

1-1-2007

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Sir David Williams
University of Cambridge

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Recommended Citation

Sir David Williams, *Ireland 1880-2005: A Constitutional Perspective*, 41 U. Rich. L. Rev. 345 (2019).
Available at: <https://scholarship.richmond.edu/lawreview/vol41/iss2/2>

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ADDRESS

IRELAND 1880–2005: A CONSTITUTIONAL PERSPECTIVE

Sir David Williams *

I. INTRODUCTION

The United Kingdom of Great Britain and Northern Ireland has experienced massive constitutional change and constitutional turmoil during the last thirty to thirty-five years. It has been an era of entry into the European Union, of the rapid expansion of administrative law, of exposure to domestic terrorism related to Northern Ireland and more recently to international terrorism, of the devolution settlements in Scotland and Wales, of constitutional experiments in Northern Ireland, of the incorporation of the European Convention on Human Rights into domestic law by virtue of the Human Rights Act 1998, of attempts to change the composition of the House of Lords and to make both Houses of Parliament more effective and democratically responsive, and of a new-found constitutional confidence on the part of the judiciary.

* Sir David Williams, Q.C., Barrister, is Emeritus Vice Chancellor of the University of Cambridge, Emeritus Rouse Ball Professor of English Law, and Life Fellow of Emmanuel College, Cambridge, U.K. He is the former president of Wolfson College Cambridge. A distinguished academic lawyer, Sir David also taught at the Universities of Nottingham and Oxford. At Oxford he taught at Keble College, later becoming an Honorary Fellow. He is an honorary Queen's Counsel and was knighted in 1991. Sir David is a former member of the Council on Tribunals, the Marre Committee, and the Royal Commission on Environmental Pollution. He has published extensively on various issues relating to English law and is a frequent guest speaker at international academic conferences.

These remarks were delivered at the University of Richmond School of Law on March 29, 2006. For the convenience of the reader, these remarks have been slightly edited from the form in which they were delivered as a speech.

Two recent decisions of the House of Lords in its judicial capacity¹—to be converted within the next few years into a Supreme Court under the Constitutional Reform Act 2005²—offer vivid examples of the constitutional issues now demanding resolution in the courts. There are currently twelve members of the House of Lords, and, unlike the Supreme Court of the United States, they sit in panels, usually of five members, to hear a wide range of appeals in private as well as public law. In the first of the recent decisions, a panel of nine Lords of Appeal in Ordinary considered a provision in the Anti-terrorism, Crime and Security Act 2001,³ enacted in the immediate aftermath of 9/11, which allowed for detention without trial.⁴ By a vote of eight to one, the House of Lords ruled that the relevant section was incompatible with the European Convention on Human Rights.⁵ British courts have no power to strike down Acts of Parliament, but this declaration of incompatibility made it politically necessary for the Government to introduce amending legislation in the Prevention of Terrorism Act 2005.⁶ In the second of the recent decisions, delivered in December 2005, a panel of seven unanimously held that evidence obtained by torture was inadmissible in judicial proceedings,⁷ though inevitably a number of questions remain unanswered.

The tone of both decisions is striking. The Law Lords were consciously speaking the language of constitutional fundamentals. Lord Bingham, the senior Law Lord, spoke in the first case of

1. *A. v. Sec'y of State for the Home Dep't*, (A. No. 2), [2005] UKHL 71, [2006] 2 A.C. 221 (H.L.); *A. v. Sec'y of State for the Home Dep't*, (A. No. 1), [2004] UKHL 56, [2005] 2 A.C. 68 (H.L.).

2. See, e.g., Lord Windlesham, *The Constitutional Reform Act 2005: Ministers, Judges and Constitutional Change*, 2005 PUB. L. 806, 811, 813, 820 (describing the preliminary debates leading to the Constitutional Reform Act of 2005). See generally Lord Windlesham, *The Constitutional Reform Act 2005: The Politics of Constitutional Reform*, 2006 PUB. L. 35, 35–37, 53–57 (detailing the final debates and conclusions of the Constitutional Reform Act of 2005).

3. Anti-terrorism, Crime and Security Act, 2001, c. 24 (U.K.).

4. *A. No. 1*, [2004] UKHL 56, at [7], [12], [14], [2005] 2 A.C. at 91, 94–95; see David Feldman, *Proportionality and Discrimination in Anti-Terrorism Legislation*, 64 CAMBRIDGE L.J. 271, 271 (2005); Adam Tomkins, *Readings of A. v. Secretary of State for the Home Department*, 2005 PUB. L. 259, 259.

5. See *A. No. 1*, [2004] UKHL 56, at [72]–[73], [84]–[85], [97], [139], [160], [190], [218], [239], [240], [2005] 2 A.C. at 127, 129, 132, 144, 150, 160, 170, 175.

6. Prevention of Terrorism Act, 2005, c.2 (U.K.).

7. *A. No. 2*, [2005] UKHL 71, [52], [80], [97], [112], [129], [150], [165], [2006] 2 A.C. 221, 270, 278, 282–83, 287, 292–93, 299, 304.

the long libertarian tradition of English law, dating back to chapter 39 of Magna Carta . . . , given effect in the ancient remedy of habeas corpus, declared in the Petition of Right 1628, upheld in a series of landmark decisions down the centuries and embodied in the substance and procedure of the law to our own day.⁸

Lord Hope insisted that “[i]t is impossible ever to overstate the importance of the right to liberty in a democracy.”⁹ A commentator has said that the decision “will long remain a benchmark in public law.”¹⁰ In the second case, Lord Bingham referred to a number of cases in other jurisdictions,¹¹ including *Rochin v California*,¹² and Lord Hoffmann said that “the rejection of torture by the common law has a special iconic importance as the touchstone of a humane and civilised legal system.”¹³ There were passing references in both cases to Guantanamo Bay¹⁴ and, in the second case, extra-legal “rendition” of suspects was mentioned.¹⁵

Each case arose in the context of international terrorism and after the enactment of the Human Rights Act. In the context of domestic terrorism, most of it associated with Northern Ireland and its republican and the loyalist factions, several cases have been decided by the European Court of Human Rights. These cases include *Ireland v. United Kingdom*,¹⁶ concerning detention without trial,¹⁷ and *McCann v. United Kingdom*,¹⁸ which arose from the shooting of three unarmed IRA members by SAS soldiers in Gibraltar.¹⁹ One case in the United Kingdom arose from a notice issued by the Home Secretary in 1988 to the BBC and the IBA, the Independent Broadcasting Authority, effectively ban-

8. *A. No. 1*, [2004] UKHL 56, at [36], [2005] 2 A.C. at 107.

9. *Id.* at [100], [2005] 2 A.C. at 132.

10. Feldman, *supra* note 4, at 273.

11. *A. No. 2*, [2005] UKHL 71, at [17], [2006] 2 A.C. at 249–50.

12. 342 U.S. 165 (1952).

13. *A. No. 2*, [2005] UKHL 71, at [83], [2006] 2 A.C. at 279.

14. *Id.* at [44] (per Lord Bingham), [126] (per Lord Hope), [2006] 2 A.C. at 267–68 (per Lord Bingham), 292 (per Lord Hope); *see also A. No. 1*, [2004] UKHL 56, at [223], [2005] 2 A.C. at 171.

15. *A. No. 2*, [2005] UKHL 71, at [82], [2006] 2 A.C. at 279 (H.L.) (per Lord Hoffman); *see also id.* at [103]–[107], [2006] 2 A.C. at 284–85 (H.L.) (Lord Hope’s remarks referring to the seventeenth century).

16. 23 Eur. Ct. H.R. (ser. B) at 23 (1976).

17. *Id.* at 33.

18. 21 Eur. H.R. Rep. 97 (1995); *see* K.D. EWING & C.A. GEARTY, *FREEDOM UNDER THATCHER: CIVIL LIBERTIES IN MODERN BRITAIN* 235–41 (1990).

19. *McCann*, 21 Eur. H.R. Rep. at 103–34.

ning the real voice of people representing specified proscribed organisations in Northern Ireland and three lawful organisations including Sinn Fein, the political wing of the IRA.²⁰ The House of Lords upheld the ban,²¹ and for some time actors were used to speak the words of those organisations which came within its scope. In another case on police powers, the House of Lords ruled in favour of the police, holding that the trial judge in an action for unlawful arrest "was entitled on the sparse materials before him to infer the existence of reasonable grounds for suspicion."²² Such cases belong to an era when constitutional awareness was not as widespread among the judiciary as it is today. This is not to question particular proceedings but rather to speak of a very different constitutional climate which has emerged since the coming into force of the Human Rights Act.

In one major respect, however, the judiciary has frequently been active in a manner which would be unacceptable to the federal judiciary of the United States. Over many years judges in the United Kingdom have been called upon to investigate in an extra-judicial capacity numerous general issues and, on occasion, particular events. Even before the First World War, Charles Evans Hughes, then an Associate Justice of the Supreme Court of the United States, said in the aftermath of his experience in serving on a commission to determine the cost of handling second-class mail that

[i]t is best for the Court and the country that the Justices should strictly limit themselves to their judicial work, and that the dignity, esteem, and indeed the aloofness, which attach to them by virtue of their high office as the final interpreters of legislation and constitutional provisions, should be jealously safeguarded.²³

For much of the last century federal judges steered well clear of "off-court chores," and the Commission, which under the chairmanship of Chief Justice Warren investigated the assassination of President Kennedy, was one of very few exceptions.²⁴ The prac-

20. *R. v. Sec'y of State for the Home Dep't (Ex parte Brind)* [1991] 1 A.C. 696, 711 (H.L.).

21. *Id.* at 767.

22. *O'Hara v. Chief Constable of the Royal Ulster Constabulary*, [1997] A.C. 286, 290 (per Lord Steyn) (H.L.).

23. 1 MERLO J. PUSEY, CHARLES EVANS HUGHES 296-97 (1951).

24. See Alpheus Thomas Mason, *Extra-Judicial Work for Judges: The Views of Chief*

tice in the United Kingdom has been different, with judges particularly involved in issues of “national security, allegations of corruption, industrial disputes, public disorder, police conduct, matters affecting commerce and national finance, [and] anti-terrorism.”²⁵ Northern Ireland was the focus of several inquiries in the 1970s, including the Tribunal of Inquiry chaired by Mr. Justice Scarman to investigate violence and civil disturbances in 1969,²⁶ a Commission chaired by Lord Diplock to consider legal procedures to deal with terrorist activities,²⁷ and the Tribunal of Lord Chief Justice Widgery which reported in April 1972 on the events of Sunday 30 January of the same year—known to this day as Bloody Sunday—which led to civilian deaths and injuries in Londonderry.²⁸

Some inquiries in which serving judges have been involved are relatively uncontroversial, but others have been open to criticism, especially when a judge has to adjudicate on “a difficult and controversial public issue” which could compromise his or her detachment.²⁹ It may well be, as I have suggested elsewhere, that the reservations will become stronger as the courts assume more of a constitutional mantle.³⁰ Inquiries into a particular event, such as the clash between soldiers and marchers on Bloody Sunday, invite direct criticism, and the Widgery Report was highly controversial from the outset. It is perhaps significant that, almost as a prelude to peace negotiations in Northern Ireland which led to the so-called Good Friday Agreement of April 1998³¹—which in itself was intended as the precursor of a new

Justice Stone, 67 HARV. L. REV. 193, 194–95 (1953); Sir David Williams, *Bias; The Judges and the Separation of Powers*, [2000] PUB. L. 45, 48–50.

25. Williams, *supra* note 24, at 48.

26. TRIBUNAL OF INQUIRY, VIOLENCE AND CIVIL DISTURBANCES IN NORTHERN IRELAND IN 1969, 1972, Cmnd. 566.

27. COMMISSION TO CONSIDER LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND, 1972, Cmnd. 5185.

28. TRIBUNAL APPOINTED TO INQUIRE INTO THE EVENTS ON SUNDAY, 30TH JANUARY 1972, WHICH LED TO LOSS OF LIFE IN CONNECTION WITH THE PROCESSION IN LONDONDERRY ON THAT DAY, REPORT, 1972, H.L. 101, H.C. 220.

29. See 572 PARL. DEB., H.L. (5th ser.) (1996) 1282 (statement of Lord Simon).

30. See Williams, *supra* note 24, at 50; see also Louis Blom-Copper & Colin Munro, *The Hutton Inquiry*, 2004 PUB. L. 472, 476 (arguing that the public’s ready acceptance of asking a senior judge to hold a public inquiry should be questioned); Iain Steele, *Judging Judicial Inquiries*, 2004 PUB. L. 738, 746–49 (arguing that the involvement of senior judges in inquiries gives rise to serious constitutional concerns and should be avoided in the future).

31. NORTHERN IRELAND HOME OFFICE, THE BELFAST AGREEMENT: AN AGREEMENT

constitutional settlement—the Prime Minister announced in January 1998 that Bloody Sunday would be revisited.³² A Tribunal was established to re-examine the events of 30 January, “taking account of any new information relevant to events on that day.”³³ With a view to guaranteeing impartiality, the Tribunal was to be chaired by a serving Law Lord, Lord Saville of Newdigate. He would be flanked by the Honorable William L. Hoyt, formerly Chief Justice of New Brunswick, and by a former member of the Court of Appeal of New Zealand who later had to retire through ill-health to be replaced by the Honorable John L. Toohey, a former member of the High Court of Australia. This international element, incidentally, was written into the peace process from 1998 with close cooperation of the Republic of Ireland and through strong support from the United States and Canada. The Saville Tribunal has itself been remarkable. Its hearings came to a close after seven years sitting in Northern Ireland and London. The Tribunal heard some 900 witnesses and faced litigation in the ordinary courts on such matters as the anonymity of witnesses.³⁴ The financial cost has been very great, and we still await the Tribunal’s Report. Whether the claims and counter-claims over Bloody Sunday can be resolved remains to be seen, especially in the light of assertions that the “curse of Ireland has been the length of its memory,”³⁵ or that the “two great misfortunes” in Anglo-Irish political relations are that the Irish memory is too long and that the English memory is too short.³⁶

Indeed, if one goes back well over a hundred years to what was then a united Ireland—partition came only from the 1920s—one will find that the volatile and sometimes bloody decade of the 1880s ended with a lengthy inquiry. This was the so-called Parnell Commission which was presided over by three High Court Judges over 128 days and had every ingredient for publicity: a central figure, Charles Stewart Parnell, who was the charismatic Irish politician of the decade, forged documents linking

REACHED AT THE MULTI-PARTY TALKS ON NORTHERN IRELAND, 1998, Cm. 3383.

32. Tony Blair, British Prime Minister, Statement to the House of Commons Establishing a New Inquiry into “Bloody Sunday” (Jan. 29, 1998), available at <http://cain.ulst.ac.uk/events/bsunday/tb29198.htm>.

33. *Id.*

34. See *R. v. Lord Saville of Newdigate (Ex parte A.)* [1999] EWCA (Civ) 1136, 1 (Eng.).

35. See 149 PARL. DEB., H.C. (5th ser.) (1921) 358.

36. See 162 PARL. DEB., H.L. (5th ser.) (1949) 947.

Parnell to the infamous Phoenix Park murders of the newly arrived Chief Secretary for Ireland and his Under-secretary in Dublin in 1882, and a dramatic and lengthy opening address for the defence by Sir Charles Russell in which he expressed the hope that the inquiry would “soften ancient prejudices” and “hasten the day of true union and real reconciliation between the people of Ireland and the people of Great Britain.”³⁷ The Commission in essence provided a pause—admittedly a fraught pause—in the attempt to solve the Irish Question. Looking back, the Commission was an early, long-winded involvement of the judiciary in the affairs of Ireland—but outside court. In matters of terrorism and anti-terrorism, even in constitutional adjudication on Irish issues, the judiciary of the United Kingdom has offered relatively little in genuine litigation. The scene may change in the light of the new constitutional self-awareness of the House of Lords in its judicial capacity, but the history of constitutional developments in Ireland, and latterly in Northern Ireland, over the past 125 years suggests that the constitutional initiative has largely rested with the executive and the legislature.

II. CONSTITUTIONAL CHANGE: THE PROJECTION OF 1886

Throughout the later part of the nineteenth century, the cause of Irish nationalism was immensely boosted by the moral and material support of the American Irish. The importance of the American Irish was recognised early on by John Bright and John Stuart Mill.³⁸ In 1886, a Government Minister noted that the result of Ireland’s “sufferings and our misgovernment in the past has been the expatriation of millions of Irishmen. That expatriation has created another and a larger, a freer, a richer, and a more powerful Ireland beyond the Atlantic . . .”³⁹ The decade began with the arrival of Parnell in New York on 2 January 1880, and very soon he was assuring the American people generally

37. R. BARRY O'BRIEN, *THE LIFE OF LORD RUSSELL OF KILLOWEN* 208–58 (2d ed. 1902); see F.S.L. LYONS, *CHARLES STEWART PARNELL* 390–422 (1977); JOHN MACDONALD, *DIARY OF THE PARNELL COMMISSION* (1890).

38. NICHOLAS MANSERGH, *THE IRISH QUESTION 1840–1921*, at 296–97 (3d ed. 1975) (referring to remarks made in 1848 and 1868, respectively).

39. 305 *PARL. DEB. H.C.*, (3rd ser.) (1886) 1186; see also 306 *PARL. DEB.*, H.C. (3rd ser.) (1886) 517. See generally F.M. CARROLL, *AMERICAN OPINION AND THE IRISH QUESTION 1910–23: A STUDY IN OPINION AND POLICY* 1–13 (1978).

that they were "virtually the arbiters of this Irish question."⁴⁰ He attacked the British imperial government which, in his words, "does not hesitate to spend 10 to 20 millions a year in childish and cruel wars in all parts of the world" whereas "it would be surely a good change if they would devote their attention to domestic affairs and to securing the happiness and prosperity of their own people at home instead of destroying that of other people abroad."⁴¹ In one city after another his targets and emphases varied, but he established a pattern of rhetoric and fundraising in the United States which has been seen again in the last thirty-five years.

When Parnell referred to the "Irish Question" there was an inevitable ambiguity: Was he referring to specific issues such as land reform, was he alluding to separatism, or was he referring in the language of the time to Home Rule? Even though many Irish members of Parliament elected at the General Election of 1874 had put Home Rule into their election addresses, the meaning of the phrase was never precise. It obviously raised the possibility of some form of self-government for Ireland, but the scope and detail of that aspiration were to dominate Irish politics and British politics for the next forty to fifty years—and the vestiges of the ambiguity linger on today. The perils of ambiguity were enhanced when the central pillar of the British constitution, the doctrine of parliamentary sovereignty or supremacy, could be invoked in response; and parliamentary sovereignty was given an eloquent affirmation in 1885 with the publication of the first edition of A.V. Dicey's *The Law of the Constitution*.⁴²

Charles Stewart Parnell, a Protestant Irishman with an American mother and with an undistinguished career as a student at Cambridge University,⁴³ and his colleagues in Parliament in London succeeded in stoking the fires of Irish dissent from the

40. ROBERT KEE, *THE LAUREL AND THE IVY: THE STORY OF CHARLES STEWART PARNELL AND IRISH NATIONALISM* 217 (1993) (internal quotations omitted).

41. *Id.* at 219 (internal quotations omitted). The neglect of Irish affairs by the British Parliament and Executive was frequently stressed, even by non-Irish politicians. See 306 Parl. Deb., H.C. (3d ser.) (1886) 948 (statement of John Morley).

42. E.C.S. WADE, *INTRODUCTION TO A.V. DICEY, THE LAW OF THE CONSTITUTION* (9th ed. 1950).

43. His mother was Delia Tudor Stewart, descended from a family which claimed kinship with the Tudor dynasty. His grandfather became a national hero when, as Commodore Stewart, he captured two British ships off the coast of Spain in the War of 1812. See LYONS, *supra* note 37, at 21–24; KEE, *supra* note 40, at 42–44.

mid-1870s through obstructionist tactics in the House of Commons—filibustering is not confined to the United States—and by vigorous campaigns outside parliament, in the United Kingdom, the United States, and elsewhere. Success of a kind was achieved when William Ewart Gladstone—probably the outstanding British prime minister of the nineteenth century—was converted to Home Rule, and his third period as Prime Minister saw the introduction of the first Home Rule Bill, formally the Government of Ireland Bill 1886.⁴⁴ The proposed legislation provided for a national parliament for Ireland and its own executive, but with odd balancing provisions such as the total exclusion of Irish members from the imperial parliament in London, which would nevertheless have complete control over foreign relations.⁴⁵ Dicey responded by writing a book entitled *England's Case Against Home Rule*⁴⁶ which gave strong emphasis to the need to preserve parliamentary sovereignty and to the undesirability of anything approaching federal government.⁴⁷ One member of Parliament declared that the Bill “sweats difficulties at every paragraph, every provision breeds a dilemma, every clause ends in a *cul de sac*, dangers lurk in every line, mischiefs abound in every sentence, and an air of evil hangs over it all.”⁴⁸ After lengthy proceedings in the House of Commons, the Bill was finally defeated by a vote of 343 to 313. The result was that Gladstone's government fell. The cause of Home Rule suffered again when, having survived the scrutiny of the Special Commission in 1890, Parnell lost much political ground after being cited in a divorce case, and then died suddenly in only his mid-forties in 1891.

The doctrine of parliamentary sovereignty survived the defeat of 1886 and was to play a part in numerous constitutional changes yet to occur, affecting the United Kingdom as a whole as well as the Irish Question. It shadowed later attempts to secure Home Rule for Ireland, and was and still is highly relevant to the debates on devolution for Scotland and Wales which was ulti-

44. The Government of Ireland (Home Rule) Bill, 1886 (Eng.), http://multitext.ucc.ie/d/Home_Rule_Bill_1886.

45. See *id.*

46. A.V. DICEY, *ENGLAND'S CASE AGAINST HOUSE RULE*; (Richmond Publ'g Co. 1973) (1886); see also Hugh Tulloch, A.V. Dicey and the Irish Question: 1870-1922, 15 *IRISH JURIST* (N.S.) 137, 142-43 (1980). See generally W.R. Anson, *The Government of Ireland Bill and the Sovereignty of Parliament*, 2 L.Q.R. 427 (1886).

47. See Tulloch, *supra* note 46, at 142-43.

48. 306 *PARL. DEB.*, H.C. (3rd ser.) (1886) 362.

mately secured through differing legislation in 1998 and is evolving slowly and sometimes in unexpected directions. Parliamentary sovereignty has been central in the history of Northern Ireland since the early 1920s, and has loomed large with regard to the European Union—which the United Kingdom joined on 1 January 1973—and with regard to the incorporation of the European Convention through the Human Rights Act 1998. In a leading case involving the Merchant Shipping Act, enacted by Parliament in 1988, the House of Lords accepted that national legislation must not be applied if it conflicted with European law.⁴⁹ In the words of *The Economist* in 1995,⁵⁰ British membership in the European Union has “blown a hole through the middle of Dicey’s doctrine of parliamentary sovereignty.”⁵¹ The Human Rights Act does not expressly endanger parliamentary sovereignty, but the courts are empowered to declare, where appropriate, that parliamentary legislation is incompatible with the European Convention. Even though the initiative is formally that of Government, it may often—as we have seen—be politically out of the question to avoid new or amending legislation. Slowly and unsurely the old assumptions of constitutional law are being undermined.

Lurking behind many of the arguments of 1886 there was also the matter of federalism. The United Kingdom in the nineteenth century was a unitary country, but discussion of Home Rule seemed to expose the possibility of a federal structure to accommodate Ireland and, in addition, Scotland and Wales; and arguments about federalism were to continue whenever a new solution to the Irish Question was broached. In his Introduction to the eighth edition of *Law of the Constitution* in 1914, Dicey complained that “[a]dvocates of the so-called ‘federal solution’ apparently believe that the United Kingdom as a whole will gain by exchanging our present unitary constitution for some unspecified form of federal government.”⁵² He added significantly that “[i]n England, which is after all by far the most important part of the

49. *R. v. Transport Sec’y (Ex Parte Factortame Ltd.)* (No. 2), [1991] 1 A.C. 603, 676 (H.L.); see David Feldman, *None, One or Several? Perspectives on the UK’s Constitution(s)*, 64 CAMBRIDGE L.J. 329, 345–46 (2005).

50. *The Case for Reform*, ECONOMIST, Oct. 14, 1995, at 25, 28.

51. *Id.* See generally H.W.R. Wade, *Sovereignty—Revolution or Evolution*, 112 L.Q.R. 568 (1996).

52. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION lxxvii (8th ed. 1920). This introduction is from the original 1915 printing. *Id.*

kingdom, the idea of federalism has hitherto been totally unknown.”⁵³

Issues of federalism have arisen with surprising frequency in several contexts over the past 125 years. First, as new countries emerged from the Empire—countries such as Canada (federal), Australia (federal), New Zealand, and South Africa—there was somewhat idealistic talk of an Imperial Federation,⁵⁴ but any unity was to be replaced by the much looser association known as the Commonwealth. The Commonwealth, which now has over fifty member-countries, does not derive from Treaty and was defined in 1971 as “a voluntary association of independent sovereign States, each responsible for its own policies, consulting and cooperating in the common interests of their peoples and in the promotion of international understanding and world peace.”⁵⁵ Secondly, federalism was raised in the context of the Irish question and more recently in seeking to establish the status of Northern Ireland, Scotland, and Wales. This is where federalism amounts to more than devolution—bearing in mind that devolution was described as early as 1913 as encompassing “a delegation which postulates that the authority making the delegation shall retain effective control over the exercise of the powers delegated, and shall have an effective right to resume them.”⁵⁶ In other words, devolution is compatible, at least in theory, with parliamentary sovereignty. In a lecture delivered some five years ago, Justice Sandra Day O’Connor said that “[f]ederalism represents a true division of power, whereas devolution is simply a delegation,”⁵⁷ but she added that devolution in the United Kingdom, “though cut from a different mould from our federalism, reflects many of the same values, and therefore many of the same opportunities.”⁵⁸ Yet, it was the essential threat to parliamentary sovereignty which underlaid the feelings of 1886 and those feelings persist to the present day.

53. *Id.* at lxxxviii–lxxxvix.

54. See 1 W.K. HANCOCK, *SURVEY OF BRITISH COMMONWEALTH AFFAIRS: PROBLEMS OF NATIONALITY 1918–1936*, at 1–2 (1937).

55. See, e.g., HILAIRE BARNETT, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 62 (6th ed. 2006) (quoting from the Commonwealth Heads of Government Meeting).

56. 53 *PARL. DEB.*, H.C. (5th ser.) (1913) 1322.

57. Sandra Day O’Connor, *Altered States: Federalism and Devolution at the “Real” Turn of the Millennium*, 60 *CAMBRIDGE L.J.* 493, 502 (2001).

58. *Id.* at 508.

Devolution was thrust into prominence in the United Kingdom through Scottish and Welsh aspirations in the 1960s, and for four years a Royal Commission on the Constitution wrestled with the variants of devolution before submitting a report in 1973.⁵⁹ The Commission spoke as Dicey might have put it, that “[t]here is very little demand for federalism in Scotland and Wales, and practically none at all in England,”⁶⁰ that “even at its best federalism is an awkward system to operate,”⁶¹ that “a federal system of government would require a written constitution, a special procedure for changing it and a constitutional court to interpret it,”⁶² that “[f]ederalism would tend to undermine” political and economic unity,⁶³ and in short that “the United Kingdom is not an appropriate place for federalism and now is not an appropriate time.”⁶⁴ A distaste for the concept of federalism has been carried over into current debates about the future of the European Union and its member states. Few people, politicians or observers, are agreed on the measure or degree of federalism involved, though as early as 1962—well ahead of British entry—a distinguished scholar wrote that “the political issues are ultimately more important than the economic. . . . The fundamental objective of the architects of the [European Economic Community (“EEC”)] is quite frankly the political unification of Western Europe into a federation or confederation of states.”⁶⁵ In this respect, it is interesting that Justice O’Connor spoke in 2001 of the consensus that the European Union “is neither a confederation nor a federal system, but rather ‘a construction *sui generis* somewhere between the two.’”⁶⁶

The confusion, the difficulty of definition, the variants of each concept were all anticipated in the turbulent 1880s and especially in 1886, but there was more to come.

59. ROYAL COMMISSION ON THE CONSTITUTION 1969–1973, 1973, Cmnd. 5460.

60. *Id.* ¶ 498.

61. *Id.* ¶ 520.

62. *Id.* ¶ 527.

63. *Id.* ¶ 535.

64. *Id.* ¶ 539. See generally D.G.T. Williams, *The Constitution of the United Kingdom*, 31 CAMBRIDGE L.J. 266, 266–77 (1972) (discussing the history of the federalist movement in the United Kingdom).

65. See JAMES E. MEADE, U.K., COMMONWEALTH AND COMMON MARKET 9 (1962). See generally Williams, *supra* note 64, at 284–90.

66. See O’Connor, *supra* note 57, at 506 (quoting Reimer von Borries & Malte Hauschild, *Implementing the Subsidiary Principle*, 5 COLUM. J. EUR. L. 369, 370 (1999)).

III. CONSTITUTIONAL CHANGE: 1893–1922 AND BEYOND

After the debacle of 1886, Gladstone lost office; but in 1892 he returned as prime minister determined to use his fourth term to secure Home Rule. The second Home Rule Bill 1893 was introduced in the House of Commons.⁶⁷ It contained significant changes from the 1886 scheme, allowing, for example, for some eighty Irish MPs in the Imperial Parliament at Westminster and, at the same time, sought expressly to preserve parliamentary sovereignty in the preamble.⁶⁸ Dicey wrote another book entitled *A Leap in the Dark*,⁶⁹ claiming that “[n]ever before was a nation so strangely advised by such bewildered counsellors to take for so little apparent reason so desperate a leap in the dark.”⁷⁰ In Parliament, the 1893 Bill was seen by Lord Randolph Churchill as “extravagant and grotesque,”⁷¹ and Joseph Chamberlain scorned the attempt expressly to preserve parliamentary sovereignty.⁷² From the Government benches came a more pragmatic approach. Home Rule, said the Home Secretary, was not “a counsel of perfection” but the best way to deal with “a highly critical and complex subject” and “a long stride towards a more generous Irish policy.”⁷³ The Bill was approved by the House of Commons but was soundly defeated by the unelected, mainly hereditary House of Lords.⁷⁴ One MP, the future Mr. Justice Darling of the High Court of England and Wales, had already advised that the Bill should be treated as “a celebrated *gourmand*” suggested as to the dressing of a cucumber: “that they should add a little salt, a little pepper, and a little oil in order to make it palatable and agreeable; and having done so they should throw the preparation out of [the] window.”⁷⁵

67. See LAWRENCE J. McCAFFREY, *THE IRISH QUESTION: 1800–1922*, at 123 (1968).

68. See JAMES LOUGHLIN, *GLADSTONE, HOME RULE, AND THE ULSTER QUESTION: 1882–93*, at 264–65 (1987).

69. A. V. DICEY, *A LEAP IN THE DARK: A CRITICISM OF THE PRINCIPLES OF HOME RULE AS ILLUSTRATED BY THE BILL OF 1893* (2d ed. 1911).

70. *Id.* at 193.

71. See 8 PARL. DEB., H.C. (4th ser.) (1893) 1611.

72. See *id.* at 1730.

73. See 17 PARL. DEB., H.L. (4th ser.) (1893) 393, 403.

74. See McCAFFREY, *supra* note 67, at 123.

75. 12 PARL. DEB., H.C. (4th ser.) (1893) 361. In the House of Lords in September 1893 a similar fate was reserved for a cooked pike: See 17 PARL. DEB., H.L. (4th ser.) (1893) 388.

Later on, in 1912, the then Prime Minister H. H. Asquith said, with reference to the Bills of 1886 and 1893, that he did not wish to burn his feet "in the embers of historical controversy."⁷⁶ Nevertheless, the 1893 Bill, like its predecessor, fired constitutional issues which have prevailed to this day and helps to explain the strange Irish Question which still plays such an apparently disproportionate part in the politics of the United Kingdom. One of these issues is the clash between the constitutional pragmatists, who saw such terms as Home Rule and, later, devolution as malleable or adaptable, and the alleged purists, who adhered to a strict doctrine of parliamentary sovereignty and preferred precision. Secondly, there was the question of the House of Lords and its place in the constitution, a compelling controversy today as before. Thirdly, there was the issue of partition as a temporary or permanent fixture in a solution to the Irish Question, allied to the more radical issue still of separatism or complete independence.

Constitutional pragmatism, allied to ambiguity in constitutional terminology, persisted after 1893. For some years the political pressure for Home Rule eased somewhat. It returned vigorously, however, in the years immediately before the third Irish Home Rule Bill of 1912,⁷⁷ which finally secured enactment in 1914,⁷⁸ by virtue of the earlier Parliament Act 1911,⁷⁹ which had provided for the by-passing of a veto in the House of Lords.⁸⁰ The Bill itself had inspired further insistence by Dicey on parliamentary sovereignty, but the Government of Ireland Act 1914,⁸¹ embracing a united Ireland, was suspended because of the outbreak of the Great War on 4 August 1914.⁸² The delay was fatal because there followed the Easter Rising of 1916, a new turbulence in Irish life, a particularly bloody period from 1919 to 1922, and eventually the Irish Free State (Agreement) Act 1922, which effectively recognised secession for all of Ireland save Northern Ire-

76. See 36 PARL. DEB., H.C. (5th ser.) (1912) 1402.

77. See D. GEORGE BOYCE, *NINETEENTH-CENTURY IRELAND: THE SEARCH FOR STABILITY* 286 (1991); ALVIN JACKSON, *THE ULSTER PARTY: IRISH UNIONISTS IN THE HOUSE OF COMMONS: 1884-1911*, at 128 (1989).

78. Government of Ireland Act, 1914, 4 & 5 Geo. 5, c. 90 (U.K.).

79. Parliament Act, 1911, 1 & 2 Geo. 5, c. 13 (U.K.).

80. See *id.* §§ 1-2.

81. Government of Ireland Act, 1914, 4 & 5 Geo. 5, c. 90 (U.K.).

82. See Suspensory Act, 1914, 4 & 5 Geo. 5, c. 88, § 1 (U.K.) (suspending the effectiveness of the Government of Ireland Act for no less than twelve months, nor more than the duration of "the present war").

land.⁸³ Secession was once again a pragmatic solution, and it was to be over a quarter of a century before it was finally and fully accepted in the Ireland Act 1949.⁸⁴ In 1922, there was talk of Dominion Status for the Irish Free State, akin to the status of the older Dominions, and the Prime Minister, David Lloyd George, saw it as “difficult and dangerous” to seek a definition of the term as applied to Ireland. Lord Sumner, a serving Law Lord but not overly responsive to the idea of separation of powers, intervened in the legislative proceedings to criticise—from the standpoint, as he put, of “a constitutional pedant”—numerous terminological and other ambiguities in the Irish Free State (Agreement) Bill.⁸⁵ Lord Carson, another Law Lord, also spoke against the Bill in vehement terms.⁸⁶ There was a sharp and unresolved conflict over the propriety of these remarks, a further reminder of the differing views on the notion of separation of powers in the United States.⁸⁷ Pragmatism prevailed, however, and the Prime Minister, Clement Attlee, maintained the emphasis on pragmatism when the Ireland Bill 1949 was introduced to recognise and regularise the Republic of Ireland’s departure from the Commonwealth.⁸⁸ It is noteworthy that the Royal Commission on the Constitution was distinctly uneasy about separatism as a possible solution for Scotland and Wales. “An independent Scotland retaining its links with the Crown and the Commonwealth, as is usually envisaged,” it commented, “could later break those links, as the Irish Republic did.”⁸⁹ It was satisfied, however, that “the necessary political will for separation [did] not exist,”⁹⁰ which is another way of stating that pragmatic or political factors would prevail rather than neat constitutional formulae.

A second long-term legacy of the defeat of the 1893 Bill was enhanced controversy about the powers and the composition of the House of Lords as the second chamber or the Upper House of

83. See Irish Free State (Agreement) Act, 1922, 12 Geo. 5, c. 4 (U.K.). See generally Brigid Hadfield, *The United Kingdom as a Territorial State*, in *THE BRITISH CONSTITUTION IN THE TWENTIETH CENTURY* 585, 591–604 (Vernon Bogdanor ed., 2003).

84. See Ireland Act, 1949, 12 & 13 Geo. 6, c. 41 § 1 (U.K.).

85. See 49 PARL. DEB., H.L. (5th ser.) (1922) 524.

86. 49 PARL. DEB., H.L. (5th ser.) (1922) 827–28.

87. See, e.g., *Berger v. United States*, 255 U.S. 22, 35–36 (1921) (holding that judges must “give assurance that they are impartial”).

88. See 464 PARL. DEB., H.C. (5th ser.) (1949) 1854.

89. ROYAL COMMISSION ON THE CONSTITUTION 1969–1973, 1973, Cmnd. 5460, ¶ 428.

90. See *id.* ¶ 497.

Parliament. As already indicated, some check on the legislative power of the House of Lords was achieved by the Parliament Act 1911 and this was further extended by legislation of 1949,⁹¹ the impact of the latter was only recently considered in the bitter aftermath of the abolition of fox-hunting.⁹² The Life Peerages Act 1958,⁹³ allowing for the appointment of lords who would serve for life,⁹⁴ was a serious and welcome break from the hereditary principle, while the House of Lords Act 1999⁹⁵ has recently severely reduced the body of hereditary peers with seats in the chamber, with a view to their later abolition altogether.⁹⁶ Nevertheless, a Royal Commission on the Reform of the House of Lords, which reported in 2000, has failed to lay the basis for comprehensive change either in powers or in composition.⁹⁷ An attempt to kick-start the process of wide-scale reform in a later White Paper⁹⁸ has also been unproductive, and the stumbling blocks have included the question of allowing for elected members and whether or not to extend the powers of the House of Lords with a reformed composition.⁹⁹

Then there is the issue of the partition of Ireland. From the outset of the Home Rule campaign, there had been in some quarters an unqualified rejection of partition, expressed in Parnell's

91. Parliament Act, 1949, 12, 13 & 14 Geo. 6, c. 103 (U.K.).

92. See *Jackson v. Attorney General*, [2005] UKHL 56 [1], [39], [2006] 1 A.C. 262, 270–71, 286 (H.L.) (per Lord Bingham) (upholding the validity of Parliament Act 1949 and acts passed thereunder without the consent of the House of Lords). See generally Michael Plaxton, *The Concept of Legislation: Jackson v. Her Majesty's Attorney General*, 69 MOD. L. REV. 249 (2006).

93. Life Peerages Act, 1958, 6 & 7 Eliz. 2, c. 21 (U.K.).

94. *Id.* § 1.

95. House of Lords Act, 1999, c. 34 (U.K.).

96. See *id.* §§ 1–2 (disallowing membership in the House of Lords based upon heredity peerages, but allowing for ninety exceptions to last for the member's life “until an Act of Parliament provides to the contrary”) (emphasis added).

97. See ROYAL COMMISSION ON THE REFORM OF THE HOUSE OF LORDS, A HOUSE FOR THE FUTURE, 2000, Cm. 4534. The report provides a useful recent history of the House of Lords, see *id.* ¶¶ 2.1 to 2.18, and there is an interesting chapter on the Law Lords and the judicial functions of the second chamber, see *id.* ¶¶ 9.1 to 9.10. For a collection of essays soon after the 1893 Bill, see THE HOUSE OF LORDS QUESTION (Andrew Reid ed., 1898).

98. PRIME MINISTER, THE HOUSE OF LORDS — COMPLETING THE REFORM, 2001, Cm. 5291, at ii–iii, ¶¶ 1–2, 4, 6, 97, available at <http://www.dca.gov.uk/constitution/holref/in dex.htm>.

99. See generally Peter Riddell, *MPs Loath to Breathe Too Much Life into Rival Chamber*, TIMES (Eng.), Nov. 26, 2004, at 32 (stating that the House of Lords seems to have unfinished business in British politics involving their chamber's power and composition).

defiant cry: "No, Sir; we cannot give up a single Irishman."¹⁰⁰ The claims for a separate Ulster or part of Northern Ireland where the Protestants were in a majority were already being heard loudly by 1893; by 1913, Sir Edward Carson, later a Lord of Appeal, claimed that the attempted betrayal of Ulster in the third Home Rule Bill was "one of the most dastardly acts that has ever disgraced the pages of history."¹⁰¹ The Great War, as we have seen, caused the suspension of the Government of Ireland Act 1914, and it never came into force. It was replaced by the Government of Ireland Act 1920¹⁰² providing for two legislative assemblies, one in Dublin and one in Belfast, cooperating through a Council of Ireland.¹⁰³ The new scheme, despite not ruling out eventual reunification, was never accepted in the south, which successfully pressed for an Irish Free State, leaving the six counties of the north—Antrim, Armagh, Down, Fermanagh, Londonderry and Tyrone—to continue as envisaged with a bicameral Parliament and its own executive.

Outside observers might wonder at this outcome, but perhaps enough has been said already to indicate the passions, not helped by the sectarian divide, which underlined Home Rule. In the build-up to the Home Rule Act 1914, many thousands of people on both sides of the sectarian divide were prepared to take up arms on the issue of Northern Ireland being carried perforce into a self-governing united Ireland, and even Dicey—the exponent of the Rule of Law as well as parliamentary sovereignty—pledged himself to armed resistance.¹⁰⁴ Yet the Ulster Unionists reluctantly accepted the 1920 scheme for Northern Ireland as an alternative to reunification, and in the words of the Royal Commission:

Northern Ireland, by one of history's choicest ironies, is the one place where Liberal home rule ideas were ever put into practice—and by a solidly Unionist government. It can truly be said to have been given a constitution that it did not want and that was designed for another place.¹⁰⁵

100. See 306 PARL. DEB., H. C. (3rd ser.) (1886) 1180.

101. See 53 PARL. DEB., H.C. (5th ser.) (1913) 1474.

102. Government of Ireland Act, 1920, 10 & 11 Geo. 5, c. 67 (Eng.).

103. *Id.* §§ 1–2.

104. See R.F.V. HEUSTON, *ESSAYS IN CONSTITUTIONAL LAW* 2–3 (2d ed. 1964).

105. ROYAL COMMISSION ON THE CONSTITUTION 1969–1973, 1973, Cmnd. 5460, ¶ 1249.

On achieving virtual independence in 1922, the Free State adopted a constitution which was adopted and confirmed at Westminster by the Irish Free State (Constitution) Act 1922.¹⁰⁶ Ireland's so-called Dominion Status was a useful tool for gradual erosion of restrictions in the 1922 statute. In 1937, a new constitution for the "sovereign, independent, democratic state" of Eire was adopted internally and then followed in Westminster by the Eire (Confirmation of Agreements) Act 1938.¹⁰⁷ Finally, all links with the monarchy were severed, and this development was, as we have seen, once again confirmed by Westminster in 1949.¹⁰⁸ Ironically, relations between Ireland and the United Kingdom became gradually closer thereafter, and the Dublin government has been much involved with London over the troubles in Northern Ireland after 1968.¹⁰⁹ That it is not always easy to eradicate the past, however, is illustrated by recent plans by the Republic of Ireland finally to abolish thousands of laws dating back to the Norman invasion and before.¹¹⁰

Meanwhile, after 1922, Northern Ireland appeared to settle into its new constitutional status. Apart from its own parliament and executive, the province enjoyed judicial oversight of the Government of Ireland Act 1920 through the courts of Northern Ireland, with perhaps the nearest approach to judicial review of legislation—albeit of a subordinate legislature in theory—since assertions of judicial review of parliamentary legislation in the seventeenth century. In one case involving a challenge to a Northern Irish statute, Lord Atkin said that "[t]hese questions affecting [the] limitation on the legislative powers of subordinate parliaments, or the distribution of powers between parliaments in a federal system, are now familiar"¹¹¹ In another case, Viscount Simonds urged a flexibility of construction appropriate for constitutional instruments, adding that the courts of Northern Ireland have in that process gained "from the manner in which great judges among the English-speaking peoples overseas have

106. See 1 W.K. HANCOCK, *supra* note 54, at 159–60, 320.

107. See J.M. KELLY, *THE IRISH CONSTITUTION* 21–27 (2d ed. 1984).

108. See J.J. LEE, *IRELAND 1912–1985: POLITICS AND SOCIETY* 300 (1989).

109. See, e.g., *Political Breakthrough That Took 12 Years to Achieve: Complete Text of Anglo-Irish Communique on Ulster*, *TIMES* (Eng.), Nov. 16, 1985, at 4.

110. See David Sharrock, *Ireland Casts Off Colonial Legacy of Crackpot Laws*, *TIMES* (Eng.), Mar. 13, 2006, at 23.

111. *Gallagher v. Lynn* [1937] 3 All E.R. 598, 601 (H.L.).

dealt with kindred problems.”¹¹² The status of Northern Ireland nonetheless remained unclear,¹¹³ with one Australian scholar writing that the Government of Ireland Act 1920 had created “an odd sort of federal situation.”¹¹⁴ In 1973, the Royal Commission on the Constitution said, however, that “the practice of home rule was very different from the theory,”¹¹⁵ adding forcefully that “a large section of the community [was] always in a minority, without any share in government or any prospect of securing a share in government”¹¹⁶ Unsurprisingly, the scheme of 1920 began to disentangle, often bloodily, after 1968. As disturbances grew, direct rule of Northern Ireland from London was introduced in 1972.¹¹⁷

There were various abortive efforts to secure a new constitutional scheme for Northern Ireland, but these were part and parcel of a sustained battle between the forces of law and order and the forces of terrorism in the province. This battle went on until a cease-fire was achieved in the mid-1990s and then followed by the Good Friday Agreement of 1998.¹¹⁸ Of course the various proposals for renewed devolution were caught up in ambiguities as Home Rule had once been trapped; there were equally serious ambiguities or evasions when observers spoke of terrorism and anti-terrorism, both often selective terms depending on where you start. There is no question that the law was unevenly or awkwardly administered under emergency legislation during the period from 1921–22¹¹⁹ and this was also true of the thirty years fol-

112. See *Belfast Corp. v. O.D. Cars Ltd.* [1960] 1 All E.R. 65, 69 (H.L.). Reference was made to American Justices Holmes and Brandeis and also to the Australian Constitution and the issue of the division of powers in Canada. See *id.* at 69–70.

113. See Harry Calvert, *Northern Ireland—What Went Wrong?*, in *WELSH STUDIES IN PUBLIC LAW* 86 (J.A. Andrews ed. 1970); see also A.G. Donaldson, *The Constitution of Ireland: Its Origins and Development*, 11 U. TORONTO L.J. 1, 5–6 (1955).

114. See GEOFFREY SAWER, *MODERN FEDERALISM* 57 (1969).

115. See ROYAL COMMISSION ON THE CONSTITUTION 1969–1973, 1973, Cmnd. 5460, ¶ 1250.

116. See *id.* ¶ 1268.

117. See Sir David Williams, *The United Kingdom's Response to International Terrorism*, 13 *IND. INT'L & COMP. L. REV.* 683, 688 (2003).

118. Patrick E. Tyler, *Strife Drops, and Belfast Builds Again with Hope*, *N.Y. TIMES*, Sept. 16, 2004, at A3; Editorial, *Sinn Fein at the Door*, *BOSTON GLOBE*, Nov. 5, 2005, at A12.

119. See K.D. EWING & C.A. GEARTY, *THE STRUGGLE FOR CIVIL LIBERTIES: POLITICAL FREEDOM AND THE RULE OF LAW IN BRITAIN 1914–1945*, at 368–69 (2000) (providing an illuminating legal and historical perspective on civil liberties in both world wars and the inter-war period).

lowing 1968.¹²⁰ In times of emergency, the Rule of Law is sorely tested, and in that period of thirty years a new and fluctuating body of statutory law emerged, principally, though not exclusively, related to terrorism in or related to Northern Ireland. There were obvious implications for

approaches to national security (including the involvement of the Security Service, M15), to police powers, to the maintenance of public order, to the exercise of administrative discretion at its widest level, to ombudsman procedures, to the status of the police, to the systems of prosecution and of trial, to the use of informers, to the employment of the military arm in aid of civil power, and to co-operation in law enforcement with other countries including the Republic of Ireland and the United States.¹²¹

Apart from recognition of the massive damage to property and general disruption caused by terrorism in the province, it needs to be recorded that “[b]etween 1969 and 30 November 1998, 3289 people died in Northern Ireland as a direct result of Irish terrorism . . . and between 1972 and the end of November 1998, 121 people have been killed in Britain in incidents of Irish terrorism.”¹²² Between 1976 and November 1998, there were 94 incidents of international terrorism in the United Kingdom and these included the bomb planted on Pan Am flight 103 which exploded over Lockerbie, Scotland, in December 1998, killing 270 people.¹²³ The United Kingdom was not unaware of the impact of international and especially domestic terrorism; in 2000 a large Terrorism Act was produced by Parliament to take account of the legislation, the inquiries and the wider responses since 1968.¹²⁴ This measure contains 131 sections and 16 schedules.¹²⁵ Three months after the events of 11 September 2001 a further measure—the Anti-terrorism, Crime and Security Act,¹²⁶ with 129 sections and

120. See K.D. EWING & C.A. GEARTY, *FREEDOM UNDER THATCHER: CIVIL LIBERTIES IN MODERN BRITAIN* 209–54 (1990). This chapter is entitled “Legal Responses to Terrorism.” *Id.* at 209.

121. Williams, *supra* note 117, at 688. See generally ANTONIO VERCHER, *TERRORISM IN EUROPE: AN INTERNATIONAL COMPARATIVE LEGAL ANALYSIS* 9–161 (1992); CLIVE WALKER, *THE PREVENTION OF TERRORISM IN BRITISH LAW* (2d ed. 1992).

122. HOME OFFICE & NORTHERN IRELAND OFFICE, *LEGISLATION AGAINST TERRORISM*, 1998, Cm. 4178, ¶ 2.2; see Williams, *supra* note 117, at 689.

123. HOME OFFICE & NORTHERN IRELAND OFFICE, *LEGISLATION AGAINST TERRORISM*, 1998, Cm. 4178, ¶ 2.3

124. See Williams, *supra* note 117, at 687–88.

125. See *Terrorism Act, 2000*, c. 11 (U.K.).

126. *Anti-terrorism, Crime and Security Act, 2001*, c. 24 (U.K.).

8 schedules, was passed and was described by one legal commentator as “the most draconian legislation Parliament has passed in peacetime in over a century.”¹²⁷

More legislation on terrorism was to follow, not without difficulties on such issues as detention without trial and the attempted introduction of a new offence of incitement to religious hatred.¹²⁸ Throughout the various parliamentary proceedings there has never been anything approaching a precise definition of terrorism. The definition provided in the Terrorism Act 2000 is, in the words of a committee of the House of Commons, “complicated but essentially it provides that terrorism is the use, or threat, of action which is violent, damaging or disrupting and is intended to influence the government or intimidate the public and is for the purpose of advancing a political, religious or ideological cause.”¹²⁹ The difficulty is that “it is possible to extend the statutory definition of terrorism to encompass the actions of those involved in industrial disputes, political processions, religious demonstrations, animal rights protests, and a variety of other public meetings in circumstances where the ordinary criminal law has hitherto sufficed.”¹³⁰ In the past there have been no accepted definitions of such terms as “security” or “subversion” or “sabotage,” and “terrorism” adds a further measure of ambiguity which may be inevitable but sits uneasily with the Rule of Law.

The Belfast Agreement of 1998,¹³¹ also known as the Good Friday Agreement,¹³² is riddled with ambiguities at a wider constitutional level, with pragmatism pointing the way as it had in 1922. Resulting from discussions involving the United Kingdom and the Republic of Ireland, the Agreement reaffirmed “total and absolute commitment to exclusively democratic and peaceful means of resolving differences on political issues” and “opposition to any use

127. See Adam Tomkins, *Legislating Against Terror: The Anti-Terrorism, Crime and Security Act 2001*, 2002 PUB. L. 205, 205.

128. See Sir David Williams, *Toleration, Religion and the Law*, in CIVILISATIONS AND PUBLIC LAW 523, 523–35 (Evangelos Venizelos & Antoine Pantélis ed., 2005).

129. DEFENCE COMMITTEE, THE THREAT FROM TERRORISM, 2001-2, H.C. 348-1, ¶ 5.

130. Sir David Williams, *Terrorism and the Law in the United Kingdom*, 26 U. NEW S. WALES L.J. 179, 179 (2003).

131. NORTHERN IRELAND HOME OFFICE, THE BELFAST AGREEMENT: AN AGREEMENT REACHED AT THE MULTI-PARTY TALKS ON NORTHERN IRELAND, 1998, Cm. 3883.

132. See BBC, Wars and Conflict: The Good Friday Agreement, <http://www.bbc.co.uk/history/recent/troubles/agreement/agreement.shtml> (last visited Nov. 9, 2006).

or threat of force . . . for any political purpose.”¹³³ Numerous commitments, institutional or political or operational, were entered into, and the situation in Northern Ireland was unquestionably improved: though even in August of the same year a large car-bomb exploded in the centre of Omagh killing twenty-eight people and injuring at least 220.¹³⁴ The Northern Ireland Act 1998,¹³⁵ enacted after separate referendums in Northern Ireland and the Republic of Ireland had approved the Agreement, provided for a number of matters including the establishment of an Assembly working on a “complex scheme of power sharing between the main parties” under a special form of devolution.¹³⁶ The devolved form of government duly came into being, but the legacy of the past and the unresolved issues of 1998, such as the decommissioning of arms, have led to two suspensions of the operation of the Assembly: one from February to May 2000,¹³⁷ and the other from 2002¹³⁸ with the Secretary of State for Northern Ireland at the helm.

There is no obvious moral to be drawn from the events in Ireland over 125 years. The British constitution, however, such as it is, has been stretched and scarred in the period by Irish events. The doctrine of parliamentary sovereignty, with all its scars, remains the guiding basis for action—because of or in spite of involvement in Europe through membership of the European Union and adherence to the European Convention on Human Rights. The independence of the judiciary has been called into question, but the recent cases on terrorism generally and the history of judicial review under the older system in Northern Ireland suggest that the courts may be more prominent in the future. If the devolution schemes of Scotland and Wales as well as Northern Ireland settle down, the structure of the United Kingdom will be irreparably changed—and it all stems from the original campaign for Home Rule. The House of Lords in its legislative form will be

133. See NORTHERN IRELAND HOME OFFICE, THE BELFAST AGREEMENT: AN AGREEMENT REACHED AT THE MULTI-PARTY TALKS ON NORTHERN IRELAND, 1998, Cm. 3883, ¶ 4.

134. See CLIVE WALKER, BLACKSTONE'S GUIDE TO THE ANTI-TERRORISM LEGISLATION 209 (2002).

135. Northern Ireland Act, 1998, c. 47 (U.K.).

136. See A.W. BRADLEY & K.D. EWING, CONSTITUTIONAL AND ADMINISTRATIVE LAW 46–47 (13th ed. 2003).

137. See *id.* at 47.

138. See NORTHERN IRELAND OFFICE, THE NORTHERN IRELAND ACT 2000 (SUSPENSION OF DEVOLVED GOVERNMENT) ORDER 2002, No. 2574.

radically changed, a reminder of the frustrations on Irish Home Rule in 1893; and the House of Lords in its judicial capacity is likely to end soon, to be replaced by a Supreme Court. Meanwhile, constitutional ambiguities remain, and it is well to be reminded that in all countries there is the likelihood of pure constitutional theories being submerged in a welter of political and pragmatic considerations. Such has been our history in relation to Ireland over 125 years.

It is perhaps appropriate to end by quoting James Bradley Thayer's perhaps overly-generous comment in his review of the first edition of Dicey's *Law of the English Constitution*:

When one scrutinizes the English Constitution, it is like looking at the nests of birds or at the curious and intricate work of beavers and insects; its strange contrivances seem not so much the ordered and foreseen result of human wisdom as a marvellous outcome of instinct, of a singular political sense and apprehension, feeling its sure way for centuries, amid all sorts of obstacles, through and around and over them, with the busy persistence of a tribe of ants.¹³⁹

139. James Bradley Thayer, *Dicey's Law of the English Constitution*, in LEGAL ESSAYS 191, 191 (1927).
