POLICY BRIEF

The British Constitution after Brexit

The case for popular codification

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ABSTRACT
The British constitution is under considerable strain. Brexit has drawn attention to the several competing sites of sovereignty within the British constitution and the transformed relationship between the executive and judiciary, fuelling a broader, popular interest in constitutional questions. The UK needs to reach an enduring constitutional settlement. This will require sustained political engagement with proposals for constitutional reform, guided by three underlying principles: the people, not parliament, are the ultimate source of sovereign authority in Britain; the United Kingdom is a voluntary union of nations which requires the ongoing consent of the people of each of its nations; and British democracy must be strengthened, extended, and re-energized.

I argue that Britain should begin a process of codifying parts of the constitution. This process could confront many of the rumbling, structural challenges facing British politics, rather than brushing them under the rug, producing a codified constitution which retained the valuable capacity to adapt and change over time. This process of codification will involve risk, since the outcome cannot be preordained, controlled, legislated for, or determined in court. Embracing the process of codification would require a particular kind of trust in the citizens of the United Kingdom, a willingness to begin a collective journey whose destination cannot be known. Perhaps Brexit will in the end prove to be the beginning of that journey, rather than the end.

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I. Introduction

On the face of it, British politics is back to normal. After three years of constitutional wrangling, a stable government has delivered on its mandate to transform the UK constitution by leaving the European Union (EU). A strong executive with a sizable majority (the largest Conservative majority since 1987) will now set the agenda and legislate without significant obstacles. Our political system has produced a clear resolution to a fractious political and constitutional issue, by forcing voters to decide what they want and representatives to find a way to deliver it. The UK constitution, on this view, is working just as it should.

This sense of normalcy is fragile. Behind the humdrum of ordinary politics, there are clear signs that the constitution is less settled and more contested than at any point in living memory. In Spring, the Government will establish a "Constitution, Democracy and Rights Commission", led by Michael Gove, to "develop proposals to restore trust in how our democracy operates". The Commission will examine the relationship between the executive, legislature, and courts, consider proposals to replace the House of Lords with an elected chamber to represent the nations and regions, ensure judicial review is not "abused to conduct politics by another means", and "update" the Human Rights Act.[1] The Scottish Government, meanwhile, has asserted the principle of self-determination and declared Scotland's "right to choose its own future," publishing plans to hold an independence referendum later this year.[2] By threatening the integrity of the United Kingdom, this may force the UK Government to pursue significant constitutional reform.[3]

The Labour Party also looks set to make constitutional reform central to its politics in the coming years.[4] Gordon Brown has urged Labour to develop proposals for a "constitutional revolution".[5] Keir Starmer has promised a "new constitutional settlement" that aims to build "long-term political and constitutional consensus" on "the principle of federalism".[6] Lisa Nandy has remarked that the UK is "inevitably moving towards a more federal system" and Rebecca Long-Bailey has pledged to replace the Lords with a "senate of nations and regions", placing devolved legislatures "on an equal footing" with Westminster.[7] Sensing that politicians and voters across the UK are no longer content with a constitution that "is no more and no less than what happens",[8] Nigel Farage has promised to establish a "Reform Party" that will argue for

"fundamental political reform", including abolition of the House of Lords, electoral reform, a politicised Supreme Court, as well as recall petitions and citizens' initiatives.[9]

This broad political engagement with constitutional questions is perhaps the most neglected consequence of Brexit. The UK's departure from the EU was a constitutional decision, not a matter of ordinary politics or policy, that most of the establishment did not expect. For a considerable period of time, citizens who felt they had made a constitutional decision, and those who sought to reverse that decision, were, for different reasons, animated by and engaged with questions about how they are governed. Tussles over prorogation and the competing authority of the referendum, the executive, and Parliament, brought the mechanics and quirks of our political system to life. This crash course in the UK constitution, however, bewildered most and left many frustrated. In moments of political crisis, a narrow band of political actors seemed able to simply declare "anything [as] constitutional or anything [as] unconstitutional just as [they] chose to look at it".[10] Brexit produced a palpable sense that the UK Constitution is creaking and that elites cannot fix it alone.

This is a welcome shift. Constitutional issues used to be the preserve of a few lawyers, academics, and politicians, producing reforms which were often muddled and myopic, imposed without broad public discussion or clear indications of popular consent. Now that an unexpected constitutional decision has worked its way through our political system, constitutional reform will last only if it engages an informed and energized public. As Lord Salisbury said in evidence to the House of Lords, "it is very important for the nation or the electorate as a whole to rescue constitutional matters, at least in their essential principles, from being the province of – however admirable – constitutional arcana."[11] If the UK is to achieve an enduring constitutional settlement over the coming decade, sustained political engagement with constitutional reform is both likely and desirable.

This means proposals for reform should be debated on the basis of clear and concise principles, not deference to authority. There are legitimate differences of view about the underlying principles of the UK constitution, often overlooked in pronouncements about what the constitution "is" or "says", that are essential to foreground in public debate. This paper outlines some essential principles that underpin the UK constitution – tools for evaluating proposals for constitutional reform. Like all arguments about constitutional principles, these are normative as well as historical, about what our constitution should be as well as what it has come to be. I defend three particular principles: the people are sovereign, not Parliament; the UK is a

multi-national state, not a nation-state, which depends on the ongoing consent of its nations and parts; and finally, our democracy needs bold reforms that empower citizens to participate and encourage representatives to deliberate. As constitutional questions become a familiar feature of UK politics, this paper outlines a set of principles to navigate the politics of constitutional reform.

II. Brexit and Constitutional Politics

Because there have been few periods of sustained political struggle over the UK constitution, settled through fierce public debate and clear indications of popular consent, the UK has never had reason to codify its constitution. For most of the history of these islands, moments of mass constitutional politics have been confined to the nations and parts of the UK, such as Oliver Cromwell's "Agreement of the People" in 1653, the first codified constitution in modern European history, or the National Covenant adopted by the Scottish Parliament in 1640.[12] Without a codified constitution, a politics centred on constitutional reform has always seemed strangely alien to British public life.[13]

The two decades before Brexit followed this trend. The constitution was transformed. An entrenched human rights regime restructured the relationship between the judiciary and the other branches of government; national legislatures established competing sources of legitimacy; several different electoral systems were introduced across the country; and the Supreme Court developed a clear role in making constitutional judgements, even about contested political questions. As far back as 2009, these reforms were judged to amount to the death of Parliamentary sovereignty and the Diceyean understanding of the British constitution.[14] And yet, outside of Westminster, nobody paid much attention. Tony Blair advanced the substance of the reforms in John Smith's "new constitutional settlement", but dropped the narrative Smith had felt was essential to drive a clear public debate.[15] Constitutional reform without constitutional politics.

Brexit broke this pattern. The political identities of many voters came to depend on the outcome of tussles over how our political system works – or should work – injecting politics into debates about constitutional reform. [16] Brexit animated four particular areas of constitutional argument, each of which will become a focal point for the politics of constitutional reform.

First, the absence of clear rules about referendums drew attention to an underlying political question about where ultimate sovereignty lies. As I argue in the next section, the referendum was not in practice consultative, because it set in motion the most powerful logic of modern democracy: sovereignty over constitutional decisions ultimately lies with the people. This logic applies to democracy in the UK, just like anywhere else. Parliamentary sovereignty has a much narrower, legalistic meaning than is often understood. This recognition of the people's constitutional authority is likely to make referendums, and the politics which accompanies them, a permanent feature of our political system. The question will be how, rather than whether, referendums should be used.

Second, in moments of heightened crisis, opaque rules about political process can muddy lines of accountability and sew distrust. To some, the Speaker's decision to allow the opposition to take control over the Commons' agenda seemed an illegitimate usurpation of the government's control over the order of business, whilst to others, it was merely a symptom of a government without a majority sufficient to force its will.[17] Similarly, by severing bind between Parliament and the executive, the Fixed Term Parliaments Act enabled Parliament to vote down government legislation without bringing down the government. This undermined Parliament's authority to perform its ordinary function of scrutiny and oversight.[18]

Third, Brexit politicized the changing role of the judiciary in our constitution. For the first time in our history, entry into the European Union meant judges could disapply legislation authorised by Parliament.[19] The subsequent transformation in the role of the judiciary was confirmed by the Supreme Court in its confident judgement in the prorogation case.

> "Although the United Kingdom does not have a single document entitled "The Constitution", it nevertheless possesses a Constitution established over the courts of our history by common law, statutes, conventions and practice…the courts have the responsibility of upholding the values and principles of our constitution and making them effective. It is their particular responsibility to determine the legal limits of the powers conferred on each branch of government, and to decide whether any exercise of power has transgressed those limits. The courts cannot shirk that responsibility merely on the ground that the question raised is political in tone or context."[20]

The future powers of the Supreme Court, and the judiciary more generally, will depend on the evolving politics of judicial reform, sparked but not settled by Brexit.[21]

Finally, Brexit has made the politics of devolution existential for the UK. The UK Government has failed to secure consent from devolved governments for its approach to leaving the EU. The Scottish National Party has rejected the repatriation of powers to Westminster, rather than to Holyrood, the Senedd, or Stormont, the Welsh government has argued for a quasi-federal system, and most obviously, the Democratic Unionist Party has made clear they view Boris Johnson's deal as a betrayal of Northern Ireland and the Good Friday Agreement. In a country with multiple, competing sites of political authority – a fact obscured by the EU's constitutional order, enabling the myth of the unitary British state to persist – it is now clear that the UK cannot withstand a sustained commitment by the people of a devolved nation to secede, whatever the law says about the residual sovereignty of the Westminster Parliament.[22]

The process of leaving the EU has generated a politics of constitutional reform that will not disappear, even now the UK has left the EU. We are once again an elective dictatorship, as Lord Hailsham described our constitution in 1970, but this time, with an assertive Supreme Court, a Human Rights Act, devolved legislatures with independent sources of legitimacy, and a population of diverse ethnicities, religions, and politics.[23] What's more, constitutional tussles around Brexit have unearthed two deeper crises which have been simmering under the surface of UK politics for some time.

The first is a crisis of identity. Whilst the UK is one of the most stable democracies in the world, its citizens have never had a stable and shared political identity.[24] Many think of themselves as English, Scottish, and Welsh, others as British, and others still in terms of their city, town, or parish – most combine all these, with different emphases and to different degrees.[25] Over the last two decades, piecemeal devolution has weakened the relationship of citizens in devolved nations to the UK state, and established new political binds between citizens and national representatives.[26] Brexit will exacerbate this crisis, by introducing geopolitics into these questions about national identity. Unmoored from Europe, the UK must decide where it sits within Churchill's three "majestic circles" of America, Europe, and the Commonwealth – perhaps now including a fourth, China.[27] Without a compelling story about the UK's place in an uncertain world, nations may develop divergent visions of their geopolitical futures, with England steering a path closer to the US, and Scotland and Northern Ireland to the EU.

The second is a crisis of trust. Brexit has forced a reckoning with the erosion of trust in our political system, which has been declining for some time.[28] A constitution "Bestowed Upon Us by providence", as Charles Dickens put it in 1865, might have been acceptable to deferent citizens

of an ascendant superpower, but not to an older, better educated, and more assertive citizenry divided by acute differences of view about Unions, geopolitics, and welfare.[29] There is an inchoate but distinct unease with a political system whose structure is determined by politicians, jurists, and a few journalists who are, apparently, uniquely able to "discover" our constitution in a "system of tacit understandings" which, as one writer confidently put it, are "not always understood".[30] When a citizenry is divided and diverse, better informed about constitutional questions than ever before, a "flexible" constitution may erode, rather than support, trust in our political system

These underlying challenges make constitutional reform almost inevitable. The question that now confronts us is whether these reforms will consist of unsatisfying temporary fixes or whether a clear resolve will crystalize to harness the politics of constitutional reform provoked by Brexit to forge a lasting constitutional settlement. The most potent and enduring way to do this, to confront the underlying challenges facing our constitution, would be to join almost every other democracy in the world and codify our constitution.

The time has come, this paper argues, to codify our constitution. A codified constitution would recognise the political realities of a multi-national state, binding the political agency and representation of each nation to a shared, civic and geopolitical purpose for the UK. The process of codification would force a confrontation with intractable constitutional questions that have been neglected for too long, encouraging a broad debate about different visions of citizenship and democracy across the United Kingdom. Forged through the political process of codification and ratification, a codified constitution would affirm that the UK's political system is the joint enterprise of its citizens, requiring ongoing consent and broad participation, articulating a shared civic purpose for the world's oldest multi-national democracy.

The politics of codification can re-energize democracy too. As well as accelerating constitutional transformation, Brexit has promoted widespread awareness that how we are governed matters. The idea of an apathetic electorate has been exposed as a lazy trope. Citizens of the UK now know a great deal about their political system, seeing clearly its flaws and the fallibilities of those who run it. This emerging constitutional politics is an opportunity to debate constitutional principles, rather than simply impose top-down constitutional tinkering, a moment to strengthen and re-energize our democracy and sense of common purpose. As Walter Badgehot wrote, "if you are always altering your house, it is a sign either that you have a bad house, or that

you have an excessively restless disposition."[31] This paper outlines three fundamental principles that should guide us as we rebuild our crumbling constitutional house.[32]

III. Sovereignty: The People

Because the UK constitution is uncodified, constitutional arguments always slide between principles and history, that is, between arguments about what the constitution should be and arguments about how the constitution has come to be understood. Consider the Salisbury convention. If the principle underpinning the convention is that a majority party in the Lords should not prevent a majority party in the Commons from enacting its manifesto, then the Lords might be justified in being more assertive than in the past, when the Conservatives enjoyed a near permanent majority in the Lords. Whereas if the convention depends on a broader principle of the democratic authority of the Commons, the deference of the Lords should hold regardless of the political makeup of both houses. What the convention entails depends not just on what was in Lord Salisbury's mind but on the principle that underpins it.

Constitutional politics should proceed on the basis of principles, not deference to authorities. The constitutional arguments of past authorities have always been driven by the political positions they wished to advance, notably so with A.V. Dicey, just as accusations of constitutional outrage in debates about Brexit were driven by the politics of the accuser.[33] Perhaps the clearest case of a constitutional question which must be answered by advancing principles as well as by drawing on history, is the question of where sovereignty ultimately lies: with Parliament or the people.

Parliamentary sovereignty is both a legal and a political idea. The Supreme Court stated the legal idea clearly in the recent prorogation case: "laws enacted by the Crown in Parliament are the supreme form of law in our legal system." The court continued, "the constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body."[34] The political meaning, by contrast, is captured by the lawyer J.A.G. Griffith's quip that the "constitution is no more and no less than what happens."[35] Unlike in the U.S., where constitutional questions are ordinarily legal questions, constitutional questions in the UK are political questions, whose resolution implies a particular balance of social and political power, rather than the acceptance

of a principle. This means that whatever Dicey or Bagehot – or for that matter any constitutional authority – says about the constitution is more an observation about the distribution of power within the political system at that time than a statement of constitutional principle.

In the political sense, parliamentary sovereignty is dead.[36] Devolution has established competing sources of legislative authority within the United Kingdom. The legal principle of subsidiarity does not lessen the political reality that the power and authority of Parliament has been irreversibly curtailed. Parliament also seems to have entrenched quasi-constitutional acts, including the Human Rights Act, since these acts appear to have bound future Parliaments in political if not in legal terms.[37] We have left the EU, and yet, parliamentary sovereignty exists only as a legal formalism, and for some, a rhetorical aspiration.

However, the referendum highlighted another more profound political limit to Parliamentary sovereignty. The referendum suggested that the people, when consulted, carry an authority over constitutional decisions that Parliament cannot in practice override.

This particular limit deserves much greater attention, for it implies a principle that would fundamentally restructure our constitution. To illustrate this, it is worth pausing to think about the basic structure of modern democracy. Modern democracy was forged in the revolutions of 1776 and 1789, when America and France adopted recognisably modern political systems. What made these democracies modern was that they distinguished between sovereignty, fundamental acts of legislation, constitutional decisions which had to be made by the people themselves, and government, the day-to-day activity of ruling which could be left to representatives or a monarch. Hobbes first separated these two kinds of rule, but Rousseau put the point most clearly,[38]

> "Ancient peoples are no longer a model for modern ones…You are neither Romans, nor Spartans; you are not even Athenians…You are Merchants, Artisans, Bourgeois, always occupied with [] private interests, with [] work, with [] trafficking, with [] gain; people for whom even liberty is only a means for acquiring without obstacle and for possessing in safety. This situation demands maxims particular to you. Not being idle as ancient Peoples were, you cannot ceaselessly occupy yourselves with the Government as they did: but by that very fact that you can less constantly keep watch over it, it should be instituted in such a way that it might be easier for you to see its intrigues and provide for abuses. Every public effort that your interest demands ought to be made all the easier for you to fulfil, since it is an effort that costs you and that you do not make willingly. For to wish to unburden yourselves of them completely is to wish to cease being free. 'It is necessary to choose,'

says the beneficent Philosopher, 'and those who cannot bear work have only to seek rest in servitude."[39]

In Rousseau's view, Parliament is part of government.[40] The sovereign people might institute Parliament to act as their agent and make decisions about everyday matters of government, but Parliament cannot represent the sovereign people as sovereign, because sovereignty cannot itself be represented. Acts of sovereignty, fundamental constitutional decisions, require the people themselves to vote. Others like Richard Tuck view Parliament somewhat differently, as fundamentally pre-modern in embodying no distinction between sovereignty, constitutional acts of legislation, and government, ordinary statutes. On this view, Parliament is *both* sovereign and government, acting as sovereign when it passed the Act of Union or the European Communities Act and as government when it passed the Hunting Act or when it authorised the invasion of Iraq.

There are good reasons to think Rousseau is right. In law, several jurists have suggested that some statutes are entrenched in ways that are not compatible with a strict view of Parliamentary sovereignty.[41] Lord Justice Laws, in *Thoburn v Sunderland City Council* (2003), suggested that constitutional acts can only be explicitly repealed or amended, which would mean constitutional statutes are not subject to the Diceyan doctrine of implied repeal.[42] More important than the legal issue is a political one. The political precedent that constitutional decisions in Britain must be put to a popular referendum is now well established. Britain had a referendum to authorise joining the European Economic Community in 1975, then a referendum to authorise leaving the European Union in 2016 (suggesting that claims the 2016 referendum was unnecessary are to some extent hubris).[43] Britain has had referendums on changing the electoral system, on whether Scotland wished to succeed from the Union, and on devolved legislatures in Scotland, Wales, and Northern Ireland. Whether or not those who proclaimed that Parliament was sovereign in the nineteenth century were right – I am sceptical – those who cling to the idea today blind themselves to the powerful logic of modern democracy. The people, not Parliament, have been sovereign all along.

Brexit sharpened this point. A sovereign Parliament that did not want Brexit could have stopped it. It was politically impossible for Parliament to unilaterally revoke Article 50 because once the people had made a constitutional decision, however narrow the margin or contingent the campaign, only the people could change that decision, and even then, the terms could not seem like usurpation by those who disagree. Brexit confirmed that referenda have a self-authoring power that ordinary politics cannot ignore or override, because modern democracy is

rooted in popular sovereignty – including in the UK. This idea has been self-consciously revived in Scotland, beginning with the Declaration of Arbroath in 1320 in which the people declared that the authority of the King of Scotland, Robert Bruce, rested on the consent of the Scottish people.[44] But England too has a neglected history of popular sovereignty, stretching back at least to the Putney Debates and the Levellers in the seventeenth century.[45]

The central role of popular sovereignty in modern democracy has implications for the structure of government. If the people are sovereign, government should be structured to keep alive a sense that the people can change how they are governed, that constitutional reform is always within the power of an engaged citizenry. Government "should be instituted," as Rousseau put it, to make it "easier for [citizens] to see its intrigues and provide for abuses. Every public effort that your interest demands ought to be made all the easier for you to fulfil".[46] This suggests that constitutional politics should be welcomed in modern democracy, not feared, for it is a sign of the vitality and vigour of a democracy. A constitution's central features should be made visible and public to encourage broad engagement with constitutional politics. Popular sovereignty is more than an occasional sporadic act in modern democracy, it has implications for how strong and vibrant democracies should be structured. I consider these ideas in later sections.

Parliament is not and should not be thought of as sovereign.[47] The political doctrine of Parliamentary sovereignty, if it ever was plausible, has been killed by the dual logics of devolution and referendums. The UK is a multi-national not a unitary state and the people have ultimate political authority not Parliament. For some time, the doctrine of Parliamentary sovereignty has obscured more than it illuminates about how our constitution works in practice. The UK should join almost every modern democracy in the world and explicitly recognise a distinction that already underpins its constitution in practice, between sovereignty, in which the people themselves have final authority to make constitutional decisions, and government, which can be structured according to whatever principles best suit a particular country at a particular time.

IV. Consent: A Union of Nations

There is one important challenge to the idea of popular sovereignty – that it lies not with the people of the United Kingdom, but with the separate peoples of England, Wales, Scotland and Northern Ireland. The question of which citizenry has the right to make constitutional decisions has vexed almost every multi-national state, including the U.S. during the adoption of its Constitution. Were the people of Massachusetts, Virginia, and the other states separately sovereign? Or were the people of the United States sovereign? Their indefinite answer should inform our own. Whilst the U.S. Constitution uses the language of 'We, the people of the United States', it required separate ratification by at least nine states and the Constitution itself entrenched states' rights.[48] Questions about the site of sovereignty cannot be settled in the abstract. They must be settled through political process and over time.

There is now widespread recognition that major constitutional reform will require ratification not just by the people of the United Kingdom, but also by the separate peoples of England, Scotland, Wales, and Northern Ireland. The CRG's Act of Union Bill, for example, affirms that "the peoples of England, Scotland, Wales and Northern Ireland" have chosen to "form the United Kingdom…to pool their sovereignty for specified purposes."[49] The Scottish Government has argued that "Scotland is not a region questioning its place in a larger unitary state" but "a country in a voluntary union of nations."[50] This suggests an important underlying principle, also obscured by the Diceyan understanding of the UK constitution: the UK is a union of nations, each of which are independent sites of sovereign authority. The continued existence of the United Kingdom requires the ongoing consent of each of its constituent nations and parts.[51]

Constitutional politics in the UK must confront a simple choice. The United Kingdom can disintegrate into smaller sovereign political units, each confined to narrower ambitions and separated by boarders defined by the European Union. Or the United Kingdom can self-consciously create a political unit based on a common political – not national – identity, in which sovereignty is intentionally pooled. Without a deliberate act of self-creation, lethargy and fear will edge us gradually towards disintegration.

The most powerful act of self-creation would be to begin the process of codifying the UK constitution. Forging a codified constitution would force a recognition that the UK depends on the consent of the people of England, Scotland, Wales, and Northern Ireland.[52] This could be secured through simultaneous referendums in a sustained "process of public and institutional

negotiation" that would require "real political stamina".[53] These referendums would involve unquestionable risk to the Union – but then, so does the status quo. Political decisions which confront intractable questions of identity and territoriality always involve risk; that is what makes them important, engaging, and what makes their resolution stick. The greater the risk that consent will not be obtained, the greater the power of the decision. The most structured way to ensure United Kingdom endures is for each nation to give its consent to a codified UK constitution with clear procedures for secession.

There are three particular ways in which codifying our constitution may avert the disintegration of the UK. The first is to do with the constitution itself. Britain's uncodified, political constitution is often said to protect a kind of self-government by ensuring the living are not ruled by the dead. There are several reasons why this argument is misleading. One is that in practice, an uncodified constitution ensures the living are ruled by lawyers and politicians, those able to pronounce on unwritten conventions or the principles of common law. The most important, however, is that it underestimates the importance in a democracy of having a constitution that binds the living to the dead. A codified constitution which can be understood by every living person who cares to read it, binds together a people who exist over time and brings that people to see themselves as existing over time. It ensures public debate about constitutional questions must be conducted in a certain kind of constitutional language, sustained over time by the language written into the constitution itself. This has a powerful unifying effect on a multi-national state. Political actors cannot create nations but they can create constitutions, and constitutions, in turn, can bind the living to the dead, forging a civic political community over time which leaves room for several nationalisms. This is exactly what a codified constitution for the UK should aim to do.[54]

The second is about the process of adopting a codified constitution, rather than the document itself. It is often said that codifying our constitution risks breaking up the United Kingdom, as if our present political system somehow secures it. That is to miss the point of codifying our constitution. Confronting structural challenges we have long ignored inevitably involves risk, including the risk of breaking up the UK. It may in fact be that the UK cannot survive without truly risking its dissolution. The process of codifying a constitution structures this risk, it gives it form and clear rules. The power of democratic politics is that collective choices with real stakes always involve risk, and cynicism or resignation should not be allowed to suffocate the genuinely creative possibilities of a sustained public debate about what form of government and

what kind of union to enshrine in a codified constitution. What's more, the clear indication (or rejection) of consent for our political system that would be built into the process of codification is more likely than any political alternative to settle the question. A clear and gradual process of codifying our constitution, conducted in the stages outlined in the final section of this paper, would do more than anything else to forge a stable political community among the nations of the UK.

The final way in which a codified constitution might prevent the dissolution of the UK is about the form of government it would institute. Any codified constitution would need to address the relationships between the devolved assemblies and the Westminster Parliament. One way to do this may be through some kind of federalism, perhaps establishing a Senate of Nations and Regions, as the Constitutional Commission will reportedly consider and several Labour leadership candidates have proposed.[55] Any viable proposals for federalism must involve greater fiscal devolution, requiring devolved spending to be matched by devolved powers of taxation.[56] Even without a formal principle of federalism, codification could address the English question, by establishing structures of devolution to English parishes, towns, cities, and where they match genuine identities, regions. This devolution should be framed not in terms of the technocratic delivery of public services, but "in the language of national representation and empowerment."[57] The principle should be self-determination rather than efficiency.

If the UK is a union of nations that requires ongoing consent, a codified constitution must also have clear procedures for constitutional amendment and secession. These procedures need not be as burdensome as in other codified constitutions, such as the United States. Much of the flexibility of our constitution can be retained by simply establishing lower thresholds for constitutional amendments than is usual. This could involve the consent of a majority of national legislatures, or even, perhaps, a simple majority in Parliament. Codification need not stultify our constitution. The secession of any nation would need to involve two referendums, the first to authorise a devolved government to begin negotiations with Westminster, the second to authorise final secession on agreed terms. This process of secession recognises what is already a political reality: Westminster cannot thwart the will of any nation within the UK to leave the union.

Those who seek to preserve the UK should focus on the politics of constitutional reform, rather than on resisting national identities or nationalism. Hostility to national identities – or artificial attempts to revive British nationalism – will not further the preservation of the United

Kingdom.[58] English, Scottish, and Welsh national identities should not be dismissed as parochial legacies of a bygone era. It is no longer true, as the Liberal politician and jurist James Bryce – born in Belfast, educated in Glasgow, died in Devon – wrote in 1887 that 'An Englishman has but one patriotism, because England and the United Kingdom are to him practically the same thing.' Or that 'a Scotchman has two, but he is sensible of no opposition between them.'[59] Many English people do distinguish between England and the UK, seeing Britishness as 'a recent façade clapped on a much older building', as opposed to 'Green England', romantic and pastoral, as John Fowles wrote in 1964.[60] Similarly, particularly in the context of the UK's departure from the EU, many Scots now see a clear opposition between allegiance to Scotland and to the UK. The future of the United Kingdom will depend not primarily on underlying national identities, but on the constitutional settlement that we reach, or fail to reach, in the coming years.[61]

V. Democracy: Participation and Deliberation

The final principle this paper defends is that constitutional reform should strengthen and extend democracy. Constitutional reform should encourage bold experimentation with the structure of modern democracy, exploring different ways of combining old forms of democratic participation and deliberation with new technologies.

This principle puts several reforms on the table. It is worth pausing to consider the different ideas which motivate these reforms, and in particular, the difference between participation and deliberation. Participation and deliberation play different roles within a political system. The assembly of Ancient Athens is often mistakenly taken as the paradigm case of a participatory *and* deliberative body. Citizens would gather together to discuss particular policies (deliberation) and make decisions about the best course of action (participation). This is not how the Athenian assembly worked. Deliberation was understood to be a private activity, in which citizens would weigh the arguments of politicians or the advice of experts, before making a decision, including about the declaration of war. Deliberation did not mean that each citizen spoke and aired their views; it meant that every citizen *heard* the views of those qualified to speak, either by virtue of their election or their expertise, and ultimately, that every citizen was part of the decision.[62] Rousseau held a similar view. Like the Athenians, he believed that when the people as a whole

make a decision, including about the constitution, they should hear the arguments of politicians and experts, deliberate in private, then participate in the decision.[63]

Deliberation and participation should play different roles in modern democracy. Deliberation should be built into the process of government, where elected representatives and experts are forced to negotiate and debate the best course of action for a country. Deliberation does not require that every citizen be involved in a debate about every political decision. Participation, on the other hand, requires that citizens make decisions together, in part because it makes clear that in democracy, citizens are bound to one another's fate. Constitutional reforms should explore how to introduce more deliberation into the process of governing and more participation into the process of decision-making.

The most important deliberative reforms would be to strengthen the House of Commons and to replace the House of Lords with a Senate. The Commons could be strengthened by placing prerogative powers in statute and giving the Commons more power over dissolution and recall, senior public appointments, and the ratification of international treaties. An elected Senate could have about 300 members, 80 percent of whom could be elected by proportional representation, with long fixed terms of three parliaments, to represent the nations and regions of the United Kingdom. An Appointments Committee would then use public criteria to appoint the remaining 20 percent.[64] Those resistant to Lords reform are right that it would require governments to negotiate and compromise with a legislature with its own source of legitimacy. They simply do not grasp that this is a good thing. UK governments have for some time been neither strong nor decisive, even where they have considerable majorities. The idea that a lack of deliberation is good for government in modern democracy is based more on prejudice than on evidence.[65]

Another deliberative reform could be to introduce citizen's assemblies and citizen's juries as regular part of government. These institutions are often mistakenly understood to be participatory bodies, whose purpose is to actually make difficult decisions. This was the motivation behind proposals for a citizen's assembly on Brexit.[66] However, the aim of citizen's assemblies and juries is really to introduce deliberation into government rather than participation in decision-making. There are two reasons why our government would benefit from making greater use of these institutions.

The first is that in some areas, they are likely to promote better decision-making. Many of the most important decisions which shape citizens' lives are no longer made by elected representatives in the legislature, but in the boardrooms of bureaucracies and private companies.

As the economy has become ever more complex, important decision-making has shifted away from the legislature, towards the private sphere and government agencies who regulate it. These centralised decision-making bodies often do not have the practical knowledge required to make good decisions, knowledge that citizens who are relevant stakeholders could contribute. This includes areas like the integration of new technologies into existing systems or how best to implement regulatory objectives within particular industries. Complexity is an argument for deliberative decision-making, not an argument against it.

The second reason we should make greater use of these deliberative institutions has to do with the changing relationship between citizens and their representatives in modern democracy. The oldest idea of what democracy means is that each citizen is capable of ruling, and so, citizens should rule and be ruled in turns, through random selection. This was the basis of Athenian democracy.[67] Representative democracy replaced this with the idea that a citizenry should elect representatives to make decisions on their behalf. In the background of this shift, however, was the assumption that representatives would be older and better educated than the citizenry as a whole. This is no longer true. Citizens are closer in age and education to their representatives than ever before.[68] We should experiment with different forms of democracy that predate representation, including ruling and being ruled in turn through random selection. Instead of selecting deliberative bodies to reflect the population in age or gender or race, some could be randomly selected from a relevant group of people, defined by geography or by economic activity.[69] We could randomly select parishioners or local councillors to serve for defined periods or workers in particular industries to participate in economic governance.

There also are several important participatory reforms to consider. These also have to do with the increasing obsolescence of the representative aspects of democracy, in this case, the decline of mass political parties. For about a century, mass parties tied the institutions of representative democracy to concrete identities, ensuring that voters could choose between distinct programmes for government, underpinning the important if dubious doctrine of the mandate.[70] Parties no longer effectively serve these functions. There is evidence that British political parties now undermine, rather than support, trust in political institutions and politicians, in part because of superficial democratic reforms within political parties.[71] In a world where politicians are no older or wiser than ordinary citizens, there are good reasons to explore how to promote citizen participation in the activity of political decision-making. Our present system of

representative democracy, depending on trusted and broad political parties, is not the only or the best way democracy might be done.

Several familiar reforms would weaken the grip of party elites over British democracy. One would be to introduce an open primary system. Instead of having a handful of unrepresentative party members select their candidate for each constituency, an open primary would enable all registered voters to select candidates for both parties. The Conservative Party successfully used an open primary to select Boris Johnson to be their Mayoral candidate in 2007. This would entrench the two party system but it would weaken the control of party elites. Another option would be to elect MPs using the Single Transferrable Vote (STV) system, which effectively builds an open primary into the general election. Voters can select multiple candidates from each party, enabling much greater expression about who best represents their policy and political objectives. A Labour voter who cared more about Brexit than about party allegiance could have ranked candidates according to their Brexit position, whilst a Labour voter committed to Brexit but unwilling to vote for other parties could have ranked Labour candidates on the basis of their position on Brexit.[72]

A more radical participatory reform would make referenda an integral part of our political system. The existing precedent that referendums are required to authorise constitutional reforms should be codified within the UK constitution. This would prevent politicians from using referendums to control party schisms and end uncertainty about the status of referendums during and after campaigns. But reforms could go further, for instance by requiring a referendum to be held on a petition that receives a certain proportion of signatures from the total electorate. The outcome of this referendum could be binding. Technology could play an important role here, as it could to deliver each of the reforms designed to strengthen and extend democracy. Technology could enormously enhance the possibilities of exactly the kind of collective decision-making that the Athenians and Rousseau favoured, in which citizens listen to the arguments of politicians and experts, deliberate in private, then participate in a final decision. This kind of decision-making could become a much more important component of the way we do democracy.

VI. A Constitutional Process

This paper has argued that many of the objections to codifying a UK constitution are not persuasive. Parliamentary sovereignty is not an accurate description of our political system; codification is more likely to preserve than to destroy an already disintegrating UK; a constitution would check the power of government, introducing deliberation where a mythology of decisiveness has reigned; and a constitution would clarify different sources of political authority, at present obscured by common understandings of our political system. There is one more persuasive argument against codification – that the politics of codification would not work.

Call this the leave-it-alone argument. The British constitution is plagued by a series of intractable issues that, if brought to the surface, might spur anything from the secession of Scotland to civil war. The scope of royal prerogatives, the relative powers and legitimacy of devolved legislatures, the role in of the monarch, the judiciary, and the House of Lords – issues like these are best left alone, shielded from the instinct to rationalise and reform according to the whims of a particular age. "The British Constitution has always been puzzling and always will be", the Queen herself is supposed to have said. As the old saying goes, "whereof one cannot speak, thereof one must be silent." These issues should be confronted only in a moment of crisis, for crises, on this view, provide the necessary political space for issues to be resolved. This has for a long time been the approach of Westminster politicians, who prefer to call it prudence.

There are two responses to the leave-it-alone argument. One is that we have now arrived at the point of crisis the argument seeks, driven by impending tussles between the executive and courts and between Westminster and Holyrood over the authority to hold a Scottish independence referendum. Citizens of the UK are more engaged in and informed about constitutional questions than at any point in living memory – how we respond to this moment is up to us. This alone might be sufficient, but there is a more fundamental response.

The leave-it-alone argument rests on a failed view of democratic politics. If recent politics has taught us anything, it is that when difficult issues are left alone, they do not come to a silent resolution, they fester, simmer under the surface, producing frustration that can swiftly become fury. The politics of codifying our constitution would be difficult, it would require us to confront stubborn and strange questions about our political system about which there are sharp differences of view. But that is an argument *for* codification not an argument *against* it. The idea that avoiding intractable issues is a sign of political success is, in the long run, a dangerous

delusion. Constitutional politics is and will be hard. It requires stamina, negotiation and longevity, traits sorely lacking in our own democratic politics. This is a reason for taking our time over codification, not for avoiding it.

The leave-it-alone argument does suggest that how the process of codification is structured would be critical. The form of that process will profoundly shape the contours of constitutional politics. The process should begin with a specific form of authorization by Parliament and the sitting government, which clearly indicates that an extraordinary kind of process has begun, separate from ordinary policy debate and legislation. Parliament must state unambiguously that it remains sovereign during the process of codification but that, once a new constitution has been authorised, Parliament will abrogate its authority to the new constitution of the United Kingdom. The process should also be as slow as possible, not less than five years but possibly longer.

The process of codifying our constitution would need to involve several distinct stages, each of which would have a different purpose. The first could be a Royal Commission to produce an initial draft of the constitution, similar but more significant than the government's Commission on the Constitution.[73] This Royal Commission would last around two years, possibly longer. It would travel up and down the country, basing itself in a particular region for a month or so, taking evidence from local community leaders, citizens, companies, and other kinds of stakeholders. Oral evidence could be televised. If the Royal (Kilbrandon) Commission on the constitution is anything to go by, such a Commission could have both the privacy to seriously evaluate and review evidence, whilst doing much to educate and raise awareness of the core constitutional questions we would need to confront. The Commission would not include active politicians. It would involve experts from different parts of society, including jurists, political theorists, perhaps former politicians – young as well as old, women as well as men, and so on. If the Commission felt some questions required further evidence or analysis, further subcommittees could be established.

After a pause, the second stage would involve a Constitutional Assembly. The purpose of this Assembly would be to produce a near-final draft of the constitution and to vote on amendments. Each member of the Assembly would require full pay, accommodation, and if necessary, childcare. The Assembly could be composed of members chosen by lot from across the country, experts, and a few politicians perhaps chosen by Parliament. The Assembly could have a series of subcommittees devoted to particular issues or sections within the constitution, and could work in bursts of two or three months over a year or two. The Assembly would then

publish a final draft of the constitution, pause for a period of public comment, then gather again to vote on final amendments before publishing the Constitution of the United Kingdom.[74]

There is good evidence that citizens can, with the right information and in the right institutional setting, grapple with thorny constitutional questions. The clearest case is the citizen's assembly in Canadian British Columbia on electoral reform in 2003. The government promised that the assembly's recommendation would be put to the people in a referendum, focusing minds by raising the stakes. The framing of the assembly was expressly radical: "Never before in modern history has a democratic government given to unelected 'ordinary' citizens the power to review an important public policy, then seek from all citizens approval of any proposed changes to that policy. The British Columbia Citizens Assembly on Electoral Reform has had this power and responsibility and, through its life, complete independence from government."[75]

The Constitution would then need to be ratified by the people in a popular referendum. The threshold for this referendum is a difficult question, involving a fine balance between the enhanced legitimacy that follows from a supermajority and the greater risk of the public rejecting a constitution that has, by this stage, been carefully and arduously crafted. It would, however, be essential that the constitution receives ratification from all the nations and parts of the United Kingdom. The clearer the indication of consent that the constitution receives, the more enduring the allegiance it will to secure.

The constitutional politics that surrounded codification would need to be different to ordinary politics. Politicians would have to stop operating in a near permanent state of crisis, even where no crisis in fact exists.[76] The media would have to respect that a process of historic significance was underway, which deserves respect and requires public education. Partisanship would need to be less transfixed by the winner-takes-all mode of British politics, and more on deliberation and argument. Our political culture would need to shift away from individual politicians and parties, and more towards the virtues and vices of our political system, as it has begun to do. Politicians would need real political stamina and an ability to appreciate the structural component of democratic politics. Above all, a constitutional process can only succeed with a clear narrative that the process *is* constitutional, different from ordinary politics.[77]

A constitutional process requires risk. Until a few years ago, our politics had become profoundly risk averse. But risk is the essence of democratic politics. It is the risk of collective decision-making that produces the actual feeling of collective will, the tingle of putting a cross in a ballot, the fury at having a political promise ignored. The outcomes of a process of codifying

a constitution cannot be preordained, controlled, legislated for, or determined in court. The process of codification requires a particular kind of trust in the citizens of the United Kingdom, a willingness to begin a collective journey whose destination cannot be known. Perhaps Brexit will in the end prove to be the beginning of that journey, rather than the end.

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[1] The Conservative Party, "Get Brexit Done. Unleash Britain's Potential," Manifesto, 2019, 47–48, https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf.

[2] Scottish Government, "Scotland's Right to Choose: Putting Scotland's Future in Scotland's Hands" (Edinburgh, December 19, 2019), https://www.gov.scot/publications/scotlands-right-choose-putting-scotlands-future-scotlands-hands/.

[3] Early indications suggest this Government may be willing to embark on significant constitutional reform. Tim Shipman, "Lords May Become 'House of Regions,'" January 5, 2020, https://www.thetimes.co.uk/article/lords-may-become-house-of-regions-63kxl2xsq.

[4] In its recent manifesto, Labour pledged to establish a constitutional convention, led by a citizens' assembly, which would consider replacing the House of Lords with a Senate of Nations and Regions, abolishing the Fixed Term Parliaments Act, reducing the voting age to 16, and enabling all UK residents to vote.
The Labour Party, "It's Time For Real Change," Manifesto, 2019, 81–82, https://labour.org.uk/wp-content/uploads/2019/11/Real-Change-Labour-Manifesto-2019.pdf.

[5] Gordon Brown, "The United Kingdom Is Too Precious to Be Lost to Narrow Nationalism," *The Guardian*, January 18, 2020, https://www.theguardian.com/commentisfree/2020/jan/18/united-kingdom-too-precious-to-be-lost-to-narrow-nationalism.

[6] Sienna Rodgers, "Starmer Calls for Federal UK to Deliver 'Radical Devolution of Power,'" LabourList, January 26, 2020, https://labourlist.org/2020/01/starmer-calls-for-federal-uk-to-deliver-radical-devolution-of-power/.

[7] Charlotte Dobson, "Rebecca Long-Bailey Pledges to 'End the Gentlemen's Club of Politics,'" Manchester Evening News, January 17, 2020, https://www.manchestereveningnews.co.uk/news/greater-manchester-news/rebecca-long-bailey-labour-leadership-17589484; Adrian Masters, "'Inevitable' Federal Future for UK Predicts Lisa Nandy," accessed February 3, 2020, https://www.itv.com/news/wales/2020-01-28/lisa-nandy-federal-future/.

[8] J. A. G. Griffith, "The Political Constitution," Modern Law Review 42, no. 1 (1979): 19.

[9] These reforms were also included in the Brexit Party's manifesto, 2019. The Brexit Party, "Contract With The People," Manifesto, 2019, https://www.thebrexitparty.org/wp-content/uploads/2019/11/Contract-With-The-People.pdf.

[10] As Anthony Trollope wrote in his novel, The Prime Minister. Quoted in Vernon Bogdanor, *The New British Constitution* (Oxford: Hart Publishing, 2009), 13.

[11] "Inquiry on The Union and Devolution," The Select Committee on the Constitution (2016).

[12] The Unions with Scotland in 1707 and with Ireland in 1801 transformed the constitution, but without much public debate or any clear indication of consent. The period during and after the passage of the Great Reform Act in 1832 is perhaps the closest Britain has come to constitutional politics. Bogdanor, The New British Constitution, 11.

[13] Bruce Ackerman calls these "constitutional moments". Bruce A. Ackerman, *We the People* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1991); Walter Dean Burnham, "Constitutional Moments and Punctuated Equilibria: A Political Scientist Confronts Bruce Ackerman's We the People.," *Yale Law Journal* 108, no. 8 (1999): 2237–77, https://doi.org/10.2307/797387; Bruce Ackerman, "Reactionary Constitutional Moments: Further Thoughts on The Civil Rights Revolution," *Jerusalem Review of Legal Studies* 13, no. 1 (2016): 47–58, https://doi.org/10.1093/jrls/jlv017.

[14] I will often use Britain and the UK interchangeably, distinguishing the two where necessary.

[15] Anthony Barnett, "John Smith and the Path Britain Did Not Take," openDemocracy, May 12, 2019, https://www.opendemocracy.net/en/opendemocracyuk/john-smith-and-path-britain-did-not-take/.

[16] The last time these weakness of our constitution were exposed in this way – in the Irish Home Rule crisis, when a sitting monarch considered exercising his veto, working with members of the opposition and the civil service to thwart parliamentary legislation – Britain's constitution was saved by the First World War. Mclean, What's Wrong with the British Constitution?

[17] "'Anti-Brexit Car Sticker Belongs to My Wife,'" BBC News, January 9, 2019, https://www.bbc.com/news/av/uk-politics-46810614/john-bercow-anti-brexit-sticker-belongs-to-my-wife.

[18] As the Supreme Court explained in the prorogation case, "the government exists because it has the confidence of the House of Commons. It has no democratic legitimacy other than that." R (Miller) v The Prime Minister (UKSC 2019).
[19] In the *Factortame* case, the Law Lords disapplied part of the Merchant Shipping Act of 1988 because it was incompatible with EU law. The *Benkharbouche* case in 2017 disapplied part of the Statute Immunity Act of 1978 because it violated human rights set out in the EU Charter of Fundamental Rights.
[20] The case has been compared to Marbury v Madison, in which the U.S. Supreme Court established the principle of judicial review, such that courts can strike down laws, status, and government actions that violate the U.S. Constitution. R (Miller) v The Prime Minister, 41 at 15; Marbury v Madison (1803).
[21] Sionaidh Douglas-Scott, "What Does Boris Johnson's Victory Mean for the Constitution?," December 17, 2019, https://www.prospectmagazine.co.uk/politics/what-does-boris-johnsons-victory-mean-for-the-constitution.
[22] Powers transferred from Westminster to devolved legislatures will not be returned, perhaps other than in war. For more on this general idea, see James Mitchell, The Scottish Question, First edition. (Oxford: Oxford University Press, 2014).
[23] A clear reminder that in politics, it is almost never possible to entirely return to the past. Lord Hailsham, Elective Dictatorship, The Richard Dimbleby Lecture 1976 (London: British Broadcasting Corporation, 1976).
[24] Britishness has a complex history driven by factors that no longer obtain: religion, war, and empire. Joshua Simons, "Plural British Identity" (These Islands, January 3, 2018), https://www.these-islands.co.uk/publications/i259/plural_british_identity.aspx.
[25] The proportion of those who see themselves primarily as English is higher among older voters. Minorities or remain voters are less likely than white or leave voters to see themselves as English, and Conservative voters are considerably more likely than Labour voters to declare themselves proud of their English identity. Mark Easton, "The English Question: What Is the Nation's Identity?," *BBC News*, June 3, 2018, sec. UK, https://www.bbc.com/news/uk-44306737.
[26] For much of the UK's history, national identities were thought to be compatible with, and even complementary to, the Union. Sir John Sinclair, a Scot from Caithness who became President of the Board of Agriculture, wrote in 1813 that 'national peculiarities are of great use in exciting a spirit of manly emulation…It is in the interest of the United Kingdom to keep alive those national, or what, perhaps, many now more properly be called local distinctions of English, Scot, Irish and Welsh.' An increasing number of people now feel their national identities are in conflict with allegiance to the UK as a whole. John Sinclair Sir, An Account of the Highland Society of London from Its Establishment in May 1778, to the Commencement of the Year 1813 (London: Sold by Longman, 1813), 27, 35.
[27] The recent Huawei decision suggested that the UK may well find itself caught between the US and China over the coming decades, with implications for the UK's relationship with Europe. William Waldegrave, Three Circles into One: Brexit Britain: How Did We Get Here and What Happens Next? (London: Mensch Publishing, 2019).
[28] Matthew Goodwin, "The End of Trust in Our Political Class," The New Statesman, accessed December 1, 2019, https://www.newstatesman.com/politics/uk/2019/05/end-trust-our-political-class.
[29] Charles Dickens, *Our Mutual Friend* (Dinslaken: anboco, 2016); Bogdanor, *The New British Constitution*, 4.
[30] Sidney Low, The Governance of England. (London: T. Fisher Unwin, 1904), 19.
[31] Walter Bagehot, The Collected Works, vol. VII (London: The Economist, 1965), 226; Bogdanor, The New British Constitution, 4.
[32] Such as the cogent proposal for an Act of Union Bill. Constitutional Reform Group, "Act of Union Bill" (2018), https://publications.parliament.uk/pa/bills/lbill/2017-2019/0132/18132.pdf.
[33] Mclean, What's Wrong with the British Constitution?, chap. 5.
[34] Quoting Lord Browne-Wilkinson, R (Miller) v The Prime Minister, 41 at 16.
[35] Griffith, "The Political Constitution," 19.
[36] Vernon Bogdanor and Ian Mclean make this point persuasively. Both describe the limits of the Diceyan idea of Parliamentary sovereignty. Bogdanor, The New British Constitution; Mclean, What's Wrong with the British Constitution?
[37] Bogdanor, The New British Constitution, chap. 3; Mclean, What's Wrong with the British Constitution?, chap. 10.
[38] Richard Tuck, The Sleeping Sovereign: The Invention of Modern Democracy (Cambridge: Cambridge University Press, 2015), 2–5.
[39] Jean-jacques, Letter to Beaumont, Letters Written from the Mountain, and Related Writings (University Press Of New England, 2013), 292–93; Tuck, The Sleeping Sovereign, 3.
[40] Jean-Jacques Rousseau, The Social Contract and Other Later Political Writings (Cambridge: Cambridge University Press, 1997), 183, 146; Tuck, The Sleeping Sovereign, 136.
[41] R (Factortame Ltd) v Secretary of State for Transport, 7 (UKHL 1990); Mclean, What's Wrong with the British Constitution?, 197–99.
[42] Whether Laws's suggestion becomes standard constitutional practice remains to be seen.
[43] As Helen Thompson has persuasively argued, the 2016 referendum was not simply the product of contingent political circumstances or short-term political judgements. There has been a notable failure by many otherwise astute observers to understand the structural implications of the European Union, in both economic and constitutional terms, and the

implication that referendums were necessary to secure ongoing consent for EU membership. Helen Thompson, "Inevitability and Contingency: The Political Economy of Brexit," The British Journal of Politics and International Relations 19, no. 3 (2017): 434–449.

[44] I am referring in part to the Claim of Right for Scotland, a document drafted by the campaign for a Scottish assembly and issued in 1988, which declared the sovereignty of the Scottish people. Also, though, Scottish politicians often much more effectively evoke the language of self-determination and self-government.

[45] Rachel Foxley, The Levellers: Radical Political Thought in the English Revolution (Manchester: University Press, 2013).

[46] Jean-jacques, Letter to Beaumont, Letters Written from the Mountain, and Related Writings, 293.

[47] I agree with Vernon Bogdanor that 'there is no point in having a constitution unless one is prepared to abandon the principle of the sovereignty of Parliament.' I am more sceptical that Parliamentary sovereignty was *ever* an accurate description of the British constitution. Bogdanor, The New British Constitution, 14.

[48] Tuck, The Sleeping Sovereign, 224; Mclean, What's Wrong with the British Constitution?, 328–29; Ackerman, We the People; William H. Riker, The Strategy of Rhetoric: Campaigning for the American Constitution (New Haven: Yale University Press, 1996).

[49] Constitutional Reform Group, Act of Union Bill, 1.

[50] Scottish Government, "Scotland's Right to Choose," 1.

[51] The United Kingdom is really three nations (England, Scotland, and Wales) and a constructed political unit (Northern Ireland).

[52] A similar effect may be achieved by passing a new Act of Union Bill. The question about such an Act is whether it would, in effect, become a codified constitution. The CRG's published Act expressly affirms that the UK Parliament could repeal or amend the Act. If so, the force of the Act, whether in practice it becomes entrenched constitutional legislation, would depend on the contingent politics of its ratification – the size of the majorities obtained, the ongoing support of major political parties, including the SNP. Nonetheless, passing such an Act would likely constitute an act of deliberate self-creation which has the consent of all nations and parts of the UK. Constitutional Reform Group, Act of Union Bill.

[53] Robert Hazell and Arthur Aughey, eds., "The Future of Britishness," in *Constitutional Futures Revisited: Britain's Constitution to 2020* (Basingstoke: Palgrave Macmillan, 2008), 101.

[54] It should, for instance, be printed at the government's expense and delivered to the homes of every resident of the United Kingdom at the time of authorisation. The cost might also encourage brevity. Much of what Jeremy Bentham had to say on this subject is particularly interesting. H. L. A. Hart, "Bentham and the United States of America," The Journal of Law and Economics 19, no. 3 (1976): 564–67.

[55] The Labour Party, "It's Time For Real Change."

[56] Philip Booth, "Federal Britain: The Case for Decentralisation" (The Institute for Economic Affairs, November 4, 2015), https://iea.org.uk/publications/research/federal-britain-the-case-for-decentralisation.

[57] Michael Kenny, *The Politics of English Nationhood* (Oxford University Press, 2014), 237.

[58] British identity was at its strongest during and after the two world wars, which entrenched and gave legitimacy to British institutions and bound the nations together against a common enemy. Deliberate attempts to revive British nationalism are likely to continue to flounder. Whether British national identity survives will not depend on the rhetorical capacity of politicians to define Britishness. It will depend on whether people continue to feel an allegiance to the British nation, whether as an identity and a form of political community it captures their common experience, through practical self-interest, loyalty to a common purpose or hostility to a shared enemy. The 'metaphysical quest' to discover 'enduring British values' distracts from this.
Mitchell, *The Scottish Question*, 7; Jeremy Paxman, *Great Britain's Great War* (London: Viking, 2013), 8; Hazell and Aughey, "The Future of Britishness."

[59] James Bryce Bryce, Mr. Gladstone and the Nationalities of the United Kingdom (London: BQuaritch, 1887), 15.

[60] John Fowles, "On Being English But Not British," in *Wormholes: Essays and Occasional Writings* (London: Jonathan Cape, 1998), 79–88; Kenny, *The Politics of English Nationhood*, 234–35.

[61] David Edgerton, The Rise and Fall of the British Nation: A Twentieth-Century History (London: Allen Lane, 2018), 518.

[62] Daniela Cammack, "Rethinking Athenian Democracy" (2013).

[63] Tuck, *The Sleeping Sovereign*; James S. Fishkin, *Democracy and Deliberation: New Directions for Democratic Reform* (New Haven: Yale University Press, 1991).

[64] "The Governance of Britain" (Seceratary of State for Justice, 2007), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228834/7170.pdf ; Roger Gough, "An End to Sofa Government" (Conservative Democracy Task Force, 2007), http://image.guardian.co.uk/sys-files/Politics/documents/2007/03/27/DemocracyTaskForce.pdf; "Report of the Commission on the Consequences of Devolution for the House of Commons" (The McKay Commission, 2013), https://www.centreonconstitutionalchange.ac.uk/sites/default/files/migrated/papers/McKay%20Commission.pdf.

[65] Mclean, *What's Wrong with the British Constitution?*, chap. 11; Anthony King, *The Blunders of Our Governments* (London: Oneworld, 2014).
[66] Alan Renwick et al., "The Report of the Citizens' Assembly on Brexit" (UCL Constitution Unit, 2017), https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/The_Report_of_the_Citizens__Assembly_on_Brexit.pdf.
[67] M. S. Lane, *The Birth of Politics: Eight Greek and Roman Political Ideas and Why They Matter* (Princeton, NJ: Princeton University Press, 2014).
[68] David Runciman, *How Democracy Ends* (London: Profile Books, 2018); Bogdanor, *The New British Constitution*, 305.
[69] Gregory Conti, *Parliament the Mirror of the Nation: Representation, Deliberation, and Democracy in Victorian Britain* (Cambridge: Cambridge University Press, 2019).
[70] Nancy L. Rosenblum, On the Side of the Angels: An Appreciation of Parties and Partisanship (Princeton: University Press, 2008).
[71] Frances McCall Rosenbluth and Ian Shapiro, *Responsible Parties: Saving Democracy from Itself* (New Haven: Yale University Press, 2018); Martin Smith, "A Crisis of Political Parties," in *Institutional Crisis in 21st-Century Britain*, 2014, 101–24.
[72] Here again careful thought would need to be given to the relationship between the electoral system and the size of districts in the House of Commons and the Senate. Senators, for instance, could represent Scotland, Wales, and Northern Ireland, and larger regions in England, elected using FPTP but with open primaries. Whilst the House of Commons could retain similar sized constituencies elected using STV.
[73] Sebastian Payne and George Parker, "Tories Focus on Major Overhaul of House of Lords," Financial Times, December 17, 2019, https://www.ft.com/content/dc8f0c22-201d-11ea-92da-f0c92e957a96.
[74] For more on the principles underpinning these assemblies, see Hélène Landemore's work. Citizen assemblies have also more recently be trialled on climate change, in both the UK and France. Hélène Landemore, *Democratic Reason: Politics, Collective Intelligence, and the Rule of the Many* (Princeton: Princeton University Press, 2013); "Climate Assembly UK - Climate Assembly UK," accessed January 30, 2020, www.climateassembly.uk/; "Convention Citoyenne Pour Le Climat: What Can We Learn From the French Citizens' Assembly on Climate Change?," Resilience, January 17, 2020, https://www.resilience.org/stories/2020-01-17/convention-citoyenne-pour-le-climat-what-can-we-learn-from-the-french-citizens-assembly-on-climate-change/.
[75] Bogdanor, The New British Constitution, 305.
[76] King, *The Blunders of Our Governments*, 389.
[77] Barnett, "John Smith and the Path Britain Did Not Take."