on constitutional balance *within* the homeodynamic order. We can only 'step back and move on', as Kavanagh and others have suggested, by limiting and channelling the sorts of politically charged constitutional changes that more evangelical champions of ideal-type political or legal constitutions have *within* this homeodynamic order, recognising and reaffirming the proper boundaries of debate. This can also help those pursuing more contentious cases for constitutional

reform (written constitutions with constitutional courts, executive-centred ‘political constitutions’, etc.) understand the specific and limited role their critiques play in the wider discourse, and perhaps encourage reflection on the value these positions hold for discourse as a whole.

Introduction

British[1] constitutional discourse has featured many prominent debates in the last few decades; the nature of human rights in a parliamentary democracy, the expanding influence of the judiciary and the role of the courts in the constitution, the sovereignty of parliament and the merits of a codified constitution have all been central. While calls for a written document have generated much interesting debate around the wider subject of Britain's uncodified constitution, there has been little political will animating these arguments, making their adoption as of yet unlikely. What *has* emerged is a renewed interest in, or at least a reassertion of, the so-called 'political constitution'. But what *is* the political constitution? This report analyses the term, sketching three 'images' of the political constitution before examining the key debates around this contested concept in contemporary discourse, questioning its utility to constitutional discussion. I argue the first two images are worth preserving and protecting in constitutional scholarship, but that the third adds a political dimension to the term which complicates our understanding of the concept in problematic ways, and that we must recognise it for what it is when discussing the British constitution. I suggest there are three useful models that can help move past the legal/political divide in constitutional scholarship – the 'unified', the 'institutional', and the 'homeodynamic' – and that while each has its own significant conceptual strengths over the current and disputed understandings of 'the political constitution', the homeodynamic is best positioned to reconcile what the unified and institutional models lack.

1 I use Britain throughout the report interchangeably with the UK to refer to the whole United Kingdom, rather than in the strict geographical sense of the term.

PART ONE

What is the political constitution?

Before diving into the contemporary debates that surround the political constitution it is worth establishing what the concept is. There are three main ways to approach the idea of the political constitution. The first is to understand the term in a historical manner as the broad political conditions that constitute a state. The second is to understand it as a meta-analytical category which is both opposed to and yet bound up with the idea of a 'legal constitution', under the broader historical image of a general constituted state. The third is to understand the term as having normative political weight, operating in the realm of political activity, aimed at achieving a certain political outcome in how a state is organised; that is, a weaponised concept with a distinct political aim. Each of these contested meanings are invoked, to various degrees, when discussing the term today, drawing on particular understandings of the concept in context. Only by recognising these three distinct, interrelated images can we distinguish between the different conceptual meanings of the political constitution today. This first section outlines these images in more depth.

The historical image

Constitutions are, at root, about enabling and restricting varieties of power. Their primary purpose is to constitute and limit the office of government, and generate the power required to govern. Just as the laws of grammar enable effective and cogent speech, so constitutions impose limits on the office of government and the exercise of political power in order to produce effective governance. They are the bodies of rules, procedures, laws, and practices[2] which define and limit sovereign power in order to then generate effective political power.[3] They also serve a number of performative purposes, demonstrating value-commitments to stave off foreign invasion (as was the case with Hawaii and the United States[4]) or to help assert a state's worth on the international stage.

During the eighteenth and nineteenth centuries London was the chief exporter of written constitutions around the world for both of these purposes. However, the idea gained little traction at home, perhaps, uniquely, because the strength of the British constitution was not to be found in its codification, but in its political nature. Much has been made of the inherent strength of the British constitution. Its 'unwritten' form, coupled with the absolute doctrine of parliamentary sovereignty – the idea that no law passed by Parliament may bind its successor – remains the working principle of the British government. Claims about this formless, timeless, unwritten constitution are often linked to a sense of British identity and peoplehood, and a sense of British – specifically English – exceptionalism runs through these arguments; the sense of post-reformation Britain, this insular, island nation, as a Protestant bulwark, holding fast against the tyrannical, Catholic hegemony of Europe.[5] John Doyle's 1848 image of the British constitution as an ark sailing smoothly through rough waters encapsulates the sense of an almost providential force, uniquely competent and self-assured.[6]

Yet while it is often assumed the political constitution is shorthand for Britain's uncodified constitution, this is a recent development, both normatively and analytically. Britain has always possessed some form of written constitution with legal force and weight, one which dates back to the negotiated settlements between landowning barons in England and the English king, ensuring political stability after periods of turmoil.[7] 'The political constitution' originally referred to the fact that *all* constitutions, codified and uncodified, British or otherwise, are created and sustained by political forces.[8] In the case of Britain, the Norman Conquest by William I in 1066, Henry I's 'Charter of Liberties', Henry II's 'Constitutions of Clarendon', the signing of Magna Carta by King John in 1215, and the 'Glorious Revolution' of 1688-89 all stand as pivotal moments in this development process, forming the political and juridical basis for the post-seventeenth century 'golden age' of constitution-making in Britain and the wider world.

2 In the broader, normative sense of the term invoked by Oakeshott.
3 See: Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2014).
4 Linda Colley, *The Gun, the Ship, and the Pen: Warfare, Constitutions, and the Making of the Modern World.* (Princeton: Princeton University Press, 2021) p.296-299.
5 Linda Colley, *Britons. Forging the Nation, 1707-1837*, (Yale: Yale University Press, 2009); Colley, *The Gun, the Ship, and the Pen.*
6 Colley, *The Gun, the Ship, and the Pen,* p.216.
7 Andrew Blick, *Beyond Magna Carta. A Constitution for the United Kingdom*, (London: Bloomsbury, 2015).
8 See: Colley, *The Gun, the Ship, and the Pen.*

This 'historical image' understands the political constitution as an outgrowth of the process of state formation, divorced from any particular constitutional arrangement, bound up with both written and unwritten forms of constitution developed during the constitutional golden age. It paints a picture of the political constitution as varied in both structure and form, open to a multitude of interpretations, sustained by a belief in a fundamental constitutional document and/or a 'cult of constitutional history'.[9] From this perspective, the political constitution is indistinguishable from the constitution-making process in general – the political means by which a state is constituted and the legal rules which both limit and generate the power of its government. However, this understanding lacks analytical or normative weight, eschewing questions of utility in favour of history and tradition[10], and whilst these are central to sustaining and stabilising a constitution in the long term, the lack of strong analytical potential – in terms of the structural form a government takes – leaves much to be desired conceptually.

9 Colley, *The Gun, the Ship, and the Pen.* p.415-416

10 Arguably this was the dominant paradigm of British constitutional understanding until 1997. See: Martin Loughlin, 'In Search of the Constitution', *LSE Legal Studies Working Paper No. 19* (2019), p.13.

The analytical image

The development of an analytical understanding of the political constitution emerged from debates around the historical image, looking at the structure as well as the traditions underpinning the system. The 'analytical image' understands the term as a broad category within constitutional analysis, one both opposed to, and yet bound up with, the 'legal' idea of a constitution. It first emerged from the debates following John Griffith's 1978 Chorley Lecture 'The Political Constitution', which transformed the political constitution into a distinct term in British constitutional vocabulary and framed the next forty years of constitutional discussion.[11] It is this analytical image of the concept, coupled with the debates it generated about the term, which comes to mind today when many people think about the political constitution.

While the lecture itself contains 'no new political, philosophical or methodological insights', the response it generated both in academia and the public consciousness produced a conceptual legacy that has lasted to the present day.[12] Griffith's primary concern was the ceding of political power on societal issues to the unelected, often conservative judges in Britain, which at that time dominated the courts. He argued for the supremacy of Parliament and the power of politicians to shape the social fabric of the country through electoral contestation, popular legitimacy, and a democratic mandate. Throughout the lecture he develops the concept of the political constitution as a descriptive term for the status quo of British constitutional arrangements at that time – one which privileges political decision making over judicial interpretation, with particular emphasis on contentious issues such as human rights.[13]

The term has since gained conceptual currency within legal and political circles as an analytical concept, and taken on a life of its own. While theories about what constitutes this image are diverse – perhaps threatening the integrity of the concept itself – a general consensus has emerged in the literature.[14] Adam Tomkins first provided normative weight to the term, juxtaposing the political constitution against resurgent theories of common-law constitutionalism and establishing the divide between the legal and the political.[15] Proponents of the former, such as Richard Bellamy, define a constitution as a 'written document, superior to ordinary legislation and entrenched against legislative change, justiciable and constitutive of the legal and political system'.[16] Legal constitutionalists begin with the assumption that 'there are certain questions that are uncontestable and insulated from the political process', arguing that the primary place where governmental action is held to account is the court-room and placing an emphasis on *limiting* government through the law.[17] These questions reflect 'certain fundamental values or truths that are held by some members of the community that are imposed on all members of

11 J.A.G. Griffith, 'The Political Constitution', *Modern Law Review* 45(1) (1979).
12 Martin Loughlin, 'The Political Constitution Revisited', *LSE Working Papers* (2017).
13 Best explored by Aileen Kavanagh in 'Recasting the Political Constitution: From Rivals to Relationships', *King's Law Journal*, 30:1 (2019) and Martin Loughlin, 'The Political Constitution Revisited', *LSE Working Papers* (2017).
14 Graham Gee and Grégoire Webber, 'What is a Political Constitution?' *Oxford Journal of Legal Studies* 30(2) (2010).
15 Adam Tomkins, *Our Republican Constitution*, (London: Hart, 2005).
16 Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy.* (Cambridge: Cambridge University Press, 2007), p.1.
17 Adam Tomkins, *Public Law,* Oxford University Press, p.19; Graham Gee and Grégoire Webber (2010), 'What is a Political Constitution?' *Oxford Journal of Legal Studies* 30(2) (2003), p.273; Adam Tomkins, 'The Role of the Courts in the Political Constitution' *University of Toronto Law Journal* 60(1) (2010), pp.1-2.

the community, incapable of removal if they disagree with them or disagree with their application in particular cases'.[18] They emphasise the primacy of common law as the bedrock of British constitutional arrangements and as the fundamental, sovereign principle of the constitution.[19] In Tomkins' words, legal constitutionalists claim 'there is no constitutional problem which is incapable of being solved by the courts, and no constitutional problem is solved until it is solved by the courts'.[20]

By contrast, political constitutions are said to place a primacy on the democratic process as well as institutional and political checks on governmental power. Ewing's nuanced interpretation of the political constitution has been influential amongst a range of scholars, emphasising the sovereignty of Parliament as the operational legal principle of the British state.[21] A range of scholars have agreed on the general contours of the concept – if not its full substantive content – articulating the idea of 'political constitutionalism' as a form of government centred on political institutions and deliberative democratic processes, as well as the normative primacy of a parliament.[22] Some have expanded on Bellamy's theory in recent years, defining the political constitution as a theory that privileges 'legislative supremacy, responsible government and mechanisms of political accountability … capable of channelling the exercise of political power towards the common good'.[23] They argue that the proponents of political constitutionalism, regardless of ideological tradition, have:

> 'coalesced around a similar institutional framework (i.e. a representative democracy organised around legislative supremacy and responsible government, and which is defined by its reliance upon mechanisms of political accountability); a similar set of constitutional values (e.g. political equality and self-government); and largely similar assumptions (e.g. about the proper relationship between law and politics)'.[24]

This legal/political divide is at the root of the analytical image of the political constitution, which understands the concept as one half of a whole; a lens and a tool to help analyse the structures of governmental power, accountability and oversight within a constitutional order, and help delineate where authority and responsibility lies. The debates since Griffith's lecture have helped formalise this long-standing polarity in constitutional thinking between legal and political structures into a useful concept, one capable of critiquing the functions of the British system and to comparing it to more 'legal' approaches. This division forms the basis of the analytical image which, when applied, can help determine the location of legitimacy, authority, sovereignty, and other significant concepts of the state, or assess the relative legal and/or political accountability given to them in a particular constitutional arrangement.

18 Keith Ewing, 'The Resilience of the Political Constitution', *German Law Journal*, 14(12) (2013), p. 2127.
19 Trevor Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law,* (Cambridge: Cambridge University Press, 2014).
20 Tomkins, *Our Republican Constitution*, p.20.
21 Ewing, 'The Resilience of the Political Constitution'.
22 See: Tomkins, *Our Republican Constitution*; Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy,* (Cambridge: Cambridge University Press, 2007); Graham Gee, 'The Political Constitution and the Political Right', *King's Law Journal* 30(1), (2019), pp.148-172.
23 Gee, 'The Political Constitution and the Political Right', p.149.
24 *Ibid.*, p.170.

The political image

This analytical distinction between legal and political constitutions is natural, but often simplifies contested and complex discussions. Nowhere is this more evident than in the political discussions about how a state *ought* to be constituted and structured and the kinds of arguments deployed to achieve these restructurings. The third image, the 'political image', concerns itself with the political discussions emerging from the contested terrain about what is valuable to a certain constitutional order. This image understands and values the concept for its rhetorical, political weight; for what it can bring to political argument. The political image may draw on a particular understanding of the historical and analytical images, constructing a certain vision of what the political constitution 'truly is'. Yet unlike these other modes of understanding it does not pursue an essential historical understanding of the constitution in context, nor an analytical understanding of the structures of the state. Rather, the political image concerns how the concept of the political constitution contributes to political action or discourse, applying the term politically in pursuit of a particular goal, reform, or agenda.

Of course, this is not unique to the concept of the political constitution; many advocates of so-called legal constitutions use the term in a similar manner to influence policy. All such concepts have political value divorced from their analytical merit or historical context, and as competing claims about the fundamental nature of how a constitution should operate lie at the root of the debates between legal and political constitutionalists this should be, on some level, expected.[25] This report does not seek to assess the merits of how this image of the constitution is being deployed, but rather to show that it *is* being used in this manner in current discourse, and that there are important distinctions between this image and the others worth highlighting for how the concept is understood in the round.

There are many political positions which can legitimately be taken on how a constitution should operate *within* a settled form of constitutional understanding, anchored in a shared belief about the fundamental 'rule of recognition' (to use Hart's term) that undergirds a given constitutional order.[26] The alternative to this dynamic and pluralist discourse is a partisan split between hard-line constitutional conservatives opposed to all forms of judicial involvement and a radical left-wing opposition increasingly sceptical of the value of political accountability itself; a bleak and atrophied form of debate which mirrors Tomkins' stark conception of the legal and political constitutions.[27] As such, a strong degree of ideological consensus around the idea of the political constitution is vital if is to endure as a concept, while a strong

25 Hans Kelsen noted this in his critique of Schmitt's essay on the Guardian of the Constitution (p.220). He summarised Schmitt's essay as having *political* value but decidedly lacking in analytical or jurisprudential weight, and made it clear to acknowledge the distinction between the two.

26 In *The Concept of Law*, H.L.A. Hart drew on Hans Kelsen's idea of the 'basic norm' to inform his understanding of the 'rule of recognition', the fundamental principle or guiding rule at the foundations of a legal order that designates what counts as valid law within that system. In Britain, this is the idea of 'parliamentary sovereignty'. We will see later that while this can be changed (by 'official consensus') this change would not be without serious consequences, and that despite divisions over the idea of the political constitution today the rule of recognition commands wide support in most serious quarters of government and administrative officialdom.

27 These are, of course, really two separate distinctions, one of which follows a traditional left/right division, the other which follows a limited versus constituted view of government. One can hold left wing political views and support strong, constituted government, as Griffith's did, or perhaps right-wing or liberal views with a more limited view of government. These conversations can overlap (and have done so during the UK's withdrawal from the EU) without political visions aligning with constitutional ones.

pluralist discourse within this framework is equally necessary for the health of the constitutional order that this concept animates.[28] However, while there has been a strong cross-party support for the idea of the political constitution for many decades, a recent 'waning ideological consensus' concerning the nature of the concept itself coupled with a 'growing gulf between different ideological traditions within political constitutionalism' puts the concept itself in doubt, and may in fact speak to a 'loss of faith by some of its adherents in its basic claims, values and assumptions'.[29] In the minds of many the British state is 'facing nothing short of a crisis of constitutional identity'.[30]

The extent to which this has deteriorated is unclear. While a far cry from the mediaeval state of 'conceptual anarchy', where a multitude of separate constitutional visions competed for legitimacy without commanding broad agreement, the current confusion has destabilised constitutional discourse.[31] Rather than a sudden collapse, the constitution is at risk of 'a gradual fraying by stages', a concern reiterated in recent reports by the UK Constitution Monitoring Group.[32] The 2016 referendum placed the parliamentary system under severe strain and reduced constitutional analysis to political argument. In the aftermath various images of the constitution circulated; half-remembered constructs of prior constitutional settlements lacking substantial meaning or conceptual depth, each vying for legitimacy. Each found its own bands of supporters within a fractured political discourse without any commanding a hegemonic consensus.[33] This was best expressed during the parliamentary disarray of early September 2019, when Parliament took over control of the order paper from the government, but it continues to this day.

As such, whereas the analytical image rests within the broader image of the historical, the political image refers to the way the term has been used as a conceptual weapon in live constitutional disagreements, specifying the particular site of contestation between different interpretations of the analytical and historical images. In such cases the three images of the political constitution, which are constitutive of the concept and yet parasitic upon one another, collapse back onto themselves, as claims about parliamentary sovereignty draw on particular historical images of the British constitution in concert with, or in opposition to, analytical images of other legal systems, political arrangements, and constitutional orders, asking whether the principle is functional or desirable today. History, philosophy, identity, present socio-political concerns, and a multitude of other concerns combine to present a *political* case which may even disagree about how to interpret the fundamental principle of the British constitution itself, parliamentary sovereignty.[34] It is with these three images in mind that this report turns to examine these contemporary debates over the political constitution.

28 Gee, 'The Political Constitution and the Political Right', p.172.
29 *Ibid.,* p.171.
30 Martin Loughlin, 'In Search of the Constitution', *LSE Legal Studies Working Paper No. 19* (2019), p.16.
31 See: Daniel Lee, *Popular Sovereignty in Early Modern Constitutional Thought*, (Oxford: Oxford University Press, 2016), p.8.
32 Andrew Blick and Peter Hennessy, 'Good Chaps No More? Safeguarding the Constitution in Stressful Times', *The Constitution Society* (London, 2019), p.30; see also: UKCMG, 'The Constitution in Review: Second Report from the United Kingdom Constitution Monitoring Group', *The Constitution Society* (London, 2022).
33 Loughlin, 'In Search of the Constitution', p.16.
34 Martti Koskenniemi provides an excellent introductory analysis of the concept today in Martti Koskenniemi, 'Vocabularies of Sovereignty: Powers of a Paradox', in: Hent Kalmo and Quentin Skinner (Eds.). *Sovereignty in Fragments. The Past, Present, and Future of a Contested Concept* (Cambridge, Cambridge University Press, 2010).

PART TWO

Contemporary debates

It was within this disputed constitutional context that the idea of 'protecting' the political constitution first emerged, bringing the 'political image' into sharp relief. This movement has been spearheaded by some influential voices, such as the former Supreme Court Justice Lord Sumption, who explored some of the benefits of rejuvenating the concept in his 2019 *Reith Lectures*. The Judicial Power Project (JPP) has led the way on the political and policy side, headed by Professor Richard Ekins and drawing much philosophical impetus from the work of John Finnis. While these thinkers differ on the substance of their proposals they all promote the political benefits of reinvigorating the political constitution. With the publication in 2019 of Ekins' report *Protecting the Constitution* and the subsequent decision of the British government to consider exceeding the rather modest recommendations of the 2021 Independent Review of Administrative Law (IRAL) in curtailing the powers of judicial review[35] (a pattern that is now being repeated in relation to the Human Rights Act), these abstract theoretical questions of the nature and limits of law and politics have been thrust centre stage, out of the backroom of academic discussion and into the heart of key political decisions.

Following recent constitutional upheavals, Ekins' report presented the 'contentious' case for 'restat[ing] limits on judicial power' in order to restore 'the political constitution and the common law tradition'.[36] The questions his interpretation raises go to the heart of the idea of what the British constitution is, and form the heart of the political discussion about the concept today. They are worth particular consideration given the influence of Ekins and the JPP on the government's current constitutional reform project. Many points raised in the report have come to pass as official government policy following the Conservative Party's victory in the 2019 General Election, with manifesto commitments to enact major constitutional reform, such as the *Dissolution and Calling of Parliament Bill* and the *Judicial Review and Courts Bill.* 'Restoring' the political constitution is at the heart of these proposals, and is the driving force behind the commitments on page 48 of the manifesto. While this debate was largely thought ended in academic scholarship, it has risen anew in politics. Indeed, for many this has become a central question of identity as much as prudent policy since leaving the European Union.

Ekins' fleshes out several major claims for what protecting this vision of the political constitution might require, all of which draw on his understanding of parliamentary sovereignty. Firstly he argues the

35 As it stands (passing the House of Lords Report Stage), the *Judicial Review and Courts Bill* proposes only minor changes. The broader point here relates to the fact that the government was minded to go much further. One could charitably, and not unreasonably, conclude this was due either to the robust processes and procedures of independent review and Parliamentary scrutiny in the British system, or that the government itself has backed down over what were fairly minor points of administrative law change within its wider agenda. There is likely an element of truth to both of these claims.

36 Richard Ekins, 'Protecting the Constitution', *Policy Exchange* (2019), p.7.

Miller 2 judgement[37] represents an 'affront to the political constitution', introducing 'a destabilising confusion about fundamentals' and a 'highly unorthodox understanding of parliamentary sovereignty' into the British system. He argues that because parliamentary sovereignty is the fundamental legal rule of the British state, it is not the court's role to create new legislation for perceived defects in the political system, claiming that the courts have usurped Parliament by exercising judicial review over a political power. The Supreme Court therefore caused a 'rupture of the political constitution' through the 'invention of new law', threatening to 'unsettle our constitutional law more generally'.[38]

Ekins blends this with a strong conception of national sovereignty in the international sphere, rejecting the encroachment of the European Court of Human Rights (ECtHR) and human rights law in British law and government (through the *Human Rights Act 1998* (HRA)), as well as defending the constitutionality of ministers who seek to break treaty agreements in the interests of national or political concerns. For Ekins 'neither the Government nor Parliament should accept that it is unconstitutional for ministers or civil servants to act in ways that would place the UK in breach of its international obligations, including treaty obligations to conform to EU law (including any post-Brexit treaty with the EU), to the ECHR, or to any other treaty.' He acknowledges that it 'would often be wrong for the UK to act in this way, but that 'the question of when and whether this is the case requires and permits political judgement and responsibility', and that 'ministers need confidential advice constrained only by basic ethics and by domestic law and settled constitutional conventions as distinct from international law, and are then accountable to Parliament and the people'.[39] Finally, and linked to this point, he claims Parliament should 'amend the HRA to limit the extent to which it undermines the constitutional balance … to restore its temporal scope – making clear that it does not apply to events that pre-date the Act – and its spatial scope – making clear that it does not generally apply outside the UK'. He claims the HRA undermines the UK's constitution by creating higher law which judges can use to challenge the legislative supremacy of Parliament, in practice overturning or amending Acts in accordance with the HRA.

This position is built on a particular understanding of parliamentary sovereignty which is not as uncontroversial as Ekins thinks it is, and which this part of the report will explore in more depth. The following two sections explore the interrelated debates between parliamentary sovereignty and executive power relating to the *Miller 2* case and the broader questions this case opened up post-fact concerning who acts as the guardian of the British constitution. The third section then considers Ekins' theory in light of this analysis, making the case that, at its core, Ekins' argument conflates the three images of the political constitution outlined in section one of this report, with fairly significant consequences for his own theory. Ekins' reading of the *Miller 2* case is important as the case serves as a microcosm of the debate he is contributing to, highlighting his own focus on judicial power as the

37 The widely-covered *Miller 2* judgement (R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland) concerned the nature of the relationship between the prerogative powers of the Crown as exercised by the government and Parliament, in this case the prorogation of Parliament by the Prime Minister in September of 2019. The court held that the advice to prorogue was unlawful as it frustrated Parliament's constitutional role of scrutinising and holding the government to account, ruling that prorogation was not a proceeding in Parliament (and therefore non-justiciable) but rather a proceeding *imposed upon* Parliament by the executive, and that the prorogation was therefore null, to be treated as if it had not happened.

38 Ekins, 'Protecting the Constitution', *Policy Exchange* (2019), pp.14-15.

39 *Ibid*., p.23.

central concern of British political thought, as well as the severe limits this theory has for discussions about the constitution. This links to the problem of guardianship, as Ekins' strong view that Parliament is the *sole* guardian of the constitution leads him to refute suggestions that the court can, in certain and extreme circumstances, find itself required to preserve the very sovereignty on which the system itself is premised. The argument follows on from this, concluding that Ekins' focus on judicial power as the central issue of the constitution creates a narrow understanding of the concept of the political constitution that skews his interpretation, deriving contentious policy and constitutional reform programs from fairly orthodox concepts that enjoy broad-based support within British political life.

Executive power and parliamentary sovereignty

The debate that Ekins is contributing to, both in his report and his wider work for the JPP, concerns the ongoing and ever-present discussion about the relative scope of executive and parliamentary power. This debate can broadly be understood in two ways: the executive 'power-grab' theory and the 'negotiated settlement' theory. The former frames this discussion as a project whereby the executive tries to accrue a more dominant position in the constitution at the expense of Parliament, while the latter sees these discussions in the broader context of executive-parliament relations and the appropriate balance in the constitution. Ekins' strong conception of parliamentary sovereignty in both the domestic and international spheres places him, in the eyes of many, squarely in the former. Critics point out that his theory embeds an argument that the power of prorogation should be non-justiciable within a larger claim about the role of the ECtHR and its relationship to Parliament, defending the idea of unqualified parliamentary sovereignty in both the domestic and international spheres. The fact that his report was issued in the midst of debates over the UK's withdrawal from the EU – and the attempts made by various governments to breach international law in pursuit of that end – should not be overlooked, and the political dimension of the arguments must be appreciated. However, the basic argument is sound. It should not be *unconstitutional* for ministers to break international agreements in extreme circumstances, although they ought to have very strong reasons for doing so, and only in cases where the international law is not yet settled and established. There is a dismissive tendency in certain elements of scholarship around the value and nature of international law, often driven by the understandable and valid concern that it is only as powerful as the measures capable of enforcing it. However, much like domestic legal frameworks, adherence to the norms and customs of international law is important, and while not as powerful as many claim, this should not be neglected in discussions about whether or not to uphold a particular treaty.

The deeper point here is whether parliamentary accountability is a sufficient check on these powers. The principle of parliamentary accountability presupposes a 'good chaps' theory of government at work behind the scenes, a fundamentally democratic principle of the British constitution whereby political considerations are given more weight than they would be in more formal, 'legal' constitutions.[40] The theory is centred on the trust placed by citizens in their elected government and the knowledge of the moral and political limits they will tolerate, stipulating that the spirit of rules and the law is more important than following them to the letter, grounded in the fact that a Parliament which has lost confidence in the Prime Minister deemed to have broken such rules may, by a simple majority, pass a vote of no confidence and remove the occupant from office. The principle has a long history in British political life, yet increasingly it has been coming under strain, with even strong advocates of the political constitution fearing it may have been stretched past breaking point.[41] This political element of the constitution has, in the eyes of many, proven incapable of dealing with a situation where a Prime Minister is 'tone deaf

40 Andrew Blick and Peter Hennessy, ''Good Chaps No More? Safeguarding the Constitution in Stressful Times', *The Constitution Society* (London, 2019).

41 *Ibid.*; see also: Peter Hennessy, 'Boris Johnson has killed off the "good chaps" theory of government', *Prospect Magazine* (2022). Available at: https://www.prospectmagazine.co.uk/politics/peter-hennessy-interview-good-chaps-theory-of-government-boris-johnson

on the melodies of the constitution'.[42]

Questions remain over whether this is particular to the current Prime Minister or symptomatic of a wider, structural malaise in Parliament. In either case, the British system continues to rely on a strong degree of political accountability, a fact that makes it more political than many others, especially when compared to the American or many European constitutions,[43] still presuming 'more boldly than any other the good sense and good faith of those who work it'.[44] Unlike other Westminster systems, such as the quasi-separation of powers model adopted by Canada or the 'independent but constrained' executive model in Australia, the British executive is fully subservient to the sovereignty of Parliament, the orthodox interpretation of which holds that the Crown in Parliament is sovereign; it is the *supreme legislator* by virtue of the delegated powers of the people acting through the concept of the Crown via the elected assembly of Parliament, possessing the legitimate authority to make or unmake any law save that which binds a future Parliament. This fact is key, for although the government possesses the discretionary power to prorogue it does not possess the absolute, unrestrained, arbitrary right to exercise that power; it must present reasons for the exercise of such a power and be held accountable for its use. This idea is not novel. The notion that the exercise of discretionary executive prerogative power should be reviewable by the courts *as well as* be held accountable to Parliament has been in operation since at least 1688, while the notion the executive is bound by the law stretches back well before this to the pre-Norman Anglo-Saxon law codes.[45] On this reading the Prime Minister is a public officer exercising public power on the behalf of the Crown, and is to be held to account for his or her actions.

Ekins pushes back against this interpretation, and has received theoretical support from Martin Loughlin on this front, who used a thought experiment involving a hypothetical 'Constitutional Council' to review the court's decision. Loughlin makes a persuasive case that the judges broke with established constitutional law, asserting their own 'constitutional principles' to evaluate the decision to prorogue Parliament.[46] He notes that while the Prime Minister used prorogation in 'a forceful manner and in politically contentious circumstances', the court itself claimed the sole right to define these abstract principles, trumping 'all practical, policy and political considerations' and destabilising a core aspect of the political constitution.[47] However, this point overlooks the fact that the government did not have the consent and confidence of a majority of the Commons.[48] Unlike previous instances where prorogation

42 Andrew Blick and Peter Hennessy, 'Good Chaps No More? Safeguarding the Constitution in Stressful Times', *The Constitution Society* (London, 2019), p.17.

43 Ewing, 'The Resilience of the Political Constitution'.

44 W. E. Gladstone, *Gleanings of Past Years, Volume 1* (John Murray, London, 1879), p.243, quoted from Andrew Blick and Peter Hennessy, 'Good Chaps No More? Safeguarding the Constitution in Stressful Times', *The Constitution Society* (London, 2019).

45 See: Thomas Poole, 'Losing our Religion? Public Law and Brexit', *U.K. Const. L. Blog* (2016). Available at: https://ukconstitutionallaw.org/2016/12/02/thomas-poole-losing-our-religion-public-law-and-brexit/; Blick, *Beyond Magna Carta* (2015), p.34. As Kavanagh notes, 'the role of the courts in supervising the Executive for compliance with the law is older than Parliament's role in holding the Executive to account'. See: Aileen Kavanagh 'Recasting the Political Constitution: From Rivals to Relationships', *King's Law Journal*, 30:1 (2019), p.65.

46 Although Loughlin diverges significantly from Ekins on the substance of much of his thought, and their approaches should not be considered particularly congruent beyond this point.

47 Martin Loughlin, 'The Case of Prorogation: The UK Constitutional Council's Ruling on Appeal from the Judgement of the Supreme Court', *Policy Exchange* (2019).

48 Meg Russell. HC PACAC, 8th October 2019. Available at: https://parliamentlive.tv/Event/Index/38018bd9-91dd-47c1-836e-bd7fd147559f

was used politically and even controversially to pass the government's business, such as the passage of the 1949 Parliament Act, there was no majority in the Commons for the government's business. On the contrary, the Commons had recently taken over the order paper from the government in an effort to *prevent* a 'no-deal exit' from the EU through the Benn Act. This was one of the primary issues of the crisis, as a minority government was attempting to govern as if it had a majority based on the supposed legitimacy the referendum conferred upon it, despite having lost its majority in the 2017 election. It did not gain this legitimacy until the 2019 general election secured an 80-seat majority.

The internal disarray of Parliament, while a pressing and important matter, should not distract from the key issue; the structural operation of the British constitution. Ekins and Loughlin are both right to say that the prorogation *ought* to have been a political issue that was resolved by political means, and that political resolution should be the norm moving forwards, but this is a fairly narrow view of how this matter played out in practice. While a central cause of this gridlock was the operation of Parliament, the matter was only brought before the court because the Prime Minister used discretionary executive power to overcome the political circumstances he found himself in. A breakdown in the understanding of political propriety required the court to step in and reassert principles of the British constitution, for unless the executive can be held accountable to Parliament then parliamentary sovereignty can no longer be said to be the animating 'rule of recognition'.[49] Although this parliamentary gridlock arose partly from the requirement in the Fixed-Term Parliaments Act for a two-thirds majority in the Commons to trigger an election – meaning that the Prime Minister's requests to elect a new Parliament were denied three times, with MPs demanding an extension to the October 31st deadline to ensure the UK did not leave the EU without a deal, potentially in the middle of an election campaign[50] – the Prime Minister could have accepted the demands of a cross-party grouping of MPs calling for an extension to the UK's withdrawal from the EU, who would then have supported his calls for an election and overcome the impasse, but he made a political choice not to do this.

The parliamentary mechanics were further complicated by the leadership candidate selection processes of the two major parliamentary parties, following the shift away from MPs' control of the candidate selection process in favour of increased membership voting. This, coupled with a lack of legislative and regulatory oversight regarding intra-party leadership removal and selection processes, led to a series of scenarios where leaders lost the confidence of their own MPs without having to step down, or where the dynamics of the Commons were distorted, making political compromise unlikely or unworkable.[51] This is important. The leadership selection processes of both parties are under-considered from a constitutional perspective – that is, for the way these processes generate leaders who then go on to have a significant impact on the ways in which the House operates in its day-to-day business. More thought could be given to how party leadership processes are structured from this perspective, perhaps for *this specific aspect* of parties to be regulated by statute, for while the main consideration a party faces when selecting its leader will *always* be how that party intends to obtain office and wield political power, the structural dynamics underpinning the post-election interplay between leaders is neglected, especially when one

49 See footnote no. 25 in this report.

50 Meg Russell, The FTPA did not Cause the Brexit Impasse, *UCL Constitution Unit Blog* (2021). Available at: https://constitution-unit.com/2021/09/06/the-fixed-term-parliaments-act-did-not-cause-the-brexit-impasse/

51 In their 2018 study *Responsible Parties*, Rosenbluth and Shapiro pointed to several weaknesses in both the Parliamentary Labour Party (PLP) and Parliamentary Conservative Party (PCP) candidate selection processes; see also: Aradhya Sethiya, 'The party has just begun: The party leader and the UK constitution', *U.K. Const. L. Blog* (2022).

considers how central this role is to the operation of the state in its totality. As Sethiya puts it, 'parties 'private' status should not preclude a minimal legal regulation of *some* of their internal processes', helping nurture the party system and constitutional order for the good of the democratic process itself.[52]

While at one level *Miller 2* was an 'earthquake' rupture in the constitution and a deviation from this orthodoxy, at another it was an obvious restatement of the historically rooted basic principles of British politics and law.[53] The court's decision stopped short of 'weatherproofing' the constitution, instead choosing to shore up the fundamental principle of parliamentary sovereignty, stressing the exceptional nature of the decision and making it clear that Parliament is at liberty to legislate on prorogation in the future, and that such legislation would define the scope of the power. Moreover, although parliamentary sovereignty is not an absolute principle and can be changed by a change of official consensus, the importance that government, Parliament, and the judiciary have placed on the principle throughout shows that this consensus appears to be in good health.[54] Attempts by the executive to unilaterally undermine the rule of recognition must, in exceptional instances, be subjected to judicial examination. As Jonathan Sumption has put it, 'some – perhaps most – conventional assumptions about politics do not lend themselves to judicial enforcement, but others are so fundamental to the democratic character of our constitution that their destruction would lead to an intolerable void, and this was such a case'.[55] Ministers exercise the prerogative as public officials and they must be held to account, and the court specified that this should be a form of *political* accountability to Parliament; specifically, that Parliament must sit to allow this accountability to occur.

Ekins' claim that *Miller 2* destabilised the fundamentals of the political constitution therefore seems misplaced, and while there is more work to be done by both politicians and judges to recalibrate the balance of power between government, Parliament, and the courts now that the UK has left the European Union, the court did not evince the 'constitution-wrecking' shift that many fear it did. However, it did insert itself into the executive-Parliament relationship to deploy constitutional principles in unprecedented and innovative ways – a potentially troubling manoeuvre given that Parliament refused to exercise its power of no-confidence, placing the burden of responsibility on the court.[56] Nevertheless, it is hard to see how this issue could have been mitigated by legislation, or how it could be in the future. While figures like Sumption are wrong to suggest that any political solution would be *inherently* authoritarian

52 Aradhya Sethiya, 'The party has just begun: The party leader and the UK constitution', *U.K. Const. L. Blog* (2022).

53 HC PACAC, 8th October 2019. Available at: https://parliamentlive.tv/Event/Index/38018bd9-91dd-47c1-836e-bd7fd147559f

54 This change in consensus might amount to nothing short of a revolution in constitutional thought, but it is a perfectly possible and legitimate course of action. See Jeffrey Goldsworthy, *Parliamentary Sovereignty. Contemporary Debates* (Cambridge: Cambridge University Press, 2010) p.106-107; Jeffrey Goldsworthy, 'Parliamentary Sovereignty's Premature Obituary', *UK Constitutional Law Association* (2012). Available at: https://ukconstitutionallaw.org/2012/03/09/jeffrey-goldsworthy-parliamentary-sovereigntys-premature-obituary/

55 Sumption, 'British Politics After Brexit', *Oxford Martin School* (2019). Available at: https://www.youtube.com/watch?v=OVlApCfy-So&t=2874s

56 One might, quite reasonably, lay the blame for the way in which this played out at the feet of a cynical Opposition party as much as the muscular and somewhat reprehensible actions of the government, having calculated that a gridlock in Parliament would be blamed on the government, giving the Opposition the upper hand in a future election. As many have recognised, this was a disastrous political miscalculation. However, from the perspective of the constitution it meant Parliament (specifically HM Loyal Opposition) abdicated much of their responsibility, requiring the court to intervene. A wider point should also be made here about the role and responsibility of the Opposition: is it, in the somewhat vacuous, popular formulation, merely to 'oppose', or does it have much deeper responsibilities to articulate serious and valid positions that deviate from those of the government?

in nature[57], the essence of this claim holds: this is not a problem that Parliament can fix by statute, at least in a single simple stroke.[58] Radical solutions, such as those proposed by the former Attorney General to introduce a political element into the judicial selection process, would shift the British constitution further towards the American model, a move both Ekins and the majority of scholars seem to agree would be lamentable, serving to further polarise political discourse. Only a change in judicial culture and attitudes towards legal interpretation can resolve this, and it is encouraging to see that scholars on all sides of the debate have recognised the need for judges, particularly senior judges, to show greater discretion regarding issues of constitutional sensitivity.[59] The British system has, on balance, proved remarkably resilient at coping with the strains placed upon it during these highly charged, politically polarising times.[60] Yet these challenges have also raised important questions, identifying lacunae to address in the future regarding the operation and balance of the constitution, questions which no branch of government is wholly competent to unilaterally resolve.

57 Sumption rather deliberately invokes the argument that the only way to ensure ministers do not do anything illegal is to grant them legally limitless power to demonstrate how ridiculous this claim is. More tempered solutions, however, might involve rather minor changes to campaign finance regulation (granting state funding to political parties) or extremely limited and minimal legal regulation of the internal candidate selection processes.

58 See: Jonathan Sumption, 'British Politics After Brexit', *Oxford Martin School* (2019). Available at: https://www.youtube.com/watch?v=OVlApCfy-So&t=2874s

59 Ekins, 'Protecting the Constitution'; Poole, 'Losing our Religion? Public Law and Brexit'.

60 Aileen McHarg, 'The Supreme Court's Prorogation Judgement: Guardian of the Constitution or Architect of the Constitution?', *Edinburgh Law Journal* 24 (2020), p.94.

The guardian of the constitution

This issue of competence in these matters is, in some ways, a major lacuna in itself, as one interesting shift that lurks behind the scenes of the *Miller 2* judgement concerns who acts as the 'guardian' of the British constitution. In Commonwealth countries guardianship has conventionally rested with the monarch or similar officials, who possess a degree of discretion in settling issues of constitutional disagreement, such as in the 2008 prorogation of the Canadian Parliament. In this instance, several parties entered into a fractious alliance to bring the government down over its proposed fiscal reforms. The Governor General granted the government power to prorogue on the proviso that Parliament would soon reconvene to vote on a budget, which would act as a vote of confidence on the government. The prorogation caused the coalition to collapse due to internal divisions and the new budget was passed, providing confidence and legitimacy for the government. Crucially, the prorogation was advised by constitutional experts who helped form and shape limits on the power to avoid future abuse. However, in recent years in Britain this guardianship role has increasingly been exercised by the courts, perhaps due to the secrecy laws surrounding the activities of the monarch and how they exercise their political advice and counsel.[61] This shift is remarkable and begs an important question for the idea of the political constitution: who, or what, is the guardian of the constitution today?

Ekins presents a clear answer to this question. As we have seen, his concept of the political constitution is rooted in an understanding of parliamentary sovereignty as the locus of constitutional guardianship, pushing back against the claim that the court can review prorogation and other executive powers. On his view, the court undermined this authority by exposing powers of the sovereign legislative body to judicial control or 'political litigation', imposing itself improperly into a political question. Specifically, he notes a worrying precedent that judges may, in future, 'openly refuse to uphold and to give binding legal effect to an Act of Parliament that was clearly intended to limit or to prevent judicial review… turn[ing] the rule of law on its head'. This, he argues, is an unconstitutional attack on the discretionary political powers of the executive, undermining the royal prerogative and the sovereignty of parliament. To redress this imbalance Ekins proposes Parliament makes clear that 'they understand that parliamentary sovereignty remains legally fundamental and that the courts have no lawful authority to question it'.[62]

In practice, as many have pointed out, this theory hands a majority government immense theoretical power by virtue of the fusion of the executive and legislative. Moreover, critics note the distinction Ekins relies on between 'legal' and 'political' constitutionalism is a fiction, driven by those promoting a political revival of the 'conservative normativist'[63] tradition of British constitutional theory, pushing back against both the prevailing 'liberal normativist' and older 'functionalist' styles' in the twenty-first century'.[64] Following the rise of 'liberal normativism' through the ranks of the judiciary (the 'traditional

61 HC PACAC, 8th October 2019. Available at: https://parliamentlive.tv/Event/Index/38018bd9-91dd-47c1-836e-bd7fd147559f (10.30-10.50)

62 Ekins, 'Protecting the Constitution', p.16.

63 By which Loughlin means traditional conservative understandings of how the constitution ought to operate, in contrast to more recent liberal interpretations or Griffiths-style constitutional functionalism.

64 Martin Loughlin, 'The Political Constitution Revisited', *LSE Working Papers* (2017), p.13. Loughlin sees these as the three animating traditions of British constitutional discourse, respectively advocating constitutional conservatism, constitutional liberalism, or a more detached form of Griffiths-inspired constitutional analysis that questions what the constitution *is*, rather than what it ought to be (functionalism).

guardians of conservative normativist values'), contemporary political constitutionalists seek to 'bolster the authority of Parliament' to promote their political agenda.[65] Others go further, framing Ekins work as part of an 'Executive Power Project' sympathetic to recent illiberal and anti-democratic 'judicial reforms' in Hungary and Poland. These concerns form part of a wider consensus of disquiet among many leading scholars and practitioners who argue the Judicial Power Project (JPP) is 'sinister' and 'dangerous',[66] narrowly focused on the dangers of judicial review, promoting a limited interpretation of the constitution for partisan political ends.[67] Rather than being a defence of classical conservative normativism, these scholars find a 'Schmittean logic' at work behind the scenes, claiming Ekins and the JPP represent a more insidious form of authoritarian anarcho-fascism with 'neo-Schmittean' aims.[68]

Accusations of congruence with Schmitt, one of the most influential jurists and political thinkers of the early Nazi era, are interesting for multiple reasons, not least because the very question of 'who acts as the guardian of the constitution' recalls Schmitt's famous disputes over the nature of the German state during the Weimar republic with Hans Kelsen, a prominent Austrian jurist and the father of the Austrian constitution.[69] These thinkers entered into a series of public disagreements over the role of the presidential veto, the constitutional court, and its 'guardianship' during moments of crisis.[70] Schmitt argues that the executive possesses the 'sovereign dictatorial power' to both maintain and reshape the constitution in times of crisis. He distinguishes this political guardianship from the legal guardianship provided by the courts, noting it is the duty of this 'guardian' to protect and preserve the unity of the German people, for as 'the president of the Reich is elected by the whole German people' only he can 'form a counterweight against the pluralism of social and economic power-groups and to preserve the unity of the people as a political whole', or 'the parliament'.[71] Schmitt's theory places ultimate and unequivocal sovereign power in the executive to 'decide' when an emergency is occurring and to act as is necessary to restore the balance of the constitution.[72]

Many criticisms claiming Ekins as a neo-Schmittean are often hyperbolic in tone and analytically thin, seeming to rest as much on the implicit, executive-centric nature of the philosophy underpinning the

65 Martin Loughlin, 'The Political Constitution Revisited', *LSE Working Papers* (2017), p.13.
66 Richard Ekins, 'Constitutional Government, Parliamentary Democracy and Judicial Power', *Policy Exchange* (2019).
67 Aileen Kavanagh, 'Recasting the Political Constitution: From Rivals to Relationships', *King's Law Journal*, 30:1, (2019), p.72.
68 Thomas Poole, 'The Executive Power Project', *LRB* (2019); and David Dyzenhaus, 'Schmittean Logic', *Philosophy and Social Criticism*, 47(2) (2021), pp.183–187.
69 See: Lars Vinx, *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, (Cambridge: Cambridge University Press, 2015).
70 For an extended analysis of this debate see: Arkadiusz Górnisiewicz, 'Dispute Over The Guardian Of The Constitution Hans Kelsen, Carl Schmitt And The Weimar Case', *Politeja* 3(72) (2021), pp.193-214.
71 Vinx, *The Guardian of the Constitution*. p.172.
72 This has been termed Schmitt's 'decisionist' theory of government. See: Nomi Lazar, 'Must Exceptionalism Prove the Rule? An Angle on Emergency Government in the History of Political Thought', *Politics and Society* 34(2) (2006), pp.258-261.

general thrust of his arguments as well as his overtly contentious position on dismissing judges.[73] At root Ekins is advocating for a strong notion of parliamentary sovereignty the likes of which were anathema to Schmitt's thought, and where the executive's power is substantially limited by internal party dynamics and the oversight functions of both the Commons and the Lords. There are elements of Ekins analysis that are distasteful, ill advised, or flatly wrong, but critiquing his approach does not require veiled allusions to Nazi-era philosophers, especially as Schmitt's theories continue to occupy a legitimate and valuable place in the canon of legal and political thought. Moreover, it is worth contextualising the nature of the disagreement at play here itself, for the issue of guardianship stretches back far further than juridical disputes in 1930s Germany. It is a contemporary take on an old dispute over a paradigmatic concept; the idea that sovereignty is something to be *limited* versus the idea that sovereignty is something which is *constituted*.[74] Sovereignty is inherently bound up with the concept and authority of the state, for the question of 'who decides' concerns who has the right to make law, and where such power and legitimacy derive from. Hence, while these debates may seem novel and modern in nature, they return to the very foundational questions of sovereignty and constitutional theory raised by the Glossators in the later eleventh and early twelfth centuries. The early jurists of the Bologna law school realised this as a fundamental question of Justinian's rediscovered *Corpus Iuris Civilis*, developing two differing theoretical interpretations of what it meant for the Roman people to 'transfer' their public power, or '*imperium*', to the '*princeps*', or 'emperor'. As Lee notes, the original, influential, and for some time dominant opinion held by the first great Glossator, Irnerius, was that this involved a total, complete, and irrevocable *transfer* of power which, once transferred, could not be reclaimed, and could be exercised by the emperor without reference to law or the people as he willed and at his pleasure. This 'translation' theory was an early form of European absolutist doctrine, whereby the emperor's purpose was to both declare and interpret the law. This reading suited the major European leaders of the time well, allowing them to shore up their power through legal arguments against the resurgent power of the Pope and rule as they saw fit.

Yet another opinion, first developed by the jurist Azo – and given its greatest expression in the work of his pupil Accursius in the *Glossa Ordinaria*[75] – claimed that power was *conferred* upon the emperor

73 As David Dyzenhaus has argued, 'judges who step out of line with his [Ekins'] vision of the executive as the guardian of the constitution should be removed from office, a step he argues would not compromise judicial independence'. Ekins has pushed back against this portrayal, noting the broad brush with which his critics paint, but it is hard to escape the conclusion that his work invites such a reading, or can at least be read in this way. His full position here is worth restating:

> Any judge who openly refused to give effect to an Act of Parliament would be liable to be removed from office by way of the procedure set out in the Senior Courts Act 1981, which itself dates back to the Act of Settlement 1701. Whether this would be a prudent course of action in any particular case would be a question of fine judgement – it is a very good thing that our judges are almost never removed from office and there should be, and is, a strong presumption against initiating the statutory process. However, removal for openly flouting parliamentary sovereignty would be no violation of judicial independence. The security of tenure judges rightfully enjoy is a protection to enable them to adjudicate disputes without fear or favour according to the laws and usages of the realm, as their oath puts it. It is not a protection to enable them openly to defy or overturn fundamental constitutional law.

While Dyzenhaus' characterisation seems to go too far, this is clearly unsettling. However, in the scheme of things it is of little relevance. As noted in Part 2, §1 of this report, parliamentary sovereignty is not under major conceptual assault in any corner of public life, and nor is it an 'absolute' principle, but rather an article of 'faith' at the bottom of the collective British constitutional psyche. It is perfectly possible to change it: the question is, to what end.

74 Lee, *Popular Sovereignty in Early Modern Constitutional Thought*, pp.5-6.

75 *Ibid.,* pp.35-39.

by the people by an act of concession, and that the people therefore retained two basic legal capacities: the power to make customary law and the power to revoke the emperor's plenary lawmaking power. This 'concession' theory held, like the translation theory, that the power to constitute the office holder of *imperium* is held by the people as a collective agent, who confer this power on the *princeps* as a delegated agent or trustee and is bound by the laws and norms, in the manner of popular *ownership* of the emperor himself. These theories were applied, even in England, as early as the thirteenth century by the jurist Henry Bracton, who likened the coronation oath to a 'bridle' which binds the king through the concession theory, and were the early forebears of Bodin and Hobbes' thought on European sovereignty.[76]

The key point here is that contemporary disputes are neither new nor novel, but the recurrence of an old problem in a modern context; the historical and ongoing disagreement over the nature of sovereignty and the guardianship of the constitution. Is the emperor alone above the legal system, simultaneously both legislator and adjudicator yet unbound by his own law, or do the people themselves, *in extremis*, become this guardian when they act to remove their emperor? Has the emperor, in acts of subsequent delegation of his *imperium*, conceded this authority to other institutions who now possess the legitimacy to protect the integrity of the constitution? The British model of parliamentary sovereignty follows a form of the delegated act theory, with authority conferred from the people to the Crown which acts through Parliament, the executive, and the courts via the monarch's legal personhood for their respective institutional jurisdictions and constitutional functions. As such, strong-parliament and strong-court theories both encounter problems by assuming there is a single guardian in the British system, rather than exploring a more interesting, pluralist theory of guardianship. Rather than resting with one body at all times, such guardianship is invoked by particular events and circumstances and given expression by the manner and form of these debates; institutionally present at specific times in specific locations; here, it is the political duty of parliament to defend it, there, perhaps, the court, or even the executive. This theory also supports a more nuanced reading of non-justiciability, doing away with the concept in favour of a 'spectrum of deference' model, relying instead on the internal restraint of institutions and the active promotion of such cultures to regulate their interaction.[77]

It is here that allusions to the Schmitt/Kelsen dispute are important, as a major flaw in Ekins' thinking is his ironclad belief that Parliament need be the *only* guardian of the constitution. By contrast, the 'multiple guardians' theory is a position Kelsen himself seems to advocate, and which a more nuanced reading of his work leads to.[78] Kelsen thought that it should be for the German constitutional court to settle many questions of constitutional significance, and while he personally supported Schmitt's political line of argument to further empower the President during the political crisis, he emphatically rejects Schmitt's theoretical arguments about how this guardianship both was and ought to be structured.[79] His vision is one of balance, noting 'the constitution authorizes the president to act as a 'counterweight' to the Reichstag only because it acknowledges parliament, as well as the 'pluralistic system' that necessarily goes along with it, as another legitimate 'weight' in the play of political powers'.[80] He refutes suggestions that the executive is empowered to save a state from the 'unconstitutional' pluralism that Schmitt views

76 Lee, *Popular Sovereignty in Early Modern Constitutional Thought*, p.49.
77 Alan Greene, '*Miller 2*, Non-justiciability and the Danger of Legal Black Holes', *U.K. Const. L. Blog* (2019).
78 If only implicitly, by absence.
79 Górnisiewicz, 'Dispute Over The Guardian Of The Constitution Hans Kelsen, Carl Schmitt And The Weimar Case', pp.209-210.
80 Vinx, *The Guardian of the Constitution,* p.217.

as corrosive to the constitutional order, as well as the assertion that constitutional courts represent an 'aristocracy of the robe', noting that the methods of selecting the judiciary can prevent such a situation arising.[81]As Górnisiewicz notes, Kelsen thought the proper functioning of the constitutional court:

> depends on the quality of the constitution itself. The more [that] the constitution in question contains general terms, not filled with specific content principles, such as justice or morality… the greater the risk of conceding to a constitutional court a fullness of power: such a shift of power from parliament to an extra-parliamentary institution, one that may turn into the exponent of political forces completely different from those that express themselves in parliament, is certainly not intended by the constitution and highly inappropriate politically.[82]

This theory 'suspends the final resolution of the question of sovereignty and even seeks to dismiss it', recognising a definitive guardianship might not even exist, and that the crown sovereignty might be diffused within the various institutions of the state.[83] Far from dissolving the idea of constitutional guardianship into a relativistic struggle for supremacy, this theory recognises the various pressures at play within a constitution and the various roles that Parliament, the government, the courts, and potentially the monarch play, particularly when it comes to holding other institutions to account. Of course, where a slumbering sovereign people has been awakened by an actor who is politically committed to assuming the role of guardianship, subjugating the other institutions to their will, there is little that institutional safeguards can do.[84] In cases such as the Weimar Republic of 1932-1933 – where the court, President Hindenburg, and the constitution itself proved incapable of preventing the rise of a party intent on ideologically instrumentalising the state – guardianship was no longer a matter of debate: the guardians had already failed.[85] When planning for unprecedented emergency situations there is only so much one can do; the constitution can be equipped to deal with and dissipate such threats before they arise, but it cannot plan for every eventuality.

As such, guardianship of either legal or political constitutions cannot narrowly rest with one body or institution. The claim that guardianship has migrated from the monarch to the court is premised on an assumption that guardianship *only* arises in instances of adjudication between the executive and parliament. Rather, guardianship resides in the activity of guarding, preserving and upholding the constitutional structure through institutionally-defined parameters, institutions which share responsibility for its protection.[86] The lesson from *Miller 2* is to rectify this conceptual gap in our thinking, filling the lacunae of the British constitution by defining prorogation more clearly and considering legislation to make party leader selection processes legally regulated, recognising the enormous constitutional significance leaders have in contemporary politics in an effort to safeguard against the radicalisation of

81 Vinx, *The Guardian of the Constitution*, p.215.
82 Górnisiewicz, 'Dispute Over The Guardian Of The Constitution Hans Kelsen, Carl Schmitt And The Weimar Case' (2021), p.201.
83 *Ibid.*, p.211.
84 See: Richard Tuck, *The Sleeping Sovereign*, (Cambridge: Cambridge University Press, 2016).
85 Górnisiewicz, 'Dispute Over The Guardian Of The Constitution Hans Kelsen, Carl Schmitt And The Weimar Case', pp.210-2111.
86 A theory which draws on Kavanagh's institutional model of the constitution, see: Aileen Kavanagh, 'Recasting the Political Constitution: From Rivals to Relationships', *King's Law Journal*, 30:1 (2019) p.68.

one or more of the major parties.[87] These dynamics were at the core of this dispute, and while it is not wise to engage in wholesale reform of a rule due to the peculiarities arising from an exceptional case, as Lord Faulks recognised in his Independent Review of Administrative Law, there are important lessons this exceptional case can teach us that pertain to the operation of the constitution as a whole.

87 This last point has been discussed recently by Aradhya Sethiya, 'The party has just begun: The party leader and the UK constitution', *U.K. Const. L. Blog* (2022). The radicalisation of the major parties was of course a large part of the downfall of the Weimar system, and was mirrored (to a much lesser extent) in the 2017-2019 period of polarisation experienced in the UK brought about by Brexit, with the election of populist leaders such as Jeremy Corbyn and Boris Johnson to the two major parties.

Conservative-normativism: more political than constitutional?

So far we have seen the major concern many have with Ekins' reading of the political constitution is the suggestion that it leads to an executive-dominated state, coupled with its overtly political nature and contentious solutions for 'protecting' this particular vision of what constitutes the British state. As we have seen, these accusations – while often overblown or overstated – are not without substance, and it is quite understandable that Ekins reaches this conclusion because this theory conflates the three images of the political constitution, leading him to apply the term indiscriminately as a historical condition premised on a strong reading of parliamentary sovereignty in both the national and international spheres, an analytical tool focussed primarily on the perils of judicial overreach, and a political model promoting, deliberately or unknowingly, a more executive-focused rebalancing of British constitutional dynamics. By envisaging a strong notion of parliamentary sovereignty that is incapable of being reviewed by the courts, locating the guardianship of the constitution in an institution the executive tends to dominate (rather than as an abstracted ideal of 'guardianship' capable of being exercised in different instances by different actors) Ekins recasts the political constitution as a vehicle for far reaching and controversial constitutional reform, even supporting the theoretical right to remove sitting judges who fail to uphold this strict interpretation of parliamentary sovereignty. While he analyses judicial power in depth, his overall vision presents a less analytical take on the constitution, lacking the historical depth or engagement with the theoretical underpinnings of the British constitution exhibited by many others. Without a clear sense of the concept's distinct and yet interrelated aspects, drawing on a narrow reading of complex constitutional histories and engaging in a limited way with constitutional analysis, Ekins presents a monolithic understanding of what the British political constitution is and applies it throughout his work, resulting in the political image dominating much of his thought.

This may be accidental, in which case much greater reflection by Ekins and the JPP would be welcomed on the specific historical, analytical, and political understandings they have of what the British constitution essentially *is*. After all, many of the basic points he makes are fairly uncontroversial; or, at least, less controversial than many think. A robust defence of parliamentary sovereignty, political accountability of government, and healthy scepticism of judicial involvement in certain political matters are not particularly contentious positions within constitutional scholarship. There is a strong case to be made for the value of a strong democratic system, both in Britain and in the abstract, applicable not just in the traditional sense of parliamentary sovereignty but also in the institutional design of European states and beyond. If this is the case the JPP is aiming to articulate, it is welcome and necessary, but it is a case that has yet to be made in their work – at least in a sustained or coherent manner. Much greater thought could be devoted to structural thinking on institutional design, internal political party selection processes, the parliamentary seat system, and the case for state funded campaign finances in pursuit of a stronger system of democratic government, one which should be welcomed by those of all political persuasions. Moreover, Ekins' historical understanding of the political constitution seems relatively thin, and while his own research is grounded in the idea of the legislative intent behind law-making[88], a patchy engagement with British political and historical scholarship beyond the work of Finnis and

88 Richard Ekins, *The Nature of Legislative Intent*, (Oxford: Oxford University Press, 2012).

other close colleagues leaves his overall vision skewed. By defining exactly how he and the JPP view the history of the British state, the role the more legal and more political elements of the constitution have in the overall dialogue of the constitution, and how their own political proposals fit into the wider scheme of constitutional health would be beneficial to both their own analysis and the ability of others to engage with their work and assess the veracity of their arguments.

However, this lack of engagement may also be deliberate, aimed at rhetorically capturing audiences by blurring older and more deeply rooted cultural images of the British 'ship of state' and the 'remarkable resilience' of the British constitution[89] with a specific form of constitutional activism, pushing through a particular political vision via polemics. While Ekins' basic premises are fairly uncontroversial, the way these arguments are extended into political proposals for constitutional reform are by no means controversy-free. By placing primacy on the sovereignty of Parliament over Britain's international obligations, human rights, and the independence of the judiciary, his monolithic view of the political constitution exalts the executive over the other major institutions of the state. Though claims of neo-Schmitteanism are exaggerated and at times more polemical than substantial, they are far from unwarranted, and his theory leaves open more questions than it provides answers to on contentious issues regarding the scope of executive power and the role of the courts in constitutional matters.

Ekins' understanding of the political constitution is therefore both normative and politically active; an expression of particular constitutional values vying for validation in a climate of fragmented political discourse. As the JPP is one arm of Policy Exchange, a centre-right think tank, this is unsurprising to an extent, and his proposals will be inherently more active and political than some more abstract scholarship in this field. Moreover, the weaponisation of the political constitution is not necessarily a bad thing; as Loughlin notes, John Griffith would much rather have been misunderstood and have his ideas stimulate constitutional dialogue than relegated to obscurity by a purist reading of his work.[90] Political concepts will always be subject to political interpretation; it is the nature of political argument. Roman law, the universal language of mediaeval and early modern political thought, was subject to political weaponization for the very fact it was universal. It was a language all sides agreed on, from devout royalists to ardent republicans, turned by one upon the other for their own ends. The political constitution is no different. The aim from a constitutional point of view is to make sure these politically weaponised images are channelled properly and used to strengthen, rather than destabilise, the overall health of the constitution. Problems arise when this becomes a narrow enterprise conducted without reflection or critique, and pursued without wider purpose for the benefit of the constitution as a whole. Understanding the limits, constraints, and goals of a weaponised concept like the political constitution can help stimulate the debate in new and important ways, exposing the valuable elements of a certain point of view.

Equally, there are places where Ekins makes interesting points. One avenue for constitutional tinkering may rest in reappraising the office of the Lord Chancellor. Before being dismissed from his role in October 2021, Robert Buckland had signalled his intention to reform the office, and while the extent of

89 See, for example, the debates between Aileen McHarg and Alison L. Young, 'The Resilience of the *(Old)* British Constitution', *U.K. Const. L. Blog* (2021) and Vernon Bogdanor, 'Reply to McHarg and Young', *U.K. Const. Law Blog* (2021) or Vernon Bogdanor, *Beyond Brexit. Towards a British Constitution*, (London: Bloomsbury Publishing, 2021).
90 Loughlin, 'The Political Constitution Revisited', p.14.

his reforms cannot be known now, it seems likely that Ekins suggestions would have played a role in their scope, particularly his idea that the government should:

> 'Stand by a Lord Chancellor who is confident in exercising his or her right to reject or request reconsideration of candidates recommended by a commission' and 'Introduce legislation requiring the relevant selection commissions to provide the Lord Chancellor with a short-list of three names for senior judicial vacancies.'[91]

There are merits to this suggestion, not least the qualifications of senior judges themselves to act as competent leaders as well as experts in legal matters. A system where multiple appointments are presented by the JAC would allow the Lord Chancellor discretion to consider the relative merits of each candidate based on their suitability for the demands of the role and could prove fruitful, although procedural changes in the Judicial Appointments Commission to give more weighting to the leadership qualities required of senior judges could also help redress this balance without increasing ministerial responsibility.

However, when taking a wider view of Britain's constitution, the recent UK Constitutional Monitoring Group's assessment on the state of the constitution seems to present the most accurate diagnosis of the present challenges facing its institutional architecture. Claims that judicial review has become too political are matters for the judiciary to resolve, not the legislature, and efforts by Parliament and government to resolve this are bound to end in failure. The HRA is an Act of Parliament that incorporates the European Convention of Human Rights into UK domestic law, allowing UK judges to uphold human rights and issue declarations of incompatibility when primary legislation is found to be in breach of the rights contained in the Convention. However, the government can choose to ignore a declaration if it deems it worth the political risk, preserving the principle of parliamentary sovereignty. The executive is not too strong, but it remains to be seen if it can be abused by unruly prime ministers dismissive of constraints and conventions, on either side of the aisle. Neither is Parliament too powerful; the circumstances of the prorogation were novel and brought about by a combination of factors culminating in a 'one-off' scenario, in circumstances which 'have never arisen before and are unlikely to arise again'.[92] Heavy-handed measures are likely to result in little more than a tit-for-tat exchange between government and the courts; a more measured response would focus on improving judicial and parliamentary cultures, institutional accountability, as well as less obvious areas such as campaign finance regulation for political parties. As Kavanagh summarises, the vast majority of scholars working on the British constitution today 'reject the stark polarisation of legal versus political constitutionalism'[93], and while political constitutionalists 'helpfully remind us of the perils of judicial overreach', avoiding 'sanguine judge worship', the 'romantic idealisation of the political process is likewise unhelpful'.[94]

91 Ekins, 'Protecting the Constitution' (2019), *Policy Exchange*, p.19.
92 R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland).
93 Kavanagh, 'Recasting the Political Constitution: From Rivals to Relationships', pp.71-72.
94 *Ibid.*, p.71.

PART THREE

Reframing the political constitution

How, then, can the idea of the political constitution be reframed to capture helpful and useful insights, limiting and directing these towards the health and stability of the constitution as a whole? Is it even worth protecting at all? Since the publication of Ekins' report a number of welcome contributions have addressed this wider debate. Each has offered a more nuanced understanding of the concept, seeking to transcend the traditional legal/political divides which previously polarised discourse. Martin Loughlin's perceptive revisiting of 'the political constitution at forty' and the 'institutional turn' thesis of Aileen Kavanagh have been significant developments in the literature, fostering an attitude which has seen both sides of the debate largely lay down their arms. Scholarship has begun to turn away from this polarity, with more constructive work now looking at what institutions do and how they do it, as well as the balance between various competing elements that comprise them, leaving Ekins and the JPP ever more on the constitutional extremities.

Many of the JPP's anxieties concerning the restoration of the political constitution have received extensive treatments by a number of scholars who have come to see the legal/political divide as anachronistic, unhelpful, and obstructive, answering these concerns without resorting to a form of political constitutionalism that strips out much accountability for the executive.[95] Given recent reports by two House of Lords' committees on the need to rebalance political power *away* from the executive and towards Parliament, it is hard to reconcile this theory with fact.[96] It is noteworthy that the JPP's effort to promote a constitutional 'rebalancing' often deploys arguments of parliamentary sovereignty in the name of preserving the independence of Parliament from an overactive judiciary, with disagreement emerging over the effects which many of their proposed reforms would have, usually the centralising of executive power at the expense of the judiciary, Parliament, and other institutions.[97] Indeed, the distinction between Ekins, Finnis, and other constitutional scholars appears not to be the *idea* of 'institutional competence' *per se* – on which there is wide agreement – but rather how institutional competence is itself interpreted.

This section unpacks several alternative models to the legal/political dynamic. The frameworks currently used to understand and discuss the concept fail to help thinkers delineate the various images of the political constitution and the roles they play in discourse. More care and caution should be taken when

95 Forceful arguments are deployed by Kavanagh, 'Recasting the Political Constitution: From Rivals to Relationships'; Loughlin, 'The Political Constitution Revisited'; and Meg Russell and Daniel Glover, *Legislation at Westminster*, (Oxford: Oxford University Press, 2019).

96 See: Delegated Powers and Regulatory Reform Committee, *Government by Diktat: A call to return power to Parliament* (HL 2021-22 Paper 105); Secondary Legislation Scrutiny Committee, *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive* (HL 2021-22 Paper 106).

97 Gee breaks this down well in 'The Political Constitution and the Political Right.' See also: Poole, 'The Executive Power Project', and David Dyzenhaus, 'Schmittean Logic', as well as Ekins, 'Constitutional Government, Parliamentary Democracy and Judicial Power', *Policy Exchange* (2019).

talking about the political constitution, couching its specific aims, histories, and analytical insights within a wider model of how constitutions work. This section recognises the important contributions made in recent years by the 'unified' model, which attempts to remove the political constitution as a significant concept within constitutional theory, and the 'institutional' model recently proposed to refocus attention away from abstract theorising onto the concrete particulars of constitutional functioning. The final model this paper proposes seeks to reconcile the valuable contributions made by these two overarching frameworks, proposing a 'homeodynamic' model of the constitution in which the various images of the constitution are recognised for the roles they fulfil within the overall discussion of the constitution (for example, the role of the political constitution's historical image in supporting the mythological underpinnings of the state, or the role of its political/rhetorical image in directing constitutional change) seeking to make actors more aware of the role their own contributions make in this regard, and how skewed towards one image their own proposals may be, contextualising them within the constitutional 'whole'. This is no silver bullet for the problems facing the British, and indeed other, constitutions. However, it recognises the need to change the frame of discourse away from the legal/political divide (as Loughlin, Kavanagh, and others would agree) without relegating the more abstract functions of the concept of 'the political constitution' to the side-lines. There is power in this concept, particularly in British discourse, and many recognise this fact. Harnessing and channelling this power to more healthy and productive ends is the problem and province of constitutional theory.

The unified model

The first of these positions, the 'unified model', supports reverting to a pre-analytical, historical understanding of constitutions, attempting to bypass the split between the legal and political. It has been put forward by thinkers such as Martin Loughlin, who argue the interrelationship between law, government and politics is inherently complex, involving trade-offs between its constituent aspects in individual cases.[98] This position attempts to avoids the legal vs political polarity, undermining it by relying on the much deeper and more substantial concepts of *jus* and *lex*. *Lex* and *jus* form two distinct yet interrelated legal components of European constitutional theory held in tension at the heart of constitutional orders, and their impact is more pronounced in Britain due to the uncodified nature of the constitution. *Lex* (written, declared law) must be passed by a legislature and can be repealed by said legislature through the normal processes of legislative procedure. *Jus,* on the other hand, forms part of the wider, deeper, unwritten component of the constitution 'normatively and institutionally autonomous from *lex*', broadly analogous with principles of moral right, political convention, and prudent statecraft.[99] At one level this distinction is obvious, merely distinguishing between statute laws enacted by Parliament and the legal or moral principles underpinning the general operation of constitutional government. The less obvious conclusion from this theory is that this dissolves the legal/political dynamic entirely, recognising the concept of the constitution into a single unified model based on two ever-present principles common to all forms of legal system; *lex*, the law in the prospective, dictates certain general rules which the courts are to enforce, while *jus,* the law in the particular, is a cloud of fundamental and subsidiary principles to be weighed in a given instance in which someone is alleged to have broken said declared law, often relying on precedent in prior occasions where similar infringements have occurred to arrive at a judgement which is both fair, consistent, and non-arbitrary.[100]

On Loughlin's reading, therefore, the 'political constitution' is a nonsensical concept, and his theory seeks to do away with the binaries presented by the very idea of it. He makes explicit the complexity of both constitutional interpretation and current debates in Britain, arguing that all forms of constitution must 'necessarily be subject to continuous re-interpretation'.[101] Similar to ideas about state unity or identity, no constitution can operate without this plurality of complex meanings existing within a single overarching conception of what the constitution is, working through the natural tensions which arise in a series of smaller, localised, and more manageable debates, and in so doing strengthening the whole. Indeed, the constitution is the framework in which this contestation takes place. For Loughlin 'a constitution is able to perform its function only if it maintains its ambiguous meaning', with the process of government being concerned with negotiating between the poles of *jus* and *lex* in a given

98 An argument made most persuasively by Martin Loughlin in *Foundations of Public Law*, but also by Jeffrey Goldsworthy and Vernon Bogdanor to varying degrees in their writings. As I have argued elsewhere, Michael Oakeshott's basic view is much the same, at least in times of 'normal' constitutional operation: Daniel Skeffington, 'The Concept of the Constitution in the Jurisprudence of Michael Oakeshott', *LSE Law Review* 6(1) (2020), pp.1-31. Available at: https://lawreview.lse.ac.uk/articles/abstract/101/

99 Paolo Sandro, 'Do You Really Mean It? Ouster Clauses, Judicial Review Reform, and the UK Constitutionalism Paradox', *U.K. Const. L. Blog* (2021). Available at: https://ukconstitutionallaw.org/2021/06/01/paolo-sandro-do-you-really-mean-it-ouster-clauses-judicial-review-reform-and-the-uk-constitutionalism-paradox/

100 For a more detailed exploration of these concepts see: Daniel Skeffington, 'The Concept of the Constitution in the Jurisprudence of Michael Oakeshott', *LSE Law Review* 6(1) (2020), pp.1-31.

101 Loughlin, 'The Silences of Constitutions', *International Journal of Constitutional Law*, 16(3) (2019), p.927.

circumstance through prudent 'statecraft'.[102] Codification of this framework can therefore only exist and succeed as an:

> 'incompletely theorised agreement' that recognises ambiguity and lack of clarity, reconciles formally contradictory principles, harnesses opposing dynamics and acknowledges difference. A written constitution should not be a 'freeze frame', generated by a still image of the constitution taken at a particular moment. It should instead result from a long exposure to transitional processes of redefinition and renewal. The question should not ask whether it is desirable for the UK to adopt a written constitution, but how the UK should be reconstituted.'[103]

Loughlin adds to this pithy starting point by Murkens, suggesting that 'a constitution's authority is strengthened through the cultivation of a tradition' which acts as the 'silent communion between contemporary political actors and the regime's founders… discreetly connect[ing] what is sanctioned today with what was initiated at the foundation… conserv[ing] what continues to work while sloughing off that which is no longer of practical value'.[104] As traditional understandings of rules and practises have been displaced by ideas about 'fundamental principles' of law[105] and idealised visions of what a constitution ought to be (whether that be a 'legal' or 'political' settlement) ideas have begun to compete within an intensely contested political and social culture, one lacking a dominant conception of what the British constitution is or indeed ought to be.[106] At every stage of current debate the misapprehensions of the constitution appear to be disagreements about the fundamentals. As we have seen, it is in these sorts of unmoored discussion over constitutional essentialism which characterise the present British constitution, highlighting the central issue at stake in contemporary constitution discourse; the role of identity in the constitution.

Questions of identity – what it means to *be* a people – run deep in constitutional thought, far beyond the mere juristic forms of a state or how it structures its offices of government, linked to wider questions of authority and legitimacy.[107] One of the earliest histories of England, the ninth century *Anglo-Saxon Chronicle*, begins with the invasion of Britain by Julius Caesar in 55 BC. While England was a relatively wealthy and influential nation during this period, the *Chronicle* consistently defines the whole of English history through the peripheral, colonial relationship it has to the Eternal City of Rome. This image of England as a backwater kingdom distanced from the navel of the world persisted throughout much of the Middle Ages, both in the minds of the English and other European peoples, and while this view waned in the centuries since, it serves to remind us that Britain's constitutional arrangements have not always been considered as the infallible pinnacle of political architecture. For much of its history Britain's constitution was rooted in a close relationship with the rediscovered Roman law codes of Justinian, which were held up as exemplary texts in legal thought across Christian European kingdoms,

102 Loughlin, 'The Silences of Constitutions', p.927.
103 Jo Murkens, 'A Written Constitution: A Case Not Made', *Oxford Journal of Legal Studies* (2021).
104 Loughlin, 'The Silences of Constitutions', *International Journal of Constitutional Law*, 16(3) (2019), 16(3), p.929.
105 Allan, *The Sovereignty of Law*, (Cambridge: Cambridge University Press, 2014).
106 Loughlin, 'In Search of the Constitution', p.20.
107 Loughlin, *Foundations of Public Law*, Chapter 8.

emphasising the unitary and total nature of the law.[108] Indeed, early written texts such as the 616 Law Code of King Ethelbert demonstrate the continuing influence and prominence of Roman law and 'written constitutions' long before Justinian's *Corpus Iuris Civilis* was rediscovered by the eleventh century Glossators, marking the revival of Roman law in European legal thought. To an extent, this remains the case today.

This is to say that all identities, especially national identities, are naturally complex, involving multiple overlapping and often contradictory elements which can be impossible to untangle from one another; it is the purpose of constitutional arrangements to allow for these contradictions to either be resolved or held in an ambiguous tension, allowing society and civil association to flourish.[109] By identifying the basic problematique that no single issue or reform can resolve the underlying crisis facing the British system, Loughlin recognises a wider, deeper issue of identity and selfhood at the bottom of contemporary disputes over the idea of the political constitution, calling into question the essence of the concept. Therefore, while the distinction between political and legal forces in constitutions is powerful and useful, especially at a broad, meta-level of analysis, this instinct to divide them into these camps can simplify a messy, contested, and complex discussion, overlooking how constitutions are built on both politics and law, and yet are sustained fully by neither.[110] It is often the silences of constitutions and the theories that sustain them where the most important work occurs; where tensions are managed, disputes settled, and grey areas debated, for the sake of the association as a whole.

Efforts made by proponents of this unified model to move past the idea of the political constitution are powerful and compelling. However, as Loughlin himself perceptively recognises in an essay on the political constitution, 'the value of historical knowledge… is not that it tells us how to succeed. Rather, it tells us what we have become'.[111] For all its strengths, the attempts made by the unified theory to move past the legal/political divide overlook the enduring mythology and historical weight afforded to the role the 'political constitution' in the identity of the British state itself. The enduring relevance of the political constitution for this fact alone is significant, and is where actors such as Ekins are on stronger ground when suggesting there is something worth 'protecting' about the political constitution. In the abstract it continues to be a powerful animating force behind British constitutional and political life. The problems Ekins faces, as we have discussed, are that his writings often present contentious readings of commonly held principles under the veil of a generally accepted concept of what constitutes this political constitution.

As such, the unified model can take us only so far, arming us with the knowledge that constitutional orders are far more subtle and nuanced creatures than the stark legal/political polarity would lead us to believe, and that the historical development of constitutions is paramount to understanding how they arose, how they operate today, and how they must develop into the future. It helps us to recognise that

108 See: Lee, *Popular Sovereignty in Early Modern Constitutional Thought*, Chapter 1, on the debates of the Glossators concerning Irnerius and Azo's interpretations of the origin of the Emperor's *potestas*, and how the Roman people came to confer their authority upon the *princeps*.

109 See: Martin Loughlin, *Public Law and Political Theory* (Oxford: Oxford University Press 1992) p. 40; Loughlin, *Foundations of Public Law,* p.227-232; More generally Hans Lindahl, 'Constituent Power and Reflexive Identity' in Martin Loughlin and Neil Walker, The Paradox of Constitutionalism (Oxford: Oxford University Press, 2007).

110 Kavanagh, 'Recasting the Political Constitution: From Rivals to Relationships'.

111 Loughlin, 'The Political Constitution Revisited', p.14.

the political constitution is not a discrete mode of ordering a state, but rather that it is one pole of a dynamic discourse which we must attune ourselves to more finely, seeking balance rather than a final resolution.

The institutional model

Others have recently sought to develop the unified theory, taking on the challenges presented by this more delicate reading of the concept of the constitution. Kavanagh's model of institutional competence is perhaps the most thoroughgoing and noteworthy to date, acknowledging the mixed legal and political aspects of all constitutions and balancing these accordingly. For her, the 'British constitution is not only multi-layered but also multi-dimensional and multi-institutional—and those institutions combine, interact and counteract in complex ways'.[112] On this view:

> Self-restraint and inter-institutional support therefore reinforce the mutuality and reciprocity of the inter-institutional relations. Collaboration does not require consensus. Nor does it preclude contestation and counterbalancing. Nonetheless, within any well-functioning constitutional system, the branches of government should generally strive to forge constructive—rather than mutually destructive—constitutional relationships in service of good government under the rule of law.[113]

Kavanagh sets the tone for this shift by revisiting the 2001 Lords' Constitution Committee report 'Reviewing the Constitution', highlighting the centrality of 'institutional relationships' to constitutions, arguing that 'constitutions are a composite of legal and political elements, comprising not only laws and legal doctrines, but also institutional practises, customs and political norms', with the legal and political forming 'interrelated component parts of the constitutional system viewed as a whole', embracing the 'idea of a collaborative constitution which includes and combines both political and legal channels of accountability in a multi-dimensional constitutional order'.[114] Moreover, that:

> Once we put institutional relationships at the heart of our understanding of the constitution, we can see that the key question for constitutional lawyers is not whether we have a legal or a political constitution.[115]

Rather, a 'growing popular distrust of elected politicians', the 'erosion of shared political norms amongst the governing elites', the contracting-out of key public services' and 'the tyranny of the tabloids' are far more pressing matters of constitutional concern than the old polarising focus on the legal versus political constitution debate.[116]

This model is rightly a pragmatic theory, specifically detailing the sites of contestation that ought to be analysed by future work and directing theoretical inquiry down new and fruitful avenues, recognising the value of the legal/political dynamic within the larger unified theory. In so doing, the institutional turn almost advocates a return to the functionalist analytical approach of Griffith's Chorley Lecture,

112 Kavanagh, 'Recasting the Political Constitution: From Rivals to Relationships', p.71-72.
113 *Ibid.*, p.67.
114 *Ibid.*, p.63.
115 *Ibid.*, p.45.
116 This has received interesting empirical support from a recent and wide-ranging study of 6,500 participants, conducted by University College London in the summer of 2021, which showed the vast majority of those surveyed were concerned with the integrity of politicians and restoring honesty and trust to British politics. See: Alan Renwick, Ben Lauderdale, Meg Russell, and James Cleaver, 'What Kind of Democracy Do People Want? Results of a Survey of the UK Population First Report of the Democracy in the UK after Brexit Project', *UCL Constitution Unit* (2022).

focusing on the practical relationships that constitute the workings of the constitution rather than abstract theorising. From an applied perspective this is valuable, laudable, and should be encouraged, driving home the point made by the unified model that the legal/political divide distracts unnecessarily from the actual workings of the constitution. However, while Kavanagh acknowledges that 'theoretical accounts of the British constitution should apply to the constitution as a whole, striving to illuminate its salient features', the institutional model itself falls just shy of this.[117] The focus on institution turns discussion inward to look at the internal dynamics of constitutions, rather than opening discussion on the operation of constitutions in the abstract. The result is a theory with a high degree of applicability and practicality *within* domestic forms of constitutional thought, but which fails to recognise the wider issues at play, particularly on the international stage and the growing domain of global constitutional law.

This is a problem for our question of whether the political constitution is worth protecting as a concept, as in essence the unified and institutional models hope to return us to the apolitical understandings of the historical and analytical images outlined at the start of this report. Both models approach the issue of the political constitution in a more tempered manner than much contemporary scholarship, but in seeking to diminish or move past the concept they fail to address its enduring significance in British political thought and political life. While the institutional model suggests scholarship look in more interesting places, it overlooks its own theoretical problems as a general theory of the constitution.

117 Kavanagh, 'Recasting the Political Constitution: From Rivals to Relationships', p.73.

The homeodynamic model

There is, however, a third model I would like to suggest: the idea of a 'homeodynamic' constitution. Like the previous two models, this theory also moves away from the legal and political divide whilst recognising these broad categories within the constitutional order. It enjoys the flexibility of a mixed model without explicitly referring to the political and legal split as a meaningful division, while making room for the historical image of the political constitution and the various cultural sensitivities this gives rise to. It shows us a constitution that can react to external changes but that this is rooted in internal processes derived from its historical, social, and cultural underpinnings, as well as general laws governing its overall balance and structure.

The concept of homeodynamics builds on the idea of homeostasis, which refers to 'the ability, present in all living organisms, of continuously maintaining certain functional variables within a range of values compatible with survival', often with reference to the analogy of a 'thermostat'.[118] However, a more comprehensive view of homeostasis includes 'its application to systems in which the presence of conscious and deliberative minds, individually and in social groups' … 'permits the creation of supplementary regulatory mechanisms aimed at achieving balanced and thus survivable life states but more prone to failure than the fully automated mechanisms'.[119] Specifically, Damasio and Damasio note that

> when homeostatic regulation is enriched by feeling/conscious interfaces, adaptability increases at the risk of basic efficiency. The system becomes too open to new possibilities. When organisms include a conscious/feeling regulatory interface, they introduce a higher degree of uncertainty in the regulation which results in less predictable and potentially less advantageous responses.[120]

They argue that sociocultural systems such as justice and governance probably originated as practical, homeostatic systems founded on a need 'primarily accomplished on the basis of feelings, and the intellectual capacity to invent a new solution'.[121] Much like the arts, economics, and systems of morality, governance aims 'at a goal compatible with both survival *and* a state of well-being' such that 'states of physical equilibrium or of neutral balance do not appear sufficient' to encompass its full scope.[122] Most interestingly for theories of government and the constitution, Damasio concludes that 'the human factor in the operation of a decision system introduces an unpredicted effect of reflexivity which, in turn, entails an increase in the fallibility of the system's operation … [that] promotes unstable, oscillatory behaviour' which should be 'factored in' to sensible models.[123] Here reflexivity refers to the idea that perceptions influence fundamentals which in turn influence perceptions, with decisions based on certain images of reality rather than reality itself. This alludes to Loughlin's understanding of a constitution's

118 Antonio Damasio and Hannah Damasio, 'Exploring the concept of homeostasis and considering its implications for economics', *Journal of Economic Behaviour and Organisation,* Vol. 126 (2016), p.125.
119 *Ibid*.
120 *Ibid.*, p.127.
121 *Ibid.*, p.128.
122 *Ibid*.
123 *Ibid.*, p.129

inherent 'reflexivity'; the idea that 'normality is always the process of normalisation', as Poole has put it.[124]

The power of a homeodynamic model is that it prizes this innovative ability to 'dynamically self-organise at bifurcation points of their behaviour where they lose stability'.[125] In so doing, it recasts the concept of the constitution as the range of abilities that constitutions possess to self regulate major aspects of their operation, while at the same time allowing for corrections to reflexive and oscillatory behaviour through deliberate choice and action, often directed by drives, motivations, and emotions, and corrected for by conscious, willed self-reflection. There is therefore a level of direction to this concept of the constitution that avoids the narrow, conservative vision of 'preserving the status quo' through constitutional balance – an accusation often levelled at 'legal' understandings – by focusing on the external, dynamic modes of development intrinsic to societies and cultures. A homeodynamic vision is, at a basic level, dualist, recognising the tension between internal stability, balance, and healthy discourse while making room for the outward-facing, dynamic aspect of constitutions, the kind of which has been referred to in recent publications as the 'Janus-faced' nature of sovereignty and the constitution.[126]

The homeodynamic model is not a replacement for the idea of the political constitution, at least in the sense of a 'straight swap'. Rather, it seeks to unpick the constitutive images inherent in discussions about the political constitution, encouraging those who draw on the concept to consider which image is being used where within a given constitutional discussion. When the historical image is invoked, to what extent is this relevant, and to what end? Is it to provide legitimacy to a particular political claim or policy proposal, or to demonstrate why the system as a whole operates in the way it does, or to draw comparative attention to the various accountability structures in different constitutions entirely? By operating as an apolitical meta-category within which to situate historical, analytical, political, or similar debates about what a constitution *is*, the homeodynamic model makes room for the political constitution in all senses of the term.

That being said, situating the various images of the political (and legal) constitution within this broader homeodynamic framework will not prevent the political weaponisation of concepts. Nor should it. What it can demonstrate is the extent to which politicisation is relied upon within a given argument, or at the least encourage those who *are* using certain terms in a more political manner to reflect on their arguments and consider the ramifications of their proposals. Nor does it seek to side-line these concepts from discussion. The political constitution is a valuable concept worth protecting – at least in the specific ways I have tried to demonstrate in this report – but it should not and cannot be a catch-all term for the processes and practices of the British state. The emphasis on good political culture and accountability, as well as the historical dimension, are of central importance to the stability and development of British constitutional discourse, as they are to the internal strength of all states. Both political and social will makes, shapes, and sustain constitutions, and their laws are an expression of this deeper force. It is the reflexive relationship between law and politics that generates and sustains good and stable government,

124 Thomas Poole, *Reason of State. Law, Prerogative, and Empire,* (Cambridge: Cambridge University Press, 2015) p.184.

125 David Lloyd, Miguel Aon, Sonia Cortassa, 'Why homeodynamics, not homeostasis?', *Scientific World Journal.* 4(1) (2001) pp.133-45. Available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6084724/pdf/TSWJ-2001-1-918917.pdf

126 See: Jacco Bomhoff, Thomas Poole and David Dyzenhaus, *The Double-Facing Constitution*, (Cambridge: Cambridge University Press, 2021).

and it is the institutional health of political discourse and the legal culture which is worth protecting and revivifying. As Linda Colley has put it, constitutions:

> Are the frail, paper creations of fallible human beings. Wherever they exist, they only function well to the degree that politicians, the law courts and the populations concerned are able and willing to put sustained effort into thinking about them, revising them when necessary, and making them work.[127]

However, for the British system to function properly it must occasionally snap back and assert its form, as happened in *Miller 2*. The homeodynamic model shows how this process can operate without being an affront to the system, admitting exceptional remedies to novel problems while preserving the spirit of political structures through continuous, pragmatic change. It allows critics of particular positions to frame contentious arguments within this framework as skewed towards a certain vision without appealing to status quo arguments about pure 'balance', removing the need to frame an argument as Schmittean when it is not. An argument can be distasteful, ill advised, problematic, or conceptually thin without needing to invoke Schmitt without clear and specific reasons, and this comparison must either be used carefully or not at all. Conversely, at its best the homeodynamic model can aid theoreticians and practitioners in bleeding these sorts of particularly partisan political or ahistorical arguments at an early stage, perhaps helping recognise the most salient points of an analysis as important but limited observations without applying them broadly and uncritically to the wider constitutional whole. At its most basic level, the model hopes to take some heat out of contemporary debates, encouraging thinkers to reflect on the different understandings they (and their critics) may hold about the concept of the political constitution when they refer to it.

It is worth noting that concepts borrowed from other disciplines must only be used carefully in concept creation, rather than being directly important in their most literal sense.[128] However, a homeodynamic model of constitutional theory can help overcome the legal/political divide while incorporating the valuable elements of the 'unified' model, neither dismissing the importance of this conceptual distinction nor holding either side up as the 'true' essence of what a constitution is. It provides the conceptual footing for a small-c conservative vision of the constitution in the vein of Anne Twomey, crossing the legal/political divide while recognising the analytical value each of these meta-categories brings to debate. It also situates Kavanagh's institutional model within a broader framework of constitutional balance that places value on the social system as a coherent whole, allowing the internal dynamics of a particular constitution to be considered externally and internationally in dialogue with the politics of international sovereigns and other actors. This report would advocate a move to a more homeodynamic approach to constitutional theory, acknowledging the continuing relevance and value of the political constitution to many aspects of constitutional thought – particularly in Britain – while emphasising the limited and particular role each of its 'images' has to play within our wider understanding of the British constitution in general.

127 Colley, *The Gun, the Ship, and the Pen*, p.14.
128 Laurence Whitehead, 'Biology, Politics, and Democracy', *Taiwan Journal of Democracy*, 6(2) (2009), pp. 23-42.

CONCLUSION

Toward a model of constitutional homeodynamics?

This report has sought to address some of the conceptual inadequacies of current constitutional debate regarding the idea of the political constitution, separating out its various intertwined and yet specific meanings. It has drawn attention to the layers comprising this nuanced and complex concept in the hope that further considerations may take these differing understandings into account, to think about what is invoked by the political constitution in argument. The political image is no more or less worthy than the historical or the analytical, nor should it be suppressed in favour of a more legal image. This seems both futile and unwise. Concepts will always be weaponised in service of political ends. It is down to individuals who invoke those particularly political arguments to weigh the merits and flaws of their positions, and to test their validity in the political realm. From a constitutional perspective, all we can do is try to situate these arguments within the broader constitutional context, demonstrating the degree to which they may lean this way or that, and therefore affording them their proper place within the overall discussion that is so vital for a healthy constitution.

The problem with someone like Ekins' defence of the political constitution is that many of the problems he addresses have been made in more nuanced ways by scholars across the spectrum, from Jeffrey Goldsworthy to Martin Loughlin and Meg Russell. Their contributions emphasise the inherent value of political checks on power in certain key instances of a state's political architecture. For example, by unpicking the complex, informal checks on executive power during the making and passing of legislation, Russell and Glover's study shows the value of parliamentary scrutiny and oversight during the passage of a bill through both the Commons and the Lords, exploring how the very act of defending bills before committees and the Houses make ministers and their legislative teams prepare extensively for opposition to their proposals, forcing them to anticipate problems before they are raised.[129] Ekins and others defend a narrow version of the British constitution under the guise of an immutable, 'political' conception of its institutional structure, one which upholds particular meanings of what is and isn't valid in constitutional discourse.

When reflecting on what the political constitution means and its place in our discussions today, it is always worth returning to one of the most memorable passages of Griffith's original lecture:

129 Meg Russell and Daniel Glover, *Legislation at Westminster: Parliamentary Actors and Influence in the Making of British Law,* (Oxford: Oxford University Press, 2019). We might see the fruits of such a process as having contributed to the tempering of several more contentious aspects of the constitutional reform agenda, as already noted with regards to the *Judicial Review and Courts Bill*.

> Law is not and cannot be a substitute for politics. This is a hard truth, perhaps an unpleasant truth. For centuries political philosophers have sought that society in which government is by laws and not by men. It is an unattainable ideal. Written constitutions do not achieve it. Nor do Bills of Rights or any other devices. They merely pass political decisions out of the hands of politicians and into the hands of judges or other persons.[130]

There can be no easy answer to the problems facing the British constitution, and indeed many others, as they stand today. The images of the political constitution, like images of the legal, have a limited role to play in our discourse, but that should not mean they do not play these roles at all. They must just be recognised, at every turn, as no more and no less than what they are.

In seeking to address these issues we have come a long way from the stark legal/political divide of the early 2000s. If this is what is meant by 'the political constitution' today, then it is a concept no longer worth protecting. However, if we view its constituent images as both a rich source of theoretical inquiry and the necessary mythological foundations around which much British constitutional theory is built, its value seems all too apparent – and too necessary – to entirely dispose of. We can see it as one pole between which a constitution might choose to swing, tinkering with institutional arrangements to find the best balance between these competing visions, conscious of the historical quirks and attachments associated with it, and mindful of its place within the healthy operation of the constitutional whole.

130 J.A.G. Griffith, 'The Political Constitution', *Modern Law Review* 45(1) (1979), p. 16.

Interviews

Robert Hazell. Professor of Government and the Constitution, University College, London. Interviewed October 25th.

Andrew Blick. Professor of Politics and Contemporary History & Head of the Department of Political Economy, King's College London. Interviewed October 27th.

Richard Bellamy. Professor of Political Science, University College London. Interviewed October 28th.

Martin Loughlin. Professor of Public Law, The London School of Economics and Political Science. Interviewed Nov 16th.

Thomas Poole. Professor of Law, The London School of Economics and Political Science. Interviewed Nov 16th.

Philippe Lagassé. Associate Professor and Barton Chair, The Norman Paterson School of International Affairs, Canada. Interviewed February 18th.

Bibliography

Arkadiusz Górnisiewicz (2021), 'Dispute Over The Guardian Of The Constitution Hans Kelsen, Carl Schmitt And The Weimar Case', *Politeja* 3(72), pp.193-214.

Aileen McHarg (2020), 'The Supreme Court's Prorogation Judgment: Guardian of the Constitution or Architect of the Constitution?', *Edinburgh Law Journal* 24, pp.88-95.

Alan Renwick, Ben Lauderdale, Meg Russell, and James Cleaver (2022), 'What Kind of Democracy Do People Want? Results of a Survey of the UK Population First Report of the Democracy in the UK after Brexit Project', *UCL Constitution Unit*. Available at: https://www.ucl.ac.uk/constitution-unit/news/2022/jan/new-report-uk-voters-value-honesty-most-political-leaders

Adam Tomkins (2003), *Public Law,* Oxford University Press.

Adam Tomkins (2010), 'The Role of the Courts in the Political Constitution' *University of Toronto Law Journal* 60(1), pp.1-22.

Adam Tomkins (2010), *Our Republican Constitution*, pp.1-22.

Aileen Kavanagh (2019) 'Recasting the Political Constitution: From Rivals to Relationships', *King's Law Journal*, 30:1, pp.43-73.

Aileen McHarg and Alison L. Young, (2021), The Resilience of the *(Old)* British Constitution. *UK Constitutional Law Association.* Available at: https://ukconstitutionallaw.org/2021/09/08/aileen-mcharg-and-alison-l-young-the-resilience-of-the-old-british-constitution/

Andrew Blick, (2015) *Beyond Magna Carta. A Constitution for the United Kingdom*, Bloomsbury Publishing.

Andrew Blick and Peter Hennessy (2019), Good Chaps No More? Safeguarding the Constitution in Stressful Times, *The Constitution Society.*

Antonio Damasio and Hannah Damasio (2016), 'Exploring the concept of homeostasis and considering its implications for economics', *Journal of Economic Organisation and Behaviour,* Vol. 126, pp.125-129. Available at: https://doi.org/10.1016/j.jebo.2015.12.003

Antonio Damasio (2019), *The Strange Order of Things. Life, Feeling, and the Making of Cultures,* Vintage.

Chris McCorkindale (2020), Parliament, sovereignty and the paradox of the political constitution. In A. Bogg, J. Rowbottom, & A. L. Young (Eds.), The Constitution of Social Democracy: Essays in Honour of Keith Ewing (1st ed., pp. 93–110). Available at: https://doi.org/10.5040/9781509916603.ch-006

Daniel Skeffington, (2020) 'The Concept of the Constitution in the Jurisprudence of Michael Oakeshott', *LSE Law Review* 6(1), pp.1-31. Available at: https://lawreview.lse.ac.uk/articles/abstract/101/

David Dyzenhaus (1999) *Legality and Legitimacy. Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar Germany,* Oxford University Press.

David Dyzenhaus (2021), 'Schmittean Logic', *Philosophy and Social Criticism*, 47(2), pp.183–187.

David Lloyd, Miguel Aon, Sonia Cortassa (2001), 'Why homeodynamics, not homeostasis?', *Scientific World Journal.* 4(1) pp.133-45 Available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6084724/pdf/TSWJ-2001-1-918917.pdf

Daniel Lee (2016), *Popular Sovereignty in Early Modern Constitutional Thought*, Oxford University Press.

Alan Greene, '*Miller 2*, Non-justiciability and the Danger of Legal Black Holes', *U.K. Const. L. Blog.* Available at: https://ukconstitutionallaw.org/2019/09/13/alan-greene-miller-2-non-justiciability-and-the-danger-of-legal-black-holes/

Graham Gee (2008) 'The Political Constitutionalism of JAG Griffith', *Legal Studies*, Vol. 28 No. 1, March 2008, pp. 20–45.

Graham Gee and Grégoire Webber, (2010) 'What is a Political Constitution?' *Oxford Journal of Legal Studies*, 30 (2). pp. 273-299.

Graham Gee, (2019) 'The Political Constitution and the Political Right', *King's Law Journal* 30(1), pp.148-172.

Hart, H.L.A (2012), *The Concept of Law*, Oxford University Press.

Jeffrey Goldsworthy (2010), *Parliamentary Sovereignty. Contemporary Debate,*. Cambridge University Press.

Jeffrey Goldsworthy (2012), 'Parliamentary Sovereignty's Premature Obituary', *U.K. Const. L. Blog.* Available at: https://ukconstitutionallaw.org/2012/03/09/jeffrey-goldsworthy-parliamentary-sovereigntys-premature-obituary/

Joshua Rozenberg (2020), *Enemies of the People? How Judges Shape Society,* Bristol University Press.

Jo Eric Khushal Murkens (2021), 'A Written Constitution: A Case Not Made', *Oxford Journal of Legal Studies*. Available at: https://doi.org/10.1093/ojls/gqab016

Jonathan Sumption (2019), 'British Politics After Brexit', *Oxford Martin School*. Available at: https://www.youtube.com/watch?v=OVlApCfy-So&t=2874s

J.A.G. Griffith (1979), 'The Political Constitution', *Modern Law Review* 45(1), pp.1-21.

Keith Ewing (2013), 'The Resilience of the Political Constitution', *German Law Journal*, 14(12), pp. 2111-2136. Available at: doi:10.1017/S2071832200002698

Laurence Whitehead (2009), 'Biology, Politics, and Democracy', *Taiwan Journal of Democracy*, 6(2), pp. 23-42.

Linda Colley (2014), *Acts of Union and Disunion,* Profile Books.

Linda Colley (2009), *Britons. Forging the Nation, 1707-1837,* Yale University Press.

Linda Colley (2021), *The Gun, the Ship, and the Pen. Warfare, Constitutions, and the Making of the Modern World,* Profile Books.

Martin Loughlin (2006), 'Towards a Republican Revival', *Oxford Journal of Legal Studies*, Vol. 26(2), pp. 425–437. Available at: https://doi.org/10.1093/ojls/gql010

Martin Loughlin (2010), *The Idea of Public Law*, Oxford University Press.

Martin Loughlin (2014), *Foundations of Public Law*, Oxford University Press.

Martin Loughlin (2017), 'The Political Constitution Revisited', *LSE Working Papers*.

Martin Loughlin (2019), 'The Case of Prorogation: The UK Constitutional Council's ruling on appeal from the judgement of the Supreme Court', *Policy Exchange.*

Martin Loughlin (2019), 'The Silences of Constitutions', *International Journal of Constitutional Law*, 16(3), pp.922-935. Available at: https://doi.org/10.1093/icon/moy064

Martin Loughlin, (2019), 'In Search of the Constitution', *LSE Legal Studies Working Paper No. 19/2019*, Available at SSRN: https://ssrn.com/abstract=3501014 or http://dx.doi.org/10.2139/ssrn.3501014

Marco Goldoni & Chris McCorkindale (2019) Three Waves of Political Constitutionalism, *King's Law Journal,* 30:1, 74-96

Mark Walters (2012), 'Is Public Law Ordinary?', *Modern Law Review*, 75(5), pp.894-913. Available at: https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1468-2230.2012.00929.x?saml_referrer

Mark Walters (2016), Public Law and Ordinary Legal Method: Revisiting Dicey's Approach to "Droit Administratif", *The University of Toronto Law Journal*, 66(1), pp. 53-82.

Maximilian Steinbeis (2019). 'Right-Wing Crits', *Verfassungsblog*. Available at: https://verfassungsblog.de/right-wing-crits/

Meg Russell and Daniel Glover (2019), *Legislation at Westminster. Parliamentary Actors and Influence in the Making of British Law.* Oxford University Press.

Meg Russell. (2019). The Supreme Court Ruling In Cherry Miller No 2 and The Power Of Parliament. *UCL Constitution Unit Blog.* Available at: https://constitution-unit.com/2019/09/27/the-supreme-court-ruling-in-cherry-miller-no-2-and-the-power-of-parliament/

Meg Russell. (2021). The FTPA did not Cause the Brexit Impasse. *UCL Constitution Unit Blog.* Available at: https://constitution-unit.com/2021/09/06/the-fixed-term-parliaments-act-did-not-cause-the-brexit-impasse/

Michael Foran (2021) 'Parliamentary Sovereignty and the Politics of Law-making', *U.K. Const. L. Blog* Available at: https://ukconstitutionallaw.org/2021/10/18/michael-foran-parliamentary-sovereignty-and-the-politics-of-law-making/

Paolo Sandro, 'Do You Really Mean It? Ouster Clauses, Judicial Review Reform, and the UK Constitutionalism Paradox', U.K. Const. L. Blog (1 June 2021) Available at: https://ukconstitutionallaw.org/2021/06/01/paolo-sandro-do-you-really-mean-it-ouster-clauses-judicial-review-reform-and-the-uk-constitutionalism-paradox/?shared=email&msg=fail

Peter Hennessy (2022), 'Boris Johnson has killed off the "good chaps" theory of government', *Prospect Magazine*. Available at: https://www.prospectmagazine.co.uk/politics/peter-hennessy-interview-good-chaps-theory-of-government-boris-johnson

Richard Bellamy (2007), *Political Constitutionalism. A Republican Defence of the Constitutionality of Democracy*, Cambridge University Press.

Richard Bellamy (2019), 'The republican core of the case for judicial review: A reply to Tom Hickey. Why political constitutionalism requires equality of power and weak review', *International Journal of Constitutional Law*, 17(1), January 2019, pp.317–328. Available at: https://doi.org/10.1093/icon/moz012

Richard Ekins (2019), 'Protecting the Constitution', *Policy Exchange.*

Richard Ekins (2019), 'Parliamentary Sovereignty and the Politics of Prorogation', *Policy Exchange.*

Richard Ekins (2019), 'Constitutional Government, Parliamentary Democracy and Judicial Power', *Policy Exchange.*

Richard Ekins (2019), 'Do Our Supreme Court Judges Have Too Much Power?' *The Spectator*. Available at: https://www.spectator.co.uk/article/do-our-supreme-court-judges-have-too-muchpower-

Richard Ekins and Graham Gee (2021), 'Reforming the Lord Chancellor's Role in Senior Judicial Appointments', *Policy Exchange.*

Tom Hickman (2021), 'Quashing Orders and the Judicial Review and Courts Act', *U.K. Const. L. Blog*. Available at: https://ukconstitutionallaw.org/2021/07/26/tom-hickman-qc-quashing-orders-and-the-judicial-review-and-courts-act/

Thomas Poole (2015), *Reason of State. Law, Prerogative, and Empire*. Cambridge University Press.

Thomas Poole (2014), 'Hobbes on Law and Prerogative', In: Thomas Poole and David Dyzenhaus, *Hobbes and the Law*, pp.68-96.

Thomas Poole (2016), 'Losing our Religion? Public Law and Brexit', *U.K. Const. L. Blog*. Available at: https://ukconstitutionallaw.org/2016/12/02/thomas-poole-losing-our-religion-public-law-and-brexit/

Thomas Poole, (2017), 'Devotion to Legalism: On the Brexit Case', *Modern Law Review* 80(4) pp.696-710.

Thomas Poole, (2019) 'The Executive Power Project', *London Review of Books.* Available at: https://www.lrb.co.uk/blog/2019/april/the-executive-power-project

Thomas Poole (2021), 'The Idea of the Federative', In: Jacco Bomhoff, Thomas Poole and David Dyzenhaus, *The Double-Facing Constitution*, pp.54-93.

Aradhya Sethiya (2022), 'The party has just begun: The party leader and the UK constitution', *U.K. Const. L. Blog.* Available at: https://ukconstitutionallaw.org/2022/02/14/aradhya-sethiya-the-party-has-just-begun-the-party-leader-and-the-uk-constitution/

Tom Spencer (2021), 'Natural Justice in Parliament: A Courageous Proposal, Prime Minister', *U.K. Const. L. Blog.* Available at: https://ukconstitutionallaw.org/2021/11/15/tom-spencer-natural-justice-in-parliament-a-courageous-proposal-prime-minister/

Vernon Bogdanor, 'Reply to McHarg and Young', *U.K. Const. L. Blog,* (14th Sept. 2021). Available at: https://ukconstitutionallaw.org/2021/09/14/vernon-bogdanor-reply-to-mcharg-and-young/

Vernon Bogdanor (2021), *Beyond Brexit. Towards a British Constitution*, Bloomsbury Publishing.

R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland). Available at: https://www.supremecourt.uk/cases/docs/uksc-2019-0192-summary.pdf

First published in Great Britain 2022
The Constitution Society
Top Floor, 61 Petty France
London SW1H 9EU
www.consoc.org.uk

ISBN: 978-1-913497-09-5

THE
CONSTITUTION
SOCIETY