



**Jeffrey Rosen:** [00:00:00] I'm Jeffrey Rosen, President and CEO of the National Constitution Center, and welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit, chartered by Congress to increase awareness, and understanding of the Constitution among the American people.

And today will have to add to that inspiring mission statement, understanding of the Constitution among the British people and people around the world because we are going to take up today, Brexit and the constitution. Brexit, the UK's campaign to leave the European Union has sparked ongoing political and constitutional controversy. But the UK does not have a written constitution, it's governed by a set of laws, conventions, norms, judicial decisions and treaties. And Brexit has led to talk of a constitutional crisis and calls for constitutional reform.

Here to discuss Brexit in the constitution a topic I've long been eager to learn about with you, dear, We the People listeners are two of America and Britain and the world's leading expert on this topic. Both of them are joining us from London.

Meg Russell is professor of British and comparative politics and director of the Constitution unit at University College London, where she heads the unit's research on parliament. Professor Russell, is senior fellow with the UK in a changing Europe program and as leading the project Brexit Parliament and the Constitution. Meg, thank you so much for joining.

**Meg Russell:** [00:01:30] Well, it's great to be with you.

**Jeffrey Rosen:** [00:01:31] And Kim Lane Scheppele is Laurence S. Rockefeller professor of sociology and international affairs in the Woodrow Wilson School and University Center for human values at Princeton. Her work on the intersection of constitutional and international law is acclaimed, and I've learned so much from it. She previously directed the program in law and public affairs at Princeton, and is in the UK as it happens, because she's so eager to join for this Brexit podcast. Kim, it's wonderful to talk to you from the UK.

**Kim Lane Scheppele:** [00:02:02] Yes, wonderful to be in the UK at least until tomorrow at midnight.

**Jeffrey Rosen:** [00:02:05] you will be out by Halloween, thanks to the Brexit extension. All right, we begin this discussion of Brexit and the Constitution of course by defining the British constitution. a famously difficult thing to do. In its decision holding that the procreation of parliament was, a violation of the Constitution. The UK Supreme Court identified two characteristics of the British constitution. First the sovereignty of Parliament, traditionally defined under the principle whatever the queen and parliament enacts its law, and second accountability of the government to parliament.

Meg we'll begin with you. Are those the two principles of the British constitution or should we add any others?

**Meg Russell:** [00:02:49] I'm not sure we should add other principles. but I think that there are two things which are worth thinking about when we conceptualize what the British



constitution is, there's form and there's content. And you have referred to both of them there.

So, in terms of form, we are one of the few countries, you know, famously this is ... if you ask people about the British constitution, probably the single thing they would say is we don't have a written constitution. So as you said, we don't have a single document, there is no way that you can go and get out of a drawer, the thing that ... a thing that says at the top of it, constitution. So you- you articulated it very nicely in a nutshell in terms of the combination of laws and norms and conventions, and so on, that- that make up the Constitution.

So in terms of form, it's a fairly unique kind of constitution. people use various, adjectives to describe the British constitution. One is it's, it's historic, it's evolved over a long period of time. You know, we've never had a moment when we sat down to say, "Right, what do we want our rules to be?" Because we've had very stable politics in the UK.

you know, the Constitution's in many other parts of the world result from revolution, defeat in war, that kind of thing. We have never gone through that, luckily. and therefore, we have this very kind of organic development of our rules, which has never resulted in a single document. Then you come to what is the content of the constitution, which is more the second part that you refer to, and that's how it was articulated recently by our supreme court.

most people I think, would say that the central, most central principle in the UK constitution is parliamentary sovereignty, which kind of goes along with this whole idea of an unwritten constitution, because you have to have some high ... that- that you have to have some organization or institution, which is your highest authority. and in the UK, that highest authority is parliament. So it's not a written document, and it's not adjudicated at least normally by the courts.

So all have is regular statute law, and the principle is that, any law can be made or unmade by parliament. That's, that's the basic principle of parliamentary sovereignty. It's complicated by things that we might come on to like the status of EU law and international treaties and so on. But that's the basic kind of central tenet.

Then the second part that you refer to in terms of accountability is to do with our form of government, really, unlike the US, which is a presidential system, we have a parliamentary system, which means that the government is at all times accountable to Parliament, and crucially, can be removed from office if it loses the confidence of parliament. So I think it's fair to say that that is a central principle of our politics and the UK ... the- the Supreme Court has articulated it as a central principle of our constitution.

**Jeffrey Rosen:** [00:05:46] Kim, the fact that the British court ruled that the executive acted unconstitutionally itself was unprecedented. in a sense, the principle of parliamentary sovereignty had been presumed to mean that Parliament could act without constraint by the court. And in holding that the executive had failed to, allow parliamentary accountability. the- the court, challenged a- a notion I was taught when I studied British politics in the late 1980s. Namely, that there was a kind of elective dictatorship where the executive as long as



it had a parliamentary majority could do what it liked. So how do we square this British Supreme Court decision with the principle of parliamentary sovereignty?

**Kim Lane Scheppele:** [00:06:30] Well, it's a very good question because the court in announcing parliamentary sovereignty itself asserts the ability to announce parliamentary sovereignty, which in some ways says that it has the last word on this matter. But it might be worth saying something about why the court got involved, what the issue was because I think that really, helps us to understand what the court was trying to do. The issue here was that there was a deadline by which the UK was supposed to leave the EU, that deadline was Halloween 31st of October. And what the Prime Minister had done was to prorogue, which means to completely suspend the parliament for five weeks of the eight weeks in the run up to that deadline.

And so prorogation is a kind of normal activity that happens very frequently whenever there's a new government program to be announced. The parliament is typically suspended for at least a few days before that government program is announced. What was unusual here was the length of the time that parliament was to be suspended. And so this case came up to the UK Supreme Court, in a very fairly difficult, problem because prorogation is a normal thing. The length of the prorogation was the problem.

And so what the Supreme Court had to look at was whether ... the- they couldn't say the propagation was unlawful, because the Queen prorogues the parliament. And another feature of the UK constitution that will be very surprising to Americans is that the Queen is actually above the law.

So the position of the court was that they looked at the advice that the Prime Minister had given the Queen. In fact, the Queen has no discretion. I mean, the prime minister advises her to do something and she does it. But the point was that it was the advice given by the prime minister to the Queen that came under judicial review. And that advice was not actually a judge to be unconstitutional. It was judged to be unlawful, which is a kind of different formulation. The courts very rarely say that things are unconstitutional. In this case, the advice was unlawful precisely because it breached the two principles that Meg Russell just mentioned.

One is that if the parliament is not there to scrutinize the executive, parliamentary accountability fails. And second of all, if the executive can get rid of the parliament so easily, the parliament cannot be Supreme. And so for both of these reasons, the prorogation of the Parliament suspending the parliament, and- and basically putting it completely out of action for this long period of time, right before the Brexit deadline was found by the court to be unlawful precisely because it interrupted those two key functions of the UK constitution.

So it was a, it was a major constitutional decision, interpreted as such. There were many interesting things about it. One was just that the court made a unanimous decision in a single judgment, which- which doesn't usually happen, that all the judges were in agreement and the opinion was written in such clear terms, that the average person could also understand it. So the court saw itself as communicating not just to legal experts, but to a general public.



**Jeffrey Rosen:** [00:09:53] It did have both of those characteristics as you described, and I urge We the People listeners to read the British Supreme Court opinion. I had chills when I read it. I felt like I was reading *Marbury vs. Madison* and it was written in such clear, terms that all of us lovers of the Constitution can follow it. Meg, I'm eager for your thoughts about Kim's comments and also about her distinction between, unconstitutional and unlawful. Does the UK Supreme Court have the authority to declare something unconstitutional as well as unlawful? And if Parliament had disagreed with the decision and held that the prorogation was not unlawful could have overturned the decision by simple statute?

**Meg Russell:** [00:10:32] Oh, wow, that's interesting. that's becoming very con-, that's becoming very convoluted and co-, and complicated. I think I mean, what ... a key, a key point is that it's very difficult to define what is unconstitutional in the UK precisely for the reason that I ... that- that I gave at the start that we don't have a constitutional document. So you know, you're interpreting a document, you can say, Yes, what just happened, there is contrary to the principle, stated in, you know, Article six or something. We don't have that, our constitution rests, on all of these this myriad combination of things, some of which is statute. So that's just legal interpretation. And some of it is convention. and the courts would not normally get involved in interpreting convention.

But I- I completely agree with what Kim said in her description of the case. the- there was a, there was a lot of doubts as to what the Supreme Court was gonna do in this case. And because basically, this was an argument about convention, and whether the request by the prime minister to prorogue for such a long period was contrary to convention. Many people thought that the court would not want to get involved in that argument. But in fact, what happened was, as Kim said, the court did get involved. And it ruled not just by majority, but by consensus that this was an improper prorogation.

and the reason that they found essentially, I th-, I think, hangs on this point about this was not just any old convention, this was a convention, which is the absolute central principle of the UK Constitution, which is that of parliamentary sovereignty. So on many things, the courts in the UK would defer to parliament. So if there isn't a law on something, they might say, "Well, we're not gonna get drawn into this. Because it's not for us to make up the law. It's for parliament to decide what the law is." So they would try and throw many difficult questions back to parliament and give parliament an opportunity to decide.

But the central point of the center of this case was that parliament had been suspended. So there was no opportunity for the court to simply throw the question. Parliament could not unprorogue itself, the nature of the prorogation was that parliament was not in existence. And that was the thing that the court went on and said, "Well, really, you know, parliament is the highest authority in the UK, and therefore needs to be reinstated in order that you can make the decisions."

And- and on your question, it would be a slightly sort of bizarre turn of events. But if Parliament had turned around and said, "Well, actually, no, we want it to be prorogued."



Thank you very much." And it could have put itself back into suspension. But the point was, it wasn't there to make the decision, and the court had to reinstate it in order to do so.

What I wanted to- to come back on in terms of the- the conversation that you just had was actually the premise of your question, Jeff. because you refer to this idea of elective dictatorship and how isn't it peculiar that the courts are stepping in, to question what the executive is doing?

and I think that this- this is a very interesting point, because many people in the UK have for many years thought that parliamentary sovereignty, in effect means executive sovereignty. the ... our- our recent history is that we tend to have single party majority governments. So a party wins the majority of seats in the House of Commons, it forms the government, and there isn't much conflict, therefore, between parliament and government. And government puts forward its policies, parliament tends to endorse those policies. And often people look on that as suggesting that parliament is a relatively weak actor in the system.

I have long said, I mean, as- as somebody who studies parliament that it's a lot more complicated than that. That actually, the reason that the government and parliament tend to agree a lot of the time is not just because parliament is doing what the government says, often it's because government is what parliament once it gets its authority from parliament. It consults members of its political party behind the scenes about what policies they will accept, and then it puts those policies forward. So there's often a misunderstanding about the direction of the- the flow of power in the UK, people think it comes from the executive to parliament, rather than the other way around.

And I think I completely agree about how beautifully written the supreme court judgment was. And I've already said, you know, it should be compulsory reading for all students of British politics, because it explains how the nature of the executive in the UK is that it, the executive, the government has no authority except the authority that it gets from parliament. And therefore it cannot be right for the executive to have the power to shut parliament down.

**Jeffrey Rosen:** [00:15:25] Wonderful, thank you very much for that and for clarifying, as the court did that this principle of parliamentary sovereignty, trumps, any notion of, executive, elective dictatorship. This leads Kim to the basic, constitutional question that was introduced in Brexit. And Namely, if parliament is sovereign what is the role of a referendum? It was striking when for the first time in British history, a- a referendum reached a decision by the people that seemed at odds with the, will of a majority of Parliament, namely to leave the European Union. parliament seemed ready to obey the referendum until a British court insisted that it ratify the result to reaffirm the principle of parliamentary sovereignty.

So my question to you is, was the resort to a referendum, challenge to the notion of parliamentary sovereignty in favor of a more popular, notion of sovereignty? And did that precipitate what some have called a constitutional crisis?

**Kim Lane Scheppele:** [00:16:25] Yes, well, that's a very good question because until the UK joined the EU, it was not in the habit of having a referenda. In fact, it's a relatively new



appearance on the UK constitutional scene. And strictly speaking, all referenda, including the Brexit one, are advisory only because parliamentary supremacy is the core principle of the constitution. So what's been very interesting to watch is the way in which referenda have become mandatory, which is to say, not legally mandatory, but mandatory in a kind of public opinion, responsive democratic sense, that whenever the parliament has, acted in such a way as to either slow down or question or potentially stop Brexit, they are routinely accused and this is very much a political accusation. They're accused of standing in the way of what the people have demanded. Okay, so the problem is that you can't have both parliamentary sovereignty and direct democracy. These are really two completely different organizing principles of democratic government.

And part of the reason why Brexit has been such a difficult problem for the UK to resolve as a matter of law is that one, that the people who were advocating getting out of the EU claim that- that the referendum was decisive and should dominate whatever, or decor control in some ways what the parliament does. And the parliament is insisting that it is sovereign, and it needs to take into account a number of things that the parliament ... that the referendum didn't even, consider. So here we are all this, you know, all this time later, and there is still no Brexit even though there was this vote.

So let me say just something about the- the referendum process, which is that the referendum result it had a very high turnout it was, it was preceded by a campaign that many people I think would say looking rather objectively at the facts was somewhat misleading on not ... The EU was not defended and the side advocating getting out said a lot of things that probably won't happen.

but there were a number of legal questions that were sort of left on the table when the referendum was called. So one was that everyone who had been living a UK national living outside the UK for more than 15 years, was excluded from voting. So the very people who have benefited the most from the EU, because they are living and working in another member status and they have every right to do were excluded from voting in the UK for Oregon's Brexit. That was a legal case that came up the Supreme Court, basically said it didn't have time to rule in the matter.

that was one question. There was another question about the- the age of voting whether that should be 18 or 16. Those of you who've seen the results of the referendum know that young people were substantially more in favor of staying in the EU, than we're older people. So there were a number of legal decisions made at the beginning about how the referendum would be framed, that probably in the end determined its result. and those questions were raised at the time as constitutional issues and kind of bad to decide by the courts because the parliament had decided to use the same rule for voting in the Brexit referendum that you use for voting in a general election.

So I know, that's one set of open questions that I think a lot of people look back on is something that might have taken more consideration. The general idea, though, is that referenda are quite unusual in British politics. And here we have a referendum on the hottest topic of the day that is divided and split and practically ruins the country. and



nobody knows what it means legally speaking, it is technically not binding. Politically, it's fatal to ignore it. So we already have a bending of the UK constitution, as these referenda have started to look like and be argued that they dominate any Act of Parliament.

**Jeffrey Rosen:** [00:20:41] Meg, Kim has identified this clash between notions of parliamentary and popular sovereignty. In the US, we the people are sovereign rather than Congress. However, we don't allow we the people to express ourselves in single referenda, Brexit would be inconceivable in the US because constitutional changes difficult and requires lots of hoops to go through. how has Britain incorporated the idea of referenda into its notion of parliamentary sovereignty? And can the genie ever be put back in the bottle, as we face the prospect of the general election campaign thought on the slogan Parliament versus the people?

**Meg Russell:** [00:21:23] Hmm. Well, I have to say I very much hope that it's not gonna be fought on that slogan because I think that's a very unfortunate way of phrasing things. I think it's, I- I don't think it's justified by the facts. And I think it's a rather disreputable and dangerous slogan to fight an election on in a country where parliament is at the center of your constitution. But I do not deny what you're saying that there are some people who want to fight it that way. And we'll see how it comes to be fought.

I said, I said a little while back that there are various adjectives which are often used to describe the British constitution and I mentioned historic and unwritten. another couple of adjectives, which are quite important, I think, are flexible, as opposed to rigid and political as opposed to legal. And so Kim was talking about the constitution being bent, but in a sense, that's an innate characteristic of the British constitution that it is bendable that it is flexible, that it's able to develop over time. and that's one of the things perhaps that gives its, it gives, it gives it its longevity. It's been able to respond to events and change itself, rather than seeing a kind of break, because, you know, there's a fundamental disagreement, we can respond to those difficulties. So things like for example, what we call evolution to Scotland, Wales and Northern Ireland in terms of the amount of power which is controlled at the local level, rather than at the UK level.

There have been disputes about that. And it's been negotiated and changed over time due to the flexibility of the constitution. and it's also political, that goes very much alongside parliamentary sovereignty in the sense that the ultimate adjudicators are politicians, not lawyers.

So if you're looking at the- the Brexit referendum, it's very difficult to talk about sort of adjudicating that referendum and thing ... in terms of some of the things that Kim was talking about, like who should have the right to vote and so on. Precisely because, as she said, the decision did not have legal status. It was officially an advisory referendum. It wasn't legally binding, but it has proved to be politically binding. And it was made politically binding because the politicians at the time said, we will abide by what you say. And they haven't felt able to renege on that promise, even though kind of legally they could do. So I think that what this episode shows up, is that it's in a way the flexibility of our constitution is a virtue.



but I think it shows up, a weakness with our flexible constitution in this whole episode. Because unlike in the US, we don't have any rules about when referendums can be used and what they can be used for. A lot of constitutions that do use referendums specify very clearly what kind of questions they can be used on, and what the decision making process is.

And if you're talking about constitutional reform, so, you know, you talked about how the Constitution is more difficult to reform and you have multistage processes. That's very common. so if you look at countries like Australia, or Japan or Italy, various other countries in Europe, if you want to change the text of the constitution, you have to go through a multi stage process. And very often one of those stages will be that it has to pass a referendum, but it has to pass parliament as well.

And what our parliament did, because it's ... parliament is sovereign, it can do what it wants, it can take political decisions, it can change the constitution as it's going along. It decided to have a constitute ... to have a referendum on this question, where it actually didn't support change. But it offered the people the opportunity to change, frankly, because the politicians expected people to say no to the change. And then when the people said, yes, we end up with a conflict between parliamentary opinion and the opinion of the people. And that question that people were asked was really a kind of yes, no, in principle question. They said yes, they did want to leave the EU, but the detail has been thrown back to parliament. So it come- comes down to parliamentarians to decide how to interpret and apply that decision. And that's where we've got into really big difficulties because ... which there are lots of different versions of Brexit that you could, that you could choose. And it seems like people want Brexit, but they don't particularly want any of the versions of Brexit, which are on the table.

**Jeffrey Rosen:** [00:25:42] Fascinating, Kim is the decision that Meg just identified the decision to put constitutional change to a single referendum that parliament didn't support, was that the fundamental [salacism 00:26:35] or constitutional error that parliament made, or is there another one? And put this in comparative perspective? Since you're the world expert on comparative constitutions. Does any other country allow for such profound constitutional change by a single up down referendum or do all other countries make you jump through more hoops?

**Kim Lane Scheppele:** [00:26:12] Well, as- as Meg said, there are a number of countries that do permit referenda not very many countries permit constitutional amendments by referenda. Although, I think California does within the US. We have some states that operate a lot by referenda. And I suppose the main country that does is Switzerland, which has referenda all the time, including on constitutional questions.

I think that dilemma in the UK and I guess this is really where some of the debate is moved with respect to the Brexit referendum, is it it's true that parliament approve the initial referendum, but they also approved it as advisory. So, you know, the parliament could have said, you know, we will carry this out in the statute that created the Brexit referendum. But in that statute, it says, "This is advisory." What it also means is, of course, that parliament could have a second referendum, which is what a number of people in the UK have also





argued for there's, there was no, there's no constitutional requirement, because referenda are quite new in the UK constitution that you only have one of them.

Or what many people have suggested where we are now with Brexit, where there is a concrete, transitional agreement on the table, the transitional agreement is- is what's the first step that the UK takes out of the EU? Is it gonna be falling off a cliff so that everybody is suddenly on their own? Or is there going to be some kind of relatively orderly legal transition between being in and being out and then what hasn't even begun to be discussed, is what the transition is to.

So, you know, as we look at this Brexit process, it's important to remember that where this thing has gotten stuck, is on what the transition looks like, because the UK quite understandably, wants to know where they're going, as they take the step out the door, and the EU will not talk to them about where they're going until they're out. This is one of the big conflicts here.

So- so one of the possibilities with regard to the referendum and what a number of people have been arguing all the way through the process is let's take this- this withdrawal agreement that is presently on the table and have the parliament vote that, you know, if we're gonna get out these- these are the terms on which we take the first step out the door. And then there are a number of advocates of the position that there should be a referendum on that transitional agreement. So in other words, go back to the people and say, Is this the Brexit you wanted? And if it's not, then we're gonna stay until we figure out something else.

So that's a proposal that keeps coming back in this process. I think there's still not quite a parliamentary majority for it. But if you can have one referendum, you can have two referenda or you could have many referenda, and this has been very interesting to watch the way the side that warm the first time has used every political option available to them to prevent it coming back to a second referendum.

So, to make this more of a constitutional point, I think the thing to say is, the British constitution is flexible, which is a very important attribute of it, it- it bends rather than breaks. The problem is when you get such a pitched constitutional or a pitched battle over the shape of the British state and its international relations, where people are really I mean, this has split families this has has, created a kind of misery all around in the British public. The constitution also doesn't settle anything. And so this is I think, where a lot of people are starting to say, maybe we should entrench this document a little bit more, because anything is possible.

The EU has also been very frustrated because you get one government that negotiates a transitional agreement as the last Prime Minister, Theresa May did, and then her successor from her own party comes back and says, "No, we don't like that." Leaving the EU to ask, "Well, what is the UK anyhow?"

So the flexibility of the British constitution has meant that the issue never gets settled. And that's also been one of the things that's led to the tremendous anxiety and misery and



political battles that split families and split friends and so on, because there is no final resolution. So we often underestimate the idea that, you know, a constitution makes some things, and this constitution doesn't.

**Jeffrey Rosen:** [00:30:58] Fascinating. Meg, for a US audience, we would think a second referendum would be constitutionally natural in the state of Massachusetts, constitutional amendments initiated by referenda have to be approved by the legislature in two joint successive sessions to prove that the people actually meant what they said. But as Kim described, there's been resistance to a second referendum, certainly by the Tories.

as a constitutional matter, is there a move to codify the British constitution? Is there support in the country for a written constitution? And if there were a written constitution, how would referenda be incorporated into it if at all?

**Meg Russell:** [00:31:44] Hmm. That's a big question. I think, I think I would treat that as a two part question. So there's ... firstly there's the sort of local question as it were the specific question of- of how we use referendums in the UK and I think that this- this episode has really given us pause for thought, as to how we deploy this instrument in the UK. One of the things that my organization the constitution unit did recently was run, something that we call the independent commission on referendums, which looked at the way that referendums are been used historically in the UK, the way that they are used around the world and what recommendations we could make, what lessons we could learn for better use of referendums in the future.

And one of it ... one of the things that it's, that it decided that it, that it agreed was that holding these kind of, yes, no referendums on questions of principle without working through the detail is very problematic, because as I say, parliament has been thrown back the difficult, if not, perhaps impossible question of how to resolve and put into effect what it is that people voted for.

So Kim mentioned earlier that all referendums in the UK are only advisory that's not actually strictly correct. There are ways of making referendums binding, we did have a referendum in 2011, on changing the electoral system for the House of Commons. That was done in a very, very different way. So, there was a piece of legislation which actually set out in detail how the electoral system would be changed if there was approval in a referendum. So all the detail was laid down in law, the referendum was held subsequently. And if people had voted for the change, the law would have just been put into effect.

It was clear and transparent what people were voting for. They voted against actually. So the change didn't happen. This Brexit situation has been very, very different. And one of the reasons is, I think it was stumbled into accidentally, you know, nobody expected this outcome. But of course, it's also connected to the fact that there are international negotiations involved. So we couldn't really set down unilaterally what version of Brexit we would want for people to vote on. So the- the vote was an in principle one that we wanted to exit and that kicks off, a process of negotiation with other countries. What as you say a lot of people are now talking about, have increasingly been talking about is the idea of putting that detailed package back to the people for referendum.



Some people are referring to this is a complimentary referendum, which as you say, would be quite a kind of rational thing to do. but at the same time, it's very controversial because of course, perhaps naively, at the beginning of this process, politicians promised that if people voted for Brexit, they were gonna get Brexit. And if you have a complimentary referendum that is offering people an opportunity to reverse their position, and many people are offended by the idea that this reversal could be made possible because we were promised it was a permanent decision.

So I think ... sorry, that was a very long answer. And I should throw it back to you. I think now because you may want to ask him the- the next part of them the next part of your question, which was, should we be moving to a written constitution? And I think I've just address there, perhaps we need to codify more how we use referendums and think more carefully about that. But that's fits within a bigger question of how much else should be codified in the UK constitution.

**Jeffrey Rosen:** [00:34:57] It was, it was a wonderful answer. Thank you very much for it. And in fact, before maybe we will work our way up to the written constitution question but I- I- I want now to ask Kim is, Brexit a constitutional crisis or not? And if so, what aspects of it represent a constitutional crisis? Me- Meg said that the Constitution is flexible and political not legal, is there an argument that it's just bending and accommodating to each twist and turn parliamentary sovereignty remains, intact, at least in theory? And, is there a case that it's not a constitutional crisis after all, or not?

**Kim Lane Scheppele:** [00:35:32] Well, I think that this is actually this has been a lot of slow moving constitutional crisis. And by saying that, I mean to say that what this has exposed is the limitations of a flexible constitution, that constitutions are sometimes needed to provide finality to decisions. And they're also needed to provide assurances to other negotiating partners, that when a, when a state says something, it will go on meaning that.

So I think what we see is the lack of entrenchment of the UK constitution that any parliament can undo with any other parliament has done has made it very difficult for the UK to negotiate with the EU over all of this, and that in the end, if the UK is now going to enter into negotiations, lots of trade agreements with other countries, they'll look at this episode and ask, you know, "What is the British word on this if the parliament can change his mind tomorrow?"

So that aspect of the British constitution I think, will really get the UK into lots more difficulty if it goes through Brexit and comes out needing to negotiate a lot of international agreements. But what you also see is that there are a number of features of the UK constitution right now that have become really dysfunctional. So for example, as- as Meg described, the way the system is supposed to work is that the executive must maintain the confidence of parliament that means there needs to be a working parliamentary majority to approve, executive action essentially.

And what we've had now is- is a prime minister operating not just for the minority government, but with a, with a majority hostile parliament, actually. So the- the current prime minister Boris Johnson has lost almost all the votes that he's brought before the



parliament. And what would, what would normally have happened under the UK constitution, as we knew it for many decades was that there would be ... the parliament would be dissolved in a snap election. But there's a statute called the Fixed-term Parliament Act, which has made very difficult to call the snap election. And so the parliament has found it so far until today, to its advantage to keep the prime minister suspended in this state where you can't get anything through the parliament without actually letting them call any election until the party parliament got its way, in ensuring that the Prime Minister would not just crash out of the UK, out of the EU sorry, the Prime Minister would not crash out of the EU without a transitional agreement.

So the parliament has suddenly become the agent of a lot of this Brexit legislation. We've seen the parliament seize the reins from the Prime Minister. And actually, as they say, the backbenchers taking control of the agenda, and actually writing legislation that constrains the prime minister. And that's also very, very surprising. So- so when you see this kind of thing happening, where every day, there's sort of another constitutional surprise. What you begin to realize is that the constitution is so flexible, that it's almost not present. And that gives a kind of sense of vertigo. You know, I think many people have been watching this closely and wondering, what is the UK constitution, which is not ... I think people knew what they thought they knew what it was before, even if it's not written in a single text, at least for the purposes of general orientation.

And now there's been so many changes so many twists and turns, so many things you thought were obvious that turned out not- not to be obvious anymore. That the argument for written constitution is really getting louder and louder, precisely because this kind of vertigo is something that I think a lot of people would like to see, disappear.

**Jeffrey Rosen:** [00:39:35] Fascinating. Meg, Kim just said a bunch of really interesting things first, that this is a slow burning constitutional crisis because the UK is unable to negotiate with international partners, much as the US at the time of the Articles of Confederation was unable to negotiate for common purposes. And second, that because of innovations like the Fixed-term Parliament Act, there are constraints on the executive that make it difficult for the executive to, govern in the way that it, t- traditionally had, and that as a result of this, there's a kind of constitutional vertigo where people aren't sure what the constitution is.

I- I- I ask if you agree or disagree with those provocative statements. And in the course of it tell us about other innovations like the Fixed-term Parliament Act and the rise of political party polarization in the UK that may have contributed to this constitutional vertigo.

**Meg Russell:** [00:40:28] Sure. I think this is really interesting, really interesting set of issues. When you ask, is it ... is this a constitutional crisis? And of course, when you have as we have a political constitution, it's very difficult to separate a constitutional crisis and a political crisis because everything in the constitution is kind of political. But once you get to a point where you're involving the Supreme Court and people are beginning to question the authority of the queen, and Boris Johnson has even talked about, potentially flouting, the- the views of the Queen as to whether he should still be prime minister, then you are



definitely getting into kind of, constitutional crisis territory and people are beginning to ask questions like, "Has Brexit broken the Constitution?"

I- I would not lay, the- the blame at the door of the Fixed-term Parliament's Act. Actually, I think it's played a very interesting role and what the Fixed-term Parliament's Act did, it was, again, it was another thing that happened in 2011 under the coalition government. prior to that Act, the British Prime Minister could decide pretty much unilaterally when to dissolve Parliament for a general election. this was seen as somewhat problematic, because that meant that the prime minister could time elections to suit his or her own political purposes and could perhaps, you know, manipulate things to some extent by increasing public spending before an election to try and maximize the governing parties, opportunities of winning an election, that kind of thing could try and take the opposition parties by surprise.

So there are some quite good principled reasons to fix the terms. It's another part of now- now the prime minister can't get an election without parliament approving, the desire to have a referendum, which again emphasizes the kind of parliamentary sovereignty idea that the government gets its authority, from parliament.

I think the things which have caused the problems are other things, actually, I mean, one we've talked about a law, which is the referendum. So that clearly challenges the central principle of parliamentary sovereignty. it leaves members of parliament not really feeling like they can freely take decisions, they have to stick to the decision in the referendum, whether they like it or not, as a consequence of that situation, and the Brexit issue itself, which is hugely divisive in both political parties, but particularly the Conservative Party. And that's one of the reasons why the referendum was held in the first place, actually, because it couldn't really be resolved through the party system.

So you've got a referendum, which is constraining what politicians feel what they can say and vote for. You've got two parties which are very, very divided. You then have Prime Minister Theresa May, who tried to break this gridlock by going back to the country for a general election in 2017. And returned with a minority government, where she didn't even have the numbers to get the Brexit deal through parliament because her party didn't have a majority. And it's that kind of toxic mix of everything, which has got us to this situation where the Fixed-term Parliament Act comes in, is that Boris Johnson wanted to dissolve parliament and have an early general election just ahead of the Brexit deadline.

And his opponents in parliament were frightened that he would potentially dissolve parliament and have us in the middle of a general election and dropping out of the European Union on the 31st of October because we were constrained by that deadline. And they basically held him there until it was clear that we had an extension to our membership of the European Union that the 31st of October was no longer a relevant deadline. And just this week, they've agreed that we should have that general election. And actually, I think the Fixed-term Parliament Act did us a service there because it prevented the government taking us out of the EU without the consent of parliament, without the consent of the people on a no deal basis. And now our drama is going to continue for longer as a result.



**Jeffrey Rosen:** [00:44:15] bad for Britain, but good for constitutional students everywhere because it's so fascinating to talk about the permutations. And that leads to one more that I wanna ask Kim about. you had mentioned that, before we started that the EU law forbids, the UK from crashing out in violation of its own constitution and if the you decide to the UK has done so, it might judge Brexit to be illegal. Tell us about that and what could happen?

**Kim Lane Scheppele:** [00:44:46] well, this is the at the EU level this is all being governed by something called Article 50 of the Treaty of the European Union. And article ... part one Article 50 says a member state may leave the EU in accordance with its own constitutional requirements. So if the EU doesn't prohibit a country from- from crashing out, it won't recognize a country that's crashed out in violation of its own constitution. So this has raised some questions that have just started coming up as a lot of these- these issues have been discussing, you know, throughout this- this, podcast have been on the table. So what would it mean to follow the UK constitution?

So, so here's the dilemma. It's not that the either the EU forbids the UK from crashing out it's that if the UK doesn't follow its own constitution, it will not have satisfied Article 50 of the Treaty of the European Union. So the European Union cannot recognize the departure. Okay. Now, a number of people that the EU constitutions which are all treaties, are also sort of flexible. Because one thing a number of people have suggested is that if there is a Brexit, and the next government, immediately turns around and wants to rejoin, one of the fictions that the EU could use is that in fact, the UK had never left because it was in violation of its own constitutional rules.

So there's starting to be some discussion on the EU side of this about whether ... because this so divides the British public practically in half, that you can imagine this question arising. And then of course, this further enrages the people who really want Brexit because they say, "How dare the EU tell us we haven't really left?" So you can imagine that that the EU lawyers are not talking very loudly about this in the UK right now. But this is certainly a discussion on EU side that there has to be a constitutional process on the member states side for the EU to recognize that the departure has happened.

And of course, the final word on that, if this became a question in a lot would be the European Court of Justice, which is like waving a red flag in front of a bull because one thing that the advocates of Brexit have said is a, is a primary motivation for getting out is to not be governed by foreign courts anymore. So every time Brexit has been sort of like a very, very windy road, where every time you come around to bend, you think, "Ah, okay, fine. Now we know where we are." And then there's another bend and there's another set of legal questions. And so, if you do this podcast next week, you'll find that we're already on to about seven new constitutional questions both on the EU side and on the UK side, which is why Brexit is this never ending struggle. Which is fascinating for people who are interested in constitutional issues, but pretty exhausting for the general public.

So just to get say one last thing that it will tell us something about what this is felt like in the UK, that, Sky News recently announced that they're going to have five hours ... a five hour program every day of Brexit for you, news, because people are so exhausted and find it so



impossible to talk to each other, that they're not watching the news at all. So I think Sky News is trying to draw people back by saying, and now we're not going to talk about Brexit.

So it sort of made the public discussion kind of toxic, in the UK. And given that the, that the legal constitution is really a political constitution as Meg says. Once you have this level of political disagreement, it of course affects the constitution as well.

**Jeffrey Rosen:** [00:48:39] I can't resist one last question to Meg, but be of course, to respond about whatever you please but, but also about this question of the relationship of EU law, and ask what would an illegal Brexit look like? What could, what could you imagine the EU might have judged being in violation of the British constitution? And- and since the question is obvious, how was it ever possible to reconcile the ability of the European Court of Justice to have its decisions binding, on the UK with the principle of parliamentary sovereignty itself?

**Meg Russell:** [00:49:12] Oh, my goodness. I'm not sure I want to answer that question to be honest. [laughing] If I could just say something about whether we should move to a written constitution.

**Jeffrey Rosen:** [00:49:20] Mm-hmm [affirmative].

**Meg Russell:** [00:49:20] Because Kim made this really important point that a lot of these controversies that we've been facing in the UK about the use of referendums, about the particularly in the last couple of months, with the prorogation which was ruled unlawful, and it seems that the flexible nature of the British constitution the extent to which we depend on convention, is actually very vulnerable to political actors like Prime Minister Johnson who come along and don't really wanna be bound by those conventions, they're really pushing the limits of what can be done within our conventional political constitution.

So there are more and more voices coming up and saying that things should be written down. Kim is right in that. But she's also completely right to say that Brexit has so divided the British politics, that it is hard ... There's a kind of conundrum because it's hard to imagine at the moment, British people being able to come together and agree on some of these fundamental, constitutional principles, which of course, by their nature would be binding for the way that we do politics for decades to come. So this has thrown up lots of questions about the constitution, and it's made it look rather unstable. But I think it's gonna be quite a while before we've got beyond this Brexit crisis. And we might be able to sit down in a calm way and come together and agree in some kind of a consensual manner, what our rule should be because we become divided about the rule, of what the rule should be, as well as what the outcome of Brexit should be.

**Jeffrey Rosen:** [00:50:58] Fascinating. I- I would love to continue this for another hour, but we must wrap up. And I think, Kim, I'm gonna ask you this, final question. Once the dust settles, if Britain were to adopt a written constitution, what principles should and might it adopt?



**Kim Lane Scheppele:** [00:51:20] Ah, well, first of all, that's for Britain to decide not for an American, even if I'm sitting here in the UK. but it seems to me there's certain topics that keep recurring that you could imagine would be on this list. So one is to think about entrenching a constitution so that not a single Act of Parliament but perhaps an Act of Parliament followed by an election, followed by another Act of Parliament or a popular ratification or something that makes constitutional change more difficult than an ordinary statute, that would be the first thing. That would be a huge change, as Meg has indicated.

But a lot of what the problem has been, at least with the UK negotiating with- with the EU and other in the- in the international sphere is that, the UK can't commit itself beyond the moment. And that I think, is increasingly a problem. There's also been a persistent question about, what the composition of the House of Lords should be. This is a really big topic that's been on the agenda for a long time.

So there are various conventions about the Lord's not blocking, legislation that comes out of a party Manifesto, for example, so that the undemocratic side of the parliament doesn't override the democratic side on certain topics, for example, and there's also a there's been a general diminution in the Lord's, powers in general, but there was sort of unfinished reform that, that was ... Tony Blair started it, never finished. to think about what the role of the Lord should be, what a second chambers for in the British constitution and that's something else that's been largely unresolved.

there's the question that Meg raises about should referendum be permissible under any circumstances? And then there's this question about an entrenched Bill of Rights. So right now, of course, the UK is, at least at the moment, still a signatory to the European Convention on Human Rights. Though I met [my dad 00:54:32] back when Theresa May was Home Secretary. She was the one who was advocating pulling out of the Council of Europe and abandoning commitment to the European Convention on Human Rights. She got Brexit instead, which is a totally different thing. But in any event, there's a question about whether the UK is going to stay in the European Convention, which commits the UK to an externally, drafted bill of rights or whether it will try to internalize a bill of rights and make them legally enforceable in the UK constitution.

So just from those few topics, and there's so many more, what you can see is that these are really fundamental, big questions, any one of which would completely change the way British politics are done. And I agree with Meg that right at the moment. It's really hard to imagine there being any peaceful discussion of any of this stuff. As long as that that pitch battle over Brexit has left so many political scars. So the question is whether, you know, by the time things get calm again, which one hopes they will, everyone will say, "Well, you see the constitution worked." And then there'll be no need to change it. And given British history. It could be that that second story is actually what happens.

**Jeffrey Rosen:** [00:54:30] Hmm. If- if I may give the last word to Meg because, as you say, Kim, it's not for Americans to, prescribe. In this regard, would you add any constitutional items to the really interesting list that, Kim just offered, namely, to step are more cumbersome process for constitutional amendment than ordinary statutes, reform of the





Lord's and some form of entrenched Bill of Rights. And do you believe, Meg that when the dust settles, there will be meaningful debate about written constitution? Or will people say, "Whoop, In the end, the flexible political constitution worked"?

**Meg Russell:** [00:55:09] Well, I wrote ... I said at the top of the program that there were two things about a constitution is four-minutes content, and we're talking about both of them here form should we move to a written constitution which is less flexible, which is more difficult to change, and then content, what should be within that constitution. Kim has run through some of the things that would need to be covered. She's mentioned, the powers of the House of Lords. I would also include the membership of the House of Lords, which is controversial. She's mentioned human rights, I would throw in evolution and their respective powers for example of the Scottish Parliament and the Westminster parliament, you could even throw in the powers of the Queen and the role of the queen. You know, once you put all of that stuff together, the chances of people agreeing on what the principles of all of those relationships should be, are close to zero. And if you then say, Well, whatever you agree is gonna be subject to some very difficult amendment process that it can't simply be changed by an Act of Parliament, you know, you have to go through some multistage process, it's gonna become very rigid, the chances of it being agreed, reduce beyond zero.

so I think that we are in the middle of a huge maelstrom of, politics and constitutional debates at the moment. it may be that things calm down, but as I said, at the beginning of the program, the way that most, countries have got their recent constitutions is through crisis through breakdown of the system through, you know, civil war, defeating war, the end of dictatorship, that kind of thing. I think it would take a total meltdown in our system to force us to really address all of these questions and come up with a package. Otherwise, I think the British, the British are likely to continue one way or another muddling through with their constitution, which is what we've always done.

**Jeffrey Rosen:** [00:56:52] Thank you so much Meg Russell and Kim Scheppele for a riveting illuminating and deeply educational discussion of the British constitution, constitutionalism and the future of Brexit. Meg, Kim, thank you so much for joining.

**Kim Lane Scheppele:** [00:57:06] Thank you. It's been great fun.

**Meg Russell:** [00:57:08] You're very welcome.

**Jeffrey Rosen:** [00:57:13] Today's show was engineered by Greg Scheckler, and produced by Jackie McDermott. Research was provided by Lana Ulrich, Robert Black and the constitutional content team. Please rate, review and subscribe to We the People on Apple podcast and recommend the show to friends colleagues or anyone in the US, in the UK or around the world who is hungry for weekly constitutional debate. And always remember that the National Constitution Center is a private nonprofit. We rely on the generosity, passion and engagement of people from around the country and around the world who are inspired by our nonpartisan mission of constitutional education and debate.



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