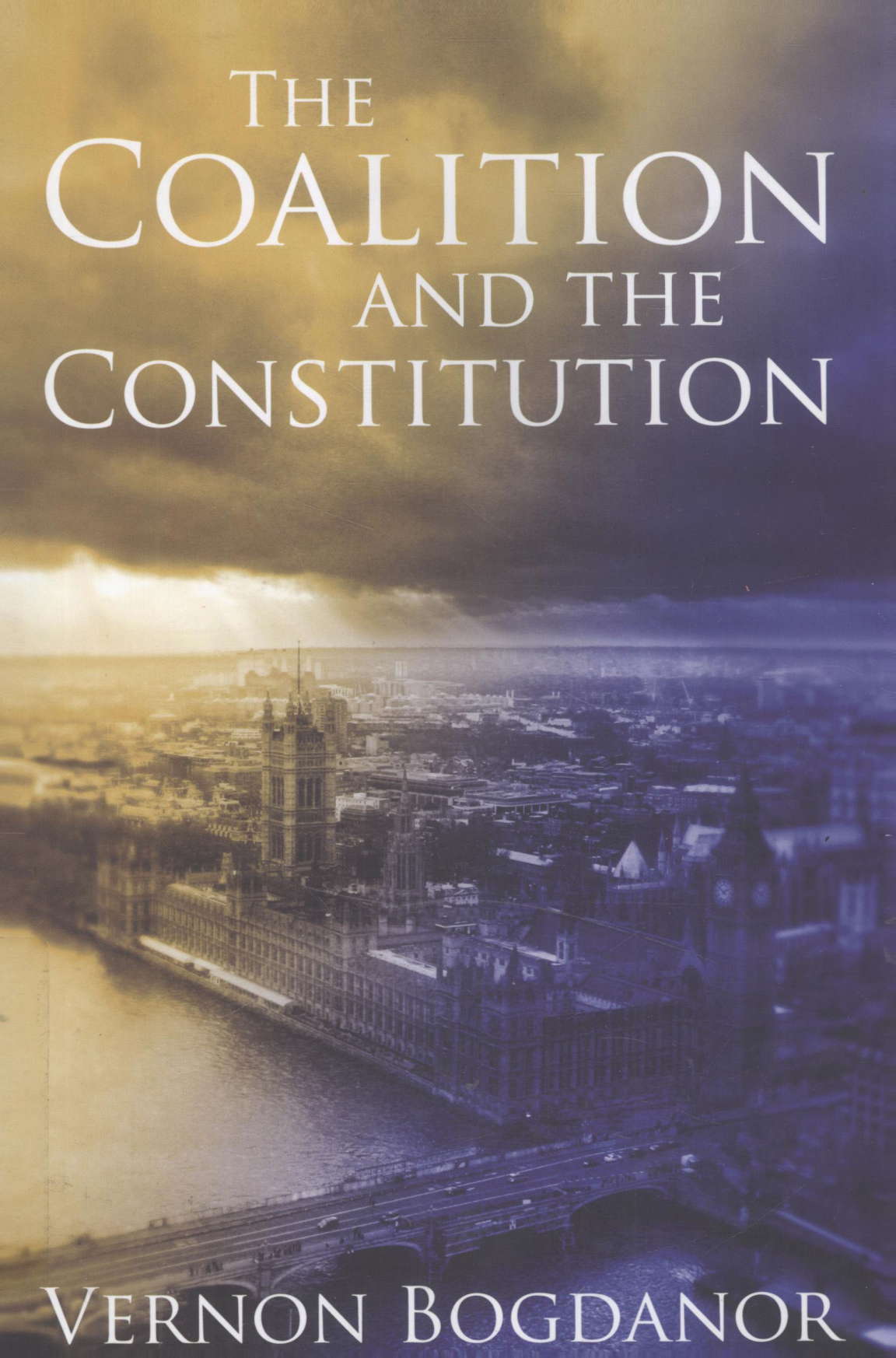
THE COALITION AND THE CONSTITUTION



VERNON BOGDANOR

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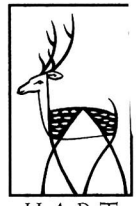

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THE COALITION AND THE CONSTITUTION

'England', Benjamin Disraeli famously said, 'does not love coalitions.' But 2010 saw the first peacetime coalition in Britain since the 1930s. The coalition, moreover, may well not be an aberration. There are signs that, with the rise in strength of third parties, hung parliaments are more likely to recur than in the past. Perhaps, therefore, the era of single-party majority government, to which we have become accustomed since 1945, is coming to an end. But is the British constitution equipped to deal with coalition? Are alterations to the procedures of parliament or government needed to cope with it?

The inter-party agreement between the coalition partners proposes a wide-ranging series of constitutional reforms, the most important of which are fixed-term parliaments and a referendum on the alternative vote electoral system, to be held in May 2011. The coalition is also proposing measures to reduce the size of the House of Commons, to directly elect the House of Lords and to strengthen localism. These reforms, if implemented, could permanently alter the way we are governed.

This book analyses the significance of coalition government for Britain and of the momentous constitutional reforms which the coalition is proposing. In doing so it seeks to penetrate the cloud of polemic and partisanship to provide an objective analysis for the informed citizen.

'Society in this country is perplexed, almost paralysed; in time it will move, and it will devise. How are the elements of the nation to be again blended together? In what spirit is that reorganization to take place?'

'To know that', replied Coningsby, 'would be to know everything.'

Disraeli, *Coningsby*

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Vernon Bogdanor
London, November 2010

Introduction

We are currently living under the first peacetime coalition government in Britain since the 1930s. The coalition arose out of Britain's first hung parliament since 1974. It was an unexpected outcome. Previously coalitions have arisen not from hung parliaments, but from national emergencies – war in 1915, 1916 and 1940, financial emergency in 1931. In the past, hung parliaments have led to short-lived minority governments, not coalitions. The process by which the 2010 coalition came into being raises fundamental questions about the British constitution, about the process of government formation in a hung parliament, and about the role of the incumbent Prime Minister in a hung parliament. Some argued that Gordon Brown should have resigned as soon as it was clear that he had not won the election. Others argued the opposite – that he resigned too soon, before it was clear whether a coalition could be formed. The coalition also raises the question of the role of the electorate. To what extent is it in accordance with the norms of democracy for the nature of the government to be determined after the votes have been counted? The voters were given no chance to endorse or repudiate the Conservative/Liberal Democrat coalition, and it may be that many who voted Conservative or Liberal Democrat would in fact have repudiated it. Nor were the voters given a chance to endorse or reject the coalition's Programme for Government, drawn up by the two coalition partners shortly after the election and held by them to supersede any promises made in their election manifestoes. That claim too has excited controversy, particularly on the issue of tuition fees in higher education, a policy rejected by the Liberal Democrats in their election manifesto but accepted by them in government. This raises anew the question of the role of the mandate in British politics, its relevance and limits.

These issues are not only of importance in relation to the coalition formed in 2010. If, as there is good reason to believe, the hung parliament of 2010 was not an aberration, but a culmination of long-term trends in social change and electoral behaviour, then the 2010 coalition could prove the first of many. In the mid-nineteenth century Disraeli famously said that England does not love coalitions, but perhaps England, and indeed Britain as a whole, will have to get used to them. Scotland and Wales have certainly done so since devolution came into effect in 1999: most of the governments in Scotland and Wales since then have been coalitions.

Not only is the formation of a peacetime coalition following a hung parliament a constitutional innovation, but the coalition promises a whole raft of constitutional reforms, the most important of which are fixed-term parliaments, a directly elected second chamber and a referendum on the alternative vote method of election, to be held in May 2011. The Deputy Prime Minister, Nick Clegg, in a speech

shortly after the formation of the coalition, on 19 May 2010, declared that these reforms amounted to 'the most significant programme of empowerment by a British government since the great enfranchisement of the nineteenth century . . . the biggest shake-up of our democracy since 1832, when the Great Reform Act redrew the boundaries of British democracy, for the first time extending the franchise beyond the landed classes'. This may be dismissed as the natural hyperbole of a politician catapulted, no doubt to his surprise, into a leading position in government. But both those who favour these reforms and those who are opposed to them claim that they are radical and will permanently alter the way we are governed. Whether that is so or not, it is already apparent that the era of constitutional reform, which began with the Blair government in 1997, and which was charted in my earlier book, *The New British Constitution*, published in 2009, is by no means over. Far from the British constitution having reached a stable resting-place, it remains in flux. Reform of the constitution is most definitely a process not an event.

The working and evolution of a constitution cannot be independent of political circumstances. The British constitution, after all, worked very differently between the wars, when Britain was governed for all but six of the 21 years from 1918 to 1939 by coalition or minority governments, than in the years since 1945, when single-party majority government has been the norm. If we are once again entering a world of multi-party politics, hung parliaments and coalition governments, the constitution will have to change to accommodate this changed political landscape. *The Coalition and the Constitution* seeks to analyse this changed landscape, to consider how coalitions might work in Britain, and to evaluate the constitutional consequences of regular coalition government. *The Coalition and the Constitution* is therefore in a sense both a pendant and a sequel to *The New British Constitution*. The earlier book sought to analyse the constitutional reforms of the Blair government from 1997, radical reforms indeed, but reforms which did not seriously alter the working of the central institutions of British government – Parliament, the Cabinet, and the electoral system for elections to the House of Commons. The reforms of the coalition government, by contrast, do seek to reform the working of these central institutions. The Fixed-Term Parliaments Act proposes to alter the relationship between government and parliament by making dissolution more difficult, while the alternative vote proposes to make the electoral system more fair. The Cabinet system could also come to be altered, not through legislation, but by the very working of a coalition government which superimposes upon the normal search for collective government an additional layer of inter-party negotiation. Indeed, in John Morley's biography of Walpole – a *locus classicus* on Cabinet government, a *locus classicus* supervised by Gladstone – it was suggested that Cabinet government actually presupposed single-party government.[1] How, then, is its working likely to be altered by coalition?

[1] John Morley, *Walpole* (Macmillan, 1889) 156.

The Coalition and the Constitution seeks to chart the future of a constitution whose fabled adaptability and flexibility are likely to be severely tested in the years ahead. It is an attempt to write the history of the future.

Contents

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The General Election of 2010 and the Formation of the Coalition

I. OUTCOME OF THE ELECTION

THE GENERAL ELECTION of 2010 occurred at the end of a Parliament that had seen two major crises. First, there was the economic crisis: the credit crunch, and the downturn and collapse of the financial markets, including a run on Northern Rock in September 2007 – the first run on a British bank since the nineteenth century. These economic events seemed to shape public attitudes, causing resentment, if not anger, directed not only towards bankers and financiers, who were held to have acted recklessly and ceased to deserve – if indeed they had ever deserved – their huge salaries and bonuses, but also towards the government of Gordon Brown, which, so it was alleged, had failed to prevent the collapse.

Second, there was the expenses crisis – the abuse by a large number of MPs of their expenses claims. These abuses included some fraudulent claims and many unreasonable or unwise ones – a pattern of behaviour summed up by *The Daily Telegraph*, the newspaper that exposed the abuse, as 'a systematic and deliberate misappropriation of public funds on an extravagant scale'.[1] The expenses crisis increased public resentment and anger towards MPs, and led to the first resignation since 1695 of a Speaker of the House of Commons: Michael Martin, many believed, had been lax in failing to investigate abuses. The expenses crisis also fuelled the demand for constitutional reform, which, for the first time since the struggles over the House of Lords and Irish Home Rule before the First World War, became a genuinely popular issue, exciting, albeit for only a short period of time, considerable interest in constitutional questions. The three party leaders responded to this sentiment by competing with each other during 2009 and 2010 to produce lists of constitutional reforms, some of which were of very dubious relevance to the expenses crisis. There was, nevertheless, a general feeling that Parliament had become too insulated from the voters and that Westminster had become remote from popular concerns. The pressure for constitutional reform was eventually to find its outlet in some of the proposals set out in the Programme for Government produced by the coalition that took office after the election.

[1] Quoted in Dennis Kavanagh and Philip Cowley, *The British General Election of 2010* (Palgrave Macmillan, 2010) 26.

Many believed that the popular disenchantment resulting from these two crises would lead to populist or radical reactions. Some predicted that the public would vent their feelings by not voting at all, since they would think that all MPs were rascals, and therefore not worth bothering to vote for. The previous two general elections, in 2001 and 2005, had seen the lowest levels of turnout since the introduction of universal male suffrage in 1918 – 58% and 62% respectively. There were fears that turnout would be even lower in 2010.

Others feared, and some hoped, that there would be a rise in support for hitherto unrepresented parties, such as the Greens or the United Kingdom Independence Party, or for extremist parties, such as the British National Party. Some predicted a surge in support for the Liberal Democrats, since they seemed less tainted by the expenses scandal and were less strongly identified with the Westminster club than the Conservatives and Labour.

In the event, all of these predictions proved false. The outcome of the general election was as follows:

	% share of vote	Change from 2005	Seats	Change from 2005[2]	Votes
Conservative	36.1	+3.7	307	+97	10,726,614
Labour	29.0	–6.2	258	–91	8,609,527
Liberal Democrats	23.0	+1	57	–5	6,836,824
UKIP	3.2	+0.9	0	0	919,546
BNP	1.9	+1.2	0	0	564,331
Greens	1.0	–0.1	1	+1	285,616
SNP	19.9 in Scotland	+2.3	6	0	491,386
Plaid Cymru	11.3 in Wales	–1.3	3	+1	165,394
Others	1.5	–0.2	1	–3	469,591
Northern Ireland parties	3.2 in Northern Ireland	0	17	0	622,551

There was no evidence of a general reaction against sitting MPs. Indeed, in all parties, incumbents fared better than new candidates, although in some cases incumbents tainted by expenses performed badly.[3] Part of the reason indeed why the Conservatives failed to win an overall majority was that some sitting Labour MPs were able to hold on to a personal vote and to resist the national swing against their party. The largest swings to the Conservatives were in seats they already held, rather than in the marginals where Lord Ashcroft, the party's fundraiser, had concentrated his efforts. However, a record number of incumbents stood down because of the expenses scandal, and it is possible that their replace-

[2] Because of boundary changes after 2005, the change in seats must be calculated on the basis of 'notional' results. The calculation here is taken from David Denver, 'The Results; How Britain Voted' in Andrew Geddes and Jonathan Tonge (eds), Britain Votes 2010 (Oxford University Press, 2010) 11. 'Others' include the Speaker, whose seat was not contested by the Conservatives, Labour or the Liberal Democrats.

[3] See the table in Denver, ibid, 16, and also the comments by John Curtice, Stephen Fisher and Robert Ford in 'Appendix 2: An Analysis of the Results' in Kavanagh and Cowley (n 1) 393 and 298.

ments were punished for the supposed misdeeds of their departed colleagues by facing larger swings against them.

Turnout was at 65%, slightly higher than the low levels of 2001 and 2005. New and extremist parties made little impact, although the Greens did succeed in winning their first parliamentary seat in Brighton Pavilion, while the United Kingdom Independence Party gained 3.2% of the vote – 'the largest share of the vote ever won by a minor party' – over 900,000 votes – though failed to win a seat.[4] The British National Party, which put up 338 candidates, as compared with 119 in 2005, doubled its vote to 1.9% – the largest share of the vote ever won by a far-right party – and slightly increased its percentage of the vote per candidate – although it too failed to win a seat. The Liberal Democrats, despite gaining 1% of the vote, lost five seats, reducing the party's parliamentary strength from 62 to 57. The Liberal Democrat share of the vote, at 23%, although 2% lower than the best third-party vote since the war – that of the Liberal/SDP Alliance in 1983, which gained 25% of the vote – was nevertheless the second best electoral performance by any third party since 1929.

Before the election, Mervyn King, the Governor of the Bank of England, was reported as saying that the 2010 general election was one that any rational party would wish to lose. The scale of cuts in public expenditure needed to eliminate a budget deficit of nearly £170bn would, King believed, be so severe that any government implementing them would then find itself in opposition for a very long time. Although, no doubt, all the major parties fought hard to win the election, perhaps King's remark had some subconscious impact. For each of the three major parties had good reason to be disappointed with the outcome. There is a sense in which all three lost the election.

The Labour Party was the most obvious loser. Its share of the vote, at 29%, was its second lowest since it became a mass party in 1918, the lowest being that of 1983, when the party fought a disastrous campaign under the leadership of Michael Foot. In 2010, Labour lost over 6% – one-sixth – of its 2005 vote. In large parts of southern England it had been all but wiped out. In the south, outside London, the party now holds just 10 out of 197 seats. Labour now has no MPs at all in Cornwall, Somerset, Wiltshire, Dorset, Sussex, Kent, Essex, Norfolk, Cambridgeshire, Northamptonshire, Rutland, Warwickshire, Buckinghamshire, Hertfordshire, Gloucestershire, Worcestershire or Herefordshire. The BBC's electoral analyst, David Cowling, was right, therefore, to describe the outcome in 2010 as 'the dismembering of New Labour's 1997 electoral triumph'.[5] For Tony Blair had striven hard to make Labour sympathetic to aspirational voters in the south of England, as well as to its traditional voters in the conurbations of the Midlands and the North, and Scotland and Wales. That indeed was the central theme of New Labour – the attempt to reconnect with skilled C2 aspirational voters who had found a home with Margaret Thatcher and John Major, and without

[4] Kavanagh and Cowley (n 1) 404.

[5] Quoted in Patrick Diamond and Giles Radice, *Southern Discomfort Again* (Policy Network, 2010) 11.

whom Labour could not hope to win power. But the Blair project now seemed to be at an end, with the party having been forced back into its traditional heartlands. New Labour seemed, for the time being at any rate, dead.

The Liberal Democrats had high hopes of making an electoral breakthrough in 2010, since the banking crisis and the expenses crisis seemed to make their calls for a radical overhaul of the political system more relevant and more popular than ever before. They had a further important advantage, in that the introduction of televised debates between the party leaders gave them equal billing with the leaders of the two larger parties and therefore helped to make their leader, Nick Clegg, appear, with Gordon Brown and David Cameron, a genuine contender for the premiership.

In the past, the Liberal Democrats had often benefited from the extra publicity they were able to gain during the immediate pre-election campaign period, and which drew them to the attention of voters who might otherwise have ignored them. A no doubt unscientific survey at the Cheltenham races, taken before the first debate, found that while 98% could name the favourite for the Gold Cup, just 26% knew who Nick Clegg was! Clegg, however, took advantage of the opportunity that the television debates gave the party, for he was widely thought to have performed better than the other two contenders in the first debate. Indeed, during this debate, Gordon Brown said on more than one occasion, 'I agree with Nick', and this encouraged Liberal Democrat supporters to wear T-shirts embellished with the slogan, 'I agree with Nick'. But the Liberal Democrats, although gaining a small percentage of the vote as compared with 2005, failed to achieve the gains they had hoped for or to make a breakthrough, and in fact won five seats fewer than in the previous general election of 2005. The party's position became pivotal not because of its electoral success, but because the Conservatives failed to win an overall majority. Its pivotal position depended upon the pattern of votes for the other two parties, not upon its own electoral performance.

The Conservatives had perhaps the greatest reason to be disappointed with the outcome. Until the summer of 2009, the party had appeared well on course for an overall majority. Survey evidence seemed to indicate that they enjoyed the support of around 40% of the voters, as compared to Labour's 30%, a lead sufficient for an overall majority. But the Conservatives failed to achieve that overall majority, despite facing an unpopular government and a Prime Minister whom it accused of having presided over, and indeed having caused, a very severe recession.

The 307 Conservative MPs were elected on just over 36% of the vote. That was the lowest Conservative share of the vote since the Second World War, except for the general elections of October 1974, 1997, 2001, and 2005. But in all those elections the Conservatives had been comprehensively defeated. In 1945, when the Conservatives were so thoroughly beaten by Attlee's Labour Party, they gained 39.8% of the vote, nearly 4% more than in 2010. The Conservative vote in 2010 was lower than at the time of the last hung parliament in February 1974, when Edward Heath had secured 37.1% of the vote. But the outcome of that election had

been a Labour minority government. When David Cameron entered Downing Street, it was with the lowest percentage of the vote of any Conservative Prime Minister in modern times.

Had the election led to a Conservative minority government, which seemed at one point a likely outcome, it would have been the second successive British government to have been based on just over one-third of the vote. Labour, although it enjoyed a comfortable overall majority of 67 seats after the 2005 general election, had won that majority on just 35.2% of the vote, a smaller share than the Conservatives achieved in 2010. The vagaries of the electoral system allowed Labour, therefore, to secure an overall majority on 35.2% of the vote in 2005, while denying the Conservatives an overall majority on 36.1% of the vote in 2010. All the same, nearly two-thirds of those voting had voted against the Conservatives, just as nearly two-thirds of those voting had voted against the majority Labour government of 2005. These two election results cast perhaps an ironic light on the notion of democracy as majority rule, and on the proposition that the first past the post electoral system generally yields a government supported by the majority of the voters. The Conservative/Liberal Democrat coalition, formed after the election, does, however, enjoy an overall majority of 78 in the House of Commons, while over 59% of those voting supported either the Conservatives or the Liberal Democrats. In this sense, the coalition can claim to be the first government to enjoy majority support since Stanley Baldwin's National Government in 1935. But it can make this claim only on the highly dubious assumption that all those who voted for the Conservatives and Liberal Democrats would have endorsed the coalition. It is doubtful, to put it no higher, whether the Liberal Democrats would have won 57 seats had voters been told before the election that the party would form a coalition with the Conservatives.

The Liberal Democrats, though winning 23% of the vote – nearly a quarter of the vote – won just 57 out of 650 seats – fewer than one-10th of the seats – in the House of Commons. They were, as has been the case ever since the 1920s when they became a third party, harshly treated by the electoral system. It took 33,468 votes to elect a Labour MP, and 35,028 votes to elect a Conservative MP, but 119,780 votes to elect a Liberal Democrat MP.

The Liberal Democrats, however, were not the only party to be disadvantaged by the electoral system. The fourth party in terms of votes in the election was the United Kingdom Independence Party, which won over 900,000 votes, 400,000 votes more than in 2005. In a proportional system, their 3.2% share of the vote would have given them around 20 seats. But, under first past the post, they won no seats at all.

Nevertheless, UKIP may not have been without influence in the election. In 21 constituencies, the total of the UKIP and Conservative vote was higher than that of the winning Labour or Liberal Democrat.[6] If one makes the assumption that, in

[6] Sean Carey and Andrew Geddes, 'Less is More: Immigration and European Integration at the 2010 General Election' in Geddes and Tonge (n 2) 277.

the absence of a UKIP candidate, UKIP voters would have supported the Conservatives, then the intervention of UKIP cost the Conservatives their overall majority. If that is so, then, ironically, the intervention of the most anti-European of the parties fighting the election handed the balance of power to the most pro-European of the parties fighting the election, namely the Liberal Democrats.

There was also a fifth party that was strikingly under-represented – the British National Party. Many were delighted that Nick Griffin, the leader of the party, was defeated in Barking. Few noticed that the BNP increased its vote by 50%, to secure nearly 2% of the vote, the highest percentage vote ever secured by a far-right party in Britain at a general election. Indeed, there were twice as many votes for the BNP as there were for the Greens. Under an entirely proportional system, the BNP would have won around 13 seats. Admittedly, the number of BNP candidates had increased threefold since the last election, and the party's vote per candidate increased only slightly. Nevertheless, the fact remains that in 2010, nearly two in every hundred British voters were prepared to support a far-right party. The BNP performed far better than Oswald Mosley's British Union of Fascists, which, in 1935, the only general election to occur before the party was proscribed by law in May 1940 as a danger to national security, put up no candidates and advised its supporters not to vote – a striking confession of weakness.

Seven parties with lower votes than UKIP and the BNP succeeded in securing representation in the House of Commons – the Democratic Unionist Party of Northern Ireland, the Scottish Nationalists, Sinn Fein, Plaid Cymru, the Social Democratic and Labour Party of Northern Ireland, the Greens, and the Alliance Party of Northern Ireland. But of these parties the Greens were the only national, rather than regional, party, and thus were the only one of those parties to fight the election on a nationwide basis. The others fought seats in only one of the territories comprising the United Kingdom.

The total vote secured by the two major parties – Conservatives and Labour – was, at 65.1%, the lowest since 1918, beating the previous low of 2005, when the two major parties between them secured just 67.6% of the vote. There were 84 MPs who, together with the Speaker, owed no allegiance to either the Labour or Conservative Parties – the second highest figure since the war (the highest, 92, occurring in 2005). The three-party vote was, at 88.1%, by far the lowest since the war. In Northern Ireland, not one MP was returned from the three major parties, and Sir Reg Empey, leader of the Ulster Unionist Party, which was allied to the Conservatives, was defeated in the constituency of Down South.

These outcomes contrast sharply with the results of general elections immediately after the war. In 1951, for example, no fewer than 96.8% of those voting supported Labour or the Conservatives. The Liberal Party, the predecessor of the Liberal Democrats, put up just 109 candidates and secured 2.5% of the vote, winning only six seats. In Scotland and Wales, all the seats were won by candidates from the three major parties – with none of the nationalist candidates securing representation. In Northern Ireland, all but three of the 12 seats were won by the Ulster Unionists, who took the Conservative whip in the House of Commons.