Introduction: The Case for the Political Constitution

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To its detractors, a group which includes many academic experts and public commentators, the British constitution is too old, too vague, too unwritten. In their view, it is, at best, something of an embarrassment and, at worst, a danger to democracy itself.[1] Unwritten constitutions such as the British one, so the argument goes, are more susceptible to either tyranny or 'populism'. Will Hutton warns that 'the weakness of Britain's constitution [is] to drive through toxic, divisive change [following] the manipulated will of the people'.[2] Anthony Barnett argues that Britain's unwritten constitution 'is the raw meat of dictatorship'.[3] Andrew Blick writes, 'a written constitution could protect politicians from making hasty, populist, media-driven promises in advance of general elections'.[4]

Yet it is not obvious that a written constitution delivers the magic fix that these reformers seek. As Brian Christopher Jones argues in the opening chapter of this book, most dictatorships around the world have constitutions, often containing very bold promises to protect individual rights and liberties. Equally, citizens of countries with written constitutions, such as the United States, France, or the Philippines, may be surprised to learn that they have avoided either populism or a media-driven political environment thanks to their hallowed documents. As Montesquieu argued, the spirit of the law matters more than textual guarantees.[5]

The British constitution is unusual, but the importance of its unwritteness is often overstated. To even say that it is unwritten is not entirely accurate for it contains many written parts. There are dozens of written statutes which pertain to constitutional matters. The numerous Representation of the People Acts clearly set out the rules of the parliamentary franchise. The Parliament Acts 1911 and 1949 establish the primacy of the House of Commons over the House of Lords. The Registration of Political Parties Act 1998 sets out the rules by which political parties may be established and operated. There is plenty of constitutional text in the United Kingdom.

A more moderate position can be found in Iain McLean's book, *What's Wrong with the British Constitution?*, in which he accepts that the British constitution is not fully unwritten, but argues that the problem lies in the fact that constitutional statutes are not afforded some higher status or embodied in a single codified text. In answer to his titular question, McLean replies, 'For a start, nobody knows what it is'.[6]

It is true that there are many aspects of the British constitution which are embodied in convention, tradition, and practice. Not every single aspect of the constitution is written in statute or even in any official document at all. This is not, however, a distinguishing feature of the British constitution. It does contain written and unwritten elements, but so do all constitutions. No constitution in the world would be fully workable without convention, interpretation, or precedent. As Akhil Amar has written, even the United States Constitution, the inspiration for

[1] B Ackerman, 'Why Britain Needs a Written Constitution' (2018) 89 *The Political Quarterly*.
[2] W Hutton, 'The Sheer Scale of the Problem Facing Britain's Decrepit Constitution Has Been Laid Bare', (2019) *The Guardian.*
[3] A Barnett, 'Why Britain Needs a Written Constitution' (2016) *The Guardian*.
[4] A Blick, 'The Merits of a Written Constitution' (2016) 21 *Judicial Review*, 52.
[5] Montesquieu, *The Spirit of Law* (1748).
[6] I McLean, *What's Wrong with the British Constitution?* (Oxford, Oxford University Press, 2009), vii.

countless written constitutions since its enactment, is only intelligible and workable by numerous unwritten conventions and understandings.[7] The US Constitution is short – far shorter than any of the fifty American state constitutions.[8] There is simply no way that the 7,591 words in its articles and amendments could precisely spell out how all aspects of government should function.[9] The Constitution is silent on much, and this means that Americans, too, have an unwritten constitution in addition to their written one.

What distinguishes the British constitution, then, is not that it is unwritten, or even that it is uncodified. Codification is in large part a secretarial exercise. It would be easy enough to gather together a collection of statutes of 'constitutional importance' into the same volume, as is indeed done sometimes by legal publishers for the benefit of law students. No one but an election lawyer might wish to read a constitution that contains all thirteen Representation of the People Acts passed between 1918 and 2000, but it is not impossible to find and collect them together. Some constitutions adopt this 'kitchen sink' approach to codification. The Constitution of India is 140,000 words long and contains hundreds of articles.[10] The Constitution of Alabama is even longer.[11]

The difference between the British constitutional system and most other constitutional systems pertains to the hierarchy of law. In most other systems, constitutional provisions are treated as more sacrosanct than 'normal' legislation. If the legislature decides to pass some legislation which falls afoul of the constitution, then the statute can be declared 'unconstitutional' and struck down. Even if the democratic legislature supports a measure overwhelmingly, some things are 'beyond politics', under such an arrangement. Some countries go even further by forbidding amendments to certain constitutional provisions, entrenching them for all of eternity.

Let us take an example from the United States, where the US Constitution is supreme and courts have the power to strike down legislation which is deemed to be incompatible with it. In 1918, Congress passed a minimum wage for women and children in federal territory. Five years later, the Supreme Court struck down this legislation, invalidating the minimum wage. Justice George Sutherland, writing the court's majority opinion, explained that a minimum wage law was 'an unconstitutional interference with the freedom of contract included within the guaranties of the due process clause of the Fifth Amendment. That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause is settled by the decisions of this court and is no longer open to question'.[12]

Such a declaration would not be permissible from a British court. Once Parliament legislates for something, it is deemed *ipso facto* constitutional. Thus, as Richard Ekins sets out in Chapter 3, what makes the British constitution rather exceptional is that the absence of a hierarchy of law gives the UK Parliament total freedom to legislate without any legal limitations. The British Parliament, therefore, is at once a legislature and a constitutional assembly. To

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[7] A Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By* (New York, Basic Books, 2012)
[8] S Levinson, *Framed: America's 51 Constitutions and the Crisis of Governance* (Oxford, Oxford University Press, 2012).
[9] E Zackin, *Looking for Rights in All the Wrong Places* (Princeton, Princeton University Press, 2013).
[10] Z Elkins, T Ginsburg, J Melton, *The Endurance of National Constitutions* (Cambridge, Cambridge University Press, 2009), 106.
[11] B Thomson (ed), *A Century of Controversy: Constitutional Reform in Alabama* (Tuscaloosa, University of Alabama Press, 2002).
[12] *Adkins v Children's Hospital* 261 US 525 (1923).

continue the American analogy, it would be as if the constitutional framers in Philadelphia never left.

The British constitution, therefore, maximises usable political power. This might concern some observers. What if a government uses its mandate to go 'too far'? Who will step in to save the public from their elected masters? For proponents of constitutional codification, the remedy is judges applying the rules of the constitution. Yes, they would admit, perhaps constitutional supremacy enables judges to stop elected governments from passing laws, including protections for workers or racial minorities, but at least such an arrangement guarantees a 'check' against the possibly of a 'tyrannical' elected government.[13]

The implication of this line of argument is that the British constitution lack 'checks' against such dangerous excess. This is not correct. As Carol Harlow describes in Chapter 2, the British constitution is famously a 'political constitution', whose safeguards come from within democratic politics. In a system without a hierarchy of law, it is true that one statute cannot be used to block the implementation of a new statute. There is nothing, legally speaking, stopping a parliament from repealing the Freedom of Information Act 2000 or the Minimum Wage Act 1998. Equally, a British government can use its prerogative powers to go to war, to sign treaties, or to prorogue parliament for a week longer than is usual.

Yet, the absence of legal 'checks' does not exclude the possibility of other ways of restraining government behaviour. While Parliament can technically legislate how it likes and while governments have sweeping prerogative powers, both are held back by what they believe the public is likely to accept. One check is the necessity of the government at all times to carry the confidence of the House of Commons. At any moment, if MPs feel that the government has gone too far, in one simple act – a vote of no confidence – they can bring down a government. Elections, then, become another way in which a check is exercised against MPs. If the MPs were wrong to bring down the government, then the British public can render their verdict in the pursuant general election.

Likewise, if the government feels unduly frustrated by MPs from implementing its agenda, it can dissolve the parliament and call an early election. If the election had been called unnecessarily, for the sake of the prime minister's advantage, the public could sanction the governing party at the ballot box. Edward Heath and Theresa May learned this lesson in 1974 and 2017. Robert Craig in Chapter 6 demonstrates the importance of this delicate balance of confidence – one which helps governments to push their programme forward but also ensures that governments do not stray too far from popular sentiments.

This is a profoundly democratic system. The public's verdict hangs like a sword of Damocles over politicians. Misbehaviour, incompetence, or failure to implement manifesto commitments do not go unpunished for long. Nick Clegg and his Liberal Democrats learned this in 2015 after having traded their manifesto pledges to support a Conservative government for five years. Boris Johnson, as Gillian Peele notes in Chapter 13, was eventually ejected from office in 2022 not by a standards committee but because the public showed that they were fed up with him. The government experienced repeated by-election defeats in a diverse array of constituencies, placing enormous pressure on Conservative MPs to remove their leader, lest the public render a similar verdict on the complicit MPs in their own seats at the next general election.

[13] For examples, see R Johnson, *The End of the Second Reconstruction* (Cambridge, Polity, 2020), Ch 2.

The contention that the British constitution is fundamentally democratic often raises heckles from commentators.[14] They often point to the unelected upper chamber and head of state as proof positive that the constitution is archaic and undemocratic. The Scottish Labour leader Anas Sawar proclaimed that Labour must 'renew democracy. The House of Lords, in its current form, as an institution has no place in twenty-first century politics'.[15] More furtively, similar points can be found against the monarchy.[16] Yet, such commentators need to go back and read their Bagehot.[17] They have confused the 'dignified' and 'efficient constitution'. The former refers to the grand pomp and ceremony of British constitutional arrangements – epitomised in the Crown and the Lords. The 'efficient' constitution refers to where power actually lies – the House of Commons and the Cabinet. In the British system, there is almost an inverse relationship between how grand and splendid an institution is and the amount of power afforded to it. Our meek Queen lives in palaces; our potent Prime Minister lives in a townhouse. The chamber of the House of Lords is much more ostentatious than the rather plain House of Commons, despite power overwhelmingly resting with the Commons.

If you want to change Britain, don't waste time on the 'dignified' constitution; grab control of the 'efficient' constitution and use it to implement your political agenda. It is precisely because the House of Lords and the monarchy are out-of-place with modern democratic values that they pose no serious threat to the popular will expressed through the House of Commons. As Philip Norton sets out in Chapter 8, these unelected actors have no legitimate claim to block the democratic will of voters expressed in the election of their MPs. This is not true in systems with elected upper chambers and elected presidents, who often feel empowered to block legislation that commands a majority in the lower chamber. Paradoxically, it is the lack of democratic legitimacy of the Lords and monarchy that acts as a democratic safeguard. Those who wish to change this will introduce greater possibilities to dilute the expression of the popular will. They have succumbed to a 'liberal' reading of constitutional reform, which fetishizes process and form over outcomes.

The British Constitution and Policymaking

This is not a partisan book. The editors support different political parties, as do our contributors. The volume contains chapters from ministers who have served in both Conservative and Labour governments. However, all those involved are united by a willingness to take seriously the value of the political constitution and to treat efforts to depart from this model, if not with unified opposition, with a healthy scepticism.

It is curious, however, that opposition to the political constitution so often comes from the left of the British political spectrum. This was not always the case. Labour politicians like Clement Attlee and Aneurin Bevan understood the transformative potential of the 'old' British constitution.[18] The National Health Service, for example, is a unique creation of the British constitution. To socialise the entire healthcare system in the UK, which involved the

[14] J Dennison, 'A Proposal for Simultaneous Reform of the House of Commons and House of Lords' (2020) 91 *The Political Quarterly.*
[15] H Stewart, 'Labour would scrap House of Lords, says Scottish party leader' (2022) *Guardian*.
[16] https://www.democraticaudit.com/2014/12/03/abolishing-the-monarchy-would-remove-an-obstacle-to-genuine-democracy-in-britain/
[17] W Bagehot, *The English Constitution* (London, Chapman & Hill, 1867).
[18] F Field (ed), *Attlee's Great Contemporaries: The Politics of Character* (London, Continuum, 2009).

appropriation of private hospitals into public hands with little or no compensation, the Attlee government simply needed a majority in the House of Commons.

In many other systems in the world, appeals might be made to an upper chamber, an elected head of state, a judge, or a state or provincial legislature to act as a block on such radical, transformative action. In a system of constitutional supremacy, there might indeed be some higher law which would protect private property rights from such appropriation. Yet, in the British system, if Parliament (and, in practice, a simple majority in the House of Commons) wishes to achieve something so radical, there is no one to stop it.

Raymond Seitz, who was US Ambassador to the United Kingdom in the early 1990s, marvelled at the British constitution compared to his own. He reflected, 'Coming from this kind of fractured, fractious federal background, an American arrives on British shores astonished to find how unfettered a modern British government is… It took me a long time to understand that a British government, with a simple majority in the House of Commons, can do pretty much what it wants to…. I kept looking for the constitutional checks and institutional balances that could stay the will of the British government. But I could find none'.[19]

His astonishment is understandable, for the United States has an exceptionally high number of 'veto players' in its constitution.[20] A veto player refers to a political institution whose consent is required for the enactment of legislation.[21] In the US constitution at the federal level, there as many as five veto players. In order to be enacted fully, legislation could need to receive assent from three institutional actors: a majority in the House of Representatives, a majority or (more commonly) super-majority in the malapportioned Senate, and the president's approval. Sanford Levinson has called the US a *tricameral* system because the president wins approximately 95% of all veto contests with Congress.[22] In addition, legislation must also sometimes withstand dissent from the Supreme Court and state governments who, often working together, can scupper legislation that has, nonetheless, won approval from the House, Senate, and president.

In the British constitution there is one effective veto player – a majority in the House of Commons. In practice, the House of Lords, Crown, and courts must fall into line should the Commons wish something to become law. This absence of veto players has real implications for policymaking. Contrast the ease of establishing the National Health Service to the challenges which Barack Obama faced when he tried to implement a modest public health insurance reform: the expansion of the Medicaid public health insurance programme to all American families whose income fell below 138% of the federal poverty line.

Medicaid expansion was a policy designed to provide public health insurance to millions of working-class people.[23] In 2010, this proposal passed the House (veto player 1), by a single vote it passed the Senate (veto player 2), Obama signed it into law (veto player 3). Then, before it came into effect, the Supreme Court stepped in (veto player 4). The court ruled that it was unconstitutional for the government to force states to expand the Medicaid programme to millions of working-class people.[24] The expansion of healthcare became contingent on the

[19] R Seitz, *Over Here* (London, Weidenfeld & Nicholson, 1998)
[20] A Stepan & J Linz, 'Comparative Perspectives on Inequality and the Quality of Democracy in the United States' (2011) 9 *Perspectives on Politics.*
[21] G Tsebelis, 'Veto Players and Institutional Analysis' (2000) 13 *Governance.*
[22] S Levinson, 'Popular Sovereignty and the United States Constitution: Tensions in the Ackermanian Program' (2014) 123 *Yale Law Journal*, 2661.
[23] L Jacobs & T Skocpol, *Health Care Reform and American Politics* (Oxford, Oxford University Press, 2010).
[24] *National Federation of Independent Business v Sebelius,* 567 US 519 (2012).

acceptance of state governments (veto player 5).[25] As Pablo Beramendi once said, federalism is a 'breeding ground for political and economic opportunism'.[26] This was no exception. Federalism threw up racialised structural barriers to the expansion of Medicaid. Nearly half of African Americans lived in states where the governors refused to expand public health care.[27]

Far from being 'radical', the kinds of constitutional reforms often supported by Labour MPs of a recent vintage are the very devices which would constrain the power of a majority Labour government from implementing a socialist programme. Indeed, some mooted reforms, like proportional representation, would make a majority Labour government a virtual impossibility altogether.[28] The dearth of veto players in the British constitution provides enormous potential for a democratic socialist party. A socialist party which can secure a bare majority in the lower chamber of Parliament can rule the country with virtually no limitations whatsoever: no senate to block its legislation, no president to veto it, no judge to overrule it as 'unconstitutional', no devolved government to refuse to co-operate, and no non-socialist coalition partners with whom to compromise. The Labour MP Peter Shore, who opposed all of these veto players, put it succinctly: 'I did not come into socialist politics in order to connive in the dismantling of the power of the British people'.[29]

Many on the left, however, are willing to sign away all this power if it means that Conservative governments cannot get their way, either. This, in effect, in the trade-off between the 'old' and 'new' British constitutions. The further Britain moves away from the 'old' constitution, the less likely it is for parties of either the right or the left to implement their programme untrammelled. What has been lost is faith in the power of the British people to act as a constitutional safeguard or true architects of their own future. When Labour gives up hope of defeating the Conservatives through the ballot box, it turns instead to trying to place constitutional restrictions on Conservative governments, even if it means reducing power for itself.

Labour's proposals to empower judges to quash government policies, empower an elected upper chamber to block a Commons majority, or to devolve more power away from Westminster never really consider what they could mean: judges ruling against democratically enacted social legislation, a Senate that blocks transformative social policy, and devolved governments cutting the social safety net to the bone. But the evidence is there in the comparative politics research should anyone care to look.[30]

To end the legislative freedom of Parliament is to end the political constitution as we know it, and to turn judges into our ultimate political masters. It is, in effect, changing the title deeds of the guardianship over the British constitution from the British public to the judiciary. As the Labour leader Hugh Gaitskell said in similar, if not identical circumstances, 'You may say "Let

[25] B Merriman, *Conservative Innovators: How States are Challenging Federal Power* (Chicago, University of Chicago Press, 2019).
[26] P Beramendi, *The Political Geography of Inequality: Regions and Redistribution* (Cambridge, Cambridge University Press, 2012).
[27] J Michener, *Fragmented Democracy: Medicaid, Federalism, and Unequal Politics* (Cambridge, Cambridge University Press, 2018).
[28] R Johnson, 'Proportional Representation Would Spell Disaster for the Labour Party' (2021) *Guardian*.
[29] K Hickson, J Miles, H Taylor, *Peter Shore: Labour's Forgotten Patriot* (London, Biteback, 2020).
[30] A Lijphart, 'Democratic Political Systems: Types, Causes, and Consequences', (1989) 1 *Journal of Theoretical Politics* 33; G Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 2nd edition (Chicago, University of Chicago Press, 2008); J Behrend & L Whitehead (eds), *Illiberal Practices: Territorial Variance within Large Federal Democracies* (Baltimore, Johns Hopkins University Press, 2016).

it end" but, my goodness, it is a decision that needs a little care and thought'. This volume is an opportunity to give a bit of care and thought as to whether these changes have delivered the benefits that they were purported to bring. Its contributors ponder whether further reform is in fact needed, or whether there was in fact something to be said for the old British constitution.

The New British Constitution: A Note of Scepticism

Since the late 1990s, the UK constitution has undergone a profound transformation. The New Labour (1997-2010) and Conservative-Liberal Democrat coalition governments (2010-15) implemented highly consequential structural changes to the British system of governance. The gist of these reforms was to weaken the power of the UK Government and Parliament by creating devolved governments, increasing veto players in Westminster, elevating the role of unelected technocratic experts, and strengthening judicial power. The role of national democratic 'politics' as the linchpin in the system was brought into question. Instead, policymakers sought to constrain politics through additional veto points, a greater role for 'neutral' experts, curtailed prerogative power, and active judicial monitoring.

Vernon Bogdanor wrote in his 2009 book *The New British Constitution* that 'the constitutional reforms since 1997, together with Britain's membership of the European Union, have served to provide us with a new British constitution…[T]he radicalism of the reforms should not be under-estimated, nor the challenge they offer to traditional assumptions about the constitution'.[31] We agree with this assessment. Bogdanor himself explores in Chapter 14 one such reform of profound constitutional consequence: devolution. He concludes that the devolution settlement has failed to live up to the promise of its 1990s devotees.

Regardless of their actual record of performance, many virtues are ascribed to these reforms. They are accepted as 'settled', rather than contingent, features of the political system. Few venture to question their value, even if, like devolution, they were controversial at the time of their introduction. To the extent that criticism exists, it has often been to argue that these reforms do not go far enough. An elected upper chamber, regional English parliaments, further devolution, electoral reform, citizens' assemblies, and a codified constitution are common tonics prescribed by commentators from this point of view.

This volume adopts a different outlook. The editors of this volume are sceptical that it is necessary or even desirable to reduce the British constitution to a canonical text that can then be enforced by judges. We tend to regard Westminster parliamentarism as one which links both maximum government power with maximum accountability to the electorate. We are sceptical of attempts to redirect the safeguards of this model away from the British public and into the hands of a mandarin class of legal elites. While not dogmatic on questions of reform, we believe that arguments that depart from this model need very good justification and are not self-justified on their face. Ultimately, this book is an effort to restore faith in the possibility of democratic self-governance where the public are the ultimate masters of what can be achieved through politics.

Outline of the Volume

The contributors to this book are a diverse array of voices, and they do not purport to be in full agreement on all matters of constitutional reform. Some are comfortable with, and see the case for, some reforms. Some might even call themselves 'reformers' of a certain kind. Other contributors are much more sceptical and argue strongly for a return to the 'old' constitution.

[31] V Bogdanor, *The New British Constitution* (London, Bloomsbury, 2009).

These differences, we argue, are a strength of the volume. What unites them is a willingness to take the political constitution seriously and to acknowledge the virtues in the unique British constitutional system. The authors in this volume have reviewed the constitutional reforms of the last quarter century and come to the conclusion that many of them have not delivered the cures which their proponents claimed they would. Along with their purported benefits, each change carried corresponding costs. In many, if not all, of these cases, the cost has outweighed the benefit.

Part I – The Political Constitution and the Law

Part I analyses the relationship between politics and law. Brian Christopher Jones (Chapter 1 – 'A Brief Case Against Constitutional Supremacy') begins by outlining a case against what he calls 'constitutional supremacy', the idea that laws produced by a democratically elected government can be overturned if deemed to be incompatible with a set of supreme or higher laws, embodied in a codified constitution. The British constitution has no hierarchy of law and, while this can carry some risks (e.g., to stability), Jones regards this system as fundamentally more democratic. Jones also points out that a codified constitution is no safeguard of democracy, with many of the most oppressive regimes in the world operating according to written constitutions.

Carol Harlow explores two key, inter-related questions in Chapter 2 ('Judicial Encroachment on the Political Constitution?'): 'What exactly is the political constitution' and 'what do we expect of our judges'. To answer these questions, she turns to the work of J A G Griffith, one of the leading exponents of the idea of the political constitution. Griffith warned against moves to convert essentially political questions from contestable claims to enforceable rights, which he believed would involve a 'substantial transfer of power from Parliament and politicians to the judiciary'. One might wonder whether New Labour's creation of the Supreme Court of the United Kingdom represented such a move. Harlow sets out to assess how much the British judiciary has encroached on politics in recent years, especially during the heated controversies over implementing the 2016 vote to the leave the EU. She believes that 'a judiciary, emboldened by the passage of the Human Rights Act, extended its ambition and power'. However, she observes that the departure of Lady Hale in 2020 as President of the Supreme Court and her replacement by Lord Reed has seen 'a reversion to restraint'. In her assessment, 'The Supreme Court over which Lord Reed presides operates in a markedly different manner and has adopted a very different style to the court that decided *Miller and Cherry, Privacy International,* and *Evans*'.

In an important contribution, Richard Ekins (Chapter 3 - 'Legislative Freedom and Its Consequences') defends the idea that the central rule of the UK constitution is the doctrine of parliamentary sovereignty. For Ekins, this means that the Queen-in-Parliament may enact any law except one that binds its successors. Even though this proposition was once entirely 'unremarkable', Ekins observes that some contemporary constitutional scholars have brought this idea into doubt, suggesting that the constitution has undergone 'a series of legislative qualifications of parliamentary sovereignty' in recent years. Usually, EU membership (until 2020), the Human Rights Act 1998, and devolution are cited as implicitly limiting the legislative freedom of the UK Parliament. Ekins rejects this thinking. All of these, he writes, are contingent. Legislative freedom remains 'fundamental' to the UK's governing arrangements. Should Parliament wish to change these strictures, it is entitled to do so. Ekins emphasises that the political constitution relies on 'politics to direct and discipline the exercise of Parliament's vast legal authority'.

The New Labour government passed two major legal reforms that appeared to reshape the relationship between the law and politics. One of these was the Human Rights Act 1998 (HRA),

which attempted to incorporate the European Convention of Human Rights (ECHR) into domestic law. Michael Foran (Chapter 4 - 'A Great Forgetting: Common Law, Natural Law, and the Human Rights Act') offers staunch criticism. The HRA, in his view, was neither necessary nor a positive contribution to rights enforcement in Britain. He argues, 'In its most basic sense, the Human Rights Act represents an abdication of legislative responsibility'. The HRA enjoys a high status in much of the legal community, and any effort to repeal a law called the 'Human Rights Act' would likely be met with scepticism and even alarm. Yet, Foran discourages alarmism. 'We should be wary of adopting an uncritical view that the arc of the moral universe is long but it bends toward the Human Rights Act', he advises.

A second major legal reform was the Constitutional Reform Act 2005, which established the 'Supreme Court of the United Kingdom' and made major changes to the ancient position of Lord High Chancellor of Great Britain. The legislation removed the Lord Chancellor's roles as presiding officer of the House of Lords, head of the law lords, Chancellor of the High Court, and President of the Supreme Court of Judicature. Simultaneously a member of the legislature, executive, and judiciary, the Lord Chancellor was once the 'linchpin' of the constitution. Sir Robert Buckland, who held the role from 2019-21, reflects in Chapter 5 ('The Nightmare and the Noble Dream: Politics and the Law') about what these changes meant for the relationship between politics and the law. Buckland makes no apologies for his view that government should be 'as effective as possible' in delivering on the agenda on which it was elected. However, Buckland, a Queen's Counsel, values the judiciary and its reputation, too. He believes the interests of both government and the judiciary are best served when there is a 'clear delineation about where the power lies'. Judges must not be drawn into the political realm. MPs and government must play their part to ensure that they are not. Finally, he defends the constitutional vision of the post-coalition Conservative governments and argues that they were 'attempting to return to the political constitutional model that was the orthodoxy for much of the 20th century'.

Part II – Westminster and Whitehall

Part II ('Westminster and Whitehall') analyses various attempts to reform the UK Parliament and UK Government since 1997. At the heart of the British constitution is the idea of the political accountability of the executive. Sometimes pilloried as 'elected dictatorship', the British constitution enables majoritarian governments to win elections and deliver on their manifesto promises with few legal constraints. Increasingly, there have been efforts to limit executive power and prerogative, through statute (such as the Fixed-term Parliaments Act) and judicial intervention (the two *Miller* cases).[32]

Robert Craig (Chapter 6 - 'The Fixed-term Parliaments Act: Out, Out Brief Candle') offers a robust critique of these efforts to constrain executive power. In the crosshairs of Craig's chapter is the Fixed-term Parliaments Act 2011, which, until its repeal in 2022, abolished the prerogative power, held by the Queen and exercised on the advice of the prime minister, to dissolve Parliament and call a new general election. Craig shows not only why the FtPA was poor law but also why it introduced an undesirable constitutional imbalance. It upset the 'mutually assured destruction' that both the Government and the House of Commons hitherto enjoyed: at any moment, MPs could bring down a government through a vote of no confidence and, at any moment, a prime minister could dissolve Parliament and call for a new election. Both MPs and the prime minister had the power to remove the other from office, providing the public agreed

[32] *R (Miller and another) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) reported in the Supreme Court at [2017] UKSC 5 (*Miller (No 1*)); *R (Miller) v The Prime Minister, R(Cherry) v Advocate General for Scotland* [2019] UKSC 41 (*Miller and Cherry*)

with them, a balance which has now happily been restored since the FtPA's repeal. Craig's chapter also includes a valuable discussion about royal power and the prerogative more generally.

The role of the UK legislature has traditionally been seen as much less 'proactive' than other legislative assemblies. In the 1960s, Bernard Crick wrote that the UK legislature can offer 'influence, not direct power; advice, not command; criticism, not obstruction; scrutiny, not initiation'. The growth of the committee system and a variety of internal reforms have strengthened the legislature's ability to scrutinise. Yet, recently, some scholars have called for an even more proactive legislature, for example one which can wrest control of the parliamentary timetable from government.

Tony McNulty, in Chapter 7 ('Reform of the House of Commons: A sceptical view on progress'), regards the House of Commons as 'the fulcrum of the UK's constitutional settlement'. Therefore, 'the first point of reference of any constitutional reform should be an assessment of how it impacts on the Commons'. McNulty takes a dim view of recent efforts to reform the House of Commons, emanating from both parties. He argues that the Wright Committee's report of 2010, commissioned by Gordon Brown, was 'not rooted in a deep analysis'. Additionally, while the 2010-15 Conservative-Liberal Democrat government pursued 'constitutional change with all the piety and sanctimony of a religious cult', the reforms proposed by the Deputy Prime Minister Nick Clegg made 'no attempt' to explain how the changes would improve the core functions of the Commons. McNulty, who served as a Labour MP for 13 years, views the Commons as serving three key functions: as a forum for national debate, a place of scrutiny over the government, and the body that sustains the government in power. Of these, McNulty argues, 'primacy needs to be given to the facilitation of the government's ability to govern'. Fundamentally, the Commons is 'a legislative factory', and McNulty strongly disagrees with present-day reformers who advocate further reforms 'from a fundamentally flawed premise of control of the order paper'. Parliament *should not* have control over parliamentary time because, as McNulty argues, 'the government needs to control business in the Commons to govern effectively'.

Another frequently floated reform is an elected upper chamber, which likely would re-introduce a veto player into the UK system that had been, effectively, abolished by the Parliament Acts 1911 and 1949. Unlike the resistance faced by David Lloyd George when he presented his reforming People's Budget, it is now understood that the House of Lords must ultimately defer to the will of the House of Commons (although, some delay is possible). By being unelected, it is clear why this deference must take place, whereas an elected chamber would surely become more assertive and, over time, seek to weaken the primacy of the House of Commons. Philip Norton, who sits in the House of Lords as Lord Norton of Louth, argues in Chapter 8 ('The House of Lords: A Sceptical View of Big Bang Reform') that the unelected feature of the Lords, paradoxically, acts as a democratic safeguard. Lord Norton argues that while some reforms in the Lords are desirable, he favours a more incremental approach which focuses on improving the Lords' function rather than obsessing over its form.

Proponents of an elected House of Lords almost always advocate that such a chamber should be elected by some form of proportional representation (PR). More broadly, it seems that many academics would like to extend PR to the House of Commons, too. Electoral reform would lessen the likelihood of majority governments, making post-election coalition deal-making a new fact of life in British politics. Electoral reform would, therefore, not simply change the legislature of the United Kingdom but it would also have profound implications for the composition of the executive. It would weaken the clarity of political accountability, warns Jasper Miles (Chapter 9 - 'Accountability and Electoral Reform'). The case for FPTP is a point of view which does not get

much of a hearing in academia; although, certainly it seemed to be the overwhelming choice of the British electorate in the 2011 electoral referendum.

Hayley Hooper's chapter (Chapter 10 – 'Delegated Legislation in an Unprincipled Constitution') explores the use of delegated, or secondary, legislation. Parliament delegates powers to ministers under provisions sometimes called 'Henry VIII clauses', enabling them to make law without the usual parliamentary processes. For decades, legal academics have complained about the use of secondary legislation, warning that it evades essential parliamentary scrutiny. At the same time, there has been a begrudging acceptance that delegated legislation is a 'necessary evil' in order to help governments overcome the limits of parliamentary time and to accommodate the need for flexibility and detail that primary legislation struggles to provide. Delegated legislation gained renewed prominence during both the Brexit process and the COVID-19 pandemic. In this timely contribution, Hooper analyses how delegated legislation was deployed in the context of these two major episodes. She concludes that it is vital for Parliament to play its part, but the strength of the British constitution is that neither Parliament nor government (neither 'Westminster' nor 'Whitehall') should completely dominate. A creative tension between the two is a strength of the system.

In an innovative contribution to this volume, Conor Casey (Chapter 11 - 'A Defence of the Dual Legal-Political Nature of the Attorney General for England and Wales') disagrees with those who argue that the Attorney General should be carved out from partisan politics and reserved for a 'neutral' legal expert. Casey sees merit in the fact that the Attorney General emerges from the legislature, like other members of the Cabinet. As a politician, the Attorney General is better able to 'translate' law and politics for the prime minister and other members of the executive. Casey also argues that a politician Attorney General is less likely to be 'cautious' in the way that some technocratic advisers might be. Casey writes, a 'very cautious and highly risk averse approach to the provision of legal advice has the capacity to seriously hamstring the state's capacity to project public power to robustly respond to socio-economic challenges for the common good'. While Casey was referring specifically to the (un)desirability of relying on legal technocrats to dispense legal advice to the government, this point can be made more broadly. Relying on 'legal', 'neutral', or 'apolitical' devices to constrain government action carries costs. They shrink politics and, therefore, the range of possible policy interventions open to a government.

The final two chapters of Part II analyse public appointments and standards in public life, the subject of lively political contestation during the premiership of Boris Johnson (2019-22). John Bowers (Chapter 12 - 'The Public Appointments System') argues that the system for public appointments has been quite haphazard and shaky. Public confidence has been undermined at times by a lack of a perception of a fair process. He suggests some reforms to strengthen public confidence in the system.

Gillian Peele (Chapter 13 - 'Standards and the British Constitution') is both an Oxford University academic and a member of the Committee for Standards in Public Life (CSPL); although, she writes in a personal capacity. Peele explains the origins of the committee, its function, and its legal footing. Peele offers some suggestions for strengthening the role and work of the committee, while acknowledging concerns MPs frequently raise about their autonomy. Peele also acknowledges that alongside parliamentary investigators, MPs themselves serve as an important vehicle in holding governments to account. Ultimately, it was a rebellion from his own MPs and Cabinet ministers which forced Boris Johnson to resign as prime minister in July 2022, rather than the long-awaited report from the Privileges Committee.

Part III – Beyond Westminster and Whitehall

Part III ('Beyond Westminster and Whitehall') examines the constitutional changes that are, to some extent, external to the operation of Parliament or the UK Government but which, nonetheless, have serious ramifications for the doctrine of parliamentary sovereignty and political accountability. They also raise important existential questions about the continuation of the United Kingdom itself.

Devolution, once thought to be a device to protect the union, has seemingly weakened the kingdom's internal bonds dramatically. From a social policy perspective, devolution fragments the welfare state and makes universal, transformative social policy more difficult to implement. Paul Peterson said, 'Federalism means inequality', yet some of the staunches advocates for federalism in Britain seem to be from the British left. Vernon Bogdanor (Chapter 14 - 'Devolving and Not Forgetting') argues that UK policymakers made a serious mistake when devolution was thought to transfer all responsibility for domestic social problems to the devolved parliaments and executives. He argues that it remains the responsibility of the UK Government to ensure a high standard of living, a well-trained and educated workforce, and equality of opportunity, irrespective of where a person lives within the United Kingdom. Therefore, UK governments should feel more empowered to intervene to address social problems with respect to British citizens living in Scotland, Wales, or Northern Ireland.

Scotland has witnessed the greatest loosening from the rest of the United Kingdom, with the Scottish Parliament being given more powers than the other devolved parliaments and being politically governed by a party whose primary purpose is to dissolve the United Kingdom. Far from 'killing nationalism stone dead', devolution has provided the institutional blueprint for a separate Scottish state.[33] Peter Reid and Asanga Welikala, both based at the University of Edinburgh, consider in their chapter (Chapter 15 - 'Scottish Secession and the Political Constitution of the United Kingdom') the remarkably relaxed approach the UK Government has taken to Scottish separatism. Few other countries in the world would have simply consented, as David Cameron's coalition government did in 2014, to the breakup of their country on the basis of a simple legislative majority in a devolved region and with the threshold being a simple majority (on any turnout) in a referendum.

Across the Irish Sea, Kate Hoey, who sits in the House of Lords as Baroness Hoey, writes about the UK Government's insouciance to British identity in Northern Ireland in Chapter 16 ('Northern Ireland's Constitutional Position in the United Kingdom'). Writing from her British Unionist perspective, Lady Hoey argues that the Northern Ireland Protocol, which was negotiated as part of the British withdrawal from the European Union, is an unacceptable disjuncture in trade across the United Kingdom. Just as people would not accept a customs barrier between the East and West Midlands, Hoey argues, such a barrier between Northern Ireland and the rest of the United Kingdom should be viewed as equally intolerable. At the same time, she argues that the Belfast (Good Friday) Agreement has been misused to argue that there should be *no* border (in any form) between the Republic of Ireland and Northern Ireland, even though, she argues, this was never the intent of the Agreement. She recalls in the chapter her time as a London Labour MP, when she travelled to Northern Ireland in 1998 to campaign in favour of the Agreement, alongside the Ulster Unionist leader David Trimble. At the heart of the Belfast Agreement is cross-community consent, which ironically is now being violated by those who wish to impose the Protocol on the Unionist community.

[33] *Hansard* HC Deb. Col 735, 6 May 1998.

The ructions caused by British membership (and exit) from the European Union are examined by Joanna George and Gisela Stuart, Baroness Stuart of Edgbaston in Chapter 17 ('The European Union and the British Constitution'). Stuart, as a Birmingham Labour MP, served as Chair of Vote Leave during the 2016 referendum on European Union membership. George and Stuart regard joining and leaving the EU as fundamentally constitutional acts, with important implications for the operation of the UK constitution more broadly. They contend that British governments tended not to take seriously how constitutional reform *within the EU* would have knock-on consequences for the operation of the constitution *within the UK*. Stuart draws from her experience as the Parliamentary Representative to the European Convention, which drafted a new constitution of the European Union, and where she served as a member of its Presidium.

The volume concludes with a wide-ranging and fascinating discussion about representation and the British constitution by Richard Tuck (Chapter 18 – 'Against (Many Kinds) of Representation'). Tuck rejects schemes like citizens' assemblies and legislatures chosen by sortition because they remove any sense of a positive mandate for action or retrospective accountability for performance. A citizen who is not lucky enough (or unlucky, depending on one's perspective) to be chosen for a citizens' assembly has no power to instruct its members or sanction them, unlike in an elected system. All that ordinary citizens can do is present petitions and try to appeal to the beneficence of the members of the citizens' assemblies, who are under no obligation to listen to or follow their instructions. Tuck likens this situation to the petitions made by subjects to their king under the absolute monarchies of the *ancien régime*. Relatedly, Tuck rejects Edmund Burke's theory of representation articulated in his Address to the Electors of Bristol in 1774. In this speech, Burke, unlike his fellow Bristol MP Henry Cruger, rejected the common practice of mandation, whereby electors would vote on certain policy instructions that their MPs would need to follow. Burke wished to function effectively as an independent, which raises many of the same concerns as sortition and citizens' assemblies. In the old practice of mandation Tuck sees the seeds of the party manifesto, 'a special document' that 'has played a powerful role in modern British politics'. Manifestos act as a form of mandation on MPs today, which Tuck regards as highly democratic and desirable. In addition, Tuck views referendums as a kind of national mandation of MPs, which they are duty-bound to accept, even if technically they could act otherwise. The attempt to revive a Burkean theory of representation during the hung parliament of 2017-19 was 'farcical' and 'a full-blooded Burkean position is no more persuasive now than it was in 1774'.