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The Historical Constitution*

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Introduction

All constitutions rely on history. Without constitutional history the political affairs of the United Kingdom would be unintelligible. As J. R. Seeley aphorised in his inaugural lecture as Regius Professor of Modern History at Cambridge in 1885: 'History without Political Science has no fruit; Political Science without History has no root.'[1] For such reasons the United Kingdom's constitutional history is as much the concern of the politician as it is of the historian or lawyer. Constitutional history exists to speak precedent unto power.

The United Kingdom, for much of its history, has made an art, or perhaps a muddle, of the ambiguity, conjecture and utility its constitutional system affords. British history for generations was taught and studied through its constitution. Its centrality to the discipline and its influence on identity and ideas is real and extensive. A symbiotic relationship exists between history and the constitution.

The British constitution was seen as intrinsic to the status and rights of not only the state, but also of those who lived in it. In 1803 Edward Christian, the first Downing Professor of the Laws of England at Cambridge, wrote of the 'English' constitution, that other than 'some slight and perhaps inevitable imperfections' – a sentiment that resonated throughout British history –

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[1] J. R. Seeley, *Introduction to Political Science: Two Series of Lectures* (London: Macmillan, 1896), p. 4.

that to be free, is to be born and to live under the English constitution.[2]

Christian's words bring a feel of the vanity and prejudice inspired by the constitution and its history. This is apparent when considering how such history is used to inform and influence power, law and society. The writing, studying and teaching of constitutional history means more than covering a set of official texts and edicts. It also compels a study of the forces and passions in society as well as the manifestation of England's and then Britain's ideals and later the United Kingdom's through its institutions and political customs. Constitutional history is therefore not narrowly confined to debates in ivory towers among historians and lawyers, but is of wider significance. The constitution can more usefully be understood through the wider horizon of the state and its machinations. This extension of the constitution's purview, while necessary, requires a command and appreciation of numerous sources and spheres of intellectual and empirical material.

This chapter on the historical constitution seeks to interrogate these ideas and show the extensive nature and form that constitutional history has taken. The chapter aims to explore the multiple facets and expanse of constitutional history by focusing on three interrelated themes. First, the history of the constitution will be covered to show that rather than seeing constitutional history purely as one of documents, institutions and events it is valuable to explore how constitutional history is indelibly one of culture and ideas that have had a powerful hold over British history, law and politics. Second, constitutional history is central to an understanding of how the constitution gave or withheld power and also of the people that sought its refuge or reform with varied results. Finally, the theme of law and utility will be explored to see the synergy of law, politics and constitutional expedience, which creates ongoing tension between the exercise of power and will on the one hand, and compliance with norms and standards on the other. Studying the constitution and its history is studying this interactive tension. Collectively these three sets of connected themes are put forward to show the breadth, variety and consequence of constitutional history and its importance for greater historical inquiry. History is needed to penetrate the

[2] Christian also approvingly quoted Cicero to further emphasise his claim: 'Hanc retinete, quaeso, Quirites, quam vobis tanquam hereditatem, majores vestry reliquerunt'. [Preserve, I beseech ye, O Romans, this liberty, which your ancestors have left ye as an inheritance]. Sir Ivor Jennings, 'Magna Carta and Constitutionalism in the Commonwealth' in H. Kumarasingham (ed.), *Constitution-Maker: Selected Writings of Sir Ivor Jennings* (Cambridge: Cambridge University Press, 2015), pp. 284–285.

constitutional fog that falls on governance, politics and law. F. W. Maitland explained that whereas in some countries, questions of constitutional rules and duties would be ones of constitutional law, in England they 'would be questions of convenience' since all that can be called 'constitutional' had 'no special sanctity' in law.[3] This characteristic presents the United Kingdom's constitution instead as a necessary mixture of history, law and politics. It is therefore more than a convenience to study constitutional history.

Culture and Ideas

The constitutional history of the United Kingdom would be meaningless without acknowledgment of the powerful role culture plays in its image and influence. It is a characteristic of many British constitutional histories written before the twenty-first century to have legislative, legal and institutional details prefaced with a national and patriotic dimension of the constitution, which often veered into the uniqueness and superiority of the English and their constitution. In 1966 Keith Thomas decried English historical writing as warped by the Victorian era's pride in British ascendency and consequent faith in the superior verity of its institutions. This legacy and climate saw English constitutional history as a flag-waving, pedagogic tool since many historians in the United Kingdom, well into the twentieth century, believed and taught that 'the constitution was England's greatest contribution to the world'.[4] The Irish-Australian constitutional historian William Edward Hearn, for example, in his popular scholarly late nineteenth-century book praised by figures like A. V. Dicey, could on one hand, describe and list in great breadth many constitutional and legal precedents with detailed analysis on issues like ecclesiastical representation or taxation powers and, at the same time, wax lyrical about the inherent excellence of the British constitution and its history. The constitution, Hearn swooned, was like 'the stateliest oak that now graces the green fields of England', a 'wondrous Constitution, so old, yet stretching forward (if Heaven pleases) to such indefinite futurity' tracing back to King Ine of Wessex's seventh-century Code of Laws. Hearn, like other constitutional writers throughout British history sought to show the idea and continuous lineage of the constitution as essential to British culture.

[3] F. W. Maitland, *The Constitutional History of England*, H. A. L. Fisher (ed.) (Cambridge: Cambridge University Press, [1908] 2007), pp. 535–537.

[4] Keith Thomas, 'The Tools and the Job', *Times Literary Supplement*, 7 Apr. 1966, pp. 275–276.

Such histories promoted a powerful message. To look back was to see how the constitution should be. Change was not the object, but past work on constitutional reform by political leaders was viewed as a matter of

> restoration, not of change. They desired to remove the unsightly excrescences of our Constitution, the gilding and the plaster with which profane and inartistic hands had deformed the grand old temple of liberty that lay sullied but uninjured beneath. Not a stone of the original structure did they wish to move; not a fragment of the time-honoured edifice that they did not regard with affectionate veneration and pious solicitude.[5]

Constitutions became, Linda Colley argues, a global political and cultural technology in the eighteenth century and gained iconic importance as a signifier of national status and civilisational affectations. For Britain this constitutional icon was the Magna Carta: a 'reviving cult around this liberty text (as some imagined it to be) was less a celebration of ancient constitutionalism' than a recognition of the growing worldwide symbolism of a constitution as a projection of history and nationalism.[6] Edmund Burke expressed this belief in 1775 when he spoke of the British constitution as the instrument that enabled the country's triumphs of liberal and enlightened good by forging 'the spirit and the power which conducted us to this greatness'.[7] These accounts were highly effective in promoting, for contemporary consumption, a culture of British constitutional hegemony and the rite of reading retrospective merit into the constitutional past. A certain amazement with the constitution was not restricted to the English. As Isaiah Berlin observed, for political thinkers like Joseph de Maistre and Montesquieu the British Constitution was a 'marvel': 'The very absurdities and conflicts of British laws and customs are evidence of divine power guiding the faltering hands of men. For there can be no doubt that the British constitution would have collapsed long ago had it been of merely human origin.' Berlin concludes that 'this is an argument in a circle with a vengeance'.[8]

[5] William Edward Hearn, *Government of England: Its Structure and Development*, 2nd ed. (Melbourne: George Robertson, 1886), pp. 4–5.
[6] Linda Colley, *The Gun, the Ship & the Pen: Warfare, Constitutions and the Making of the Modern World* (London: Profile Books, 2021), pp. 96–101.
[7] Richard Bourke, *Empire and Revolution: The Political Life of Edmund Burke* (Oxford: Princeton University Press, 2015), p. 8.
[8] Isaiah Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas*, Henry Hardy (ed.), 2nd ed. (London: Pimlico, 2013), p. 168.

Not all saw a celestial constitution of perplexity and wonder. Humans were very much at the fore. The Edinburgh historian and philosopher David Hume, who would write his own multi-volume constitutional history of Britain, opined in 1741 that the best way to think of the constitution and system of government was to recognise that 'every man ought to be supposed a knave' acting in private self-interest.[9] It was in the interests of Britain to present its constitutional history as laudable and instructive of its power. Beyond England, Scottish unionist historians like William Robertson in his *History of Scotland* (1759) described the 1707 union of England and Scotland as one of equals, which made neither 'feudatory to the other'; if that were not the case, no 'treaty of union' could have been concluded. An alternate reading of the union's constitutional importance by the Scots would render their interests irrelevant and exposed accordingly.[10] Welsh affairs in contrast were to be considered England's from the time of the annexation of the territory by Edward I. From 1747, it was ruled that any mention of England in an Act of Parliament was synonymous with Wales. The following century would see the Welsh Courts of Great Sessions abolished and the Principality's laws placed under English jurisdiction.[11] Westminster was there to subsume the private and corporate interests of all parts of the union. In practice, naturally, this was, and is, disputed. The politics of autonomy have long been a feature of constitutional debates, especially at times of crisis such as over the issue of 'Home Rule' for Ireland. In the summer of 1913, Ireland seemed on the verge of war with armed militias like the Ulster Volunteer Force and Irish Citizen Army ready to attack the other in order to defend their competing interests in what Ireland should be. Figures like George V, fearing that conflict could spread to the British mainland, appealed to political leaders for a constitutional settlement, building on earlier ideas on 'devolution' by the Earl of Dunraven, a sympathetic Anglo-Irish landlord, to provide autonomy in order to placate the various interests within the union. Beyond a parliament and executive for 'Southern Ireland' and a parliament and executive for 'Ulster', ideas circulated during this tense period that anticipated devolution reforms in the late 1990s by the Blair government, for new parliaments in Scotland, Wales and even for England itself. Westminster

[9] David Hume, 'Of the Independency of Parliament' in Knud Haakonssen (ed.), *Hume: Political Essays* (Cambridge: Cambridge University Press, 1994), p. 24.

[10] Colin Kidd, *Union and Unionism: Political Thought in Scotland, 1500–2000* (Cambridge: Cambridge University Press, 2008), pp. 96–97.

[11] William R. Anson, *The Law and Custom of the Constitution, Part II: The Crown*, 2nd ed. (London: Stevens & Sons, 1896), pp. 217–218.

would remain the paramount legislature. Austen Chamberlain wrote in November 1913 of these plans, 'Four or five Parliaments ... may be a nuisance but can hardly be a serious danger to Westminster sovereignty'.[12] Whether Chamberlain was right or wrong, the ability and appeal of the British constitution to house those beyond England, whether by conquest or convention, was a crucial feature.

The constitution was also undeniably a powerful emblem beyond the British Isles, especially when imperial Britain was the world's foremost power. It found admirers in unlikely places. Simon Bolívar, El Liberator of the Spanish American Empire, advised the delegates and constitutional drafters of the new Venezuelan state: 'Representatives, I suggest that you study the British constitution, which is the one that seems destined to bring the greatest good to the peoples who adopt it.' As Colley explains, Bolívar was not attempting to copy the British constitution, but saw the selective utility of its elements, during the tumultuous creation of Latin America, to balance executive power with societal consent. Britain's 'popular constitution' was one despite being a monarchy, which Bolívar believed 'recognizes popular sovereignty, the division and balance of powers, civil liberty, freedom of conscience, freedom of the press, and all that is sublime in politics'.[13]

As Britain's empire and might expanded so did the culture of constitutional hagiography. A certain disquiet occasionally surfaced. The poet, Robert Burns, could on one side, declare 'the British Constitution, as settled at the [1688] Revolution, to be the most glorious Constitution on earth, or that perhaps the wit of man can frame'. Yet at the same time, Burns, who sympathised with the American and French revolutionaries, could complain that Britain had 'a good deal deviated from the original principles of that Constitution', especially as 'an alarming System of Corruption has pervaded the connection between the Executive Power and the House of Commons'.[14] Prejudice against foreign constitutions was a strong trait of Britons; and no more so than in the case of the French. Sir Henry Maine believed, perhaps conservatively, that 'detestation for the [French] Revolution did not cease to influence politics till 1830'.[15] Burke famously attacked the ideals and actions of

[12] Harold Nicolson, *King George the Fifth: His Life and Reign* (London: Constable & Co Ltd, 1952), pp. 218–229.
[13] Colley, *The Gun, the Ship & the Pen*, p. 233.
[14] Philip Butcher, 'Robert Burns and the Democratic Spirit', *Phylon*, vol. 10, no. 3, 1949, p. 267.
[15] Henry Sumner Maine, *Popular Government: Four Essays*, new ed. (London: John Murray, 1890), pp. 12–13.

the French Revolution as dangerous and ill-conceived. He implored the need to preserve 'the firm ground of the British constitution' rather than attempt 'to follow in their desperate flights the aëronauts of France' in their dangerous constitutional innovations.[16] In her stinging 1790 pamphlet *A Vindication of the Rights of Men*, Mary Wollstonecraft publicly disagreed with the reverential cult surrounding the constitution that Burke asserted. The constitution of the state was not one of 'religion and piety'. Instead, to Wollstonecraft, it was one that worshipped property, the rich, and men using the false constitutional deities of Crown, Parliament and Church. She refused 'to reverence the rust of antiquity' that the constitution and English history conjured for Burke with its fatal propensity to

> term unnatural customs, which ignorance and mistaken self-interest have consolidated, the sage fruit of experience: nay, that, if we do discover some errors, our feelings should lead us to excuse, with blind love, or unprincipled filial affection, the venerable vestiges of ancient days. These are gothic notions of beauty – the ivy is beautiful, but, when it insidiously destroys the trunk from which it receives support, who would not grub it up?[17]

In his 1912 history of English government, A. Lawrence Lowell wrote from Harvard that England had a 'peculiar veneration for custom' that meant constitutional 'tinkering' was the preferred method of constitutional change rather than radical reform.[18] Such accounts, however, hide Britain's constitutional furnace, belching out actions and policies that not only challenged the status quo, but often took the state into directions and actions that had hitherto seemed implausible and contradictory judged by historical practice. The so called 'Glorious' Revolution of 1688, celebrated as a sensible corrective to monarchical absolutism, was, in reality, more a spectacular fix utilised by politicians, lawyers and historians alike. The expulsion of a legitimate sovereign, James II, because of his open Catholicism and his replacement by a Protestant pair in his daughter and Dutch son-in-law, Mary and William, risked full-scale civil war, the violation of legal norms and the collapse of institutions and offices of state. Indeed, the seventeenth century saw the execution of James's father, Charles I, a republic and military dictatorship

[16] Iain Hampsher Monk (ed.), *Burke: Revolutionary Writings* (Cambridge: Cambridge University Press, 2014), p. 249.
[17] Sylvana Tomaselli, *Mary Wollstonecraft: A Vindication of the Rights of Men and a Vindication of the Rights of Woman and Hints* (Cambridge: Cambridge University Press, 1995), p. 8.
[18] A. Lawrence Lowell, *The Government of England*, vol. 1 (New York: Macmillan, 1912), p. 14.

under Oliver Cromwell, civil wars, extensive and armed religious turmoil, fundamental disagreements over principles of government, major revolts in Ireland and Scotland and foreign invasion. All of this clearly undermined the constitutional bedrocks of the state, but also posed challenges to scholarly explanation of the traditional historical continuum of the constitution. As J. G. A. Pocock argues, it suited England to see 1688 as a bloodless revolution achieved under the 'fabric of an ancient constitution' instead of the reality of destructive havoc, divided allegiances, weaponised positions, contested dogma and transactional replacement of kings.[19]

The narrative encouraged the belief that the constitution and its history were supported by heaven's command and the people's will. When the constitution was attacked, the forces of God and nature would correct any extremes. Even the legend, that James II had petulantly tossed the Great Seal ('emblem of sovereign sway' as a later Lord Chancellor, John Campbell, described it) into the Thames just prior to his flight to France to impede any moves against him, was further mythologised to explain the indestructible constitution and its symbols. 'Heaven' intervened, the Lord Chancellor wrote, so that the seal was netted by a fisherman who 'restored it to the Government' and thus ensured the divine continuity of the constitution, which did 'not depend on the frailty of man'.[20] All of this was sustained by elastic constitutional history. William of Orange summoned 'Convention' parliaments in England and Scotland which, though dismayed by James II, had various interpretations of the dramatic events and what to do about them. The Tory belief in hereditary monarchical succession was tested, as were hopes among their number that James II could recant, reform and return. When this did not happen, it was read conveniently as abdication of the throne. The Whigs took a different view, soon after notably theorised by John Locke in his *Two Treatises of Government* (1690) in terms of the 'contract' argument, that James II had reneged in his responsibilities to the people and violated the rights and fundamental laws having 'abdicated the government' and abandoned the kingdom. As a result, for the Whigs, the throne was vacant; and this legitimised the dramatic succession of Mary and William. While not a condition of the enthronement, the royal couple accepted the Declaration of Rights (the 'Claim of Right' in Scotland), which would

[19] J. G. A. Pocock, *The Discovery of Islands: Essays in British History* (Cambridge: Cambridge University Press, 2005), pp. 120–121.

[20] See Hilary Jenkinson, 'What Happened to the Great Seal of James II?', *The Antiquaries Journal*, vol. xxiii, nos. 1–2, 1943, pp. 1–13.

become the 1689 Bill of Rights. The language of the law was purposely ambiguous to overcome party and personal rancour. It did, nonetheless, set out to prevent royal abuse of legal proceedings, taxation and direction of the armed forces. It also committed to frequent and free elections and the right of petition; but it also constitutionalised a sectarian principle of barring Roman Catholics from many offices of state including, most obviously, the throne. Yet, it is misleading to read the events of 1688–1689 as establishing a constitutional compact of subdued monarchy and enhanced parliaments of the people. Most of the participants were interested just as much, if not more, in the immediate protection of landed property that underwrote their constitutional privileges as in the long-term constitutional legacy the 'revolution' provided or the parliamentary rights that emerged.[21]

Constitution worship was an attractive idea and style of history despite its obvious shortcomings. Sir Ivor Jennings adduced 'very little in the theory of "the wisdom of our ancestors"'. He believed, instead, that a pragmatic theory operated in British constitutional history which, in essence, showed 'that slow evolution wraps our institutions in the fabric of society'.[22] Yet even the idea of evolutionary pragmatism is found wanting in the quest to conceptualise the state and its history. Historians, especially looked to German constitutional 'science' to help form British constitutional history. From the eighteenth-century German academics developed the term *Staatswissenschaft*, which implied a science of the state that used economic, political, legal, social and historical factors to study, and prepare for, government and statecraft. In the early nineteenth century, the influential German historian, Leopold von Ranke, famously stated that facts were paramount to an historian. Ranke judged that the duty of the historian was to avoid 'moralising' and rather 'simply to show how it really was (*wie es eigentlich gewesen*)'. As E. H. Carr reflected well over a century later 'this not very profound aphorism had an astonishing success'.[23] Constitutional history in the British tradition tried to follow the German example and incorporate elements of the science of the state and produce a factual record. H. A. L. Fisher stated in his biography of his brother-in-law, the legal historian F. W. Maitland, that two books greatly affected the early 'intellectual virility' of the famed Cambridge constitutional historian. One of those works was

[21] Mark Kishlansky, *Monarchy Transformed: Britain 1603–1714* (London: Penguin, 1997).
[22] H. Kumarasingham, 'Sir Ivor Jennings' "The Conversion of History into Law"', *American Journal of Legal History*, vol. 56, no. 1, March 2016, pp. 126–127.
[23] E. H. Carr, *What Is History?* (London: Penguin, 1990), pp. 8–9.

Friedrich Carl von Savigny's multi-volume *Geschichte des Römischen Rechts im Mittelalter* (1815–1831). Maitland found the German jurist's history of Roman law impressive for its framework of historical jurisprudence and legal reasoning of medieval and 'Teutonic civilization', and even started a translation into English. The other book we are told was 'found in a London club'.[24] It was William Stubbs' three volume *Constitutional History of England* (1875–1878). Stubbs, a nineteenth-century historian and bishop, also looked to German historical methods and called his famous constitutional texts both a 'treasury of reference' and a 'manual for teachers and scholars' so that the British could become well versed in the machinery of state of their own land and not just ancient Athens and Rome.[25] Constitutional history in this rendering became instructional. Stubbs was admired by a successor in the Regius Chair of Modern History at Oxford as being a 'scientific historian' whom he directly compared to Darwin in that his *Constitutional History* 'textbook' was 'one of the finest examples of the process of evolution ever worked out'.[26] It is no great stretch to find an almost biological exclusivity of the constitution and nation in these once celebrated styles of history as being the subjective property of 'virtuous' Englishmen to the exclusion of others on account of gender, race and class.[27]

In 1901, the scholar-politician, James Bryce, attempted to classify political systems, including Britain's, in order to identify their constitutional characteristics. Rejecting 'written' and 'unwritten' as categories, he saw the constitutions of older states, such as Britain with its common-law traditions and consequent 'elasticity', as being of the 'flexible' type that can be bent and altered in form while retaining [its] main features', as opposed to the 'rigid' type predominantly found in newer states. Yet Bryce, like many, struggled to differentiate between laws that are constitutional and those that are not. The Scottish Universities Act of 1852 would not be considered a constitutional

[24] H. A. L. Fisher, *Frederick William Maitland, Downing Professor of the Laws of England: A Biographical Sketch* (Cambridge: Cambridge University Press, 1910), pp. 48–50.

[25] William Stubbs, *Select Charters and Other Illustrations of English Constitutional History: From the Earliest Times to the Reign of Edward the First*, 8th ed. (Oxford: Clarendon Press, 1895), pp. v–vi.

[26] This was Fredrick York Powell. James Campbell, 'Stubbs, Maitland and Constitutional History' in B. Stuchkey and P. Wende (eds.), *British and German Historiography, 1750–1950: Traditions, Perceptions and Transfers* (Oxford: Oxford University Press, 2000), p. 103.

[27] Catherine Hall, Keith McClelland and Jane Rendall, *Defining the Victorian Nation: Class, Race, Gender and the Reform Act of 1867* (Cambridge: Cambridge University Press, 2000), pp. 25–28.

statute and yet it modified the constitutionally critical Act of Union; however, there was technically no difference between the status of these statutes.[28]

The constitution stretched far in its historical and legal reach. Constitutional theories and ideas are useless without context and culture. Linked to this is the attention constitutional history gives to politics and behaviour. Legal and political theorists like Burke, Locke and Montesquieu saw this and all considered that laws should be made to underscore the civilisation of the state. William Blackstone even wrote, in the 1769 edition of his famous *Commentaries of the Laws of England*, that individuals were legally 'bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners, and to be decent, industrious and, inoffensive in their respective stations'.[29] Yet there were those who believed that scandalous behaviour at the highest 'stations' littered British history and corrupted the state. The republican historian Catherine Macaulay in her multi-volume *History of England*, which appeared from 1763, critiqued the personal 'imperfections and vices' of the British establishment, especially royalty, and the calamity their peccadillos, lovers and favourites inflicted on the constitution. Such analysis had an underlying theme of reform to remedy the constitutional and societal rot in favour of normal citizens. The radical libertine, John Wilkes, popularised Macaulay's intellectual points on the constitution to a wider spectrum of society by peddling vivid sexual innuendos and xenophobic abuse about figures such as the Scottish nobleman, John Stuart, 3rd Earl of Bute, who was personally chosen by George III, whom he had closely tutored as a young man, to be prime minister in 1762. Wilkes graphically spread lurid and nationalistic rumours that Bute was having an affair with the King's mother and insinuated a Stuart Scottish plot to rule England. These smears were used to showcase that scandal and corruption lay at the heart of the constitution and were, in Bute's case, part of Wilkes' attempt to question the rights of the King to select a prime minister that did not enjoy support of parliament, the readers of his newspaper the *North Briton*, or from crowds of 'middling and inferior sorts of people' whom he stoked on the streets of London.[30] Accepted conduct and societal norms were powerful themes in British constitutional history designed to distinguish those who deserved power and those who did not.

[28] James Bryce, *Studies in History and Jurisprudence*, vol. I (New York: Oxford University Press, 1901), pp. 126–134.

[29] Keith Thomas, *In Pursuit of Civility: Manners and Civilization in Early Modern England* (New Haven and London: Yale University Press, 2018), pp. 338–339.

[30] Anna Clark, *Scandal: The Sexual Politics of the British Constitution* (Oxford: Princeton University Press, 2006), pp. 19–52.

Power and People

Early modern political thinkers articulated a common belief that the interests of the people were represented by others, especially through the responsible leadership of the sovereign. The fifteenth-century jurist and thinker, Sir John Fortescue, was dismissive of the idea that the people were a distinct political community since 'a people beynge headless is not worthye to be called a bodie'. The people needed a head. In the sixteenth century, scholars employed and popularised the idea of 'mixed monarchy', which saw the monarch, lords and commons as collectively representing the people and all united under one constitution.[31] Three hundred years after the 1567 English translation of Fortescue's *A Learned Commendation of the Politique Lawes of Englande*, in 1867 Walter Bagehot explained, in his famous *The English Constitution*, that it was no 'defect' to have the 'effective exclusion of the working classes from effective representation'. Bagehot, echoing Fortescue, explained stylishly that the constitution's symbolic power and 'dignified' parts were crafted to 'impress the many' in order that the elite could with 'efficient' power discreetly 'govern the many'.[32] Richard Crossman perceived that Plato's 'Noble Lie' was used by writers on the British constitution, like Bagehot, where a version of history was given not just to describe the history of the development of the constitution, but also a feeling of respect, if not deference. While criticisms and flaws are highlighted, the people must be persuaded not to overthrow the constitution and its institutions. In thus being descriptive and prescriptive the constitutional historian and writer, perpetuates, 'the acquiescence of the many in the rule of the few'.[33] However, as the twelfth century cleric and scholar John of Salisbury recognised in his *Policraticus* (1159) while the ruler 'holds the place of the head' and is 'rightly preferred before others', the church guides the body as the soul, the ruler's counsellors being the heart, the tax collector and soldier forming the two hands, it is the peasantry as the feet 'who raise, sustain and move forward the entire weight of the body' and despite the different and unequal functions of these and other parts only in cooperation can the body politic function in the collective good of the whole.[34]

[31] Quentin Skinner, *From Humanism to Hobbes: Studies in Rhetoric and Politics* (Cambridge: Cambridge University Press, 2018), pp. 341–383.
[32] Walter Bagehot, *The English Constitution* (London: Fontana, 1978), p. 176.
[33] Ibid. R. H. S. Crossman, 'Introduction', pp. 26–28.
[34] Cary J. Nederman, "The Physiological Significance of the Organic Metaphor in John of Salisbury's "Policraticus"', *History of Political Thought*, vol. 8, no. 2, 1987, pp. 212–217.

Finding power in the formal, historical constitution was not straightforward. It would not be until the Chequers Estate Act 1917 that statutory reference was made to the most powerful person within the modern constitution: the Prime Minister. The person commonly taken to be the first holder of the title, Sir Robert Walpole, was at pains to reject the label. In a motion of 13 February 1741 to remove Walpole, Samuel Sandys, a leading member of the opposition, argued that 'According to our constitution we can have no sole or prime minister.' He charged the resident of 10 Downing Street with committing 'the most heinous offence against our constitution' having 'monopolized all the favours of the crown' by irresponsibly assuming 'sole direction of all public affairs' instead of sharing power. Walpole, who had effectively functioned as prime minister since 1721, stated in refutation: 'I unequivocally deny that I am sole and prime minister, and that to my influence and direction all the measures of government must be attributed.' In mitigation Walpole said that he only functioned at the King's pleasure and was ready to depart should confidence in him be withdrawn.[35] The location and nature of power may have been obscure in statute and constitutional law, but it was clear in practice and in the popular imagination that Walpole and his successors were indeed the *prime* minister. Constitutional history would be redundant without the analysis of power even though for much of British history statute and law barely recognised the reality of the political executive. Near the end of the eighteenth century, James Gillray's caricature, of an obscenely huge prime minister, William Pitt, literally straddling over the chamber of the House of Commons, flattening his great rivals Charles James Fox, Thomas Erskine and Richard Sheridan with one foot while the other is held up by Henry Dundas and William Wilberforce, depicted in satire what the law had yet to recognise namely the reality of prime ministerial power. Political personalities were critical because they had the power to direct and deflect the constitution. As Samuel Taylor Coleridge remarked, the nimble George Canning 'flashed such a light around the constitution that it was difficult to see the ruins of the fabric through it'.[36] Several politicians fitted this description.

Maitland, was someone who, with great elegance, rejected the idea that people in the medieval period used the word 'liberty' or thought of 'sovereignty'

[35] *English Historical Documents, c1714–1783*, vol. vii (London: Routledge, 1996 [1957]), documents 19B and 19C.

[36] Boyd Hilton, *A Mad, Bad and Dangerous People? England 1783–1846* (Oxford: Oxford University Press, 2006), footnote 394, p. 308.

in the same way as those in more modern eras might. Despite this straightforward revelation and the eminence of Maitland's historical influence, the idea of constitutional constancy has been near irresistible for many scholars through the ages.[37] For E. A. Freeman the continuity of the constitution and its institutions, and their ancient pedigree, were as obvious as the Whig view of progress. This historical narrative gave power to institutions and people who ran them by giving them an ancient and continuous legitimacy. In a tellingly titled article in the *Edinburgh Review* in July 1860 called 'The Continuity of English History', Freeman claimed 'from the thirteenth century onwards we have a veritable Parliament, essentially as we see it before our own eyes. In the course of the fourteenth century every fundamental constitutional principle becomes fully recognised. The best worthies of the seventeenth century struggled, not for the establishment of anything new, but for the preservation of what even then was already old.' Even at the time of the Norman Conquest, England possessed, in her 'barbaric greatness and barbaric freedom' the 'germs' of 'every institution which we most dearly prize'.[38] In this Freeman, like other historians of that period especially, looked back into the political and constitutional history of England to give credence to the idea of having institutions and a constitution of near divine significance that needed conserving not abandoning.

However, Freeman, who served as Regius Professor of Modern History at Oxford, was no Conservative. Instead, he was a firm Liberal, who used his popular historical narrative to patriotically explain the 'origin of the national tradition of liberty' in Britain, an idea persuasively parroted in countless history faculties at the time.[39] Constitutional history was written with party politics in mind. Henry Hallam, considered to be the first writer to use the term 'constitutional history', in his influential *Constitutional History of England* published in 1828, was perceived as promoting history and philosophy aligned with the Whig party. A review of it by Robert Southey in the Tory *Quarterly Review* damned the book as full of 'prejudices of party'.[40] Historians like G. M. Trevelyan and his great-uncle, Thomas Babington Macaulay, (who penned an admiring review of Hallam), wrote their popular and rich histories with the partisan Whiggish idea of progression as its central theme. The

[37] John Hudson, *F. W. Maitland and the Englishness of English Law* (London: Selden Society, 2007).

[38] E. A. Freeman, 'The Continuity of English History', *Edinburgh Review*, July 1860 in *Historical Essays*, Series 1 (London: Macmillan, 1871), pp. 42–43.

[39] John Burrow, *A History of Histories: Epics, Chronicles, Romances and Inquiries from Herodotus and Thucydides to the Twentieth Century* (London: Allen Lane, 2007), p. 407.

[40] Michael Bentley, 'Henry Hallam Revisited', *The Historical Journal*, vol. 55, no. 2, 2012, pp. 454–456.

narrative was alluring. Yet, Herbert Butterfield thought it 'strange' that Macaulay 'should ever have imagined his *History of England* as transcending party prejudice'. From the seventeenth century, Butterfield continued, parties and historians did not want to be 'innovators', even if they were but, instead, to be seen as 'restorers of ancient ways' using history to 'discover what they wished to discover'.[41] A tendency that has not ended, especially on vexed subjects such as sovereignty. Trevelyan, who had begun as an 'angry young Whig', had by the end of his career in the mid-twentieth century, shifted to seeing the Liberals and Tories as necessary to each other in order to act as guardians of Britain's great institutions. Only together had they contributed to make Britain 'exceptional', and its constitution, history and liberties 'the envy of "less happier" lands'.[42] Party interests unquestionably propelled the constitution and its control was an accepted ambition to further political aims. Authors of constitutional histories were often adorned by party rosettes since such works provided an historical frame which either justified a party's record in government or explained the perils of not being so. It should come as no surprise that politicians as varied as Earl Grey, Lord John Russell, Benjamin Disraeli and Harold Wilson penned works of political and constitutional history.

The much-used school textbook, *The Groundwork of British History*, by two History masters from Harrow and Eton respectively, written and revised throughout the first half of the twentieth century, astutely asserted that 'the Constitution develops most when the Crown is for any reason ineffective'.[43] The monarch was a constant and active presence in the constitution, but changes in the eighteenth century saw the constitution move away from the sovereign's sway. This change was driven, in part, by the development of parties, as the Crown retreated from ruling without them. The Crown had not, however, become ceremonial. Between June 1710 and June 1711 alone, Queen Anne and her consort, attended sixty-four meetings of the Cabinet (but never of cabinet committees) dispelling impressions of a 'leisured' past.[44] The Queen was popular and able to appeal to the Tories as an Anglican Stuart and to the Whigs as a contractual monarch; and this versatility helped

[41] H. Butterfield, *The Englishman and His History* (Cambridge: Cambridge University Press, 1944), pp. 4–6.
[42] David Cannadine, *G. M. Trevelyan: A Life in History* (London: Penguin, 1997), p. 108 and generally pp. 95–140.
[43] George Townsend Warner and C. H. K. Marten, *The Groundwork of British History* (London: Blackie and Son, 1924), p. 100.
[44] J. H. Plumb, 'The Organisation of the Cabinet in the Reign of Queen Anne', *Transactions of the Royal Historical Society*, vol. 7, 1957, p. 142.

foster the growth of party politics. Even Anne's famous withholding of the royal assent to the Scottish Militia Bill in 1708 was on the advice of ministers rather than as an arbitrary projection of royal power. Anne died in 1714 without any surviving children, which meant that the Act of Settlement 1701 bypassed her Catholic half-siblings. Into the breach came Georg Ludwig von Braunschweig-Lüneburg, electoral prince of Hanover, who would become George I. The constitutional history of the state from the Hanoverian period began to assert styles of government that would have lasting impact on our historical understanding, if not the practice, of political power. Despite his inaptitude in the English language and early inexperience of the affairs of his new British realm, George I did not entirely leave the running of government to others, but he did rely on his advisers. Many key conventions of cabinet government and parliament emerged from the early eighteenth century that saw the sovereign become less of a force in the executive powers of the constitution. Instead, beginning with Sir Robert Walpole, monarchs delegated their instructions to a *prime* minister chosen on the basis of their ability to deliver royal policy preferences in cabinet and parliament. In consequence, the decisions of cabinet and statutes of parliament assumed greater significance.

However, it would be almost two hundred years after the Hanoverian dynasty took the throne before systematic record keeping of the apex of government became routine. In December 1916, in part due to the demands of war, a Secretary to the Cabinet from the Civil Service was appointed for the first time and the production of cabinet minutes and an office to serve the most important decision-making body in the land became a regular and mandated function. Like much of the constitutional history of the state this seemingly logical development of a cabinet office and secretary was in fact driven by exigencies and the vision of key personalities, in this case David Lloyd George and Sir Maurice Hankey.[45] On the other hand, while a cabinet secretariat might well be relatively new, the office of the Privy Council, which was seen by many historians as the original critical administrative organ of the state, can trace a systematic recording of its decisions to the Tudor period when the Council, in 1540, decided to appoint a clerk to administer its official activities.[46]

[45] Anthony Seldon, *The Cabinet Office 1916–2016: The Birth of Modern Government* (London: Biteback, 2016).

[46] See David J. Crankshaw, 'The Tudor Privy Council c.1540–1603' (Cengage Learning EMEA, 2009).

To some the highest levels of the state had forgotten the constitution's compact with the people. 'Originally the constitution must have been free', speculated John Baxter, a silversmith from Shoreditch, a politically active radical, and author of the 1796 text *New and Impartial History of England*, a work which sought to see in history the rights of ordinary people. As E. P. Thompson observed of such thinking on the constitution 'History was the history of its corruption', which gave ordinary working people, the right to 'defy the constitution', which no longer upheld their liberties and rights as 'free-born Englishmen' but favoured degraded aristocratic rule.[47] In the opinion of the famed Thomas Paine, who shared many of these critical constitutional views, the constitution had rotted and needed radical reform. As it stood it was only good for

> courtiers, placemen, pensioners, borough-holders, and the leaders of the Parties . . .; but it is a bad Constitution for at least ninety-nine parts of the nation out of a hundred.[48]

A narrow and formal analysis of constitutional history would see the limited position of women in the long eighteenth century. Lord Mansfield, as Lord Chief Justice from 1756, extended the 'exceptions' to the common-law rule that married women had no legal personality separate from that of their husbands. Yet this concentration ignored the broader and richer constitutional history of assertion by women and their contribution and reaction to the state. During this period, Mary Wollstonecraft challenged the patriarchal underpinnings of the constitution and argued that gender equality was essential and justified. In fact, the active participation of women could in fact be seen not only in roles such as political hostesses, but through involvement in local government and in political and reform movements, including seventy-three female associations working across Britain in the anti-slavery campaigns of the 1820s and 1830s. George IV's attempt, in 1820, to divorce his first cousin, Queen Caroline, and the proposed Pains and Penalties Bill that aimed to strip the Queen of her title and position, generated considerable political agitation. While the high politics of the trial of the Queen were conducted in the House of Lords, all manner of classes and people protested on the streets and by speeches and letters. Conceivably, these feelings were motivated by the restricted constitutional position of women in the state, even at the very top.[49]

[47] E. P. Thompson, *The Making of the English Working Class* (London: Penguin, 1991), p. 94.
[48] Ibid., pp. 100–101.
[49] Frank O'Gorman, *The Long Eighteenth Century: British Political and Social History 1688–1832*, 2nd ed. (London: Bloomsbury, 2017), pp. 353–357.

Throughout British history, the constitution seemed not to reach all in society. An ordinary northern Englishman in 1838 argued that the 'truth is we have no constitution, and it is high time the people set about making a constitution for themselves'.[50] Perhaps the most significant organised movement of popular protest concerning the constitution and the state of Britain was Chartism. The Chartists were a loose assemblage of disparate groups and individuals such as Scottish universal suffragists, Irish independence fighters, trade unionists, temperance campaigners and education reformers. Emanating from core groups like the London Working Men's Association and Radical MPs, they produced in May 1838 a People's Charter, drawn up by William Lovett and Francis Place, respectively a cabinet maker and a tailor, which contained six demands: universal manhood suffrage, secret ballots, constituencies of equal size, abolition of property qualifications for MPs, payment of MPs, and annual parliaments. The Commons needed to become, the Chartists proclaimed, 'the People's House'. Over the next decade the Chartists petitioned parliament three times with demands near constant to those published in 1838. The second petition presented to parliament in May 1842 reputedly listed more than 3 million signatures, while the Irish Protestant MP, lawyer and publisher, Feargus O'Conner, boastfully claimed that the third one, delivered in April 1848, contained over 5 million (though the House of the Commons disputed such high numbers). The new industrial heartlands of Glasgow, Manchester, Leeds, Birmingham, and the working and occupational labour classes of London, were particularly in evidence in their support. Nevertheless, each petition failed to convince more than a small minority of MPs in the Commons. The rejections were predicted to cause revolution which, in 1848, was raging across Europe, seeing popular upheavals demanding constitutional change and political rights. The Royal Family left London for the Isle of Wight at the Government's request when around 150,000 Chartist supporters descended upon Kennington Common in April 1848, who were met by a heavy and menacing military and police presence including 85,000 special constables. However, no revolution occurred and no coronets tumbled. Instead, the movement faded from consciousness, and while episodes of violence occurred and intensive discord openly existed, there was no bloody repression from the state and no armed militia determined to overthrow it. The Chartist message, while not completely adopted, was finding voice in key

[50] Colley, *The Gun, the Ship & the Pen*, p. 250.

laws and policies such as the Income Tax Act (1842), the Mining Act (1842), the Ten Hours Act (1847) and, most importantly, Sir Robert Peel's repeal of the Corn Laws, which had favoured landed interests by maintaining high grain prices to the detriment of others in society. Some historians argue that these reforms contributed to the weakening of the belief that the state was the enemy and indicated that society and constitution were moving away from serving only the interests of the landed oligarchy.[51] Eventually, all of the Chartist demands, except annual parliaments, would become reality and thus shedding their 'radical' label in constitutional history, despite earlier views to the contrary.

However, it would be a leap too far to read this as a victorious insertion of the people into the constitution. It is conventional to place great store on the electorate, and the reforms to expand it are heralded as critical achievements. The 'Great' Reform Act of 1832 created an electorate where just 3 per cent of the total population could register to vote and the Second Reform Act of 1867 increased this to about 10 per cent of the adult population (those who had reached the age of majority of twenty-one). In 1918 women were partially enfranchised and in 1928, when they finally had the same conditions to vote as men and same voting age of twenty-one, the electorate became around 90 per cent of the total adult population. By 1970 when the voting age was lowered to eighteen years the electorate had risen to almost 100 per cent of the total adult population.[52] There were, nonetheless, still some who, like the 3rd Marquess of Salisbury, rebuffed the idea of 'the people as an acting, deciding, accessible authority' and saw social reforms such as the 1884 Reform Act, which he helped to draft, as necessary only in order to protect property and prevent revolution.[53] His rival, William Gladstone, albeit with suitable ambiguity, captured a growing sentiment when he declared that 'every man' is 'morally entitled to come within the pale of the Constitution'. For all his successful platform hustings on the needs for change, the Liberal leader had his limits. Gladstone's constitutional reform attempts in his 1866 bill excluded the 'residuum', as the urban poor were

[51] See Robert Tombs, *The English and Their History* (London: Penguin, 2015), pp. 450–453; and more generally on the significance of the Chartists David Cannadine, *Victorious Century: The United Kingdom, 1800–1906* (London: Penguin, 2017), pp. 240–241; Malcolm Chase, *Chartism: A New History* (Manchester: Manchester University Press), pp. 300–303; and Hilton, *A Mad, Bad, and Dangerous People?*, pp. 612–621

[52] S. E. Finer, *The History of Government*, vol. I (Oxford: Oxford University Press, 1997), pp. 44–45.

[53] Andrew Roberts, *Salisbury: Victorian Titan* (London: Weidenfeld & Nicolson, 1999), p. 840.

termed, from the constitution's embrace.[54] In the context of decolonisation of the British Empire, Jennings observed that little could be done regarding the creation of a new state 'until someone decides who are the people'.[55] The United Kingdom was no different. The union between England and Scotland caused the construction of a new national identity of 'Britishness' defined in part as being against France, Catholicism, the Irish and the Jews.[56]

Access to the British constitution and its privileges in history therefore was culturally and legally restrictive, based on what David Cesarani argues as assumptions that migrant groups coming in the late nineteenth and early twentieth centuries, such as Russian Jews, Chinese or Blacks, 'could not fully belong to the nation'. Various acts, like the 1919 Aliens Restriction (Amendment) Act gave the state huge power to remove civic and employment rights from such communities even if naturalised since they were perceived as the racialised 'other' with their rights dependent on the interests of the government.[57] The history and law of the British constitution was, therefore, critical to racial and cultural discourse. As Paul Gilroy argues, statements like those of Sir Kenneth Newman, Metropolitan Commissioner of Police 1982–1987 – stating that in 'Jamaicans, you have a people who are constitutionally disorderly ... It's simply in their make up, they're constitutionally disposed to be anti-authority' – pushed a far from uncommon racial narrative in history and law that Britain was being 'violated' by Blacks and others unable to appreciate or adhere to Britain's constitution and the rule of law. In this way prejudices, like Newman's, emerge of the 'national constitution ... distorted and destroyed by the presence of the alien blacks' threatening British identity and civilisation.[58] This tendency to label such 'outsiders' as incompatible with national constitutional probity arguably highlights what David Armitage has observed from the late eighteenth century onwards of the 'persistent reluctance' to politically and academically

[54] Jon Lawrence, *Electing Our Masters: The Hustings in British Politics from Hogarth to Blair* (Oxford: Oxford University Press, 2009), p. 43.
[55] Ivor Jennings, *The Approach to Self-Government* (Cambridge: Cambridge University Press, 1956), pp. 20–21.
[56] See generally Linda Colley, *Britons: Forging the Nation 1707–1837* (London: Yale University Press, 1992).
[57] David Cesarani, 'The Changing Character of Citizenship and Nationality in Britain' in David Cesarani and Mary Fulbrook (eds.), *Citizenship, Nationality and Migration in Europe* (London: Routledge, 2003), pp. 61–68.
[58] Paul Gilroy, *There Ain't No Black in the Union Jack: The Cultural Politics of Race and Nation*, 2nd ed. (London: Routledge, 2002), pp. 84–91.

incorporate empire into studies of the British state due to narratives of domestic *libertas* sitting uncomfortably with *imperium* abroad.[59]

Typically, in chronicles of the constitution, there appear figures resembling the omnipresent English gentleman. It suited an historical narrative that the state preferred the dabbler over the professional. This history embraced and venerated a Queensbury Constitution, where the game of politics was run by eternal norms and fair-play verities. The leftist constitutional scholar, Harold Laski, decried the 'gentleman' theory of British history that government and state were the patriarchal preserve of a certain type of Englishman. This, Laski argued, was based on 'two hundred years and more of instruction in the thesis that only the gentleman is fit to govern'.[60] Interestingly, John Austin, writing in 1859 believed that because of the flexible and wide application of the word 'gentlemen' in British society, the House of Commons was in fact 'an aristocracy of independent gentleman', that enabled a more porous avenue for political participation in contrast to the closed aristocracies of Europe, which led to 'fatal consequences' for those states. This is also perhaps due to the tendency seen by Elizabeth I's trusted counsellor, Sir Thomas Smith, that 'gentlemen . . . they be made cheap in England'.[61]

It is thereby tempting to see Britain as having 'government by amateurs'. This idea of the 'amateur' is augmented by ordinary citizens 'unlerned and lewed' (as Sir Sidney Low imagined Chaucer would see freeholders) doing their duty in the county court, burgesses and knights in the Commons, justices of the peace, members of school boards, guardians of the poor and other lay people holding various governmental or civic roles upheld in turn by an 'amateur electorate'.[62] In this rendering constitutional history was also social history in that it provided an idealised portrait of the governing characters and their society, which was equally important to the constitution, as, if not more than, legislation and laws. While not historically as rigid in its membership as its European neighbours, the political and social class found at the highest and middling levels of British government were conscious of their position and adept at maintaining their influence with a cloistered and

[59] David Armitage, *The Ideological Origins of the British Empire* (Cambridge: Cambridge University Press, 2004), p. 11. On this point and on the links between empire and the constitution see Kirkby and Kumarasingham's chapters 19 and 20 respectively in Volume 2.

[60] Harold J. Laski, *The Danger of Being a Gentleman and Other Essays* (London: George Unwin, 1940), p. 28.

[61] John Austin, *A Plea for the Constitution*, 2nd ed. (London: John Murray, 1859), pp. 10–12.

[62] Sidney Low, *The Governance of England* (London: T. Fisher Unwin, 1904), p. 201.

practised rigour that ensured government and bureaucracy were filled by those who shared comparable educational and social qualifications. Though there was no 'grand design' of detailed planning, the constitutional ethos of the public-spirited dilettante was a powerful historical tool popularised to deflect attention from the carefully constructed cultural and institutional edifice that the constitution provided British society. The 1853 Northcote-Trevelyan Report, for example, which led to the introduction of open competition for entry into the hitherto socially closed Civil Service, was the product of Victorian reformers who, Asa Briggs argued, saw the need for 'a plentiful supply of informed gentlemen'. The social spectrum from this reform indeed expanded and saw, for instance, the son of a carpenter, P. J. Grigg, and an heir to a dukedom, Sir George Murray, both rise on merit to head the War Office and Treasury respectively. Nonetheless, while background and emphasis on competition over class had changed, the reforms were still geared to foster an expanded professional cadre of gentlemen with 'proficiency in history, jurisprudence, political economy', well versed and invested in British constitutional history and the preservation of its values in order to deliver public service and run the state.[63] Therefore, through acculturation and training, the number of those versed in the constitution's mores expanded into the age of democratisation.

In Whitehall there existed what Clive Priestley called in the mid-1980s 'the good chap theory of government' where unwritten mantras of constitutional courtesies reigned to underwrite the running of the state. This amusing description of 'good chaps' masked a more cohesive, sensitive and historically grounded understanding and professional handling of the constitution.[64] The hazards, however, of relying on the 'good chaps theory' was only too real and can be illustrated when this was tested in the Federal Court of Pakistan over the scandalous use of the Royal Prerogative to forcibly dissolve the legislature in 1954 without advice to stop it from passing measures to curb the Crown's powers. In decrying the abuse of British conventions by the Governor-General, the counsel for the President of the Assembly informed the Court that such an action went against the tenets of British constitutional

[63] Cited in Peter Hennessy, *Whitehall* (London: Pimlico, 2001), pp. 31–51.

[64] Priestley explained the good chap theory to visiting American civil servants as the Whitehall equivalent of the 'Code of the Woosters'. Peter Hennessy, '"Harvesting the Cupboards": Why Britain Has Produced No Administrative Theory or Ideology in the Twentieth Century', *Transactions of the Royal Historical Society*, vol. 4, 1994, p. 205.

history and accepted behaviour: 'After all, one has to rely on the words of a gentleman'. This was not enough to prevent this blatant abuse of power.[65] Nonetheless, the amateur and gentlemanly versions of constitutional history shrouded a deep, pervasive and shrewd appreciation of the social dynamic of the British constitution's power strategies as well as the essential and sensitive manoeuvrability of the constitution to adapt for crisis and immediate need.

Law and Utility

The Liberal grandee Sir William Harcourt, who served for a time as both Home Secretary and Whewell Professor of International Law at Cambridge, was incensed by the 1910–1911 parliamentary crisis that saw the two Houses of Parliament engage in a deeply partisan conflict that threatened many of the principles and conventions of the pre-1914 constitution. Harcourt colourfully exclaimed to his party colleagues who sought to reform the constitution that they should avoid such indulgences, 'We must stick tight to principles and not go a' whoreing after false constitutions.'[66] The problem was that the constitution embraced many conflicting principles. Constitutional history and law provide ample evidence that norms are easily replaced. Henry VIII radically overturned key understandings of the ecclesiastical foundations of the state and used the law to do it. The King's dynastic ambitions saw a social and religious tumult in the state's constitutional affairs. Finding that Pope Clement VII was unwilling to endorse the Tudor monarch's marital choices, Henry, the once loyal servant of Rome, removed papal legal jurisdiction over England. This led to a chaotic and long-felt constitutional revolution. The Pope was sensationally replaced by the Sovereign as Head of the Church and Catholicism's divine and exclusive constitutional status was dramatically revoked by the Act of Supremacy 1534, with deep institutional, financial, and social ramifications. This included transforming English rule in Ireland, which was taken to be endorsed by the 1159 papal bull *Laudabiliter*, embellished to serve the Angevin desires for conquering the territory. The English

[65] S. S. Pirzada, *Dissolution of Constituent Assembly of Pakistan and the Legal Battles of Maulvi Tamizuddin Khan* (Karachi: Asia Law House, 1995), p. 291 and H. Kumarasingham, 'A Transnational Actor on a Dramatic Stage: Sir Ivor Jennings and the Manipulation of Westminster Style Democracy in Pakistan' in Gregory Shaffer, Tom Ginsburg and Terrence C. Halliday (eds.), *Constitution-Making and Transnational Legal Order* (Cambridge: Cambridge University Press, 2019), pp. 55–84.

[66] Roy Jenkins, *Asquith* (London: Collins, 1964), p. 205.

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monarch's ambiguous twelfth-century title of Lord of Ireland was replaced with King of Ireland in 1541 in order to affirm the English crown's complete legal sovereignty over the Irish and render papal supremacy *ultra vires*. The Irish reformation was no less a major constitutional revolution than its English counterpart.[67] Henry's desires had lasting import and illustrated how the bedchamber is an essential source in constitutional history.

The expanse and variety of the common law made many political actions possible. Henry II sought to unify the different courts and laws in the kingdom so that there could be a common system of the King's justice administered by royal judges and courts. This was disputed, particularly by the Church. Nonetheless local customs and principles did not die as long as the Crown was acknowledged and justice administered in its name. While the Crown wanted centralisation of the rule of law, there was inherent scope for variety. This system of law, relying on historical precedent and judicial interpretation, encouraged legal thinking to look to history to inform contemporary and local disputes. The common law abetted a sovereign's desire for control across their dominions, but it also gave certain benchmarks from which to check royal and state intrusion. As G. M. Trevelyan put it, from the thirteenth century 'Our constitution was the child of Feudalism married to the Common Law.'[68] Doctrines and laws had their limits. In the late thirteenth century, Edward I suspected that some lands in England held by nobles were in fact originally Crown lands; and in an attempt to reverse a perceived decline in royal authority, he used writs of *quo warranto* to demand proof of the legal pedigree of the landholder's claim; and if it could not be satisfactorily established, the tenurial rights would revert to the King. The Earl Warenne, for one, did not respond with parchments, but instead flourished his rusty sword to the King's Justices as his alternative authorisation.

> Here my lords, here is my warrant! My ancestors came with William the Bastard and conquered their lands with the sword, and I shall defend them with the sword against anyone who tries to usurp them.[69]

[67] Nicholas Vincent, 'Angevin Ireland' in Brendan Smith (ed.), *The Cambridge History of Ireland: Volume I 600–1550* (Cambridge: Cambridge University Press, 2018), pp. 185–221 and Brendan Bradshaw, *The Irish Constitutional Revolution of the Sixteenth Century* (Cambridge: Cambridge University Press, 1979), pp. 231–257.

[68] G. M. Trevelyan, *Illustrated History of England*, Illustrated ed. (London: Longmans, Green and Co, 1956), p. 167.

[69] Andrew M. Spencer, *Nobility and Kinship in Medieval England: The Earls and Edward I, 1272–1307* (Cambridge: Cambridge University Press, 2013), pp. 72–73.

Much of traditional constitutional history was told through law and institutions. The generally ready archival availability of legal and legislative acts as well as the identifiable reality of Crown, Lords, Commons and Courts provided institutional and legal bones for the state's body. However, as Jennings memorably diagnosed, it is conventions, which we may think of as political and legal norms formed by contextual utility, which give the constitution and the body politic its 'flesh'.[70] All of this is to say that laws and institutions, along with historical norms and political context, are collectively needed to understand and study the constitution. Removing one part would undermine the relevance of constitutional history. Nonetheless, this has not always been apparent in constitutional texts. A popular English history book published in the late nineteenth century complained that 'our constitutional history has been perverted at the hands of lawyers'. If History was to look to law at all, it conceded, then it should be seen from the statute book, 'but it must be in a Statute Book which begins at no point later than the Dooms of Æthelbehrt'.[71] For their part legal scholars, too, had reservations about the use of history. One of the most famous, A. V. Dicey, saw constitutional history, while possibly 'fascinating', as 'mere antiquarianism' not remotely linked to the modern constitution or its law; instead, such history dangerously engaged in 'retrogressive progress'. Dicey was by no means against history, but saw it having limited worth in producing law. History was not law.

> [T]he appeal of precedent is in the law courts merely a useful fiction by which judicial decision conceals its transformation into judicial legislation; and a fiction is none the less a fiction because it has emerged from the Courts into the field of politics or of history. Here, then, the astuteness of lawyers has imposed upon the simplicity of historians. Formalism and antiquarianism, have, so to speak, joined hands; they have united to mislead students in search for the law of the constitution.[72]

Nonetheless, and inevitably, Dicey used history. Interestingly, Dicey's most famous articulation of constitutional principle, made in 1885, namely the principle of parliamentary sovereignty, being parliament's right 'to make or unmake any law whatever', while drawing on ideas of Coke, Blackstone and

[70] Ivor Jennings, *The Law and the Constitution*, 5th ed. (London: University of London Press, 1959), p. 81.
[71] E. A. Freeman, *The Growth of the English Constitution from Earliest Times*, 3rd ed. (London: Macmillan), pp. x–xi.
[72] A. V. Dicey, *The Law of the Constitution*, J. W. F. Allison, ed. (Oxford: Oxford University Press, 2013), pp. 17–18.

Burke, also uses histories of the British constitution by outsiders to validate his theory. Judged by the written histories of the eighteenth century 'foreign observers' such as Swiss theorist Jean-Louis De Lolme, the nineteenth century German jurist Rudolf von Gneist and the French man of letters Alexis De Tocqueville, saw what locals did not. To Dicey these international scholars were 'as is natural, clearer sighted than Englishmen' in detecting 'at once the sovereignty of Parliament as a salient feature of the English constitution'.[73] These legal and historical ideas helped cement parliament in popular and scholarly thinking as the seminal institution of the British constitution. Key histories, such as A. F. Pollard's influential 1920 work, *The Evolution of Parliament*, which used the Tudor legislatures as its pivot, consciously looked to parliament as the focus and explanation of Britain's history. Parliament's wider representative function was prominent in constitutional history. While challenging earlier ideas of 'model' parliaments, later histories still promoted the historical Whiggish idea of development of the constitution as the growth and evolution of parliament sustained by a liberal sentiment found within the English character.[74] Laski who, in earlier writings, argued for major decentralisation of British institutions and fundamental transformation of the state, with Labour in power in 1950 robustly defended the power of parliament, cabinet and the civil service to be in the national interest. Critics of the constitution, who argued for reform of the system, like his contemporary Leo Amery, the Tory writer and politician, suffered from 'distorted historical perspective' in not seeing the transformation of Britain from an agricultural state to an industrial one; and that the House of Commons, now out of the hands of the oligarchy, had evolved to enable positive government intervention reaching and representing a wider electorate and society. Laski, the one-time radical saw parliament, now with his party finally in clear majority from the 'most mature electorate in the world', as the historical culmination of the British constitution. He dismissed the critics of parliament with the stark judgement that they 'would, if pressed, admit the real alternative to the House of Commons is the concentration camp'.[75]

The jurist Sir Edward Coke's creative and instructive use of constitutional history are among the most famous in British history and hugely influential on the development of the constitution and the common law. Coke, in his

[73] Ibid., pp. 51–52.
[74] Michael Bentley, *Modernizing England's Past: English Historiography in the Age of Modernism, 1870–1970* (Cambridge: Cambridge University Press, 2005), pp. 19–44.
[75] Harold J. Laski, *Reflections on the Constitution: The House of Commons, The Cabinet, The Civil Service* (Manchester: Manchester University Press, 1951), p. 16.

legal and political roles in the eras of Elizabeth I and James I, sought protection and natural justice against arbitrary absolutism. In the Magna Carta, Coke found his historical vessel to bring life into his arguments. His reinvention gave the Charter, which was hitherto hardly discussed in the Tudor period, an assumed fundamental and emotional power as the fountain head of Anglo-Saxon liberty, despite the limited legal practicality of the majority of its chapters. Indeed, were it not for its reinvention in the seventeenth century it is plausible that the document would have been of interest only to medievalists and not an object of international celebration. Coke, 'the supreme figure in weaponizing the common law', as Mark Goldie has labelled him, 'constructed a canon' to defend his views, which harnessed ideas such as those of Henry de Bracton's thirteenth-century espousal of England's predilection for *lex non scripta*, 'unwritten law rooted in usage'. Such was the power of Coke's interpretation, as written in his *Reports* and *Institutes*, that Charles I confiscated them on his death. Later, the Long Parliament ordered their publication, which helped cement their historical status.[76] Pocock notably argued that the 'common-law mind' interpretation of history produced a picture of an ancient constitution in existence before the Norman Conquest that bequeathed the common law, courts and trial by jury, and parliament itself. The 'immemorial' nature of the constitution intensified the 'radical' tendency of the 'English mind' to 'read existing law into the remote past'.[77] As Coke himself put it

> The Lawes of England are of much more antiquity, then they are reported to be, and more then any of the constitutions or lawes Imperiall of the Romaine Emperours.[78]

As John Baker argues, the fact that Coke and others mythologised and reinvented the past, as in the case of Magna Carta, is not sufficient to erode their significance: 'Coke may have got some of the early history wrong, but his constitutional conclusions have thrived down the centuries because they seemed right'.[79]

[76] Mark Goldie, 'The Ancient Constitution and the Languages of Political Thought', *Historical Journal*, vol. 62, no. 1, 2019, p. 10.
[77] J. G. A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century – A Reissue with a Retrospect* (Cambridge: Cambridge University Press, 1987), pp. 30–31.
[78] Butterfield, *The Englishman and His History*, p. 50.
[79] John Baker, *The Reinvention of Magna Carta 1216–1616* (Cambridge: Cambridge University Press, 2017), p. 444.

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Edmund Burke identified the contradictory forays of history and the common law. In *An Essay towards an History of the Laws of England* he perceived the esteemed writings of the jurist and legal historian, Sir Matthew Hale, and the historian polemicist, Henry St John Bolingbroke, as united in two incompatible historical assertions. Hale and Bolingbroke wrote of the 'eternity' of English law as well as placing faith in its constant 'improvement'. For Burke the common law and the constitution, far from being eternal, were instead based on contingencies and struggles between liberty and authority and could, without vigilance, crumble away. Burke believed the people's ultimate welfare in fact needed contestation or the branches of state could be ranged against them: 'the People cannot suffer a great deal whilst there is a Contest between different Parts of the Constitution.'[80] Contestation of legal principles has always been at the heart of key constitutional clashes and their history. The ability to make law and, thus, rule is a fundamental part of governance. Constitutional history is often an account of disputations of which institution or institutions has this power to make law. In *Trew Lawe of Free Monarchies*, published in 1598, James VI asserted that kings alone by divine right were the 'authors and makers' of law. The Scottish cleric Samuel Rutherford challenged this idea in his 1644 work *Lex, Rex, or, The Law and the Prince* arguing that kings, in practice, needed to work with parliament in 'the power of making Lawes'. The powerful intellectual George Buchanan, who had been James's childhood tutor, also believed that kings were subject to law and not God alone.[81] These were critical and volatile themes in Scottish constitutional history and political thought and, of course, in the kingdoms of England and Ireland, which James assumed in addition to his Scottish one in 1603. In June 1616, sitting atop his new realms, James declared to the judges of the Star Chamber that the 'absolute Prerogative of the Crown is no Subject for the tongue of a Lawyer'. The seventeenth-century judiciary, while not rejecting this regal rule of law, sought to navigate it by accepting wide governance functions assigned to the Crown, which was different from allowing arbitrary and autocratic power. Over 300 years later the Lord Chief Justice, Gordon Hewart, published *The New Despotism* in 1929, which argued that this judicial forbearance of executive discretion had gone too far and eroded the rule of law.[82]

[80] Bourke, *Empire and Revolution*, pp. 191–195.

[81] Laura A. M. Stewart and Janay Nugent, *Union and Revolution: Scotland and Beyond, 1625–1745* (Edinburgh: Edinburgh University Press, 2021), pp. 124–125.

[82] Martin Loughlin draws this link also between James and Hewart in *Foundations of Public Law* (Oxford: Oxford University Press, 2010), pp. 379–380, 398 and fn. 121. Lord Hewart, *The New Despotism* (London: Ernest Benn, 1929).

Lord Melbourne believed the conduct of executive government 'rested so much on practice, on usage, on understanding, that there is no particular publication to which reference can be made for the explanation and description of it. It is to be sought in debates, in protests, in letters, in memoirs, and wherever it can be picked up'. Even a cursory examination of the nineteenth century, which saw the active phase of Melbourne's political career, shows how practices and principles though deeply historical and intrinsic to the constitution are, in fact, of more recent innovation and expedience. As G. H. L. Le May shows, key conventions, which many consider akin to constitutional law took shape only in Queen Victoria's reign. Conventions that only came about in the Victorian age include: a parliamentary majority is a condition of taking office; a ruling party enjoys autonomy in cabinet selection; the speech from the throne, and matters of defence and foreign policy are the government's responsibility unshared with the monarch; the House of Commons is the dominant institution of the constitution; the cabinet is collectively responsible; and the monarch is obliged to follow the advice of the incumbent administration, only came of age under the Victorian Constitution. It would be remiss to ignore the fact that the person behind this eponymous constitution did not always move with the times. Queen Victoria still believed she needed to give to her heir the constitution that she 'inherited' in 1837 from William IV, despite the coming of a very different era of constitutional usage and custom. Perhaps this explains Victoria's solution for avoiding undesirable counsel from William Gladstone. The Sovereign simply told her Prime Minister 'she did not wish to receive advice'.[83] This also illustrates how emotion and human nature invest themselves in constitutional norms. Sir Henry Maine sensed this. To him the British constitution

> if not (as some call it) a holy thing, is a thing unique and remarkable. A series of undesigned changes brought it to such a condition, that satisfaction and impatience, the two great sources of political conduct, were both reasonably gratified under it.[84]

As Sir Courtney Ilbert, Clerk to the House of Commons, elegantly, but with steely appreciation, explained, in a letter in November 1909 to prime minister Herbert Asquith during a time of political crisis, 'There are occasions when respect for the constitution must override respect for the law.'[85]

[83] G. H. L. Le May, *The Victorian Constitution: Conventions, Usages and Contingencies* (London: Duckworth, 1979), pp. 63–84.
[84] Maine, *Popular Government*, p. 54. [85] Jenkins, *Asquith*, p. 201.

Ilbert's analysis provides a neat statement of the constitution's generous allowance for expedience. This feature was also crucially attractive to various groups from foreign dynasties on the throne, to trades unions and outsiders, who reasoned that constitutional power could be theirs. Both Monarchists and Marxists could utilise such history. A close reading of British constitutional history showed how the constitution enabled levers of state to be used in extraordinary ways, but also largely imperceptibly since, outwardly, institutions such as parliament remained, and traditions, invented and real, were honoured and remarketed. John Locke argued in 1690, a critical English constitutional principle, namely the 'power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it'. Clinton Rossiter believed this to be a classic statement of the constitution's historical power to allow the rise of dictatorial powers within the established customs of the state.[86]

The institutions and laws of the state enabled considerable reforms and changes to British society. William Beveridge, for example, saw the constitution's ability to create the welfare state, or 'social service state' as he preferred to call it, and formalise his principle of 'bread and health for all before cake and circuses for any', despite disappointments in application.[87] The Welsh Labour party titan, Aneurin Bevan, spoke approvingly of the British constitution's 'revolutionary quality' since it affords 'a flexibility enjoyed by few nations' to transform society without appeal. To Bevan, the 'British constitution, with its adult suffrage, exposes all rights and privileges, properties and powers, to the popular will'.[88] In periods of crisis and dramatic reform across British history, law was still craved to legitimise that which seemed irredeemable. Of the Cromwellian Commonwealth, with its brutal and violent battles at home and across the Irish sea, it was said 'they wished ... to fix a legal wig upon the point of a soldier's sword'.[89] The constitutional history of Britain is one that shows a symbiotic relationship between law, convention and political behaviour. The law is both a check and an instrument of politics. Statutes, conventions, and the common law operate not just under the burden of history, but also for the needs of a society and state used to finding a solution for its ever-changing requirements

[86] Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (London, Transaction Publishers, [1948], 2009), pp. 138–139.
[87] José Harris, *William Beveridge: A Biography* (Oxford: Clarendon Press, 1977), pp. 458–461.
[88] Vernon Bogdanor, *The New British Constitution* (Oxford: Hart, 2009), p. 40.
[89] Warner and Marten, *Groundwork*, p. 392.

within its constitutional corpus. As Sidney Low argued, the constitution 'enshrines within its being the principle of Life and the principle of Law. Its capacity for growth, its rhythmical flexibility, have not left it'.[90]

Conclusion

At the beginning of the twentieth century a student doing the History Tripos at Cambridge could expect around seventy lectures in 'English' constitutional history and likely another fifteen in comparative constitutions. In earlier times students crammed the 'sacred' texts by the likes of Bishop Stubbs, which 'were approached by the devout disciple in much the same spirit as that in which the youthful Brahmin draws near to the Vedas'.[91] At times the craft of constitutional history has been dominant and unavoidable while at other periods, including more recently, training in constitutional history evades entry in the historian's manual. The field of constitutional history is not for a rarefied scholarly caste, and nor are there sacred texts, which must be read to uncover its revelations. Instead, constitutional history is critical to understanding so many areas of life, society and government. Constitutional history's wider importance is reflected in it being grounded in, and best engaged via a multi-disciplinary vantage, especially History, Law and Politics. The constitution's role in history requires a broad thematic approach to appreciate its deep ubiquity. It has been argued in this chapter that the historical constitution can be usefully recognised through three sets of connected themes. The theme of culture and ideas is essential to understanding the historical constitution since the constitution has been central to debates over identity and legitimacy. In this, the constitution's history is shown to be more than documents and institutions: it is also pivotal to the culture of society and ideas of governance. Power and people are at the heart of the constitution's history and a theme of enduring relevance. Too often constitutional history has been characterised as one of antiquarianism at the edge of history, yet in fact it is mandatory in evaluating the exercise of power as well as how people of all levels have been affected by the constitution's influence. Through the theme of law and utility we are witness to contestation over constitutional norms and the use of institutions. The tension between changing canons of the constitution and the assorted practices of

[90] Low, *Governance of England*, p. 311.
[91] J. R. Tanner, 'The Teaching of Constitutional History' in W. A. J. Archbold (ed.), *Essays on the Teaching of History* (Cambridge: Cambridge University Press, 1901), pp. 51–68.

the state are a fundamental theme of constitutional history. Together these themes give an impression of the wide-ranging reach of constitutional history and its influence and relationship with the state. If nothing else, the historical constitution inherently binds the tangled fabric of the United Kingdom and its parts.

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