Constitutional Change in the United Kingdom: An Institutional Analysis.

Fraser H. J. King

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Abstract

This thesis seeks to explain the lack of significant constitutional change in the UK between 1945 and 1980 and has two main findings. First, and principally, the thesis rejects conventional understandings of the UK constitution based upon Dicey's analysis and the Westminster model of British politics. It is argued that these models can no longer provide the analytical toolkits necessary to unlock the nature and scope of power in British politics. It also questions the efficacy of micro level analyses in explaining the absence of constitutional change in British politics. Second, the thesis explores realist, state centred and cultural models of political change and applies these models to a case study of devolution from 1966 - 1979. It is argued that analytical models which take account of the power of institutions in shaping and conditioning the policy agenda, enable a more comprehensive explanation of both constitutional development and obstacles to constitutional change. The thesis does not advocate a new constitutional doctrine but does point to research strategies, which may facilitate the development of one.

Introduction

The language, symbolism and ritual of the constitution dominate the political universe of the United Kingdom. Despite some tumultuous activity at the turn of the century[1], the immediate post war period saw very little questioning of Britain's constitutional arrangements: a system of representative, cabinet government under a constitutional Monarchy and steered by a permanent and politically neutral civil service was taken for granted. Since the mid 1960s however, the constitution has come under severe stress. The problems of Northern Ireland; the pressure for regional devolution; the debates over the future course of first the European Community and then the European Union and the distortions produced by the voting system, have served as reminders that it is constitutional issues, which have again become dominant in the United Kingdom.

It is now a commonplace to refer to these issues as challenging the fabric of the UK political system (Norton, 1982; Harden & Lewis; McAuslan & McEldowney, 1986; Dearlove & Saunders, 1991; Jowell & Oliver, 1994; Peele, 1992). Alongside these commentaries have come consistent and forceful calls for constitutional reform and political renewal (Phillips, 1970; Hailsham, 1976; Johnson, 1977; 1980; SDP/Liberal Alliance, 1987; Holme & Elliot, 1988; Charter 88, 1988; Lester, 1991; IPPR, 1991; Barnett, Ellis & Hirst (eds.), 1993; Haseler, 1991; 1993). What has been less obvious however is the extent to which the established constitutional theories, derived from Dicey and Bagehot, which seek to explain the way the system works, have been placed under pressure by these events. Indeed, the very language of constitutional reform implicitly recognises that there has emerged a considerable 'lack of fit' between existing theories and political practice. Despite this, the post war period has seen little in the way of serious attempts to reform the constitutional order, and proposals by the main political parties[2] for constitutional reform have accepted the basic contours of the existing political system. The uncodified, flexible constitution forged by William and Mary's 'velvet'[3] revolution in 1688, has shown itself to be adept at reforming and reinventing itself to accommodate quite substantial social, economic and political change. For example, the widening

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[1] The turn of the century was fertile ground for issues of a constitutional flavour. In particular questions surrounding Home rule for Ireland, proportional representation, referenda and the House of Lords were laid to rest (but not extinguished) by the Parliament Act 1911; the Representation of the Peoples Act, 1918; and the Anglo Irish Treaty, 1922.

[2] The Liberal Democrats and their SDP and Liberal predecessors have consistently argued for a new constitutional settlement. However, this debate has never really been mainstream. Moreover, the Liberal Democrats have little chance of wielding power alone and even in coalition would find it difficult to get what they wanted on little more than 18% of the vote.

and deepening of the franchise by the two Great Reform Acts of the Nineteenth century, the establishment of universal suffrage, the development of modern political parties and the creation of the welfare state all took place within the architecture of a constitutional system essentially designed in the seventeenth century.

This thesis is concerned to explain why this architecture has proven itself so resistant to radical constitutional reform and posits the hypothesis that the existing institutional arrangements themselves (namely a highly centralised executive system where rights and a separation of powers are absent), and the way in which the process of their historical development has been understood and conceptualised, are the principle obstacles to such change. Further, that understanding the process of constitutional change in the United Kingdom demands a far more systemic understanding of the nature of political power than traditional constitutional theory allows.

The literature on constitutional reform is very diverse and three distinct approaches to the study of the constitution can be discerned: the descriptive, the critical, and the prescriptive. The descriptive approach is to be found in those studies, which broadly accept the contours of the doctrine distilled by Bagehot (1963), Dicey (1959) and Jennings (1959). They are concerned to describe the patterns of Cabinet and/or Prime Ministerial power, the location of sovereignty and the changing nature of parliamentary practice and procedure (Bogdanor, 1981; 1992; Brazier, 1988; 1992; Mackintosh, 1968; Norton, 1992). In short, this perspective is concerned with description and dispute within the orthodox nineteenth century liberal-democratic constitutional tradition. The critical approach is one, which seeks to demonstrate how the British constitution fosters unaccountability, is unrepresentative and does not encourage political participation. Central to this approach is to contrast the provisions of the British constitution with those of our continental neighbours in order to demonstrate the uniqueness of the British system. The absence of written rules, entrenched rights, the lack of a formal separation of powers, and the necessity to rediscover the rule of law are all highlighted here (Benn, 1981, 1992; Harden and Lewis, 1986; Johnson, 1977, Haseler, 1991a, 1991b). The prescriptive approach accepts this but goes a stage further by advocating positive changes such as adopting a Bill of Rights, a Freedom of Information Act, the abolition of the Monarchy and a written constitution (Haseler, 1993; Cornford, 1991; Nairn, 1988; Holme and Elliot, 1988; Lester et al, 1990, Liberal Democrats, 1990, 1993).

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[3] I borrow this term from descriptions of the collapse of communist rule in Eastern Europe.

These arguments, despite forming a substantial contribution to the constitutional debate, do not provide a framework for to explain why the system has been so durable. The critical perspective, in particular, lacks an explicit explanatory scheme to illustrate how certain issues pertaining to constitutional change reach the political agenda and more importantly why they do not. The present state of constitutional studies then leaves an explanatory vacuum between the descriptive accounts of traditional scholars and the radical constitutional reformers. Starting from this position ought not discourage consideration of how the constitution agenda has been managed. It should, by contrast, encourage the formulation of alternative analytical frameworks, which explain how the constitution changes and more importantly why it does not.

To do this means that the terms of reference within British constitutional debate have to be re-evaluated. Constitutional theory and practice in the UK is often discussed parochially. This is to say that the task of placing the UK constitution in any wider theoretical or historical framework is seldom undertaken. It is strongly argued that this is one of the central analytical problems which pervades constitutional thinking in the UK. The first chapter, therefore, addresses the theoretical nature of constitionalism.

The opening chapter explores ancient, classical and modern sources of constitutional thought and argues that there is a core model of the constitution. A core theory of the constitution must take account of three elements: a separation of powers; representative democracy; and a fully-fledged system of rights. The most contentious section of this chapter is the consideration of rights. The logical justification and rationale for rights is a highly disputed area within political theory (Rawls, 1972; 1993; Nozick, 1974; Hayek, 1982; Walzer, 1983; Gewirth, 1982; Macintyre, 1983; Rorty, 1993) and the discussion in the chapter reflects this. Whilst the chapter does not directly engage in these philosophical disputes, the notion that a rights discourse has been negligible to the development of constitutions and constitutional change (Bellamy, 1995; 1996; Bellamy & Castiglione, 1996) is strongly challenged. The chapter concludes by arguing that constitutions and constitutional theory reflect a realist tradition in political thought, which regards power and interests to be the motivating force behind political activity.

The first chapter provides a theoretical and historical framework within which the constitutional theories and traditions of the UK can be critically explored. The second chapter then, critically evaluates the orthodox constitutional doctrine (Bagehot, 1867; Dicey, 1885) in the light of

the arguments made in the preceding chapter. The absence of a separation of powers and a system of rights are the most obvious points of departure and these are explored at some length, showing how instead of these the UK developed a highly centralised system of rule with a strong monarchical tradition. A number of examples are used to illustrate the extent to which conventional constitutional theory, with its reliance upon limited conceptions of sovereignty and conventions, can no longer provide the analytical toolkits necessary to unlock the nature and scope of power in British politics. The chapter concludes by hinting at alternative conceptions of political change, based upon a more radical and realist conception of political power and interests, which though not constitutive of a new constitutional doctrine, could be operationalised as a research strategy to explain constitutional development.

The third chapter considers in greater detail the most significant challenge to the stability and order of the British political system in the post war period: devolution. In selecting this case study, I have followed the distinction made by Cornford, (1992) in distinguishing between political and explicitly constitutional issues. Cornford argues that constitutional reform is a 'first order' political process about both changing the fabric of the state and the rules of governance. It has the potential to substantially alter the balance of power between branches of government and subsequently the nature of state-citizen relations. It is 'first order' because constitutions and our understanding of them determine what is, and what is not, the proper range and scope of political powers both within and between branches of government and in some cases outline the parameters of state goals and responsibilities. In this scheme then, the structure of the state; the interaction between different branches of the state and their locus of power and authority; the direct interaction between the state and civil society and the subjection of these branches to a formal legal framework allowing for the legitimisation of rule are constitutional concerns. By contrast, electoral reform (both systems and geographical boundaries) and ideas such as a Freedom of Information Act (citizen access to the state and its agencies) ought to rightly be seen as political controls. The political controls that the citizenry hold over political institutions may have constitutional implications, for example, the election of a majority government on a minority vote willing to carry out a raft of constitutional changes, or the ability of the citizen body to subject state activity to scrutiny. However, the voting system itself and say freedom of information, does not qualify as a constitutional check. In choosing a case study it was important to isolate an issue that was explicitly constitutional and significant enough to

demonstrate the interplay between principles and practice. The only case that merited such consideration was the development of regional politics in the UK and the subsequent failure to devolve legislative power to Scotland and Wales, which covers the period 1965 – 1979. This case demonstrates two things: first the conscious development of a constitutional discourse distinct from the principles which underpin traditional constitutional theory in the UK, and secondly, that explaining and subsequently understanding constitutional politics in the UK demands a more sophisticated tool of political analysis to map the basis of political power in the UK. The case study thus suggests that mapping political change in the UK demands a reconsideration of both the implicit model of constitutional change in traditional constitutional theory as well as the theory itself.

The case study constitutes a sustained analysis of arguments for, and attempts to, devolve power to Scotland and Wales, which will limit itself to the period 1965 - 1979. The importance of the case study is that it does cover a significant period of time in the post-war period, which demonstrates how dissensus over the constitution has been (and still is) central to British politics. As such it is multi-layered and intrinsically linked to the theoretical perspectives discussed in the preceding chapter, that is to say it is concerned with the way in which principles of equal rights and limited government associated with the more accepted continental constitutional doctrine sought accommodation within the British political/constitutional tradition.

With regard to devolution there are a number of issues that the study is attentive to. Although the thesis is principally concerned with the period from 1965 when arguably Scottish and Welsh nationalism manifested themselves as major political forces, the case study does not ignore some historical background. This will include a brief outline of why Scotland and Wales are distinctive regions with distinctive identities, which are different not only to England but also between themselves: a recognition that the Celtic element of the United Kingdom is not a homogenous bloc. The chapter considers how the apparent content with the constitutional framework broke down between 1965 and 1974 and considers why territorial politics manifested itself in the manner that it did, as well as the response of established political parties and governing elites? Of significant importance are the events leading up to, and the report of, the Royal Commission on the Constitution.

The period leading up to the Royal Commission has been subject to much interpretation but inevitably focused upon the rise of nationalism and nationalist parties as significant electoral forces

in Scotland and Wales. The difficulty lies in unravelling and isolating causal factors. The growth of organised political parties in Scotland and Wales, able to motivate the sleeping giant of national consciousness is one such argument (Rose, 1970). Similarly, the relative decline of the U.K economy has been argued as a pivotal impetus to pressure for change, given that the traditional justification for the Union was that Scotland and Wales were economically better off allied to the dominant English economy (Oliver, 1992). Alongside these arguments lie the notion that the increase in central government activity since 1945 had ensured that Westminster was a more visible authority in Scottish and Welsh affairs. The welfare state, large scale nationalisation and the accompanied bureaucratisation had led to the establishment of a range of administrative involvement outside of England (Rowlands, 1972; Drucker & Brown, 1980) This, arguably, had a dual effect. On the one hand it has helped foster disenchantment e.g. undesirable effects can be put down to Westminster (English) interference, and on the other it reinforced the notion of difference and distinctiveness.

All these arguments have problems. The rise of nationalism in the 1960s cannot simply be explained by the rise of well organised political parties, the relative decline of the U.K economy nor the growth of central government direction from Westminster since 1945. As Drucker and Brown, (1980) cogently argue, the growth of nationalism cannot easily be related to the efforts of parties, as historically dissatisfaction had been subsumed by other U.K parties, principally Labour. Similarly, the Scottish and Welsh economies had in fact performed badly during the inter war years without the growth of national parties. A combination of these factors has to be taken into account accompanied with an appreciation of the global impact of nationalism. Canada, France, Spain, Belgium and of course at home in Northern Ireland for example, were all faced with national and regional movements which sought to redefine the character of the nation state (Drucker & Brown, 1980: 11-13). The determination of these causal factors is important because it facilitates a clearer understanding of the nature of agency and strategy discussed above. A clear grasp of agency and strategy is important to illuminate these constitutional questions by the use of a theoretical toolkit which highlights the critical role of institutions in managing dissent and exercising power.

The chapter includes a sustained analysis of the Royal Commission report and the attendant Memorandum of Dissent. The chapter considers in detail the majority report and the memorandum of dissent. It is argued that any critical engagement with the problems highlighted by

the commission are ostensibly ruled out by the reluctance of the majority of commissioners to consider essential concepts such as equality, rights and a separation of powers. The rigid attachment in the majority report to the orthodox British constitutional doctrines and the unitary state with a dominant Westminster parliament limited the conclusions they were likely to draw by definitional fiat. By contrast, the minority report, although not a radical departure from the British political tradition, is willing to engage more systematically with alternative forms of institutional design, which departs from the hitherto accepted model of politics, which centres on Westminster.

The final chapter analytically develops the problems which arise when core constitutional principles are applied to constitutional politics in the UK. The significant point here is the extent to which in the British political process and constitutional theory are essentially the same thing: constitutional theory informs how we understand the political process and the political process informs our understanding of the constitution. The British constitution, almost uniquely, has no special procedure for constitutional change. Substantial constitutional changes therefore, can be made in the same way as legislation covering road building or education. Given that there have been quite significant political changes during the post war period, and the relative ease with which constitutional change could be facilitated, one might have expected to see a public politics dominated by the process of constitutional change. However, despite a considerable constitutional flavour to the politics of post war Britain; remarkably little had in fact altered. The chapter considers how constitutional discourse has developed and develops in greater detail the diverse approaches to the constitution noted above. In particular despite making considerable contributions to the analysis of the constitution many of these approaches do not attend to the question of explaining why the constitution does not change. It is argued that the key ingredient missing from these analytical schemes is an understanding of institutional power and the way in which political institutions become self serving and political change path dependent.

The chapter develops an explanatory model of constitutional politics in the United Kingdom, which is attentive to basis of institutional power and political culture. Drawing on developments in political studies, which suggest the increasing pertinence of institutional factors in political life (Richardson & Jordan, 1990; Krasner, 1984; Dearlove, 1989; March & Olsen, 1984; 1989). The institutionalist literature is in itself diverse and tackles the question of institutional power from a variety of disciplines including sociology, history and political science. Of particular importance for

this thesis is to contrast society centred models of political change focusing upon policy community and policy network analysis with rational choice and historical institutionalist arguments. Whilst the network models tend to explain a lot of policy changes by drawing upon empirical studies of actors and processes, the chapter argues that the process of constitutional change, especially in the United Kingdom demands a keener understanding of the institutional and historical variables at play. In particular, the significance of history and precedent to much of the constitutional politics in the United Kingdom means that a model of political change which is attentive to institutional, historical and cultural factors will be better placed to explain the particular constellation of forces which surround the issue of the constitution in general and devolution in particular. A model of institutional power is developed which explains the resistance to constitutional change and the way in which the historical development of the British constitution constrains the dialogue of reform to those changes, which do not threaten the constitutional status quo.

The thesis concludes with a discussion of how a historical institutionalist model of politics may be applied to constitutional matters wider than devolution and considers the potential research strategies invited by recent constitutional changes in UK politics. In particular, the conclusion suggests that historical institutionalism provides the basis for a radical reconceptualisation of the constitution and constitutional history in the United Kingdom and places constitutional politics back into the hands of political scientists, theorists and analytical historians.

Chapter 1:

The Constitutional Tradition: Towards a Political Theory of the Constitution

Quod principi placuit legis habet vigorem (what pleases the ruler has the force of law).

A society where rights are not secured or the separation of powers established has no constitution at all (The French Declaration of the Rights of Man and of the Citizen, 1789).

If the constitutional tradition in the United Kingdom is to be fully understood it cannot be considered in a vacuum. Too often the British constitution is cursively defined as unique and then discussed, described and analysed within the terms of Dicean legal formalism, the Westminster Model of British politics or in the context of normative arguments for reform. The task of placing the British constitution in any wider theoretical or historical context is seldom undertaken. The introduction makes clear that it is one of the themes of this thesis to challenge conventional descriptions and explanations of the British constitution. The first task is to discuss the nature of constitutionalism itself.

This chapter will argue that standard definitions of constitutionalism as an unidimensional institutional means to limit power, epitomised by Wheare (1966), are inadequate and unhelpful because they fail to fully account for the complexities of political power in the modern state. The case will be made that despite the fact that constitutions are in themselves the product(s) of unique socio-political histories, it is possible to distinguish a clear tradition of constitutionalism from within the western political tradition. It will be demonstrated that that there is a theoretical canon of constitutional thought, both classical and modern in origin from which a core theory of constitutionalism can be discerned. The canon includes classical theorists such as Machiavelli, Locke, Montesquieu and Madison and contrasts the work of modern theorists such as Kelsen, (1960), and Vile (1967) with MacCormick (1982; 1984; 1993) Bellamy (1996a; 1997), Dahl (1989; 1985), Rawls (1972; 1993), Dworkin, (1977; 1986), Walzer, 1983; 1995), Beetham, (1993) and Held, (1993; 1996). It will be argued that a core theory of constitutionalism will comprise two essential elements: structural provisions and rights provisions. Structural provisions ensure that institutions are designed, insofar as is possible, to act in the public interest and to preclude political institutions or their agents acting in their own interest. The rights provisions will be seen as those specific areas which must be fenced off from majoritarian control and which operate as legal constraints upon the political process. In short, it will be claimed that structural provisions limit the exercise of political power through the political process and rights provisions limit the exercise of political power by ring fencing certain issues off from the decision making process.

These two general provisions lead to three essential ingredients of a constitutional order: the separation of powers, representative democracy and a rights discourse. The discussion of these provisions form the general structure of the chapter. The separation of powers doctrine is critically explored drawing primarily on classical accounts found in Machiavelli and Montesquieu. These accounts are then subsequently contrasted with the democratisation of the doctrine by Madison and the Federalists. It is noted that Madison and his followers, committed to a republican tradition of protective democracy, were less than willing to explore the institutional, procedural and social requirements of democratic forms of rule. This is explored at length. Drawing explicitly upon Dahl (1989) and Beetham (1993), a definition and justification of constitutional rule resting upon the strong philosophical and epistemological relationship between liberalism and democracy is defended. Making an explicit and logical political connection between liberal constitutionalism and democracy invites a consideration of the logic and pre conditions to such a form of rule. This too is given lengthy consideration and it is in this respect that the thesis departs markedly from established accounts.

Arguments are made that both political and social rights are essential to a constitutional and democratic system of rule. In making these arguments, the case against constitutional rights made by Bellamy (1996) and Bellamy & Castiglione, (1997) are critically explored using theoretical, empirical and historical examples. Similarly the philosophical case against social rights made by neo-liberal political thinkers such as Fried (1967), Hayek (1944; 1960; 1976) and Nozick, (1974) is subjected to critical examination. It is argued here that a core theory of the constitution must take full account of both structural and rights provisions. Only then can adequate conclusions be drawn concerning what powers are to be limited and separated, what obligations the state has toward its citizens and what mechanisms and resources civil society can legitimately employ to affect the state. It is suggested in this chapter that a theory of the constitution based upon such reasoning will move from a range of competing perspectives about constitutions and constitutionalism toward something resembling a core theory. The identification of a core theory will then provide the context in which the unique traditions of the United Kingdom can be considered from a theoretical, historical and critical perspective.

The Nature of Constitutionalism

Constitutionalism provides the (generally obscured) background to contemporary political life and political discourse in much of the western world. A general reading of constitutionalism is usually understood as a dedication to a given set of social and institutional arrangements, which can support a system of rule in any given political community[1]. In addition, such a reading contends that constitutions have existed in a variety of different regimes with strikingly different procedures, rules and fundamental laws. For example, constitutions can be codified, as in the United States or uncodified and inferred from history, custom and practice as in the United Kingdom. A constitution could quite simply say *quod principi placuit legis habet vigorem*, that is, what pleases the ruler has the force of law (MacCormick, 1993: 132).

Following this, the standard definition of a constitution found in most textbooks on government or public administration refers to the act of constituting a political system or the norms, structures and characteristics of the body politic. In this sense, a fundamental distinction is generally made between the abstract and the concrete use of the term constitution. The abstract sense is used to refer to the set of rules, procedures, customs and conventions which define the composition and powers of the organs of state, and which regulate the relations of the various state organs to one another and to the private citizen. In the concrete sense, the term is used to refer to the document in which the most important laws of the state are authoritatively written. In this view, nation states without such documents do not lack a constitution; they just lack a constitution of a particular kind (Hood-Phillips & Jackson, 1987: 5). Such constitutions are usually regarded as unwritten, although the term is probably misleading. This description has been applied particularly to the constitutional status of the United Kingdom, Israel and until 1986, New Zealand. In these cases, it is almost certainly more accurate to characterise them as part written and uncodified

[1] See e.g. Wheare, K. (1966).

(Wolfe, 1984). In the case of the United Kingdom the powers of various parts of the state - particularly those powers which have a bearing on constitutional and administrative law - are, in fact, written; the Bill of Rights of 1689; the Act of Union 1706; the 1911 and 1949 Parliament Acts; the European Communities Act 1972; The European Union Act 1993; the Habeas Corpus Act 1679; Administration of Justice Act 1960 and the various acts from 1832 culminating in the Representation of the People Act 1969 are obvious examples.[2] Despite the praise of what we might call 'English exceptionalism' (Norton, 1987; 1989; Moodie, 1964; Patten, 1991), 'codified' constitutions now form the mainstay of political and legal principles within western democracies. Whether from violent revolution (France), 'velvet' revolution (the newly emerging eastern European states), wars of independence (United States), the federation or confederation of existing states (Switzerland), or the development of a new national identity (former colonies and protectorates), a written or codified document which defines the range and limits to government power is the pre-eminent form of constitutionalism.

Constitutions then have generally been described in many ways. Traditionally, this takes the form of seeking out the basic laws, which define and regulate a system of government. K. C. Wheare (1966) in his now classic study of modern constitutions writes that:

> The word 'constitution' is used to describe the whole system of a government of a country, the collection of rules, which establish and regulate or govern the government (Wheare, 1966: 1).

These rules, he argues, are partly legal and partly non-legal, of which the latter are norms, understandings, customs and conventions. Arguably, the most common definition is to consider constitutions as instruments to limit power. MacCormick (1993) argues that:

> The idea of a constitution is that of a legal normative framework for the exercise of political power. A constitutional ordering, when duly observed, constitutes political power as legal authority, and can at the same time place restrictions and limits on the exercise of power. (MacCormick, 1993: 131).

Few would quibble with either definition. But, such dry renditions leave constitutional theory solely in the realm of inferring rules or to limiting, separating and defining political power. However, constitutional theory is also about *politics*, about the locus of power, the structure of relationships within the state, and the relationships between the state on the one hand and individuals and associations at the level of society on the other. In this sense constitutions might be said to include a combination of essential ingredients: representative democracy; the rule of law and procedures for judicial review; a separation of powers; federalism or confederalism; civil and political rights; socio-economic rights; minority rights; representative and accountable institutions; and electoral rules. In the realm of constitutional design, it has appeared legitimate to be selective about the ingredients one chooses from a shopping list of constitutional 'goods'. For example, in its formative stages the framers of the United States constitution and their followers chose to separate the three

[2] Note also changes in 1983, which designate qualifications required for the use of the franchise.

powers of government, entrench rights[3] and grant a central role to the process of judicial review[4], whereas the United Kingdom places (at best) minimal stress on all three of these things. Similarly, the old Soviet Union entrenched collective socio-economic rights at the (actual) expense of the civil and political rights common to, say modern France or Germany. Despite this, all have been regarded as legitimate forms of constitution if not legitimate forms of rule[5] (Elster & Slagstad, 1988): in other words, to reinforce my opening point, a constitution has been generally understood as anything that institutionally binds together any system of rule in any given human community. Such understandings of 'constitutionalism' are inadequate and unhelpful. The following sections consider the separation of powers doctrine, ideas about representative democracy and the rights discourse and uses past and present examples to argue that within these three ideas lie the core elements of a constitutional system of rule.

Separation of Powers

Separation of government powers into three branches, legislative, executive and judicial is a commonplace of constitutional theory. Seventeenth and Eighteenth century theories of the separation of powers were based upon the premise that were legislative, executive and judicial powers to become concentrated in one body then that body would have absolute authority, the logical conclusion of which would be tyranny. David Hume, an early exponent, in his discussion of free government, gives force to the notion of a separation of powers when he argues that, '...free government...is that which admits of a partition of power among several members, whose united authority is no less, or is commonly greater, than that of any monarch...' and further that '...a republican and free government would be an obvious absurdity, if the particular checks and controls, provided in the constitution had really no influence...' (cited in MacCormick, 1993: 134). It later became a fundamental axiom of republican constitutionalism that these powers ought to be located in separate institutions each serving as a check upon the others. The constitutional task was therefore to ensure a proper balance between the three main functions or powers of government. (Montesquieu, [1748], 1961). The essence then of a separation of powers is that different institutions ought to be empowered with executive, legislative and judicial functions. The doctrine envisions a healthy state of affairs as one in which a permanent (actual or potential)

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[3] The Bill of Rights constitutes the first ten amendments of the constitution made in 1791. Madison, Hamilton, Jay and the Federalists argued that individual rights would be protected as they were intrinsic to the democratic process. Anti-Federalists led by George Clinton argued for an entrenched Bill of Rights to protect citizens against the newly powerful federal government.

[4] The power to review legislation for constitutionality is itself a judge made power, first exercised in Marbury v. Madison (1803) and not entrenched in the constitution. In assuming this power, Chief Justice Marshall famously argued that "[t]he constitution is either a superior paramount law, unchallengeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall be pleased to alter it. If the former part of the alternative is true, the a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable" (Marbury v. Madison, 1803, 1,Cranch 103, 177).

[5] I use the term legitimate here to illustrate that both political forms were regarded as constitutional; I am not making any wider philosophical claims with regard to the 'moral' legitimacy of these forms.

tension exists between the branches of the government, each guarding its prerogatives and therefore guarding against abuses of power.

Vile's historical study (1967) describes the separation of powers as the most significant constitutional device of the twentieth century. He argues that the purpose of the doctrine of separation of powers is to ensure those individuals or grou-ps cannot become judges in their own cause. By isolating three core components of the pure doctrine - which he derives from the ancient world - he seeks to show its benefits. The three components to the pure doctrine of the separation of powers are: (a) a functional distinction between legislative, executive and judicial acts; (b) the division of government into these corresponding agencies kept distinct from each other and; (c) no overlap amongst the personnel who staff these agencies. The benefits said to accrue from such an arrangement are fourfold and are related to the transition from the *ancien régime* to liberal republicanism. First, the stability of relatively fixed yet open, clear and prospective laws, which promote the common good, replace the arbitrary, and therefore, unstable use of public power associated with absolutism. Second, individual freedom is promoted by the ability to plan in a predictable and stable environment. Third, the regulation of public power brings with it efficiency gains. Legislation is less cumbersome because short term decisions can be devolved to the executive which is more centrally and coherently organised to react to rapid decision making. Fourth, the model ensures mutual accountability of the powers both to representatives of each branch and to the public.

However, the pure doctrine of separation of powers carries with it a number of disadvantages, two of which are particularly apparent. First there are the conceptual and practicable difficulties of distinguishing the boundaries at which different functions end. For example, when judges adjudicate new cases, precedents are often set which are, in effect, new rules. Similarly, new rules are often created by officials who implement new laws and such rules can often take on an institutional dynamism of their own. Legislators too, are invariably concerned with how the laws that they create are interpreted, refined and redefined in the light of case specific judgements. In practice then, a separation of powers becomes less a separation of powers *per se* and more, to paraphrase Neustadt's (1990) more modern interpretation, one of separated institutions sharing power. The very necessity of the branches of government to co-operate simply by virtue of checking each other's power means functional separation may be impossible. This type of problem is exacerbated if the business of government grows or becomes more organisationally complex. The more complex the problem the greater degree of interrelatedness will follow. Even if functional separation could be maintained, the ability to limit the power of those controlling the various branches would be meaningless if they all represent the interests of similar groups.

It is certainly plausible to argue that these problems render the doctrine of a separation of powers totally unworkable. However, as constitutional historians have noted, the doctrine was never really implemented in this pure form but became modified by a number of forces acting to both adjust its operation and simultaneously reinforce its principles (Vile, 1967). These can be essentially reduced to the influence of theories of mixed and balanced government (Machiavelli, 1970; Bellamy 1996); the incorporation of representative democracy (Held, 1996); and a rights

discourse. These developments became supplements to, as opposed to rivals of, the doctrine (Dworkin, 1977; Rawls 1972; 1993).

The *locus classicus* of the doctrine of the separation of powers is to be found in book XI chapter VI of Montesquieu's *The Spirit of the Laws*, although the idea did not originate from him. As Bellamy (1996: 440) notes, he drew on a wealth of earlier thinking: the Polybian[6] theory of mixed government; the Machiavellian[7] notion of a balance of social forces; and Harrington's[8] formulation of the doctrine of political checks and balances. Montesquieu used these ancient and classical observations to argue that in a world where individuals place their own interests above others, institutions must be created which encourage these desires to inform effective government. The separation of powers for Montesquieu provided a forum internal to the state allowing for competing interests to clash.

Montesquieu showed more precision than his predecessors in distinguishing between the manner and function of the separated powers and made the case for three distinct organs with distinct legal powers. He argued that virtuous government depended not on heroic individuals or civic discipline but on a coherently worked system of checks and balances. Montesquieu grasped the importance of the mixed regime, which balanced the powers of the Monarch, the aristocracy and the people. In this sense, the political universe would be divided into public and private spheres: a public sphere of politics and the state and a private sphere of home, families and economies[9]. Without such a balance, the law would only reflect one set of interests and lead to despotism. As Montesquieu puts it:

> ... Experience shows us that every man invested with power is apt to abuse it ... to prevent this abuse, it is necessary from the very nature of things that power should be a check to power (1952:69).

The strength of Montesquieu's analysis lies in his discussion of the relationship between centres of power within the state. What his analysis lacked was a coherent understanding of the relationship between the state and civil society. In particular, he did not establish watertight arguments for the protection of the private sphere. He concluded that the protection of liberties in the private sphere was dependent upon what the law permits. However, he overlooks the notion that the law itself may foster tyranny, since lawmakers were not accountable to the mass of people. In the relationship between the state and civil society, then, Montesquieu tilts the balance in favour of the state, particularly those branches with the power of rapid despatch such as the monarch. In a departure from ideas found earlier in Locke, Montesquieu ignored the idea that the state ought to

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[6] See e.g. Polybius, (I.Scott-Kilvert, trans. F.W. Walbank, (ed.), (1979), *The Rise of the Roman Empire*, Harmondsworth: Penguin.

[7] See e.g. N. Machiavelli (1970), *The Discourses*, Harmondsworth: Penguin.

[8] See e.g. G. Pocock (1977), *The Political Works of James Harrington*, Cambridge: Cambridge University Press.

[9] It should be noted here that Montesquieu's formula was gender specific. The public sphere was for men and the private sphere (economy discluded) was the domain of women and children. See e.g. C. Pateman, (1987) 'Feminist Critiques of the Public Private Dichotomy', in A. Phillips, (ed.), *Feminism and Equality*, Oxford: Blackwell; S. Moller-Okin, (1991,) 'Gender, the Public and the

be, in some measure, accountable to civil society and that free citizens ought to be able to reform the government; for Montesquieu the governed were accountable to the governors. Nevertheless, the importance which Montesquieu attached to the notion of the mixed state and of a division of powers made an important impact upon the founding of the United States constitution, and it was for Madison, Hamilton, Jay and the Federalists in the late Eighteenth century to provide a clearer worked out and substantially more coherent political theory of the separation of powers suited to the complexities of the modern republic.

Madison, The Federalists, and the Modern Republic

Madison accepted that political and public life was grounded in self interest, and like Montesquieu before him he drew upon the republican tradition of mixed government found in Machiavelli and Harrington (although essentially adhering to Montesquieu's interpretation of these ideas). Madison and the Federalists, recognising that mixed government could not be an option in a state which had abolished both monarchy and aristocracy, fused these ideas with notions of democratic power sharing based on a more complex understanding of the estates of the realm.

The Federalists began by dispensing with the idea of a precise functional separation of powers. As Bellamy (1996: 448) notes, Madison and Hamilton followed Locke and Montesquieu in recognising that the executive branch was in want of speedy despatch and similarly that the legislative function will, simply because of the fissiparousness of modern societies, regularly encroach upon the other branches. The net result of these observations led the Federalists to reason that the problem in modern republics was less the restraint of executive power of absolute monarchs which had been the concern of the ancients and both Locke and Montesquieu, and more the threat from tyrannical legislative majorities. Madison in particular noted that the dynamics of a free market economy necessarily fragmented society into various interest groups and factions. He argued that dissent, argument, conflicts of interest and the ongoing formation of rival and competing factions are inevitable not only because this is a logical corollary of human nature, but because this is the nature and stuff of politics. What Madison recognised above all was that constitutional concerns were not only a matter of jurisprudence but that they were enmeshed in 'systems of politics' which need to be designed to contain the problems of factions. To grasp how important this is demands a clearer understanding of how Madison defined the problems created by factions. A faction for Madison was:

> A number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse or passion, or interest, adverse to the rights of other citizens, or the permanent and aggregate interests of the community (Federalist, 10: 17)

The constitutional task was to find some way of regulating how these factions and interests interact at the level of government in such a way as they become enmeshed in the ordinary operation of

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Private' in D. Held, (ed.), *Political Theory Today,* Cambridge: Polity Press; L. Nicholson, (1984) in,

the state. Madison's revolutionary solution was to harness factional conflict so those different groupings checked and balanced each other. This was achieved by:

> ...So contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places ... [by these means] ... the private interest of every individual may be sentinel over the public rights (Federalist, 51: 265- 266).

This was to be realised by dividing the legislature against itself within a system of large, territorially defined, federal states governed by representative democracy, and by ensuring an effective balance of power between local and national concerns. To maintain a consistent and coherent majority, representatives would need to build a coalition of interests at local level and be able to reflect this at the level of a national legislature. To counteract the possibility of national concerns overtaking local ones, the federal system also included state legislatures, which would ensure that local issues were not neglected. The division of the national legislature into two chambers buttressed the balance of forces between local and national representation: a Congress elected directly and a Senate elected by state legislatures. The benefit of a large legislature representing the fissiparous nature of the modern republic mediated through a system of federalism and bicameralism would ensure a political and social balance and facilitate deliberation and circumspection.

The internal and external checks and balances in the legislature were joined by similar innovations to the executive and judicial branches in Madison's democratisation of the separation of powers. The elected Presidency, itself a popular check against unsatisfactory incumbents, served mainly as a further institutional check to the legislature but also as the fulcrum of foreign affairs. Presidential discretionary powers in this area were constrained however by the involvement of the Senate in treaty making and executive appointments.

The Supreme Court only partially benefits from this democratisation. Hamilton departed from Montesquieu by arguing that the Supreme Court ought to be a professional body thus ruling out election. However, the fact that the political independence of the justices of the Supreme Court was dependent upon life tenure divorced them further from the electorate. Hamilton's solution was to make the court in some respect dependent upon other branches of the government. The justices themselves were to be appointed by the President and approved by the Senate, and Congress retained the power to regulate the Court's appellate jurisdiction. Hamilton believed that the Judiciary would be the weakest branch of the government with no war powers and no financial powers. The Court had no powers to enforce its decisions, the domain of the court was limited to the power of judgement, and would depend upon presidential support for implementation or even support of its decisions. Although these devices placed the court within the general scheme of mutual checks and balances, its principal limitation came from its role as guardian of the constitution. In this sense the justices would not act as morally superior quasi guardians or as a boardroom of legal experts, they would defend the will of the people as outlined in the constitution

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G. Gould (ed.), *Beyond Domination* New York: Ronan Allenheld.

against the possibility that legislative representatives could suppress such a will in favour of their own cause. In sum, the power of the court was rooted in the constitution, itself a reflection of the will of the people, it was not based upon the discretionary authority of the individual justices.

Bruce Ackerman (1993; 1998) in two volumes entitled '*We The People: Foundations*' has argued that the logic of a dualist conception of democracy is being played out when the supreme court deliberates over matters of constitutional significance. To understand this requires some insight into Ackerman's theory of constitutionalism. Ackerman argues that we must distinguish between 'normal' politics and 'constitutional' politics. Normal politics occurs under settled constitutional conditions where people are divided into ideological factions and conflicting interest groups. To prevent a tyrannical majority coming to power and exercising authority, a divided legislature and Madisonian checks and balances are required. Under conditions of constitutional politics, a national crisis engenders prolonged deliberation between various groups that can legitimately claim to represent the common good. In such extraordinary times, political deliberation follows Rousseauean rather than Benthamite rules of engagement where a 'general will' rather than an 'aggregation of preferences' are sought. Such deliberations, he argues, eventually unite people and accordingly they transcend their own interests in search of the common good: after each period of constitutional politics a more progressive understanding of the constitution is reinforced. Ackerman argues (1991: 191) that the founding of the US Constitution is one such example.[10] The Constitution resulted from the deliberations of delegates when factional divisions were put to one side in the struggle for independence and state building. The constitution was subsequently submitted to the people through popularly elected conventions where majoritarianism held sway. It is exactly this higher law making which needs to be distinguished from general legislation which emerges from normal politics, where self interest and factionalism as opposed to the search for the common good dominate the political process. In periods of normal politics, ordinary legislators could not be expected to define fundamental rules and principles, as they are concerned with representing only one part of the political community. If the rule of law is to be defended, a higher authority - in this case the Supreme Court - must be a servant of the popular will rather than either its interpreter or a substitute for the legislature. If, however, the court ought to reflect the popular will rather than act as its interpreter, it begs the question: are not the people themselves better equipped to protect their will? This was, in effect, Thomas Jefferson's point, refuted but nonetheless accepted in modified form by Madison,[11] that periodic conventions could

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[10] In fact Ackerman identifies three such periods in American History: Founding, Reconstruction and New Deal. These constitutional moments established a framework for normal politics that the Supreme Court could then defend as the popular will.

[11] It is fair to point out that Madison accepted only the notion that there ought to be a mechanism for the people to effect constitutional change. There are essentially four ways to amend the constitution provided for in Article Five. 1. Passage in House and Senate by two thirds vote; then ratification by majority vote of the legislature of three-fourths (Thirty Eight) of the states. 2. Passage in House and Senate by a two thirds vote; then ratification by conventions called for the purpose in three-fourths of the states. 3. Passage in a national convention called by Congress in response to petitions by two-thirds of the states; ratification by majority vote of the legislatures of three-fourths of the states. 4. Passage in a national convention, as in 3; then ratification by conventions called for the purpose in three-fourths of the states. In practice methods 3 and 4 have never been used and

be called to specifically redress constitutional breaches or to redefine the meaning of the constitution.

There are however reasonable grounds to be sceptical on this point of Ackerman's thesis. First such conventions may well undermine the belief in the constitution itself, giving the impression that the constitution is inherently faulty and in need of constant readjustment. Second, it is questionable that people will put aside their normal interests in periods of exceptional circumstances. This led Madison to conclude that 'the passions ... not the reason of the public would sit in judgement' (Federalist, no. 49: 261)[12]. Nevertheless, in drawing this back to the role of the Supreme Court, the judges must uphold the intentions of the people by weaving together the strands of popular will expressed in periods of constitutional politics. By using Ackerman's framework the conflict between judicial activists (those who believe that the constitution has to be interpreted in the light of changing social and political conditions) and strict constructionists (those who argue that literal interpretation of the Founders is the only legitimate form of constitutional interpretation) can be side-stepped. The Founders' intentions remain important, but have been modified by subsequent periods of constitutional politics. Constitutions do evolve but not because of isolated judicial interpretation but as a response to the collective will of the people.

The Founders treatment of the separation of powers was innovative and multilayered, responding to the complexities of the modern republic. They successfully fused Machiavellian theories of a balance of social forces, Montesquieu's original reformulation of the pure doctrine of the separation of powers and Madison's theory of representative democracy. The separation of powers doctrine, eloquently expressed in the United States constitution, was essentially concerned with building in checks and balances between the different branches of government as a centrifugal force. It would be highly unlikely in such circumstances - though not impossible - that tyranny would arise from it. Vile (1967) commenting on Madison's contribution to the development of the doctrine argued that:

> ...It stands alongside that great pillar of western political thought - the concept of representative government - as the major support for the systems of government which are labelled constitutional ... (1967: 2)

The separation of powers model - certainly as it came to be expressed in the United States - restricted itself to devising institutions with two principal tasks: (1) to avoid the danger of an omnipotent government imposing its notion of collective happiness upon the people and (2) to allow people to pursue their diverse interests and their own particular conception of the good life. The importance of a political analysis which focuses directly upon the distribution of power amongst groups lent itself extraordinarily well to an institutional design which ensures that no individual or group can affect the rules concerning others without sanction.

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method 2 used only once (to abolish prohibition), method 1 has been used in the 26 other occasions.

[12] Indeed, throughout the pages of Ackerman's text the shadow of a potential Reagan revolution looms large. If Reagan had wished to muster enough support for a major redraft of the constitution in the image of neo-conservatism then the notion of each exceptional period being defined as 'progressive' might have been called into question.

Although this sits happily in a liberal democratic paradigm, the Federalist's commitment to democracy was limited. Despite Madison's democratisation of the separation of powers doctrine, his commitment to popular democracy and entrenched codes of individual rights was lukewarm. The reason for this was his inability to resolve the central tension in his thought between the liberal preoccupation with individual freedom and the strong republican inheritance of protective democracy. In the first instance, Madison's conception of citizenship was not a universal category applicable to all. There were clear limits relating to property ownership, sex and race. Hostile to a well specified Bill of Rights, he argued that a federal representative state was the best mechanism to aggregate individual interests and to protect rights. The liberties of citizens, he argued, was intrinsic to the constitution and protected by the checks and balances inherent in the structure of the federal state.

This argument has been played out more recently by Bellamy and Castiglione (1997). Whilst not defending the limited democratic aspirations of the Federalists, Bellamy and Castiglione have argued that the Federalists were right to be sceptical of a Bill of Rights. They argue, *qua* Madison, that justice is best served by a consideration of the realities of political power. In defending the power politics model of constitutionalism they argue that oppression is guarded against, not by abstract principles of rights, but by virtue of a political process which allows the people to voice their concerns for themselves (Bellamy, 1996: 455). They buttress their argument by suggesting that major social reforms in the United States such as the New Deal and the campaign for black civil rights were the result of popular movements of principle, as opposed to judicial activism. Two points need to be made here. First, rights based constitutionalism is in no respect incompatible with a realist understanding of politics, it is essential to it. Second, the notion that major changes in US history occurred only because of popular movements of principle is highly questionable. Dealing initially with the second point will serve to highlight the relevance of the first.

With reference to the New Deal, it is fair to say that it was not a result of judicial intervention and was not articulated in the language of rights. However, it was not a popular movement of principle. The New Deal was an elite led policy period designed in the first instance to restore credibility to the economic system and the relationship of the federal government to that system (Conkin, 1967; Sitkoff, 1983). Roosevelt of course was not operating in a popular vacuum; like any political actor, he was responsive to public opinion[13]. But, the establishment of a nascent welfare state post 1935 was not a response to movements of popular principle, rather it was a strategy to redefine the scope of the federal government and its relationship to the socio-economic structure (Hamby, 1981; Patterson, 1984), and certainly for Ackerman (1991) was a period of exceptional constitutional politics where the very comprehension of what is 'constitutional' (that is to say what the legitimate activity of the state is) is open to debate.

On the question of black civil rights, a questionable logic informs the idea that the public activities of the civil rights movement can be separated from either a political discourse of rights or the judicial campaign that ran alongside it. In the critical period between 1950 and 1964, the cases

Sweatt vs. Painter (1950)[14] and *McLaurin vs. Board of Regents* (1950)[15] set precedents, which chipped away at the language of segregation. These judgements paved the way for the decision in *Brown vs. Topeka* (1954) [16] which in itself was one of the mechanisms which led to the Civil Rights Acts of 1957, 1960, 1964 and 1968 and the Voting Rights Act of 1965. The notion that one can logically separate the civil rights movement from the rights culture could be derived from Martin Luther King. Chafe notes (1991: 146) that King once remarked that Rosa Parks refusing to give up her seat on a bus in Montgomery was more important to the civil rights movement than the decision in Brown vs. Topeka. King is clearly right. There is no doubt that popular protest was of incalculable importance to the development of the civil rights movement, but popular protest does not exist in a vacuum. In this respect, Bellamy and Castiglione underplay the importance of the rights discourse. The Bill of Rights (comprising the first ten amendments to the constitution) was less important for what it achieved in 1791, than for the language of rights that it established in American political culture. Later amendments, principally the Civil War amendments XII, XIV and XV built upon the initial ten to establish a culture of rights. The importance of the Civil War amendments, in particular amendment XIV, which established the principle of equal protection of the laws, formed one of the primary focal points for the judicial arm of the NAACP (National Association for the Advancement of Coloured People) and the civil rights movement in general. Indeed, the judgement in the Brown decision was that racial segregation of public schools violated the equal protection clause of the Fourteenth Amendment. In making this judgement the Warren Court inferred a stronger meaning to the language of equal rights than the Fuller court had infamously done in 1896 when establishing the principle of 'separate but equal' in Plessy vs. Ferguson.

The cultural power of the rights discourse was not limited to the civil rights movement. As Stanley Katz, (1989) has argued, the infusion of political and social substance into interpretations of the equal protection clause of the Fourteenth Amendment stands as one of the most important aspects of constitutional law in the United States. What is more important, following the Civil Rights Act of 1964, civil rights have taken on a wider meaning. As Katz puts it:

> Civil rights now took on a richer range of meaning, extending to employment, public accommodation, education, and many other significant realms of public activity. The

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[13] For example, Huey Long's 'share the wealth' movement, Towshend's OAP movement and the growing power of the industrial unions, which were of course to become central to the democratic party in the post new deal period.

[14] The Court ruled in favour of a black student who refused to go to the Texas law school for blacks, arguing that it was inferior to the state school for whites. Although the Court did not confront the legality of segregation in this case it did question how far a segregated institution could be equal.

[15] George McLaurin was a black student at the Oklahoma state law school but was required to sit in a roped off area of the class and in a separate alcove of the dining room. Justice Thurgood Marshall famously argued that such regulations created 'a badge of inferiority which affects [McLaurins] relationship, both to his fellow students and to his professors'. Again, the court questioned the legality of segregation but fell away from outright condemnation.

[16] The judgement in Brown vs. The Board of Education in Topeka (1954) reversed the Plessey Vs. Ferguson judgement which argued that separate facilities for blacks were justified if the conditions

> aged, women, and other previously discriminated-against groups in the American population were specifically "included in" by the new legislation. For Americans ... equality had become an operative public value (Katz, 1989: 760).

It is in this respect that rights based constitutionalism becomes so critical to, and beneficial for, a power politics model of the constitution because neither representation nor a separation of powers infallible. This is not to say of course that rights are a panacea for all pressing political and constitutional disputes. They are however, attempts to bind outcomes where majoritarian procedures are not to be trusted. Goodin (1996), for example, argues that there are always instances where things cannot be tightly bound in this way. For example, things that straddle the rights of several individuals or groups, or those instances where the administration of a decision rule requires conflicting interpretations pose such problems. In such situations, we have no recourse save for a reflection upon the spirit of rights guarantees. This however, does not make rights pointless, quite the opposite, as Goodin puts it:

> The culture that grows up around the practice of rights, where they can be respected, usefully moulds people's responses to other situations where they cannot. Presumably, we would also find the same proving true of the other more political analogues of rights, such as institutionalised vetoes and separate spheres (Goodin, 1996: 643).

The establishment of a rights culture cannot be ignored or underplayed in discussions of constitutionalism. Rights are the most effective means to (a) fence off certain principles from the arbitrariness of majoritarian decision making, and (b) provide a powerful resource for publics to claim a 'trump' against any political authority.

In sum, the design of government that Madison was concerned to articulate had the following three components. First, institutions which both encouraged the creation of faction and prevented the rise of a dominant majority faction. Secondly, institutions which promoted deliberative ways of reaching decision rules necessary to refine the collective voice of the people thus giving concrete meaning to the notion of the public interest. Thirdly, a social basis for the regime, where self interest will inevitably overlap with the public interest. Notwithstanding the criticisms outlined above, it is clear that the separation of powers model reconstructed by Madison, Hamilton and the Federalists not only served as the pivotal intellectual force behind the United States constitution, but also became a fundamental axiom of republican constitutionalism within the western political tradition.

Nevertheless, this in itself is not sufficient for a core theory of the constitution, simply because, as has been argued above, it deals almost explicitly with the internal characteristics of the state. The critical area of how citizens affect the state requires a more thoroughgoing account of the relationship between the state and the individual than the Federalists gave. In particular, a more encompassing conception of democracy than the protective republican tradition could offer is

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were of equal standard. The case removed any legal justification for segregation in public schools and elsewhere in the United States.

necessary and subsequently a more rigorous account of politics beyond the state: specifically a consideration of rights. Indeed, *contra* Bellamy and Castiglione, the following two sections argue that no core political theory of the constitution can ignore the central place of democratic citizenship and the rights discourse.

Democracy

The above section makes the case that the separation of powers model outlined by the Federalists gave a thorough account of the how the internal characteristics of the state check each other. The doctrine works not only at the national level between executive, legislative and judicial powers by ensuring that the interests of all three are in some way interlocked, but also by extending that interconnectedness to the relationships between national and local agencies. However, it has been noted how far the Federalists' concern with the relationship between the state and the individual fell short of a thorough democratisation of constitutional mechanisms. This section not only explores the meaning of democracy but also justifies a particular definition of democracy such that it is a necessary ingredient to a core theory of the constitution. This section takes as its starting point the criteria famously set by Robert Dahl (1989) who argued that any theory of democracy must among other things give reasonably convincing arguments concerning (a) the philosophical grounds of democracy (b) the institutions required in order to satisfy the democratic process and (c) the conditions that facilitate the development and persistence of democracy (Dahl, 1989: 7).

There is no universally accepted definition of democracy. Indeed even a simple clarification of core principles constitutes a difficult task, Robert Dahl (1956) argued there is no one theory of democracy, only a range of democratic theories. Michael Saward (1998) in trying to elucidate a core theory of democracy, follows May (1978) and defines it as 'responsive rule'; Holden (1988), suggests that popular sovereignty is the most useful meaning attached to democracy; whilst Held identifies ten competing models of democracy but finally boils it down to personal autonomy (1995; 1996). Democratic theorists might all agree that democracy means a situation in which the people make a mediated or unmediated impact upon the formation of collectively binding decision rules. This statement appears uncontentious and fits with most peoples understanding of the term. Indeed, in his in his magisterial account of democracy, Dahl (1989) broaches the etymological route to definition, which defines democracy as 'rule by the people'. However, such a definition turns up thorny categorical problems. In dealing with the first part of the equation, the question of what properly constitutes a 'people' has been a major source of controversy and conflict. As Held (1996) argues, history tends to suggest that such a definition has been used to exclude some people from the political process rather than to widen participation in ruling. The concept of a 'people' has been limited to 'owners of property, white men, educated men, men, those with particular skills and occupations, adults' (Held, 1987: 2). The second half of the equation concerned with 'rule' elicits even more difficulties. Does rule mean that all should govern, make policy and apply laws? To what extent should rulers be the representatives of the ruled? If so, should rulers act in the interests of the ruled? Further, should they be accountable and removable

by the ruled and by what mechanism? (Held, 1987: 3) indeed, even a simple definition raises questions about political participation and how this in turn relates to interests, accountability and electoral methods.

If defining democracy is problematic, justifying democracy over other conceivable forms of rule has its own set of perils and pitfalls. Consider the following familiar forms: 'first principles' arguments which suggest that democracy is consistent with the self evident principle of equality; 'intrinsic benefits' arguments which suggest that political participation is itself a worthy virtue; or 'beneficial outcomes' arguments which suggest that democracy produces a greater sum of liberty or political stability (Saward, 1996). Each of these can easily be lost in rhetorical arguments about what has produced the best outcome, the most equality or liberty, or the most stable system. In any event such variables would (a) necessarily need to be confirmed empirically on a case by case basis or (b) be continually justified against other prevalent phenomena, i.e. culture or dominant value systems. Any first principles, intrinsic benefits, and beneficial outcomes arguments will only lead to further definitional problems. Rather than become bogged down in semantic quarrels, it seems to me to be far more profitable to follow Saward (1996) and dispense with generic anti democratic arguments before we define innumerable qualities as the most 'succinct' or 'core' elements of democracy and its relationship to constitutionalism. However, before we begin it is worth making a simple starting point that all democrats could agree with: for democracy to pertain the many ought to rule the few as opposed to the few ruling the many (although I will naturally stop short of saying how they should rule). It is worth while taking a risk with a 'thin' definition because it then becomes easier to identify generic anti democratic arguments.

All serious generic anti-democratic arguments rest on two claims, one procedural the other substantive. First, that in some organisational and institutional form the few should rule the many and, second, that they should so rule rests upon the (generally self-proclaimed) possession of superior knowledge. There are of course a variety of takes on this theme: vanguardism; enlightened despotism and; theocratic rule; all share the central view that there are a minority who either 'know', or can show the rest of us the way to emancipation or enlightenment. As Dahl (1989) points out in his discussion of guardianship such claims constitute the most formidable challenge to proponents of democracy, and arguably constitutes one of the most desirable systems of rule. We might all imagine a political community in which 'we, the ones that know' have a greater say in collectively binding decisions than the rest of the community. We could also think of a range of criteria as a qualification for such advantages: all those with a first degree can possess two votes; those with a postgraduate degree three votes and so forth. As Dahl argues:

> ...Rulership should be entrusted to a minority of persons who are especially qualified to govern by reason of their superior knowledge and virtue (1989: 52).

In tackling this, Saward (1996) has argued not only that superior knowledge is hard to attain, but also that it is virtually impossible to know when it has been attained (1996: 80). There are, of course, technical and procedural claims to superior knowledge that we are socialised to trust: the knowledge of doctors and lawyers for instance. However, there are no grounds to claim that that the ethical substance of their associated actions constitutes knowledge of a similar kind. As Walzer

(1983) notes with reference to Plato's seafaring metaphor, we only trust the navigator after we have told him where to go:

> ... The pilot doesn't choose the port; his *techné* is simply irrelevant to the decision that the passengers have to make, which has to do with their individual or collective purposes and not with the seasons of the year, sky, stars, and winds (1983: 286).

Although moral judgements are nearly always necessary for intelligent decision making, such moral judgements will always be fluid. This does not necessarily mean that the truth can never be known, it simply implies that we are never certain that our knowledge is absolutely right; there is always the chance that we might be wrong. Essential human fallibility then provides one argument against the notion that the few should rule the many. We can flesh this out by considering three more reasons why elite, expert or technocratic rule of the few can never be justified.

First there is a necessity to acknowledge that contemporary states and societies have become extraordinarily complex. This complexity operates at empirical and theoretical levels. An increase in the specialisation of tasks, functional differentiation and the development of quasi-autonomous sub-systems indicates that there are very few with enough expertise to fully grasp the resultant administrative complexity. (Zolo, 1992; Rhodes, 1988; 1996). This type of argument conjures up images of a worst case scenario: ill informed political actors coupled with a dominant technocratic officialdom. The implications for democratic arguments are all too clear. However, even if we accept such arguments about complexity, the degree of specialist knowledge required in complex societies is by definition self limiting. One may become technically accomplished in 'one' thing but will certainly remain ignorant of other things, thus limiting one's ability to make informed judgements about the empirical world and about all feasible alternatives and their consequences (Dahl 1989). Second, *contra* Plato and his followers, the 'royal science' of political knowledge simply does not exist. There is no single science, let alone a majestic science of governance, which could conceivably unify instrumental and moral knowledge (Dahl, 1989). Third, even when purely instrumental decision making is called for it often requires assumptions that are not in the least bit technical or scientific about the way the world works and reacts (Dahl, 1989: 77). These points however only tell us of the difficulties in justifying expert rule it does not necessarily constitute an argument for democracy. Clearly, we need something else. Of all the democratic arguments that can be utilised in support of such scepticism, the most persuasive is one which focuses upon interests.

Any claim to superior knowledge concerning the ethical substance of governance will ultimately rest on the belief that it is possible to know the interests of others. We might concede that on some issues it is possible for politicians and administrators to know the best interests of others, but the ability to gel together a complex array of changeable issues into a complete picture of an individuals' interests is virtually impossible. Any claim that a political authority can know the interests of individuals and groups should at best be regarded as spurious. This type of reasoning pushes us toward the notion that individuals must be regarded as the best judge of their own interests. Can such an argument be sustained? Goodin, (1990) for example thinks not. He argues that people are poor judges of a number of crucial interests, particularly those that require long

term probability calculations. Long term calculations that require an understanding of innumerable possible outcomes are always subject to a range of ill thought out short term biases: Why do I need to pay that much for a pension? Why should I give up smoking? Why should I avoid high fat foods? Allied to this, of course, is a notion of how interests and preferences are framed. It is by no means clear that people have even adequate, still less perfect, information to rationally judge interests and form preferences in the first place. Goodin's arguments need to be considered carefully because he can show that people are unlikely to be 'technically' the best judge of their interests. This however does not tell us who, if anyone, is the best or a better judge. Indeed such a judge can never be known. There is a myriad of psychological mindsets, cultural preferences and historical forces which all cumulatively have an influence upon how our interests are perceived. The notion that it is possible to tap into such a mental state is extraordinarily difficult, if not impossible, to demonstrate. In the absence of any convincing argument to the contrary, the near impossibility to psychologically know the full range of others interests forces us to consider people to be the best judges of their interests.

If people are considered to be the best judge of their own interests, then it must logically follow that they be furnished with the freedoms, resources and autonomy necessary to judge them. Similarly, in the absence of any person or group with superior knowledge, we can make a strong assumption that all people be regarded as equal in their capacity to do so. The ability of individuals to freely and equally frame and pursue interests being a prerequisite to a given people making an impact upon collectively binding decisions, enables us to follow Beetham (1992) when he defines democracy as a:

> Mode of decision making about collectively binding rules and policies over which the people exercise control, and the most democratic arrangement to be that where all members of the collectivity enjoy effective equal rights to take part in such decision making ... one, that is to say, which realises to the greatest conceivable degree the principles of popular control and equality in its exercise (1992: 40)

However, it ought to be clear here that the equality that is referred here to is an equality assumption not a foundational claim of human equality. It is an assumption that all people are worthy of equal moral consideration in political affairs, not a foundational claim about the intrinsic equality of all human beings.[17] If, as has been argued above, we can consider the claim to superior knowledge to be the defining feature of generic anti democratic arguments, the falsification of such claims leaves us with democracy. In part answer, then, to the three requirements that we started with we can argue that the philosophical foundations of democracy are to be found in a critique of superior knowledge claims and the affirmation of the best-judge principle. From these arguments we can

[17] The notion of 'intrinsic equality' is best encapsulated by Locke (1689/90) when he says that "...the equality that I there spoke of ... being that equal right that every man hath, to his natural freedom, without being subject to the will or authority of any other man". This view, underpinned by a religious imperative (we are all gods children, equally) has been criticised most forcefully by Dahl (1989) who argues that the idea of intrinsic equality is weak for two reasons. First it does not specify what human interests or goods are, thereby as a concept it is unable to set adequate limits

derive an assumption of equality and subsequently employ Beetham's (1992) two principles, defining democracy as political equality and popular control. Does such a definition allow for the many to rule the few? Democracy should not really be understood in any other way than in strictly procedural terms. That is to say there can be no constraint upon what 'the people'[18] freely organised will choose, save for the constraint against abolishing the conditions necessary for democracy itself. This constraint preserves the link between the preferences of the majority of citizens and the outcomes produced, without negating the long-term preservation and development of democracy. This does of course demand a defence of a particular type of majority rule and an explanation and discussion of the conditions necessary for democracy to prevail.

Majority rule is often strongly defended on the following three premises. First majority rule maximises the number of persons who can exercise self determination. Second, majority rule conforms to reasonable requirements of a decision rule: it ought to be decisive, anonymous (e.g. not favour one voter or set of voters), neutral, and positively responsive. Third, on the basis that the pooled judgements of the many will be wiser than the one or the few, majority rule will have a far greater chance of producing correct decisions. Each of these constitutes a formidable argument but is too easily refutable. All these three justifications for majority rule depend upon a number of assumptions. First there is an assumption of political homogeneity. Strict majoritarianism could only be favoured in a demos where there is a high degree of consensus about political goals, and where majority decisions are unlikely to damage the interests of the minority. Second, the political system must be assumed to be relatively fluid, thus ensuring that today's minority could reasonably be expected to form part of tomorrow's majority. Finally, majority rule is assumed not to undermine the security of minorities in matters of religion, language and security. On virtually all points, countries which practise majoritarian rule very rarely come close to reaching a stage which can warrant making these assumptions.

The problems associated with majority rule have traditionally concerned liberals who have been as critical of the potential 'tyranny of the majority' as much as they have been scornful of elite, expert or minority rule - indeed it is axiomatic of the constitutional tradition as discussed thus far that majority rule needs to be regarded with a high degree of scepticism. However, majority rule need not be 'unlimited' rule. If we define democracy as political equality and popular control, it would be plainly anti democratic to place restrictions upon these institutions by virtue of the democratic process. In short, if democracy is a 'good thing' then we ought not to abolish it, nor can we abolish those things central to the democratic process. I would contend here that the process of democracy cannot be used to end democracy itself. There are certain conditions that are bound up in the logic of democracy and it would therefore be counter to that logic to recast or abolish its central tenets. It becomes what Elster (1988) describes as 'self binding' . This brings us to the important matter of what conditions are necessary to the democratic process. So far, we have labelled them loosely as political equality and popular control, but what does this mean in practice?

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upon inequalities. Second, and as a consequence of the first weakness, it does not allow for individuals to best judge their own interests; which is further developed in this thesis.

[18] For present purposes 'the people' is limited to adult members of a political community except for transients and the mentally deficient (see e.g. Dahl 1989).

In addition, what kinds of institution are necessary for the preservation of these qualities and can such institutions be assured under conditions of majority rule?

Liberalism and Democracy

Following Beetham (1993), democracy has been defined as political equality and popular control and justified on grounds of scepticism about superior knowledge claims concerning personal or collective interests. What follows outlines the conditions and institutions required for democracy to exist, and looks in particular at the close relationship between liberalism and democracy. This section develops the argument that liberal fear of a dominant majority faction provided an essential platform for the development of democracy. However, at the same time these fears acted, paradoxically, as a constraint against further democratisation.

Robert Dahl, in a variety of major works (1979; 1985; 1989) has made the powerful case that democracy has a number of essential components. In his discussion of 'polyarchy' (Dahl's particular term for liberal democracy), he argues that for democracy to exist the following institutions have to be present: (1) Elected Officials. Control over government decisions about policy is constitutionally vested in elected official's (2). Free and Fair Elections. Elected officials are chosen in frequent and fairly conducted elections in which coercion is comparatively uncommon. (3). Inclusive Suffrage. Practically all adults have the right to vote in the election of officials. (4). Right to Run for Office. Practically all adults have the right to run for elective offices in the government, though age limits may be higher for holding office than for the suffrage (5). Freedom of Expression. Citizens have a right to express themselves without the danger of severe punishment on political matters broadly defined, including criticism of officials, the government, the regime, the socio-economic order, and the prevailing ideology (6). Alternative Information. Citizens have the right to seek out alternative sources of information. Moreover, alternative sources of information exist and are protected by laws. (7). Associational Autonomy. To achieve their various rights, including those listed above, citizens also have a right to form relatively independent associations or organisations, including independent political parties and interest groups (Dahl, 1989: 321-327).

For these institutions to be meaningful a number of social criteria need to be fulfilled which Dahl describes as:

- Effective participation - citizens must have adequate and equal opportunities to form their preferences, to place questions on the public agenda, and to express reasons for affirming one outcome rather than another.
- Enlightened understanding - citizens must enjoy ample and equal opportunities for discovering and affirming what choice in a matter before them would serve their interests.
- Voting equality at the decisive stage - each citizen must be assured that his or her judgement will be counted as equal in weight to the judgements of other citizens at the decisive stage of decision making.

- Control of the agenda - the *demos* must have the opportunity to make decisions as to what matters are and are not to be decided by processes that meet the first three criteria.
- Inclusiveness - the provision of the powers of citizenship to all mature persons with a legitimate stake in the polity (i.e. transients and visitors can be exempted) (Dahl, 1989: 310 -311).

As Dahl would freely concede (1989: 330) many of these conditions have their roots in the liberal tradition, yet such assertions are not without complication.

Liberalism and democracy often make uneasy political bedfellows. The core concerns and key principles at the heart of these concepts can in many instances seem to be entirely at odds, yet in crucial areas the importance of each to the other cannot be underplayed (Holden, 1988; Arblaster, 1984). Beetham (1992) for example has argued that liberalism has been both a necessary platform for the development of democracy and a powerful constraint against future democratisation within nation states. In this respect liberalism has often been janus faced with regard to democracy: interrelated, interconnected and necessary yet at the same time a potential restraining force. For Beetham (1992) there are five objectives shared by liberalism and democracy that have proved to be indispensable to the establishment and consolidation of both. First, freedoms of expression, association and movement codified as rights and subject to constitutional protection. The establishment of civil and political rights has been essential to the development of liberal constitutionalism and constitutional democracy. If these rights were absent, it would be hard to imagine democracy functioning at all. As Beetham rightly argues, without such rights to organise political parties, seek public support and naturally to vote, democracy would be meaningless (1992: 42). Second, the separation of powers, underpins the rule of law and secures the subordination of state officials to the legal process. Without legal redress against maladministration of officials, critical ingredients of democracy would be absent. Third, the institution of the representative assembly elected through open competition and with powers of taxation, legislation and scrutiny of the executive. The representative assembly has established itself as the most enduring, if not the most effective, channel of popular control in the context of a territorially bounded nation state. Fourth, the principle that the state should be subject to certain limits, and that there exists a distinction between the public and private spheres. Private in this sense being civil society and the market and private denoting the family and personal relations and the realm of personal conscience. The separation of state and civil society into private and public spheres allows for private space to develop preference formation independent of the influence of the state. Fifth, the strong epistemological premise shared by liberalism and democracy that there are no final truths about the source of the good life. In this sense, the only criterion for establishing the public good is that chosen by a freely organised people (Beetham, 1993: 56-57).

Historically speaking any attempts to dissolve these liberal features in the name of a higher stage of democracy only results in something anti-democratic in its place. History is replete with examples of what Ted Benton (1983) calls the 'paradox of emancipation'. In all examples where

liberal democracy has been suspended in the search for some 'higher' or 'purer' form of democracy, the result is exactly the opposite to what was sought. As Beetham argues:

> One thing we have learnt by the end of the twentieth century is that attempts to abolish these liberal features in the name of a more perfect democracy have only succeeded in undermining the democracy in whose name they were attacked. Thus the very idea of individual rights has been attacked in the name of the popular will, the collective good or the realisation of a higher form of freedom; the separation of powers has been eroded in the name of people's justice; the powers of a representative parliament have been neutered in the name of direct democracy, or functional representation, or soviet power; the separation between the public and private spheres has been abolished in the name of bringing all aspects of social life under democratic control; and the pluralism of ideas about the common good has been dismissed as a source of error and confusion in the face of established truths about the ends of human life or the future course of history ... have typically undercut the democratic ground from under their feet (Beetham, 1992: 42).

The conditions and institutions for democracy to prosper thus owe a substantial debt to political liberalism. The establishment of civil and political rights; separation of powers; representative assemblies; private and public spheres and moral pluralism has been significant to the institution and development of political equality and popular control, but, not entirely adequate.

Putting aside the concept of representative assemblies, it is certainly arguable that the remaining points advance prerequisites for the establishment of self-determination. By this I mean free and equal individuals capable of rationally deciding and justifying what is in their interests, and thus entering into self chosen obligations and responsibilities free from coercion. However, if the establishment of self determination means the ability to weigh up the relative merits of alternative courses of action and utilise resources to make reflective decisions, one has to question how far liberalism can lay claim to successfully implementing the conditions necessary for political equality.

It would clearly be unfair to suggest that liberals have not shown a concern for political equality. In different times and in different contexts liberals since Locke have advocated various conceptions of freedom and equality. The right to self determination, the absence of arbitrary rule and a conception of individuals as bearers of rights enabling them to pursue their own interests have all been principal liberal concerns. The problem here is the extent to which liberals have been less concerned with exploring the real circumstances of how people lived, and have misunderstood the conditions necessary for the fulfilment of political equality. For Held (1987; 1995) this has primarily concerned two principal institutions: a particular conception of the family on the one hand and a vigorous defence of private property rights on the other.

In defending a hierarchical division of labour within the family, classical liberals (with the arguable exception of John Stuart Mill) excluded women from active citizenship because fathers or husbands represented their interests. It was for feminists and democrats, not liberals, to advance often with violent struggle the rights of women and other disenfranchised groups. However, the eventual granting of universal suffrage only served to reveal quite different and deeper structures

which keep women and other groups politically unequal (Phillips, 1993; Held 1987). For liberals, the granting of the vote and the institution of regular elections was regarded as sufficient to fulfil all the obligations of political equality. That there were deeper inequalities of wealth, information, education, access and voice which impact upon the exercise of those rights necessary to democracy, were systematically overlooked. The point is that these rights are necessary, but they are pointless if they are not tangible. An equal right to vote, like an equal right to stand for election is a formal equality; we all have an equal right to choose to sleep at the Ritz, few however have the necessary resources.

Similarly, the vigorous defence of the market and private property against collective interests have tended to engender significant inequalities in income and wealth. These economic inequalities have manifested themselves as political inequality in two ways. First, those with income and wealth are able to secure more access, information, education and voice in the political system than those without, and second, the ability of those without income and wealth to exercise political voice can be significantly compromised. The conditions for political equality have always occupied the minds of democratic theorists, yet not until recently has the relationship between democracy and the principles of private property been brought into question (Bowles & Gintis, 1986; Dahl, 1985:1989; Held, 1987). Dahl (1989) for example has argued that:

> ...If income, wealth and economic position are also political resources, and if they are distributed unequally, then how can citizens be political equals? And if citizens cannot be political equals, how is democracy to exist? Conversely, if democracy is to exist and citizens are to be political equals, then will democracy not require something other than a market oriented, private enterprise economy, or at the very least a pretty drastic modification of it? (Dahl, 1989: 326).

Liberal resources then can only go so far in providing the full conditions necessary for the realisation of political equality[19]. Liberalism can systematically underestimate the conditions required by the democratic process, but *qua* Beetham is, paradoxically, also essential to it. The argument that will be returned to, and further developed in this chapter, suggests that if civil and political rights are to be fully realised they will almost certainly require a range of social and economic rights.

Drawing this back to the justification of majority rule it is clear that the democratic process is to a significant extent contingent upon resources. These resources however are inextricably bound up in the logic of democracy itself. Key criteria such as the protection of minority rights, the resources for effective participation and enlightened understanding are ones that simply cannot be bargained away by majorities without undermining the process of democracy itself. It is in this

[19] Although it is outside the present remit, it is worth making the point that the types of structures that a vigorous defence of the market produces go beyond traditional material inequalities. Lindblom (1977), amongst others, has argued that the structural position of capital enables it to systematically limit policy options. The fact that private decisions tend to have major public implications, i.e. investment levels, unemployment levels, levels of economic growth. Government, in order to ensure its own survival tends to favour policy choices, which are biased toward the interests of large corporations.

respect that constitutionalism and democracy become interdependent. The most appropriate means of protecting the democratic process is to cement it within a constitutional order. Proper guarantees against encroachments by the state or organised majorities outside the state must be protected by the due process of law, thus ensuring that the durability of fair systems of majority rule rest upon the backing of a wider majority. Similarly, the endurance of any constitutional system depends upon both the popular commitments to it and the legitimacy that it commands. As MacCormick argues, the velvet revolutions of 1989 testify that even the most powerful systems of state coercion and ideological hegemony may fall foul of popular dissent (MacCormick, 1993: 144). Democracy may require cementing in the form of a constitution but constitutionalism itself is critically dependent upon democracy.

The second building block of a core model of constitutionalism then, is democracy both defined and justified as political equality and popular control and the full conditions required to realise it. Thus far, it has been argued *inter alia* that the conditions for a fully-fledged constitutional democracy have a crucial dependence upon the establishment of constitutionally derivative rights. This goes beyond the civil and political rights commonplace to the constitutional canon and encompasses socio-economic rights as well. This aspect demands further exploration and a further elaboration of the tensions between liberalism and democracy concerning the extent of rights claims.

Rights

The importance of constitutional rights has already been outlined above, yet further questions remain unresolved about the scope of rights claims. This section looks more closely at the nature and scope of constitutional rights. In particular the inclusion of socio-economic rights is considered alongside civil and political rights as core elements of a political constitution.

The liberal and republican concern with limiting power and establishing the principle that individuals must be regarded as the best judge of their own interests, reflected a movement away from the absolutist notion that a uni-dimensional political authority can establish the public good. This shift was toward recognition of individuals as bearers of a diverse range of interests and desires: toward rights. In this view the powers of the state and the powers of individuals with regard to the state can be defined and limited in the light of the existence of basic, natural or human rights (Plant, 1991: 253). It would be useful at this point to clarify the context in which rights will be employed here. We can discuss rights as a point of moral philosophy, e.g. 'what rights do individuals have'. To answer this question demands a consideration of what rights a person *ought* to have and what the state *may* or *may not* do to (or for) an individual. Alternatively, we can make an empirical proposition 'what rights do citizens have in this political community'? Answering this question demands an investigation of case law, which may have established precedents regarding what rights may be justifiably claimed.

To make a distinction between human rights and institutional rights has tended to imply that there are different analytical schemes for the discussion of rights: a theoretical framework on the

one hand and an empirical one on the other. (Plant, 1991, Kymlicka, 1991; Bellamy 1992; Steiner, 1991). Some theories of rights claim that they are universal and inviolable, this is to say that they ought to be applicable to all persons in all political communities and social groups (Nozick, 1974. Others such as Rawls (1972; 1993) and Barry, (1991[a]; 1991[b]; 1996) have adopted a more contractarian approach and use heuristic devices and hypothetical models of social choice to deduce what rights individuals would choose under conditions of moral equality. Others follow traditions of ethical relativism and claim that rights can simply be 'good things' amongst a variety of other good things in particular, but not all, political communities (Walzer, 1983; Rorty, 1982). Institutional rights on the other hand tend to focus upon the rights recognised and incorporated into specific legal systems. This section concerns itself with both approaches. We want to know how far the rights discourse extends into constitutions that we know about, but we also want to give a convincing account of constitutionally entrenched rights, which cover civil and political freedoms and socio-economic freedoms. Both of these, it will be argued, are necessary requirements of constitutional democracy and hence constitutionalism.[20]

Why do we talk about rights in the context of constitutions as opposed to say interests, needs, or general welfare? One practical answer is that virtually all states which have not had (and indeed do not have) a well-developed culture of rights have been responsible for heinous acts of cruelty against humanity. The essence of such a claim is captured by the preamble to the UN Declaration of Human Rights:

> Disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and freedom from fear and want has been proclaimed as the highest aspiration of the common people (United Nations Declaration of Human rights and Fundamental Freedoms)

Plant (1991) gives a further indication of the necessity for rights when he argues that rights give some kind of moral foundation to the way the state can treat its citizens. By defining what citizens may do to one another and how they are in turn treated by the state, rights also serve to further fragment the concentration of power. Rights may not be transgressed, regardless of what utility can be derived from transgressing them, even if such transgressions reflect the preferences of the majority in the political community (Plant, 1991: 258). Rights tend to form that special category of claim against state action because they act as a 'trump card' against the wishes, interests, happiness or welfare of the majority.

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[20] The existence of fundamental human rights is a major philosophical dispute. Bentham famously argued that theories of rights constitute 'nonsense upon stilts'. More recently Alisdair Macintyre (1981) argued that there is no such thing as rights and belief in them is akin to a belief in unicorns and witches. Richard Rorty (1993) equates claims of human rights with outmoded foundational political theory. He argues that the search for rational and universal foundations that are not context dependent is intrinsically misguided because it confuses the possibilities available to political philosophy. In response, writers such as John Rawls (1971; 1993) and Alan Gewirth (1982) have attempted to build a 'constructivist' theory of rights based upon intuition and rationality. For them human rationality is independent of tradition and socio-cultural context but is 'thin' enough to

What rights though are necessary to a constitutional order? Constitutional freedoms have generally taken the form of negative rights as opposed to positive rights. In noting this difference I follow Berlin's (1958) famous distinction that negative liberty concerns a person's freedom when there is an absence of restraint: someone is 'free from' something. Positive freedom, by contrast, is linked to a person's ability to realise a particular goal: someone is 'free to' realise some goal or other. In the positive sense, then, persons may require certain resources to be truly free (Plant, 1991:221).[21] Constitutional rights have been the civil and political rights to life, basic liberties (such as free speech and association; freedom of thought and conscience; right to possessions; freedom of movement), and a fair trial. Rights claims such as the right to unemployment insurance, medical insurance, old age pensions, which go beyond civil and political rights have only rarely been incorporated into the constitutional canon.

Civil and political rights reinforce the constraint upon arbitrary rule implicit in the separation of powers model quite simply because they disperse power and introduce a higher authority in the form of judicial enforcement. Whether rights are written into the constitution as for the Federal Republic of Germany, or become the subject of a major amendment as for United States, they are more than a statement of intent or good on behalf of the government because they are enforceable in the courts. The enforcement of rights constitutes a paramount commitment to protect basic freedoms and to protect minorities against the tyranny of the majority. All of these commitments become meaningless without an understanding in law and culture that the constitution and its provisions are always binding on both government and people.

The 'rule of law' as Hood-Phillips & Jackson (1987: 33) note, is an ambiguous expression: From Bracton and Coke in the Thirteenth and Fifteenth Century respectively it was the identification of a higher law and legal authority than the temporal power holder. For Dicey in the Nineteenth century, it was the exclusion of official discretion, which he associated with arbitrary power.

In this instance, I will refer to the rule of law in the context of the *Rechtsstaat*. The central European idea of the *Rechtsstaat* (the state-under law) has been instrumental in linking the rejection of arbitrary authority with respect for private rights. This concept has been a commonplace of liberal political thought, and the development of liberal democratic and constitutional forms of government. In this sense the government ought to be subject to the same rules as everybody else and subject to specific limits: executives ought not be able to make up such rules and procedures in the process of governing. Intrinsic to the idea of a *Rechtsstaat* has been the internalisation of abstract conceptions of rights such that they constitute one of the fundamental premises of the state. Again, there is no need to dwell upon the idea that there might be rights anterior to a constitutional order, but we must recognise that rights have had an importance in establishing basic freedoms, legitimising the state and providing one of the necessary dynamics toward democracy.

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avoid the charge of relativism. Clearly there is no room to develop this argument fully, so I will leave this here merely as analytical comment.

[21] This distinction is not a consensual view. For a critique of eliding the difference between positive and negative freedom see G. C. MaCallum Jnr, (1967), 'Negative and Positive Freedom' *The Philosophical Review*, 76.

It has already been mentioned that bare negative rights might not be sufficient as conditions for constitutional democracy, and I have commented that socio-economic rights have generally been absent from the constitutional canon. The following fleshes this out and makes strong claims for the inclusion of positive rights in a core model of constitutionalism. In so doing, consideration is made of two central arguments against socio-economic rights: first that they are vague, imprecise, lack clarity and are not always possible to fulfil; second, even if they can be adequately defined, the nature and extent of state intervention necessary to implement them will undermine individual freedom and liberty. Indeed contemporary examples tend to illustrate the point. For instance, in one of its most famous decisions, the US Supreme Court held that the due process clause of the fourteenth amendment severely limited government interference with a woman's right to have an abortion. At the same time however, it made it perfectly clear that the government was under no constitutional obligation to subsidise abortions for women who lacked the financial security to pay for it.[22] In a recent judgement, the court reaffirmed this principle in holding that the state had no constitutional duty to protect a child against violence by its own parent:

> [n]othing in the language of the Due Process Clause itself requires the state to protect the life, liberty and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law', but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. (*DeShaney* vs. *Winnebago County Dept of Social Services*, 1989: 109 S. Ct., 998,1003)

The US constitution is a fair example of how social and economic rights are treated in the modern constitutional lexicon[23]. In addition it is no easy matter to make the case for social rights. Social rights are so inherently open ended and have such imprecise boundaries that their realisation is not likely unless it is backed up with executive and legislative definition. The theoretical problems are all too clear. Forsthoff (1954), has commented that:

> Social rights such as the right to protection of the family, motherhood, and youth cannot be captured in an enforceable, abstract norm in the same way as a civil or political right (Forsthoff, 1954: 8).

These problems of definition have practical problems of implementation. If an argument for social rights is to be sustained, such rights have to be formulated so that they can be clearly specified and

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[22] Roe vs. Wade (1973).

[23] Notwithstanding this it is worth noting that they have not been totally ignored. Perhaps the best two examples are that of the new French Constitution in 1789 and the Weimar Constitution of 1919. The French Constitution of 1791 required the state to establish a system of public education, a programme of public assistance and, employment relief. The Weimar Constitution of 1919 granted positive rights in the form of public services, social insurance and employment. Although the German Basic law and the constitutional courts of the French Fifth Republic do not enforce positive rights in any meaningful way, the establishment of the principle, qua Goodin, forms an important organising perspective within the political culture.

practicable. This follows an essentially Kantian dictum that ought implies can: if I have a duty then I must be able to discharge it. It further follows from the elementary requirement that we should be able to ascertain whether a right has been upheld or not, and when it has been infringed or violated. In this respect civil and political rights (narrowly defined) take on a philosophical elegance. Fried (1978) puts it well:

> It is logically possible to treat negative rights as categorical entities. It is logically possible to respect any number of negative rights without necessarily landing in an impossible and contradictory situation ... Positive rights, by contrast, cannot as a logical matter be treated as categorical entities because of the scarcity limitation. It is not just that it is too costly to provide a subsistence diet to the whole Indian subcontinent in time of famine - it may simply be impossible. But it is this impossibility which cannot arise in respect of negative rights (Fried, 1978: 270).

There is a clear philosophical case against socio economic rights: they are vague and indefinite, subsequently there is an absence of clarity in determining the corresponding duty. Negative rights on the other hand are clear, precise and unambiguous.

A second, arguably more compelling case, originates from liberal theories of justice and draws upon the work of Robert Nozick (1974) and F. A Hayek (1944; 1960; 1982). In different ways these theorists seek to undermine claims for social justice. For Nozick this is a based upon a strong negative conception of rights derived from Locke. For Hayek the criticism of socio economic rights stems from his belief that only transactions within an unfettered market environment are likely to realise just rules of distribution.

Hayek, in defending the primacy of the market as the principle mechanism for the distribution of resources denies that the language of justice may be applied when impersonal processes have caused unintended consequences. Hayek points out that the market functions within a framework of diverse desires operating under general conditions of ignorance. The key for Hayek is that these conditions of ignorance predispose market orders to spontaneous, as opposed to patterned, distributional outcomes. In other words, a market order requires the spontaneous action of innumerable persons who are acting without any other intent than to maximise their own self-interest as they see it. Taken together these spontaneous actions produce outcomes that cannot be known in advance by market actors. Consequently, no actor can be held responsible for the outcome of fair market transactions even if such an outcome produces poverty for some because the consequences were not intended by any of the participants. He argues that:

> ... the market mechanism would in many instances have to be regarded as very unjust *if* it were the result of a deliberate allocation to particular people. But this is not the case. Those shares are the outcome of a process the effect of which on particular people was neither intended nor foreseen by anyone when the institutions first appeared - institutions which were then permitted to continue because it was found that they improve for all or most the prospects of having their needs satisfied. To

> demand justice from such a process is clearly absurd, and to single out some people in society as entitled to a particular share evidently unjust (Hayek, 1982: 64-65).

For Hayek the concept of social justice has no role or meaning in an economic order based on the market. Neither is it desirable that some other agency interferes with market processes to redistribute society's resources according to some assessment of individual performance within it. Should this happen, the logical outcome is steady progression toward an authoritarian political order. The pursuit of social justice can only be realised in a directed economy where actions 'are guided by specific directions and not by rules of just individual conduct' (Hayek, 1982: 69). In the market order where individuals and groups pursue their own interest, and where the difference in material outcome is not the result of a predesigned pattern, the concept of social or redistributive justice is wholly inapplicable.

What underpins this is the belief that there are no overarching moral rules for the distribution of benefits and that the particular kind of spontaneous order in which societies prosper is analogous to a game. This game is played out in conditions, which ensure that superior skills and chance determine the winner; the outcome of which is entirely generated by spontaneous action. For the state to intervene to adjust the outcome of this spontaneous order is a pointless and self defeating project for it always results in less general social welfare. The logic of this argument is fairly simple. By pursuing the 'mirage of social justice', socialists and social democrats have undermined the stability of the market order and the wealth that it creates. By confiscating the wealth of the successful and redistributing it, they prolong the dependency culture of the needy, entrench organised interests and override individual freedom (Pierson, 1992: 85). The result is not only that the spontaneity of the market order is corrupted, but that the state has used 'illegitimate' coercion to alter the outcome of market exchanges. In this sense coercion describes state intervention which circumvents the free liberal order which, as Held (1990) has summarised, Hayek believes to be:

> ... Incompatible with the enactment of rules which specify how people should use the means at their disposal. Governments become coercive if they interfere with people's own capacity to determine their objectives ... Distributive justice always imposes on some other's conception of merit or desert. It requires the allocation of resources by a central authority acting *as if* they knew what people should receive for their efforts and how they should behave (Held, 1990: 175).

A free market economy and the limits on political action required to achieve it is, for Hayek, a prerequisite for a free and democratic polity. To prevent the state from interfering with the market order He proposed a range of constraints aimed specifically at insulating the economic sphere from the political. These measures are concerned explicitly with producing a condition of justice in which freedom is preserved by institutions of the state protecting entitlements through a system of property rights and the rule of law. Hayek's proposals, although in some senses bizarre, are nevertheless a logical conclusion to his arguments about justice and coercion.

In the first instance government ought to be bound within the principles of the rule of law. This is more than simple constitutionalism, because Hayek follows a traditional conception of constitutions, which could conceivably be any action allowed by the constitution. The rule of law for Hayek is not simply *a* rule of law but '...a rule concerning what the law ought to be, a meta legal doctrine or political ideal...' (Hayek, 1960: 206). Hayek's 'basic principles' (Hayek, 1982: 111) are based upon universal rules which uphold an abstract order. Hayek is unclear about the full content of these rules, but would require limits upon what government may do and would go beyond the traditional contents of a Bill of Rights. In short, the state may only use its powers of coercion if it can be shown to uphold the universal rules of a just order, i.e. that which is based upon the principle of individual liberty and that, which is produced by spontaneous market transactions.

Putting aside constitutional implications and returning to social justice, Hayek does have some problems, for he assumes that free and equal individuals are a feature of market societies. The free and equal individual however, is rarer in market societies than Hayek tends to think. The structural inequalities that exist in market societies (inequalities of region, wealth, resources, gender and ethnicity) all raise a significant question mark over Hayek's conception of a just market order. Far from the state acting to produce emiseration it is the market order which produces structural constraints upon freedom. These constraints which are imposed by the market order cause a radically uneven distribution of liberty relating to resources of both social (e.g. race, culture, gender, disability, region and sexual orientation) and material kinds (e.g. wealth and income). Hayek would rule out these effects by definitional fiat because they involve distributional questions, which are contrary to his conception of the rule of law.

The freedoms necessary to pursue one's ends in the marketplace ought, by implication, to be tangible freedoms that can be actualised. If these freedoms cannot be realised Hayek is in some difficulty for he would need to use state power to enforce what he takes to be self evident. Difficulties also arise when one considers the notion of unintentional consequences of market activity. Hayek is correct to argue that in a free market we cannot predict what the outcome may be for individuals but this is not the only way of conceptualising justice. Plant's critique (1992) is particularly cogent in this case. Plant argues that we may well not be able to consider the individual outcomes of market action, but that does not preclude us from thinking about groups. If, for example, groups who enter the market with least end up with least and that, furthermore, this was foreseeable, does this still rule out intervention in the name of social justice? In unpicking this question Plant distinguishes between to 'foresee' and to 'intend'. Hayek claims that market orders are the result of unforeseen and unintended consequences however, if an outcome can be foreseen though not intended it would be untenable to claim that I hold no responsibility for that outcome. If applied to market transactions Plant suggests the following:

> (a) If as an empirical fact those who enter the market with least will tend to end up with least (with exceptions for random individuals); (b) if this is known to be the case as a foreseeable general outcome even though it is not intended; (c) if there is an alternative course of action available namely some redistribution in the interests of social justice; then ... those who support the market do bear some responsibility for

> the least well off even though they do not intend that these people should be in this position ... (Plant, 1992: 92).

In both cases then, without some state action to redress inequalities Hayek's argument begins to look a little less formidable, and his conception of the liberal state of justice a little less justifiable.

Robert Nozick (1974), like Hayek, also rejects socio-economic rights on the basis that it imposes some kind of pattern on a market order although his argument is predicated upon a slightly different, and much stronger, conception of individual rights. Nozick's theory is essentially rights-based. For him:

> Individuals have rights, and there are things no person or group may do to them (without violating their rights). So strong and far reaching are these rights that they raise questions of what, if anything, the state and its officials may do (Nozick, 1974:10).

In providing an answer to these questions Nozick is unequivocal, 'the minimal state is the most extensive state that can be justified, any more state violates people's rights' (Nozick, 1974: 7). A minimal state in Nozick's terms means a state that is limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts and so forth. Such a state will naturally emerge he argues, from a state of nature for the mutual benefit of individuals. Nozick initially gives us a strong conception of individual rights, which take precedence over almost any other human attribute. Nozick is however ambiguous about what these rights are and why indeed we have them. What he does spell out is a number of circumstances where such rights may hold sway over other claims. In Nozick's scheme, there are two interrelated ideas here. First the inviolability of persons refers to the notion that there is no value greater than human life and there are no good ends to which one individual may be used for the benefit of another. Second, the principle of separate existence is used to justify why we may not be used for the benefit of others regardless of outcome. As Nozick puts it:

> ...there is no social entity with a good that undergoes some sacrifices for its own good. There are only individual people, different individual people with their own individual lives. Using one of these people for the benefit of others uses time and benefits the others. Nothing more...This root idea, namely that there are different individuals with separate lives and so no one may be sacrificed for others, underlies the existence of moral side constraints (Nozick, 1974: 32-33).

Given these constraints there is no procedure to preserve or enhance the greater good that justifies the infringement of individual rights. It is here that Nozick's hostility to socio-economic rights takes shape. He argues that 'most contemporary theories of social or distributive justice are incompatible with such rights in that they involve continual interference in and coercion of individuals' (Plant, 1992: 125). The reason for this is that the pursuit of social justice cannot be seen as a one-off interference by the state at any particular time to redistribute individual's possessions, because acquisition, production, exchange and transfer are on-going events. Nozick distinguishes between current time slice principles of distribution (end state principles of justice),

i.e. 'to give someone more now to counterbalance the less he had earlier' (Nozick, 1992: 143) from historical principles of justice which hold that 'past circumstances or actions of people can create differential entitlements or differential deserts to things' (Nozick, 1992: 143). To interfere with these different holdings or property without necessarily demonstrating a historical injustice may be an injustice in itself:

> An injustice can be worked by moving from one distribution to another structurally identical one, for the second, in profile the same, may violate people's entitlement, or deserts; it may not fit the actual history (Nozick, 1974: 143).

Justice then for Nozick is less concerned with what people have now, but how they gained their property (acquisition). If the manner in which property and wealth have been acquired is just (i.e. did not conflict with individual rights) and not based upon some patterned principle, the state has no right to redistribute resources because of some general proposition about equality, need, desert or anything else. All end state principles of justice whether they redistribute according to need, usefulness or moral merit are patterned. These patterns can only be sustained by the coercive use of state power to prevent voluntary action, which may undermine the pattern of distributive justice being proposed.

Nozick here both agrees with, and differs from, Hayek. Both would agree that the state has no legitimate right to interfere in what Nozick calls 'capitalist exchanges' to effect a different outcome to that which would be produced by the market. However, whilst it could be argued that Hayek would concede minimal state protection for the poor (Hayek, 1960; Kukathas, 1989), Nozick finds no case for the right of the poor to state protection. As Plant (1992) notes, for Nozick:

> Compulsory state redistribution of resources to meet concerns of patterned principles of social justice is incompatible with individual rights. So the poor and needy do not have any *rights* to welfare or to any particular set of resources. Of course individuals may choose as an act of generosity, altruism, humanity or philanthropy to transfer their justly held property to those who are worse off than themselves ... but this is a matter for individual choice and not for the state (Plant, 1992: 133).

Much like Hayek, there is a rejection of the good in favour of the right.

The two principal cases against socio-economic rights are formidable but a case can still be made. If we are to justify social and economic rights, we need to be able to do three things. First they have to be justified with the same foundational logic as any other rights. Second, they ought to be clearly defined, specified and feasibly justicable. Third, it needs to be shown that it follows from the duty to protect contract and property rights that the government is obliged to protect against poverty or disease.

The justification of civil and political rights, as far as we have pursued them here, has been to uphold the principles of political equality and popular control. These principles have been predicated by a strong assumption of equality and that the rights which spring from this assumption are fundamental to a constitutional order. It is from an assumption of equality that the claim to socio-economic rights stems. What then are the necessary conditions for political equality and

popular control. In exploring these conditions, we must avoid the confusion of a right with a desire. The fear that almost every desirable 'good thing' somehow becomes a right has been well expressed by Milan Kundera (1991) who comments:

> ...The more the fight for human rights gains in popularity, the more it loses any concrete content, becoming a kind of universal stance of everyone towards everything, a kind of energy that turns all human desires into rights ... the desire for love a right to love, the desire for a rest the right to a rest, the desire for friendship a right to friendship, the desire to exceed the speed limit the right to exceed the speed limit, the desire for happiness the right to happiness, the desire to publish a book the right to publish a book, the desire to shout in the street in the middle of the night the right to shout in the street (Kundera: 1991: 3).

These examples clearly span from the sublime to the ridiculous and can result in almost unlimited demands upon others. This can be avoided, if a clearly specified set of core basic social and economic rights can be found.

Traditional rights claims, exercised within the constitutional tradition, have been essentially concerned with limits upon public power. They complement procedures of legislative scrutiny and judicial review in restraining the actions of the majority. To consider social and economic rights means that the rights discourse must be expanded to a far broader range of issues than is commonly supposed. Rights claims such as these inevitably involve certain obligations of citizens to one another as well as the traditional obligations of the state to protect individuals in possession of certain rights from coercive interference. They involve establishing the pre-conditions for political equality and popular control: not only the equal right to vote, but also equal rights to enjoy the conditions for meaningful political participation. Held (1987) puts it well when he argues that social and economic rights ensure that the authority of the state would be clearly circumscribed and that its capacity for freedom of action bounded (1987: 285). The establishment of the rule of law, or *rechtsstaat*, would involve more than simply the constraint of the state, but would involve a set of distributional questions concerning social and economic rights. In short, in order for citizens to realise formal equality before the law, they require the actual capacity to enjoy those equalities. It must be clear that the provision of such rights is necessarily context dependent. Such rights cannot be provided in an arbitrary way, because such arbitrariness in the provision of rights makes a mockery of the entire idea of rights.

The overriding justification of socio-economic rights is the recognition that in political communities rich in both resources and human knowledge, all people ought to be guaranteed the basic means for sustaining life and that those who are denied this are victims of an injustice. That they should be granted such core provisions will inevitably go beyond the demands of need and welfare and will become part of a complex mixture of conditions that go toward maintaining political equality. This can range from obvious but little recognised resources such as mobility and reading skills necessary to exercise the vote (Saward and Mills, 1993: 169-170), to basic material needs including, the right to food of an adequate nutritional value, to clothing, to shelter, to basic (or primary) health care, clean water and sanitation, and to education to at least primary level

(Beetham, 1995: 48). Beetham argues that these core rights are both universally applicable and can meet the test of specificity because it is possible to specify a level below which a given right can be denied. Although a degree of arbitrariness will always pertain, necessary nutrition will differ from person to person and clothing and shelter will vary according to climate, the necessary methods of measurement can never be too complex to measure income levels, literacy rates, nutrition levels, access levels, housing needs and school attendance rates (1995: 48). The precise content of these rights will of course differ from society to society, because needs differ, but this does not necessarily damage the argument.

To consider this further demands an exploration of the logic, which separates positive from negative rights. Following Berlin again, it is famously assumed that a negative right is a right from, whereas a positive right is a right to. However, to elide the two could well be argued to be a conceptual error.[24] In political communities that we understand and are aware of, even negative rights need some resources in order to be protected. The right to life, liberty and property would be meaningless without a well-developed system of positive provision, e.g. law enforcement, courts and judicial processes. As Plant (1991) puts it:

> The degree of protection that may be required to secure negative rights cannot be excogitated from the nature of the rights in question any more than it can in the case of welfare rights. These are matters for policy and politics but nevertheless a right such as the right to privacy does not lose its force as a bench mark against which to assess governments, any more than a right to welfare - but the extent of the institutional provision to protect a right to privacy is a contingent matter not a conceptual one and, furthermore, one which, like medical needs, will change with technological advances (1991: 277).

Such rights by their nature then will be to some extent ambiguous and contingent. Yet, in ensuring their provision they are subject to the same type of qualification as other rights. The central claim to have a right to those material resources necessary for both negative and positive rights is logically bound up in the resource requirements for political equality. It is certainly then *arguable* that socio-economic deprivation can violate the conditions necessary for political equality. As I have argued throughout this section, socio-economic rights can be defined and justified with the same foundational logic as civil and political rights and that despite the contingency and the obvious inability to be applied universally, can be institutionalised as a core ingredient of constitutionalism if the obvious limitations described above are accepted as contingencies.

This chapter has argued that *contra* orthodox understandings of constitutionalism, a legitimate political form of the constitution cannot simply be regarded as any set of rules which can uphold any given system of rule. Further, it is possible to move from a variety of competing perspectives towards a core model of constitutionalism. Consideration has been made of both

[24] This debate is both complex and highly abstract. Clearly there is no space here for a complete discussion of this, but it is pivotally important to consider this argument if progress is to be made here. For a complete overview of contending positions regarding negative and positive rights see e.g. MaCallum, op cit, Taylor, 1979; Berlin, 1969 especially, pp, 121-154; Plant, 1991 Chapter, 7.

structural provisions and rights provisions. In this sense, the political form of the constitution has been concerned as much with the realities of politics as with political theory. This has meant that the political model of the constitution has been predicated upon a necessary consideration of the question of power, the inevitability of interests and, the necessity of civil, political and socio-economic rights.

Following Madison, politics is conceived in terms of power, concomitantly a separation of powers is the most obvious structural component of constitutionalism. A separation of powers recognises that politics will be the central concern of diverse interests within the community and allows a forum for competing interests to clash. Multiple power centres also ensure that power is to some extent balanced and limited, power in this sense is harnessed as the principal means to check power. A consideration of interests also lies at the heart of the argument for democracy. The fallibility of superior knowledge claims concerning people's interests was advanced as a justification for considering people the best judge of their own interests. From this a strong assumption of equality was made with regard to political decision making and democracy was defined as political equality (at the appropriate point of decision making) and popular control (of the political agenda). Constitutional democracy was argued to have a number of core components: effective participation; enlightened understanding; voting equality at the decisive stage; control of the political agenda; and inclusiveness. Constitutionalism and democracy were argued to be interdependent. Democracy requires a constitution so that its core components can be cemented in political and popular culture, and constitutions require democracy as a means of legitimating their rule structures and establishing legal citizenship.

The structural provisions of the constitution, a separation of powers and the social and political institutions necessary for democracy are not sufficient for a core model of the constitution. The neglect of rights provisions within a realist conception of the constitution has been argued to be a conceptual error when questions of power and interests are at stake. The rights discourse, that is to say a language of rights, is argued to be a central component of constitutionalism. The core canon of civil and political rights has been justified on two grounds. First, that it fences off certain freedoms from majoritarian decision making and second that it facilitates those freedoms that are integral to any understanding of democratic citizenship. In defending a conception of social rights neo-liberal and libertarian critiques of positive liberty have been rejected on the grounds that positive rights can be defended with the same foundational logic as negative rights. Indeed, it has been suggested that to elide the difference between the two may well have theoretical problems which cannot easily be overcome.

The core model outlined here, has been derived from ancient, classical and modern sources of constitutional thought. It rests upon strong realist premises, seeing power and interests as the central motivation for political activity and therefore at the heart of institutional design. It suggests a fuller democratisation of the separation of powers doctrine developed by Madison which, following Beetham (1992), and Saward (1998), includes the definition and justification of democracy as political equality - at the most decisive point of collective decision making, and popular control - over the political agenda. Constitutionalism and democracy (as I have defined it) have been argued to be interdependent and necessary to each other if both are to prosper and develop. The model

also includes civil, political and socio-economic rights. Rights act as 'trump cards', and are the essential mechanisms which 'bind' democracy and ensure that certain conditions cannot be bargained away by majorities. These constitute the essential features of structural and rights provisions in the political form of the constitution. The model is underpinned by the notion that constitutionalism (thus defined) is not a benchmark about the legitimacy of all political systems, but a statement about those regimes which claim to be constitutional. In this sense, it provides the conceptual framework to place the constitutional traditions of the United Kingdom and ensures that some framework exists so that the discussion can be conducted within a proper political, historical and theoretical context.

Chapter 2:
The Constitutional Tradition in Britain

Everyone knows that the British constitution provides for a system of representative and responsible government (A. H Birch, 1964).

A thousand textbooks describe our government as representative and responsible, but in fact, it is neither (M. J. Vile 1988).

A very peculiar constitution which noeone intended ... whereby the government of the day decides what the constitution is (V. Bogdanor, 1996).

To understand how we're governed, and hence the power of the Prime Minister, you have to understand the power of the crown. It's like the Trinity: God the father is the Queen - she's just there and nobody knows very much about her; God the Son is the Prime Minister - who exercises all the patronage and has all the real power; and God the Holy Ghost is the Crown - the Royal Prerogative - and the Crown is a state-within-a-state, surrounded by barbed wire and covered in secrecy (Tony Benn, 1994).

In the transition to political democracy...this country underwent... no inner conversion. She accepted it as a convenience, like an improved system of telephones; she did not dedicate herself to it as the expression of a moral idea of comradeship and equality, the avowal of which could leave nothing the same. She changed her political garments, but not her heart. She carried into the democratic era, not only the institutions, but the social habits and mentality of the oldest and toughest plutocracy in the world ... she went to the ballot box touching her hat (R.H. Tawney, 1931).

The previous chapter considered the constitutional tradition in western political thought. It was argued that constitutionalism is not only the central mechanism in limiting state power (Wheare, 1966) but also the fulcrum of politics. A realist perspective on political power and interests was identified as being at the heart of ancient, classical and modern political forms of the constitution. From this perspective, it was argued that the core components of constitutionalism comprise structural provisions, in the form of a separation of powers and representative democracy, and rights provisions, in the form of inalienable rights fenced off from majoritarian controls. Structural provisions were argued to be the essential mechanism for defining, limiting and separating potential concentrations of state power, and significantly, rights provisions were seen as essential to a power politics model of the constitution.

The task of this chapter is twofold. First, to critically evaluate the traditions and theories of the UK constitution in the light of the model of constitutionalism discussed in the previous chapter. This evaluation will be concerned both with the type of politics that such a constitutional tradition has produced and with the explanatory force of the constitutional theories themselves. The discussion will concentrate on the theories and analysis of Walter Bagehot (1867) and Albert Dicey (1885). It will be suggested that the analysis, which enabled Bagehot and Dicey to distil a new constitutional doctrine in the nineteenth century, is no longer sufficient as either a descriptive or an explanatory model of contemporary constitutional politics in Britain. Of particular importance, will be a critical examination of the usefulness of the Dicean doctrines of parliamentary sovereignty, constitutional conventions and the rule of law as effective constraints against the arbitrary use of executive power. In addition, the absence of rights, both in institutional terms and within the political culture, is critically examined in the light of the case for expansive constitutional rights provisions made in the preceding chapter. Indeed, it will be suggested that it is the absence of a rights culture, which may give succour to the high concentration of executive power argued to be prevalent within the British political system. This chapter also suggests that the inability to check executive power persists because of the gradual and seamless transition of power from the monarchy to the Prime Minister. The political and structural role of the monarchy is therefore critically examined.

The second task of this chapter is to explain why Britain does not have a constitution in the form that has been developed in the previous chapter. Critical to this argument is a critical analysis of the traditional understandings of the relationship between our constitutional settlement and the 1688 revolution. Indeed, it is strongly argued here that the events of 1688 should not be considered a revolution in any sense of the term. The chapter concludes, therefore, that to move towards a more critical understanding of the forces underpinning the British constitutional tradition demands more appropriate models of politics, which can better explain the shifting locus of power and authority than those implicit in orthodox constitutional theory. Such models, which take account of the power of institutions, the role of political culture and the salience of 'path dependency' in shaping outcomes may provide a more fulsome explanation of constitutional developments, as well as the obstacles to constitutional change.

Bagehot, Dicey and the Constitutional Tradition

To ask 'what is the British constitution?' is to become enmeshed in a number of competing interpretations. The lack of a formal constitutional document ensures, as Haseler (1991[b]) notes, that any potential answers can only be unauthoritative, opinionated, ambiguous and numerous. Haseler argues that most of our pre-eminent sources of constitutional authority, for example, Bagehot (1867), Dicey (1885), Jennings (1959), Mackintosh (1968), Rose (1985), and Bogdanor (1980; 1981), all disagree over how one maps the basis of political power and legitimate authority in Britain. In this sense, it is generally undisputed that the political system of the United Kingdom has a certain peculiarity, which sets it apart from mainstream liberal democratic and constitutional systems (Jennings, 1959; Johnson, 1977; Griffith, 1979; Harden & Lewis, 1986; Brazier, 1988; Peele, 1991; Jowell and Oliver, 1994; Norton, 1984; Hood Phillips & Jackson, 1987). The lack of a single document as a primary source of reference, which holds a special political status above the ordinary law, serves to emphasise the uniqueness of the British political system. The United Kingdom is, thus, the bastion of an uncodified constitutional framework where political processes and the rights and obligations of state and people are dependent upon a curious amalgam of laws, customs and conventions. Furthermore, unlike most other constitutional systems, the British political system was never 'made' at any decisive historical moment, it has evolved and continues to evolve, it is flexible and constantly in flux (Norton, 1984; Mount, 1992). Indeed, at the same time the British constitutional tradition is not one marked by its continuity. The changes wrought by the great reform acts of 1832 and 1867 are enough to demonstrate that the shifting boundaries of power between King, Parliament, feudal magnates and the Church has not been a seamless process. Consequently, as Mount argues, there has been a gradual decline in the rights and privileges of institutions outside of central government. Greenleaf (1983) concurs with this and notes how the transition from feudalism to industrial capitalism and from unfettered laissez faire to welfare capitalism, demonstrate that there have been forces of change and development at work. More recently of course, it has been noted that the House of Commons has given way to cabinet government (Jones, 1992), or Prime Ministerial power (Crossman, 1963; Birch, 1964; Benn, 1982; Madgwick, 1991). Others have noted the development of a core executive in British politics able to withstand pressure from both inside and outside the political system (Rhodes & Dunleavy, 1995). On a more critical level, reinterpretations of British history from a Marxist perspective have suggested that the formal continuity of political institutions mask major changes. Hall and Scwhartz (1985) have suggested that industrialisation, the extension of the franchise and the growth of welfarism have brought about major structural upheavals over the last three hundred years. In addition, studies of territorial politics have drawn attention to the shifting pattern of relationships between England and the component parts of the United Kingdom. Consequently, critical and historical studies of Britain as a multinational state have explored in more detail the constitutional relationship between England, Scotland and Wales (Nairn,

1977; Bulpitt, 1986) and between Britain and Northern Ireland (O'Leary, 1990; 1995; Lijphart, 1975).[25]

Constitutional changes and political developments have, then, altered the locus of power, but what is debatable is the extent to which the nature and concentration of that power has changed. The central point is that most analyses appear not to consider that despite the gradual transfer of power to other (political) institutions, the range, scope and nature of those powers has remained remarkably undiluted. Despite the fact that these studies show the gradual transition of power from Monarch to Parliament, Cabinet, Prime Minister and core executive, they are less than explicit in demonstrating two key points. First, the transfer of considerable executive power to elected parts of the political system has not resulted in a rise in the type of democratic controls over those powers that we might expect. Second, that the existing theories of the constitution, which purport to explain how political power is mapped within the British state are no longer adequate for that task. What is beginning to emerge, and which will be critically discussed later, is the necessity for a new set of theories (not necessarily a re-codification of the constitution) about British politics. The remainder of this section will now explore the first point in more detail.

It has become commonplace to note that the lack of a separation of powers, a Bill of Rights and a decentralised structure has led to significant pressure being placed upon the political system. The 1970s and 1980s for example, saw a rash of publications concerned to highlight the impending crisis of the constitution (Hailsham, 1978; Denning, 1980; Harden & Lewis, 1986; Graham & Prosser, 1988; McAuslan & McEldowney, 1986; 1988). It has been less frequently observed however, that as the system itself has come under pressure so too, have the conventional understandings or 'theories' of the constitution which claim to map the changing relationship between political power and power holders. As conventional understandings have become questioned, searches for new models of explanation have tended to fall within the paradigm of micro level analysis within British political science. Such models have tended to lack an overtly 'political' consideration of constitutional matters and have been reluctant to adopt critical and historical perspectives. Indeed political analysts and political scientists, preoccupied with what Bulpitt (1994) calls 'microism', have devoted little time to study the systemic bases of British politics. Rather, the dominant thinking has been to break down the study of the British political system into its various component parts and study them in isolation (Mackintosh, 1962; King, 1985; Hennessy, 1986; 1988; 1995; Grant, 1989; Smith, 1993; Butler, 1995; Fisher, 1995; Drewry, 1989; Norton, 1985; 1990; 1993; Silk & Walters, 1995; Fry, 1995; Byrne, 1992). Consequently, the vast majority of studies in British institutional politics in the last three-quarters of the twentieth century have tended to be highly mechanistic. Usually they fall into one or more of the following categories: parliament; the cabinet; the Prime Minister; the courts; the electoral system; parties and the party system; the military and civil service; interest groups and government-industry relations. The responsibility for explicitly constitutional analyses has largely, though not exclusively, been delegated to public lawyers (Griffith, 1994; Ewing & Gearty, 1985; Gearty, 1996; Wade & Bradley, 1993). Their

[25] These examples though not explored in any detail here, serve to illustrate the general theme that the

approach however, has been inattentive to political context and arbitrary in divining matters legal and political, thus tending to provide, at best, an apolitical account of processes central to politics or, at worst, an approach which fits too neatly into dominant paradigms.

The above points give some indication of the limitations of relying upon conventional understandings of constitutional theory and politics in the United Kingdom and has prompted some to call for a major reworking or 'recodification' of those theories (Johnson, 1977; Harden & Lewis, 1986; Dearlove and Saunders, 1991). Such an undertaking is outside the scope of this thesis, but does not however, proscribe critical analysis of the theories themselves.

Despite the lack of an explicitly constitutional discourse, the political ecology of modern British politics has been dominated by questions which centre upon the constitution. 'Experts' are regularly consulted in an attempt to unearth the hidden wiring of the UK constitution, the elasticity of which is best illustrated by the various interpretations of the 1995 election for the leadership of the Conservative party, called by the then sitting Prime Minister John Major. Hennessy (1995) cites three conflicting interpretations of the constitutional context of this event. First, a leading Whitehall figure who reputedly said,

> The Prime Minister's resignation of the party leadership has presented no constitutional difficulties at all (1995: 14).

Second, Robert Maclennan who argued that,

> the action of the Prime Minister in seeking to end the civil war in his party ... by calling an internal party leadership election is constitutionally questionable and without precedent (1995: 14).

And, finally, Enoch Powell added his voice to the equation by wondering,

> ...Why nobody has yet...reacted to the constitutional aspects of John Major's self-immolation? He says to the sovereign: "I no longer am leader of the majority party in the House of Commons; but I am carrying on as Prime Minister." Now, I do not think anyone can say that - at least not without inflicting damage on the constitution (1995: 14).

These three contradictory views highlight the analytical dilemmas faced by students of the British constitution: there is no constitutional problem; the actions were constitutionally questionable; the actions were damaging to the constitution. Putting aside the implication that the British constitution is whatever can be inferred from the gothic politics of Whitehall or the Conservative Party, it is only right to suggest that what is needed is a firm basis for understanding what the constitution is and how it fits together. In short, what is the British constitution?

In the first instance, it can be argued that the constitution is simply the political system or framework; the Monarchy, parliament, the cabinet, the civil service and so on. Second, it can be

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British political system has been subject to significant and well documented change.

regarded as the consensually accepted constitutional theories, which explain how these institutions are bound together so that we can make sense of them. An initial response to a question about the British constitution would therefore be that it is what the recognised authorities say it is. For most of the twentieth century the accepted constitutional theory has rested upon the accounts developed by Walter Bagehot in the mid nineteenth century and subsequently distilled by Albert Venn Dicey at the century's close. Bagehot's '*The English Constitution*' and Dicey's '*Introduction to the Study of the law of the Constitution*' have endured to be regarded as so authoritative that they have defined the rules of constitutional debate and in many respects the actual constitution itself. So powerful have these accounts become that in the absence of a formal document, their work has become the written codification of the customs, conventions and traditions of the constitution.

The constitutional project which Bagehot and Dicey embarked upon did more than simply describe and explain the workings of the political system. They both applauded and rejoiced in the perceived benefits of the British system as a successful project in maintaining economic advance, overseas expansion, and political stability. In their view, the British political system achieved the right balance between the different elements of constitutional politics and was overseen by the flexibility and foresight of the governing class (Johnson, 1977). What is important about the established constitutional doctrine is that it is underpinned by three particular elements not always explicitly drawn out. First, a conception of the state as enlightened, neutral, representative and rational; second, a unidimensional and empirical conception of political power; and third a conception of British history characterised as the progressive establishment of liberal political institutions that fostered compromise and tolerance, promoted individual liberty and ensured that government remained limited and accountable.

Few today would advocate such a complacent perspective, yet Bagehot and Dicey are still regarded as the points of departure for any systematic analysis of the constitution. As Harden & Lewis note, even in works that are overtly critical of the orthodox constitutional doctrine, the contours of Dicey and Bagehot's investigations are more or less adhered to (Harden & Lewis, 1986). What follows will establish whether or not the perspectives advanced by Bagehot and Dicey in the nineteenth century can continue to capture the central features of the constitution in the twentieth century. Moreover, are they able to provide a toolkit to map both the *loci* of power and its nature and scope?

In many respects, it is surprising that Bagehot's analysis assumes such a position of prominence amongst constitutional writers given that his major work was considered to have been out of date almost as soon as it was published (Mount, 1992). Bagehot's work was itself a response to the changes wrought to the constitution by the Great Reform Act of 1832, which exhausted the explanatory power of the existing theories of the constitution. *The English Constitution* remains our only political consideration of the constitution because it explored the degree to which the 1832 Act produced a constitutional politics out of step with established theories. It was an analysis which saw the constitution as an issue in politics, as well as the framework in which politics is conducted. To make sense of

Bagehot's contribution a consideration of the 1832 Reform Act would be helpful.[26] In the first instance, the act increased the franchise (though not substantially) resulting in a decline of the systems of patronage that had hitherto characterised the politics of the eighteenth and nineteenth centuries. One of the principal reasons for this was that the composition of the House of Commons became more dependent upon the electorate, which indirectly reduced the power and influence of the House of Lords. In a similar way, the power of the Monarch was greatly reduced, because the choice of Prime Minister and Cabinet largely became the domain of the House of Commons. The second principle change was structural. By ensuring that the Commons was to represent 'the people', as opposed to 'whole boroughs', implicit in the established constitutional wisdom of the Eighteenth and early Nineteenth century, the nature of political representation became far more individualistic. The third, and arguably the most important change, was that a newly independent House of Commons, coupled with the growth of the franchise, witnessed the emergence and consolidation of parties as dominant actors in the political system.

In the light of these changes, Bagehot made a distinction between the 'dignified' parts of the constitution, (those that were regarded as powerful, such as the Monarchy and the House of Lords) which secured support for the system by 'impressing the many', and the 'efficient secret' embodied in the system of cabinet government. Bagehot noted that the cabinet, under the stewardship of the House of Commons, was now the fulcrum of power in British politics. He also argued that the withering power of the Monarchy and the nobility had reduced the English constitution to a 'republic in disguise.' Bagehot's principal insight however, was to note the growth and power of the cabinet. He regarded the Cabinet as the means through which the executive and the legislature were linked. He famously asserted that,

> The efficient secret of the English constitution may be described as the close union, the nearly complete fusion, of the executive and legislative powers ... a cabinet is a combining committee – a hyphen which joins, a buckle which fastens, the legislative part of the state to the executive part of the state. In its origin it belongs to the one, in its functions it belongs to the other (Bagehot, 1963: 21).

It is important to note that, for Bagehot, the cabinet was chosen by the House of Commons as the locus of executive authority, it was not claimed. In this respect, the chief function of the House of Commons was *inter-alia* the formation and dissolution of cabinets. Equally, the relative power of the cabinet was the ability to request a dissolution of the parliament. It was this delicate balance of power between the cabinet and the commons that allowed Bagehot to characterise the relationship as,

> not an absorption of the executive power by the legislative power; [but]... a fusion of the two (Bagehot, 1963: 28).

[26] I do not wish to dwell upon the 1832 act at any length but it is important to note some significant effects of 1832, if some understanding of Bagehot's analysis is to be reached.

For cabinet government to thrive, three essential features, arguably, the logical conclusions of the 1932 act, had to be present: party discipline, collective responsibility and secrecy. The discipline of parties ensured that there would not be 'government by incoherent public meetings'. Parliament would have to be disciplined and ordered to ensure that it remained under the control of the few. In order for the dominant party in the House of Commons to have confidence in the cabinet, it had to act, and be seen to act, collectively. Concomitantly, if the appearance, even if not the reality, of collective responsibility were to be maintained, then secrecy must be its organising principle.

To summarise, Bagehot responded to changes in the political system wrought by the 1832 reform act. He was attentive to the contrast between appearance and reality, and how far the established theories of the day were unable to provide an adequate toolkit to reveal the real sources of power. In many respects Bagehot was concerned to explain political action within specific institutional contexts, where political actors respond to the immediate constraints and circumstances they face. He must also be regarded as significant to the realist tradition in British political analysis, which sees politics less as the high pursuit of the public interest and more a question of power.[27]

If Bagehot was responsive to the changes in the early nineteenth century, Dicey distilled the constitutional doctrine away from the more overtly political analysis of Bagehot. Dicey reworked the constitutional doctrine by following the legal approach in the tradition of Coke and Blackstone. His analysis and conclusions in *Introduction to the Law and Study of the Constitution*, first published in 1885, still constitutes the dominant paradigm of constitutional discourse in the UK. Dicey centred his analysis on three guiding principles, which he considered all pervasive in the British system of government: parliamentary sovereignty, constitutional conventions and the rule of law.

For Dicey the key to unravelling the British constitution, lay in the sovereignty of parliament. This understanding of sovereignty is not one limited by any rigid separation of powers, where for example, a higher court or authority would enable appeals by citizens and their representatives. The courts retain the power of interpretation, but unlike their American counterparts, there is no formal provision to overturn or prevent decisions becoming law. In short, there is simply no legally enforceable limit to the legislative authority of the Westminster parliament. The courts interpret and apply parliament made legislation, but in the absence of a 'written' constitution, they may not review the validity of such legislation. Essentially, parliaments' can do as they please. They can pass retrospective legislation, overturn laws passed by previous parliaments and, in the absence of any fundamental law of the constitution, no parliament can bind its successor.

The willingness of the public to obey these laws, and public servants to enforce them, was dependent upon parliament being recognised and accepted as representative of the population. Moreover, despite the fact that the boundaries of legislation were often controversial, Dicey established the principle that parliament was, and ought to be, sovereign and representative.

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[27] Of course, what distinguishes Bagehot from leading contemporary figures in this school such as Middlemass (1979) and Bulpitt (1985; 1994) is that as noted above, for Bagehot the masking of the true face of power from the public was seen as normatively desirable.

The second core aspect to the Dicean triptych was the importance of constitutional conventions. Constitutional conventions can be regarded as customs and habits that grow up around a political system: the unwritten rules that are necessary for the smooth running of the political system. They constitute the essential oil in the formal machinery of the constitution and they are seen to plug the gap between formal law and political reality. They are in themselves not that unique. Nearly all systems of rule rely upon some informal codes and agreed principles on the basis that not everything can be written in statute or included in a formal document.[28]

The rule of law is the third aspect to Dicey's doctrine and constitutes the least discussed but probably the most important element. For Dicey, the rule of law embraced three distinct, though necessarily related, practices. First, the rule of law excludes the exercise of arbitrary official power over individual citizens. Second, it stood for the equality of all before the law. Third, it reinforced the notion that the constitution was not the proper source of citizens rights. Dicey argued that the general principles of the constitution, which were the result of the liberties conferred and remedies provided by case law, were a more effective means of protecting citizens rights and liberties. Thus, there existed no specific reason to entrench some specific rights within a written document. The rule of law was an important abstract value in the UK constitution for Dicey because it was a principle of constitutional morality, limiting the power of the state.

Taken together both Bagehot and Dicey sought to provide a coherent and fully-fledged constitutional and political doctrine which can be characterised in the following way: The central institutions of British government were more or less at the disposal of a parliamentary majority. The system was lauded as one that provided responsible and representative government. The cabinet, the Prime Minister and the civil service formed an executive, which though subject to parliamentary scrutiny and approval, retained its capacity for independent action. Its dependence on parliament and parliament's dependence upon the electorate allowed a channel for new demands and interests, ensuring that the system remained flexible and responsive. This forms the kernel of British constitutional orthodoxy.

The remainder of this section will look more closely at the relationship between theory and practice. What follows will take Dicey's formulation as the dominant paradigm, although his development of Bagehot's observations will figure prominently. The theory of parliamentary sovereignty, the role of constitutional conventions and the rule of law in theory and practice will be critically examined in the light of the model of constitutionalism developed in the previous chapter.

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[28] Indeed, there are over 150 constitutions in the world, all of which supplement their formal document with codes of practice. It would be quite wrong for example, to suggest that the US constitution gives a foolproof guide to the American political system. The US constitution does not mention parties, the method of presidential selection, nor does it grant the Supreme Court the power of judicial review arguably the most politically significant institutional power for over Sixty years. Equally, the Indian constitution, despite being a recent creation and arguably the most detailed of all the worlds' constitutions, does not define the powers of the Prime Minister nor does it mention political parties.

Parliamentary Sovereignty

Parliamentary sovereignty constitutes the starting point, and for many the end, of constitutional discussion in British politics. For Dicey, the legislative supremacy of parliament means that, Parliament [that is the Monarch, Lords, and Commons assembled] can pass laws on any topic, affecting any persons, and that there are no 'fundamental laws' which parliament cannot amend or repeal in the same way as ordinary legislation (Dicey, 39-40:1885). Dicey followed Bodin, Austin, Blackstone, Bentham and Coke (Jennings, 1959; Hart, 1961), in using a legal definition of sovereignty. Dicey asserted that,

> Parliament can make or unmake any law whatever...that no body is recognised by the law of England as having the right to override or set aside the legislation of parliament (Dicey, 1959: 39-40).

Further, parliament can legislate on any subject, as Jennings (1959) has aptly summarised,

> [Parliament]...may remodel the British Constitution, prolong its own life, legislate ex post facto, legalise illegalities, provide for individual cases, interfere with contracts and authorise the seizure of property, give dictatorial powers to the government, dissolve the United Kingdom or the Commonwealth, introduce communism or socialism or individualism or fascism, entirely without legal restriction (Jennings, 1959:147).

Although in a technical sense the above is correct, it is questionable whether this formula tells us anything about the way that the contemporary parliament conducts its business in practice. If we were to update Jennings statement, *qua Bogdanor*, it might read something like this, 'The government of the day may remodel the Constitution, prolong its own life'... *ad nauseam*. The relationship of parliament to the majority party is such that the two are not easily disentangled. Orthodox descriptions themselves stress the positive benefits of such an arrangement. As has already been noted, cabinet government according to Bagehot was the means by which the executive and the legislature were fused. 'The efficient secret', of the English Constitution, Bagehot reminds us

> ...may be described as the close union, the nearly complete fusion of the executive and legislative powers (Bagehot, 1963: 210).

This, of course, is notwithstanding excellent studies that suggest that power is even more concentrated than this, in the hands of a small group of senior ministers, and/or the Prime Minister (see e.g. Crossman 1963; King, 1985, 1988; Hennessy, 1986,1987; Burch 1988)[29].

The previous chapter developed a model of constitutionalism which concerned itself primarily

[29] The question of Prime Ministerial power will be discussed in this chapter however, the present section will focus upon the power of the government. It should be noted here that a new constitutional explanation is not being sought, rather an argument as to the inadequacies of the present orthodoxy, in particular that of Parliamentary Sovereignty.

with the conditions necessary to limit government power. If Parliament, or rather government, is sovereign, what constraints exist upon the power of British government? The Dicean orthodoxy informs us that the existence of an effective opposition, coupled with the contemporary scrutinies applied to government departments by select committees, is sufficient to prevent an powerful executive enacting its will with impunity. This much is implicit in his conception of the rule of law. Yet, without a revolt by those of the majority party, the parliamentary opposition is unlikely to achieve any serious reversal of policy, simply because the majority party in parliament support the executive. Similarly, as Frank Vibert (1991) has argued, the weakness of the House of Commons Committee system as an investigative body, merely assists the power of the executive to suppress scrutiny of its legislation and activities. Bagehot was the first to note how far parties had altered the balance of power in parliament, however, the development of a party politics, which arguably reflects collective and class interests has gone far beyond anything he would have imagined. Indeed, the ability of MPs to act independently, rather than as representatives of interests has long since past. As Poggi (1978) noted, some years ago, Parliament has effectively been reduced to,

> ...A highly visible stage on which are enacted vocal, ritualised confrontations between performed, hierarchically controlled, ideologically characterised alignments...Under such conditions, parliament no longer performs a critical and autonomous role as a mediator between societal interests; instead, its composition and operations simply register the distribution of preferences within the electorate and determine in turn which party will lead the executive (Poggi, 1978:141).

Here lies one of the essential ironies at the heart of conventional theory. Parliament is not characterised by its supremacy but, *contra* Dicey, by its weakness. Its main function is to provide, by way of an obscured electoral process, personnel for government, and enough support to sustain a parliamentary term without serious challenge. Despite the introduction of a more rigorous Select Committee system in 1979 (Drewry, 1989), the balance of power between the executive and the House of Commons has remained a system which Madgwick (1990: 143) described as a system of executive dominance. This remains the case because establishing the committee structure was one thing, ensuring that they work as adequate checks upon executive activity is quite another. To operationalise the latter requires that information is easily accessible and ministers and civil servants are openly available for questions: such a system requires the proactive co-operation of the executive. The fact that this never really happened supports the view of McAuslan and McEldowney (1988) that a form of 'auto limitation' operates where the executive remain powerful by not actually doing anything. They cite the example of the Ponting trial as a perfect example of where misleading information was given to committees. [30] In this case, both the government and the civil service were argued to be at best

[30] There is no need for a lengthy exegesis of the Ponting affair here. For a reasonable account see Peele. 1991; Dearlove & Saunders, (1991) and particularly, Treasury and Civil Service Committee 7th Report (1986).

reluctant participants in the process of executive scrutiny (Dearlove & Saunders, 1991; Jowell & Oliver, 1989; 1994; Drewry, 1989; Gamble, 1988).

Conceptions of sovereignty have now also become questionable in the light of pressures upon the legislative supremacy of parliament from political and economic sources both inside and outside the United Kingdom. The following will explore (as will Chapter 4 in greater detail) the internal pressures to parliamentary sovereignty focusing upon the nature of party and pressure group politics. Arguably, such power politics fragments modern government into informal and secretive institutional structures which militates against open, accountable and responsive government. At an external level, the ratification of the European Communities Act (1972) in 1973 and the subsequent amendments to the Treaty of Rome by virtue of the Treaty on European Union (Maastricht, 1992) in 1993, The Treaty of Amsterdam (1998), has pooled (and will pool) a significant degree of political decision making to the institutions of the European Union[31]. All decisions and regulations in force at the time of Britain's joining, automatically became part of British law. This poses a significant challenge to Dicey's notion of a sovereign Parliament because institutions of the Union are able to override the legislation of a British Parliament and make laws, which *contra* Jennings; parliament cannot make or unmake. This represents a considerable alteration to the both the substance and the pattern of sovereignty. Notwithstanding complex arguments about whether or not British membership of the European Union reduces the concept of sovereignty to a legal misnomer (Bradley, 1989; Collins, 1990), a profound change has taken place. The reality is that the UK can no longer regard itself as politically or economically independent. In a similar way Britain's membership of *inter-alia* NATO, the UN, and the International Monetary Fund have, at times, demonstrated powers that cast a significant doubt over the surety of orthodox theories of sovereignty.

It is debatable, but technically correct, to argue that the UK could simply withdraw from its various international obligations and make its own laws, which gives some comfort to traditional defenders of parliamentary sovereignty. In many instances, the United Kingdom although being signatory to, and legally bound by, international treaty obligations is not compelled to enforce such requirements. For example, the UK is a signatory to both the European Convention on Human Rights (1950) and the International Covenant on Civil and Political Rights (1946), yet these acts have no legal bearing in the domestic courts of the United Kingdom. Nonetheless, these institutions have been argued to constitute a form of 'external constitution' (Oliver, 1991). In this respect, the United Kingdoms obligations to international treaties and transnational and intergovernmental agreements has substantially diluted the concept of parliamentary sovereignty described by Dicey. The political reality is that external pressures undermine the entire notion of an independent nation state exercising complete sovereignty so that *de facto* if not *de jure* sovereignty resides elsewhere. This leaves the Dicean notion

[31] See Van Gend & Loos (1963) which established the principle of direct effect of primary community legislation and Costa vs. ENEL (1964) which establishes the supremacy of community law over national law where they conflict. For an example of the European Court of Justice overruling a British Act of

of sovereignty a little less robust than traditional theorists might like.

Parliamentary sovereignty has, therefore, been questioned on two grounds. First, the domestic experience of growing party, cabinet and Prime Ministerial dominance of the House of Commons has eroded the theoretical power of the concept. Second, the growth of global (and particularly European) interconnectedness, both as political and economic forces, although not constituting an external constitutional force, severely limits *de facto* if not *de jure* sovereignty. Parliamentary sovereignty then has become little more than a vehicle by which the executive dominates the national political system. This much is implicit in the doctrine itself, for it regards as normatively desirable that no internal or external check exists upon the sovereignty of parliament. If, as argued above, this formulation is taken to mean the sovereignty of the government of the day, how far do constitutional conventions and the rule of law act as effective constraints upon the executive?

Constitutional Conventions

It is stated, often in general terms that Britain has an 'unwritten' Constitution. It has already been noted in the previous chapter how this is part myth and part reality. On the one hand, there is no formalised constitutional document where the fundamental rules and procedures of legislative, executive and judicial functions can be located, yet on the other there are easily definable political institutions and rituals. Yet, simple identification of institutions provides no clear understanding of the relationships between them. As has been noted above, many important political relationships are not covered by law but rather by convention. For example, the Monarch's use of her powers; the distinction between the Monarch and the Crown; the dissolution of Parliament and the forming of a new government; the organisation of the civil service and civil servants' duties; and the collective and individual responsibility of ministers to parliament. All these are areas of overwhelming political significance, yet they remain subject to a set of vague and disputable understandings. Traditional interpretations place great confidence in the role of conventions as sufficient guides to guard against constitutional abuses (Dicey, 1885; Jennings, 1959). Their existence forms yet another curious paradox of the British political system. Precedent largely governs conventions; however, if that precedent is broken a new convention is simply established. It is not a wholly unreasonable proposition that if a new convention is established it has little or no legitimacy except that parliament (or the cabinet or Prime Minister) has changed its mind over a particular rule. In reality, the durability of rules and conventions are governed more by expedient than precedent. If a rule no longer fits the political priorities of the government, it is simply changed. If it serves a useful purpose, or is of no consequence, it will be left as part of the constitution. It is in fact a tautologous proposition; a convention is binding for as long as it is binding. A good example of this was the (mis) use of conventions during the Thatcher era.

The Thatcher period witnessed the greatest erosion of established constitutional conventions in

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Parliament, see The Queen vs. Secretary of State for Transport, ex parte Factortame (1991) where the

the post war period, especially those covering both collective and individual ministerial responsibility. The former was undermined by significant dissent in the early years of her administration, and the latter because of the Prime Minister's unprecedented involvement in departmental work and policy detail and by ministers reduced autonomy. The example which best illustrates the point was the Westland affair, where Michael Heseltine endeavoured to turn his own resignation into a major constitutional issue. Heseltine insisted that Mrs Thatcher's handling of the Westland question in Cabinet involved procedural improprieties, though arguably he, too, flagrantly breached some of the long standing principles underpinning British Cabinet government by naming and blaming individual officials. In the select committee investigations that followed officials, publicly implicated in the leaking of a letter from the Solicitor General to Heseltine, were prevented from testifying on the grounds that it was ministers who were accountable to parliament, not officials (Hennessy, 1989; Oliver and Austin, 1987; Dunleavy, 1990). A further irony was how the same conventions after being blatantly ignored were resurrected to limit the damage imposed on government during the Ponting affair (Oliver & Austin, 1987; Drewry, 1990, Dunleavy, 1990; Hennessy, 1995). These examples certainly illustrate the instinctive nature of British conservatism, but moreover they show that conventions once easily dispensed with are dusted down and rehabilitated, albeit for motives which are often transparently expedient.

The Rule of Law

The rule of law for the United Kingdom is a somewhat ambiguous concept given the absence of any superior law to limit what parliament may legislate upon (O. Hood-Phillips & Jackson, 1987: 34). For Dicey, the rule of law was conceived from three distinct meanings: (i) the absence of arbitrary power. No person is above the law. No person is punishable except for a distinct breach of the law, established in the ordinary legal manner before the ordinary courts. (ii) Equality before the law. Every person, whatever their rank or condition, is subject to the ordinary law and the jurisdiction of the ordinary tribunals. Dicey contrasted this with the French *droit administratif*, under which the responsibility of public officers for their official acts is decided by a distinct system of administrative courts. (iii) The general principles of the constitution – especially the liberties of the individual, such as personal liberty, freedom of speech and public meeting – are the result of judicial decisions in particular cases. For our purposes points (i) and (iii) pose particular difficulty. No person may be above the law yet in institutional terms there is no check on the manner and form of legislation passed by parliament. The rule of law in this sense is merely a buttress to parliamentary sovereignty rather than a check upon it. The 'guiding principles' are not 'fundamental laws', which in itself would conflict with the notion of parliamentary sovereignty, but is expected to impose a moral limitation on the exercise of power. A wider conception of the rule of law however, implicit in the model outlined in the previous chapter, goes beyond the definition offered by Dicey. McAuslan and McEldowney (1988) have rightly suggested that the rule of

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Court ruled that the 1988 merchant shipping act was against community law.

law is thought to have a broader more 'political' meaning which embraces fair administrative practices; recognition of the rights of political opposition, the right to dissent and a fair means of redress against government action. However, even taking into account both a broad and a narrow interpretation of the rule of law, confusion still arises because of the general open-endedness of these principles.

The Dicean notion of the rule of law should stand alongside constitutional conventions as the main bulwark against the abuse of executive power implicit in the doctrine of parliamentary sovereignty. However, what is clear is that the Dicean interpretation of these concepts result in principles, which when adopted, provide little safeguard against the power of government under a system of parliamentary sovereignty.

Dicean orthodoxy also includes the other non-legal parts of the constitution termed as 'precepts and maxims'. Dicey and academic lawyers that followed him used these terms specifically as alternatives to, or other 'sources of principle', than conventions. However, there is little to delineate between them and there is no clue as to what these different 'understandings' and 'habits' are aside from the fact they can be called upon to regulate the power of government. That constitutional conventions and the rule of law, as Dicey understood it, have not been sufficient to prevent the abuse of parliaments' powers relates to the assumptions, which underpin Dicey's analysis. These assumptions reflected not only the concerns of the historical period in which Dicey's work was grounded - in which the modern administrative state was undeveloped - but also the dominant legal and intellectual tradition of logical positivism[32]. In short, the reliance upon legal norms and powers, which were observable and in some sense quantifiable, blinded him to informal and immeasurable sources of power and influence (Johnson, 1977; Harden & Lewis, 1986; McAuslan and McEldowney, 1989). These dangers are more likely to arise where important political functions, and the relationships which govern them, are reliant upon informal codes of conduct and understandings.

The principal area of criticism then, rests with Dicey's conception of the constitution still being considered as the ruling paradigm of constitutional interpretation by theorists. As Harden and Lewis (1986) point out, even where Dicey's constitutional thought is disputed there is a marked tendency to accept the contours of his investigation and with it much of the positivist assumptions which underpin it. The central problem with this approach, in analysing the rule of law, is its limited ability to identify the less obvious and covert expressions of political power. This gives traditional theories problems when seeking to explain macro and meso levels of politics: the interaction between ideology and the interrelationships between state actors and actors at the level of sub-systems and society. The tradition thus allows for the perpetuation of rules that have not been made but which 'emerge', or can be 'found'. It has no use for realist or meta legal principles common to both political liberalism and to continental state systems. The dominance of logical positivism in our constitutional theory and practice has led to a set of assumptions about politics, which when used as a guide to institutional design, fail to provide any kind of check against executive authority. In addition, when used as an analytical tool it provides too

thin an account of the complexity of political power.

It is at this point that Dicey's conception of the rule of law and the history of constitution making in the United Kingdom intersect. The British constitution was not created by a constituent act but has defined its own character with the growth of the common law. Bogdanor (1995) is close to the mark when he suggests that, 'our constitution is unique to the extent that the government of the day decides what it is' (Bogdanor, 1995: 136). This distinguishes it sharply from systems of government, which derive their sense of legitimacy from the statutory provisions that created them[33]. Thus we find, as Bryce has argued, that,

> The instrument in which a constitution is embodied proceeds from a source different from that whence spring other laws, are regulated in a different way, and exert a sovereign force. It is enacted not by the ordinary legislative authority but by some higher and specifically empowered body. When any of its provisions' conflict with a provision of the ordinary law, it prevails and the ordinary law gives way (Ridley, 1988: 343)[34]

Britain singularly among the liberal democratic nations of the West has a political arrangement where the constitutional environment is not defined as a special category of law (Maitland, 1908; Ridley, 1988).

The limits to traditional constitutional theory in providing a fully rounded and useful understanding of the constitution suggests something is missing from its analytical toolkit. Foremost in this respect is the problem of defining what the constitution is, because it is clear that reliance upon the constitutional authorities leaves too many ambiguities and questions. John Dearlove (1989) has suggested that purposeful political analysis of the constitution has been neglected precisely because of such definitional problems. His answer is to ignore the fact that the constitution is unwritten and ambiguous, regarding it as a 'hoary old point' (1989: 112) that limits considered responses to constitutional questions. However, this type of approach seems to miss some of the central concerns expressed here. It is implicit in what has already been said that the lack of unambiguous and clear rules regarding the exercise of executive authority is the essential problem with the existing system. To ignore it simply glosses over some central problems. Namely, that the absence of a written document ensures that isolation of explicitly constitutional provisions is problematic. Ridley (1965) for example, takes the view that the UK does not have a constitution at all in any meaningful sense of the word. Moreover, as Brian Sedgemore (1980) has suggested, the combination of complex, and highly secretive, networks of intertwining institutions that make up British government in addition to an unwritten constitution, ensures that locating any formal existence is extremely difficult. In a similar way

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[32] Such a tradition refuses to allow the meaningfulness of any statement that was not either definitional (analytical) or empirical (synthetic).

[33] The obvious example here is that of the US constitution, which derives its legitimacy from the constitutional convention of 1787. It is worth pointing out that subsequent constitutional amendments followed distinct procedures, which confer legitimacy to the process of constitutional change.

Peele (1978) comments that the lack of a written document that can provide a primary reference point ensures difficulty in,

> ...The search for the rules and principles which constrain and structure the distribution of authority in the state and which prescribe the relationships between the several parts of government and the individual citizen (Peele, 1978: 1).

The lack of a written document, as argued in the previous chapter, does not necessarily mean that a system is in itself unconstitutional or illegitimate. In the British case however, the lack of an effective system of rights and a separation of powers has *inter alia* two principal effects. First, legislation can be passed without fear that it could be put to the test of a constitutional court and ruled invalid, and second, the internal organisation and reorganisation of the regime and the relationship between the state and the individual, is determined by the government of the day. Taken together this set of powers leads to a system of significant executive power. Moreover, as has been argued above constitutional conventions and the rule of law provide little or no safeguard against the abuse of executive authority.

Overall, there is a clear absence of any systematic criteria by which one may isolate which areas of the state are constitution, convention or law. If any understanding about the nature of constitutionalism and constitutional change in Britain is to be reached, two things are apparent. First, we cannot avoid the existing political framework and second, the dominant constitutional theories severely limit any attempt to describe and explain the nature of British politics.

The preceding analysis has clearly demonstrated that despite its weaknesses, the constitutional theory distilled by Dicey at the turn of the century, is still the dominant paradigm of UK constitutional analysis. Further, one of the central problems is that there exists no alternative discourse, which has been sufficiently fleshed out to challenge its dominance. The charge is that whilst Bagehot and Dicey might have established authoritative accounts during their own epoch, there explanatory force has waned. During the last thirty years, a significant 'lack of fit' has been noted between the established theories of the constitution and the actual practice of politics. However, a vacuum has emerged. In place of the old surety there is a marked confusion about who or what can be counted as a definitive authority. In the absence of a more convincing account, constitutional analysts have clung to the contours of Dicey's account, which falls woefully short of providing a toolkit able to effectively map political power in the UK.

The sources of constitutional authority in the UK have a distinctive historical and interpretative flavour. Moreover, the context in which British political institutions have emerged and developed has played a crucial role in how they have been interpreted. The remainder of this chapter will concern itself with a critical historical account of the emergence and development of the UK constitution so that the interplay between theory, history and practice can be unpacked and subsequently clarify the types of criticism made so far. The most pressing concern is the antipathy to, and the absence of, rights in the

[34] This was also the view of Thomas Paine who argued that 'a constitution is a thing antecedent to a government, and government is only the creature of a constitution'.

British constitutional lexicon.

Britain is often regarded as a modern liberal democracy and in many respects, the British political system can be easily located within a liberal democratic tradition. Universal suffrage, multi-party competition, regular elections, reasonable limits upon state power and politically neutral civil and military services, can be seen to ensure a degree of popular control. However, in many important ways Britain remains a pre-modern political society. In significant areas the assumptions that underpin the existence of the British State have not, and do not, reflect the core features of constitutional democracy evident elsewhere. The core model of constitutional democracy outlined in the previous chapter relied heavily upon the rights discourse. This means that the core of any constitutional model must include easily identifiable and justicable individual rights which can be claimed against the arbitrary use of state power. A concern about the arbitrary use of state power lies at the heart of the conception of the rule of law outlined by Dicey, but the inability of this to adequately guard against the centralisation and dominance of executive power begs a fundamental question: why not rights?

The Absence of Rights

Historically, Britain has treated abstract conceptions of rights with almost total scepticism (Johnson, 1977; Lester, 1984; McAuslan & McEldowney, 1985; McAuslan, 1986; Harden & Lewis, 1986; Graham & Prosser, 1988; Plant, 1990; Dearlove & Saunders, 1991). Rather, we have preferred to develop a historical view of rights, regarding them as understandings which have emerged from the complex narrative of social development and safeguarded by the confidence that experience engenders. Principal among these is that rights have been understood in a peculiarly bastardised way and seen as the right of parliament to exercise authority independent of the monarch. The basis of this understanding has largely rested upon custom, culture, and the accumulation of precedent and has been noted with some effect by Nevil Johnson who claims, that

> The notion that rights in this country are rooted in custom was mirrored in the growth of common law, and it was through the common law that custom became embodied in legal theory and practice. And, as is well known, all this had a profound effect on British constitutional development, distinguishing it sharply from most of its neighbours. It was the vitality of the common law which did more than anything else to frustrate the emergence of an absolutist state, and then ensured that so long as the scope of public powers remained narrow there was no need for more serious discussion of the effectiveness of the protection given to individual rights (Johnson, 1977: 132-133).

There is however a far more powerful idea at work here than simply the reliance upon the common law. It is a presumption of English law that individuals might do anything that is not expressly forbidden (Hood Phillips & Jackson, 1987). The assumption that there are no inherent public prohibitions gradually became part of the common law, thus relying on the type of self-restraint, which emerged

from the complexity of social relationships, tradition, and meaning. The combination of a historical view of rights and negative view of public prohibition can go a long way to explain the absence of a well-developed conception of public law and a mature concept of the state.

That statements of rights as guiding principles, evident in the United States constitution or the German basic law, have been absent makes the British political system unique in comparison with other liberal democratic states.[35] There is an absence of a contractual relationship between the state and the individual where the people could be said to regard the government as their own (Haseler, 1991). In many respects, this is one type of contractual safeguard that rights tend to provide (Rawls, 1972; 1993; Dworkin, 1977; 1987 Barry, 1995). Some rights, for example, freedom of association, expression and peaceful assembly, institutionalise the rights of citizens to deliberate over the actions of government and the substance of public policy. This form of public accountability breaks up concentrations of power and exposes both public and private interests, at both state and sub state level, to an active citizenry which can organise itself against potential abuses of power (Peele, 1991)[36].

The second type of contractual safeguard, discussed at length in the preceding chapter, is a separation of powers, which asserts that if all three powers of government, namely legislative, executive and judicial powers are concentrated in the one body, that body would have absolute authority. As opposed to the United States where this principle pre-determined the nature of their constitution, its influence in Britain has been largely minimal. In terms of constitutional law, only in the independence of the (politically unimportant) judiciary is any perception of separation of power in evidence. In British government the connection between the three branches is thus retained: The cabinet links the executive and the legislature; the Lord Chancellor, the judiciary and the executive; and the Lords of appeal sitting in the House of Lords, the legislature and the judiciary.

The absence of a tradition of contract and a rights discourse in the United Kingdom has largely been attributed to the unique way in which the British political system has developed (Johnson, 1977; Harden & Lewis, 1986; Dearlove, 1989). This uniqueness has resulted in the lack of a coherent concept of the state as an entity defined and legitimated by law, which means that the legislative parameters within which the government can function, remain unchecked by any public or institutional prohibition. The following asserts that one of the most important influences on this development has been the monarchical tradition in British politics.

The Monarchical Tradition

[35] Although this is not a comparative study the point is worth making.

[36] Peele (1991) gives a number of examples where public bodies seek to regulate or interfere with the free exercise of speech and association by individuals and private institutions. Peele argues that there have been repeated attempts to block the right to transmit and receive information notably by the BBC, the IBA and the Observer. Examples include, the Zircon Affair'; 'Real Lives'; 'My Country Right or Wrong'; the Spycatcher litigation; the reporting of the Ponting affair and the transmission of interviews with terrorist organisations in Ireland.

The starting point for any discussion of the British Monarchy must be the analysis provided by Bagehot in '*The English Constitution*'. Bagehot presented a picture of British society as one that was essentially deferential in its attitude toward the Monarchy. Indeed, his analysis argued that the secret of the constitution was that real power lay with the 'efficient' institutions of the cabinet and the Prime Minister whilst the 'dignified' institutions of the monarchy and the peerage served to mesmerise the mass of the population into a respect for the system as a whole. The real power of the monarchy, argued Bagehot, lies not in its legislative or overt political power, but in its mystery. Whilst he recognised that formal power no longer resided in monarchical hands, he rejoiced in the public perception that the monarchy were politically significant. The great mass of men, he commented, were not fit for elective government. A visible symbol of authority was necessary because the 'coarse, dull, contracted multitude' could never command the respect and authority of a lord of ancient lineage. The rich and wise, he argued, ought to have more power than the poor and stupid. For this reason, the imperative of the ruling class was the preservation of the magic glow of royalty - 'we must not let daylight in upon magic' - for fear of undeceiving the mob.

Again, the familiar theme is that 'ordinary folk' cannot understand more than 'monistic' forms of government and therefore must be beguiled into believing that the monarch governs them. Bagehot held that only a very few were able to see through the charade of Monarchy, but even these enlightened numbers would respond to the pageant of Monarchy as a heart touching symbol of their shared history and culture. It remained not only a focus for their allegiance but as the symbol of legitimate authority, which was entitled to demand their obedience. The superiority of the ruling classes was maintained, so the argument went, because they were able to see through the charade.

In this respect, it is quite clear that Bagehot believed that the British political system was maintained by men of a 'ruling class' who, like himself, were able to serve government according to principles that they alone could understand. The lower and middle orders were, according to him, when tried by what is that standard of the educated ten thousand, narrow minded, unintelligent and without curiosity.

Contemporary musings on the monarchy have inherited a lot of the baggage passed down by Bagehot, albeit without the obvious dislike of anything other than the upper-middle class. The present orthodoxy surrounding the monarchy ranges from the adulatory 'it is desirable to separate the political and ceremonial aspects of public life' (Punnett 1994: 254) to the pragmatic 'if it isn't broken then don't mend it' (Starkey, 1993). In this type of argument, the Monarchy is presented as a symbol of national unity and one that has more intuitive resonance than the ambiguity of the state. In effect, it replaces the concept of the state. Thus, the monarchy becomes the symbol of political stability and continuity. Without the monarchy, the continuity that they believe has characterised the United Kingdom, and which they seek to conserve, would be disrupted and lead to political unrest. The kernel of the orthodox position can be stated in short: as a symbol of national unity the Monarch is politically neutral, possesses no political power and what residual powers there are, have become subsumed by the Prime Minister and the cabinet.

This, however, forms only a starting point and not the conclusion of analytical comment on the institution of Monarchy. There are two problems here which will benefit from critical exploration and which relate to the question of locating political power. First, despite the oft (rightly) made assertion that the monarch's prerogative powers are a legal fiction, the transition of power from monarch to cabinet and Prime Minister demands more than a cursory footnote. Second, the notion that the ceremonial has no political significance will be questioned. Together these points go some way to overcome the shortcomings of traditional theories in mapping political power in Britain.

Aside from the remaining two royal prerogatives (the dissolution of parliament and the invitation of a person to form a government), the instance of the monarch's use of prerogative powers is hard to demonstrate: it is in fact a legal fiction. What is not difficult to demonstrate however, is the extent to which the Prime Minister of the day can effectively bypass any form of scrutiny by the House of Commons with use of the royal prerogative. The Prime Minister may invite foreign troops to be based here, go to war, sign treaties, make and unmake ministers, create peers, and appoint archbishops, bishops, judges and hundreds of others (Benn, 1992; 19). The lack of any internal check and balance upon executive authority has allowed for the seamless transfer of a magisterial array of powers available to the political executive in Britain. Moreover, the royal prerogative is the means by which the political power structure in Britain, although externally changing, retained its interior character. In other words, the powers wielded by a British Prime Minister are in fact a seamless inheritance of the monarch's former authority. In this sense, monarchical power in Britain is not a physical thing that can be isolated to a set of powers which can be drawn upon by the monarch; rather it is a power structure that resides in the executive. The concept of the crown and the nature of prerogative power place a considerable degree of unaccountable power in the hands of the Cabinet and the Prime Minister and is directly related to the absence of an internal separation of powers and a comprehensive rights discourse. This is implicit in the notion that stability is achieved through properly recognised forms of control governed by the rule of law, rather than the atomistic view of natural rights that tend to disperse power. (Greenleaf, 1983). The right to appoint ministers, judges, bishops and archbishops, make treaties, and declare war are well known prerogative powers formerly exercised by the monarch, now exercised by the Prime Minister on the monarch's behalf. However, other cases, relating particularly to the Civil Service raise more concern.

The case of GCHQ has already been mentioned but it is appropriate to focus on this example because it illustrates the point well. In the case of GCHQ, the Prime Minister gave an order, by virtue of her position as minister for the Civil Service, outlawing membership of trade unions by government staff at the Government Communications Headquarters. This action was contested not only on grounds of lawfulness but also of legitimacy. The Law Lords declared the act lawful arguing that the Prime Minister merely exercised powers always apparent, namely that civil servants are servants of the Crown and hold their positions at the pleasure of the Crown. Crown powers are therefore a convenient means for a Prime Minister to avoid the scrutiny of Parliament, and render impotent the influence of the opposition, and government backbenchers. All this runs quite contrary to the broad understanding of the rule of law

already mentioned. The legality of the Prime Ministers actions are not in doubt, the powers exercised were in accordance with the constitutional powers of her office, but constitutions are more than simple legality, they imply limited government and involve – as argued in the previous chapter – judgements about fairness, reasonableness, and legitimacy. In the case of GCHQ, trade unions were banned without consultation under the guise of national security. It is arguable that this action was unfair and unreasonable. Indeed, it was a high handed exercise of power that sits uneasily within a framework of limited constitutional government.

In this analysis, a degree of authority ultimately derives from the Monarchical tradition and demonstrates the degree to which Monarchy both informally fashions the political system and can be used by it. The important point is the reverence that a constitutional Monarchy finds in traditional theory. It is not only that a hereditary head of state is unchallenged within orthodox doctrines, but that in many ways it forms the subjective cement that binds the system. This means that Monarchy endows the system with a sense of history, ceremony, and particularly authority, which in other political systems would find expression in more codified form. But why has our political system developed in this way? The beginnings of an explanation lay in the role of ceremony and the circumstances of how the constitution emerged; it is to this that we now turn our attention.

Ceremony plays an important role for many critics of the Monarchy and of the conventional constitutional approach. This type of critique suggests that the Monarchy exists at the centre of the constitution and is ultimately its fundamental essence. This approach identifies the Monarchy as the rationale for a deferential society and one that keeps the forces of modern liberalism contained within a structure that is pre-modern. The notion that the reverence of Monarchy is more than just a cultural quirk, it is on the contrary, of profound political importance. Haseler comments that:

> You cannot become Royal yourself, but you can be bestowed with an honour redolent of ancient chivalric or imperial symbolism. There is the Order of the Garter, the Order of the Thistle, the Order of the Bath, the Order of St Michael and St George, the Royal Victorian Order and the Order of the British Empire (still awarded even though the Empire no longer exists). These awards produce Knights and Dames, Companions and Commanders. It is all very complicated, yet deadly serious. (Haseler, 1991: 47)

The significance of the Monarchy in this view is that it cannot be divorced from the constitution. The Monarchy is the constitution. Tom Nairn in his polemical work '*The Enchanted Glass: Britain and its Monarchy*' (1988), echoes this view. Nairn suggests that British politics is innately social in character and its political institutions are derived from the rigidly hierarchical norms of social stratification in England. In support of this argument Nairn, cites Frederick Engels' observations of English political organisation.

> The English constitution cannot exist without the Monarchy. Remove the Crown, the 'subjective apex', and the whole artificial structure comes tumbling down. The English

> constitution is an inverted pyramid; the apex is at the same time the base. And the less important the monarchic element became in reality, the more important did it become for the Englishmen. Nowhere is the non-ruling personage more revered than in England. (Nairn, 1988: 204)

The importance of a social and monarchical tradition being at the core of a political system is also argued to have a bearing upon economic performance (Weiner, 1981; Barnett, 1988; Nairn, 1988; Acheson, 1990)[37]. The 'glamour of backwardness', to use Nairn's terminology not only brings us a pre-modern political society, but has also been used to explain the relative decline of the British economy. As Weiner (1981) insists, there is direct a link between economic performance and cultural values. In short, the British psyche is suspicious of modernity and sits ill at ease with progress. Weiner comments that,

> ...it is a historical irony that the nation that gave birth to the industrial revolution, and exported it throughout the world, should have become embarrassed at the measure of its success. The English nation even became ill at ease enough with its prodigal progeny to deny its legitimacy by adopting a conception of Englishness that virtually excluded industrialism... (Weiner, 1981: 146)

We need not dwell upon the decline of the British economy; we should however note the similar terms of reference. The suggestion implicit in Nairn and explicit in Weiner is that there is a link between the 'English' aspects of British culture, and the preservation of a certain kind of politics, which is characterised by reverence for old established institutions. As Nairn puts it, liberalism and Marxism share the notion, albeit for different reasons, that republicanism and the bourgeois society that goes alongside it with represent progress (Nairn, 1988: 44). Concomitantly, royalism and ultramontanism are associated with regression. It is no surprise that this radical liberal perspective derives ultimately from the Jacobin revolution in France, which removed the aristocratic element from its political system. The same he argues cannot be said of Britain. Why?

Unravelling this means that there is a necessity to return to the question of founding a constitution discussed in the previous chapter. The difficulties in identifying what is and what isn't a part of the UK constitution is largely a consequence of its never being made at a decisive point in history.

The preceding chapter noted how Ackerman (1991) made a distinction between normal and constitutional politics. 'Normal' politics occurs under settled constitutional conditions whilst in a period of 'constitutional' politics, a national crisis engenders prolonged deliberation, between various groups that can legitimately claim to represent the common good. In such extraordinary times, political deliberation follows Rousseauean rather than Benthamite rules of engagement where a 'general will' rather than an 'aggregate of preferences' are sought. Such deliberations, he argues, eventually unite people in search

[37] Again, despite the economic field not being within the remit of this thesis it is worth making the point for its own sake precisely because the premise of the analysis is largely the same.

of the common good: after each period of constitutional politics, a more progressive understanding of the constitution is reinforced. It was argued that this schema was able to explain the emergence of the US constitution and the various periods of reform and reconstruction in US history[38]. The claim here is that the UK has never experienced a period of constitutional politics in Ackerman's sense nor in the wider constitutional terms employed in the previous chapter.

Implicit in Ackerman's analysis is that the birth of a constitution has historically been the result of political upheaval, major crisis, or a substantial shift in the social and political organisation of a nation. Rarely has a new constitution been born of evolutionary development or the 'natural order of things'. Revolutions that have been liberal or republican in nature generally share a number of characteristics, in particular the ideas of liberation, freedom, declarations of rights and the implication that something fundamental has ended and something new has begun (Arendt, 1963:211). The British constitution was itself based upon a perceived shift in political organisation. William and Mary's glorious revolution of 1688 that settled the supremacy of parliament over the Crown is rightly seen as the starting point for constitutional analysis. However, was the seventeenth century settlement a revolution and can it rightly be regarded as a period of constitutional politics?

The Glorious Revolution: A Re-evaluation

What constitutes a revolution, and what characteristics of revolution is an important area of study and is part of a complex historiographical debate (Arendt, 1963; Tilly, 1978; Skocpol, 1979). The orthodox interpretation of the English Glorious revolution is that it laid the foundations for the political organisation of the United Kingdom (Norton, 1988). Norton argues that the revolution settled not only the dispute between parliament and the Monarch but also established, by virtue of the 1689 Bill of Rights, the supremacy of parliament enforced by the courts[39]. However, does this in itself constitute a revolutionary act? If we compare the American and French revolutions with that of the English there are manifest differences. Although the American revolution did not intend to be so radical, in the sense that it sought a restoration of the status quo before the Stamp Act 1763, it did result in the questioning of the type of legal formalism that dominated the polity of the United Kingdom. Similarly, the French revolution substantially altered the manner in which power was distributed - which is the same in both cases - the internalisation of abstract conceptions of natural rights. Moreover, as Arendt has sought to demonstrate, crucial to revolution are the ideas of freedom, liberation and renewal. Revolutions in this sense inherently mark the end of the old order and the beginning of the new: in the case of the French, the new Republic was marked as year one (Arendt, 1963: 29).

Of course in a technical sense, the case can be made that the English revolution conformed to

[38] By this I am referring to the American Civil War, the New Deal and arguably the Civil Rights revolution in the 1960s.

[39] Meaning that the courts are denied the power to declare invalid an act of parliament on the basis that it conflicts with constitutional or other 'higher' or 'natural' law.

this model with respect to the end of the King's powers and the establishment of parliament's freedom to legislate. However, the essential difference still remains that the English revolution resulted in no radical restructuring of the range of powers that were to be exercised, thus the power structure remained largely unchanged and became what Haseler (1991) refers to as a 'template'. Of equal significance though, as Ridley (1988) notes, is that the starting point of the present constitutional order - and it is at the starting point that legitimacy is determined - was not one, which any other western democracy, would regard as the proper foundation for their constitutions.

The glorious revolution of 1688, paradoxically called, was essentially a conflict between the crown and the lesser nobility. If a successful revolution depends on the formation of *constitutio libertartis* (Arendt, 1963) - a constitution of liberty - in which a common statement of rights and freedoms is the fundamental premise for its existence (*the rechtsstaat*), then the British experience was not a revolution in the modern sense of the term nor in the eighteenth and nineteenth century usage of the language. Indeed, despite the fact that revolution as a term of political action originated from this process, it was definitively retrogressive. The expulsion of the Stuarts and their replacement by William and Mary cannot be regarded as a revolution but as the restoration of the Monarch to its rightful and dignified place. Contrasted with that of the American experience there are clear dissimilarities. The American constitution, whilst concerned with limited government, was more attentive to the notion that the rights and liberties of the citizen had to be protected. Arendt quotes Madison who suggested that

> ... It is of great importance in a republic, not only to guard the society against the injustice of the other part ... but also to save the rights of individuals or of the minority...from interested combinations of the majority...(Arendt, 1990:147).

The 1688 settlement was based on no such premise, and we can make similar comparisons with the French Revolution of 1789. Britain was, and remains, closer in internal character to the Monarchy overthrown in 1789 than to the republican constitutions that followed in France and elsewhere in Europe. It is certainly arguable that French Jacobin republicanism reinforced a rigid centralisation of state power that has many parallels with the modern British state. But, crucially, it also established the doctrine of popular sovereignty based on the notion of the rights of man, expressed in a constitution of supreme authority to which the nascent citizen could appeal over the heads of the National Assembly. Thus, what emerges is not only the foundation of limited government and the guarantee of civil liberties, but the establishment of a new framework for the distribution of political power. By contrast the 1688 settlement did not create a framework of political power radically different from what preceded it. Haseler cites Plumb who suggests that,

> The seventeenth century had witnessed the beginning and partial success of a bourgeois revolution that came near to changing the institutions of government. In this, however, it never succeeded. The revolution of 1688 and all that followed was retrogressive from the point of view of the emergence of the middle class into political power. Socially and

economically they continued to thrive, but not politically. (Haseler, 1990: 47)

Implicit in this form of analysis is that both the American and French revolutions were forms of bourgeois political expression. Indeed, abstract conceptions of rights and their subsequent internalisation in a political sense embody the basic premise of bourgeois expectations and ideology. Herein lies the essence of the Constitution of the United Kingdom (or perhaps more accurately the English Constitution). It did not emerge by virtue of a bourgeois political culture but was cast in the image of the nobleman and lord. In seeking to explain why the middle class ceased to be the carrier of an individualist concept of politics, Siedentop has argued that:

> The very openness of British society in the eighteenth and nineteenth centuries led...to the middle classes assuming quasi-aristocratic attitudes and accepting a more corporate conception of society.... There followed a partial collapse or failure of middle class values and ideology which is basic to an understanding of the condition of Britain today. It is the chief reason why the individualist movement here has been contained (1985: 38)

In a similar manner Thompson has argued that the 1688 settlement:

> Inaugurated a hundred years of comparative social stasis as far as overt class conflict or the maturation of class consciousness was concerned. The main beneficiaries were those vigorous agrarian capitalists, the gentry ... At a local level (the magistracy) they did so in an astonishingly naked manner. At a national level (desuetude of the old restrictions on marketing, the facilitation of enclosures, the expansion of empire) they furthered their interests. But ... a prolonged period of social stasis is commonly one in which the ruling institutions degenerate, corruption's enter, channels of influence silt up, an elite entrenches itself in positions of power. A distance opened up between the majority of the middle and lesser gentry (and associated groups) and certain great agrarian magnates, privileged merchant capitalists, and their hangers on, who manipulate the organs of the state in their own private interest. (Thompson, 1965: 89)

The Constitution of the United Kingdom then emerged, not from a 'revolution' as is popularly thought, but from a seizure of power by one group of established politicians from the Monarch. A *coup* certainly, a revolution unlikely. Consequently, the notion of a 'glorious revolution' is just one piece of the cement that holds together conventional theory; the assumption that the 'revolution' dispensed with monarchical power is, as argued above, highly questionable. It forms another aspect of the mythology and ritual that shapes, and continues to shape, British constitutional thought. It is in this respect that the British polity presents the political analyst with a paradoxical set of social and political relationships. We inhabit a modern socio-economic system, yet this modernity has failed to recreate itself in political institutions, characterised by executive authority, that have remained largely unchanged since the seventeenth century settlement and which struggle for definition in a modern (and largely liberal) domestic and global environment. Britain, far from being a model of liberal democracy, emerges as an

entity with a fundamentally pre-modern form of political organisation. There has been no point in her development when fundamental concepts such as rights, a coherent concept of the state, the effective separation of powers, and proper rules and guidelines drawn to permit the lawmaking process have been brought to bear on the business of government.

The previous chapter considered the political theory of constitutionalism in the light of western political traditions. Drawing upon ancient, classical and modern sources it was argued that a core theory of the constitution was discernible from this tradition. Such a core theory was predicated upon a realist conception of politics, which concerned itself with the intersections between power, interests and rights. This chapter has considered the complex interconnections between, theory, practice and myth that make up the ecology of the British constitution. This has made necessary a broad analysis and many of the implicit arguments deployed here, will be fleshed out in the case study discussed in the next chapter and the conclusions and explanations drawn in chapter 4. Nevertheless, two key analytical points have been established.

First, the UK does not have a constitution that in any way mirrors the core model outlined in the previous chapter. Most notably, there is a complete absence of a separation of powers and a fully-fledged set of rights.

Second, the dominant theories of the constitution, which were argued to be both descriptive and normative, are no longer adequate to either describe or analyse how power and authority is distributed within British political institutions. A number of examples highlighted the inability of the dominant theories to move beyond a unidimensional conception of power and interests in British politics. Tony Prosser (1996: 473) has argued the fact that the British political system does not have any key institutional mechanisms, such as a Supreme Court or Constitutional Council, means that constitutional debates lack the necessary foundational concepts to deal in principles, which provide a framework within which key constitutional issues can be discussed. As a consequence, whilst it is indeed the dominant argument developed thus far that constitutions are both inside and outside of politics, constitutional *debates* in the UK are peculiarly within politics. It therefore becomes clear that any attempt to explain the lack of constitutional change in Britain will depend upon utilising models of politics, which can take account of the multidimensional character of political power and how this power intersects with interests at the most critical level.

Chapter 3:

Challenging the Constitution: The Royal Commission & Devolution

It is sometimes said that a Royal Commission is a device for the avoidance of action. If that is so, this is a Royal Commission par excellence (The Times, November 1st 1973).

...our attempt to provide devolution to Scotland and Wales proved a disastrous failure, like so many other attempts to reform the British constitution before it...(Denis Healey, The Time of My Life, 1989: 460.)

The previous two chapters have discussed the history, logic and political theory of constitutionalism. The essential elements of constitutional thought were argued to be the separation of powers, a rights discourse and representative democracy; constitutionalism as a political form was subsequently argued to be predicated upon power and interests. These observations were contrasted with the interplay between theory, history and practice in constitutional thought in the United Kingdom. It was noted that a separation of powers and a language of rights were notably absent from the British constitutional tradition allowing for a system of almost unrivalled executive supremacy.

The place of the constitution in post war British politics will now be assessed, focusing on a case study of the strongest challenge to the prevailing constitutional order: Devolution. Under consideration in this thesis is the period from the middle 1960s to the late 1970s when question of devolution directly challenged the unitary fabric of the British state. This section is not concerned to give a detailed historical account of the failure of the devolution Bills, but a consideration of the political principles at work which surrounded the debate about territorial politics in the UK. Of particular significance is the Royal Commission on the Constitution and it's accompanying Memorandum of Dissent which explored not only the various devolutionary schemes that might be appropriate for the United Kingdom but also the principles and values which underpinned those potential changes. The alternative schemas this section highlights, detail the conflict that arises between the British political tradition and core constitutional principles, and argues that the politics of constitutional change in the UK have been underpinned by pragmatism and not the principles and values of constitutional idealism. The chapter then considers the 1974-1979 Labour Government's response to the Royal Commission and the Memorandum of Dissent. This section argues that despite the political tide which demanded some form of devolved framework for the United Kingdom, the Government's position was rooted in constitutional orthodoxy. I argue that the Scotland and Wales Bills and the Acts which followed where institutionally designed to limit the autonomy of the devolved institutions and preserve the constitutional status quo.

Towards the Royal Commission on the Constitution

As Drucker & Brown (1980:41) note the post war electoral history of Scotland and Wales essentially falls into two periods: 1945-1966 and the period up to 1980. In the immediate post war period, Scotland and Wales voted much like the rest of the United Kingdom. There was general contentment and a perception that the United Kingdom was governed by representative and responsible Government steered by a neutral and anonymous civil service under a constitutional monarchy (Birch, 1964). Between 1966 and 1968 however, nationalist sentiment in both Scotland and Wales significantly heightened and provided a challenge to the perceived basis of the British constitutional order. The popularity of the Scottish Nationalist Party and Plaid Cymru in general and electoral terms, constituted one of the first cracks in the constitution during the post war period.

There are a number of explanations for the sudden upsurge in nationalist sentiment during this period and they will be explored briefly before moving on to the effects of, and the institutional

factors in managing, this discontent. Bogdanor, (1980), argues that a number of issues were being played out in this period: the declining salience of social class in British voting behaviour (Crewe & Sarlvik, 1979), the re-emergence of a national political consciousness in Celtic Britain (Drucker & Brown, 1980), a climate of dissatisfaction with centralised power in Westminster and the relative decline of the UK economy (Gamble, 1984). In addition, the strong sense of national identity in Scotland had been preserved and reinforced by the particularity of political institutions in Scotland in the form of the Scottish office and the separate legal and educations systems. Furthermore, their was a growing sense of disengagement from the Labour administration, as Scotland suffered under the weight of economic decline - sharply apparent since the mid 1960s - that did much to increase the popularity of nationalists. In short, the traditional argument for the union, namely that Scotland would be best served by attaching itself to the stronger English economy was beginning to look a little threadbare by the mid to late 1960's.[1]

In Wales, Plaid Cymru had identified Welsh speaking districts as its main electoral targets. As Bogdanor notes, it was surprising to find that it was in the industrial heart of Wales that the breakthrough came. In July 1966, Plaid Cymru defeated Labour by toppling a 9,233 majority in Carmarthen and in Rhondda West, hitherto the strongest Labour constituency in the UK, Labour saw its majority reduced from 16,888 to 2,306 (Bogdanor, 1979:130). However, Plaid Cymru did not see a consolidation of their by-electoral strength in the 1970 and 1974 Elections returning only five seats and 10.7% of the Welsh vote. Although the Labour party did not face a threatening decline of its support in Wales, the message that they could not take the Welsh vote for granted became firmly embedded.

Scotland proved the most electorally volatile with success for the SNP in both local and central Government elections. The SNP had been growing in electoral strength since 1955 (Bogdanor, 1979:90), however the major change came in the 1966 General Election where the SNP secured 5% of the Scottish vote. In fielding only 23 candidates the SNP scored 14.1% per opposed candidate (Bogdanor, 1979:92). This was quickly followed with a number of significant by-election results. In March 1967 the SNP scored 23% of the vote in the Glasgow, Pollak by-election and had an unforeseen victory in the Hamilton by election the following year. By 1968 the SNP had also made gains in municipal elections, and in the General Election of 1970 secured 11.4% of the Scottish vote. In the February and October 1974 General Elections the SNP secured 21.9% and 30.4% of the Scottish vote respectively and had won 11 seats making the conservatives the second largest party in Scotland. What was more significant was the fact that the SNP already having eleven seats were second placed behind the Labour Party in 42 other Scottish seats. A swing of 5% would have been sufficient to give the SNP sixteen further seats in Scotland and remove Labours majority position north of the Border.

Both the Labour party and the Conservatives reacted to the rise in nationalism with a degree of predictability. The Conservative Party established a committee under the stewardship of

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[1] There are rival explanations for this (Drucker & Brown, 1980; Bogdanor, 1979; Budge & Irwin, 1966; MacCormick, 1970; Donaldson, 1969), however the central concern here is not primarily with

Sir Alec Douglas-Home to consider the feasibility of expanding the role of the Scottish Office and the implications for the Union of a Scottish legislature. The committee recommended an elected chamber with deliberative functions and legislative capabilities *if* the legislation were to specifically affect Scotland. The Conservatives commitment - in the form of a speech by Edward Heath in May 1968 in Perth - to a form of devolution was to cost them politically when in power between 1970 and 1974. They were to be reminded of this fact when the Royal Commission established by Labour in 1969 reported it's findings in 1973. The Labour response was the appointment of that Royal Commission. The Commission was not due to report until 1973 which served a dual purpose for the Labour administration. On the one hand, they had no formal recommendations of their own, which meant they could not be called upon by the Scots and the Welsh for early implementation in the event of victory in coming election. On the other, they could avoid alienating Scottish support by referring all matters relating to Scotland and Wales to the Royal Commission which was diligently exploring a range of devolutionary schemes and their feasibility for the United Kingdom.

Both parties responses have a degree of curiosity about them. If there were to be any devolved assemblies to Scotland and Wales, there would have been a high likelihood that they would return strong Labour majorities, making Heath's May 1968 declaration in Perth somewhat self defeating. By the same reasoning, any devolved assemblies, whether or not such an institutional change was accompanied by a federal solution for the UK, would simply by virtue of electoral fairness lead to a reduction in Scottish representation at Westminster and hence fewer Labour MPs. In addition, no party was willing to regard the upsurge in support for nationalist parties as anything more than it seemed; a rise in national consciousness for national reasons. When the Royal Commission on the Constitution was charged with the investigating potential schemes of devolution, it was automatically assumed by the labour administration that some form of devolution to Scotland and Wales was the only solution. This became a major source of conflict between a majority of commissioners and the two who drafted the Memorandum of Dissent.

The Royal Commission on the Constitution thus stands out as a key institutional mechanism of managing constitutional change and responding to the challenge of regional and territorial politics in the UK, as well as the first primary source material which develops a constitutional language distinct from the British constitutional orthodoxy. The Memorandum of Dissent in particular demonstrates a willingness to engage with ideas such as rights, equality, power and interests; a language which has been largely absent from constitutional discourse in the United Kingdom.

The Royal Commission on the Constitution

The appointment of a Royal Commission on the Constitution in April 1969, first under the chairmanship of Lord Crowther and upon his death, Lord Kilbrandon, was the Labour Governments'

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explaining the development of nationalism but to assess the response of the political system to constitutional challenges.

direct response to the rise in nationalist sentiment between 1966 and 1969 discussed above. Its terms of reference were considerably wide:

> To examine the present functions of the central legislature and Government in relation to the several countries, nations and regions of the United Kingdom; to consider, having regard to developments in local Government organization and in the administrative and other relationships between the various parts of the United Kingdom, and under the Crown, whether any changes are desirable in those functions or otherwise in present constitutional and economic relationships; to consider, also, whether any changes are desirable in the constitutional and economic relationships between the United Kingdom and the Channel Islands and the Isle of Man (Cmnd. 5460, 1973: 1).

As the Commission stated: 'Only if we recommend the abolition of the Monarchy would we be in conflict with our terms of reference' (Cmnd, 5460, 1973: 1). From the outset, the commission was divided over how far its brief should extend into the constitutional machinery of Government. Lord Crowther Hunt and Professor A. T. Peacock (who ultimately drafted the Memorandum of Dissent) argued that the brief gave the Commission a remit to examine the political system as a whole. The remaining eleven however, regarded the subject matter of the commission to be the 'several countries, nations and regions of the United Kingdom'. The dissenters were of the opinion that the entire structure of Government ought to be reviewed with very little exception, in their view the remit of the commission demanded 'a root and branch examination of the whole of the British constitution' (Cmnd, 5460: 14). As a consequence of this division there were effectively two reports presented as the majority report and a Memorandum of Dissent.

The commission demonstrated unanimity over three areas. First, the rejection of a federal solution for the UK and outright separatism. Second, the support of a directly elected Scottish Assembly. Third, the recommendation of the 'Single Transferable Vote' as the electoral system for any devolved layer of Government. The majority report was, in essence, an analysis of options for the United Kingdom and the possibility and desirability of some form of devolved rule. It recommended (albeit outlining four different institutional designs) devolution of power to Scotland and Wales. The Memorandum of Dissent, taking as a principle equality of rights within the Union, argued for devolved assemblies throughout the United Kingdom. To this end as Bogdanor (1980: 150) argues, it was a Royal Commission on Devolution rather than the constitution *per se*.

As most commentators have noted (Bodganor, 1980; Steed, 1977; Rose, 1977; Peele, 1998), the diversity of views and interpretation of evidence went beyond an eleven/two split indicated by the existence of a majority report and a Memorandum of Dissent. There were in fact three opinions which emerged from the Commission and which lay within the two publicly declared positions. The first group, essentially the majority group, comprised six members all of whom argued for legislative assemblies for Scotland and Wales on grounds of national distinctiveness. The second group had four members including Lord Crowther Hunt and Professor A. T Peacock who drafted the Memorandum of Dissent. This group, in addition to the devolved assemblies for Scotland and Wales, wanted regional devolution to the whole of the United Kingdom. This group

found little evidence to suggest that dissatisfaction with Government was more marked in Scotland and Wales than elsewhere in the country and that 'special pleading' on grounds of national distinctiveness was misplaced. The third group were composed of the sceptics. This group, although recognising that a case for devolution to Scotland could be made, were unconvinced about the arguments for devolution of any kind and found that the statistics were inconclusive in all matters.

The diversity of views within these factions reflects not simply the different lenses with which the evidence was viewed but the radically divergent conception of what is, and what is not, a constitutional matter. It is this distinction which underpins the nature of constitutional politics in the UK and which the remainder of this section develops.

In many senses the Royal Commission had the potential to unlock the pragmatic approach to constitutional development that had marked British politics, arguably since 1688. To do so would have unleashed a welter of issues that the language of the constitution was not equipped to address. As previous chapters have argued, constitutional matters generally throw up questions of power, rights, democracy and accountability. In this sense 'constitutionalism' is as much a matter internal and external to politics. Any major discussion of 'constitutional matters' in the UK however, has been predicated upon the constitution as an entity predominantly within politics. Prosser (1996), makes the point rather well:

> ...Constitutional reform and constitutional debate...is a debate conducted in what are essentially political terms. Partly because of a lack of an authoritative source of constitutional principle in the form of a Supreme Court or Constitutional Council, we have difficulty in finding the necessary concepts for a debate which would deal in principles which are foundational in the sense of providing a framework within which key political concepts, such as the meaning of democracy and its relationship to concepts of rights, could be built up (Prosser, 1996: 473).

In this sense, the logic and clarity of the dissenters approach sits well with an understanding of constitutionalism as an idea that is both within and without politics. Whereas the majority approach was rooted in an understanding of the immediate political background to the commission being established, the dissenters case is marked by its willingness to engage with the wider questions of accountability and democracy that regional and national disillusionment tended to reveal. In other words, it may well have been the case that rising national sentiment and territorial politics was a symptom of a more systemic set of problems about UK Government. This question may well be illuminated by an assessment of the scale and nature of discontent in the UK that the Commission found.

As with much of the Royal Commission's findings, the statistical evidence produced by the Office of Population Censuses and Surveys, and found in *'Research Paper 7, Devolution and other Aspects of Government: An Attitudes Survey'* was subject to wide differences of interpretation between the majority and the dissenters. In general, the survey found a level of dissatisfaction with Government without finding anything 'specific and clear cut' (Research Paper 7, 1973: I). One of the more telling outcomes of the survey, according to the majority report, was the strong attachment to

national identity. The term 'region' carried very little meaning for a considerable section of the sample. Equally, 'national' and 'regional' attachment appeared not to vary significantly in different parts of the United Kingdom. On the explicit question of devolving more power to the various nations and regions of the UK, the statistics (see Appendix A) demonstrated that there was an overwhelming desire for greater regional and national autonomy over decision making. The table also indicated that the support for decentralisation was not unique to Scotland and Wales but remained remarkably consistent across regions. For example, when asked 'in comparison with other parts of Britain, would you say that the Government understands the needs of the (region) better, about the same or worse' (Research Paper, 7, 1973:50-51), the response patterns in Scotland and Wales were not markedly more pronounced than any other part of the UK. Equally, regional attachment was not demonstrably greater in some parts of the UK than others. Scotland and Wales for example showed only marginally more regional attachment than Yorkshire or the South-East.

The table in the report (Appendix A), clearly demonstrated one thing: the overwhelming preference for some form of increased regional responsibility in all regions, with a national total of 85%. It was somewhat surprising therefore, that the commission made a special case for Scotland and Wales (regardless of the degree of autonomy proposed) when the evidence the commission used indicates just as much a preference for regional autonomy in say East Anglia or the South East. The preference for devolution should, however, not be overplayed. The benefits of devolution were only perceived by respondents to be of value if they were linked to practical or economic benefits as opposed to political benefits. As the survey commentators point out:

> Although 61% were in favour of some degree of change to more regional responsibility, only 38% were in favour and felt certain that it would make a difference; 23% were in favour but felt it would make no difference. Only 16% were in favour of change and felt that they themselves would benefit from the change; 40% felt that it would make no difference to them (Research Paper 7, 1973: 108).

The fall in favour is more marked if respondents felt that there region would decline in prosperity in comparison with another; very few supported the principle if living standards were to fall as a consequence. Despite this, the general trend of the survey was to demonstrate the extent to which the respondents, despite their regional affiliation, perceived Government as increasingly remote and centralised. The majority report however, seemed to focus more specifically upon the differences between Scotland, Wales and the rest of the UK whereas the Memorandum of Dissent placed emphasis upon the marked proclivity of all respondents to share similar experiences regardless of region.

The two reports also place differing weight on other aspects to the survey which relate to questions of democratic participation and accountability. For the majority, questions of participation appeared to be of little consequence. The report notes,

> We do not wish to give the impression that we have found seething discontent throughout the land. We have not (Cmnd, 5460, 1973: 324).

The Memorandum of Dissent could not be more at odds with the majority report. Peacock and Crowther Hunt claim, by contrast, that the constant decline in election turnout in the post war period reflects, 'widespread and grave disquiet' (Cmnd 5460-I, 1973:78), and raises the question of legitimacy. They comment:

> This of course calls our political parties into question- as well as our system of Government...In any event, the resulting sense of powerlessness contributes to the growing alienation from our peaceful, constitutional political processes. The danger is that this will push us along the road to direct action - possibly violent action - when people and groups believe they have no other alternative to secure what they feel are their just demands; there is already obvious evidence that this is the road we are beginning to travel (Cmnd 5460-I, 1973: 78).

The natural response to such findings, according to both the majority and the minority was institutional change designed to remedy such democratic shortcomings. But their respective proposed institutional changes were coloured by their differing interpretations of the evidence presented to the commission: the majority were concerned to articulate changes inferred from the national and cultural distinctiveness of Scotland and Wales, the minority from the perspective of the United Kingdom as a whole.

The majority position, despite it's conclusions took an ambiguous view of potentially devolved institutions in Scotland and Wales, they argued that,

> Dissatisfaction with Government and support for the devolution of power from London are both probably greater in Scotland than in other parts of Britain. But, as in Wales, many people who favour more devolution apparently do not realise the extent of administrative devolution that already exists...The interest in devolution in Wales may be no greater than it is on average in England. Even in Scotland, where interest in devolution is greatest of all, few people...would support devolution if it was likely to lower their living standards (Cmnd, 5460, 1973: 387).

The minority however, remained decidedly unambiguous.

> Whatever the remedies needed to counter the erosion of democracy and to meet the complaints and aspirations of the people, it is important to stress that, so far at any rate, there is no case for treating the people in Scotland and Wales any differently from those in the English regions (Cmnd, 5460-I, 1973: 81).

The majority conclusion, then, has largely been reached from their assessment of dissatisfaction with Government on the one hand and the elusive assertion of national feeling in Scotland and Wales on the other. It was however, the deeper question of political principles that divided the majority and the dissenters and heavily influenced their respective recommendations.

Principles

The most striking difference between the two approaches was the willingness of the dissenters to consider wider constitutional principles that went to the heart of the system of Government. The majority, by contrast, were concerned explicitly with the question of devolution. This was justified with their assertion of national distinctiveness in Scotland and Wales coupled with the general level of dissatisfaction with Government.

The majority were unambiguous in their general principles. They were not interested in embarking on a major project of constitutional renewal nor one of innovative institutional design. Any reform, they reasoned, ought to be entirely consistent with the existing framework of political machinery in the UK. In this sense the majority were operating wholly within the British political tradition of 'pragmatism and compromise'. The majority argued that the existing system which had been the subject of gradual evolution rather than the creation of a singular constituent act, was to well integrated to bear extreme or radical change. They were also aware too, of the necessity to preserve what they saw as the 'high regard for personal liberty', which the British system of Government tended to foster (Cmnd. 5460, 1973: 398). In this respect the majority report notes a concern with the growing size and complexity of the state which had been paralleled by public disillusionment.

The first, and arguably, primary principle of the majority then, was to preserve the long standing unity of the United Kingdom whilst accommodating regional and national difference:

> Within the United Kingdom there is considerable diversity, based on differences of history, tradition and culture, which is already reflected in different Governmental arrangements. It is a source of strength and should continue to be respected (Cmnd, 5460, 1973: 417).

In many respects the majority were unable to look beyond the constraints of tradition and history and were lacking in any systematic linkage between the general dissatisfaction with Government, the perceived importance of national distinctiveness and the recommendations (discussed below) that were finally made.

The minority report, by contrast, was far more lucid about the nature of the problems and the logic of the changes needed to resolve them. Much like the majority, the minority report was mindful of the legitimacy that existing institutions possessed and were reluctant to engage in revolutionary change. However, recognising the legitimacy of existing institutions did not in their minds rule out innovative institutional design and a reconsideration of the structure of Government. To this end the Memorandum of Dissent is unconvinced that devolution to Scotland and Wales alone should be an adequate response to the commission findings. In their view dissatisfaction with Government resulted form the inevitable growth in the size and complexity of Government due to changes in society. Population growth, scientific and technological change and improvements to communication systems tend to enlarge units of administration and depersonalise the Governmental process. The attendant problems of such a process in the Twentieth Century, namely the growth of power of the executive over parliament, the limitations of the controls over the Civil

Service (despite the Fulton Report[2]) and the accumulation of central Government functions and its associated inefficiency ensured that adequate means of redress between the state and the individual were largely absent. For the minority, devolution was but one of a series of reforms necessary to the system of Government as a whole if the disjunctures between the state, the individual, and the regions were to be redressed. Much like the core political model of the constitution discussed in the previous chapter, the minority report tended to embody values which sat outside the dominant British constitutional tradition. Wishing to preserve the essential unity of the UK, the dissenters maintained that such a project depended upon the fostering of substantial equality in both political and socio-economic rights. They argue forcefully that:

> ...Political rights are a hollow sham if people in some parts of the United Kingdom are too poor or ill educated to make proper use of them. So the United Kingdom Government must continue to have the obligation of directing our economic resources and making its financial arrangements in such a way that all parts of the United Kingdom have the means of enjoying equality of standards in those services like health, education, and so on which are now regarded as the responsibility of Government (Cmnd-1, 1973:127).

This should not be taken as an argument against devolution, but rather a statement of wider constitutional principle. This argument, and what logically follows from it, marks out the Memorandum of Dissent as fundamentally opposed to the ambiguous logic of the majority report. To this end it is worth citing the argument at length so that its analytical precision, and its connection with arguments in the previous chapter, can be fully appreciated:

> The concepts of a substantial equality of political and economic rights and obligations throughout the United Kingdom have particularly important implications for any scheme of devolution. It means that we cannot offer rights to one part of the United Kingdom which we deny to another part. More specifically, if we think it is in the interests of "the good Government of our people under the crown" that there should be elected assemblies with legislative or other powers in Scotland and Wales and thus give the people in Scotland and Wales an extra vote and an extra "say in the way their affairs are conducted", then we cannot deny, as the majority of our colleagues wish to do, that extra vote and extra "say to the people of the different regions of England". Still less can we accept a second feature in the scheme of legislative devolution to Scotland and Wales proposed by our colleagues. Not only do they want to transfer legislative sovereignty important fields like education, health, agriculture, etc., from the United Kingdom Parliament to Scottish and Welsh assemblies, they also envisage that when the United Kingdom Parliament then legislates for England alone in the matters which

[2] The Fulton Report published in 1968 criticised the amateurish nature of the Civil Service and found a number of major faults. The primary problem was the 'cult of the generalist' or the bias towards the 'good all rounder'. The highest posts tended to go, not to specialists but to those with a broad balanced education. Training was an in house matter and promotion was a matter of too much seniority patronage and not enough merit.

have been transferred to Scottish and Welsh assemblies, the 100 or so Scottish and Welsh MPs at Westminster should have a full share in the legislative process for England. While we agree that within the framework of their scheme there was no practical alternative, that does not commend their solution; it condemns the scheme. For it must be completely unacceptable not only to give the people in Scotland and Wales political rights which are denied to the people in the various regions of England - but in addition, to give to the people of Scotland and Wales a share in determining policies applying to England only, while denying the people of England any similar share in shaping policies in Scotland and Wales. There is surely a profound irony here; the scheme commended by the majority of our colleagues to give Scotland and Wales autonomy in certain specified fields would actually deny autonomy to England in those very same fields. This is no way to maintain the political and constitutional unity of the United Kingdom. And, anyway, it is a fundamental violation of the principle of the equality of political rights - of the basic democratic principle expounded by Bentham when he wrote: - "everybody to count for one, nobody to count for more than one" (Cmnd 5460, 1973:128).

This has to be considered a measured, though sharp, critique of the majority approach which employs the language and logic of liberal constitutionalism in making the case. This was to be echoed some years later when Tam Dalyell MP asked the then (and now) constitutionally loaded West Lothian Question[3]. In addition, the dissenters added two more arguments to the above considerations. First, the treatment of Scotland and Wales as distinct nations does *not* justify granting them favourable political conditions or more responsive Government than counties of comparable size and distinctiveness. Second, that an injustice would almost certainly be worked if the peoples of England were denied similar increases in political rights (Cmnd 5460-I, 1973: 129). Nevertheless, the recommendations in the majority report bore all the hallmarks of constitutional orthodoxy.

The Majority Report

The majority report rejected separatism[4] on the basis that recognising nationhood in Scotland and Wales does not, in itself, threaten the essential unity of the United Kingdom (Cmnd 5460, 1973: 452-488), or that seperatism harms their social and political welfare. The majority position can be summed up thus:

> ...The economic fortunes of Scotland and Wales are inextricably bound up with those of England; that as independent states they would not in practice be able to cultivate a separate prosperity by adopting independent economic policies; that they would be

[3] Tam Dalyell had asked whether or not it was fair that Scottish MPs sitting at Westminster could vote on matters relating to England when English MPs could not have a say on matters relating to Scotland.

> overwhelmingly influenced by English economic policies without having the right to influence them; and that in general they would be in a weak trading position, largely dependent on the English market and on co-operation with the English Government (Cmnd 5460, 1973:487).

The claim that the discovery of North Sea oil revenue could be the basis for an economically self sufficient Scotland was rejected on the grounds that Scotland would still be significantly dependent upon England. Equally, the question of EEC membership would not be automatic in the case of separation. There would be very little advantage for the Community and a major increase in assistance should Scotland and/or Wales opt for independence.

The majority treated a federal solution for the United Kingdom with a similar degree of scepticism. The federal option was regarded as inflexible in large measure because of the necessity of a written constitution with entrenched provisions. The sheer size and complexity of Government activity that had become the norm by the late 1960s and early 1970s was also cited. Arguably, the majority commissioners had half an eye westward to the United States where the federal structure had always been a source of conflict between the federal Government and the states and led in their view to a political process in which the constitution was worked around, rather than through.[5] The most significant objection relates to the question of the size of the respective federal components. Federalism, they argued, tends to accommodate the loss of sovereignty associated with smaller states when joining a larger political community. In the UK the question was the reverse; smaller nations wishing to take, not cede, greater power and autonomy. It was therefore deemed inappropriate to the political traditions of the United Kingdom. (Cmnd 5460, 1973:526). Whilst there is some credibility in the claim that a federal constitution would indeed have been more radical than separation – principally by having a major effect upon the structure of the legislature and the judiciary – there seems to be little justification in rejecting a written constitution. The only reason given was that it was contrary to British political traditions (Cmnd, 1973: 527-8). However, the question of a written constitution is an entirely different objection to that involving constitutional balance. The ruling out of a written constitution in the context of rejecting federalism appears to assume that the two options are mutually inclusive; a point generally unnoticed even by the Memorandum of Dissent.

Far from considering principles and practices from the lexicon of constitutional theory and practice, the majority sought principles which had been tested within the British political tradition. If the regions were to be granted an increased level of political autonomy, then they reasoned that some limitations would be desirable so as to preserve the integrity of the United Kingdom as a whole. With this consideration in mind, the commission turned to the scheme that had been in place for Northern Ireland Government prior to the imposition of direct rule in 1972. It was reasonable for the majority to dismiss the failure of those institutions set up in Northern Ireland between 1922 and 1972 on the grounds that the particular circumstances of Northern Ireland politics were the

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[4] The report considers at some length whether or not separatism would be a viable option for the UK despite the fact that there was little or no popular support for this in the submitted evidence.

[5] See for example the conclusions drawn in Research Papers 1,2 and 9.

dominant variable in explaining political failure. The commission logically reasoned that Scotland with its separate legal and education systems in addition to its distinct administrative structure closely resembled the regional distinctiveness of Ireland, whereas Wales more closely resembled England. Despite this the commission reasoned that although not without problems, the 'scope for devolution in Scotland and Wales was broadly similar' (Cmnd, 1973: 559). The majority found no grounds for devolving power to the regions of England on the basis that '...some of the regions, however they were defined, would have long artificial boundaries, many of them drawn through areas of substantial population..' (Cmnd, 1973: 560). The commission had no objection to a wider degree of discretion for regional authorities to make financial decisions which reflected regional as opposed to national priorities, but sought to avoid the complexities of regional and local taxation where the boundaries are set beyond Westminster.

The commission made no concrete recommendation for regional revenue collection. A number of possible alternatives were rehearsed but it was concluded that central control was necessary in all of these. They recommended a Regional Exchequer Board with independent and executive powers to decide the amount of revenue to be spent on regional services and only then decide what funds end up with competing regions. Although the majority justify this reasoning, the loss in representation and accountability appears to negate the purpose of devolution in the first place. Arguably, their commitment to the 'immediate' problems that they found obscures their ability to consider wider principles of constitutionalism and democratic accountability. The unintended consequence of such a scheme would preserve existing pyramids of authority and power, whilst appearing to loosen the control of the centre. The real core of any set of devolved powers were not a radical departure from the existing competencies exercised by the Scottish Office: environment, health, education and personal services. In addition, criminal and judicial matters which, were already the domain of the Secretary of State for Scotland, would be candidates for devolved authority. However, in the case of Wales the commission were less than enthusiastic for the transfer of similar powers. As with other features of the majority report the lack of clear principles bedevils any attempt to deal equitably with devolved matters. Despite the fact that the justification for Scottish and Welsh Devolution was their 'national distinctiveness' Wales was clearly less of a nation, in their view, than Scotland.

The commission argued (rightly) that the modern era had witnessed a growing trend for policy making to move up rather than down the decision making hierarchy in Government. For this reason – amongst others – they strongly argued that regional powers be clearly defined so as to avoid the centre clawing back authority at some later stage. However, at the level of the relationship between the regional authority and the individual, the commission dismissed the notion that a Bill of Rights was applicable to the question of devolution. The question of human rights and personal freedom were strangely regarded as 'not considerable' under the terms of any scheme of devolution for reasons obverse to the commissions' logic concerning federalism and a written constitution. The majority regarded the question of rights and devolved power as mutually exclusive (Cmnd, 5460, 1973: 755), when they are in fact anything but. On closer inspection two explanations can be utilised. The first is that the majority were prescriptively hamstrung by their own terms of reference.

Wider terms of reference, which would have naturally included key constitutional questions like democratic accountability and rights, would have opened up a major reappraisal to the way Britain was governed as a whole – a matter the commission regarded as undesirable, and the Memorandum of Dissent, essential. The second explanation is the traditional reasons given to reject the enactment of a Bill of Rights in the United Kingdom: the granting of arbitrary judicial power. The majority regarded the question of rights as one which was best resolved by the traditional mechanism of public prohibition. They argued:

> There must be a need to curb the sovereign power of the supreme legislature, as is done for example in the United States...we have not discussed this question, partly because it does not arise specifically out of the devolutionary proposals we have examined, and also because there is no evidence that the public conscience, as made effective through our existing democratic institutions, is not adequate to provide the protection called for (Cmnd, 5460, 1973: 755).

Despite building legislative constraints into any devolved scheme - borrowed essentially from previous restrictions covering Northern Ireland[6] - to safeguard against regional bodies adopting extreme policies or those incompatible with international treaties, the lessons (which must have been glaringly apparent) of Northern Ireland seemed to be lost on the Commission. Whilst, taking the view (rightly) that a proportional voting system would tend to protect minorities, the rejection of rights was yet another orthodoxy justified with less than convincing reasons. A unicameral legislature, elected under conditions of proportional representation with no concomitant new constitutional settlement incorporating a written constitution and a Bill of Rights, was the limit to constitutional innovation displayed by the majority report.

The commission reasoned that a proportional electoral system ruled out the necessity for a second chamber in the devolved regions, but missed the opportunity that their own terms of reference afforded them to reform the House of Lords. The majority view was that House of Lords reform raises considerations 'extraneous to the question of regional Government' (Cmnd, 5460, 1973:1073). They added the view that it would be 'unrealistic' to envisage a second chamber comparable to the Bundesrat. This cursory dismissal again demonstrates the commissioners desire to limit change rather than to innovate. The minority report, by contrast, considered the possibility of the House of Lords being reshaped to accommodate the wider interests of the regions or to oversee regional matters.

The Commission went on to examine executive devolution, the possibility of regional councils with advisory capacity and administrative devolution. All of which would involve considerably less decentralisation than legislative devolution. In essence the majority reports' recommendations do little more than note the disease and treat the symptom.

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[6] The 1920 Government of Ireland Act ensured that the 'supreme authority of the Parliament of the United Kingdom shall remain unaffected and undiminished' and further that the Governor of Northern Ireland retained the power to refuse the Royal Assent on the direction of the Secretary of State.

The Memorandum of Dissent

The key differences between the majority report and Lord Crowther-Hunt and Professor Peacock have already been explored however, it is necessary to explore the recommendations for change that were explored by the minority. The most striking difference between the two was that where the majority took a programmatic view of the immediate problem, the minority were far more expansive both in their terms of reference and their analytical position. In contrast to the majority, who were concerned with the immediate nature of political discontent, the minority approach was concerned to contextualise the present difficulties within the last one hundred years of governmental changes. This taken together with their overall systemic approach considers a number of features: the strengthening of the executive against parliament and the corresponding decline in the power of local government and the decentralisation of central Government departments with very little democratic oversight. In their view this had led to 'a widespread and disturbing sense of powerlessness in the face of Government' (Cmnd 5460-I, 1973: 44). As has been mentioned above, the Memorandum of Dissent takes far more seriously the survey evidence amassed by the commission which suggested that dissatisfaction with Government was not solely related to national and regional matters. The memorandum focuses on the "sense of powerlessness" in three ways: participation, communication and maladministration. They were right to point out that there was very little in the survey evidence which suggested that Scotland and Wales could be regarded in any distinctive way. In this sense, the relative success of nationalist parties in Scotland and Wales in the 1974 elections can be explained less as a growth in nationalism *per se* but, much like the rise in liberal support in England, as a growing dissatisfaction with Government.

There is also considerably more stress on the European dimension in the Memorandum of Dissent. EEC membership was regarded by the minority as giving further impetus to the trends associated with 'powerlessness' and provided solid ground for considering the devolution of power wider than Local Government. The gradual transfer of competencies from the UK parliament to Brussels – and the concomitant democratic deficit (although the minority report does not use these terms) – blurred the traditional model of ministerial accountability. Further, the European dimension to much domestic legislation would have demanded a well thought out program of competencies for any devolved scheme of Government, which would be limited because of that dimension.

The memorandum was also well aware of the existing institutions which enabled regional and national identity to be articulated (see above) and the *ad hoc* regional boards and public corporations that were many in the early 1970s.[7] This reflected, according to the minority, successive Governments' preference for appointed rather than democratically controlled regional tiers of administration. They argued that such bodies:

> ...Show a further withdrawal of functions from Local Government, and this even though the design of creating enlarged local authority units was to enable them to take on new

functions not to shed existing ones. And, finally, they are a further illustration of the way the regional boundaries of the various *ad hoc* bodies are becoming ever more various and lacking in uniformity (Cmnd, 5460-I, 1973: 169).

The minority were thus attentive to inconsistencies in institutional design surrounding existing regional boundaries and, critically, keen to establish some regularity with regard the English regions. They argued,

> Decisions can be, and are, taken in the Scottish and Welsh Offices, for example, about the right balance of expenditure in those countries...As a result there is no doubt that Scotland and Wales are better governed, and with more sensitivity to their needs, than any comparable region in England. The need, therefore, is for similar centres of power and decision making in the English regions (Cmnd, 5460-I, 1973: 203).

The specific proposals in the Memorandum of Dissent included the establishment of democratically elected assemblies in Scotland and Wales and five English regions. In many respects the powers of these regions would not in themselves have been new, but a consolidation of existing powers carried out by local Government and the transfer of authority over regional departmental offices to the regional assembly. The memorandum argued that the real political role of the Assemblies would be to devise policies to ensure the 'general welfare' of the region and to promote 'good Government'. The Government of each region would be drawn from the Assemblies and would direct policy initiation, development and termination. This would include the implementation of United Kingdom legislation and the adaptation of it to meet local needs:

> In sum, it is important to stress that the democratically elected assemblies and Governments would not mean the creation of another tier of Government...Essentially they would be a means of subjecting to democratic control a tier of Government that already exists. At the same time they would undoubtedly develop a powerful momentum of their own as they set about providing for the general welfare and good Government of the people in their areas: they have a latent potential which could reinvigorate the whole of the Governmental system (Cmnd, 5460-I, 1973: 277).

The proposed structure of the assemblies would have had three central institutional forms: the Assembly, the Executive and the Ombudsman. The Assembly would consist of 100 members elected by the Single Transferable Vote on fixed four yearly terms. The Executive would be based upon committees, the structure of which would depend upon party strength, and a 'policy committee' ostensibly a Cabinet to oversee policy development. The Executive would be open and accessible to minority parties. By far the most overlooked aspect to this was the Ombudsman. Unlike the existing structures for the Ombudsman, the dissenters scheme envisaged substantial powers of oversight. In particular, grievances would not need to be made by MPs but could be brought directly to the Ombudsman whose remit was not only the Assembly but all local authority decisions within the region and all bodies charged with supplying a public service.

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[7] These would have included: Gas, Coal, Electricity, the Airports, River Authorities and Health Boards.

The transfer of many responsibilities to the regions would have had significant effects on the centre. Indeed, it is implicit in much of the memorandum's arguments that reform of the centre is a necessary part of the devolutionary process. Central Government departments of state would have been relieved of many administrative functions in relation to local authorities thus releasing ministers and MPs to focus more fully upon (the then emerging centrality of) the European dimension to domestic politics. Of course many of these changes could have taken place without altering the present structure of the House of Lords, however the dissenters put forward a case for reform that would make a reformed second chamber systemically related to the regional structure which they envisaged for the United Kingdom. The reformed house was to be modelled on the West German Bundesrat and would enable the 'interlocking principle' of representation. Surprisingly, there was no sustained argument to remove the unelected element of the second chamber simply a proposal to supplement the existing peers with some 150 regional representatives.

The Commission in retrospect

The recommendations of both reports fell short of any serious radical transformation of constitutional politics in the UK. Despite references by the minority report to the 'growing centralisation of power' the ascendancy of the executive in the British political system and the concomitant weakening of parliament is barely addressed to any great extent. The report as a whole interprets the evidence that it gathered inconclusively and it never grappled with the serious questions that were raised in the evidence concerning administrative secrecy and the 'powerlessness' of individuals with regard to Government. Why for example did the commission think that there was a general level of dissatisfaction with Government? Why would 'regionalism' of some sort be the remedy to - as the minority make clear – widespread ambivalence across regions to Government. In many respects the commission as a whole failed to examine the proposition that the problem may not in fact have a regional basis to it at all despite manifesting itself in a regional or national way.

The minority report, from hindsight, is more persuasive especially with regard to its claim that there seemed little evidence to justify special treatment to be given to Scotland and Wales. It also grapples with some central elements of constitutionalism outlined in Chapter 1. In terms of Government commissions it was the first (if only in part) which began to draw away from the British political tradition of pragmatic empiricism and embrace ideas of equality, justice, democratic rights and freedoms and limited government that are at the heart of any meaningful discussion about constitutionalism. Arguably, what the Kilbrandon commission reflects, is the tensions implicit in the traditional constitutional model when political questions emerge – such as the territorial dimension of British politics – and which demand a consideration of concepts about which it is woefully inadequate to contemplate. Nowhere does the report challenge or even question an attachment to the orthodox doctrine that political sovereignty resides at the Westminster parliament. Indeed, one of the more obvious characteristics of the commission process was the isolated nature in which the commissioners carried out their work. In many respects the Wilson Government was at fault here

for it never sought to co-ordinate the work of the Kilbrandon report with that of the Wheatley and Redcliffe-Maude Commissions on local Government in Scotland and England respectively. This is precisely the stuff with which British politics is made. Programmatic responses to particular circumstances; in this case the response to a rise in territorial politics.

The response to the response

The structured analysis of the Commission reports makes clear that applying mainstream (or rather continental) notions of constitutionalism to British politics results in a dialogical impasse. In many instances the terms of reference employed by the Memorandum of Dissent, such as equality of rights and a balance of powers, have no means of finding common ground with a system that so strongly adheres to centralised political decision making. Furthermore, it can be strongly argued that piecemeal reform of the constitution can do very little to remedy the types of concern that the attitudes survey tended to reveal, precisely because those concerns were about the basic structure of British political life. This section considers the response to the Royal Commission and the rise in nationalist/territorial politics during the 1970s. Of particular concern is some historical background to the development of the Scotland and Wales Acts as well as an analysis of those Acts taking into consideration the core ideas about constitutionalism and the British Constitution developed in previous chapters. Of course much has been written about the development of Scottish and Welsh nationalism and the devolution proposals that were a consequence of it (Bogdanor 1980; Drucker & Brown, 1982; Miller, Sarlvik, Crewe & Alt, 1977; Nairn, 1977; 1980). However, many of these tend to treat the question of devolution as distinct from the political system as a whole. This reiterates the point made in Chapter 2 that the study of issues in British politics tend to be micro level studies that generally ignore the systemic character of political issues. This section will therefore consider the development of these acts not only in their historical context but also in the theoretical context that has already been developed.

The Royal Commission reported at an unpropitious moment in early 1973. The end of the Yom Kippur war had brought a serious threat to the UK economy by virtue of the impending rise of oil supplies from the Middle East and the general feeling of economic unrest engendered in part by Heath's Industrial Relations strategies. The Commission's report was largely ignored after a cursory discussion in the House of Commons. As Bogdanor (1979) argues it was nothing more than an interesting diversion from the 'real' political issues of the day. The question of devolution was resurrected as a key issue after the February 1974 General Election which saw the return of a minority Labour Government headed by Harold Wilson and electoral success for the SNP who returned six MPs and Plaid Cymru who returned two. Despite the report of the Royal Commission neither of the major parties manifestoes contained reference to devolution. The Queen's speech however, attentive to the reliance of Harold Wilson's administration on Liberals (who had long favoured a federal solution to the UK) and the nationalists, whose price for support was a recognition of their national claims, made clear the Governments intentions to re-examine the Royal

Commission on the constitution and 'bring forward proposals for consideration'. Wilson claimed in the House that 'we shall publish a white paper and a Bill'.

In laying out it's initial plans the Government accepted neither the majority nor the minority report of the Royal Commission in its entirety. The consultative document[8], published on June 3rd, simply laid out the various schemes of devolution that had been reported by the Commission. Although the public had been asked for comments there was a deadline of June 30th to make any representations. The main reason for this was that the faltering minority Government was well aware that a further election was likely that same year. The support of labour members in Scotland would be pivotal to the Bills success. As a result the summer was spent preparing for an Autumn election with the party in Scotland in line behind the bill. Prior to the announcement of the election on September 17th, the administration published a white paper, *Democracy and Devolution: Proposals for Scotland and Wales,* (Cmnd, 5732). Despite amendments that were to come in the wake of SNP (and other) objections the general principles that the Government laid out in the white paper were rigidly adhered to. In short, these would include a directly elected assembly for Scotland with legislative powers and a directly elected assembly for Wales with executive functions. Both assemblies would be financed by block grants. The number of Scottish and Welsh MPs at Westminster would not be reduced and the institutional offices of Scotland and Wales would remain cabinet posts. The loosely put together arguments in the White Paper did not address many of the key concerns that had arisen in the Royal Commission, particularly those related to economic affairs. As Bogdanor (1980) and Drucker, (1978) amongst others have noted there was a degree of disquiet within the cabinet and the civil service about the general principles that the Government had laid out. However, the pressure of an early election and the necessity for party unity tended to overwhelm the desire to explore these doubts. It is clear that even at a very early stage of policy development, constitutional innovation gave way to pragmatism. The rigid adherence to these principles was to constrain the amendment of devolutionary proposals that would emerge from the White Paper.

When the Government published the second White Paper, *Our Changing Democracy: Devolution to Scotland and Wales* (Cmnd, 6348: 1975) its limited ambitions for devolution were apparent. Restraints were built into the devolved assemblies with regard to the economy and industrial policy, energy and agriculture and significantly tax raising powers which were uniformly rejected. What became a matter of particular distaste for the SNP, was the power which the Secretary of State for Scotland would have over an elected assembly. The White Paper granted the Secretary of State for Scotland considerable powers, akin to a Governor General, which would allow the office holder to appoint the Chief Executive and the Cabinet of any Scottish Administration, ratify or veto Scottish legislation not simply on grounds of legality but also if the policy was unacceptable to the Westminster Parliament. Bogdanor suggests that the powers retained by the Secretary of State were akin to the constitutional functions of a monarch (Bogdanor, 1980: 153), whilst George Reid MP, for the SNP, suggested at the time that Scots, '...expected to be disappointed. They did not expect to be insulted...'. In a briefing paper the SNP argued:

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[8] *Devolution within the United Kingdom: Some Alternatives for Discussion*

> The concept of a legislative body dealing with matters affecting the life, liberty and other interests of the individual being constitutionally subordinate to a member of the Executive is offensive to the principles established by both Kingdoms at the end of the seventeenth century (SNP, 1976: 5).

In the wake of this kind of criticism, and the extent that the White Paper was coolly received in almost all quarters, the Government issued a further White Paper entitled *Devolution to Scotland and Wales: Supplementary Statement* (Cmnd. 6585, 1976) with some revisions which mainly affected the powers of the secretary of state. In effect the White Power tinkered with the powers of the Secretary of State rather than radically removed them. The new provisions prevented the veto of Assembly Bills on policy grounds and remaining powers would be subject to Westminster approval.

The Bill passed a second reading with a majority of 45, with some 40 Labour MPs voting against or abstaining; indicating that the Bill would have a troubled passage through the House of Commons. The major difficulty for the Government was the amount of Labour dissidents who were largely against devolution in principle, and the Liberals, who demanded greater devolved powers in return for their continued support. The Government's compromise was to offer the concession of a referendum to Labour dissidents, giving them the opportunity to back the Government in parliament but campaign against the Bill in a referendum.

The inclusion of a referendum caused major procedural difficulties for the Government. In the first instance it attempted to ensure that the referendum was mandatory rather than consultative – a position that they were forced to retreat from. In the second, the right to vote was limited to those resident in Scotland and Wales. Many MPs felt that the devolution Bill would cause a major change to the constitution of the united Kingdom and as such ought to be deliberated on by all citizens. The Government's view was strong. They argued that the position would simply be untenable if a majority of English voters were able to overturn a majority in Scotland and Wales. There was clearly a lot of credibility to the Government's case, however, the debate on this issue was indicative of the general problems that arise - especially in the case of the United Kingdom – when issues as fundamental as the organisation of political power to differential levels of authority are conceptualised in a way which ignores the wider systemic (both institutional and ideational) context in which they expect to operate. The exclusion of English voters from matters which would have affected them, perhaps less in terms of constitutional rights but more in terms of taxation and resourcing, conflicts with the strongly held view in the Memorandum of Dissent that there ought to be equal rights of influence when constitutional matters were at stake. The *ad hoc* inclusion of a referendum clause in the Bill indicates the general problems that arise when constitutional questions emerge in a polity like the United Kingdom. As was made clear in the previous chapter, the fact that the British political system does not have any key institutional mechanisms, such as a Supreme Court or a Constitutional Council, means that constitutional debates lack the necessary foundational concepts to deal in principles which provide a framework within which key constitutional issues can be discussed.

It was no surprise that the resultant Bill was generally regarded to be incoherent. John Mackintosh who had argued passionately for devolution found the Bill so flawed that he argued in the House of Commons that:

> ...As a person who has supported devolution for twenty years, I would rather see this House have the courage of its convictions and reject the Bill. It should be thrown out and the electorate should make their views known at a general election, so that the Government can come back with a better Bill at a later stage... (John Mackintosh, H. C. Debs, Vol, 925, cols. 1715-6).

Rather than heed Mackintosh's advice and deliberate further, the Government, running out of parliamentary time, proposed a guillotine to ensure that the Bill would be completed within the session. This measure simply increased the hostility to the Bill. Dissident conservatives had rallied to the party colours and the Liberals clung to their demand for proportional representation. The Government could only claim the grudging support of the nationalist parties. David Steel argued that the devolution project, which had begun as a means to prevent a haemorrhage of Labour support in Scotland and Wales to the nationalists, had backfired. He claimed:

> The whole exercise started off as a ploy to keep the nationalist wolves from the door, but the Government find that they have ended up in bed with them. The Government have as their non-Labour supporters only those people in the House who know that the Bill will not work and hope that it will not (David Steel, H. C. Debs, Vol, 926, Col. 1273).

Inevitably the Government lost the guillotine motion and appeared to undermine the Governments authority and confidence (Childs, 1997: 221). The response of the nationalists was to withdraw support for the Government hoping to force a general election.

The Government and what was now two Bills (The Scotland Bill and the Wales Bill) survived by virtue of Callaghan and Healey 'engineering' a pact with the Liberal party (Healey, 1989: 461) and persuading dissidents within the party to support the bill. The passage of the bill was wrapped in traditional pragmatism and party loyalty rather than any positive belief in constitutional innovation and reform. The Labour Government determined not to lose face over a major plank of its legislative programme pushed ahead despite the flawed character of the bill that even supporters recognised. Bogdanor (1980) makes a similar observation to Steel when he noted that Labour MPs, despite speaking against the Bill, were willing to vote for it to avoid embarrassing the party whilst conservative MPs both voted and spoke against it but denied that they were opposed to any serious devolutionary strategy (Bogdanor, 1980: 160). In many respects, the survival of the Bill owed much to the skill of the Government in managing to steer a Bill through the House of Commons that on the basis of expressed preferences had no natural majority. As Bogdanor rightly argues:

> ...These two bills fundamental to the constitutional and political future of the United Kingdom came to be passed by a House of Commons which was opposed to Devolution (Bogdanor, 1980: 160).

The Government's response then, was fuelled by the necessity to quell support for nationalists in electorally sensitive regions of the United Kingdom. Despite the rhetoric, the motivation for pursuing devolution was wholly pragmatic.

Before moving on to consider the substance of the Bills themselves it's worth noting the amendments suggested by the House of Lords and two amendments made to the Bill in the committee stage, one of which was to have a major influence on the process and effectively remove devolution as an issue in British politics for twenty years. The first was the most significant. As the committee stage was nearing its end, MPs scrutinised an amendment from Labour backbencher Mr. George Cunningham. The amendment required the Secretary of State to lay before Parliament an order repealing the Act unless at least 40% of the eligible electorate voted 'yes'. The amendment was strongly opposed by the Government, but it lost the vote by 166 votes to 151. The second, inserted a clause to both Bills that if a General Election were to take place before the referendum had occurred, the referendum would have to postponed for three months.

The Lords for their part had voted for both assemblies to be convened by virtue of proportional representation only to see the amendments rejected by the House of Commons. The most significant input from the Lords, proposed by Lord Ferrers, was closely related to the West Lothian question proffered by Mr. Tam Dalyell MP for West Lothian. Tam Dalyell had questioned whether or not it was fair that Scottish MPs sitting in the House of Commons could vote on matters affecting England which in Scotland would be devolved (for example, housing, health and education). English, Welsh and Northern Irish MPs would be unable, in such a situation, to vote on equivalent Scottish matters. Ferrers' amendment moved, that if a Bill concerning any matter devolved to Scotland was passed through the votes of Scottish MPs a fresh vote ought to be taken two weeks later. One concern with such a provision, raised by Mr. Francis Pym MP, was that Scottish MPs would be under considerable pressure not to vote, thus ensuring that the Westminster parliament was behaving much like a devolved assembly itself. This would have had a considerable impact upon the nature of British Government especially in circumstances, not uncommon for Labour Governments in the post war period, where Commons majorities were dependent upon Scottish MPs. The implications of this would be nothing less than constitutionally unprecedented whereby an executive was essentially bifurcated. Despite these concerns the Bills passage through the House of Commons was sealed on 31st July 1978. Much of the content of the Acts has been mentioned above however the following will put into greater clarity the range and scope of powers envisaged for the Assemblies.

The Scotland and Wales Acts

The Scotland Act provided for a directly elected Assembly and established the constitutional and financial means for it to carry out the powers that it would exercise by virtue of the Act. The Scottish Assembly would be unicameral and elected by virtue of multi member constituencies; though not as noted above by a system of proportional representation. The Assembly would be re-elected every four years, although the reserved powers of the Secretary of State for Scotland allowed for a

dissolution after two thirds of that period if the assembly members so wished. The Scottish Assembly could make laws - within its legislative competence – even if this conflicted with previous United Kingdom legislation. The Assembly would be financed by virtue of a block grant allocated by parliament for devolved services[9].

Despite the potential existence of the devolved assembly it's powers would have been strictly limited (see note 7 above). It had no power over *inter alia*: Universities, The High Courts, the sheriff courts; insurance; banking; and trade unions and employers associations. The Scottish Executive would be appointed by the Secretary of State who had considerable reserved powers over legislation. If it appeared to the secretary of State that a Bill passed by the Scottish Assembly contained aspects which may affect a reserved matter (taken to be one that affected Scotland but was not within it's legislative competence), however slight, (s)he may lay the Bill before Parliament. In addition, the Secretary of State had discretionary power over matters which may conflict with existing European Community obligations. Despite persistent lobbying both within and without Westminster a Bill of Rights in the form of the European Convention was rejected as was the ability to raise revenue independently of the Westminster parliament.

The provisions for a Welsh Assembly within the Wales Act were considerably less adventurous than those for Scotland. The Single Chamber Welsh Assembly was granted a degree of policy making and executive power but no legislative power. The main operating principle of the Assembly was a series of committee structures much akin to the scheme outlined in the Memorandum of Dissent (see above) recommended for the five English regions, Scotland and Wales. The Welsh Assembly's functions were, as a consequence, markedly less involved than the Scottish Assembly. Furthermore, as opposed to the cabinet structure which characterised the latter, the Assembly was responsible for particular subjects exercised through committees[10]. The reserve powers for the Secretary of State were the same as the Scotland Act.

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[9] Devolved matters within the legislative competence of the Scottish Assembly fell into the following groups: Health, Social welfare, Education, Housing, Local Government and local finance, Land use and development, including town and country planning, Pollution, Erosion and flooding, Countryside, Transport, Roads and bridges, Marine works, Agricultural land, Fisheries, Water supply and inland waterways, Fire services, Toursim, Ancient monuments and buildings, registration and births marriages and deaths, Miscellaneous, including charities, public holidays and liquor licensing, Court jurisdiction and procedure, the legal profession and legal aid, advice and assistance, Tribunals and enquiries, including the Lands Tribunal for Scotland, Public Records, Civil law matters, including, obligations, heritable and movable property, conveyancing, trusts, bankruptcy, succession, remedies, evidence, diligence arbitration, and private international law, Crime, including the principles of criminal liability, offences against the person, sexual offences, offences against property, offences of dishonesty, offences against public order, criminal penalties, treatment of offenders, criminal evidence, criminal procedure, including arrest, search and custody, and the recognition and enforcement of court orders.

[10] The 'subjects' concerned: The provisions for the constituencies, the normal duration of the Assembly, disqualification from membership, remuneration of members, the franchise, election of presiding officer, financing of devolved services, accounting and auditing, a Welsh Comptroller and Auditor General and a Welsh Consolidated Fund and Loans Fund, the status and payment of the staff of the Welsh Assembly and of the Welsh Comptroller and Auditor General, Commencement of the Act and the Referendum in Wales. Functions and powers included: supervision of local Government, education, landlord and tenant and housing, fire services, health and social services, pollution, planning and land use, development, forestry, water and land drainage, freshwater fisheries, countryside, ancient monuments and buildings, tourism, transport, roads and bridges, road traffic, registration of births, marriages and deaths, tribunals and enquiries, responsibility for the Welsh language.

In the referendum, on 1 March 1979, Scotland voted in favour of devolution by 52% to 48% - but only 32.9% of the total electorate had joined the majority. In Wales where support for devolution had always been weaker only 20% voted for an Assembly: some 12% of the population. The Cunningham Amendment meant the prospect of devolution disappeared. The labour Government fell in May 1979 and despite many overtures to Scotland, successive Conservative administrations had no incentive to pursue devolution to Scotland or Wales.

What conclusions can be drawn from this case study. The first point is to note the manner in which the a nascent nationalism ought to be regarded. There is nothing to suggest that the Labour administrations of 1966-70 and 1974-1979 thought that anything other than national sentiment was being played out. Whether the rationale was economic, social or a question of identity, the solution certainly did not involve, as far as the Government were concerned, reflection upon the political system itself. Despite the Memorandum of Dissent's arguments, the Government ignored the convincing analysis of the minority of commissioners which made two important points. First, their was little evidence to suggest that Scotland and Wales ought to be treated as special cases for devolution because dissatisfaction with Government was clearly, and evenly, felt throughout the United Kingdom. Second, to understand the nature of discontent with the political system demanded a reconsideration of the theory and practice of the British constitution and consequently a new constitutional settlement based upon the need to decentralise power. It is argued that rather than consider this analysis, and options, the labour administration acted to limit change whilst simultaneously protecting their electoral interests in Scotland and Wales.

This naturally led to the second strand of the argument that constitutional dialogue in the United Kingdom lacked the employment of any framework, theoretical, cultural or institutional, that allowed for a consideration of the elementary features of constitutionalism: namely equal individual rights, a separation/balance of powers, limited Government and democracy.

This was best illustrated in the direction taken by the majority report of the Royal Commission. It is clear from the deliberations of the commissioners that when confronted with evidence that demanded a wider conception of constitutional thinking than the British political tradition allows, problems of interpretation arose. For example, the insistence by the majority that Scotland and Wales should be treated differently from the rest of the United Kingdom on the grounds of 'national distinctiveness' was highly questionable. The evidence in the attitude survey did not reveal any great difference across the UK when variables such as 'remoteness of Government' or 'detachment' were considered. One of the principal reasons for treating Scotland and Wales as distinct is that the question over dissatisfaction with Government can then be looked at unidimensionally. This is to say within the context of the unitary state ruling out any necessity to consider wider systemic questions of political organisation and the logical conclusion that a serious rethink of British political institutions and constitutional traditions was necessary. The logical conclusion, quickly drawn by the authors of the Memorandum of Dissent is that the evidence presented demanded a far more radical rethink of how the United Kingdom is politically organised. Such a rethink demanded, in their view, a reconceptualisation not only of the British political system, but of the theories which bind the history and convention of the system together: more significantly

an engagement with the question of equal rights, a balance of power, and limited Government. The tone which pervades the majority report often reads as a rationale for changing as little as possible. Indeed, the majority report favoured a highly diluted form of legislative devolution which in many respects mirrored the subsequent Scotland and Wales Acts.

The Memorandum of Dissent, by contrast, was far more willing to engage with questions, and consequently solutions, about the system as a whole. The recommendations made by the minority, in particular the option of five regional assemblies with legislative powers would, as they noted (see above) have had a profound impact on the balance of power between central, and (new as well as existing) regional, political institutions in British Government. Moreover, in the view of the minority, the reform process gave a unique opportunity to address central questions such as the role of the House of Lords and indeed the Monarchy in a modern democracy. In many respects, then, despite the proposed regional assemblies, the minority report was more willing to see the evidence as a consequence of the centralisation of power, the remoteness that most respondents felt from Government and of Government secrecy. As the minority report notes, the tendency of the political system to centralise power has been a consistent theme of post war British politics. The expansion of Government in a variety of areas such and health and welfare, education and housing gave a greater impetus to a political system which by design has a tendency to centralise, rather than devolve, power. As the minority hints at suggesting, but sadly falls short of, is that the problem may not in fact have a regional basis to it at all despite manifesting itself in a regional or national way.

The Scotland and Wales Acts were inextricably linked to the Commission, not only in the dialogical terms, but also in terms of the extra-parliamentary advice the Wilson Government sought. In this sense, the manner in which the question was addressed was not guided by any desire to rethink the nature of the constitutional settlement in the United Kingdom, more to protect the electoral interests of the Labour Party in Scotland and Wales. In seeking to pacify nationalists in Scotland and Wales the Labour Party and subsequent Governments found themselves drowning in a constitutional soup of their own making. Neither the Labour Government nor the vast majority of the wider Labour movement showed any commitment to serious constitutional change. The adherence to orthodox constitutional doctrines, which demanded the retention of existing parliamentary structures, coupled with the dominance of party interests ensured that the Bills were the least liked, but most likely passable, legislation that the Government could construct. In short, the very structure of the existing political system, alongside the ever present ghosts of Bagehot and Dicey as parchment defenders, provided the very best defence of it against reform. The tragedy of the devolution bills was best summed up by David Steel MP whose conclusion that 'the Government [had] as their non-Labour supporters only those people in the House who know that the Bill will not work and hope that it will not'.

What is clear is that constitutional politics in the United Kingdom during this period was heavily constrained by the interplay of the constitutional theories, historical developments and dominant political traditions that provide the framework within which political change is managed. In many respects the existing political system in the UK is the perfect auto limitation device: *contra*

Norton (1994), amongst others, it is not particularly flexible. It provides a framework for accommodating major social and economic changes but systematically limits the consideration of fundamental changes to the structure of power that it's institutions possess. In addition, unlike say the United States, the British political system does not have any key institutional mechanisms, such as a Supreme Court or constitutional council, which results in the absence of constitutional debates which might engage with foundational concepts and principles would provide a framework within which key constitutional issues can be discussed. As a consequence, whilst it is indeed the dominant argument developed thus far that constitutions are both inside and outside of politics, constitutional debates in the UK are peculiarly *within* politics. It therefore becomes clear that any attempt to explain the lack of constitutional change in Britain will depend upon utilising models of politics, which can take account of the multidimensional character of political power and how this power intersects with interests at the macro level of politics.

The final chapter considers again the interplay of ideas that make up the constitutional fabric of the United Kingdom and works toward explaining why constitutional dialogues in the United Kingdom have lacked the consideration of the foundational principles outlined in the first chapter and evidenced in this case study.

Chapter 4:

Explaining Constitutional Change: Towards an Explanatory Model

[T]he constant and repetitive quality of much organised life is explicable not simply by reference to individual, maximising actors but rather a view that locates the persistence of practices in both their taken for granted quality and their reproduction in structures that are to some extent self sustaining (Steinmo & Thelen, 1992: 8).

The previous chapters have considered two very different traditions of constitutionalism and used the example of devolution to illustrate the nature of constitutional politics in the United Kingdom. The first chapter derived a core model of constitutionalism from classical, modern and contemporary sources. It was argued that modern constitutionalism, as a tradition in political thought, owed much to a realist conception of politics where power and interests, rather than the search for the common good governs political activity. From such a tradition constitutions have tended to be conceived as much as instruments to limit power as they have been a forum for competing political interests to clash. It was claimed that a robust defence of individual rights is complimentary to, and indeed essential for, a cogent political theory of constitutionalism based upon such premises and a consequent model of the constitution.

This model was then contrasted, in the second chapter with the constitutional theory and practice in the United Kingdom. Two main points were established. First, if constitutionalism is accepted to mean the institutional separation of powers under conditions of representative democracy and an institutionalised set of individual rights,[1] then the United Kingdom does not have a constitutional system of government. Secondly, that the dominant theories of the 'constitution' in the United Kingdom can no longer explain how political power is distributed within it and how interests are aggregated both within and without political institutions. A number of examples were used to demonstrate the inability of the Westminster model of British politics to adequately map the complex relationships between interests and political power. The central problem in this respect was the marked propensity of orthodox theories to discuss power in unidimensional terms and as a consequence to divorce the exercise of power from a conception of interests.

The third and preceding chapter considered a case study of devolution between the mid 1960s and the collapse of the provisions of the Scotland and Wales Acts in the referendums of 1978. This chapter emphasised the importance of institutional variables, most notably the importance of the Royal Commission (1969-1973) on the Constitution and it's attendant Memorandum of Dissent. The case study thus provided a sound example of the difficulties that arise when the British constitutional tradition is confronted with political problems which demand a more innovative approach to constitutional reasoning than the British political tradition provides. The issue of devolution demonstrated that the response to the rise in dissatisfaction with government, manifested as regional and national politics, between 1966 and 1978, was driven less by clear, rational constitutional thinking and more by pragmatic party political considerations. Moreover, the institutional context in which the devolution debates were played out were constrained, and in some cases dictated the direction of the dialogue, by the dominant ideology of the constitution at that time.

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[1] Again the point must be made that to claim a political system is unconstitutional, does not mean that it is illegitimate, or cannot gain legitimacy.

As a consequence, in the light of the conclusions drawn in the previous chapter, this thesis claims that any alternative explanation of constitutional politics must take account of the complex and multilayered nature of political power both within and without the state. In particular, constitutional issues must be considered as an issue *in* politics. Moreover, it must also be recognised that because of the peculiarity of the British political system, in which constitutional change demands no special procedure over ordinary legislation, constitutional change should be analysed as an issue in the policy process. This chapter argues that the new and historical institutionalist perspectives give greater explanatory value than other competing analyses of the policy process in British Politics. It demonstrates how the growth of the state in the post war period has made a unidimensional power analysis difficult to sustain and considers the centrality of power to political analysis. In particular, it suggests that more nuanced conceptions of power, interests and the state are necessary for an adequate understanding of constitutional politics in the United Kingdom. Consequently, the chapter evaluates alternative models of politics. In particular, the chapter will focus upon new thinking in explaining political change through the power of institutions: notably policy network analysis, the new institutionalism (from both a rational choice and historical bias), and political culture.

The 'Westminster model' of British politics, has long been regarded as too simplistic an account of the modern state (Dearlove, 1989). The major criticisms of this model are that it is over reliant on formal state structures and governmental processes, which ignore the complexity, differentiation and diversity of the modern political process. I will return to this briefly below, before moving on to consider theories of institutional behaviour, to see how well they can provide an analytical framework that may inform studies of constitutional change. Of critical importance are sets of organising perspectives, which could claim to explain the distribution of power within the state system and how this affects the policy process. The following sections consider institutionalisation via policy communities and policy networks, the notion of an institutional political culture and historical and rational choice institutionalist models of politics.

Traditional models: traditional problems

Traditional theorists[2] have generally underestimated the necessity to elucidate a conception of the state beyond legal terms: the main problem of which is that the orthodox approach lacks both a theory of, and a convincing empirical account of power. The core of the orthodox case has been to locate power in cabinet or prime ministerial government, the sovereignty of Parliament, or latterly political parties and their leadership. This in many ways is surprising. It has been a fairly consistent and strong theme of post-war political analysis that

locating power in the modern state has become particularly complex (Rhodes, 1988; Luhmann, 1983; Zolo, 1992). In addition, the reality of global interdependence of economies (Lindbeck, 1978; Evans, 1984; Maier and Lindberg, 1985) and the interconnectedness of the global political environment (Bradley, 1989; Held, 1993; 1995) has demonstrated that ascribing power as a unidimensional phenomenon, located in specific places at all times, is at best a questionable thesis.

Notwithstanding these pressures, the growth of the state in the post war period has witnessed the emergence of well organised sectional interests and the dominance of the market as the arbiter of accountability between citizen and polity (King, 1987; Dunleavy, 1989; Eckstein, 1960; Richardson and Jordan, 1979; 1990). This has meant not only that power is more complex, but also the context(s) and sub context(s) in which power is deployed are harder to locate. The lack of a well-defined theory of the state coupled with a weak power thesis challenges the salience of the orthodox view and leaves traditional constitutional theory with some problems.

Traditional British constitutional theory has a simple model for constitutional change. The unlimited sovereignty of Parliament (taken to mean the wishes of the government of the day) has within its power to change any aspect of the constitution by means of a majority vote in the House of Commons. The fact that no government can bind its successors means that almost anything can be done in the name of Parliament. On the surface there does not seem to be a problem here; both legally and technically this is correct. The central problem however, is the assumption that Parliament is the central focus of mediating interests. The argument suggests that since Parliament is the sole source of authority all other branches of the state are subordinate to it and so the diverse range of state agencies are obliged to carry out its will. In addition to this, the traditional model does not sufficiently distinguish, indeed ignores, the differences between the government on the one hand and a conception of the state on the other. The terms 'government', taken to be a transient authority removable periodically by the electorate, and 'state', taken to be the ongoing legal, bureaucratic and administrative agents and institutions (Skocpol, 1979), are generally confused by traditional theorists as the same phenomenon. In the traditional scheme therefore, the idea of the 'state' does not exist and is not understood or conceptualised in the same way as it was in the opening chapter. The traditional model lacks any concept of the state as a separate legal and political entity and does not consider it a crucial determinant of either public policy or the political agenda.[3] In short, there is no concrete recognition of either structural or non-structural sources of power that may be said to exist within the state at the level of organised interests (Richardson & Jordan, 1979; Rhodes, 1986; Marsh and Rhodes, 1992);

[2] Where I refer to 'traditional theorists' or the 'orthodox approach', I am referring to the tradition of constitutional theory distilled by A.V. Dicey and which informs most if not all descriptions of constitutional practice and accounts of constitutional change.

institutional ideology and culture (Miliband, 1969); or individual preferences (Ward, 1987). Of course, there is a sense in which the traditional model has an account of organised interests seeking representation in Parliament, but again it falls foul of assuming that MPs are power brokers and that parliament is the unidimensional locus of power.

On a practical level, it has long been argued that the management of public money has been the domain of sectional interests within and without the state (Heclo & Wildavsky, 1974). This view suggests that the notion of members of parliament or even governments having complete control over the direction of public policy is no longer a credible one. With the increased involvement of the state in many areas of public provision the complexity that this engenders has led to government agencies and state departments developing a high degree of autonomy in policy formulation, implementation and termination (Heclo & Wildavsky, 1974; Richardson & Jordan, 1979; Hood, 1991; Hood & Scott, 1996). Such autonomy leads to the development of departmental ideologies often disguised as standard operating procedures (Rhodes, 1996; Rhodes & Marsh, 1992). The legal formalism, which characterises the traditional model of the constitution has, by its very nature, major difficulties with relativist concepts such as ideology, and thus has no means to explain how pivotal the role of ideas has become in contemporary governance. As a consequence, ideological activity is confused for legal fact, and the model cannot identify the critical lines of determination that run as much (or more) from state structures to party organisation to the content of electoral politics, as they run from voter preferences to party platforms to state policies (Skocpol, 1984:24-25). It fails therefore to comprehend the idea that the state can play a crucial, and in some cases dominant role, in shaping political preferences, priorities and outcomes.

In summary, traditional models do not have the theoretical resources to explain the exercise of power, particularly state power, and the critical role played by the management of ideas in justifying state action. Where then does consideration of constitutional reform go from here? The common answer has been to refer to the raft of constitutional thinking that has emerged in the last two decades and focuses upon descriptive, critical and prescriptive approaches to constitutional dialogue. The next section explores the direction that thinking about the constitution has taken and considers their strengths and weaknesses before going on to consider in greater detail the question of power and interests, considering how reconceptualised notion of both, can be applied to an understanding of constitutional politics.

Modes of Constitutional Thinking

[3] This is not to suggest that Parliament is insignificant, rather that understood in its traditional sense as an omnicompetent authority, it is an insufficient explanation and needs to be supplemented by a theory of political power.

Contemporary criticisms of traditional theory tend to go alongside prescription for a new constitutionalism. This is found in the recent arguments for constitutional change in the new republicanism (Nairn, 1988; Haseler, 1991, 1993; Wilson, 1992) and the rediscovery of citizenship as a political concept (Oldfield, 1990; Fishman, 1989). One of the problems with the renewed interest in constitutional reform is that it does not provide a new set of organising perspectives or analytical frameworks within which constitutional change or inertia can be explained. Most of these arguments imply that a new constitutional language can only emerge alongside a new constitutional settlement. In concert with these arguments are those that seek to tease out the essence of the constitutional order, or to provide an immanent critique of the organisational structure of the polity. Three distinct approaches to the study of the constitution can thus be discerned: the *descriptive;* the *critical;* and the *prescriptive*.

The descriptive approach is to be found in those studies that broadly accept the contours of the doctrine distilled by Bagehot (1963), Dicey (1959) and Jennings (1959). They are concerned to describe the patterns of Cabinet and/or Prime Ministerial power, the location of sovereignty and the changing nature of parliamentary practice and procedure (Bogdanor, 1981; Brazier, 1988,1992; Mackintosh, 1968; Norton, 1992). In short, this perspective is concerned with description and dispute within the orthodox nineteenth century liberal-democratic constitutional tradition.

The critical approach is one which seeks to demonstrate how the British constitution fosters unaccountability, is unrepresentative and does not encourage political participation. Central to this approach is to contrast the provisions of the British constitution with those of our continental neighbours in order to demonstrate the uniqueness of the British system: the absence of written rules; entrenched rights; the lack of a formal separation of powers; and the necessity to rediscover the rule of law (Benn, 1981, 1992; Harden and Lewis, 1986; Johnson, 1977; Haseler, 1991[a]; 1991[b]).

The prescriptive approach accepts the pillars of the critical approach but goes a stage further by advocating positive changes such as adopting a Bill of Rights, a Freedom of Information Act, a written constitution and the abolition of the Monarchy (Charter 88, 1988; Cornford, 1991; Holme and Elliot, 1988; Lester *et al,* 1990, Haseler, 1991; 1993; Liberal Democrats, 1990, 1993).

These arguments, despite forming a substantial contribution to the constitutional debate, only provides pointers to how a framework for explaining constitutional politics might be advanced. What is lacking in these schemes is an explicit explanatory basis which might show how certain issues pertaining to constitutional change reach the political agenda, why they do not, and more importantly how the debates surrounding the constitution are constructed. The present state of constitutional studies leaves us stranded then, between the descriptive accounts of traditional scholars and the radical constitutional reformers. Starting from this position ought not

discourage consideration of the constitution, rather it should encourage the formulation of alternative analytical frameworks which explain how the constitution changes and more importantly why it does not.

Constructing new analytical and explanatory frameworks as opposed to simple description and/or creative prescription does entail difficulty but this is not insurmountable. I argue that if the study of constitutional change is to be given an explanatory dimension it needs to be grounded in (a) a theory of power; and be considered alongside (b) the context of a theory of the state.

Power

The literature on power is extremely diverse which reflects its centrality to political analysis. This centrality constitutes both an *analytical* question concerning the identification of power with specific social and political contexts (Dahl, 1962) and a set of *normative* questions concerning the critique of the distribution and exercise of power thus identified (Lukes, 1974; 1978; Bachrach & Baratz, 1962; 1963; 1970; Connolly, 1993), is subject to extended and heated debate (Hay, 1995; 1997). Indeed as Lukes (1974) argues, power, much like liberty, justice and equality is an essentially contested concept.

For much of the post war period, power was treated as a transparent political phenomenon, observable through the behaviour of actors within the decision making process (Polsby, 1960; Dahl, 1961). Primarily in the United States, the community power studies of the 1950s and 1960s reflected the tensions between elite theorists such as Wright-Mills (1956) and Hunter (1953) and pluralist schools of thought amplified in the work of Truman, (1951), Polsby (1960) and Dahl (1957; 1958; 1961). For Wright-Mills (1956), the locus of power was the elite, which in industrial societies like Britain and the United States, coalesced around the executive branch. The most obvious characteristic of elite power was its selectiveness. According to Wright-Mills, while many run of the mill domestic issues may be left to 'democratic' decision making processes, critical decisions such as the future conduct of economy policy or foreign and defence policy are the reserved domain of the executive branch.

From his critique of the elite theorists, Dahl developed the classical pluralist position on the exercise of power asserting that,

> *A* has power over *B* to the extent that he or she can get *B* to do something that *B* would not do otherwise (Dahl, 1957: 207).

Dahl's method was to study decision making by focusing on the range of alternative preferences made by particular actors; those participants with the greatest number of successes were deemed to be the most influential. So, as Polsby (1960) put it, the pluralist approach is concerned to study the specific policy outcomes in order to determine who prevails in community decision

making. What is distinctive here is the stress upon observable behaviour, focusing upon actual conflict where there are observable conflicts of interest expressed, and a belief that preferences reflect the interests of those who express them. In short, a resolutely behavioural model, which concluded that power was an observational relationship that could be identified by examining the nature of political participation in the decision making process.

This fits very well with the understanding of power implicit in the Westminster model of British politics. A unidimensional and non-hierarchical conception of power where the principal focus is upon agency-centred decision-making lies at the heart of traditional theories. In this sense power relations are visible and can be recorded according to the preferences expressed in the decision-making process. This has obvious appeal, and to models of British politics, which conceptualise parliamentary power in unidimensional terms (Norton, 1980; 1995) a clear resonance. However, there are a number of reasons why the pluralist approach to power is insufficient for this particular study. Principal amongst these is the strong adherence to a positivist and behaviourist methodology, which although demonstrates who prevails in observable decision making, pays very little attention to either 'agenda setting' or 'preference formation'.

A standard response to a behavioural methodology with regards to power is that power relations not only exist in decision making but in 'non decision-making (Bachrach & Baratz, 1962; 1970). Bachrach and Baratz, (1970), wrote:

> Of course power is exercised when A participates in the making of decisions that affect B. Power is also exercised when A devotes his energies to creating or reinforcing social and political and institutional values that limit the scope of the political process to public consideration of only those issues which are comparatively innocuous to A. To the extent that A succeeds in doing this, B is prevented, for all practical purposes, from bringing to the fore any issues that might in their resolution be seriously detrimental to A's set of preferences (Bachrach & Baratz, 1970:7).

Power then, in this view is janus-faced, because its true nature can all too easily be obscured by a methodological insistence on studying only the overt nature of decision making. Bachrach and Baratz borrowed the term 'mobilisation of bias' from E.E. Schattschneider (1944), to explain how some issues are mobilised into politics and some issues are filtered out in a kind of 'gatekeeping' of the political agenda. Bachrach and Baratz maintained that the strong focus on formal decision making in Dahl's model merely identifies which actor or actors prevail more frequently in political outcomes. As a consequence the model is unlikely to be able to distinguish between important and less important issues and so confuse the nature of the power relations involved. Following this analysis one may conclude that a hegemonic group allows for minority dissension over a selected few matters as part of its strategy to maintain power and authority (Hay, 1997).

Bachrach and Baratz explicitly argue for a model of power which takes account of setting the political agenda both overtly and covertly. This, arguably, takes us closer to a model of power

which may be able to explain how and why constitutions change and more importantly why they do not. In particular, it develops a theory that the political agenda can be shaped by a process of non-decision making. The appearance/reality distinction that is found normatively desirable in Bagehot (1867) and more analytically and critically in Bulpitt, (1979) and Middlemass (1978), could be regarded as a non-decision making process which involves the mobilisation of bias in favour of a particular understanding of the political system. Significantly, this also takes the theory of power closer to explaining the points made in the preceding chapter by Weiner, (1985), Nairn, (1988) and Haseler, (1991; 1993) about the recreation of a dominant British ideology within the system. In particular, Haseler's view that the Monarchy and the constitutional framework in general has been conveniently ignored as a matter of policy deliberation precisely because it served the interests of the two major parties.

However, in this model of power much like Dahl (1961) and Polsby (1960) there is a conception of interests at work that remains highly challengable. In both cases power is assumed only to be have been exercised if there is an actual and observable conflict between those who exercise power and those over whom it is exercised. Whether that is in decisions, non-decisions or the control of the political agenda. The possibility of power being exercised without the conscious knowledge of those subject to subordination is ruled out. In both cases preferences are taken as representative of individual interests. In the absence of conflict, individuals cannot perceive of themselves as possessing an interest because of the power relation to which they are negatively subjected. Very little consideration can then be given to the less visible exercise of institutional, structural and cultural power by which preferences (not necessarily interests) are influenced and shaped. Lukes (1974) rejects both these models of power and suggests a third dimension of power relations which he describes thus:

> To put the matter sharply, *A* may exercise power over *B* by getting him to do what he does not want to do, but he also exercises power over him by influencing, shaping or determining his very wants. Indeed is it not the supreme exercise of power to get another to have the desires you want them to have - that is, to secure their compliance by controlling their thoughts and desires? ... is it not the most insidious exercise of power to prevent people, to whatever degree, from having grievances by shaping their perceptions, cognitions and preferences in such a way that they accept their role in the existing order of things, either because they can see or imagine no alternative to it, or because they see it as natural or unchangeable, or because they value it as divinely ordained and beneficial (Lukes, 1974: 23-24).

It is at this level of consideration that a workable model of power begins to emerge. Lukes (1974) advances a model of power that is sensitive to (a) the strategies and practices of decision making (b) the *actions* and *inactions* involved in shaping the political agenda and (c) the *actions* and *inactions* implicated in the shaping of perceived interests and political preferences. Lukes argues

that we need to make a distinction between subjective and perceived interests on the one hand and real or objective interests on the other. Lukes clearly then, focuses attention not only upon the actual exercise of power, of *A* getting *B* to do something he would otherwise not do, but also upon the notion that regardless of *B's* preferences, this was contrary to the *real* interests of *B*.

This clearly raises a substantial problem because Lukes, in rightly locating power in the realm of preference shaping, does so in a way that raises the spectre of vanguardism. It has been widely noted (Connolly, 1972; Clegg, 1989; Benton, 1981; Hay, 1995; 1997) that such a position has become very hard to defend. Benton (1983) in particular, has suggested that Lukes' model of power presents us with a 'paradox of emancipation'. For example, If *A* has no real purchase over his/her real interests then notwithstanding *A*'s preferences, *B* may act against the perceived interests of *A* but in his/her real interests. The problem being that much like Rousseau in the 18th Century Lukes contrives to suggest that people ought to be 'forced to be free', and by doing so conflates the necessary focus on unobservable exercises of power with the ultimately contestable notion of interests. Indeed, it is the preoccupation with interests, which clouds the usefulness of the third face of power and places it too closely to an overtly Marxist account of social relations.

The main point to be established is whether a model of power that takes account of decisions, agenda setting and preference formation be generated which does not rely upon making a distinction between real and perceived interests? One way beyond this is to make a distinction (which Lukes fails to do) between *power* on the one hand and *influence* on the other. If power and influence can be regarded as separate things, one can observe the existence of social and political restraints at work without there necessarily being a conflict of interests.

It is a commonplace for writers on the subject of power to conflate power and influence by using them interchangeably. This has the potential to both mislead and limit the application of both concepts. Morriss (1987: 12-13) for example, makes a distinction both etymologically and philosophically. He argues that *influence* is both a verb and a noun, whilst *power* is primarily a noun. In his view, this means that one can *influence* something but one can only power something with the help of something 'other'. In addition, Morriss suggests that the words Latin derivations bring greater clarity to meaningful distinctions. Power, for example, comes from the Latin *potere*, meaning 'to be able'. Influence, by contrast, originates form *influere*, which means 'to flow in'. Morriss suggests that this refers to 'an astrological belief that a substance emanated from the stars flowed into people in the subliminary world, changing their behaviour or at least affecting them in some way' (Morriss, 1987: 9). Of course, meanings may change over time. However; as Morriss goes on to argue, the distinction has significance for social and political research for two principal reasons. First, because power 'always refers to a *capacity* to do things, while *influence* sometimes (and typically) does not' (Morriss, 1987: 12). In this sense *power* is a disposition that may or may not be activated whilst *influence* is 'a capacity in the sense of continuing influence, not a capacity in the sense of potential *influence*' (Morriss, 1987: 24). Or, in

short, the power to influence. A further distinction offered by Morriss concerns the difference between power which *effects* and influence which *affects* something. As Morriss puts it:

> To *affect* something is to alter or impinge on it in some way (any way); to *effect* something is to bring about or accomplish it (Morriss, 1987: 29).

The significance of Morriss's view is that it allows the useful consideration of Lukes' third dimension of power whilst jettisoning the evident ideological bias in the conception of real interests. Lukes' criticism of both the pluralists and Bachrach and Baratz was that they overplayed the notion of *power to* and ignored the ability to have *power over*. The first two dimensions of power then indicate a capacity or a facility not necessarily a relationship (Lukes, 1977: 31). If however, we consider Lukes' conception of *power to* as to be akin to Morriss's definition of *power*, and his notion of a relationship to be what Morriss understands as *influence*, then Lukes' three dimensional model is a useful tool for considering the nature of constitutional politics and the way the political system both conditions and grounds the parameters of legitimate debate about the constitution. In short, we can now move toward the suggestion that the 'idea' of the British constitution has influence over how debates about are constructed in the absence of conflict, be it latent or otherwise.

The importance of power to a model which explains constitutional politics in the UK, will be returned to in the conclusion of this chapter. However, it is important now to turn to a consideration of models of political change which consider the institutionalisation of political life and the notion that organisations have an impact on political outcomes.

Alternative Conceptions: institutionalisation, networks, and culture.

Given the peculiarity of the British constitution, in there being no special procedure for constitutional law, there is no reason to treat proposals for constitutional change as distinct from any other area of policymaking. Whilst studies of policymaking and the policy process have long surpassed the weak characterisation of power implicit in the 'Westminster model', little of these analytical and explanatory models have been applied to the study of constitutional change. The burden of this chapter is to construct a model which is able to explain the exercise of power and influence over constitutional debates and to explain the institutional context in which such debates are played out. It needs to show how these power relationships have conditioned British political processes how those processes have systematically prevented significant constitutional change in the post war period.

Studies which attempt to 'bring the state back in' often neglect to spell out clearly what a theory of the state ought to explain. (Held, 1990; Jessop, 1990). It is important that this is made clear.. What I am interested in, in this thesis is to explain how *institutions* and the *organisation* of politics shape interests and preferences, manage issues that have emerged on to the political

agenda orblock the preferences of particular policy directions when issues have reached an advanced stage. Such a theory by implication places formal and informal institutions at the centre of the political process and would seek to explain how institutions as organisational forms not only mediate interests internal to them, but also explains how external interests can be excluded by deploying influence particular to those institutions. Institutions therefore form an overarching schematic framework in demonstrating how structural and non-structural factors play a critical role in managing political debate, and consequently, shaping political outcomes.

Policy Communities and Networks

Policy communities and policy networks as organising perspectives were introduced to British political science in the late 1970s as a means to redefine the distinction between state and society as a little less hard-edged (Richardson and Jordan, 1979). Community and network analysts have been, and are, concerned with the 'institutionalisation' of the policy process, yet have been concerned to de-emphasise the orthodox constitutional version of the Westminster model: rejecting the formal institutions of government, legislatures and political parties as deciding factors in British politics. Community and network analyses were essentially 'realistic' and 'pluralistic' (Jordan, 1990) in their understanding of the policy process and understood policymaking as characterised by different and 'differentiated' policy arenas. This led Richardson and Jordan to characterise the British system as one in which:

> ...Ongoing problems and constraints force successive governments into very similar policy positions. Problems are handled similarly, irrespective of what government is in power. Agreement will be sought within the community of groups involved ... Our argument ... posits strong boundaries between subject matters and indistinct, merged relationships within individual policy areas ...[T]he central point is that policy-making is fragmented into sub-systems (cited in Jordan, 1990: 471).

Politics and the political process is, then, less about states, structures, constitutions and formal institutions and more about the hard realities of informal political behaviour within political institutions; the *realpolitik* of 'who gets what, when and how'. Moreover, network analysis suggests that policy is made in 'vertically sealed components' which have the capacity to exclude unwanted resource groups, government departments, parliament and, crucially, the wider public from the policy process (Dowding, 1994: 59). There is something intuitively plausible here both in the nature of the accounts and in the concept itself. The idea of an institutionalised 'network' operating with a level of autonomy from the wider political universe has appeal as a potential research strategy. By rejecting the certainties of classical pluralism (Smith, 1990) which reduces the state to at best another exogenous actor and at worst a neutral tool to aggregate the preferences of state actors and various sectional and public interest groups, network analysis

seems to offer the kernel of an explanatory framework in our context. Constitutional change, understood as a major organisational change to the British political system, will inevitably be the result of state agency, principally in the form of (sections of) political parties in government.[4] If networks can provide a framework to 'map' the distribution of power across different policy arenas it looks as though such an approach may well be useful in considering constitutional change. However, if one digs a little deeper a number of unresolved questions emerge from the literature.

The literature tends to suggest that networks can be operationalised at a number of levels of analysis. For Rhodes (1988; 1990) and Rhodes and Marsh (1992) networks operate primarily at the meso level by examining the links between sectoral interests and national governments and agencies. For Wilks and Wright (1988) networks are explained in terms of the relationship between micro and meso levels and demonstrate how individual actors integrate with sectional interests and how resources are bargained within the general policy arena. In both these senses, networks could provide a framework in order to analyse new forms of 'institutionalisation' in which policy is managed and power is utilised within the state.

However, in all cases the notion of 'resource bargaining' and 'power dependence' between groups on the one hand and state agencies on the other denote a level of pluralism or group power/involvement. Indeed, Smith (1990) calls the network analyses 'reformed pluralism', where the decisive variables are resource dependencies, which do seem appropriate at the meso level but perhaps explain less at the systemic or macro level where primary societal factors are hard to locate. Network models do not provide a general theory of state power. Despite the fact that they are a strong concept for describing relationships within a policy arena, network models are weak on explanation and in many respects fall victim to the same assumptions that are made by pluralism (Dowding, 1994, Mills and Saward, 1994). It is not necessary to consider this in great depth though it is sufficient to demonstrate why network models do not constitute a useful tool for the analysis of constitutional change.

Constitutional change must be regarded as a first order political process in which any substantial change would inevitably be the result of the state ceding to pressure from below to alter it's own internal arrangements (in the most extreme sense this would be a revolution). Analyses which look at how that pressure has been resisted and redefined is not so much concerned with the bargaining between groups, their dependence upon each other and the way they share resources at different levels. Rather, it is concerned with the power and influence at the macro level operationalised *within* the state: an expression of power that is permanent and has a high degree of insulation from social and political pressures. It is power then, which shapes structures, which develop meaning and preferences through the control of information, education and limiting the process of political experience.

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[4] The pressure for such change may well come from outside the state e.g. pressure groups, organised interests etc. etc. The point however is that nothing will happen without such groups being able to 'capture'

Network theory (if in fact network analysis is 'theory'[5]), provides none of these explanations. Used in its intuitive sense it may well be allied to another macro or meta level theory so as to give it explanatory depth but it still would ultimately fall foul of being over reliant on societal variables, that is to say an explanation which reduces state action to conflicts of competing social interests and falls into what Gamble (1990) calls the dominant pluralist paradigm of British political analysis. Pluralism explains British politics in terms of the public policy process which in itself is the sum of exogenous forces. Such an approach cannot fully explain the role of the state in determining political outcomes and preventing change. Pluralists argue *inter alia* that the state[6] acts as a neutral umpire between competing interest groups and that power, especially state power, is only expressed through overt political participation. Putting aside the criticisms of Marxists and feminists who criticise the entire pluralist thesis regarding pressure groups and political power, pluralists simply cannot explain two pivotal things: the way that the state dominates the picture of the British polity in general and the dominant role of the state in determining policy preferences and policy outcomes in particular.

Political Culture

The nature of British politics has long since been explained in terms of British Political culture. Political culture deserves our attention because of its long tradition in seeking to explain the nature of British politics. The notion that the UK has a particularly deferential political culture has been the dominant interpretation of British political culture since the publication of Bagehot's *The English Constitution* in 1867. Whether or not we accept, critically or otherwise, the central claims of Bagehot it is certainly the case that Britain has been stable (narrowly defined) in comparison with her European neighbours. If political culture can explain the enduring stability of the British system, it may well provide a useful analytical framework to explain the lack of any fundamental constitutional change.

In the view of cultural theorists, the behaviour of politicians and officials is markedly affected either by the political culture into which they have been socialised (Almond & Verba, 1965; Hayward, 1976; Street, 1994) or as the outcome of a dominant value system which is marked by it's conservatism (Nairn, 1988; Weiner; 1985). The concept of political culture in the context of this thesis can be taken to be particularly seductive as the cultural thesis can be argued to explain a whole host of socio, economic and political phenomena. The scope of the cultural thesis ranges from explanations of economic decline to elite attitudes and in some cases institutional sclerosis. Elements of the cultural thesis are to be found in explanations of Britain's

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state actors.

[5] See Mills, M & Saward, M, (1992), 'All Very Well in Practice, But What About the Theory', paper delivered to the PSA Annual Conference, University of Leicester.

[6] Classical pluralists generally ignore the notion of the state, preferring instead to focus upon government.

economic decline. Marquand (1988) for example, links the relative decline of the British economy to the absence of the constitutional and political preconditions that have characterised developmental states in Europe and the United States. These preconditions, he argues, have been absent and successfully resisted in the United Kingdom. This type of approach leads us to consider political culture as a perspective from which to explain constitutional endurance.

In essence, the cultural thesis seeks to advance the argument that political elites are encumbered with a particular 'mind set' which includes certain assumptions about the nature of politics, and excludes others; it notes a certain disposition. The thrust of the cultural thesis is that economic performance, institutional inertia and cultural values, are in no small measure, linked. Weiner (1981), Nairn (1988), and Haseler (1991,1993) for example, point to a set of cultural values that are ill at ease with the notion of progress and modernity. 'Englishness' came to be characterised as nostalgic as opposed to progressive, morally stable in place of materially advanced and rural as opposed to industrial. It is not too difficult to advance theses of this type to encompass institutional sclerosis, to demonstrate that a culture hostile to progress and modernity would wish to retain an institutional framework that is the constitutional mirror of the pre-modern. The cultural thesis in many ways gives an alternative conception of political dynamics to the structural-functionalism of Marxism as well as challenging the empirical methodologies of positivist approaches to state power. But, if political culture is to be useful it ought to be able to explain a number of things: Firstly, it ought to be able to account for the character and intention of action (Street, 1994: 90) and to demonstrate that political culture is the deciding factor in that nature of intent.

Political culture has been argued to work symbiotically on three levels, macro, meso, and micro (Girvin, 1989). At a macro level symbols and ritual define the collective enterprise (Street, 1994: 103) and subsequently informs the meso level about how the rules of the game are to be conducted, which invariably involves some form of political struggle. At the micro level political culture supplies the language of politics (Street, 1994: 104) which informs both political identity and value systems. In this type of account, political culture is seen as the dominant factor in shaping political action and political outcomes.

The main problem for exponents of the cultural thesis is that beyond survey data there is little empirical evidence to account for the influence of political culture; there is nothing to suggest that culture is little more than an instrumental device for linking citizens to the state, there is, arguably, nothing there which cannot be explained without prior reference to institutional factors. In other words political culture is real, it certainly exists and helps to explain certain patterns of behaviour amongst groups and individuals but its exact location in the social and political system is undefined.

Theorists tend to be vague when describing the route by which culture shapes politics. Merelman (1991), for example sees culture as the collective sets of ideas which shape our

understanding of political concepts such as 'liberty' or 'freedom', for Thompson (1990) culture is the means of reproducing a dominant ideology in which preferences are learned rather than assumed, Wildavsky (1991) argues that culture is the means by which preferences are created, the nature of culture determining the nature and rationale of political choices, whilst Anthony Smith suggests culture is pivotal in explaining political identity and nationhood. Mythology, language, ideology and symbolism are all then presupposed by myriad forms of culture. The important point lying behind the cultural theorists cases (in particular Wildavsky and Smith) is the assumption that preference formation is a matter of routine, is the culture of the institution as opposed to the institutionalisation of culture. This might seem a rather fine distinction but it is a necessary one if a meaningful distinction is to be made between forces at the macro level.

Political culture certainly explains more than the Westminster model. It can account for ideology and the presence of interests. However, on its own it cannot provide an adequate account of power. As an explanatory framework the cultural thesisis weak. Elkins and Simeon (1979) for example, have argued that:

> If a scholar is interested in culture primarily in a descriptive sense, he may specify *a priori* which collectivity interests him (or her) and then proceed to describe patterns of assumptions within it. But if we use culture as an explanation, we must identify what it is about these collectivities which leads to the distinctive patterns of assumptions. Thus, for nations, we must ask, whether their collective experience is important or whether the intonation difference stems from the varying proportions of particular groups, each with its own unique experiences. If it is the latter, then our attention should shift to an enquiry about the cultural attributes of the sub national collectivities rather than the national one. Conversely, if our focus were on religious groups, but we found that Catholics in one nation differed strongly in political behaviour from Catholics in another, then we would be led to hypothesise the nation as the relevant culture bearing unit; and it would be national rather than religious cultures to which we would look to for explanation. Hence, explanation based on national cultures can be persuasive only after we have ruled out some structural and institutional explanations...(Elkins & Simeon, 1979: 130).

Political culture, although at first sight attractive, has limitations as an explanatory model of constitutional change. If we wish to find out how ideas are managed and interests mediated political culture needs to be allied to institutional and structural constraints.

Rational Choice and Historical Institutionalism

It is important to point out at this juncture that prior to the 1950's the study of British politics was the study of the state; or rather the study of political institutions. From the mid 1950's

this approach came under attack from theorists concerned to explain political phenomena from a behavioural perspective (Dahl, 1956). The behavioural approach rightly criticised the framework of existing research as a narrow legalism, tending to focus on the formal distribution of power within political institutions as an explanation of the political process. In contrast, behaviourism is concerned with the social context of politics and uses empirical case studies of micro and meso level processes such as interest groups, voting behaviour, legislative processes, political development and sources of social conflict, sometimes (though rarely) within a macro level theory to explain political phenomena. The behavioural revolution inspired a diversity of subjects rightly placed within the context of political science in particular race, class, and gender. The problem which the behavioural revolution spawned was the virtual exclusion of the state as both a subject of political enquiry and as a deciding factor in political decisions (Krasner, 1984). In short, the state was virtually discarded as a coherent form of study within the professional academic lexicon (Krasner, 1984). There have been writers who have concerned themselves with the state such as Bendix (1968), but by and large the study of British politics (or politics *per se*) has been concerned with explanation at the level of political behaviour.

The criticism of this approach takes a number of forms, and has been primarily concerned with reappraising the role of the state as an essential actor in political outcomes (Nordlinger, 1981; Tilly, 1975; Scocpol, Reuschmeyer & Evans, 1985; March & Olsen, 1984,1989; Thelen, Longstreth & Steinmo, 1992). The new statist literature emphasises five main themes, which differs from the prevailing orthodoxy, which sprang from the intellectual revolution of the 1950s. Krasner (1984) identifies five broad themes of the statist project. First, statist accounts tend to be more concerned with the preservation of order against internal and external threats than with allocation and distribution. Second, statist accounts treat the state as an actor in its own right and therefore cannot be treated as a reflection of social forces. Third, emphasis is placed upon institutional constraints upon individual behaviour. Actors are bound by institutional rules which limit and even determine their understanding of their own interests, outcomes then are not understood as the resolution of conflict emanating from a variety of social groups. Fourth, statist orientations place emphasis upon historical pertinence. Existing institutional structures are seen as the result of some past event rather than contemporaneous factors. They emphasise path dependency, that is to say once a historical choice is made it precludes some choices but facilitates others. Finally, statist arguments are concerned to analyse stress and conflict not simply within a given political system but within the state. States are not composed of interrelated and harmonious structures but by competing institutions with ideological divergence.

In criticising the behaviouralist approach this thesis follows J.G. March & J.P. Olsen (1984; 1989), who have discerned five important features of the behavioural approach, which have hitherto characterised the study of politics? In many important ways March and Olsen follow Krasner's observations but turn them into a full blooded critique of contemporary political analysis

which they regard as: (a) *Contextual:* politics is regarded as an integral part of society, and thus there is no differentiation between state and society (b) *Reductionist:* political phenomena are regarded as the aggregate consequences of individual behaviour, less likely to attribute the outcome of politics to the nature of the organisation and the political structure (c) *Utilitarian:* inclined to see action as calculated self interest, less inclined to see political actors as responding to obligations, duties and rules. (d) *Functionalist:* inclined to see history as an efficient mechanism for reaching uniquely appropriate equilibrium, i.e. political life is seen to develop from some efficient process toward an advanced level independent of a historical path determined by institutionally fashioned choices. (e) *Instrumentalist:* more concerned to define decision making as the central concern of political life and as such is less attentive to the ways in which political life is organised around the development of meaning through symbols, rituals and ceremony.

In short, March and Olsen have been concerned to highlight the way in which modern political analysis obscures the enduring socio-economic and political structures which shape behaviour in different ways and in different national contexts. Institutional scholars are therefore attentive to 'historical contingency' (Thelen & Steinmo, 1992) and 'path dependency' (Krasner, 1984,1988; Hall, 1992; Rothstein, 1992). The key to the new theorising about institutions is the degree to which the nature of the institution can shape both the objectives and actions of political actors. More important then than the formal characteristics of either state and social institutions, is how a political institution shapes political interactions, we are not therefore concerned to identify 'groups' which is the concern of policy community and policy network theory that hold a veto or 'promotional' power within institutional contexts, but as Immergut (1992) has suggested, to identify veto points in the system where opposition can be effectively mobilised. This is important to the extent that we are attentive to the way in which institutions are primary and autonomous political actors and not subject to the pressure and preferences of groups outside the state structure. At this point, it would be useful to clarify what 'institution' means in the new institutionalist analysis.

As Lane & Ersson (1999) have recently noted this is not an easy question to answer. The new institutionalism they argue 'is still a loose set of different models which may or may not have much in common' (Lane & Ersson, 1999: 2). This means that what counts as an institution in one model may not count in another. Subsequently, the boundary between what belongs to an institution and what lies outside an institution is a source of contention because it raises questions about how institutions are related conceptually to say behaviour, interests and information (Lane & Ersson, 1999: 4). A 'thin' interpretation would posit the view that an institution is a norm that has been institutionalised meaning that political behaviour is governed by the threat of sanctions. In this view, institutions are analytically distinct from other factors that shape behaviour, such as interests, preferences and ideas. By contrast, the meaning of an institution in the thick conception

takes on more than rules and norms; the Constitution embodies a wider set of things which might include, life long practices, memories, ideas and even individuals. As Lane & Ersson put it:

> According to the thick conception of an institution, it is more generally considered as a practice, and practices are behaviour patterns that people form expectations about and that tend to involve interests and belief systems...institutions may comprise routines, procedures, conventions, roles, strategies, organisational forms, technologies, beliefs, paradigms, codes, cultures and knowledge (Lane & Ersson, 1999: 4).

What ought to be clear is that this is not simply a restatement of traditional forms of state analysis but should be seen as complimentary to it. March and Olsen (1984) argued that:

> By labelling the collection of ideas 'the new institutionalism', we mean to note the fact that there was indeed and 'old institutionalism', that cycles in ideas have brought us back to considerations that typified earlier forms of theory in political science. We do not mean to suggest, however, that the new and old are identical. It would probably be more accurate to describe recent thinking as blending elements of old institutionalism into the non-institutionalist styles of recent theories of politics (March and Olsen, 1984: 738).

It is here that confusion arises. Are we talking about a looking at traditional institutions through some new glasses, or are we articulating a different plane of abstraction whereby new forms of 'institutionalisation' have arisen to take precedence over the old? If it is the latter we ought to be talking about 'policy networks' (discussed above), and the type of policy community that creates an institutionalised form of pressure group-government relations which favours certain interests (Smith, 1990: 319). In this sense, the policy process becomes characterised by the institutionalisation of structures and the dominant value systems which pervade those structures. This characterisation seems to me to place too much emphasis on the role of exogenous factors, that is to say that the state is a complex filter which picks and chooses from a variety of societal interests, rather than advancing it's own interests. If it is the former, institutional analysis ought to do more than restate the value of formal pyramids of authority. How well then does it succeed in providing a coherent framework for this analysis?

The institutional literature is by no means consistent and studies tend to fall within two distinct analytical frameworks. A rational choice perspective influences one strand, the other is informed from a historical/sociological perspective. They are attentive to the strategies that individuals will employ to maximise their interest in institutional settings[7]. Historical instutionalism

[7] It should not be surprising that rational choice theorists are interested in institutions, theorists coming from this perspective are going to be concerned with political and economic institutions simply because institutions define the range of influence and limits to strategies which political actors employ.

by contrast, is informed by the strategic role that institutions have in shaping politics and political history. Historical institutionalists such as Thelen and Steinmo (1992) suggest that the rational choice element in institutional thinking is far to narrow. They cite Di Maggio and Powell (1991) who have argued that:

> [T]he constant and repetetive quality of much organised life is explicable not simply by reference to individual, maximising actors but rather a view that locates the persistence of practices in both their taken for granted quality and their reproduction in structures that are to some extent self sustaining (Steinmo & Thelen, 1992: 8).

In other words, even when individuals profess to maximise their own interest the range from which their preferences are formed has been defined institutionally and transmitted into organisationally accepted rules. It is in the central issue of 'preference formation' which distinguishes one approach from the other. For rational choice theorists preference formation is exogenous. They observe the preferences of actors who are within or are co-opted into the institutional structure. For historical institutionalists, preference formation is endogenous; they are attentive to the ways in which strategies are informed by institutional variables. (Steinmo & Thelen, 1992).

Rational choice perspectives are, therefore, strong in explaining the action of individuals within institutional contexts, but weak in grasping the nature of organisational ideology and the role of traditions, obligations, duties, and symbols. An historical institutionalist approach, however, does not disregard the critical role which ideas, interests and even individuals have as agents of change, but they are less inclined to treat them as independent variables. Their activity has to be analysed within the constraints which institutions as organisations place upon them. If institutional models of politics are to help in the explanation of constitutional politics in the UK, institutions (in the thick conception) need to be considered as central, rather than peripheral, actors and not as a complex set of filters which mediate interests. In addition, the model ought to explain how institutions use their power and influence to shape policy preferences.

it would be useful at this point to restate one of the criticisms of orthodox constitutional theory, namely that modern state is so 'complex' (Zolo, 1992; Rhodes, 1988; Luhmann, 1990) that to ascribe 'truisms' or 'norms' about the nature of power is decidedly misleading. Modern government by its very nature is so fragmented, impersonal and secretive (Harden & Lewis, 1986: 12), that the informal networks which in combination provide a core value system, form an unaccountable and by implication elusive source of power. Harden and Lewis, (1986) argue that the traditional model is a 'noble lie' only kept alive by the secrecy which pervades the British system of government. They suggest that there is a lack of fit between the real location of decision-making functions and the map of such functions implied by traditional understandings of constitutional authority.

Implicit in much of what has been said is the claim that to understand why the constitution has endured we need to reintroduce institutional power as a key variable within the political system, manifested as the ability to advance, resist, and shape change, independent of social, economic and political pressure. This, of course, directly challenges the theory of the liberal-democratic constitution which generally sees the people as having the ultimate sovereignty exercised through regular participation at general elections. (see Figure 1) Thus, it is characterised as a bottom up model in which political authority is tempered by the transmission of orders from the people to the controlling few in the government (Dearlove & Saunders, 1993: 36) and whose orders are transmuted into public policy. Putting aside the legal formalism which so often pervades constitutional thinking, the traditional theory is fairly simply stated as a system of Cabinet or Prime Ministerial government, in which legal sovereignty resides in Parliament and political sovereignty rests with the people. The limitations to this model have already been discussed. What concerns us here is a model which looks radically different from the traditional conception (see figure 2). The traditional model envisages lines of determination running from electoral preferences and group pressure through to party platforms, which inform state structures and result in political outcomes. The model informed by institutional variables places state structures at the apex of the management of ideas and would demonstrate the degree to which institutions of the state contain and diffuse the pressure for change. Formal and informal sources of state power are placed at the apex of the political structure and contribute toward the construction of core values at the heart of the socio-political system. The institutional state therefore is a political and moral order whose operational procedures reflect values that are shared by the majority of the population (March and Olsen, 1989). The principal aim of the institutional state is to defend the political order and to guarantee autonomy to the institutional sphere, and to uphold uniform and collective understanding of the political system and it's processes and practices. Thus as March and Olsen stated:

> Governmental agencies are not neutral instruments...they are carriers of cultures, missions, values and identities...they are unlikely to adapt automatically to any attempts at influence including those of political leaders. (March and Olsen, 1989: 114)

Why then is there hostility to constitutional reform? Essentially a program of constitutional reform would do a number of things, not least, threaten the stability of the political and moral order. As March and Olsen have argued:

> [S]uch a program affects the political order regulating the exercise of public authority and power. A change in this order may alter the values of the state, the purpose and meaning of state actions, the rationale and legitimacy of institutional boundaries, the

> regulation of conflict, and the conditions under which different interests may be pursued (1989: 111)

It is in this respect that this thesis departs from existing constitutional analysis. It treats constitutional change in Britain as a matter indistinct from the processes associated with general policymaking. However, constitutional change, as a peculiarly distinct aspect of policy making, ought to be treated as a 'first order' political process which establishes the boundaries of political institutions and the levels of popular sovereignty, of political equality and popular control. It is for this reason, existing institutions as opposed to societal, party political elite or governmental pressures are the primary explanatory variable when matters of constitutional reform are considered. This is because it is they who are primarily affected, as Stepan (1978) has eloquently argued:

> The state must be considered as more than the 'government'. It is the continuous administrative, legal, bureaucratic and coercive systems that attempt not only to structure relationships between civil society and the public authority in a polity but also to structure many crucial relationships within civil society as well. (Cited in Evans, Rueschemeyer and Skocpol, 1984: 7).

However, the institutional models, especially those employing a 'thick' understanding of an institution and utilise the notion of path dependency, provide an organising perspective that marks it out from the pluralist conception of British politics. Allied to a modified understanding of Lukes' three dimensional model of power, a coherent picture of how institutional factors limit the scope of political change at the most critical systemic level is needed. Whilst it is conceded that the state itself is not a uniform organism with a distinct set of interests that it can articulate, and further that it is divided into complimentary yet competitive departments and elected and non-elected officials say, having distinct interests to promote and protect (Smith, 1990: 321). It is, however, possible to show how a constitution, in this analysis, can embody more than simply formal institutional norms, but can also carry historical resonance and a culture which can, in turn, constrain exogenous and endogenous attempts to reform it. Institutions, of which the constitution must be regarded as the largest, embody what March & Olsen (1989) term a moral order. The first rule of any moral order is to protect itself.

The strong historical bias of British constitutional theory and the dominance of conventions - themselves derived form historically established norms – lend themselves well to a historical institutionalist analysis and a more rigorous conception of power and influence than traditional constitutional theorists generally allow for. The symbolism and meaning attributed to the Glorious Revolution of 1688 and the consolidation of political power at the centre that derived from that event illustrates the path dependency of constitutional development in the United Kingdom. Indeed the UK constitution (if we can still regard it as a legitimate constitutional form) is

unique, not simply because of the absence of a written document, a formal separation of powers or an entrenched Bill of Rights, but because our understanding of it is grounded in historical accounts and interpretations and a gothic reliance on precedent.

The extensive explication and analysis of the British constitution in Chapter 2 coupled with the case study of devolution in Chapter 3 suggests that the existing constitutional framework, as an institutional and moral order, contained the debate about the centralisation of power within a political discourse that excluded any radical challenge to the status quo. The direction taken by the Royal Commission, even when confronted with evidence of widespread dissatisfaction with the present constitutional arrangements, could not consider concepts that went beyond traditional constitutional understandings. This, in part, could be explained by the conservatism and reluctance of the Commissioners to undertake a wider remit than they had been given. However, a more compelling argument and the claim made in this thesis, is that a historical institutionalist account of the policy process, and by implication constitutional change, has greater explanatory value.

A consistent theme of post war British politics has been that the existing constitutional framework, predicated upon a belief in responsible and representative government under a symbolic constitutional monarchy and steered by a permanent, neutral and anonymous civil service, is the best that can be obtained. Further, despite major changes to direction and scope of government responsibility, the moral integrity of the British political system has rarely, if ever, been challenged. The context in which constitutional debates manifest themselves tends to prescribe the range and scope of policy options that are considered. Employing a historical institutionalist approach best explains constitutional change in the UK in the post war period to 1980.

Conclusion

This thesis has argued that the primary obstacle to fundamental constitutional change in the United Kingdom between 1945 and 1980 was the existing institutional arrangements themselves, described here as a highly centralised executive system where a language of rights and a separation of powers were absent. In addition, the way in which the process of political development has been understood and conceptualised, taken here as the dominance of the work of Dicey and Bagehot in British (and English) constitutional thought, conditioned debates about the constitution and devolution in particular. As a case study, the Royal Commission on the Constitution (essentially a Royal Commission on Devolution) illustrates the dialogical impasse that occurs, when pressures on the constitution confront received wisdom(s) about institutional design. As a means of reconceptualising the power of institutions to shape and condition the political agenda, a more nuanced conception of institutional power, drawn from the historical institutionalist literature, provided an explanatory dimension to the case study. A historical institutionalist position enables a far broader conception of institutional power, which traverses rules and traditional legal instruments and considers the power of ideas and the significance of institutional forms to political culture and development. In this respect it compliments the existing critiques of the UK constitution (outlined in Chapter 2) without accepting a broadly Dicean analytical framework. This is not, in itself, a claim that the thesis recodifies the political system of the UK, but does point to a diversity of research agendas which might facilitate such a process.

In reaching these conclusions it was necessary to place the political system of the United Kingdom in some kind of historical and theoretical context. A discussion of constitutionalism was regarded as essential if any meaningful conclusions about constitutional reform in the United Kingdom were to be drawn. The first two chapters argued that it has been (and remains) a weakness of most studies of the UK constitution that it is passed off as unique without any consideration of the wider constitutional traditions that inform our understanding of the term. Therefore, the nature of constitutionalism and what has been argued to be its core elements, are thoroughly fleshed out in chapter one. Here, it is argued that the core features of a coherent political theory of the constitution include a separation of powers, a language of rights and (mediated or unmediated) democracy. The chapter drew upon both philosophical and empirical sources in the claims that are subsequently made. First, ancient, classical and contemporary sources of constitutional thought were utilised to show the pre-eminence of these three principles in philosophical claims about the nature of constitutionalism. Ancient and classical sources tended to focus far more on the question of political stability, the importance of virtue, citizenship and the common good maintained by a political balance of social forces. Contemporary sources tend toward the interplay between rights and democracy and how the former protects majoritarian abuses of the constitution. Second, various examples drawn mainly from the United States, highlighted the importance of both rights and the separation of powers to constitutional stability and democratic engagement.

The chapter made strong claims about the importance of a rights discourse to constitutionalism, and whilst arguments about the degree of importance attached to rights were explored and recognised, the chapter argued that the notion of rights as secondary limitations to government power was highly challengeable. The chapter developed the view that rights are one the most significant instruments in fencing off certain areas of public interest (especially those areas which safeguard the democratic process) from the arbitrary nature of majoritarian decision making. Strong claims were also made about the difficulty in eliding the difference between positive and negative rights. The argument played out takes an expansive view of political and social rights as applicable to a constitutional order. The chapter consequently provided a series of reference points (a template of constitutionalism perhaps) from which the UK constitution might be considered in a less parochial manner.

The second chapter contrasted the political theory of the constitution to the main strands of constitutional thought prevalent in the United Kingdom. The chapter noted the main currents in constitutional analysis and concluded that despite noting a considerable divergence between established constitutional theories and actual political practice, the vast majority of constitutional and political analyses tend to accept the theoretical terrain established by Bagehot and distilled by Dicey in the mid to late nineteenth century. The central problem with this approach was that the analysis of crucial concepts such as rights and the distribution and locus of political power became ruled out by definitional fiat. In addition to a sustained analysis of the inadequacies of orthodox approaches to the constitution, evidenced by the weight of political (both domestic and international) changes, the chapter assessed the British constitution in the light of the claims made in chapter one. The absence of a separation of powers and a culture of rights, given succour by the monarchical and retrogressive social and political culture which pervade British political life, are the most obvious points of departure. The reason that this becomes problematic, is that when the constitution comes under pressure, generally with claims about the distribution political power and the rights of individuals, the dominance of the Dicean tradition rules out the necessary foundational concepts to deal in principles within which key constitutional issues can be discussed.

The third chapter utilised the example of the Royal Commission on the Constitution (the majority report) and it's attendant Memorandum of Dissent (the minority report). This enquiry perfectly illustrated the dialogical and conceptual problems that arose when the political system was confronted with constitutional problems that could only be resolved by raising questions about the fabric of that system. The majority report concluded that there was no widespread dissatisfaction with government, but argued that devolution to Scotland and Wales was desirable due to the recognition of 'national distinctiveness' and spelt out numerous devolutionary schemes, which might be applicable within the British political tradition. As the memorandum of dissent made clear, much of the evidence drawn upon during the course of the four year commission tended to show a broad spread of dissatisfaction with government across the United Kingdom. The authors of the minority report argued that there was very little evidence to suggest that feelings of alienation and detachment from government were more marked in Scotland and Wales than anywhere else. The chapter argued that the central problem that

the commission faced (highlighted by the memorandum of dissent) was it's unwillingness to engage with principles alien to the British political tradition. As the chapter makes clear:

> Arguably, what the Kilbrandon commission reflects, is the tensions implicit in the traditional constitutional model when political questions emerge – such as the territorial dimension of British politics – and which demand a consideration of concepts about which it is woefully inadequate to contemplate. Nowhere does the report challenge or even question an attachment to the orthodox doctrine that political sovereignty resides at the Westminster parliament (Chapter 3: 170).

The chapter strongly made the case that the majority report and it's recommendations were contingent upon an attachment to the existing constitutional orthodoxies, rather than the evidence that was presented to it. Consequently, the Scotland and Wales acts, which were intrinsically linked to the majority report were muddled and lacked direction. Designed by the then Labour Government to placate nationalists, on whose support the future of the administration rested, the Bills – precisely because they lacked any principled direction - became bogged down in the quagmire of parliamentary procedure and internal party disputes. In the words of David Steel:

> The whole exercise started off as a ploy to keep the nationalist wolves from the door, but the Government find that they have ended up in bed with them. The Government have as their non-Labour supporters only those people in the House who know that the Bill will not work and hope that it will not (David Steel, H. C. Debs, vol. 926, Col. 1273).

What began in 1969 as an opportunity to question the nature and fabric of the UK political system ended a decade later in disarray.

The chapter was strongly sympathetic to the direction and arguments outlined in the minority report. The authors of the minority report were far more expansive in their terms of reference and their analysis. They eschewed the pragmatic approach of the majority of commissioners, in favour of understanding the then current unrest within the context of the development and expansion of government responsibilities. They powerfully argued that the dissatisfaction with Westminster government al all levels of society was a question of institutional design and development. They noted that post war trends in government had witnessed, the strengthening of the executive against parliament and the corresponding decline in the power of local government coupled with the decentralisation of (some) central Government departments with very little democratic oversight. In their view, this had led to 'a widespread and disturbing sense of powerlessness in the face of Government' (Cmnd 5460-I, 1973: 44). The minority recommendations of five elected assemblies covering five regions is also more persuasive than the list of alternatives presented by the majority report.

In short, the real importance of the Royal Commission on the Constitution was the extent to which it revealed the growing chasm between orthodox constitutional theory and actual political practice. In addition, when confronted with a wealth of findings that demand flexible and quite radical thinking about institutional design, the majority preferred to hide behind the misleading certainties of Dicean orthodoxy and the consequent conclusions that this would engender.

What became apparent from chapters two and three was the inadequacies of traditional constitutional theory in explaining the way in which the issue of constitutional reform had developed and had been conceptualised. The Dicean approach, focusing primarily upon the Westminster parliament as the pre-eminent locus of power and authority, and conventions and the rule of law as instruments of control and regulation, betrayed a reliance on a unidimensional model of political power. In addition, the formal legal approach of Dicey, disguised the role of ideas and ideology in political institutions, which have become commonplace in discussions of political change and the political process in the United Kingdom since the 1970s. A wealth of analytical models drawing upon pluralist, neo-pluralist, rational choice, new and historical institutionalist theories have emerged in recent years, which challenge the sureties offered by Dicey. The final chapter considered these approaches and sought a more nuanced conception of political power to take account of the particular characteristics of the British Political system.

The fourth chapter strongly challenges the efficacy of behavioural and individualist models of politics with respect to explaining constitutional change in the United Kingdom. In the first instance, behavioural models of politics are recognised as significant in rejecting the view that form maps function. Indeed, most would concede that all political outcomes cannot be explained and understood through the lens of government institutions and legal precepts. However, the generality of behavioural models applicability was argued to be greatly exaggerated. The chapter notes the extent to which behavioural models of politics underestimated the importance of institutions to behaviour. As Goodin has recently argued:

> The behaviouralist focus usefully serves to fix attention upon agency, upon individuals and groupings of individuals whose behaviour it is. But those individuals are shaped by, and in their collective enterprises act through, structures and organisations and institutions (Goodin, (1998: 13).

The chapter made two general points. First, individuals and groups pursue their goals in a context that has been collectively constrained. Second, that those constraints take the form of institutions as Goodin puts it 'organized pattern of socially constructed norms and roles, and socially prescribed behaviours...which are created and recreated over time' (Goodin, 1998: 19). This type of thinking was supplemented by a theory of power that drew heavily on Lukes' three dimensional model but which abstracted Lukes' ideas from their Marxist ancestry. In other words a model of institutional power that takes account of the ability of institutions to shape, moderate and influence political outcomes without any necessary economic interests at stake. The chapter argues that the strong historical bias of British constitutional theory, the dominance of conventions and the fact that theory, practice and history tend to be regarded as the sources of constitutional knowledge in the United Kingdom, lends itself to a historical institutionalist analysis. The key to understanding the UK constitution, it was argued, lay in the concept of 'path dependency' whereby decisions or choices made at one time constrain the choices and options open to policy makers in another. In this sense, the events of 1688 established an institutional template to which constitutional theorists and architects became bound. Despite, the constitutional turmoil throughout the nineteenth and early twentieth century, the dominant principle of

the British political system remained one of a centralised executive authority, with no obvious separation of powers and a lack of a fully articulated culture of rights. As the final chapter argues, the UK constitution (if we can still regard it as a legitimate constitutional form) is unique, not only because it remains unwritten and uncodified, but also because our understanding of it is grounded in a gothic reliance on precedent.

This thesis has argued that the lack of any radical constitutional change in the post war period is largely explained by the power of the existing institutions. Not simply formal powers (which are expansive) but the informal layers of understanding that give meaning to political forms. The lack of a rational political tradition, and the dominance of one marked by pragmatism, has resulted in an absence of those elements of constitutionalism, which were argued to be central features of legitimate constitutional rule. In particular, the lack of a culture of rights, argued to be a central mechanism in the establishment of a confident political community goes a long way to explaining the durability of a centralised system of rule. The case study of devolution between 1966 and 1979, focussing on the Royal Commission on the Constitution, demonstrates the extent to which dominant thinking about the constitution coloured the interpretation and analysis of the evidence that the commission produced. The majority of commissioners tended to focus solely on the question of devolution and regional government. The memorandum of dissent however took far more expansive terms of reference and considered the system as a whole. The pragmatic approach of the former limited their discussion of the evidence that the enquiry revealed, whilst the more idealistic approach of the latter tended to ask hard questions about the structure of government that they only partially addressed.

Two arguments of importance are thus concluded. First, the (still) dominant Dicean approach to the constitution is now redundant. The formal-legal approach that Dicey and those that followed his analysis clung to are no longer sophisticated enough as empirical or explanatory accounts of the British political process. The unidimensional model of power implicit in orthodox constitutional theory will no longer suffice as a theory of British government nor as a means to explain and reveal the political significance of institutional power in the United Kingdom. It is clear that a far more nuanced conception of power and a more expansive notion of institutions and their relevance to political life is necessary for a meaningful understanding of the constitution and constitutional change. Second, if a more meaningful analysis of the British political system is to be articulated, it is essential that the constitution is considered in its historical and theoretical context. It will no longer be enough to note the uniqueness of the British constitution and rest content with a purely parochial analysis. Only a wider conception of the constitution and of constitutionalism, informed by both historical and theoretical literatures, provides the necessary analytical depth for that task.