**Parliamentary Sovereignty and the Political Constitution(s): from Griffith to Brexit**

**Michael Gordon\***

***Introduction***

John Griffith’s influential lecture ‘The Political Constitution’[[1]](#footnote-1) provides a crucial template to understand and critique the UK constitution. The idea of ‘The Political Constitution’ is, of course, hotly contested in contemporary constitutional scholarship. There are debates about the underpinnings of Griffith’s lecture and the nature of his claims,[[2]](#footnote-2) whether it is possible to turn his analysis of the UK constitution at a particular moment into a broader constitutional theory,[[3]](#footnote-3) whether and how the theory is to be juxtaposed against ‘legal’ alternatives,[[4]](#footnote-4) among many other issues. While these are rich debates, of general significance to constitutional scholars, perhaps less attention has been given to an issue more closely linked to Griffith’s now seminal text: what it means to approach the UK system as a political constitution from an analytical perspective. The value of Griffith’s idea of the political constitution may be in its application to particular circumstances as an explanatory tool, providing a distinctive perspective on the operation of constitutional law and politics. In foregrounding the political aspects and principles of the operation of our constitutional system, Griffith’s work provides an increasingly necessary reminder that we must look at more than simply legal norms to understand the constitution, while also making it clear that the political dimensions of state activity are open to analysis from a perspective which is explicitly constitutional in focus. As such, in emphasising the political character of the constitution, and the potentially constitutional character of the political, Griffith’s approach enhances our ability to understand the norms and institutions of the UK’s constitutional order (and perhaps any other constitutional order). And it is through this exploration of what a political constitution is, how it functions and is legitimated – what we might see as engaging with the practice of the political constitution – that any broader theory of political constitutionalism must emerge.

 The particular focus of this paper will be to explore the doctrine of parliamentary sovereignty, as located in the UK’s political constitution. While there are no doubt many dimensions of the constitution that might be analysed through a prism of political constitutionalist thought, the fundamental principle of parliamentary sovereignty has a special status given its nature and position in the constitutional hierarchy. The doctrine of parliamentary sovereignty, which establishes a law-making power for the UK Parliament which is legally unlimited, has a distinctive nature in so far as it is a constitutional principle which is both concerned with and produced by institutional power. Further, the position of this doctrine at the pinnacle of the UK’s constitutional arrangements means that it performs a number of important functions, including operating as an organising principle and focal point of the constitution, while also playing a key (if provisional and contestable) role in establishing the democratic legitimacy of the political system.[[5]](#footnote-5) As a result, the doctrine of parliamentary sovereignty is both a constitutional principle of major significance in the UK, and one which has crucial political dimensions and implications.

 For some, parliamentary sovereignty may be seen as *the* fundamental principle of the political constitution, despite its rather curious absence from Griffith’s lecture.[[6]](#footnote-6) The significance of parliamentary sovereignty to the political constitution can, in essence, be seen to derive from the claim of the doctrine to establish the constitutional primacy of political decision-making. Yet this apparent synergy between parliamentary sovereignty and the political constitution may now be in question. For the idea of parliamentary sovereignty itself may be (to some extent) implicated in the 2016 referendum decision to exit the European Union, which is having a profound effect on the UK’s political arrangements. The narrative that withdrawal from the EU is necessary to restore the sovereignty of the UK Parliament might be understood as driving the (re)imposition of a particular vision of the constitution and its politics, rather than promoting an openness to a broad range of societal change. In this context, we may see parliamentary sovereignty not just as a tool for delivering political change, but as an emblem, or even stimulus, for a particular kind of constitutional order, founded on nostalgic appeals to an all-powerful Westminster. Yet at the same time, we may see both the politicisation and the depoliticisation of parliamentary sovereignty, if it is also being converted into bland rhetoric, available in support of all arguments for or against Brexit, and therefore emptied of clear, or even meaningful, constitutional substance. The position of parliamentary sovereignty in the current climate therefore raises important new challenges for attempts to link the idea of parliamentary sovereignty with the idea of the political constitution stemming from Griffith’s work. Can parliamentary sovereign remain the foundation of the UK’s political constitution when it its politics are contested, its constitutional status is in doubt, and the political and constitutional dimensions of the doctrine might even appear to be in tension?

 In light of this potential disharmony between parliamentary sovereignty and the idea of the political constitution, this paper will reconsider the relationship between these concepts in the UK. First, the paper will set out the classic account of the significant complementary relationship between the doctrine of parliamentary sovereignty and Griffith’s idea of the political constitution. Second, the challenge of Brexit will be explored, considering in this context whether parliamentary sovereignty is still political, is still constitutional, and whether it can be political *and* constitutional. Third, the paper will respond to these challenges, and argue that while the relationship between parliamentary sovereignty and the political constitution may appear to be changing, it remains of fundamental importance to understand the doctrine in the broader context that Griffith’s account of the political constitution provides. From this perspective, we not only obtain a clearer understanding of the functioning of parliamentary sovereignty within the UK constitution, but we also see that we must be open to different ideas of the political constitution, or perhaps, different political constitutions. As we move from Griffith to Brexit and beyond, the lessons of this line of scholarship can – and should – continue to shape our understanding of the UK’s constitutional order in particular, while the practical application of political constitutionalist ideas can also provide the basis for deeper insights into the purposes and limitations of constitutional law in general.

***The Relationship between Parliamentary Sovereignty and the Political Constitution[[7]](#footnote-7)***

*Griffith’s Political Constitution and the Absence of Parliamentary Sovereignty*

Given its status as the dominant principle of the UK constitution, it is notable that parliamentary sovereignty is essentially absent from Griffith’s definitive account of that constitutional framework. Griffith’s only comment on the doctrine of parliamentary sovereignty in ‘The Political Constitution’ was to deny that such legally unlimited legislative power presented a constitutional danger, as had then been suggested by Lord Hailsham, and has frequently been repeated or implied by subsequent generations of constitutional scholars.[[8]](#footnote-8) The defensiveness of this approach is unsurprising. Parliamentary sovereignty is predominantly the subject of grudging acceptance by lawyers and legal academics, if it is accepted at all, since it stands above and in potential conflict with the effusively cherished ideal of the rule of law. Griffith’s reluctance to engage in detail with the idea of parliamentary sovereignty, or place it at the core of his account of the UK constitution, is also arguably dispositional. It is evident in his other work on Parliament, which is focused on the functioning of the institution, and its scrutinising, rather than its legislative, role.[[9]](#footnote-9) Indeed, the seminal study *Parliament* which Griffith co-authored makes only a few passing references to parliamentary sovereignty. One is to distinguish delegated from primary legislation, the latter being ‘made by a constitutionally sovereign authority’ and not subject in the UK to ‘any constitutional limitations’.[[10]](#footnote-10) A second is phrased so as to distance the authors from the claim they report: ‘[s]o it is said by constitutional lawyers today that legislative sovereignty – the power to make laws – rests in the Queen in Parliament’.[[11]](#footnote-11) Perhaps in the second half of the twentieth century parliamentary sovereignty remained an unquestionable foundation of the UK constitution, such that it was unnecessary for Griffith to have devoted time to academic study of the doctrine. But his relentless focus on the importance of constitutional practice also led him to see Parliament as ‘essentially a debating body’, and not a legislative institution: ‘[t]he two Houses, therefore, cannot properly be described as governing bodies, nor correctly analysed as being institutions with initiating or law making functions within the constitution’.[[12]](#footnote-12) From this unorthodox perspective, if Parliament is not even to be characterised as a legislator, the idea of parliamentary sovereignty might be considered abstract in the extreme, and of limited concern. However, as Keith Ewing has argued, it is ‘frustrating that Griffith makes little reference to this legal principle, for it is difficult to see how a political constitution could operate without it’.[[13]](#footnote-13) Despite Griffith’s reticence, then, a potentially significant link between the doctrine of parliamentary sovereignty and the idea of the political constitution can still be discerned.

The idea of a political constitution is easily caricatured, overlooking the fact that it does not seek to suggest that law has no constitutional relevance, but instead to establish a particular account of the relationship between law and politics. In his lecture, Griffith argued that ‘conflict is at the heart of modern society’, and ‘politics is what happens in the continuance or resolution of those conflicts’.[[14]](#footnote-14) Law was simply ‘one means, one process, by which those conflicts are continued or may be temporarily resolved’, and ‘[n]o more than that’.[[15]](#footnote-15) As a result, for Griffith the ‘concept of law’ was not inherently moral, for a law was a ‘political act’, and the result of ‘a power relationship’.[[16]](#footnote-16) Law was not therefore separate from politics, because ‘law is politics carried on by other means’.[[17]](#footnote-17) But in constitutional terms, the fact that law was a form of politics meant, for Griffith, that it was impossible for law to displace politics, through the adoption of a formal, authoritative, codified constitution:

The fundamental political objection is this: that 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. To require a supreme court to make certain kinds of political decisions does not make those decisions any less political.[[18]](#footnote-18)

This approach to the relationship between law and politics had important consequences for the location of power and the mode of accountability. For Griffith, ‘political decisions should be taken by politicians’, who were ‘removable’, while also responsible for their exercise of power in ways which were ‘real and not fictitious’.[[19]](#footnote-19) And in pursuit of better mechanisms of constitutional accountability, he argued that we should avoid assuming legal controls offer salvation, for ultimately ‘[o]nly political control, politically exercised, can supply the remedy’.[[20]](#footnote-20)

 Griffith’s account of the political constitution is not therefore one which seeks to exclude law. Instead, it recognises that law and politics are inherently interrelated, and that law is a social instrument. But law is also a social instrument that has limits, and which is necessarily subject to politics, for legal activity is a subset of political activity. In that sense, this is not a question of law or politics, but a matter of the constitutional priority of politics over law. Yet there is also an ambiguity in Griffith’s lecture, which has shaped subsequent debate as the political constitution has evolved from an account of the UK’s constitutional arrangements into a manifesto for potentially universal use. It is open to debate whether this necessary constitutional priority of politics was, for Griffith, simply an empirical truth or also a principled position. The argument made in ‘The Political Constitution’ is generally presented as one revealing the world as it is, yet if it is ostensibly a descriptive account, it is also one which reflects ‘a preference rooted in principle’.[[21]](#footnote-21) This is not least because Griffith was responding to normative arguments of the day for constitutional formalisation, enhanced legal protection of human rights, and the related empowerment of the judiciary, which he rejected: ‘[t]he solution to such problems should not lie with the imprecisions of Bills of Rights or the illiberal instincts of the judiciary’.[[22]](#footnote-22) But, moreover, because Griffith advocated an alternative direction of very consciously political constitutional reform: ‘the best we can do is to enlarge the areas for argument and discussion, to liberate the processes of government, to do nothing to restrict them, to seek to deal with the conflicts which govern our society as they arise’.[[23]](#footnote-23)

The principled commitments which may be latent in Griffith’s own work have been made much more explicit in subsequent academic engagement with the notion of the political constitution. As Marco Goldoni and Chris McCorkindale note in introducing a crucial collection of such scholarship, a ‘normative grounding’[[24]](#footnote-24) for the political constitution has been developed in the work of Adam Tomkins,[[25]](#footnote-25) Richard Bellamy,[[26]](#footnote-26) and Graham Gee and Gregoire Webber.[[27]](#footnote-27) These efforts to expose overtly the normative underpinnings of Griffith’s work have, Goldoni and McCorkindale maintain, provided ‘a full-fledged constitutional *theory* capable of standing as an alternative to the liberal-legal paradigm – a turn, one might say, from the political constitution to political constitutional*ism*’.[[28]](#footnote-28) Yet the elevation of Griffith’s lecture to normative constitutional theory does not necessarily reduce this body of scholarship to one half of an artificial competition between legal and political constitutionalism. For the political constitution does not seek to exclude law, and instead represents a response to the universal constitutional question of ‘how the idea of law within the political constitution (i.e. the constitution of the polity) might best be conceptualized’.[[29]](#footnote-29) Consequently, a theory of political constitutionalism does not need to be conceived as locked in opposition to a legal constitutionalism which seeks to structure and constrain politics.[[30]](#footnote-30) Although these contrasting models may usefully be used as a framing device through which to understand competing constitutional arrangements,[[31]](#footnote-31) or to analyse the change to such arrangements,[[32]](#footnote-32) this should not be seen to limit the potential for political constitutionalism to be considered apart from legal constitutionalism, ‘on its own terms’.[[33]](#footnote-33)

 Yet if the constitutional priority of politics is to be more than merely a descriptive account of unavoidable reality, and become established as the basis for an independent theory of social order, it must obtain its normative force from some further principle. The bare fact that politics is ultimately ascendant over other institutions or social structures which condition human behaviour – which, for example, might be religious, moral, corporate, familial or legal in nature – may be of little normative interest if that politics is of dubious legitimacy. Instead, the nature of the politics in accordance with which power is exercised, and by which power is conditioned, is crucial if its constitutional priority is to be justified. For political constitutionalism, democracy provides that normative force. It is the legitimacy of majoritarian democratic politics, which provides the principled rationale for political constitutionalism. In the absence of an agreed account of what justice requires, a community of political equals must take decisions as to what collective action will be pursued on simple majority grounds, on the basis of a universal franchise.[[34]](#footnote-34) Democratic politics can therefore provide the means by which constitutional power is to be exercised, and also, at the same time, the conditions on the use of that power: what receives democratic support, in principle, can be achieved; what does not receive democratic support, in principle, cannot be achieved.

Griffith was far from a democratic romantic, describing the idea of popular sovereignty as ‘nonsense’, and arguing that ‘the trappings of democracy concealed rather than adorned the body politic’.[[35]](#footnote-35) However, that Griffith’s conception of the political constitution was, ultimately, a democratic one – even if a very thin democratic one – seems apparent in his emphasis on the removability of those in power. While Griffith was more concerned, certainly, with establishing transparency as to the ends of public power, forcing ‘governments out of secrecy and into the open’, to ensure effective accountability for official action, the ultimate form of accountability he envisaged is surely democratic: those who temporarily govern us are vulnerable to being ‘dismissed’ (indirectly) if their performance is unsatisfactory.[[36]](#footnote-36) And this is consonant with Griffith’s later work, where, in a forceful rebuttal of common law constitutionalism, he became slightly more explicit about the constitutional significance of democratic politics, as a means to challenge private corporate power, arguing that ‘[o]nly democratically elected Governments committed to policies of promoting the public interest can present a challenge to [this] powerful hegemon’.[[37]](#footnote-37)

 Much fuller accounts of the democratic nature of political constitutionalism can be found in the body of scholarship which more explicitly develops these basic normative foundations of Griffith’s work. Bellamy, for example, has defended ‘the constitutionality of “actually existing democracy”’, which is ‘the claim of actually existing democratic practices to embody constitutional values and to supply mechanisms likely to preserve them’.[[38]](#footnote-38) This account focuses on the capacity of majoritarian democratic politics to establish the freedom of citizens, understood in republican terms as non-domination,[[39]](#footnote-39) while better serving ‘the constitutional goods of rights and the rule of law’ than is achieved by the introduction of ‘less effective and legitimate legal constitutional constraints’ on that democratic process.[[40]](#footnote-40) Bellamy’s approach is, in effect, to view democratic political constitutionalism as a means by which the broad goals of (liberal) legal constitutionalism may be satisfied: democracy is *not* ‘more important than constitutionalism, rights or the rule of law’, but ‘embodies and upholds these values’.[[41]](#footnote-41) In promoting the values of fundamental rights and the rule of law, this is a significant shift from the position of Griffith, who rejected the former as ‘political claims’, and the latter, if understood in anything more than formal terms, as ‘a fantasy’ which can be used ‘to throw a protective sanctity around certain legal and political institutions and principles which they wish to preserve at any cost’.[[42]](#footnote-42)

Nevertheless, a more modest account of the democratic potential of political constitutionalism might instead be adopted; beyond the minimalism of Griffith’s democracy as accountability, but without going so far as seemingly to endorse the contentious objectives of a constitutionalism rooted in the values of legalism. This may be found in Ewing’s suggestion that it is ‘a purpose of the political constitution – perhaps greater than the purpose of holding government to account – that it allows for the wishes of citizens to be realised and for these wishes to be translated into law’.[[43]](#footnote-43) This is the ‘*openness* of the political constitution’, which is able ‘to provide for popular demands to be met without formal limit’, while also sustaining a ‘latent transformative potential’ by which – in principle – the re-making of social order could be achieved.[[44]](#footnote-44) The political constitution therefore has the capacity to facilitate the democratic empowerment of citizens in two ways: through its routine operation, but also its amenability to moments of fundamental change. The democratic potential of the political constitution is therefore simultaneously mundane and extraordinary, and this can be seen to provide the normative basis for a political theory of constitutionalism. And it is a theory of constitutionalism in which parliamentary sovereignty is arguably the key instrument.

*Parliamentary Sovereignty as the Key Instrument of the Political Constitution*

Whether the political constitution is a descriptive account of (UK) constitutional reality or provides the basis for an alternative normative theory emphasising the political dimensions of constitutionalism, a clear and significant relationship with the idea of parliamentary sovereignty can be seen to emerge. The doctrine of parliamentary sovereignty attributes to the UK Parliament a law-making power which is legally unlimited – in accordance with A.V. Dicey’s famous two principles, the House of Commons, House of Lords and the Queen can together ‘make or unmake any law whatever’, and no court or any other body can override the legislation which is produced.[[45]](#footnote-45) In purely descriptive terms, the doctrine of parliamentary sovereignty is a principle which facilitates politics through law. Political decision-making must be translated through a legal process to have legal effects, but the outcome of that process will not be subject to any substantive legal limits. Yet when a normative perspective is also introduced, the relationship between the doctrine of parliamentary sovereignty and the idea of the political constitution is further reinforced. For when the political decision-making which is legally unlimited is also democratic in nature, we can identify a principled justification for the allocation to Parliament of sovereign legislative authority: parliamentary sovereignty functions as a vehicle for delivering the normative aspirations that a democratic political approach to constitutionalism might be understood to establish.

Consequently, just as Griffith’s initial work on the idea of the political constitution has been developed by subsequent scholars, so too can his account be supplemented by consideration of the relevance of parliamentary sovereignty in this framework. Ewing’s work, for example, has filled the gap left by Griffith, outlining the role of the doctrine of legislative sovereignty in a democratic political constitution, and drawing together both the descriptive and normative aspects of this relationship. For Ewing, ‘the legal principle of the sovereignty of Parliament provides both the source of legal authority, and the source of legal restraint of the power of government in a political constitution’.[[46]](#footnote-46) In this sense, it is the ‘core legal principle of the political constitution’ which underpins the ‘political principle that in a democracy there should be no legal limit to the wishes of the people’.[[47]](#footnote-47) On this analysis, the doctrine of parliamentary sovereignty is a fundamental, and highly prominent, legal component of a democratic political constitution. The fundamental consequence (and also arguably the core virtue) of the doctrine of parliamentary sovereignty is that it ensures the constitutional primacy of democratic decision-making,[[48]](#footnote-48) and this corresponds with the defining feature of the political constitution, which recognises the constitutional priority of politics. The doctrine of parliamentary sovereignty is therefore the key instrument of a democratic political constitution; it is the legal principle which recognises the autonomy of the democratic process, and guarantees that the law is subject to the political results of that process.

 We must not, however, overstate the significance of the relationship between democratic political constitutionalism and the doctrine of parliamentary sovereignty for two reasons. First, from a perspective internal to political constitutionalism, we might not wish to be committed to the notion that parliamentary sovereignty is a necessary component of a political constitution. While noting the ‘thematic linkages between the idea of political constitutionalism and the doctrine of Parliamentary Sovereignty’, Paul Scott has argued that there is ‘excessive identification of political constitutionalism with British parliamentary democracy and a lack of consideration for those instantiations of political constitutionalism which are common to all democratic constitutions or are entirely alien to the British system’.[[49]](#footnote-49) This has two potential disadvantages. On one hand, it unduly limits our understanding of the scope and sophistication of political constitutionalism, which ‘deserves … more generous consideration’ than may be forthcoming if it is understood to be exclusively, or predominantly, associated with the UK’s system of parliamentary democracy in particular.[[50]](#footnote-50) And on the other hand, this might endanger the very existence of the political constitutionalist project, if ‘the rejection of the specific historical contingencies of the United Kingdom constitution’ has been, or comes to be, ‘understood as the rejection of the political constitution generally’.[[51]](#footnote-51)

 Secondly, while it may go too far to suggest that parliamentary sovereignty is an essential tenet of the political constitution, we should also refrain from viewing the doctrine as necessarily a political constitutionalist doctrine. To accept parliamentary sovereignty as a legal doctrine does not entail a commitment to any theory of political constitutionalism. Dawn Oliver’s pragmatic defence of parliamentary sovereignty provides one example, and seems broadly agnostic as between ‘legal’ and ‘political’ theories of constitutionalism. Oliver rejects a democratic justification for the doctrine, but advances the pragmatic argument – in a manner which resonates with political ideas of constitutionalism – that there is no need for a dramatic shift to the judicial review of legislation in the UK, in part because of the existence of ‘elaborate organic systems of intra-governmental and intra-parliamentary constitutional preview’.[[52]](#footnote-52) Yet in so far as Oliver’s account is premised on the need effectively to protect ‘constitutionality and the rule of law’, it also appears to be inspired by concerns most readily associated with a more legalistic variant of constitutionalism.[[53]](#footnote-53) Such is the constitutional openness of parliamentary sovereignty, the legislative power which it recognises may be used for a variety of ends, with complex legal and political implications. The Human Rights Act 1998, for example, clearly extends judicial power over the substance of legislation, yet the ultimate remedy, a declaration of incompatibility, cannot undermine the legal status of an Act of Parliament,[[54]](#footnote-54) and therefore has primarily a political impact. The overall implications of such a scheme of judicial powers for law and politics in the constitution are open to debate, but whether the political constitution has been strengthened,[[55]](#footnote-55) or a ‘rich’, ‘mixed constitution’ has been created,[[56]](#footnote-56) or we are witnessing the formation of a ‘new British constitution’ with a reinvigorated rule of law,[[57]](#footnote-57) these alternative visions can all be based on the continuing centrality of the doctrine of parliamentary sovereignty.

 It would go too far, therefore, to claim parliamentary sovereignty as a doctrine which is exclusively located on political constitutionalist terrain. It is possible to accept the sovereignty of Parliament, and its resounding democratic credentials, while simultaneously defending a robust and substantive notion of the rule of law, and a statutory scheme of rights protection which permits judicial oversight of the legislature.[[58]](#footnote-58) Just as it is possible to support parliamentary sovereignty without approving of all particular substantive uses of its power, it is also possible to support parliamentary sovereignty while adopting a less sceptical view of law and legal values than that set out by Griffith in ‘The Political Constitution’. Indeed, such a divide on the question of the harmony between the rule of law and parliamentary sovereignty can be traced back to Dicey and Ivor Jennings, with the former confident of a compatibility between these concepts,[[59]](#footnote-59) whereas the latter dismissed the rule of law as an ‘unruly horse’.[[60]](#footnote-60) Ultimately, the sovereign law-making power of Parliament can be, and has been, used to complicate the interactions between legal and political authority, and legal and political modes of accountability in the UK’s constitutional order. This may be subject to the overarching proviso that these structures are ultimately a function of politics, and the law is always susceptible to alteration. But parliamentary sovereignty is still a legal doctrine which makes change possible through the law, and this aspect of its character is important to appreciate.

Yet even if the political constitution may not therefore be entitled to capture parliamentary sovereignty, it is from this perspective that embracing the doctrine, and its democratic virtue, can best be understood. The idea of a political constitution provides the broader framework in which the doctrine of parliamentary sovereignty can most convincingly be located.[[61]](#footnote-61) And the doctrine of parliamentary sovereignty, in establishing the constitutional primacy of democratic decision-making, provides a compelling foundation on which a political constitution can be structured. Furthermore, making this link between parliamentary sovereignty and the political constitution can also provide a fresh perspective on debates relating to the meaning and implications of the doctrine itself. In particular, drawing on political constitutionalist ideas can offer a democratic justification for the manner and form theory of parliamentary sovereignty, a disputed interpretation of legislative authority according to which Parliament can use its sovereign power to make legally valid changes to the law-making process itself, rather than being permanently bound to the status quo of the Queen, Lords and Commons acting in conjunction.[[62]](#footnote-62) A normative justification for this theory was never fully developed by its original academic proponents,[[63]](#footnote-63) and given the theory provides a strong explanation of modern constitutional developments in the UK, from EU membership to the rise of binding referendum requirements, it is important to be able to respond to concerns about the potential for misuse of such a power to alter the legislative process.[[64]](#footnote-64) The desirability of understanding parliamentary sovereignty in such a way as to make permissible, rather than to exclude, the possibility of statutory change to the law-making process is crucially linked to democratic political concerns. A normative justification for the manner and form theory can be rooted in the significance of democratic self-renewal, and the need to open up debate about the appropriate inputs to the legislative process, given two out of the three actors which comprise the Queen-in-Parliament are unelected. Moreover, such reflection is made more urgent when viewed in light of broader concerns about the contemporary (dis)engagement of citizens with democratic legal and political systems. A commitment to democracy demands that change to the law-making process is not constitutionally prohibited by the mantra that ‘Parliament cannot bind its successors’, but is instead a matter open to serious political debate, with sufficient legal authority for even radical change to be implemented.[[65]](#footnote-65) Locating parliamentary sovereignty in the context of the political constitution therefore helps us extend and expand the original democratic justification for the doctrine to encompass the manner and form theory, leaving us better positioned to explain the contemporary force of this understanding of legally unlimited legislative power.

 The connection between parliamentary sovereignty and the political constitution is therefore one which is multi-layered, and profound. Parliamentary sovereignty establishes the constitutional primacy of democratic decision-making, and as a result, at the most basic level, the priority of politics over law, and democracy over other constitutional values. This doctrine is the key instrument of the political constitution, even if the political constitution is about more than parliamentary sovereignty, and parliamentary sovereignty is not dependant on a commitment to political constitutionalism. Given this relationship, it is therefore unsurprising that the doctrine of parliamentary sovereignty has been at the apex of the contemporary disagreements between legal and political constitutionalism in the UK and elsewhere. Yet there are now new (or perhaps newly revived) dimensions to thinking about the relationship between parliamentary sovereignty and the political constitution, which may serve to complicate this account of their interconnection. Ultimately, we may now be required to consider whether we have been too complacent in imaging the relationship between parliamentary sovereignty and the political constitution to be the one (coherent though it is) which flows from Griffith’s lecture. For even if that is a relationship we still want to defend, it may be that such a defence will also require more detailed engagement with other ways of characterising the place of parliamentary sovereignty in a political constitution, and the implications of those alternatives. The key challenge is that posed by Brexit.

***Parliamentary Sovereignty in the Contemporary Political Constitution: the Complications of Brexit***

The UK decision to exit the EU has had, and will no doubt continue to have, a seismic impact on the domestic legal and political system. There are seemingly intractable complications associated with government decision-making (or the lack thereof), the legislative framework for exit, transition, and our future arrangements, and the interactions between UK central government and the devolved institutions, among many others. But Brexit also raises important conceptual questions about the constitutional position of the doctrine of parliamentary sovereignty. The idea of parliamentary sovereignty has been central in debates about exiting the EU – whether it should happen, how it can be delivered, what the consequences will be. This prominence has seen parliamentary sovereignty set up as a reason for Brexit (whether for voters in the referendum,[[66]](#footnote-66) or in the official narrative after the fact[[67]](#footnote-67)), a principle which will be restored,[[68]](#footnote-68) a principle which has been disturbed,[[69]](#footnote-69) a rejection of the referendum result,[[70]](#footnote-70) even a norm which relies on judicial definition and enforcement.[[71]](#footnote-71) And in all this incoherence, parliamentary sovereignty has been simplified and sloganised.[[72]](#footnote-72) It has shifted from a nuanced constitutional norm to a rhetorical exclamation mark, designed to raise the stakes of a problem, or emphatically trump all opposing arguments. From this vantage point there are new questions to ask about the nature of parliamentary sovereignty and its place within the UK’s political constitution, which present a range of contradictory answers.

First, we might ask, in what ways and to what extent is parliamentary sovereignty still political? In one sense it is has been acutely politicised, given its strong association with the 2016 EU referendum and its aftermath. Parliamentary sovereignty, understood as unfettered national power to make decisions free of European constraints, can be conflated with the Leave campaign message that Brexit would allow voters to ‘take back control’. Or it can be used to establish the rationale, or perhaps even the constitutional necessity, for privileging representative democratic decision-making over direct democratic decision-making, in a bid to undercut the authority of the outcome of the Brexit referendum. Yet in another sense the doctrine may also have become depoliticised by these developments, in so far as it has seamlessly become available to all, regardless of any prior hesitancy, and whether for or against Brexit. Parliamentary sovereignty is invoked from all sides, by opposing political actors, and in so doing it has the potential to become devoid of any real content, and therefore incapable of providing an answer to any substantive dispute.

Second, we might ask, in what ways and to what extent is parliamentary sovereignty still constitutional? On the one hand, we see reaffirmation of parliamentary sovereignty as a core doctrine of the UK constitution in *Miller*.[[73]](#footnote-73) And while this is arguably formal rather than substantive, given it is accompanied by a heavy dose of judicial constitutionalising,[[74]](#footnote-74) it fits with a pattern which demonstrates the robust and continuing centrality of parliamentary sovereignty in UK constitutional debates. Yet on the other hand, we equally we see the doctrine potentially overwhelmed by politics and rhetoric, with claims that the array of subordinate law-making powers contained in the European Union (Withdrawal) Act 2018 will displace Parliament as the primary domestic legislator at the precise moment significant competences are being reacquired as a result of Brexit.[[75]](#footnote-75) Parliamentary sovereignty could simply have become dated window-dressing, failing to capture or represent Parliament’s role in the UK constitution, as it becomes more apparent, perhaps than ever before, that it is limited by internal[[76]](#footnote-76) and external[[77]](#footnote-77) actors.

And third, we might consider whether, in this context, parliamentary sovereignty can be both political and constitutional? Could disharmony have emerged between these different ways of thinking about our system of government, such that any sense that parliamentary sovereignty could continue to be the key instrument of the political constitution is reduced to a muddle of contradictions? We could perhaps be faced with a choice between parliamentary sovereignty as either a contentious political catchphrase shorn of constitutional relevance, or a bland constitutional fascia lacking any distinct political character or substance. This leaves a dilemma which threatens to break the link between parliamentary sovereignty and the political constitution mapped out in the previous section. The doctrine of parliamentary sovereignty cannot stand as a constitutionally open principle through which to pursue competing accounts of social goods if the doctrine is associated with a particular vision of political order seeped with constitutional nostalgia. Yet if parliamentary sovereignty is opened up to the point where it lacks clear definition as a constitutional principle, its potential to offer a route by which to pursue the re-making of political, social and economic systems also becomes lost.

The consequences of these tensions could be significant. Could we see the political constitution of the UK collapse onto parliamentary sovereignty, because of parliamentary sovereignty?[[78]](#footnote-78) The complications in the relationship between the ideas of parliamentary sovereignty and the political constitution could have a range of effects. They might unsettle the existing normative hierarchy in the UK, with clashes between primary and secondary legislation (whether with the enigmatic status of ‘retained EU law’ or otherwise), and uncertainty about the direction of the common law compounding uncertainties about the scope of the royal prerogative from *Miller*. We could see institutional dynamics destabilised, as the executive and judiciary redefine their constitutional positions in relation to the legislature, and the House of Commons and House of Lords spar over the terms of Brexit in a hung Parliament. The principled foundations of the constitution could collide, with tension between direct and representative democratic votes already evident, and the potential for further clashing mandates in the event of a second referendum. There is also tension between regular and irregular sources of constitutional authority, with some actors in established non-democratic institutions such as the courts and the House of Lords struggling (albeit in different ways) to conceptualise and to take account of the unexpected outcome of the referendum when performing their respective functions. And any existing territorial equilibrium could be lost in disputes over the post-Brexit distribution of powers between the UK, Scottish and Welsh governments, in the absence (for very different reasons) of an institutional voice for the Northern Irish or the English.

The upshot of these constitutional ruptures could be that we are compelled to legalise and formalise the constitution, to buy out uncertainty and disagreement. Vernon Bogdanor, for example, has argued that the Brexit process will see the UK transition from a protected to an unprotected constitution, and that in the aftermath, the advantages of adopting a codified constitutional text, placing legal constraints on Parliament as with all other institutions of government, may become more apparent. According to Bogdanor, ‘Brexit, by revealing the nakedness of our unprotected constitution, may, paradoxically provide a powerful impetus to the process of completing our constitutional development by enacting a codified constitution’.[[79]](#footnote-79) A similar constitutional destination for the UK has also been predicted by Martin Loughlin, if we are to avoid the ‘disintegration of the British state’.[[80]](#footnote-80) A ‘radical’ new constitution would be required based on a ‘tremendous leap of constitutional imagination’: ‘[w]ith Westminster reverting to its original role as an English parliament, a new federal settlement should be established in which only national aspects of defence, foreign affairs, taxation, pensions and social security are retained, and new federal institutions should be created – in Manchester’.[[81]](#footnote-81) If it were the result of Brexit, a shift to a federal system of government established in a protected constitutional instrument would be confirmation of the end of both parliamentary sovereignty, and the political constitution as understood by Griffith.

These are challenging questions not simply about the relationship between parliamentary sovereignty and the political constitution. They also require us to consider whether the complementary connection between these ideas means that if there is dramatic change to either, mutual reinforcement could turn to mutual destruction. Consideration of the impact of Brexit on these constitutional ideas also makes clear the potential tension which might arise between ideal accounts of the relationship between parliamentary sovereignty and the political constitution, and the practical analysis of the particularities of an actual constitutional order. Nevertheless, the difficulties posed here are not insurmountable. On the contrary, in the next section, I will argue that when we respond to these problems posed by Brexit, we can obtain an enhanced understanding of the status of parliamentary sovereignty in the UK’s political constitution, and also a more complete sense of the value (as well as the limitations) of the idea of the political constitution in general.

***Parliamentary Sovereignty and the Political Constitution(s): Constitutional Understanding through Constitutional Context***

The exploration of the issues raised by Brexit demonstrates that there can be no room for complacency about the status of parliamentary sovereignty in the UK constitution, or the singularity of the vision (if it indeed was a vision, as opposed to a functionalist method)[[82]](#footnote-82) of the political constitution articulated by Griffith. Nonetheless, when we address the complexities prompted by Brexit as to the interaction between ideas of parliamentary sovereignty and the political constitution, we can conclude that this need not be the end of either. Indeed, it is considering the relationship between these different ideas which allows us to better understand the character, and the potential, of both. When we look at parliamentary sovereignty in light of the uncertainties created by Brexit, we might be tempted to abandon such an archaic, muddled concept. Yet it is by analysing the doctrine in its context, as part of the political constitution, which allows us to obtain a clear understanding of the idea of parliamentary sovereignty in the UK’s constitutional system.

First, in relation to the meaning and implications of parliamentary sovereignty, it is not a doctrine which can be restored by Brexit, for it had never been lost, only misunderstood. Parliamentary sovereignty does not establish some mythical absolute power for unfettered national action, it is a legal doctrine which establishes the scope and location of legislative authority, vesting substantively unlimited law-making authority in the UK Parliament. But when we position this doctrine as part of the political constitution, we can see that in clearing the field of the possibility of absolute legal limits on law-making authority, it creates a space which politics can, and must, fill. The absence of substantive legal restraints does not leave the exercise of legislative power unconstrained. Instead, it is conditioned by the operation of democratic politics, which provides a more legitimate and arguably more effective means of structuring the use of public authority than the imposition of constitutional legal limitations.[[83]](#footnote-83) The political constitution is therefore unambiguously empowering, but also creates the means by which that power can be held to account. The doctrine of parliamentary sovereignty plays an obvious role in enabling the former – as the constitutional source of legislative authority – yet its indirect role in facilitating the latter – by preventing the emergence of absolute legal limits, and thereby establishing room for politics – must also be recognised.

These constraints, derived from democratic politics, will of course not function perfectly, given the process of government is inevitably controversial, based on competing interests and different views as to what action will be justified. But the political constitution is not premised on the idea that democratic politics operates in an immaculate fashion – it is, however, based on the idea that even in the circumstances of imperfection, democratic political constraints can be systemic. The doctrine of parliamentary sovereignty creates the space in which political constitutional conditions operate, by excluding the possibility of absolute legal limitation of legislative power. But the existence and operation of these conditions is neither inadvertent or trivial, but part of a broader, conceptually coherent constitutional scheme. These democratic limits should not be dismissed as ‘transient artefacts of political expediency’, as distinct from ‘values that are genuinely constitutional in nature’ such as the rule of law or separation of powers, and which are invested with ‘a status that transcends the merely “political”’.[[84]](#footnote-84) For this is to misunderstand the constitutional character of democratic politics, which is as grounded in fundamental principle as any constraint derived from the rule of law or separation of powers, and has a profound, rather than a subsidiary, impact on the organisation and exercise of authority in the constitution. To rely on democratic political limits to shape and constrain legislative power is a constitutional preference that can be implemented and justified in its own right. To adopt such limits as the primary mode of constitutional accountability may be atypical, but it is not simply an accident of fate.

 Yet subject to the caveat that legal limits on law-making authority power can never be absolute, when we locate parliamentary sovereignty in the context of the political constitution, we can also appreciate that there may sometimes be political imperatives to create legal instruments or institutions which function in specific ways to shape the use of legislative power. This may be through the creation of the devolved institutions, exercising a primary legislative competence which, while still subject to the ultimate sovereignty of the UK Parliament, is also protected by consent procedures as a matter of constitutional convention.[[85]](#footnote-85) Or it may be through the Human Rights Act 1998, which establishes new powers for courts to assess the human rights implications of Acts of Parliament, yet ensures that it is ultimately for the political branches of government to decide what the consequences should be when an irresolvable incompatibility is judicially identified.[[86]](#footnote-86) Or, perhaps of greatest salience in the context of Brexit, it may even be through legislative change to the law-making process itself. This may be exhibited in Parliament’s construction of a statutory scheme in which EU law has been afforded supremacy over inconsistent domestic law, unless the sovereign legislature were to state expressly that it intended to override EU law in specific circumstances, or indeed to repeal the entire framework.[[87]](#footnote-87)

In this sense, when viewed in context, operating as part of the political constitution, we can see that, whether before or after Brexit, parliamentary sovereignty does not necessarily produce an ‘unprotected’ constitution. Instead, non-legal constraints on parliamentary activity are built into the system by a political constitution, and contingent legal ‘protections’ can be, and have been, established by Parliament while retaining its legislative sovereignty. The context provided by the political constitution therefore helps us cut through misconceptions about parliamentary sovereignty having been previously diminished, or being inherently unfit for future purposes. Indeed, to locate parliamentary sovereignty in this framework may be essential if we are to avoid simplifications and caricatures, and instead to understand its complex operation and principled justification to any significant extent.

 Second, when we analyse parliamentary sovereignty in context, by locating it as part of the political constitution, our ability to understand the political character of this specific constitutional doctrine is also enhanced. Brexit has made clear the fact that the position of parliamentary sovereignty as a constitutional fundamental can be defended from a traditionalist perspective. But this does not diminish the fact that support for parliamentary sovereignty can also develop from arguments based on radicalism. The consequences for the constitution will differ significantly depending on which of these alternative perspectives is adopted. A conservative vision of what parliamentary sovereignty could generate is entirely plausible. This would be a confined state with powerful central institutions, limited internal dispersal of power to devolved institutions, limited formal engagement with external actors or supranational systems, and a lack of impetus for constitutional institutions to engage more actively with citizens, who are to be represented not consulted. And such a constitutional vision could also, in itself, amount to a political constraint on the possibilities for change that parliamentary sovereignty might present.

It may be more difficult to see the radical interpretation of parliamentary sovereignty in the current climate, which many might view as one of constitutional retrenchment. Yet to approach the doctrine in context, in the political constitution, shows that such potential inevitably remains. From a radical perspective, its legally unlimited legislative authority enables Parliament to exploit the full reach of the state to transform not only social and economic systems, but also to transform the political constitution itself. This could include institutionalising pathways for new democratic inputs from citizens, redistribution of powers to new and existing democratic bodies throughout the UK, and structured engagement and cooperation with other nations and external organisations. And such change to the political constitution could provide fresh perspectives on the further possibilities for social and economic reform, as well as increasingly elaborate cross-cutting systems through which greater democratic accountability can be accumulated. It is obvious that parliamentary sovereignty cannot deliver this alone; most fundamentally it would require the existence of appropriate political will. But the continued existence of parliamentary sovereignty provides a means to channel and facilitate such political ambitions, allowing any aspects of the UK state to be remade, and therefore offering possibilities far beyond an exercise in the legal entrenchment of the tired and tiring constitutional status quo.

 When we consider the political constitution by exploring its potential applications in a practical context, the variability of the idea becomes obvious. We may adopt the model of the political *constitution*, yet in fact this can produce a range of quite different political *constitutions*. In some ways, this might be thought unsurprising, since the malleability of a constitution premised on the prioritisation of politics, with the doctrine of parliamentary sovereignty as its key instrument, must inevitably leave open the prospect of power being exercised for a whole range of varying political purposes. Yet when we consider the different ways of characterising the place of parliamentary sovereignty in a political constitution, it becomes clear that it is not just the political outputs which are variable, but the possible political constitutions themselves. In addition to the distinction between constitutions which are traditional or radical in nature, we may trace a range of other possibilities. Political constitutions may be structured in ways which promote authoritarian, consensual, or pluralistic politics. They may be focused on supporting representation, populism, direct citizen engagement, or sustaining elitism. Or, when we move from the theoretical to the actual, a political constitution will most likely be based on some complex mixture of a range of these different characteristics, and the many others which might need to be included in a typology of constitutional features. My purpose here is not to construct such a typology, but instead to demonstrate that the fluidity which the political constitution facilitates also extends to the practical form of the idea itself.

The scope for very different political constitutions to exist means that different constitutional mechanisms and functions will be emphasised and deemphasised accordingly. And this must include the possibility for different roles for parliamentary sovereignty – or, perhaps, for a principle of legally unlimited legislative authority which could be conceptualised in some other way, disaggregated from its present parliamentary location, given the continuation of this particular variation of the doctrine cannot be taken for granted. As a result, if we want parliamentary sovereignty to remain an instrument for institutionalising the kind of political constitution defended by Griffith, it is not enough to be satisfied that the doctrine continues to exist. For Griffith's focus on openness as the route to secure the accountability of the powerful, and the inspiration for radical political reform, is far from inevitable, even in a democratic political constitution. Instead, when evaluating the position of parliamentary sovereignty in the UK constitution, it is incumbent on us to consider not just whether the doctrine exists and what its value might be, but how the significant power which it establishes can be used to enhance the democratic values which offer a justification for legally unlimited legislative power to begin with.

This is not to advance a consequentialist justification of parliamentary sovereignty, where the doctrine is legitimate to the extent it is utilised for good ends, whatever they may be. Instead, it is to argue that the justification for parliamentary sovereignty must be iterative: parliamentary sovereignty establishes the constitutional primacy of democratic decision-making, the democratic foundations of the doctrine therefore generate an expectation that those who possess that power are proactive in the pursuit of changes which enhance the operation of the political constitution, and this should have the effect of further strengthening the normative justification for these arrangements. Of course, this is a broad prescription, and exactly what reforms would or would not enhance the operation of, and therefore justification for, a democratic political constitution will be a matter of intense debate and disagreement. Nonetheless, when we locate parliamentary sovereignty in the context of a political constitution, we see not only that these ideas are mutually reinforcing, but that just as the political constitution will ultimately be what we make of it, parliamentary sovereignty will be what we make of it as well.

Yet to consider parliamentary sovereignty in the context of the political constitution does not just enhance our understanding of this fundamental legal doctrine. When we explore the idea of the political constitution in practice, we can also start to see crucial features of this constitutional framework more clearly emerging. First, in analysing parliamentary sovereignty as part of a broader constitutional scheme, we see that the political constitution is not haphazard in its structure and operation, but has a deliberate and systemic character. Second, when we explore the alternative political interpretations of parliamentary sovereignty, we also see that the political constitution is not uniform, but has a crucial variability – what we might understand as the possibility of different political constitutions. And the demonstration of these features has significant implications for the way we think about constitutional law and reform after Brexit, and more generally. The systemic character of the political constitution shows that it is not simply a set of facts that have to be accepted, but a complex framework which can be cultivated, reorganised and reinvigorated, to further enhance its democratic character and its effective operation. The variability of the political constitution shows that it is compatible with a vast array of constitutional visions, each of which could promote different institutions, mechanisms, practices and norms. It therefore becomes readily apparent that we need to think far beyond binary debate about whether a political constitution exists in the UK, and to avoid the associated practice of attributing a singular view to political constitutionalists, when this approach to constitutional law is fundamentally premised on the possibility of diverse positions. Instead, when we analyse a political constitution, we need to think not just about what it is, and what values it serves, but what it has the potential to become, and how that can be achieved. And in this sense, when we pursue constitutional understanding through the context provided by the idea of the political constitution, we are provided with an approach which not only allows us better to comprehend and critique existing arrangements, but also, by its very nature, exhorts us to examine the ways in which we might enhance the system for the future.

***Conclusion***

The relationship between the concept of parliamentary sovereignty and the idea of the political constitution is complex but ultimately complementary. While Griffith may not have viewed parliamentary sovereignty as crucial, it is arguably the key instrument of his political constitution. And while the role of parliamentary sovereignty in and after Brexit poses difficult questions about the extent to which this relationship could have been undermined or even fractured, the doctrine can nevertheless be understood to remain a core norm around which a political constitution can be arranged. In reaching this conclusion, we see the value both of analysing parliamentary sovereignty in the context provided by the idea of the political constitution, and of exploring the idea of the political constitution in the context of particular practical questions arising in a specific constitutional regime. We see the sophistication and enduring potential of parliamentary sovereignty as the key instrument of the political constitution. And we see the systemic and variable character of the political constitution as a framework in which parliamentary sovereignty can successfully operate.

 This has related methodological and practical implications. In methodological terms, reconsideration of the relationship between parliamentary sovereignty and the political constitution reminds us that the tensions and differences within the political constitutionalist approach require attention and analysis. Obtaining a clear understanding of the idea of a political constitution is at least as important, if not more so, than playing this off against more legalistic conceptions of constitutionalism. And perhaps we have underestimated the importance of trying to evaluate what a political constitution is, how it is distinctive, and how it might be structured through the application of this idea to a specific practical context, rather than simply developed through more abstract reflection. Indeed, while there is no reason to sustain Griffith’s distain for the theoretical, the relentlessly practical focus of his lecture should be seen as establishing a trajectory for future scholarship. If we take these concepts to be normative templates for constitutional design, it is not enough simply to prefer political constitutionalism to legal constitutionalism. Instead, it is crucial to consider what the distinctive goals of a political constitution should be, and how they can be best be operationalised and achieved. In a sense, we should try to do political constitutionalism in practice, rather than simply talk political constitutionalism in the abstract.

 In practical terms, then, in the UK context, it must simply be a starting point, rather than the end of the story, to map the parameters of the relationship between parliamentary sovereignty and the political constitution. It is not sufficient simply to identify parliamentary sovereignty as (still) the key instrument of a political constitution. Rather, we must go much further and consider: what kind of political constitution do we want? The UK constitution is in a process of major change, and after Brexit could be in transition, whether constitutional and/or political. There are many constitutional and political values which could shape the future, and it will be crucial to consider the implications of the alternative trajectories they may project. A political constitution based on enhanced democratic accountability, institutional and national collaboration, and citizen engagement is just as possible, in principle, as one based on centralism, insularity, and exceptionalism. Parliamentary sovereignty provides the means and authority through which these different visions (or many others) could be implemented. But ultimately, whatever direction we take, it will not be enough to describe this model as the political constitution. Instead, we must decide what kind of political constitution we now want to pursue. And then we must pursue it.

1. \* School of Law and Social Justice, University of Liverpool. I’m very grateful to Graham Gee and Chris McCorkindale for their comments on the initial draft of this paper, and to all participants at the University of Sheffield workshop in September 2017 for feedback, questions and discussion which shaped the argument made here.

 JAG Griffith, ‘The Political Constitution’ (1979) 42 *Modern Law Review* 1. [↑](#footnote-ref-1)
2. See eg Graham Gee, ‘The political constitutionalism of JAG Griffith’ (2008) 28 *Legal Studies* 20; Thomas Poole, ‘The Elegiac Tradition: Public Law and Memory’ (2014) *Public Law* 68. [↑](#footnote-ref-2)
3. See eg Martin Loughlin, ‘The Political Constitution Revisited’ (2018) XX *King’s Law Journal* [11-14]. [↑](#footnote-ref-3)
4. See eg, Aileen Kavanagh, [paper in this collection]. Note to eds - other relevant citations from this collection here? [↑](#footnote-ref-4)
5. See Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* ( Hart Publishing, 2015) ch 1. I argue that the special nature and position of parliamentary sovereignty distinguish this doctrine from the idea of the rule of law, with the latter being a principle which is contingent upon, and does not establish, any specific arrangement of constitutional power. The rule of law, I argue, is also not capable of performing the organising and legitimating functions performed by the doctrine of parliamentary sovereignty; 30-31. [↑](#footnote-ref-5)
6. See eg, KD Ewing, ‘The Resilience of the Political Constitution’ (2013) 14 *German Law Journal* 2111. [↑](#footnote-ref-6)
7. This section draws on and develops material first published in *Parliamentary Sovereignty and the UK Constitution: Process, Politics and Democracy* (Hart Publishing, 2015) ch 7. [↑](#footnote-ref-7)
8. Griffith, ‘The Political Constitution’ (n 1) 18. See eg, RFV Heuston, *Essays In Constitutional Law*, (Stevens and Sons, 2nd edn, 1964) ch 1; John Laws, ‘Law and Democracy’ [1995] *Public Law* 72; TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001); Jeffrey Jowell, ‘Parliamentary Sovereignty Under the New Constitutional Hypothesis’ [2006] *Public Law* 562. [↑](#footnote-ref-8)
9. See, eg JAG Griffith, *Parliamentary Scrutiny of Government Bills* (George Allen & Unwin, 1974), which on my reading contains no references to parliamentary sovereignty. [↑](#footnote-ref-9)
10. JAG Griffith and Michael Ryle, *Parliament: Functions, Practice and Procedures* (Sweet & Maxwell, 1st edn, 1989), 244-245. [↑](#footnote-ref-10)
11. Ibid 4. [↑](#footnote-ref-11)
12. Ibid 10, 6. [↑](#footnote-ref-12)
13. Ewing, ‘The Resilience of the Political Constitution’ (n 6) 2118. [↑](#footnote-ref-13)
14. Griffith, ‘The Political Constitution’ (n 1) 2, 20. [↑](#footnote-ref-14)
15. Ibid 20. [↑](#footnote-ref-15)
16. Ibid 19. [↑](#footnote-ref-16)
17. JAG Griffith, ‘The Common Law and the Political Constitution’ (2001) 117 *Law Quarterly Review* 42, 59. [↑](#footnote-ref-17)
18. Griffith, ‘The Political Constitution’ (n 1) 16. [↑](#footnote-ref-18)
19. Ibid 16. [↑](#footnote-ref-19)
20. Ibid 16. [↑](#footnote-ref-20)
21. Ewing, ‘The Resilience of the Political Constitution’ (n 6) 2116. [↑](#footnote-ref-21)
22. Griffith, ‘The Political Constitution’ (n 1) 14. [↑](#footnote-ref-22)
23. Ibid 20. [↑](#footnote-ref-23)
24. Marco Goldoni and Chris McCorkindale, ‘A Note From the Editors: The State of the Political Constitution’ (2013) 14 *German Law Journal* 2103, 2109. [↑](#footnote-ref-24)
25. Adam Tomkins, ‘In Defence of the Political Constitution’ (2002) 22 *Oxford Journal of Legal Studies* 157; Adam Tomkins, *Our Republican Constitution* (Hart Publishing, 2005). [↑](#footnote-ref-25)
26. Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007). [↑](#footnote-ref-26)
27. Graham Gee, ‘The Political Constitutionalism of JAG Griffith’ (2008) 28 *Legal Studies* 20; Graham Gee and Gregoire Webber, ‘What Is a Political Constitution?’ (2010) 30 *Oxford Journal of Legal Studies* 273. [↑](#footnote-ref-27)
28. Goldoni and McCorkindale, (n 24) 2104. [↑](#footnote-ref-28)
29. Martin Loughlin, ‘Towards a Republican Revival? (2006) 26 *Oxford Journal of Legal Studies* 425, 436. [↑](#footnote-ref-29)
30. See, eg Tom Hickman, ‘In Defence of the Legal Constitution’ (2005) 55 *University of Toronto Law Journal* 981; TRS Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford University Press, 2013). [↑](#footnote-ref-30)
31. See especially Gee and Webber, ‘What is a Political Constitution?’ (n 27). [↑](#footnote-ref-31)
32. See eg, Andrew Le Sueur and Jack Simson Caird, ‘The House of Lords Select Committee on the Constitution’ in Alexander Horne, Gavin Drewry and Dawn Oliver (eds), *Parliament and the Law* (Hart Publishing, 2013). [↑](#footnote-ref-32)
33. Goldoni and McCorkindale, (n 24) 2105. [↑](#footnote-ref-33)
34. See eg, Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1998). [↑](#footnote-ref-34)
35. Griffith, ‘The Political Constitution’ (n 1) 3, 5. [↑](#footnote-ref-35)
36. ibid 16, 18. That Griffith is thinking in majoritarian democratic terms, at least in principle, with respect to the taking of political decisions seems evident, for eg, from claims that a law is good ‘only in the limited sense that a number of people hold that opinion of it’, or his (seeming) implicit acceptance that ‘a majority’ confers some sort of legitimacy: 19, 20. [↑](#footnote-ref-36)
37. Griffith, ‘The Common Law and the Political Constitution’ (n 17) 63. [↑](#footnote-ref-37)
38. Bellamy (n 26) 12, 259. [↑](#footnote-ref-38)
39. See generally Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press, 1997); Quentin Skinner, *Liberty Before Liberalism* (Cambridge University Press, 1998). [↑](#footnote-ref-39)
40. Bellamy, (n 26) 12. [↑](#footnote-ref-40)
41. Ibid 260. [↑](#footnote-ref-41)
42. Griffith, ‘The Political Constitution’ (n1) 17–18, 15. [↑](#footnote-ref-42)
43. Ewing, ‘The Resilience of the Political Constitution’ (n 6) 2117. [↑](#footnote-ref-43)
44. Ibid 2117. [↑](#footnote-ref-44)
45. AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 8th edn, 1915) 37-38. [↑](#footnote-ref-45)
46. Ewing, ‘The Resilience of the Political Constitution’ (n 6) 2118. [↑](#footnote-ref-46)
47. Ibid 2118. [↑](#footnote-ref-47)
48. For further discussion, see Gordon, *Parliamentary Sovereignty in the UK Constitution* (n 5) 32-55. [↑](#footnote-ref-48)
49. Paul Scott, ‘(Political) Constitutions and (Political) Constitutionalism’ (2013) 14 *German Law Journal* 2157, 2169, 2172. [↑](#footnote-ref-49)
50. Ibid 2172. [↑](#footnote-ref-50)
51. Ibid 2172. [↑](#footnote-ref-51)
52. Dawn Oliver, ‘Parliament and the Courts: A Pragmatic (or Principled) Defence of the Sovereignty of Parliament’ in Horne, Drewry and Oliver (n 32) 329. [↑](#footnote-ref-52)
53. Ibid 310. [↑](#footnote-ref-53)
54. Human Rights Act 1998, s 4(6)(a). [↑](#footnote-ref-54)
55. See eg, Richard Bellamy, ‘Political Constitutionalism and the Human Rights Act’ (2011) 9 *International Journal of Constitutional Law* 86. [↑](#footnote-ref-55)
56. Adam Tomkins, ‘What’s Left of the Political Constitution?’ (2013) 14 *German Law Journal* 2275, 2292, 2290. [↑](#footnote-ref-56)
57. Vernon Bogdanor, *The New British Constitution* (Hart Publishing, 2009) especially 62, 83. [↑](#footnote-ref-57)
58. See eg, Alison Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart Publishing, 2009). The leading extra-judicial statement of such a position is Thomas Bingham, *The Rule of Law* (Penguin, 2011). [↑](#footnote-ref-58)
59. Dicey, (n 45) ch 13. [↑](#footnote-ref-59)
60. WI Jennings, *The Law and the Constitution*, (University of London Press, 5th edn, 1959) 60. [↑](#footnote-ref-60)
61. For an alternative attempt to locate parliamentary sovereignty in a framework provided by a model of democratic dialogue see Alison Young, *Democratic Dialogue and the Constitution* (Oxford University Press, 2017) ch 6. Yet this requires us to shift our understanding from parliamentary sovereignty, to legislative supremacy, to bi-polar sovereignty, which is premised on the idea of the sharing of sovereignty between Parliament and the courts. The model of democratic dialogue therefore arguably provides a framework which changes, rather than contextualises, the doctrine of parliamentary sovereignty. [↑](#footnote-ref-61)
62. See especially, Jennings, (n 60) ch 4. [↑](#footnote-ref-62)
63. See eg, the claims made by Heuston, (n 8) ch 1. [↑](#footnote-ref-63)
64. See eg Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 138. [↑](#footnote-ref-64)
65. See Gordon, *Parliamentary Sovereignty in the UK Constitution* (n 5) ch’s 7 & 8. [↑](#footnote-ref-65)
66. See eg, Kirby Swales, *Understanding the Leave vote* (NatCen Social Research, 2016): <http://natcen.ac.uk/media/1319222/natcen_brexplanations-report-final-web2.pdf>; John Curtice, ‘The Vote to Leave the EU: Litmus test or lightning rod?’ in Elizabeth Clery, John Curtice and Roger Harding (eds), *British Social Attitudes: the 34th Report* (NatCen Social Research, 2017): <http://www.bsa.natcen.ac.uk/latest-report/british-social-attitudes-34/brexit.aspx>. [↑](#footnote-ref-66)
67. See eg, Department for Exiting the EU, *Legislating for the United Kingdom’s withdrawal from the European Union* (Cm 9446, March 2017) 7. [↑](#footnote-ref-67)
68. See eg, Jacob Rees-Mogg MP, *Hansard*, HC Deb, Vol 620 col 908 (31 January 2017): ‘On 23 June, the people voted that parliamentary sovereignty would be restored to this House.’  [↑](#footnote-ref-68)
69. See eg, Vernon Bogdanor, ‘Europe and the Sovereignty of the People’ (2016) 87 *The Political Quarterly* 348. [↑](#footnote-ref-69)
70. See eg, Geoffrey Robertson, ‘How to Stop Brexit: Get Your MP to Vote it Down’, *The Guardian* (27 June 2016): <https://www.theguardian.com/commentisfree/2016/jun/27/stop-brexit-mp-vote-referendum-members-parliament-act-europe>. [↑](#footnote-ref-70)
71. This is arguably the result of the majority decision in *R (Miller)* v *Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61. [↑](#footnote-ref-71)
72. See Michael Gordon, ‘The UK’s Sovereignty Uncertainty: Brexit, Bewilderment and Beyond’ (2016) 27 *King’s Law Journal* 333, 333-335. [↑](#footnote-ref-72)
73. *Miller* (n71) [43]. [↑](#footnote-ref-73)
74. Ibid, see especially [65]-[67], [80]-[82]. [↑](#footnote-ref-74)
75. See eg, Sionaidh Douglas-Scott, ‘An “utterly pernicious” Bill?’, *The UK in a Changing Europe Blog* (18 September 2017): <http://ukandeu.ac.uk/an-utterly-pernicious-bill/>; Jo Murkens, ‘The Great “Repeal” Act will leave Parliament sidelined and disempowered’, *LSE Brexit Blog* (21 October 2016): <http://blogs.lse.ac.uk/brexit/2016/10/21/the-great-repeal-act-will-leave-parliament-sidelined-and-disempowered/>. [↑](#footnote-ref-75)
76. See eg, the amendments to the EU (Withdrawal) Act 2018 agreed between the UK and Welsh governments; *Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks* (24 April 2018): <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/702623/2018-04-24_UKG-DA_IGA_and_Memorandum.pdf>. [↑](#footnote-ref-76)
77. See eg, Mark Elliott, ‘Does the Government defeat on clause 9 of the EU (Withdrawal) Bill mean Parliament has “taken back control”?’, *Public Law for Everyone Blog* (14 December 2017): <https://publiclawforeveryone.com/2017/12/14/does-the-government-defeat-on-clause-9-of-the-eu-withdrawal-bill-mean-parliament-has-taken-back-control/>. [↑](#footnote-ref-77)
78. See eg, Michael Gordon, ‘Brexit: A Challenge *For* the UK Constitution, *Of* the UK Constitution?’ (2016) 12 *European Constitutional Law Review* 409. [↑](#footnote-ref-78)
79. Vernon Bogdanor, *Brexit and Our Unprotected Constitution* (The Constitution Society, 2018) 40. [↑](#footnote-ref-79)
80. Martin Loughlin, ‘The End of Avoidance’, *London Review of Books,* Vol 38(15) (28 July 2016) 12-13. [↑](#footnote-ref-80)
81. Ibid 13. [↑](#footnote-ref-81)
82. See eg, Loughlin, (n 4) [7-8]. [↑](#footnote-ref-82)
83. See eg, JAG Griffith, *The Politics of the Judiciary* (Fontana Press, 5th edn, 1997); GN Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago Press, 1991) esp Part 1; KD Ewing and CA Gearty, *Freedom Under Thatcher: Civil Liberties in Modern Britain* (Clarendon Press, 1990); KD Ewing and CA Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914–1945* (Oxford University Press, 2000); Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of New Constitutionalism* (Harvard University Press, 2004); KD Ewing, *The Bonfire of the Liberties: New Labour, Human Rights and the Rule of Law* (Oxford University Press, 2010). [↑](#footnote-ref-83)
84. Mark Elliott, ‘The Principle of Parliamentary Sovereignty in Legal, Constitutional, and Political Perspective’ in Jeffrey Jowell, Dawn Oliver and Colm O’Cinneide (eds), *The Changing Constitution* (Oxford University Press, 2015) 64-65. [↑](#footnote-ref-84)
85. Parliamentary sovereignty has been explicitly preserved in the devolution settlement from the outset: see Scotland Act 1998, s 28(7); Northern Ireland Act 1998, s 5(6); Government of Wales Act 2006, s 107(5). The operation of the Sewel Convention (captured in *Devolution: Memorandum of Understanding and Supplementary Agreements* (October 2013) [14]) is now also formally recognised, but not made legally binding, in the legislation relating to Scotland and Wales: Scotland Act 1998, s 28(8), as amended by the Scotland Act 2016, s 2; Government of Wales Act 2006, s 107(6), as amended by the Wales Act 2017, s 2. [↑](#footnote-ref-85)
86. Human Rights Act 1998, s 4 & s 10. [↑](#footnote-ref-86)
87. This is arguably the best understanding of the effect of the convoluted scheme established in the European Communities Act 1972; for the full argument, and consideration of alternatives, see Gordon, *Parliamentary Sovereignty in the UK Constitution* (n 5) ch 4. See also now European Union (Withdrawal) Act 2018, s l(1). [↑](#footnote-ref-87)