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Excerpt

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PART I

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PERSPECTIVES

## I

The Historical Constitution<sup>\*</sup>

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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.'<sup>1</sup> 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 –

<sup>\*</sup> I would like to thank Ewen Cameron, James Mitchell, Laura Stewart and Asanga Welikala for their help with certain queries of mine. I am very grateful to Donal Lowry and Stuart Ward for the astute and detailed comments they generously provided on earlier drafts. Peter Cane proved an excellent and constructive person to test the ideas in this chapter and without doubt his questions and advice helped improve it.

<sup>1</sup> J. R. Seeley, *Introduction to Political Science: Two Series of Lectures* (London: Macmillan, 1896), p. 4.

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that to be free, is to be born and to live under the English constitution.<sup>2</sup>

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

<sup>2</sup> 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.

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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.<sup>3</sup> 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 ascendancy 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'.<sup>4</sup> 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.

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

<sup>4</sup> Keith Thomas, 'The Tools and the Job', *Times Literary Supplement*, 7 Apr. 1966, pp. 275–276.

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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.<sup>5</sup>

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.<sup>6</sup> 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’.<sup>7</sup> 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’.<sup>8</sup>

<sup>5</sup> William Edward Hearn, *Government of England: Its Structure and Development*, 2nd ed. (Melbourne: George Robertson, 1886), pp. 4–5.

<sup>6</sup> Linda Colley, *The Gun, the Ship & the Pen: Warfare, Constitutions and the Making of the Modern World* (London: Profile Books, 2021), pp. 96–101.

<sup>7</sup> Richard Bourke, *Empire and Revolution: The Political Life of Edmund Burke* (Oxford: Princeton University Press, 2015), p. 8.

<sup>8</sup> Isaiah Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas*, Henry Hardy (ed.), 2nd ed. (London: Pimlico, 2013), p. 168.

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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.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> 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

<sup>9</sup> David Hume, ‘Of the Independency of Parliament’ in Knud Haakonssen (ed.), *Hume: Political Essays* (Cambridge: Cambridge University Press, 1994), p. 24.

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

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

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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'.<sup>12</sup> 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 Libertador 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'.<sup>13</sup>

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'.<sup>14</sup> 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'.<sup>15</sup> Burke famously attacked the ideals and actions of

<sup>12</sup> Harold Nicolson, *King George the Fifth: His Life and Reign* (London: Constable & Co Ltd, 1952), pp. 218–229.

<sup>13</sup> Colley, *The Gun, the Ship & the Pen*, p. 233.

<sup>14</sup> Philip Butcher, 'Robert Burns and the Democratic Spirit', *Phylon*, vol. 10, no. 3, 1949, p. 267.

<sup>15</sup> Henry Sumner Maine, *Popular Government: Four Essays*, new ed. (London: John Murray, 1890), pp. 12–13.

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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.<sup>16</sup> 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?<sup>17</sup>

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.<sup>18</sup> 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

<sup>16</sup> Iain Hampsher Monk (ed.), *Burke: Revolutionary Writings* (Cambridge: Cambridge University Press, 2014), p. 249.

<sup>17</sup> 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.

<sup>18</sup> A. Lawrence Lowell, *The Government of England*, vol. 1 (New York: Macmillan, 1912), p. 14.



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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.<sup>19</sup>

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'.<sup>20</sup> 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

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

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

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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.<sup>21</sup>

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’.<sup>22</sup> 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’.<sup>23</sup> 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

<sup>21</sup> Mark Kishlansky, *Monarchy Transformed: Britain 1603–1714* (London: Penguin, 1997).

<sup>22</sup> 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.

<sup>23</sup> E. H. Carr, *What Is History?* (London: Penguin, 1990), pp. 8–9.