Part I

The Old Constitution: Two Approaches

Introduction

Yet if he [Robert the Bruce, King of Scotland] should give up what he has begun, and agree to make us or our kingdom subject to the King of England or the English, we should exert ourselves at once to drive him out as our enemy and a subverter of his own rights and ours, and make some other man who was well able to defend us our King; for, as long as but a hundred of us remain alive, never will we on any conditions be brought under English rule.

It is in truth not for glory, nor riches, nor honours that we are fighting, but for freedom—for that alone, which no honest man gives up but with life itself.

(Declaration of Arbroath, 1320, translation at http://heritage.scotsman.com/declarationofarbroath/The-text-of-the-Declaration.2600645.jp, original Latin text available at http://www.geo.ed.ac.uk/home/scotland/arbroath_latin.html)

For really I think that the poorest he that is in England hath a life to live, as the greatest he; and therefore truly, sir, I think it's clear, that every man that is to live under a government ought first by his own consent to put himself under that government; and I do think that the poorest man in England is not at all bound in a strict sense to that government that he hath not had a voice to put himself under.

(Speech of Col. Thomas Rainborough at Putney Debates, October 1647; text (modernized spelling) at http://courses.essex.ac.uk/cs/cs101/PUTNEY.HTM)

There is nocht tua nations vndir the firmament that ar mair contrar and different fra vthirs, nor is inglis men and scottis men quhoubeit that thai be vitht in ane ile and nythtbours, and of ane langage: for inglis men ar subtil and scottis men ar facile, inglis men ar ambitius in prosperite, and scottis men ar humain in prosperite. inglis men ar humil quhen thai ar subieckit be forse and violence, and scottis men ar furious quhen thai ar violently subiekit[.] inglis men ar cruel quhene thai get victorie, and

> scottis men ar merciful quhen thai get victorie. and to conclude it is onpossibil that scottis men and inglis men can remane in concord vndir ane monarche or one prince be cause there naturis and conditions ar as indefferent as is the nature of scheip and voluis [wolves].
>
> (Complaynt of Scotland, c. 1549, at http://www.scotsindependent.org/features/scots/complaynt/chap13.htm).

This book is about how four neighbours of two (main) isles and one (main) language have remained, more or less, in concord for three centuries. It may or may not be true that Englishmen are humble when they are subjected by force and violence, and cruel when they get victory, but in constitutional matters this book shows that Englishmen (they are mostly men) tend to be far from humble; therefore they systematically misunderstand and misrepresent the British Constitution.

The traditional story of the British (English, United Kingdom) Constitution does not make sense. It purports to be both positive and normative: that is, to describe both how people actually behave and how they ought to behave. It fails to do either. It is not a correct description and it has no persuasive force. This book offers a reasoned alternative. The UK government's 2007 Green Paper, *The Governance of Britain* (HM Government 2007), starts down the road proposed in this book, but it does not go nearly far enough. The succeeding White Paper (HM Government 2008*a*) was widely regarded as backsliding—for instance, in rejecting change to the role of Attorney-General. One aim of this book is to encourage policy-makers to be bold—and consistent.

The view that still dominates the thoughts of constitutional lawyers is *parliamentary sovereignty* (or *supremacy*). According to this view, the supreme lawgiver in the United Kingdom is Parliament. Some writers in this tradition go on to insist that Parliament in turn derives its authority from the people, for the people elect Parliament. An obvious problem with this view is that Parliament, to a lawyer, comprises three houses: monarch, Lords, and Commons. The people elect only one of those three houses.

However, the rival idea that the people themselves are sovereign is ancient, as my first two epigraphs show. The Declaration of Arbroath was written in 1320. It was addressed by fifty Scots barons to the pope at Avignon, asking him to recognize Scottish independence from England. The signatories claimed to speak on behalf of the 'entire community of the realm of Scotland' (*tota Communitas Regni Scocie*). In the first epigraph I quoted, the signatories claim that their war hero Robert the Bruce, who had defeated the English at Bannockburn in 1314, was king only by their consent, and that if he 'subverted' their rights (*sui nostrique Juris subuersorem*), they would depose him.

In 1647, after the parliamentary armies had defeated King Charles I in the first English civil war, they argued among themselves about what that defeat implied. A faction of soldiers and civilians, known as the Levellers, put forward a programme ('An Agreement of the People') for limited government, universal male franchise, and frequent general elections. This horrified the leaders of the Parliamentary Army, but they nevertheless debated the proposals for two weeks with the Levellers, beginning in Putney church. The (now) best-known speech at Putney was made by Col. Thomas Rainborough. He was rescued from utter obscurity by the discovery of the transcript in 1890, followed after a further century by a prize-winning exhibition in Putney church and the accolade of TV serialization (*The Devil's Whore*, 2008). Rainborough's ideas were reinvented independently by John Locke, whose *Second Treatise of Government* was published in 1690 after the abdication of King James II (of England) and VII (of Scotland). After the writing, but before the publication, of Locke's *Second Treatise*, Convention Parliaments[1] in both countries had separately chosen William of Orange and his wife Mary to be king and queen. An elected monarchy, as perhaps foreseen by the Scots in 1320, was thus a reality. The parliaments rearranged the rules of royal succession again in 1701 (in England) and 1705–7 (in Scotland).

That this history should have led for three centuries to the legal convention, and rule of common law, that *Parliament*, rather than the people, is sovereign is slightly mysterious. The Framers of the US Constitution, students of Locke and his successors in the Scottish Enlightenment, declared in 1787 '*We the People of the United States . . . do ordain and establish this Constitution*.' They did not know about Rainborough, but some of them, including Thomas Jefferson,[2] were close students of the English Civil War. Similar declarations have been made in numerous other democracies including France and Australia. This book explores how the British Constitution would look if its writers were to do what the American Framers did in 1787.

The British Constitution is changing fast. The biggest generators of change were UK membership of the European Union (EU) in 1973; the first, and so far only, nationwide referendum, on whether Britain should remain in the EU,[3] in 1975; and the devolution of power to elected governments in Scotland, Wales, and intermittently Northern Ireland, enacted in 1997–8 and beginning in 1999. Through all these changes, and others described in this book, some writers of textbooks on law and constitutional theory have clung to an outdated framework defined for them by a deeply prejudiced law professor with a long beard, whose most famous book was published in 1885. Even as they argue with him (as most of them do), they continue

to take his theories as their starting point. One problem is that he seemed to know very little about Scotland, although he coauthored a book about the Union of England and Scotland in 1707. That Union created Great Britain, a new state with a single Parliament and executive.

The incoherence of the British Constitution is not a new problem. It dates back to that union of 1707, when two constitutional traditions were awkwardly merged. A symbol of this awkwardness has endured for three centuries with almost no comment. The Treaty and Acts of Union 1706/7 unite the executives and legislatures of England and Scotland into Great Britain. They comprise three documents in temporal sequence. In the first (the Treaty), English and Scots negotiators agreed a set of terms for union. In the second (the last Act of the Scottish Parliament), the Scots enacted the articles of the treaty, but announced in advance that their assent would be withdrawn if the English failed to accept the incorporated Act for the Security of the Church of Scotland. The English were welcome to add an Act of their own for the security of the Church of England. In the final document, namely the last Act of the English Parliament, the English did just that, while reciting and incorporating the Scottish Act.

Whether this third document is viewed as the last act of the English Parliament or (as the various collections of Statutes do) the first Act of the Parliament of Great Britain, it imposes two conflicting duties on the monarch of Great Britain. The incorporated Scottish Act is an Act for securing the true Protestant religion and Presbyterian Church Government. Each incoming monarch must, by the Acts of Union, 'inviolably maintain and preserve the foresaid Settlement of the true Protestant Religion'. The English Act requires that

> for ever hereafter every King or Queen succeeding and coming to the Royal Government of the Kingdom of Great Britain at His or Her Coronation shall in the presence of all persons who shall be attending assisting or otherwise then and there present take and subscribe an Oath to maintain and preserve inviolably the said Settlement of the Church of England and the Doctrine Worship Discipline and Government thereof as by Law established within the Kingdoms of England and Ireland the Dominion of Wales and Town of Berwick upon Tweed and the Territories thereunto belonging.

Because the English Parliament incorporated the Scottish Act as the Scots had forced it to do, these two incompatible requirements are found in a single Act of Parliament, the (English) Union with Scotland Act 1706 c.11.[4] There can be at most one true Protestant religion. The monarch of the United Kingdom is legally required to protect inconsistent truths.

Despite that anomaly, the Union of England and Scotland was successful after a rocky start. It was bitterly unpopular in Scotland when it was negotiated, and its unpopularity enabled the Jacobites (supporters of the deposed King James VII and II—*Jacobus* in Latin—and his descendants the 'Old Pretender' and 'Young Pretender') to mount their unsuccessful risings in 1715 and 1745. Bonnie Prince Charlie, the 'Young Pretender' to loyalists, arrived in Edinburgh in 1745 and set up his court at Holyrood Palace (just across the road from the present-day Scottish Parliament). The Edinburgh militia of university intellectuals failed to resist him, and he soon defeated a government army at Prestonpans, east of Edinburgh. However, his invasion of England petered out at Derby, and his forces were routed on the retreat at Culloden, near Inverness, in 1746.

Soon after Culloden, the Scottish Enlightenment of Adam Smith and David Hume burst forth in astonishing profusion. Scotland suddenly changed from the dirt-poor theocracy it had been only fifty years earlier, when an Edinburgh student was hanged for blasphemy, to a prosperous and cultured society, whose elites believed that the Union had been very good for Scotland. Nobody seriously challenged that view until the 1880s, and then only because nationalism started to seep back from Ireland.

The Union of Great Britain with Ireland in 1800–1 looked superficially like the Union with Scotland of a century earlier. But there was one fatal difference. In both cases, the MPs and negotiators of the smaller country demanded conditions in return for their agreement to dissolve its parliament. In Scotland, those conditions were subsequently honoured (with an exception, described below, which lasted from 1712 to 1843 and caused a great deal of trouble but did not threaten the Union itself after 1746). In Ireland, they were not. Ireland was overwhelmingly Catholic; its second religion was the Presbyterianism of the Ulster Scots; the established Anglican religion was only the third in size. A faction of its all-Protestant Parliament had demanded greater civil rights for Catholics and Presbyterians as part of the Union bargain. Prime Minister William Pitt the Younger had promised them. But after the Act of Union had passed and the Irish Parliament had dissolved itself, King George III decided that Catholic emancipation, as it was called, would violate his Coronation oath to protect the Protestant religion, and he vetoed it. Pitt resigned, and the Union was illegitimate from the start in the eyes of most Irish people. When they got the vote, they used it to elect politicians who demanded a weakening (but not a dissolution) of the Union. They were called 'nationalists'. Their opponents were called 'Unionists'. By the 1880s, Protestants from the north-east of Ireland tended to be fervent Unionists, but so did many English and Scottish people.

In spite of the Scottish and Irish difficulties, a traditional narrative of the British Constitution continued to develop, due principally to the nineteenth-century jurist and Unionist ideologue A.V. Dicey (1835–1922), who was an Oxford law professor. After the Hanoverian succession, 'the King' became to a large extent 'the government, acting in the king's name'. The government inherited the Royal Prerogative from the king. Under the Royal Prerogative, which is part of the customary common law and is not codified, the government may do lots of things without seeking the consent of legislature or people. Here as elsewhere, English commentators have assumed without hesitation that legal doctrines derived from English history apply throughout Great Britain, although Scots law remained distinct under the terms of the Treaty and Acts of Union.

Throughout his writings Dicey refers to 'England' and the 'English Constitution' to mean the United Kingdom and the British Constitution, respectively. His last book, however, written jointly with R. S. Rait, the Historiographer-Royal for Scotland, was a study of the 1707 Act of Union. Here Dicey and Rait (1920) acknowledge that Scotland might be different, although even in this book they refer only to a singular Act of Union. However, Dicey is most famous for his *Introduction to the Law of the Constitution* (Dicey 1885/1915), a text which went through eight editions in his lifetime and is still a reference point for constitutional law despite frequent attacks on it by public lawyers. He announced two fundamental doctrines: parliamentary sovereignty and the rule of law. These were intended to be both descriptions of the British Constitution and normative statements. In other words, they claimed to describe both how constitutional actors, such as judges and soldiers, actually behaved and how they ought to behave.

But Dicey was also a fervent Unionist who hated the idea of devolution to Ireland. This hatred led him to undermine his own constitutional doctrine and to encourage others to do so. He was one of the main godfathers of the Unionist revolt of 1912–14, described later. A coalition including the king, the leaders of the Opposition, the House of Lords, and a group of contingently mutinous[5] army officers vetoed the policies of the elected government. What happened in spring 1914 was no less than a successful coup d'état. It would have made a civil war in Ireland almost inevitable had it not been providentially overtaken by the First World War.

Dicey's own actions helped to make his doctrine descriptively wrong. Parliament was not sovereign, nor did the rule of law apply, in 1914. Dicey and other Unionists groped for a rival doctrine of popular sovereignty, but did not produce a credible one. He also destroyed his own normative theory.

By 1913 he had reduced it to the proposition: 'Parliament is sovereign except when I think it should not be: in which case those who think it should remain sovereign are fools.' In his last and most strident blast against Irish Home Rule, *A Fool's Paradise* (Dicey 1913), he writes that 'oppression, and especially resistance to the will of the nation, might justify what was technically conspiracy or rebellion'. In Ireland, soldiers at the Curragh and gunrunners at Larne took him at his word in 1914. In the name of what they took (without evidence) to be the will of the nation, they destroyed parliamentary supremacy, as this book relates.

Nevertheless, modern texts on constitutional law still operate in the shadow of Dicey (but see Weill 2003). Despite a formidable onslaught from (Sir) Ivor Jennings in the 1930s, standard texts would say until recently, 'Dicey's word has in some respects become the only written constitution we have' (Jowell and Oliver 1985, second edition 1989: p. v). Vernon Bogdanor, quoting this, sets about 'exorcising Dicey's ghost' in his copious writings about the UK Constitution (Bogdanor 1995, 1996, 2003). He has to. Although Jowell and Oliver now refer to 'hammer blows against our . . . Diceyan traditions' delivered since 1997 (Jowell and Oliver 1985, fourth edition 2000: p. v), the undead Dicey still hovers over discussions of sovereignty and the rule of law. For instance, in the most important constitutional case to reach the Law Lords so far in the twenty-first century, one of the Law Lords giving judgment describes Dicey as 'our greatest constitutional lawyer'.[6] As a consequence, professional discussions of such matters as Crown prerogative, church establishment, the role of the UK monarchy in its constitution, devolution, Europe, and the status of fundamental constitutional law have a century-old conservative slant.

This book aims to exorcize Dicey's ghost. It is both political history and political science. The history aims to explain why Dicey's legacy is bankrupt. By examining the creation of the United Kingdom in 1705–7 and 1800–1, I try to show how Dicey's anglocentrism blinded him, and almost everybody who has followed him, to the real nature of the two unions. I then focus on the Unionist campaign of (initially civil) disobedience against the elected governments between 1909 and 1914, which began with the House of Lords' rejection of government bills including the 1909 Budget and culminated in the illegal arming of Ulster Protestant paramilitaries with 30,000 rifles and three million ammunition rounds from a dealer in Hamburg. (The price was high because German arms dealers were also arming both sides in the Mexican civil war.) This operation was bankrolled by, among others, Rudyard Kipling, Lord Milner, and possibly the Unionist frontbencher

Walter Long. The most revered commander in the British Army, Field-Marshal Lord Roberts, approved a letter to be issued in his name encouraging soldiers to disobey orders.[7] The coup was masterminded by Sir Edward Carson and encouraged by the Leader of his Majesty's Loyal Opposition, Andrew Bonar Law. Law probably had advance knowledge of, and may even have financed, the Hamburg-to-Larne gunrunning. His Majesty King George V was loyal to his opposition, not to his government. All of these believed that the Parliament Act 1911 had removed Parliament's legitimacy.

The reader may say that this was a long time ago, and that the possibilities for later coups have been modified by such developments as the abdication of Edward VIII and the Parliament Act 1949. But these events need only have happened once to destroy Dicey's credibility, because they show that at times of heightened partisanship—exactly the times when a constitution must be most robust—the British Constitution was at its most fragile. To replace Diceyanism as positive description I introduce (in Chapter 2) veto-player theory and an American-derived theory of modified popular sovereignty.

Briefly, the more veto players there are in a political system, the more stable its outcomes. Under the normal operations of parliamentary politics, there were only two veto players in British politics up to 1911, and something like 1.5 since then. The two veto players can be represented as the median MP and the median peer. Normally, with single-party governments, the median MP is a member of the governing party. The median peer was always a Conservative up to 1999 and is now a Liberal Democrat, a Lord Spiritual (i.e. bishop), or a cross-bencher. The median peer held a veto over all legislation (except, it was believed, money bills) up to 1909. In 1909, he vetoed the Budget. This led, after two general elections forced by successive kings' veto on creating peers without an election, to the curbing of his powers in the Parliament Act 1911, limiting, but not eliminating, his veto. It is still effective in the last years of a Parliament, when time has run out to enforce legislation by repeated passage through the Commons under the terms of the Parliament Acts 1911 and 1949.

I then introduce the concept of the 'win set' of the status quo. The win set is the set of points that can be reached by majority decision without being vetoed. If the United Kingdom truly was the 'elective dictatorship' that politicians in opposition sometimes claim it to be, the win set would be of infinite size, because anything the median MP could be persuaded by her government to support would be carried. This would be majoritarian, but not stable, because after the next election the median MP might be of a different party. But the United Kingdom is not an elective dictatorship, except perhaps under Conservative governments before the United Kingdom's entry to the

EU. At all other times, the (Conservative till 1999) median peer is a veto player subject only to the Parliament Acts and the 'Salisbury convention' discussed later. Since EU entry, the primacy of EU over member-state law limits parliamentary sovereignty. This is brought out most starkly in the *Factortame* cases of 1990–1,[8] which I analyse below. With more veto players, policy is more stable, but some outcomes that a majority of elected legislators would prefer cannot be reached. Since EU entry, two further challenges to parliamentary sovereignty have materialized. One is devolution within the United Kingdom, which brings back to the agenda a number of issues that Scots lawyers and historians (and almost nobody else) have worried about since 1707.[9] The other is human rights law. These are discussed in detail in Chapters 9 and 10, respectively.

If parliamentary sovereignty is incoherent, what might replace it? My answer is popular sovereignty modified by entrenchment. American constitutionalism reached this point over 200 years ago (and Australian constitutionalism over 100 years ago). The US Constitution, ratified in 1787–8, declares that 'we, the people of the United States . . . do ordain this Constitution'. It is easy to be cynical. No women or slaves ordained it. Nevertheless, it was subject to ratification, and was ratified. The original Constitution therefore embodies the compromises necessary to get majorities of those entitled to vote in at least nine states to ratify it. It contains provision for its own ratification and amendment. It creates two directly elected chambers—the President and the House of Representatives. Since the Seventeenth Amendment in 1913, the Senate has also been directly elected. As they are all elected by different procedures, the median voter in each is a different person, and the win set of the status quo is the set of policies that is not vetoed by the median (unique) President, the median Senator, or the median Representative.

There is therefore a considerable amount of discussion of the US and Australian constitutions in this book. Why these two countries in particular, rather than (say) Canada, Germany, or France, which get only passing mentions? Because the United States and Australia are the only two countries with a common-law tradition whose original constitutions claim to derive from the people. (Canada was a latecomer to this party, but its 1982 constitution is discussed in Chapter 10). The US Constitution had to be ratified by constitutional conventions in at least nine states before coming into effect. It was, although some of the ratifying states demanded that a further Bill of Rights be added: it was, too. The Australian Constitution was the product of constitutional conventions in 1891 and 1897–8—the first elected by the colonial legislatures, and the second directly elected by the people. Neither Constitution may be amended unless the draft amendment is ratified by a supermajority of the people in a majority of the states.

The United States is a federal republic. So, according to Galligan (1995), is Australia. The former description is uncontroversial; the latter is controversial. Australians had a constitutional crisis in 1975, logically followed by a referendum on a republic in 1999, which the republicans lost. Nevertheless, I agree with Galligan that in all essentials Australia is both a federal and a republic. The starting point of this book is: 'How would the British Constitution look if we all agreed (1) that the Acts of Union 1706/7 enacted a treaty, not a takeover; and (2) that sovereignty ultimately comes from the people, not Parliament?' I argue that it would look like the constitution of a federal republic.

The US Constitution also guarantees rights, both procedural (e.g. against self-incrimination) and substantive (e.g. of free speech), which are intended to be proof against majorities. To that extent it restricts popular sovereignty in favour of protecting rights. As explored in Chapter 2, it does not operate as it says on its face. Analysis of the US Constitution and inference for the United Kingdom must deal with the uncomfortable fact that all the most important amendments to the Constitution have been enacted unconstitutionally.

This book discusses what would change and what would not were the United Kingdom to become a regime of popular sovereignty modified by entrenchment. Laws to be entrenched would include those that create or amend a *rule of recognition*. A rule of recognition is a secondary rule or meta-rule that stipulates which claimants to the title of 'rules' may actually be called rules. As classically defined:

> [A] 'rule of recognition' . . . will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts . . . . In a developed legal system the rules of recognition . . . instead of identifying rules exclusively by reference to a text . . . do so by reference to some general characteristic possessed by the primary rules (Hart 1961).

Another class of rules about rules are 'rules of change' which give a defined set of people the right to introduce new primary rules and abolish old ones. The rule of recognition needs to recognize the rule of change (Hart 1961: pp. 92–3).

Thus the Parliament Acts, Representation of the People Acts, and Parliamentary Constituencies Acts are rules of change. They each redefine the class of people entitled to make authoritative primary rules, and the class of people entitled to elect those who make those primary rules. So do those Acts that incorporate treaties between sovereign bodies, such as the Act of Union 1706

and the European Communities Act 1972. The 1706 Act creates a Parliament of Great Britain; the 1972 Act gives EU law priority over domestic law.

Rules of change must contain a rule for their own amendment. If a branch cannot bend, it may break. The US Constitution, wonderful achievement though it was, contained no rule saying whether, and if so in what circumstances, states could secede. This omission helped to cause the bloodiest war in US history. For the same reason, it would be wrong to insist that Scotland cannot secede from the United Kingdom, or that the United Kingdom may never leave the EU. It would not only be wrong, but also pointless. If a majority of both Members of the Scottish Parliament and the Scottish people want Scotland to secede, there would be little or no resistance in the UK Parliament to repeal of the 1706 Act. Since the Scottish election of 2007, both the minority Scottish Nationalist government and the leader of the Opposition in Scotland have called for a referendum on Scottish independence (although they wanted different sorts of referendum, at different times). Parliament has already offered the same guarantee to Northern Ireland. If a majority of the people there wish to secede from the United Kingdom, nobody will stand in their way. It would be totally pointless for a UK government to say to the Scots that, since the constitution is a reserved power, a Scottish referendum vote in favour of independence was of no force.[10]

Nevertheless, Parliament and the courts already treat constitutional Acts like these two as special, in ways to be described in later chapters. It would be much clearer and simpler if the procedures for their repeal or amendment were explicitly *supermajoritarian*. All written constitutions include rules for their amendment. For instance, amendments to the US Constitution require a two-thirds vote in both houses of Congress and the assent of three-quarters of the states. Amendments to the Australian Constitution require an absolute majority of both houses of parliament and approval in a referendum. These are high thresholds, there have been few constitutional amendments in either country. If an Act or constitution cannot be repealed by a simple majority of those voting in each Parliamentary chamber, it is said to be *entrenched*. How entrenchment might work in the United Kingdom is discussed in later chapters.

Many constitutions also entrench fundamental rights. It would be possible to entrench some rights protection in the United Kingdom, including, for instance, the Human Rights Act 1998. It would also be possible to go further. One entrenchable Act protecting fundamental rights could be drawn directly from the US Constitution by simply adapting its First

Amendment: 'Parliament shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.'

Under such a regime, a number of bodies that remain only because of intellectual conservatism would disappear. These would include an unelected upper house, established churches, and the remaining constitutional duties of the monarch. The 2007 Green Paper on Governance in practice disestablishes the Church of England, although it denies doing so.

The upper house of Parliament would be wholly or largely elected. After the Commons voted (perhaps cynically) for a wholly elected upper house in 2007, a cross-party Parliamentary committee with representatives from both houses (including a bishop) produced a White Paper in 2008 (Ministry of Justice 2008), analysing options and transitional arrangements for such a house. The immediate press response was cynical. But I think the White Paper is worth taking more seriously than the UK press did when it appeared. Dicey and others were scrambling around for a theory of popular sovereignty a century ago. But that theory must remain radically incoherent unless the people elect the veto players in the executive (who may be drawn from either house) and the legislature. All churches and faith communities would become voluntary bodies subject to the same regulation as all other charities. They would have no role in the legislature (whereas the 2008 White Paper proposes to retain bishops). The head of state would be either directly elected or chosen by both elected houses of Parliament. The titles 'king', queen', prince', 'lord', etc. could remain but neither duties nor privileges would be attached to them.

Constitutional law is a secret garden. Some lawyers object to people who are not lawyers setting foot in it. One lawyer told my publishers that the prospectus for this book was the worst proposal he or she had ever seen. I think this is unfortunate. It has meant that lawyers' discussion of the British Constitution has been locked away in the secret garden. But it matters to everybody. That is why I have barged in. Equally, as one trained originally in history and later in political science, I have not hesitated to barge into the secret gardens of other academic disciplines. Historians may find this book annoying for a different reason. I have not recounted the long sweep of British and Irish constitutional history, but have rather zoomed in on a few key moments. I concede that I may have wrenched my moments out of context. But with a tight word limit it was that or nothing. I want my political science to be historically informed.

My reference list is therefore a list of the works referred to in the book. It is not a list of everything I have read on British history or the British Constitution. Some may raise an eyebrow at my scanty citation of (especially)

law texts. The reason is that I find that they go on an infinite regress. *What is the British Constitution? What a previous constitutional lawyer has said it is.* Some people who are not constitutional lawyers are allowed into the canon, including a mid-Victorian journalist, and a king's secretary writing to *The Times* under the pseudonym 'Senex' (old man). As related below, in late 1975, when the Australian Attorney-General's office urgently had to compile a file on whether the Governor-General of Australia could properly dismiss the Prime Minister of Australia (which he just had), they were reduced to photocopying a mutually referring cycle of mostly British constitutional law books. Most of them said he could. One of them (Sir Ivor Jennings) said he perhaps could but certainly should not. This is pretty intellectually unsatisfying.

One lawyer whose approach is quite similar to mine, namely Elizabeth Wicks (2006), is scantily cited for a different reason—I did not become aware of her book until I had written about two-thirds of this one. Like me, Wicks analyses certain critical junctures of UK constitutional history, although (except for her important chapter on the European Convention on Human Rights) she does not use archive sources. Her list of crucial junctures is similar but not identical to mine. The main difference is that, like other lawyers and historians, she seems to underestimate the (counter-)revolutionary events of 1911–14, which I analyse in detail.

For different reasons, I cite only scantily some other modern UK lawyers and political scientists whose approach is closer to mine, although I do not exactly agree with any of them. They include Adam Tomkins, Anthony King, David Marquand, and Richard Bellamy (Tomkins 2005, 2008; Bellamy 2007; King 2007; Marquand 2008*a*, 2008*b*). I have deliberately *not* kept their books beside me whilst writing mine: not because I do not respect them, but because I want to say what I want to say, rather than produce a more conventional literature review.

I am limited in time and words. Some topics for which I have no room are admirably covered in the recent review by the Constitution Unit, University College, London (Hazell 2008*b*). This book reviews Hazell's earlier constitutional *History of the Next Ten Years* (1999) which mostly proved prophetic. I say little about proportional representation and almost nothing about either watchdogs of the constitution or freedom of information (although I have used FOI to prise open some of the sources I use). Although I talk about upper house reform, I have no room for a discussion of lower house reform. For admirable and even-handed discussions of all of these, see Hazell (2008*b*).

If people outside the magic circle were allowed to nominate their most important constitutional document (other than an Act of Parliament), my

vote would go to an exchange of letters between Prime Minister Asquith and King George V in autumn 1913 on the constitutional position of the sovereign. The issues they contest are at the heart of the book. I believe that, on all the main points, Asquith was right and the king was wrong. But that is for the reader to judge. Although four of the five have been published before, to the best of my knowledge, they have never been published as a set; and Asquith's final salvo has not been published before as far as I know.

I struggled to find the right place to put them in the book. In the end, I have put them as an appendix to Chapter 12. But I refer to them constantly in the book. And they are such a good read that perhaps the reader should go there first, and then decide whether or not to read the rest of this book.