



2016

Britain at the Constitutional Crossroads – Court, Parliament, and Popular Sovereignty in the Twenty-First Century

Bruce Ackerman
Yale Law School

Follow this and additional works at: http://digitalcommons.law.yale.edu/fss_papers

 Part of the [Law Commons](#)

Recommended Citation

Ackerman, Bruce, "Britain at the Constitutional Crossroads – Court, Parliament, and Popular Sovereignty in the Twenty-First Century" (2016). *Faculty Scholarship Series*. 5013.
http://digitalcommons.law.yale.edu/fss_papers/5013

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

Britain at the Constitutional Crossroads

Bruce Ackerman

Parliamentary government, judicial review, popular referenda. These are mere labels. These constitutional forms take on very different meanings within different constitutional cultures, grounded in different historical experiences. Our task is to reflect on the distinctive character of British constitutional culture, and the particular challenges it confronts in the aftermath of the Brexit referendum.

To gain perspective, contrast the British path to democracy with the path blazed by the American, French, and Bolivarian Revolutions of the Enlightenment - and repeated, with many variations, ever since. Under this scenario, revolutionary outsiders mobilize against the existing government at Time one. Many movements are crushed at this point, but many others have triumphed over the status quo. This sets the stage for the revolutionary leadership to win popular consent for a Constitution codifying the fundamental principles that

inspired the years of collective struggle in the name of the People.

This classic scenario has played itself out - with very different results - over the course of the twentieth century. In Europe, the experiences of modern France, Italy, and Poland can serve as paradigms. In each case, the promoters of new Constitutions used referenda as part of their campaign to vindicate their new regimes. But this legal form should not be confused with the deeper logic that served as the foundation of their emerging political cultures. These constitutions gained their legitimacy by expressing the ideals inspiring the mobilized effort at collective resistance against Nazi, Fascist and Soviet oppression. Once the revolutionaries rose to power, they used referenda to establish that they had not abused their new-found authority by framing constitutions which failed to express the revolutionary ideals of the movement. But this legal form took on cultural meaning only as part

of the deeper dynamic from revolutionary challenge to constitutional triumph in the name of We the People.

No similar dynamic has propelled Britain down its path to constitutional democracy over the past two centuries. To be sure, Edmund Burke's great diatribe against the French Revolution has not deterred mass movements from repeatedly appealing to the British People to revolutionize their system in the name of one or another version of Liberty, Equality and Fraternity. Moreover, the system has sometimes responded to these demands in very substantial ways. But these transformations haven't occurred through the revolutionary scenario in which movement-outsiders sweep away the old political establishment and proclaim the coming of a new era by hammering out a new Constitution.

Instead, pragmatic members of the British establishment have played a central role at moments of crisis. The Reform Act of 1832 set a crucial precedent. Despite their triumph over the French Revolution in

1815, the British establishment soon found itself confronting wide-ranging popular demands for more democracy, greater liberty, and the liberation of all humanity from the burden of slavery. Hard-liners, led by the Duke of Wellington, were bent on crushing these movements, but they were finally outmaneuvered by pragmatists like Earl Grey - who used the threat of revolutionary upheaval in 1832 to overcome royal resistance to the Reform Act, finally convincing King William IV to threaten to pack the House of Lords if it did not pass the bill. This opened a path for new leaders coming out of the reform movement to enter parliament, reinvigorating the pragmatic establishment's claim to legitimate authority.

The cooptation of "sensible" outsiders into the political class hardly marks the decisive end of radical critique. To the contrary, many activists condemn their former comrades for betraying the revolutionary ideals that had formerly united them. Nevertheless, the split inevitably weakens radical

efforts to build a broad popular base for a more sweeping transformation - leaving much unfinished business for a future-that-may-never-arrive.

The pragmatic elitism of 1832 served as a paradigm for similar scenarios that generated the Reform Act of 1867 and the Parliament Act of 1911. As modern courts have repeatedly emphasized, these "constitutional statutes" serve as the foundation of British democracy. Nevertheless, but they lack the ringing statements of principle that appear in the revolutionary Constitutions. If you restricted yourself to the words of the Parliament Act, for example, you would never guess they heralded a new era of redistributive taxation permitting the construction of the modern welfare state. In contrast, the post-war Constitutions of France and Italy immediately confront the reader with great statements of principle on these matters. Instead, the Parliament Act expresses the same spirit of pragmatic adaptation that inspired Gray, Disraeli, and Asquith. These practitioners of "common sense"

recognize that the opponents will sometimes pander to the masses with inspiring calls for revolutionary change on behalf of one or another ideology. But they are quick to condemn them as dangerous demagogues if they take these slogans seriously.

The great mission of British constitutional culture is to put a brake on this dynamic. If the public momentarily succumbs to Utopian fantasies (a/k/a abstract principles), the challenge of responsible statesmen is to resist long enough for sanity to return so that pragmatic problem-solving can prevail.

In contrast, political cultures in places like France or Italy take a very different view of revolutionary appeals to the People. Since their Constitutions are grounded in narratives based on earlier acts of collective sacrifice against illegitimate regimes, they are alive to the danger that the future politicians may repeat history and use their power to establish new forms of tyranny. From this perspective, it is only reasonable for the Constitution

to provide for popular referenda to as a focus for revitalized grass-roots movements to act decisively defeat such threats in the name of the People.

When we turn to Britain, however, the rise of popular referenda owes absolutely nothing to this revolutionary spirit. Instead, it is the creation of no-nonsense politician making short-term decisions without any regard to the longer-term consequences of his wheeling-and-dealing. The star of this tragedy-comedy, however, is not David Cameron but Harold Wilson.

When Prime Minister Edward Heath triumphantly brought home his agreement to join the Common Market in 1972, he did not think of offering it up for approval by the People at a referendum. He presented its fundamental terms to parliament as yet another constitutional statute in the British tradition. The result was a fierce struggle in the House, with Labour united against the bill, and a few right-wingers, led by Enoch Powell, joining the opposition. Nevertheless,

Heath managed to push the measure through by razor-thin margins, permitting Britain to join the Community before Heath lost his majority in the election of 1974, leading to Margaret Thatcher's ascent to Conservative leadership.

This put Harold Wilson in a tough spot when he became Prime Minister on the basis of a very narrow parliamentary majority. Wilson was a leader of the pro-European wing of his sharply divided party. But to maintain Labour unity in the election campaign, he had condemned Heath's deal as insufficiently advantageous, and promised to get a better one if he won the election. Once in power, he followed through on his pledge and returned from Brussels with a new deal that wasn't very different from Heath's original bargain. This forced the Prime Minister to rely on Conservative support to push his authorizing legislation through the House. With a majority of Labour MPs breaking party discipline to oppose the measure, the government was on the verge of collapse.

None of this took Wilson by surprise - indeed, he had already prepared a path that might lead him out of the wilderness. Labour's Election Manifesto committed the Party to "give the British people the final say... through the ballot box within twelve months of this election" on whether Wilson's New Deal with Brussels sufficed to resolve their doubts about Heath's earlier bargain.

The Labour Manifesto was framed in broad terms, allowing Wilson to fulfil his pledge in two different ways - either the traditional way of calling yet another parliamentary election and making Europe a central issue in the campaign, or by enacting a statute authorizing a special referendum.

So far as Wilson was concerned, it would have been political suicide to take the traditional course. With a majority of Labour MPs opposed to Europe, it would have been impossible to present a unified front in a parliamentary election, leading to a triumphant Thatcherite assault on Social Democracy. Wilson's

only hope was to lead pro-European Labourites into an ad hoc coalition with like-minded Conservatives and Liberals to win the referendum, and then call upon his Party's anti-European wing to accept the judgment of the People and join together in a united front against Thatcher at the next election.

Given the short-term stakes, Wilson did not hesitate. So far as I can tell, the long-term constitutional implications of his appeal to popular sovereignty played no role in his decision.

Paradoxically, it was the hard-headed pragmatism prized British constitutionalism that would be at the root of its undoing. The pragmatic logic that drove David Cameron represents a continuation of Wilson's no-nonsense short-termism - with the difference that Wilson won by a margin of 67 to 33 while Cameron lost by 48-52.

Yet I would hope that the grave crisis in which Britain finds itself will will encourage even the most

no-nonsense inhabitant of these islands to confront an “ideological” question with uncharacteristic seriousness: What precisely is the relationship between the *principle* of popular sovereignty and the *outcome* of a single referendum?

Prevailing opinion seems to be moving in the direction of Nigel Farage - for whom it is obvious that a single 52 to 48 vote suffices to establish that the People of Great Britain demand Brexit. But this, I suggest, is not obvious at all. To the contrary, the June 23rd vote is best understood as the beginning, not the end, of an intensive period of popular debate and decision. While the 48-52 decision does indeed express widespread dissatisfaction with the status quo, the principle of popular sovereignty requires something more - an informed and deliberate choice of a new direction for Britain. The conditions for such a choice can only arise after parliament authorizes Prime Minister May to invoke Article Fifty, and she returns in two years' time with a deal that permits ordinary

voters to confront the real meaning of Brexit for their country's political future. Only if they vote their approval a second time should their decision be considered authoritative. Only then will the referendum satisfy two basic preconditions for the *legitimate* exercise of popular sovereignty.

The first condition requires the referendum to express a *considered* decision by the voters - not merely one that is based on contingent inclinations expressed at a particular moment in time. In making important choices in our personal life -- choosing a mate or a job or a home -- we all do our best to expose our immediate inclinations to sober second-thought. Granted, there are also dangers in dilly-dallying forever - but we know that it's really stupid to take the path that seems most attractive at first sight without a second look. Sometimes the need to make an immediate decision is so pressing that we can't afford the luxury of reflection. But with the exception of

some ecstatic existentialists, a leap in the dark shouldn't be a cause for celebration in its own right.

The same is true in politics. To put my point in practical terms, when parliament shortly turns to consider the government's bill triggering Article Fifty, it should amend the bill to require a second referendum in two years' time. This will allow for hundreds of millions of conversations around the dinner table and at the pub and in the office and maybe even at the football stadium - at which citizens can test their initial impressions to reach considered judgments on a matter that will shape their collective political destiny for a very long time to come.

The two-year period will also permit a more legitimate decision on a second dimension. To see my point, return again to the dilemmas of personal decision. Although you may engage in serious reflection about a big decision, you may simply be wrong when it comes to crucial facts -- perhaps an attractive job

offer has hidden down-sides or a potential life-partner has is conducting a secret love affair.

The same is true when it comes to Brexit. If voters are given a chance to the ballot-box a second time, they will confront Theresa May's best shot at a soft Brexit. While many imponderables will remain, they will be in a far better position to understand the stakes than they were on June 23.

To be sure, even this decision will fall short of one-or-another ideal picture of informed deliberation. A referendum campaign isn't a philosophy seminar - nor should it be. We are dealing with the proper design of a constitution for a democracy, not some twenty-first century Platonic Republic. Nevertheless, for real-world democrats, there is all the difference in the world between the wake-up call of June 23rd and the exercise in considered judgment that would be delivered by the People in 2020 -- supposing that parliament insists that it take place. While it is easy to see why Nigel Farage refuses to recognize this difference, I find it

surprising that Theresa May, and so many other one-time Remainers, fail to appreciate that conditions are not yet ripe for the British People to give an authoritative answer to a question that will shape their future for generations to come.

Instead, regardless of the forthcoming decision by the Supreme Court, the prime minister should not resist parliamentary demands for a second referendum, but should endorse special steps to assure that voters take their responsibilities seriously in making their fateful decision.

In that spirit, I'd like to urge consideration of a proposal that Jim Fishkin and I have developed to address this very problem. While it may seem speculative at first glance, it is in fact based on 25 years of rigorous social scientific investigation. Before discussing key empirical findings, let me simply present the basic idea. Our book, *Deliberation Day*, calls for the creation of a new national holiday at which citizens are given a day off from work to join

their neighbors at local community centers to discuss the key issues raised by the coming election.

Deliberation Day would begin with a familiar sort of televised debate between leading spokesman for the Yes and No sides on the Brexit issue. After the show, local citizens form small groups of fifteen, which begin where the televised debate leaves off. Each group spends an hour responding to the broadcast by defining questions that the national spokesmen left unanswered. Everybody then proceeds to a plenary assembly of 400 to hear their questions answered by local representatives designated by the national Leave and Remain campaigns.

After lunch, participants repeat the morning procedure. By the end of the day, they will have moved far beyond the top-down television debate of the morning. They will have achieved a bottom-up understanding of Brexit's implications for the nation. Discussions begun on Deliberation Day will continue during the run-up to Referendum Day, drawing those who did not attend into the escalating national dialogue.

Deliberation Day isn't an idle fantasy. It builds on more than seventy-five social science experiments, conducted throughout the world, in which representative groups of citizens have engaged in the give-and-take I've just described. Fishkin has been the leading force behind these "deliberative polls," as he calls them, and his Stanford Center for Deliberative Democracy has organized an impressive research effort that has rigorously analyzed polling data. These empirical studies consistently demonstrate that participants greatly increase their understanding of the issues and often change their minds on the best course of action. Swings of 10 percentage points or more are very common.

For present purposes, the results of two polls are particularly suggestive. In 1995 and 1997, two groups of British voters, representative of the country in both attitudes and demographics, were invited to discuss the future of the country's relationship to the Europe Union. Deliberations proceeded along the lines I

described -- with ordinary citizens meeting in small groups to prepare for encounters with leading political Euro-skeptics and Euro-advocates, including the up-and-coming Tony Blair. On each occasion, participants began the proceedings with pro-European sentiment in the low-to-middle 40s; on each occasion, deliberation changed a lot of minds, and pro-European views rose to the high 50s or low 60s by the end of the discussion.

I don't suggest that the same this would happen in 2020. The polls took place a quarter century ago, and Deliberation Day might well swing in the opposite direction today. Indeed, systematic study of all seventy-five deliberative polls shows that there have been big shifts to the Right, as well as to the Left, on many occasions as citizens gain a better sense of how large issues of public policy relate to their core values. My point is simply that these British polls suggest that, if parliament took its responsibilities seriously, Deliberation Day deserves a serious place in the debate over the 2020 referendum.

There is no disguising the fact that Deliberation Day would be a major undertaking. But so is the idea of popular sovereignty. If it makes sense for ordinary citizens, on certain great occasions, to take their own political destinies into their own hands, it makes sense to give them an opportunity to cast their votes in an informed fashion.

Our book goes on to argue that a country like Britain could readily meet the bureaucratic challenges involved in organizing Deliberation Day at a reasonable cost. But obviously, there are many other reasonable ways to design the referendum in an effort to redeem the promise of popular sovereignty.

Only one thing is clear: Britain won't get there by muddling through.

This is, alas, precisely what the May government is presently attempting. Rather than inviting a serious debate on the meaning of popular sovereignty, the Prime

Minister is trying to make an end-run around parliament by invoking the royal prerogative to trigger Article Fifty of the Lisbon Treaty. Like the rest of you, I will be a very interested bystander to the government's effort to defend this maneuver before the Supreme Court. I should emphasize, however, that this Lecture has been exploring a dimension of the issue which is not involved in the litigation.

Although the Court of Appeals' judgment rejected the government's claims, it did not do so on the grounds that I have been developing. My argument, in a nutshell, is that the June 23rd vote cannot be considered an authoritative act of popular sovereignty. Rather than reflecting on this question, however, the Court focused on the principle of *parliamentary sovereignty* - insisting that the government's appeal to the royal prerogative represented an unconstitutional end-run around the House. As a relatively knowledgeable outsider, I was impressed by the Court's reasoning - but I'm very confident that the justices of the Supreme

Court don't need outsiders to help them figure out the right answer to this classic question.

My aim here, however, is to suggest that the traditional way in which the Court of Appeal posed its question doesn't do justice to the distinctive character of the current crisis. The issue isn't simply parliament versus royal prerogative, but the rise of popular sovereignty as a constitutional principle in its own right.

When viewed from this angle, my thesis appears in a paradoxical light: Precisely because the notion of popular sovereignty is so unfamiliar in British constitutional culture, the June 23rd vote has been accepted uncritically as an authoritative act of We the People by broad swaths of the British political class as well as the general public.

It is here where my outsider perspective might prove useful. As an American, I come from a country which whose constitution is based on popular, not

parliamentary, sovereignty - and we have two centuries of experience in working out the practical implications of this foundational commitment. If there is anything we have learned, it is this: From the election of Thomas Jefferson in 1800 to the election of Ronald Reagan in 1980, there have been moments when a particular voting result served as a major turning point, with voters repudiating the status quo, and giving their support to leaders who advanced a new constitutional vision for America. But this is all it accomplished. Although a Franklin Roosevelt or a Ronald Reagan might assert that their initial electoral victories had granted them mandates for fundamental change, such assertions of authority only provoked political opposition that framed further electoral contests - which gave voters further opportunities to confirm, modify, or reject their original proposals for transformation in the name of We the People.

The same is true, I suggest, of parliament's encounter with Brexit. If I am right, my conclusion

reinforces the Court of Appeals' holding. The government's appeal to royal prerogative not only assaults a principle of parliamentary sovereignty rooted in centuries of British history; but it is attempting an end-run around parliament in the name of a single referendum that cannot rightly be viewed as an authoritative decision by We the People of Great Britain.

As you may have noticed, America is also confronting a similar issue. The election of Donald Trump, like the referendum of June 23, also signals an emphatic, and broad-based, challenge to the status quo. But it remains for the next elections to determine whether President Trump's victory represents a flash in the pan, or the harbinger of yet another revolutionary transformation of foundational principles in the name of We the People.

America and Britain, in short, continue to maintain a special relationship. We confront parallel constitutional dilemmas - and the way we manage to

resolve them will shape the future of the trans-Atlantic community - and much else besides - for a very long time to come.