5

Ruling Britannia

Martin Loughlin

5.1 INTRODUCTION

Britain's constitutional evolution falls within the mainstream of European constitutional traditions, but the gulf between its governing practices and those adopted in the European mainstream has grown progressively wider. While most European nation-states have adopted written constitutions at critical moments of modern history, Britain continues to adhere to the traditional conception of a constitution as a set of laws, customs and practices that continuously evolve in response to social, economic and political change. This is one reason why Britain's involvement in the venture of creating a European Union has always been rather awkward.

In this chapter, I sketch the main constitutional tropes that have emerged in British thought and show how they express a constitutional identity antithetical to the assumptions driving the project of continuing European integration. I first introduce a series of constitutional stories through which the English have sought to explain themselves as a nation and a state and then consider how these accounts have evolved with the expansion of the English state into a British imperial state. Finally, I will indicate how these legacies ensured that Britain could never become an active participant in the European federal project.

5.2 ENGLISH CONSTITUTIONAL NARRATIVES

We live in an age of constitutionalism. With so much ideological power now being invested in that term, it is difficult today to speak of the constitution of a state without there looming over us an image of the constitution as a foundational text that not only establishes the framework of government but also expresses the regime's sense of collective identity. Because of this, it may be less confusing simply to state that Britain does not possess a constitution. This claim was first clearly expressed by Alexis de Tocqueville, who noted in 1835 that 'in England the constitution may

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change continually or rather it does not in reality exist'.[1] Now that the normative weight invested in that term is so great, it is difficult to discuss the British constitution without this leading to a skewed understanding of the nature of the regime.

The British certainly have a system of government, but those who now invoke 'the constitution' invariably end up investing it with an inappropriate degree of normative authority. Whatever normative power the term carries can only be grasped by immersing ourselves in the sense of the constitution as the inheritance of a long tradition in the practical art of governing. But, because the authority of its practices rests on experience, the type of knowledge these practices embody cannot easily be reduced to formal rules: to codify the practices is to change them. To the extent that constitutional rules exist, they are invariably rules of procedure and precedent rather than of principle. Consequently, the normative force of the practices is best revealed through a series of stories that have grown up around them.

These stories have generated a series of shared beliefs about the formation of not just an imagined community (a people, a nation), but also of the terms on which they are governed (a state). I introduce five related narratives through which the political identity of the English is shaped: the ancient constitution, the tradition of local self-government, the authority of the rule of law, the status of the Crown and the principle of sovereignty.

5.2.1 *The Ancient Constitution*

The English political tradition has been much influenced by a series of claims prominently touted by seventeenth-century common lawyers, which they formalized as the doctrine of the ancient constitution. This asserted that the early Saxons (the Goths) had created an ancient, pre-feudal and liberty-preserving constitution. At its core was the great meeting, the *Witenagemote*, where freeborn Anglo-Saxons met to make law and deliberate over the affairs of the kingdom.

This story of the ancient Gothic constitution supports a series of constitutional claims. First, it underpins the asserted existence of an immemorial common law. Arguing that the common law is a body of unchanging custom that exists 'time out of the mind of man', Chief Justice Coke maintained that, rather than conquering England, William I had vindicated his claim in trial by battle and took the throne subject to these ancient laws.[2] The story, secondly, challenges any Norman claim to absolute sovereignty; English kings, including William, occupy an office of limited authority and are obliged to rule according to the ancient fundamental laws of the land. Thirdly, the story rebuts the standard historical account that Parliament came into existence only in the latter half of the thirteenth century as an instrument of

[1] Alexis de Tocqueville, *Democracy in America* (Vintage Books, 1990).
[2] Edward Coke, 'Institutes', in Steve Sheppard (ed.), *The Selected Writings and Speeches of Sir Edward Coke*, vol 2 (Liberty Fund, 2003).

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Norman policy. According to the Gothic narrative, the rights of the Commons derive from the ancient *Witenagemote*: the rights of 'freeborn Englishmen' to meet in Parliament derive directly from the ancient constitution, independent of sanction by kings.[3]

According to this narrative, the continuing quest has been to overthrow 'the Norman Yoke' and restore these ancient liberties. The great constitutional documents of Magna Carta (1215), the Petition of Right (1628) and the Bill of Rights (1689) do not enact anything new. 'In all our great political struggles', proclaimed the nineteenth-century Whig constitutional historian, E. A. Freeman, 'the voice of the Englishman has never called for the assertion of new principles, for the enactment of new laws; the cry has always been for the better observance of the laws which were already in force, for the redress of grievances which had arisen from their corruption or neglect'.[4] English constitutional development is apparently marked not by political struggles of the disenfranchised to assert their modern claims, but by the degree to which these ancient liberties have been restored.

During the seventeenth-century, this doctrine of the ancient constitution was part of the ideological weaponry of the parliamentary forces, who maintained that the true source of governmental power lay not with the king but with 'the people', as expressed by their parliamentary representatives. The failure to resolve this dispute between king and parliament by political negotiation led to civil war, defeat of the royalist cause, execution of the king, formation of the Commonwealth and Protectorate and then, in 1660, restoration of the monarchy. These dramatic events in turn shaped the form of the modern British constitution.

The modern constitutional settlement was forged after the Revolution of 1688 when, once James II had fled the kingdom, a convention Parliament – established without any king to convene it – offered the throne to William and Mary on terms laid down in the Bill of Rights. But the settlement was ambiguous. Was the king above the three estates of lords, bishops and commons as the law of the constitution stated? Should the king now be treated as one of three equal component parts of the sovereign Parliament (king, lords and commons) as the emerging doctrine of parliamentary sovereignty implied? Should the commons, as sole representative voice of the people, now be accorded clear primacy in the constitution, as the emerging principle of popular sovereignty suggested? Such questions had to be fudged both to maintain the stability of the post-1688 state and to strengthen the authority of its governing institutions.

From the outset, the modern settlement was marked by a reluctance to avoid any close examination of its founding principles. Its legacy is to be found in a distinctively English style of constitutional scholarship based on what came to be called the

[3] See J. G. A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge University Press, 1987).

[4] E. A. Freeman, *The Growth of the English Constitution* (Macmillan, 1876), 57.

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Whig interpretation of history. The great nineteenth-century Whig historians conceived the English constitution as an elaborate cultural heritage whose study provided a boundless source of prescriptive wisdom. They present a story about the triumph of liberty over absolute sovereign power, evidenced by the increasing importance of representative institutions in the British system. And a central theme of this narrative was a distaste for the lawyer's approach to the subject. Complaining that 'the legal mind' is congenitally incapable of grasping ambiguity, uncertainty, or heterogeneity, the historians argued that the invention of the legal concept of sovereignty had corrupted understanding of this unique constitutional development.[5]

5.2.2 *The Tradition of Local Self-Government*

The arguments of the Whig constitutional historians also bolster a claim about the pivotal importance of local self-government in the English system. England, they maintained, 'is pre-eminently the country of local government', a claim based on the fact that the main outlines of English local government – the township, the hundred and the shire – were drawn long before central government (as distinct from rudimentary political overlordship) came into existence.[6] Central administration was the creation of the Normans and local administration, which 'was probably the unconscious adaptation of primeval Teutonic custom to the conditions of new settlement', was at least 500 years older.[7] Consequently, whenever the centre has devised new local tasks, it has tended to work with the existing fabric.

The hundred has since disappeared, but the township (which became known by its ecclesiastical name of parish) and the shire (better known by its Norman name of county) continued as the institutional framework of local government through centuries of unbroken political development. And, although not forming part of the original Teutonic settlement, by the time of the Conquest, each shire had a borough (*burh*), such that the two formed an integral unit: 'The shire maintains the burh; the burh defends the shire'.[8] By the eleventh century, a distinctive pattern of local government that recognized differences between town and country existed, and it establishes the basis of the modern system.

Within this Whig tradition, local self-government is an important source of English liberties. It was claimed that exclusive responsibility for the management of local affairs under the ancient constitution, including that of taxation, rested with the *gemote* (moot or meeting) of all the freemen of the township. Further, the *gemote* provided the foundation of the entire political structure, since it was the

[5] Ibid., 4. See also Herbert Butterfield, *The Whig Interpretation of History* (G. Bell and Sons, 1931); J. W. Burrow, *A Liberal Descent: Victorian Historians and the English Past* (Cambridge University Press, 1981).

[6] Edward Jenks, *An Outline of English Local Government*, 5th ed. (Methuen, 1921), 9.

[7] Ibid.

[8] F. W. Maitland, *Township and Borough* (Cambridge University Press, 1898), 37.

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heads of the *gemotes* (the *reeves*) who met collectively in the *Witenagemote*, from which the modern parliament emerged. The structure of political authority thus rested on the will of the people expressed through their local communities. Neither the king nor his government had the power to make law or levy taxes without first obtaining the consent of the nation in parliament.

From this perspective, the great constitutional struggle has been to ensure that these ancient local liberties – the fundamental laws – are not usurped by the central authority. This narrative runs through to the nineteenth century where we find Joshua Toulmin Smith arguing that: 'Local self-government lies at the very basis of free institutions, and is the only effectual guarantee for the responsibility of those in authority'.[9] Local government immunises the regime from a hierarchical order being imposed by the central authority.

Yet how is this liberal order maintained once the concept of sovereignty emerges as the fundamental principle during the eighteenth century? One answer was supplied by the German jurist, Rudolf Gneist, who in the late nineteenth century argued, contrary to Montesquieu, that the real basis of English government was to be found not in separation but in unity. England, Gneist contended, is governed from top to bottom by a class of wealthy landowners, who performed unpaid personal service not only as members of the Lords and Commons but also as Justices of the Peace who administered the counties. Beneath the apparent divisions there existed a deep unity, which Gneist referred to as 'self-government'.[10] Within this network, the Justices of the Peace performed the pivotal role. Being entrusted with the combined tasks of administration and justice free from active control by the central authority, the Justices became the principal organs of local government.

Gneist did not base this scheme on some romantic-historical idea of Teutonic folk-freedom that built authority from the locality upwards. He recognized that the English state was highly centralized and that 'England has to thank the Norman kings for an absolute government which enabled her to develop a consciousness of unity and strength at a time when all the great nations of the Continent were disintegrated by feudalism'.[11] It was precisely because England had centralized so early and no serious challengers to the sovereign authority of the central power existed that it was able to concede local liberties. This evolving practice, in turn, established an organic connection between state and society that permitted the

[9] Joshua Toulmin Smith, *Government by Commission Illegal and Pernicious* (S. Sweet, 1849), 51. Cf. Tocqueville, Democracy in America, 61: 'municipal institutions constitute the strength of free nations. Town meetings are to liberty what primary schools are to science; they bring it within the people's reach, they teach men how to use and how to enjoy it. A nation may establish a free government, but without municipal institutions it cannot have a spirit of liberty.'

[10] Rudolg Gneist's main writings on this subject are: *Self-Government: Communalverfassung und Verwaltungsgerichte im England* (Springer, 1871) and *Englische V erfassungsgeschichte* (Springer, 1882). The latter is translated as *The History of the English Constitution*, trans. P. A. Ashworth (Clowes, 1886).

[11] Josef Redlich and F. W. Hirst, *Local Government in England*, vol 2 (Macmillan, 1903), 395.

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emergence of the rule of judicature. And it is this rule of judicature that prevented the Crown from taking direct control over local administration.

This narrative of local self-government presents a distinctive account of English constitutional arrangements. By the end of the eighteenth century, it had been recognized across continental Europe that responsibility for the internal administration of the country was that of the central state. As the tasks of government increased, so a distinction emerged between judgement and the execution of a judgement. From this differentiation, two discrete activities came to be identified: the rule of judicature and the rule of administration. The latter – administrative law – was founded on the power of the sovereign to issue ordinances. Since administration was the peculiar domain of the sovereign, these orders were treated as his law and were equivalent to the laws of the land. It was through this administrative law that the central state regulated and controlled the activities of local institutions.

This continental tradition can be contrasted with the English story of local self-government. Although England has since the Conquest been ruled from the centre, the central authority has not generally sought to administer from the centre. Consequently, the idea that administration is the special preserve of the sovereign, in the sense that disputes concerning administrative issues should be resolved by separate courts in accordance with special principles, has never been accepted. This achievement has been realized by ensuring that the common law formed an undivided system of law. Since no clear distinction could be made between public law and private law, the administration has remained subordinated to the ordinary law and the principle of the rule of law comes to represent the rule of judicature.[12]

In this story, there never emerged in England a hierarchical and undifferentiated concept of 'administration'. Central government exercised no inherent superior jurisdiction over local institutions. Local institutions emerge not simply as creatures of the central authority but as representations of historic communities within a structure of national laws to which both the Crown and the localities are bound. In this sense, the English inheritance is one of local government rather than local administration.

A second, equally important, implication concerns the role of Parliament. The common law, as an undivided system of national laws, could not be altered by the Crown alone, but only with the consent of the people expressed in Parliament. This principle of Parliamentary sovereignty is thus entwined with the idea of the unity of law. There being few significant prerogative powers in the domestic sphere, the Crown-in-Parliament, as a supreme legislature, came to exercise absolute authority over internal administration. The Act of Parliament thus became the form through which was framed, not only all new laws, but also all the ordinances which regulate

[12] See A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (Macmillan, 1915), chapter 4.

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the conduct of administrative activity. Consequently, the institutions of local government become answerable not to central government, but to the courts and, ultimately, to Parliament. In the English tradition, relations between the centre and the localities were worked out through a network of relationships between local government, Parliament and the courts.

In this tradition, the Act of Parliament became the formal method by which the will of the central government was expressed to the localities. The significance of this achievement resides in the fact that central government needed to secure the approval of a Parliament comprising representatives of local communities. Parliament thus provided the localities with a forum within which their interests and grievances could be brought to the attention of the central authority.

This tradition lived on until the mid-nineteenth century when rapid industrialization and consequential urbanization undermined the foundations of the system. But its significance, especially in resisting the claims of bureaucratization and the emergence of administrative law through the ongoing work of Parliament, continued to influence constitutional thought. Until the end of the eighteenth century, the Crown and Parliament had generally left local institutions free to deal with their own responsibilities. When, however, new needs made themselves felt through the demand for new services, the centre inevitably became involved. These demands took the form of petitions from local bodies seeking new powers to act. By retaining control over this process, Parliament was able to assume a jurisdiction which in continental states had become the preserve of the central authority under administrative law. This was achieved primarily through the private Bill procedure, in which Bills were presented on the petition of local bodies and were deliberated upon mainly by the representatives of the localities concerned. It thus gradually came to be recognized that two different activities were being carried out under the general form of an Act: legislating both for the common interests of the country (public general legislation) and for special needs of the locality (private or local Acts). Through the development of this latter instrument, Parliament became the mediating link between central and local government. And, insofar as Parliament assumed an essentially judicial mode in adopting the private Bill procedure, this practice of the High Court of Parliament reinforced the principle of the rule of law.

5.2.3 *The Rule of Law*

The principle of the rule of law is based on this rule of judicature. This meant, first, that every exercise of public power must have a legal basis and, secondly, that, having no system of administrative law, the sole judge of legality is the ordinary courts applying the ordinary (*sc.* common) law. There had been occasions, especially under the Tudors and Stuarts, when attempts were made to fashion a special administrative jurisdiction. Under Henry VIII, for example, proclamations and royal warrants were issued directly to the Justices of the Peace, thus bringing them directly

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under the authority of the Crown and under the Stuarts the Star Chamber, a committee of the Privy Council, threatened to develop into a supreme administrative authority.[13] But controversy over such measures contributed to the constitutional conflicts of the mid-seventeenth century and after 1660 no further attempt was made to develop a separate administrative jurisdiction.

By the eighteenth century, the courts, through the use of the prerogative writs, had established themselves as the principal agencies for the control of local action. That most of the work of local administration was carried out by Justices of the Peace who were themselves also judicial officers reinforced the idea that government was based on law and administrative duties must be undertaken in a judicial spirit. But cohesion was achieved not only through these institutional mechanisms but also through the shared culture of the governing class. The custom of governing families giving their sons a common education in the public schools and Oxford and Cambridge conferred on them the necessary authority to assume office as a Justice of the Peace and later to represent their community in Parliament. This common culture replaced the need for institutional balancing mechanisms. It also rendered the need for constructing a formal body of 'jurist-law' unnecessary, a feature reinforced by the fact that, unlike their continental counterparts, English judges were not civil servants but were drawn from the ranks of practising barristers who often had also taken some part in public and parliamentary life.

Only in the Victorian era were these arrangements transformed into a formal constitutional principle, labelled 'the rule of law'. This was mainly attributable to the work of A. V. Dicey. For Dicey, the rule of law had three specific meanings. First, no one can be punished except for a 'distinct breach of the law established in the ordinary legal manner before the ordinary Courts of the land', a principle that highlights the tradition of strict legality running through the English system. Secondly, it embodies the principle of equality before the law: 'the universal subjection of all classes to one law administered by the ordinary Courts'. This meant that disputes are to be adjudicated in accordance with a common set of rules, applied to ordinary subjects and Ministers of the Crown alike. The third meaning reflects a belief that the constitution itself comes from the ordinary law of the land. The 'law of the constitution', Dicey states, is 'not the source but the consequence of the rights of individuals'. Civil liberty is achieved not by the formal declaration of rights but by constant struggles leading to outcomes recorded and protected in particular judicial decisions.[14]

This safeguarding of liberty through the workings of the 'rule of law' contrasts with modern constitutional documents which contain formal declarations of rights. Rights then are *deduced* from the constitution. In the English case, however, rights

[13] See, e.g., F. W. Maitland, *The Constitutional History of England* (Cambridge University Press, 1908), 261–264.

[14] Dicey, *Law of the Constitution*, chapter 4.

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and liberties are *induced* from various court rulings on personal rights. For Dicey, the English approach is preferable. Being the work of many 'whose labours gradually framed the complicated set of laws and institutions which we call the Constitution', it may form a less than tidy arrangement. But, although the Habeas Corpus Acts 'declare no principle and define no rights', they are 'for practical purposes worth a hundred constitutional articles guaranteeing individual liberty'. Rights enunciated in written constitutions can be suspended or repealed, but where the right is 'part of the constitution because it is part of the ordinary law of the land' it 'can hardly be destroyed without a thorough revolution in the institutions and manners of the nation'.[15]

5.2.4 *The Crown*

From these accounts it is evident that there exists no tidy arrangement of institutions that constitutes an apparatus of 'the state'. In English law, the symbol of state power is that of the Crown. Any inquiry into the status of the Crown quickly takes us deep into medieval legal thought and the question of the king's two bodies. As Southcote J. explained in *Willion* v *Berkley* (1559), the king has both a body natural and a body politic, the latter of which is a corporation that includes all his subjects, wherein 'he is the Head, and they are the Members, and he has the sole Government of them; and this Body is not subject to the Passions as the other is, nor to Death, for as to this Body the King never dies'.[16] Maitland commented that 'I do not know where to look in the whole series of our law books for so marvellous a display of metaphysical – or we might say metaphysiological – nonsense'.[17] But it is this notion that provides the basis of the English concept of the state.

It might be thought that one reason for invoking this metaphor was to bolster the perpetuity of the office of the king, but that principle had already been established by the end of the thirteenth century.[18] In practice, it was the question of the Crown's corporate character that proved most troublesome. A distinction between king and Crown had already been drawn by the end of the twelfth century,[19] and by fourteenth century the coronation oath was requiring kings to swear to maintain

[15] Ibid., 197.

[16] *Willion* v *Berkley* (1559) Plowden 233a. See also *Case of the Duchy of Lancaster* (1561) 1 Plowden 212.

[17] F. W. Maitland, 'The Crown as Corporation' (1901) in H. A. L. Fisher (ed.), *Collected Papers*, vol 3 (Cambridge University Press, 1911), 244, 249.

[18] As Coke reported in *Calvin's case* (1608) 7 Co. Rep 1, at 11a, it appeared 'by infinite precedents … that by the laws of England there can be no *inter regnum*' and that 'by the descent, His Majesty was completely and absolutely King, without any essential ceremony or act to be done *ex post facto*, and that coronation was but a Royal ornament and outward solemnization of the descent'.

[19] See George Garnett, 'The Origins of the Crown', in John Hudson (ed.), *The History of English Law: Centenary Essays on 'Pollock and Maitland'* (Oxford University Press, 1996), 171.

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unimpaired the rights of the Crown.[20] In this respect, the concept of the Crown seemed to incorporate the entire body politic. The problem was that different versions tended to present themselves on different occasions. Rather than adopting a concept of the Crown as a corporation aggregate which could emerge as analogous to the modern idea of the state, English jurists tended to employ it as 'a personification in its own right' and, therefore, as 'not only above its members, but also divorced from them'.[21] Their habitual distrust of abstraction led to the failure to draw a clear distinction between king and Crown. What resulted was a persistent 'confusion of tongues'[22] in the language through which the law characterized the structure of English governmental authority. Part of the problem was that any attempt to separate the Crown from the person of the king was held to be a 'damnable and damned opinion' which would lead to 'execrable and detestable consequences'.[23]

This failure has bequeathed a distinctive legacy. In law, the Crown is employed as the symbol of government authority. But thereafter it stubbornly refuses to do much real work. In formal terms, it is the king's fiat which makes laws, it is his sentence which condemns and it is his judgements that determine the rights and liabilities of his subjects. The king, as head of the executive, appoints his ministers, who are the king's servants and do not stand in any legal relation to Parliament. Further, this Parliament is summoned, prorogued and dissolved by the king. And, as the fountain of honour, the king maintains the power of dispensing honours and dignities.

Such prerogatives are sometimes said to be attributes of the monarch's ideal character, which we may assume to mean the king as Crown. So, although the ideal king might be the source of justice, at least since the reign of Henry III the monarch has not been able to disturb the fountain or divert the stream from its proper channel, except through the agency of his judges.[24] Further, in the exercise of these prerogative powers, constitutionally the king is advised, directed and controlled by others.[25] But, notwithstanding these modifications as to how these powers are actually exercised, the legal form, which unites two capacities in one person, persists and, with the extending powers of modern government, it has required piecemeal adjustment by both statutory intervention and common law innovation. These developments include ensuring that ministers and government departments are capable of being held legally accountable for wrongful acts and of

[20] See Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton University Press, 1957), 354–358.

[21] Ibid., 382.

[22] Francis Bacon, *Works*, vol 7, ed. J. Spedding, R.L. Ellis, & D.D. Heath (Longman, 1852), 651.

[23] *Calvin's Case* (1608) 7 Co.Rep.1, 11a–11b.

[24] For the most celebrated formulation, see Sir Edward Coke, *Twelfth Reports, Prohibitions del Roy* (1607) 12 Co. Rep. 63.

[25] Hence the importance of what Dicey (*Law of the Constitution*, chapter 14) called 'conventions of the constitution'. But these conventions are 'vague and slippery' and 'they cannot be understood "with the politics left out"'. G. H. L. Le May, *The Victorian Constitution*, vol 2 (Duckworth, 1979), 21.

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reforming the principles of judicial review to ensure oversight of the exercise of public power.[26]

The general point is that, in this tradition, the legal theory of government has been formulated as a set of royal acts and the English have consequently experienced considerable difficulty in advancing a coherent legal theory of the state. At the beginning of the twentieth century, Maitland commented that: 'We cannot get on without the State, or the Nation, or the Commonwealth, or the Public, and yet that is what we are proposing to do.'[27] Subsequent developments have not fully resolved those difficulties.

5.2.5 *Parliamentary Sovereignty*

The seventeenth-century upheavals, driven by the conflict between the Crown and Parliament for ultimate authority, led to a civil war which was resolved in favour of the parliamentary forces. In 1660, however, the monarchy was restored, and the 1688 revolution produced a modern settlement in which fundamental principles were fudged. During the eighteenth century, the conflict between Crown and Parliament for ultimate authority was sublimated through abstraction. This was achieved by formulating as the basic principle of the constitution the idea that sovereignty vests in a composite entity called 'the Crown-in-Parliament'.

This formulation was most authoritatively presented by Sir William Blackstone, whose *Commentaries on the Laws of England* (1765–1769) was the first modern account of the laws of England. Blackstone acknowledged the disjunction between constitutional law and constitutional practice. The law of the constitution, he noted, still 'ascribes to the king, in his high political character . . . attributes of a great and transcendent nature'. Formally, all governmental authority is exercised in the name of the king but the basic legal principle of the constitution was that of the sovereign authority of parliament. But he was quick to emphasise that here 'parliament' did not mean the people's representatives in the Commons. Parliament is a purely legal construct which denotes the king's convening of the three estates of the realm. This is the Crown-in-Parliament and, far from being an expression of popular sentiment, it is a formal expression of state sovereignty.

The Crown-in-Parliament signified 'that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms'. This power, Blackstone asserted, knows no legal limits. Downplaying the checks and balances provided in practice by the three components of Parliament, he emphasized the conceptual unity of the Crown-in-Parliament. Supplanting the

[26] See, e.g., Martin Loughlin, 'The State, the Crown and the Law', in M. Sunkin and S. Payne (eds.), *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press, 1999), 56–76.

[27] F. W. Maitland, 'The Crown as Corporation' (1901), in H. A. L. Fisher (ed.), *Collected Papers*, vol 3 (Cambridge University Press, 1911), 244ff, 253.

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notion that the common law as immemorial custom was an expression of fundamental law, he presented law as a simple positive entity: the commands of the Crown-in-Parliament.

Blackstone's account was reinforced in the nineteenth century in the work of A. V. Dicey, the high priest of Victorian constitutional orthodoxy. Placing law at the centre of constitutional scholarship, Dicey emphasized that the sovereign authority of the Crown-in-Parliament is the first principle of the constitution. Acknowledging that there exists a secondary principle, that of the rule of law, he sought to show that the two are not contradictory. Parliamentary sovereignty promotes the 'supremacy of law' because Parliament's commands 'can be uttered only through the combined actions of its three constituent parts' and it therefore establishes a regime of rigid legality.[28] Dicey advanced an account of the law of the constitution as an autonomous idea, but, like Blackstone, he also asserted that civilized rule rests on the necessity of maintaining an untrammelled power at the centre.

5.3 THE FORMATION OF THE BRITISH STATE

The narratives of constitutional identity so far examined have been English. With the formation of the modern British state, the influence of these schemes became more qualified. The English, as the largest and most powerful nation on the islands, have always sought a dominating influence over the Irish, the Scots and the Welsh, if only to maintain the security of their state. This policy was first advanced by incorporating Wales into the structure of the English state. This was quickly pursued by the Normans through a brutal practice of subjugation, which was formally concluded by the Statute of Wales of 1535. By this Act, Welsh lands were absorbed into the English shire system and the English common law was then applied throughout England and Wales. In this respect, the English state comprises the territories of England and Wales. The Welsh maintain a distinctive identity but, rather than a political identity indicated by distinctive institutions, it is a cultural identity mainly signified by language.

In the eighteenth century, however, constitutional narratives become more ambiguous. Scholars continued to talk about the English constitution – evident in the works of Blackstone and Dicey in the eighteenth and nineteenth centuries – but in 1707 a new state, that of Great Britain had been formed. This state, encompassing England, Wales and Scotland, was established not through conquest but by treaty. In 1707, Scotland and England were joined by a Treaty of Union to create the United Kingdom of Great Britain.

5.3.1 *The Making of Britons*

The formation of the British state was the culmination of a relatively long process. The seeds of union had been sown in 1603 when James VI of Scotland acceded to

[28] Dicey, Law of the Constitution.

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the English throne as James I, a process reinforced by the fact that the Reformation had bound Scotland and England together in the community of Protestant nations. But the eventual union of 1707 came about in inauspicious circumstances, involving England offering access to trade and empire in return for Scots' rejection of the Jacobite succession. The settlement resulted in the creation of a common set of legislative, executive and fiscal – though not judicial – arrangements for the new kingdom of Great Britain.

The Union Treaty gave certain protections relating to Scots identity, especially in relation to law, education and religion. Contrary to recent argument by some Scottish jurists, however, it cannot be regarded as analogous to a modern constitutional settlement.[29] Following the Treaty, 45 Scottish MPs and 16 representative peers simply joined the Westminster Parliament without even a general election being held, unequivocally making the point that Scotland had been incorporated into an Anglo-centric British state.

During the period after 1707 a distinctive British national identity was forged. Invented for the purpose of binding England and Scotland together, this identity built on the fears of a French invasion and the reimposition of Catholicism. Protestantism, explains Linda Colley, 'was the foundation that made the invention of Great Britain possible'.[30] Propagated by Anti-Popery and Francophobia, it was mainly advanced through war, specifically, the long wars with the French between 1688 and 1815. This marked a period in which Britain rose to become a major imperial power: in 1740, when 'Rule Britannia' was composed, Britain was well on the way to having built the world's most powerful navy.[31] This growth in power led to the cultivation of imperialism as a distinctively British cult in which all the home nations participated. As Colley notes, 'the cult of superior and unique British liberty was so powerful and so elastic that for a long time it operated as a cross-border cement and language in common'.[32] It also resulted, for reasons of state, in a deliberate suppression of English nationalism. During this period, the terms 'English' and 'British' constitution were commonly used interchangeably and without specificity, and the English narratives of ancient constitution, local government, the rule of law, and the concept of the Crown were incrementally and informally absorbed into an inchoate sense of 'Britishness'.[33] Of pivotal importance was the concept of sovereignty.

[29] T. B. Smith, *The Union of 1707 as Fundamental Law* (Stevens, 1957); Neil MacCormick, 'Does the United Kingdom Have a Constitution?' (1978) 29 *Northern Ireland Legal Quarterly* 1.

[30] Linda Colley, *Britons: Forging the Nation 1707–1837* (Pimlico, 1992), 54.

[31] Linda Colley, *Acts of Union and Disunion* (Profile Books, 2014), 24–25.

[32] Ibid., 39.

[33] Of particular significance are the works of the great Scottish writers of the eighteenth and nineteenth centuries, such as David Hume, John Millar and Thomas Babington Macaulay, all of whom wrote histories of England which included discussions of Scotland, Wales and Ireland.

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From the eighteenth century, asserting parliamentary sovereignty as the dominant characteristic of the constitution became a deliberate policy that underpinned the formation of the British state. As a system of government, the British state has never been as centralized or as unitary as its political elite and jurists have tended to suggest. But the doctrine of parliamentary sovereignty was consciously emphasized for the purpose of advancing the unity and homogeneity of the realm. Only in the eighteenth and nineteenth centuries was a legal doctrine of sovereignty formally articulated and it was then wilfully confused with the pseudo historical doctrine that the maintenance of absolute sovereignty at the centre was the pre-condition for maintaining the political stability of the state. As a legal doctrine, it is purely formal: the Act of Parliament is the highest expression of law. Politically, it was employed for rhetorical purposes. The two were commonly conflated for reasons of state.[34]

In a high-profile Scottish case in 1953, Lord Cooper, Lord President of the Court of Session and Scotland's leading judge, asserted that 'the principle of unlimited sovereignty of Parliament is a distinctively English principle and has no counterpart in Scottish constitutional law'.[35] This was a less than astute analysis. The doctrine is neither English nor Scottish; it is a British creation that came to fruition following the Union as a critical element in a strategy of managing not only the newly-formed British state, but also the rapidly expanding British empire.

5.3.2 *The Irish Question*

Union with Ireland follows an altogether different story. Ireland had long been dominated by England through centuries of conquest and colonization, but it was only after the 1798 Rebellion of United Irishmen, influenced by the republican ideals of the American and French revolutions, that the British determined that the only lasting foundation for security lay in the union of Ireland with Britain. In 1801 the Irish Parliament was dissolved and incorporated into the Westminster Parliament. In a formal sense, a new state – the United Kingdom of Great Britain and Ireland – was created. The Treaty of Union of 1801, marking the apotheosis of the principle of parliamentary sovereignty, unified legal authority from the centre throughout the islands.

But the integration of Ireland was a stillborn affair. Attempts to reconcile the aspirations of Irish nationalism within the framework of the British state became the dominant political issue of the late nineteenth century. Home Rule Bills were introduced and rejected in 1886 and 1893 and when a third Bill eventually passed the Commons in 1912, it was enacted in the face of Lords' opposition only through the special procedures of the Parliament Act 1911. The resulting delay led to its

[34] See Martin Loughlin and Stephen Tierney, 'The Shibboleth of Sovereignty' (2018) 81 *Modern Law Review*, 989–1016, 1001–1005.

[35] *MacCormick v Lord Advocate* (1953) SC 396.

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suspension because of the war, which gave time for Ulster Protestants to organize in opposition. What followed in quick succession was the Easter Rising in 1916, the electoral success of Sinn Féin, the formation of the Dáil, the Irish War of Independence (1919–1921) and then the Anglo-Irish Treaty by which Ireland – with the exception of the six counties of Northern Ireland in which there was a Protestant majority – seceded from the United Kingdom. Consequently, the only part of the Westminster Parliament's Government of Ireland Act 1920 to be implemented was – ironically – home rule for Northern Ireland.

Formally, what was created was the United Kingdom of Great Britain and Northern Ireland. But is there really a UK state? Northern Ireland is evidently part of the UK state from the perspective of international law. Whether in a constitutional sense the six counties of Northern Ireland actually forms part of the British state, however, is debateable: the troubled history of the province, its special governmental and security arrangements, the acknowledgement by the British of its right to re-unite with the rest of Ireland when signalled by a majority of its population, and the unique governing arrangements established in accordance with the peace settlement in 1998 all suggest that the province has not, in a strict sense, been structurally integrated into the formation of the British state. The narratives of ancient constitutional liberties, local self-government, and rule of the ordinary common law here have little resonance. The Crown as an expression of state authority is a divisive symbol and the sovereign authority of the Crown-in-Parliament remains contested.[36]

5.3.3 *The Apotheosis of Sovereignty*

The fixation on sovereignty owes much to Dicey's authoritative treatment. In the *Law of the Constitution* he set in place the centrality of the legal doctrine. But he also wrote three books against Irish home rule, released to mark the occasion of the publication of each home rule Bill. In these, his claims extend beyond the legal doctrine and assert the political claim that beneath 'all the formality, the antiquarianism, the shams of the British constitution, there lies latent an element of power which has been the true source of its life and growth'.[37] That power is 'the absolute omnipotence of Parliament' which is 'nothing else but unlimited power'. Dicey claims that Irish home rule 'would dislocate every English constitutional arrangement', but this is not because the legal doctrine would be qualified. Home rule is a constitutional threat because it would weaken the power of Great Britain. By undermining the sovereignty of Parliament, 'it deprives English institutions of

[36] See Martin Loughlin, 'The British Constitution and the Irish Question' (2024) 35 *King's Law Journal* 395–415.

[37] Albert Venn Dicey, *England's Case against Home Rule* (Murray, 1886), 168.

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their elasticity, their strength, and their life; it weakens the Executive at home, and lessens the power of the country to resist foreign attack'.[38]

What Dicey's robust defence makes plain is that sovereignty is essential to the exercise of maintaining effective rule across the nations of the United Kingdom and to the task of governing the Empire. But beyond that specifically political conviction sits an illuminating constitutional argument. Ordinary law rules precisely because it operates under the absolute authority of the Crown-in-Parliament. That is, the rule of law depends for its realization on the doctrine of sovereignty. The British constitution comprises a body of rules, customs and practices that fix the terms on which the activity of governing is carried on. But the rules allocating and regulating the exercise of sovereign powers applied in Scotland and Northern Ireland differ in significant respects from those operating in England and Wales. These differences are authorized through the overarching authority of the Crown-in-Parliament. Dicey believed that home rule would lead to 'the immediate dislocation and the ultimate rebuilding of the whole English Constitution' because it would inevitably result in 'leaving the settlement of constitutional questions to a Court'.[39] And constitutional questions are for Parliament, not the courts.

5.4 THE BRITISH CONSTITUTION AND THE PROJECT OF EUROPEAN UNION

With the coming of democracy and the dramatic extension of government powers in the twentieth century, the traditional narratives of constitutional identity were all eroded. What followed was a decline of faith in this constitutional inheritance and increasing ambiguity about constitutional identity. The conviction that progress rested on restoring ancient liberties (rather than meeting new claims) sounded increasingly hollow. The idea that the tradition of local government might be retained in the face of rapid urbanization could not be sustained and the formation of nationally-organized political parties put an end to the notion that MPs were primarily representatives of their localities. Governmental growth shifted the action from Parliament to government, leading to the emergence of a body of administrative law and the necessity of eliminating Crown immunities. It also required a distinction to be drawn between public and private law matters which eroded the significance of the rule of ordinary law. Sovereignty remains the basic principle binding together the British state but, no longer bolstered by its religious and imperial anchoring, the gulf between legal doctrine and governmental practice grows ever wider.

By the end of the century, there had emerged a relatively broad-based conviction that Britain's inherited constitution had come to the end of its useful life. The need

[38] Ibid., 169, 171, 173, 196.
[39] Ibid., 274 and 271.

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for basic reform – for modernization – was touted across the political spectrum, though without much insight as to what that might entail. And, in the background, one powerful impetus of modernization had often been overlooked: the UK's participation in the venture of continuing European integration.

Involvement in the European project has empowered the judiciary to enhance rights-based methods of review and has resulted in the British adopting what is in effect a Bill of Rights without having gone through a process of extensive public deliberation.[40] It has also helped set in place a dynamic scheme for devolving governmental powers to the constituent nations of the UK.[41] And it has bolstered the unique cross-border arrangements that brought about a peace settlement in Northern Ireland.[42] Continuing European integration had enabled governing arrangements to be re-configured and constitutional fundamentals re-ordered so as the bring the UK into closer alignment with the frameworks of modern constitutional democracies.

The British have lived with a tension between myth and reality in these stories of constitutional identity throughout the modern era, but this tension acquired a new dimension with accession to the EU. Because of its imperial legacy and close trading ties to British Commonwealth countries, the UK did not initially seek participation in the European project. By the 1960s, however, views were changing. When first contemplating joining, the Government asked its leading lawyer (Lord Kilmuir, the Lord Chancellor) to assess the constitutional implications. His opinion focused directly on the impact of sovereignty and the rule of law:

> To sign the Treaty of Rome would be to legislate for a loss of national sovereignty in three respects. First, parliament would surrender some of its functions to a Council of Ministers which could by majority vote make regulations that became the law of the land. Second, the crown's treaty making power would in part be transferred to an international organisation. Third, British courts would sacrifice some of their independence by becoming subordinate in some respects to the European Court of Justice.

Kilmuir concluded that it will not be easy to persuade Parliament or the public to accept them.[43] And so it proved. The UK eventually joined in 1973 but controversy over the implications for sovereignty has permeated debate ever since.

The European Communities Act 1972, which gave effect in domestic law to this 'new legal order', was a masterpiece of concise legislative drafting. Stating that all rights and obligations 'from time to time arising by or under the Treaties … are

[40] Human Rights Act 1998, which makes the rights protected under the European Convention on Human Rights directly enforceable by British judges.
[41] Scotland Act 1998; Wales Act 1998.
[42] Belfast Agreement; Northern Ireland Act 1998.
[43] Cited in Hugo Young, *This Blessed Plot: Britain and Europe from Churchill to Blair* (Macmillan, 1998), 126.

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without further enactment to be given legal effect', few grasped its radical implications. It was commonly felt that, holding a veto over any proposed new powers, the UK retained control. But, as the Union evolved, decision-making was streamlined, with majority voting becoming standard. The claim that Parliament retained final authority over adoption of new social or economic regulations therefore became rather strained.

Furthermore, being immersed in the traditions of law-making by Parliament, British politicians were oblivious to the point that the European Court of Justice (ECJ), quickly establishing itself as the guardian of this 'new legal order', could itself be a major source of law. The Court's rulings, especially in enunciating the principles of the *supremacy of European law* (requiring European law to prevail over any conflict with domestic law), and *direct effect* (conferring rights and obligations that can be directly enforced by individuals in the courts of member states), seriously compromised parliamentary sovereignty. Operating as the constitutional court of the European legal order, the ECJ went about constructing that regime and, after years of avoiding the question of the ECJ's primacy, the point was finally accepted by the British courts in the early 1990s.[44]

Following the completion of the single market programme, in 1992 the EU moved to the next – federalist – stage of the project, which included the launch of a single currency (the euro) in 1999. This was accompanied by a period of growing scepticism within the UK about the project, signified politically by the rising influence of the United Kingdom Independence Party (UKIP) and constitutionally by pledges from all major political parties not to agree to the transfer of new powers to the EU without holding a referendum. 'The essence of the problem', noted Vernon Bogdanor, 'was one of fitting Britain into a continental system whose assumptions about constitutions, politics and economics were so different from those held in Britain'.[45]

These developments eventually came to a head in 2015 when the Conservatives were returned as a majority government, having pledged an in/out referendum on EU membership. Held in June 2016, it resulted in a majority (52%:48%) voting to leave. This led to a protracted period of unsettlement, the constitutional implications of which did not end on 31 January 2020, when the UK formally left the EU.

5.5 THE CONTEMPORARY CRISIS OF CONSTITUTIONAL IDENTITY

In different circumstances, Brexit might have become a constitutional moment, an occasion when the nation, recognizing that a new chapter in the development of the British state was opening, grasped the opportunity to renovate constitutional fundamentals. This is not what happened. Instead, Brexit has come to signify the depth of

[44] *R v Secretary of State for Transport, ex parte Factortame (No 2)* [1991] 1 AC 603.
[45] Vernon Bogdanor, *Britain and Europe in a Troubled World* (Yale University Press, 2020), 54.

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cleavage in Britain's constitutional identity. The referendum split the country down the middle, exposing fissures on class and geographical lines. It led to Remainers extolling the virtues of the EU as a symbol of modern, liberal, cosmopolitan values and Brexiters, under the mantra of 'taking back control', claiming the decision would lead to the restoration of traditional practices. Both claims were divorced from reality.

One immediate effect of the referendum result was to highlight the gulf that had emerged between the political class and the popular will: having effectively transferred the decision to the electorate, MPs found themselves saddled with implementing a decision despite the fact that around 75 per cent of them had voted to remain. In these circumstances, the traditional practices of parliamentary government were placed under severe strain and at times entirely broke down.[46] Following the resignation of two Prime Ministers (David Cameron after being on the losing side in the referendum; Theresa May after her negotiated withdrawal deal was thrice voted down by the Commons), Boris Johnson took over in summer 2019, went to the country and was returned with an eighty-seat majority (though he was also obliged to resign for other reasons in the summer of 2022). But, ultimately, the process highlights just how much it is the Government, not the Parliament, that has assumed control.

The longer-term implications are even more unsettling. In the process of negotiating withdrawal, the Government has made determined efforts to bolster the traditional principle of sovereignty. It included in the EU (Withdrawal Agreement) Act of 2020 a provision that '[i]t is recognised that the Parliament of the United Kingdom is sovereign', that 'its sovereignty subsists' notwithstanding any continuing EU law, and that 'nothing in this Act derogates from the sovereignty of the Parliament of the United Kingdom' (s.38). This might be read simply as a technical clause within a complex transitional process, but it also sent a signal. That signal was reinforced by the then Government's apparent intention to replace the Human Rights Act with a Bill of Rights Act. Ostensibly designed to restore the balance of power between the legislature and the courts, in reality it aimed to lessen the influence of the European Court of Human Rights and reinforce the sovereignty principle.

The signal being sent is directed primarily to the judiciary who, building on the modernization theme, over the last few decades have been seeking to reorder constitutional fundamentals by asserting that the rule of law, rather than sovereignty, is the basic principle of the British constitution. This thesis, generally called 'common law constitutionalism', asserts that sovereignty does not lie with 'those who wield governmental power' but rests 'in the conditions under which they are

[46] See Martin Loughlin, 'In Search of the Constitution', in Oran Doyle, Aileen McHarg and Jo Murkens (eds.), *Constitutions under Pressure: The Brexit Challenge for Ireland and the United Kingdom* (Cambridge University Press, 2021), 313–335, 328–332.

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permitted to do so' and the role of the judiciary must be to make explicit these conditions as 'a framework of fundamental principles'.[47] It is controversial, not least because it implicitly assumes the primacy of English common law within the British state. Yet it is one on which the judiciary have, in certain landmark decisions, made significant advances.[48] Here we see a struggle between the Government and the judiciary over the fundamentals of British constitutional identity.

But there also looms an even more fundamental problem than this contest between the principles of sovereignty and legality. By exposing significant differences across the UK's territorial regions, Brexit has thrown up certain more basic existential threats to the British state. The various devolution schemes set in place since 1998 have created a governmental mosaic, with the devolved schemes all containing modernizing elements and governing arrangements for each part of the UK now significantly varying. Lip service continues to be paid to the continuing sovereign authority of the Westminster Parliament, but these developments have strained this to breaking point. The catalyst has been the Scottish National Party's (SNP) majority rule in Scotland since 2011. They pushed for a referendum on Scottish independence which was held in 2014 and yielded a majority vote against (55.3% to 44.7%). But the Westminster Parliament felt it necessary to make further concessions, including passing legislation stating that 'the Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom's constitutional arrangements' and 'are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum'.[49] These developments signal the beginning of the end of Dicey's doctrine of parliamentary sovereignty, and the incremental evolution of an asymmetric federal scheme for the UK.

Brexit has brought a new dimension to these territorial developments. Although the 2016 referendum yielded a majority for leaving the EU, Northern Ireland and Scotland recorded majorities (56%:44% and 62%:38%, respectively) in favour of remaining. This divergence strained territorial relations throughout the negotiating process, including claims that withdrawal without the consent of the devolved legislatures was illegitimate. It has also had serious post-exit consequences. Arguing that Scotland had been removed from the EU against its will, the SNP then pledged to hold a second independence referendum (though this would require Westminster's consent). The situation in relation to Northern Ireland is no less serious. It is the one area of the UK that maintains a land border with an EU member state, yet the erection of customs barriers here was felt to threaten the peace process and accords established in the Good Friday Agreement. Consequently, a Protocol to the Withdrawal Agreement was negotiated, under which Northern

[47] Sir John Laws, 'Law and Democracy' (1995) *Public Law*, 72–92.

[48] See, e.g., *Jackson v Her Majesty's Attorney-General* [2005] UKHL 56; *R(Miller) v Prime Minister/Cherry v Advocate General for Scotland* [2019] UKSC 41.

[49] Scotland Act 2016. Similar constitutional protections were included in the Wales Act 2017.

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Ireland would remain in the customs union, with a customs border being established in the Irish Sea. But the working arrangements for this have generated disputes between the UK and EU, are a source of continuing discontent among unionist groups in Northern Ireland and may be signalling the moment at which the holding of a referendum on re-uniting Ireland becomes ever closer.

Ruling Britannia today presents greater challenges than has been faced at any stage in modern history. The idea of British nationhood was formed out of a Protestantism that bound the Anglo–Scottish union, flourished with the expansion of the British Empire and was sustained in the twentieth century by the establishment of a national industrial economy. These ties have since been progressively loosened: first through secularization of public life, then through loss of Empire and most recently with the promotion after 1979 of policies of de-industrialization and privatization.[50] Yet, once the factors enabling the British to identify themselves as a nation and a state have dissipated, the conditions for rejuvenating a common constitutional identity no longer seem propitious. It would require a conscious and determined effort to restore a pan-British sense of patriotism, and that seems a distinctively un-British thing to be contemplating. In this respect, George Orwell's observation that 'England is perhaps the only great country whose intellectuals are ashamed of their own nationality' still rings true.[51] The best hope lies in the advancement of radical reforms to the system of government, which might incrementally provide an institutional foundation for a renewal of faith.

[50] See David Edgerton, *The Rise and Fall of the British Nation: A Twentieth-Century History* (Penguin, 2018).

[51] George Orwell, 'England Your England' (1941), in *Essays* (Doubleday, 1954), 257–283 and 279.

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