ENHANCING THE METHODOLOGY OF FORMAL
CONSTITUTIONAL CHANGE IN THE UK

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Unless otherwise stated, throughout the thesis the following references refer to these reference books.

‘British Political Facts 1832-2012’ refers to Colin Rallings and Michael Thrasher (eds) British Electoral Facts 1832-2012 (Biteback 2012)


Abstract

The University of Manchester

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Doctor of Philosophy

Enhancing the Methodology of Formal Constitutional Change in the UK

Friday, 5th September 2014

Since 1997, the UK constitution has undergone a transformation. This has since become a rolling process which shows little sign of abating. However, some of this constitutional change has been criticised for being rushed, piecemeal and with little consideration of the broader constitution. Yet, despite these criticisms, the underlying methodology of constitutional change has not been discussed in any great detail. This thesis, focusing on formal constitutional change, argues that the methodology to deliver that change should be enhanced to address these concerns. After establishing the limits of formal constitutional change, this thesis then considers how constitutional issues are approached within government and suggests that a Department of Legal Affairs would improve the preparation of proposed changes before being presented to Parliament. The politics of constitutional change are then analysed, with a particular focus on the process of coalition negotiations, which has become a new part of the methodology. The parliamentary process is considered by analysing the parliamentary passage of what became the Constitutional Reform Act 2005 and the Legislative and Regulatory Reform Act 2006. Recent changes to parliamentary procedure have allowed Parliament to scrutinise constitutional legislation more effectively, although there are still areas for significant improvement, particularly during the Committee Stage in the House of Commons. The thesis then considers the role of referendums and establishes when a referendum is required either as a matter of law or convention. The thesis then shows how procedural innovations such as the constitutional conventions in Australia and Ireland or the citizens’ assemblies in British Columbia and Ontario could be used in the UK. Also, as any recommendations of a constitutional convention or a citizens’ assembly are usually put to the rest of the electorate at a referendum, the links between a convention or assembly and the referendum process are discussed. Taken together, these enhancements to discrete aspects of the methodology of constitutional change should ensure that changes are more considered and allow for a more a stable constitutional settlement.
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I’d like to thank Jennifer Thorne, Adele Tyler and Justin Sham, Olivia and Patrick Houlihan, Zena Sorrmally and Steffen Bolwig for being such splendid hosts during my frequent stays in London for teaching and research over the past four years.

Finally, I must thank my parents for their support during the last four years.

This thesis considers the law and the general situation as it stood on 31st May 2014.

All internet links provided were last accessed on 9th September 2014.
Introduction

‘All I can see in the community in which I live is a considerable disagreement about the controversial issues of the day and this is not surprising as those issues would not be controversial if there were agreement’.

John Griffith

‘Process is critical in terms of upholding, and being seen to uphold, constitutional values: particularly those of democratic involvement and transparency in the policy-making process. Moreover, we believe that a proper process is the foundation upon which successful policy is built: a lack of proper process makes an ineffective outcome more likely.’

House of Lords Constitution Committee

‘Over the past ten years or so, process has been a constant problem in constitutional reform’.

Robert Blackburn

‘We have no proper mechanism for constitutional change’.

Sir John Baker

‘Perhaps it is a sign of maturity that the British public are interested in matters of substance rather than in procedures’.

Vernon Bogdanor

1 John Griffith, ‘The Political Constitution’ (1979) 42 MLR 1, 12.
2 Constitution Committee, Fixed-term Parliaments Bill (HL 2010-12, 69) para 160.
1. ‘Constitutional Unsettlement’

The UK constitution has always been peculiarly flexible, allowing for fundamental changes to be subsumed into the existing order. Usually, such changes are gradual. For example, the emergence of the mass democratic state was the result of a century-long process beginning with the 1832 Great Reform Act and culminating in the Representation of the People Act 1918, which gave some women the vote, and the Representation of the People (Equal Franchise) Act 1928, which extended the franchise further, with women obtaining the vote on the same terms as men. Other changes, such as the UK joining the EEC in 1973, questioned constitutional fundamentals such as parliamentary sovereignty, unleashed a new dynamic force that the constitution has been able to accommodate.

This flexibility provides the conditions for the ‘most sustained discussion in Britain of constitutional principles since the seventeenth century’, with any conclusion remaining elusive. Particularly for Labour, this discussion was part of their response to Thatcherism and 17 years of Opposition. After much internal debate, Labour’s landslide victory at the 1997 General Election created the basis from which to embark upon an unprecedented programme of constitutional change. The list below highlights the extent of this programme.


• The creation of the Scottish Parliament.

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7 Those over 30, a graduate voting in a university constituency or who complied with certain property qualifications.
8 Men over 21 already had the vote, and the 1928 Act gave the vote to women on these terms.
• The establishment of the Welsh and Northern Irish Assemblies.\textsuperscript{12}

• The creation of a unique form of local government in London.\textsuperscript{13}

• The Human Rights Act 1998.

• The House of Lords Act 1999, removing all but 92 of the hereditary peers, creating a predominantly appointed chamber.

• The Freedom of Information Act 2000.

• The use of different electoral systems, STV for elections to the Northern Ireland Assembly, the additional member system for the Welsh Assembly and Greater London Assembly, the SV for the Mayor of London. For European parliamentary elections, the regional party list system is used,\textsuperscript{14} which was one reason for the registration of political parties.\textsuperscript{15}

• The use of referendums to approve the creation of the Northern Irish Assembly, the Welsh Assembly, the Scottish Parliament and the Greater London Authority.

• The rolling modernisation of electoral administration and the creation of framework legislation for certain aspects of referendums.\textsuperscript{16}


\textsuperscript{13} Greater London Authority Act 1999.


\textsuperscript{15} Registration of Political Parties Act 1998.

\textsuperscript{16} PPERA 2000.
• Increasing integration with the EU with the ratification of
the Treaty of Amsterdam in 1997 and the Treaty of Nice

Remarkably, this list could have been even longer. Commissions were
created to consider the next phase of House of Lords reform, and the electoral
system to the House of Commons, but further change failed to materialise.\textsuperscript{17} In
Labour’s second term, they enacted the Constitutional Reform Act 2005, which
reformed the office of the Lord Chancellor and created a new Supreme Court,
while the Government of Wales Act 2006 recast Welsh devolution.
Paradoxically, these changes were led by Tony Blair, a Prime Minister who was
famously uninterested in the constitution and, remarkably, at times appeared to
not recognise the significance of his reforms.\textsuperscript{18} By contrast, his successor
Gordon Brown’s interest in the constitution led him to propose a Bill of Rights
and even suggest a codified constitution.\textsuperscript{19} But these ambitions were scuppered
by the economic crash of 2008 and the need to respond to the MPs’ expenses
scandal with the creation of IPSA. Alongside ratifying the Lisbon Treaty,
Brown’s constitutional ambitions resulted in the Constitutional Reform and
Governance Act 2010, a portmanteau of an Act, which \textit{inter alia} placed in
statute the role of Parliament when ratifying treaties,\textsuperscript{20} gave a statutory basis to
aspects of the Civil Service,\textsuperscript{21} and amended the rules regulating IPSA.\textsuperscript{22}

Reflecting on Labour’s time in office, the sheer amount of change is
unsettling as it takes time to adjust to the new constitutional structure.
Additionally, it is clear that Labour adopted a ‘shopping list’ approach to
constitutional change. Once an item on the list was completed, it was crossed

\textsuperscript{17} Royal Commission on the Reform of the House of Lords, \textit{A House For The Future} (Cm 4534,

\textsuperscript{18} Tony Blair, \textit{A Journey} (Hutchinson 2010) 517-8, describes himself as being ‘naive, foolish’
and an ‘irresponsible nincompoop’ for introducing freedom of information, and that the Act
‘strayed far beyond what it was sensible to disclose’.

\textsuperscript{19} HM Government, \textit{The Governance of Britain} (Cm 7170, 2007) para 204-215.

\textsuperscript{20} Constitutional Reform and Governance Act 2010, ss 20-25

\textsuperscript{21} ibid, ss 1-19.

\textsuperscript{22} ibid, ss 26-40.
off and focus turned to the next item. Lord Irvine once stated that ‘the correct road to reform was to devise a solution to each problem on its own terms’, as was a ‘recognition that that is the way that our constitution has always developed and should develop’. With the benefit of hindsight, this approach created some curiosities, such as establishing a common framework for referendums only after the four referendums envisaged in Labour’s 1997 manifesto had been held. A better process would have been to have developed the framework first, and then held the referendums. However, the fact that the referendums framework was introduced after the referendums in Scotland, Wales, Northern Ireland and London, supports Hazell’s conclusion that an ad hoc approach to constitutional change ‘unleashes powerful forces which can create new challenges and tensions’.

This can also be seen in how some constitutional change has involved making amendments to previous changes. For example, Welsh devolution was amended heavily only eight years after being enacted. Morestartlingly, the legislation creating IPSA was amended only six months after first being enacted, reflecting how the original legislation was an urgent response to the MPs’ expenses scandal.

Some of this constitutional change can be described as a ‘process not an event’, and the case of Welsh devolution provides evidence of a possible weakness in present methodology. The Government of Wales Act 1998 established the National Assembly for Wales as a ‘corporate body’, with powerful subject committees drawn from the membership, but with ‘Assembly Secretaries’ to lead policy development in policy areas. As Assembly Secretaries were members of the subject committees, this meant they were scrutinising the activities of one of their own members. The second feature

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24 PPERA 2000, ss 101-129. This is discussed in Chapter 6.
26 For the perspective of the journalists that broke the MPs’ expenses scandal, see Robert Winnett & Gordon Raynor, No Expenses Spared (Bantam Press 2000).
was that the Assembly, unlike the Northern Irish Assembly and the Scottish Parliament, would be restricted to secondary legislative powers. Further, instead of power being clearly defined, the Assembly would inherit the functions of the Secretary of State for Wales, which had accumulated over the past decades on an Act-by-Act basis. Rawlings described this structure as ‘peculiar’ and ‘woefully uninformed’.

The main reason for this model of devolution was that it was the scheme that could be agreed within the Welsh Labour Party. As Ron Davies admitted,

‘... unless there was support for the proposals within the Labour Party and in particular in the Policy Commission and the Welsh Executive Committee then [more extensive] schemes were pretty futile.

This was part of a policy process that was ‘less than ideal’ with ‘manoeuvring and compromise within the innermost circle’. While he felt that policy was ‘dynamic and workable’, the limitations of the 1998 Act were addressed during the First Assembly. This strove to create a ‘virtual Parliament’ within the confines of the Act, pending an inquiry into the structures of the Assembly by the Richard Commission, which proposed wholesale change that was delivered through the Government of Wales Act 2006. While this could be a case of “all’s well that ends well” as Wales now has a Senedd with primary legislative powers, it remains concerning that fundamental constitutional legislation has to be revisited and subject to wholesale change so soon (at least in constitutional terms) after being enacted.

29 Rawlings, ‘The New Model Wales’ (n 27) 480. For a general criticism of the Welsh Assembly during its first ten years see, Martin Shipton, Poor Man’s Parliament: 10 Years of the Welsh Assembly (Seren 2011).
30 Ron Davies, Devolution - A Process Not an Event (Gregynog Papers, Institute of Welsh Affairs 1999) 6.
31 These came into affect after the 2011 referendum as required by the Government of Wales Act 2006.
It is concerning that the need for political consensus prevails over the need for a workable model; the lack of which not only creates uncertainty, but also the demand for further change at a later date. This change upon change increases the sense of constitutional unsettlement, as it takes more time for the structures to become established.\(^{32}\) Arguably, constitutional change should be more of an event and less of a process. A key argument of this thesis is that this can be achieved through a more robust process of constitutional change.

The Coalition between the Conservatives and the Liberal Democrats, created following the 2010 General Election, has also embarked on a series of constitutional changes. Some changes were motivated by political compromise and the interest of the parties to the Government, including a referendum on the AV voting system for elections to the House of Commons, reducing the number of MPs to 600, and the Fixed-term Parliament Act 2011. Some change is a response to previous changes, such as the European Union Act 2011, which was a response to the ratification of the Lisbon Treaty by the previous Government. Other changes have developed previous change, the Scotland Act 2012 was (compared to the Government of Wales Act 2006), a modest development of Scottish devolution. Other constitutional changes, such as the Succession to the Crown Act 2012, which removes the rule of primogeniture and the prohibition of those who marry Catholics from the line of succession, show a willingness to embark on constitutional change across all aspects of the constitution, as these two changes have long been placed in the “too difficult” box.\(^{33}\) In this way, the ‘dynamic of constitutional reform feeds itself and so doing creates a disequilibrium, whetting an appetite that cannot be fully or finally satisfied’.\(^{34}\)

\(^{32}\) To continue the example of Wales, the second use of the Assembly’s primary legislative powers resulted in the Attorney General referring the legislation to the Supreme Court to determine whether it was *ultra vires*, *Local Government Byelaws (Wales) Bill 2012 - Reference by the Attorney General for England and Wales* [2012] UKSC 53; [2013] 1 AC 792.

\(^{33}\) Lord Falconer stated that reform in this area ‘would be a complex and controversial undertaking, raising major constitutional issues that would involve the amendment or repeal of a number of pieces of related legislation’. HL Deb 14 January 2005, vol 668, col. 509. See also Rodney Brazier, ‘Legislating About the Monarchy’ (2007) 66 CLJ 86.

\(^{34}\) Walker (n 6) 541.
Looking ahead, it is clear that further fundamental constitutional change is on the horizon. Whatever the result of the Scottish independence referendum in September 2014, it is likely that it will be followed by fundamental constitutional change as politicians seek to grapple with the future of the Union. The Union is becoming ever more asymmetric and should Scotland vote to remain within the Union, how it would do so under the promised ‘devo-max’ is currently unclear. Similarly, a Union with only England, Wales and Northern Ireland would have to address how it would not become ever more subject to the dominance of London and the South East of England.\textsuperscript{35}

Beyond the 2015 General Election, there is also a chance that some of the newer constitutional fundamentals are likely to be called into question. Writing in 2005, Anthony King suggested that the UK had a ‘new constitution’ with the Human Rights Act, ‘despite occasional complaints’, being ‘entrenched in political fact if not in theory’.\textsuperscript{36} With the Conservatives likely to pledge to repeal the Human Rights Act should they continue in Government, this cannot be the case. Similarly, Bogdanor stated that Britain’s membership of the EU was an obvious example of the ‘startling and radical discontinuity’ between the “old” and “new” constitutions.\textsuperscript{37} However, the rise of UKIP and (at least partially in response to this) an increasingly Eurosceptic Conservative Party make withdrawal from the EU more likely than at any point since Britain’s Accession in 1973. Should both the Human Rights Act and European Communities Act 1972 be repealed, this ‘new’ constitution may suddenly start to appear more like the ‘old’ constitution it was said to replace.\textsuperscript{38} It is concerning that such a fundamental constitutional change as the Human Rights Act should become such a contested issue so soon (again, in constitutional terms) after its enactment. Although human rights could be a particular issue, the central concern is that future fundamental constitutional change could become similarly contested and lurching backwards and forwards with changes in Government

\textsuperscript{35} See Chapter 6, fn 68.

\textsuperscript{36} Anthony King, \textit{The British Constitution} (OUP 2005) 363.


\textsuperscript{38} Of course, this depends on results at the 2015 General Election and any coalition negotiations.
will result in the constitution becoming increasingly ragged and unmanageable. The very fact that some constitutional changes have become contested, with politicians believing that political capital can be gained by repealing recent changes, perhaps reflects that public acceptability of some constitutional changes is not as secure as it could be. Had the Human Rights Act been enacted under a different methodology, perhaps by being approved at a referendum, current concern over the Act would be of a different nature and it might enjoy a more secure place within the constitution.\(^39\) As Bolingbroke stated, a requirement of a constitution is that the ‘community hath agreed to be governed’ by the rules of the constitution.\(^40\) The methodology of constitutional change needs to ensure that future change meets this requirement.

Inevitably, the longer-term future is more uncertain still. Accurately predicting the future is notoriously difficult, but Fusaro and Oliver, after surveying constitutional change around the world, concluded that amongst constitutions in the ‘western liberal tradition’, recognised that,

‘…change will certainly be needed, even more so today than in the past given an increasingly fast moving environment. If a constitution does not establish an effective way to transform itself, change will occur anyway’.\(^41\)

It seems that the future will be just as unsettling as the recent past.

2. Focus on Procedures

The focus of the literature that discusses constitutional change, particularly since 1997, has understandably been on the substance of the various

\(^{39}\) This point is developed further in Chapter 5.

\(^{40}\) This definition is discussed in Chapter 1.

constitutional changes,

or suggested further reforms for discrete parts of the constitution. There is less literature that discusses the constitution in a more holistic manner. In many ways, this reflects the *ad hoc*, shopping list approach to constitutional change pursued by politicians. Yet, this has meant that far less attention has been paid to the process that has led to the constitutional change discussed above, particularly by lawyers.

A discussion of process is needed because the constitutional changes since 1997 have been accompanied by an increasingly loud chorus of concern at the process used. Some measures, such as the proposals enacted in the Constitutional Reform Act 2005 or the Fixed-term Parliaments Act 2011, were announced and developed without much prior indication or period of consultation. Yet other measures have been the result of an extensive process. In contrast to the process that led to the original settlement, primary legislative powers were granted to the Welsh Assembly after the Richard Commission highlighted the need, the Welsh Assembly accepted the proposals, and Parliament enacted legislation. Moreover, both chambers of Parliament and the Welsh Assembly passed motions in favour of a referendum being held on the question of primary legislative powers.

It is difficult to understand why there has been this lack of discussion, for beyond the requirement of an Act of Parliament, the uncodified constitution is

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42 In addition to the literature cited throughout this thesis, Dawn Oliver and Jeffrey Jowell (eds) *The Changing Constitution* (7th edn, OUP 2009) is an example of how different aspects of the constitution are considered, but there is less focus on the methodology underlying that change.

43 Examples include, Vernon Bogdanor (n 37), Rodney Brazier *Constitutional Reform* (3rd edn, OUP 2008), Anthony King (n 36), Iain MacLean, *What’s Wrong with the British Constitution* (OUP 2009), and Dawn Oliver, *Constitutional Reform in the UK* (OUP 2003).


pregnant with ambiguity about the process of constitutional change. When should referendums be part of the process? What is the role of the House of Lords when considering constitutional legislation? How are proposals for change initiated? Codified constitutions around the world usually provide at least a partial answer to these questions. As discussed in Chapter 1, codified constitutions provide for a hierarchy of laws, with fundamental constitutional laws being separate and usually subject to a particular procedure before they can be changed. Although they cannot be exhaustive, as not all constitutional issues are resolved by recourse to the constitution with detailed provisions being left to ordinary legislation. As the UK, as a matter of legal form, lacks this distinction,46 this has arguably led to a confused process of constitutional change. Some fundamental changes, such as the Fixed-term Parliaments Act 2011, have been undertaken without much preparation or process; while other, arguably less important, changes such as the Constitutional Reform and Governance Act 2010 have followed a far more rigorous process. Neither can we expect comparativists to do the work. A comprehensive census of constitutions since 1789, decided to ‘exclude the United Kingdom from our sample entirely’, citing the lack of entrenchment as a reason to treat it as ‘a special, sui generis case, a category whose membership is unlikely to expand or contract in the near future’.47

If fundamental constitutional change is on the horizon, then a consistent process of constitutional change would allow this to be handled this more effectively. Paradoxically, although parliamentary sovereignty means that anything could be possible, the current process of constitutional change arguably contains inherent political limitations. The piecemeal approach to constitutional change necessarily inhibits any notion of an underlying or connecting theme. As the discussion on Welsh devolution shows, this approach


47 Zachary Elkins, Tom Ginsberg and James Melton (eds), The Endurance of National Constitutions (Cambridge, 2009).
has been pursued because the adversarial nature of Parliament makes garnering the consensus needed for more fundamental change extremely difficult to achieve.

The logical conclusion to this problem is perhaps a wholesale re-fashioning of the process of constitutional change. Robert Blackburn concluded that ‘there needs to be a recalibration between flexibility and rigidity in the working of the UK constitution’, which raises ‘the wider question of whether the UK should not codify its constitution as a whole’.48 While this is a perfectly rational conclusion, it resides within a paradox. For what process should be created to adopt a codified constitution? When such a process is formulated, why not use that process, such as a citizens’ assembly, constitutional convention and/or referendums with the necessary modifications for individual constitutional changes as and when they arise?

Similarly, the benefit of some constitutional changes, is that once enacted there would be an improved process of change. It has been argued that a fully reformed House of Lords could have particular responsibility for the constitution, which would improve the methodology of constitutional change. However, despite numerous attempts, the current methodology has been unable to deliver the wholesale reforms needed to get into that position.

This thesis asks the logically prior question: how can the current methodology of constitutional change be enhanced to deliver wholesale reform? This means ascertaining the current methodology of constitutional change, and then proposing how different aspects of that methodology can be improved. Overall, the aim is to ‘enhance’ that methodology. In the context of this thesis, methodology means a series of processes or methods. This allows the hierarchy of laws problem identified above to be resolved in a sophisticated manner. The more fundamental the constitutional change, the more elaborate the methodology needed to enact the change. By contrast, more minor change will not need to be subjected to every process discussed. For example, the

48 Blackburn (n 44) 381.
creation of IPSA does not need to be approved by a referendum in the way that Scottish independence requires.

However, this creates a tension between enhancing the methodology of constitutional change, while taking account of the political aim of a political party to implement their manifesto when in Government. A Government may only have five years in power, and will be anxious to use that time to proceed with legislation rather than developing procedures that may lead to unpredictable outcomes, and from the Government’s view delay the passage of its legislation. However, as discussed in Chapter 3, ‘political reform’ has become a distinct policy area. Moreover, with widespread dissatisfaction with politics, pursuing political reform could become a fertile area for a political party. Further, as outlined above, the current methodology has resulted in constitutional changes that are deeply contested and failed to resolve fundamental issues, such as House of Lords reform. The combination of seeking to respond to dissatisfaction with politics by delivering fundamental constitutional reform may mean that a political party may pursue constitutional change differently.

This gradualist, pragmatic approach to the issue of constitutional change is in line with the prevailing approach of UK politicians to constitutional issues. This also requires an approach focused on ‘political constitutionalism’, which was expressed by Griffith as meaning that the ‘the constitution of the United Kingdom lives on, changing from day-to-day for the constitution is no more and no less than what happens’. Consequently, this thesis focuses on the practical and political aspects of these issues. Political knowledge remains an ‘inescapable part of our public law learning’, despite a move amongst some public lawyers to distil the constitution to a ‘set of principles’ and ‘

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prevailing practices in terms of those principles, and if necessary calling for the re-fashioning of practice around principle'.

In particular, there is a focus on recent political practice. As Griffith states, the constitution changes ‘day-to-day’. An enduring fascination of public law is how, almost unnoticed, aspects of the constitution can change, meaning that something that happened even five years ago, may not entirely capture the present situation or practice. One such example is the increasing assertiveness of the House of Lords on a day-to-day basis. Regrettably, this means that, for reasons of space, some potential lines of enquiry have had to be excluded. Inter-party conferences have not been considered because the last one took place in 1967-1968 to consider House of Lords reform. This lasted for seven months and met 15 times. Recent practice, such as the talks that led to the creation of IPSA and the response to the Leveson Inquiry, indicate that talks are likely to be more informal and will meet for a shorter period of time. Also, the traditional pre-war conferences have received magisterial treatment by David Fair. Moreover, Speaker’s Conferences appear to be diminishing in importance and now only consider aspects of electoral law, which is largely irrelevant for this thesis. Furthermore, space has prevented any substantive discussion of the Scottish Constitutional Convention. This has been discussed elsewhere and, although not inconceivable, it is unlikely that given current

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51 ibid, 708.
52 Griffith, ‘The Political Constitution’ (n 1) 19.
53 This is discussed in Chapter 4.
55 ibid.
56 British Interparty Conferences: Study of the Procedure of Conciliation in British Politics, 1867-1921 (OUP 1980). The role of such interparty conferences may also be negated by any coalition negotiations, as they will be the main opportunity to set the legislative agenda for the forthcoming parliament.
57 The last Speaker’s Conference discussed the difference between the representation of women, ethnic minorities and disabled people in the House of Commons and the UK population as a whole, Speaker’s Conference (on Parliamentary Representation), Final Report (HC 2009-10, 239).
focus on constitutional issues, a *civic-led* cross-party convention will take place on a constitutional issue in the foreseeable future. It would also replicate much of the discussion of the ‘official’ constitutional conventions discussed in Chapter 6.

### 3. Outline of the Thesis

From the above, it can be seen that within this enquiry, which seeks to enhance the methodology of constitutional change, there are two broad guiding aspects that must be considered. Firstly, as far as possible, the methodology used for constitutional change must produce stable constitutional change and avoid a similar experience to the beginnings of the Welsh National Assembly. The second guiding aspect is that the methodology of change should ensure that the public are able to express their views on proposed constitutional changes, and the approval of the public should allow for greater stability in the long term.

To do this, Chapter 1 considers the key terms of the thesis title (in addition to the discussion of ‘methodology’ above), and contrasts informal change with formal change. Chapter 2 discusses the limits of formal change. Chapters 3 and 4 consider how the political parties and Whitehall deal with constitutional change, with a particular focus on the negotiations that led to the Conservative-Liberal Democrat Coalition Government. One assumption this thesis makes, is that there are a range of factors that mean future Coalition Governments are more likely than ever, especially if the Conservatives lead the polls.\(^6^9\) It will be shown that constitutional change is almost exclusively Government-led, with the public playing a minimal role at this stage of the process. Chapter 5 considers how Parliament approaches Bills with constitutional implications, and how

\(^6^9\) The psephologist John Curtice has calculated that the FPTP works to the disadvantage of the Conservatives who need a nine or ten point lead in national polls for an overall majority. By contrast, Labour requires a four or five point lead. Election results within this range are likely to deliver a coalition or minority government. See John Curtice, ‘So What Went Wrong with the Electoral System? The 2010 Election Result and the Debate About Electoral Reform’ (2010) 63 Parliamentary Affairs 623, 637. Of course, should Scotland no longer send MPs to Westminster then a Conservative majority government will be more likely. Yet the rise of UKIP and the splintering of the Conservative vote, may over time, counter that advantage.
Parliament can take account of the level of preparation in Government when considering a Bill. Chapter 6 will consider the use of referendums, which is the most obvious way that the public's consent for a constitutional change can be secured. Finally, Chapter 7 will consider how the public could initiate proposals for a constitutional change and be involved in the development of the substance of constitutional change. Throughout the thesis, proposals are made to improve parts of the methodology of constitutional change, aimed at addressing the two guiding aspects highlighted above. Overall, an improved, sophisticated methodology will emerge, allowing the concerns highlighted to be resolved and ensure that the constitutional issues on the near and far horizons can be considered properly.
Chapter 1 - Definitions

“Anything is constitutional, or anything is unconstitutional, just as you choose to look at it”.

Anthony Trollope

The Introduction has highlighted the problem that this thesis seeks to resolve: how to improve the methodology of constitutional change within the confines of the existing constitution. The title of this thesis is ‘Enhancing the Methodology of Constitutional Change in the UK. In the interests of clarity it is necessary to define the key terms this title. Consequently, the following sections discuss the meaning of ‘constitutional’ and ‘change’. Methodology has already been defined in the Introduction as meaning a series of processes or methods.

1. ‘Constitutional’

1.1. The Legal Constitution

The issue of what is a constitution and what qualifies as ‘constitutional’ has been a contested issue for centuries. Edmund Burke and Thomas Paine disagreed fundamentally with each other as to whether Britain had a constitution in the 18th Century, and no modern constitutional law textbook can begin without dealing with this question. Countries with a formal document entitled ‘constitution’ acquire one definition of the phrase guided by the contents of that document. As Wheare states, it is a ‘selection of the legal rules which

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1 Anthony Trollope, The Prime Minister (first published in 1875, OUP 1973) 260.
2 See page 21.
govern the government of that country which have been embedded in a
document'.

The UK lacks such a formal document, but is still regarded as having a
constitution. Further, in countries with a codified constitution, there are rules,
both legal and non-legal, which ‘govern the government of the country’ but are
not included in the constitutional document. Consequently, constitution and, by
extension, ‘constitutional’ must also be used in a broader sense. As Bolingbroke
stated,

‘By constitution we mean, whenever we speak with
propriety and exactness, that assemblage of laws,
institutions and customs, derived from certain fixed
principles of reason, directed to certain fixed objects of
public good, that compose the general system, according
to which the community hath agreed to be governed’.

Another formulation along a similar theme comes from Wheare:

‘The word “constitution” is used to describe the whole
system of government of a country, the collection of rules
which establish and regulate or govern the government.
These rules are partly legal, in the sense that courts of law
will recognise and apply them, and partly non-legal or
extra legal, taking the form of usages, understandings,
customs, or conventions’.

5 Kenneth Wheare, Modern Constitutions (OUP 1951) 2.
6 Although for the alternative view see Francis Ridley ‘There is No British Constitution: A
Dangerous Case of the Emperor’s New Clothes’ (1988) 41 Parliamentary Affairs 340. Indeed,
Lord Neuberger, the President of the Supreme Court, stated, ‘it may be said with considerable
force that we have no constitution as such at all, merely constitutional conventions, and that it is
as a consequence of this that we have parliamentary sovereignty’, Britain and Europe,
Cambridge Freshfields Annual Lecture, 12 February 2004, [http://supremecourt.uk/docs/speech-
140212.pdf].
7 Henry St. John Bolingbroke, A Dissertation Upon Parties (1733) as cited in Bradley and Ewing,
(n 4) 1.
8 Wheare (n 5) 1.
It is clear from Bolingbroke and Wheare, that this broader definition includes codified constitutions within its scope, as well as the legal rules of uncodified constitutions. As regards the UK, Wheare considers that this broader meaning of constitution ‘the normal, if not the only possible meaning which the word has’. However Wheare’s definition does not reflect adequately the role of human rights within the modern constitution. If they are included within the definition at all, it is only implicitly. The Constitution Committee gave a further definition that avoids this potential problem. It believes the constitution to be:

‘… the set of laws, rules and practices that create the basic institutions of the state, and its component and related parts, and stipulate the powers of those institutions and the relationship between the different institutions and between those institutions and the individual’.

The reference to the relationship between those ‘institutions and the individual’ is nod to human rights and administrative justice. However, in solving this problem, the Constitution Committee has created another. The definition is limited to those laws, rules and practices that ‘create the basic institutions of state’. King adopts a similar position. For him, a constitution contains ‘the most important rules that regulate the relations among the different parts of the government … and the relations between the different parts of the government and the people.’ By contrast, Wheare is clear when he describes a

9 ibid.
11 For a discussion of how this thesis approaches human rights, see the text to n 55 below. Before being repealed, the term ‘administrative justice’ was defined in Tribunal, Courts and Enforcement Act 2007, sch 7, para 13 (4) as follows, ‘the overall system by which decisions of an administrative or executive nature are made in relation to particular persons, including– (a) the procedures for making such decisions, (b) the law under which such decisions are made, and (c) the systems for resolving disputes and airing grievances in relation to such decisions’. See also William Robson, Justice and Administrative Law (Greenwood Press 1961), William Wade, Towards Administrative Justice (Ann Arbor University of Michigan Press 1963), ‘Anglo-American Administrative Law: Some Reflections’ (1964) 81 LQR 357, and ‘Anglo-American Administrative Law: More Reflections’ (1966) 82 LQR 226. Michael Harris and Martin Partington (eds) Administrative Justice in the 21st Century (Hart 1999).
12 Anthony King, Does the United Kingdom Still Have a Constitution? (Sweet & Maxwell 2001) 1.
constitution as relating to the ‘whole system of government’. Clearly, there is some disagreement over the scope of the definition of ‘constitutional’ with the possibility that there are some issues covered by Wheare’s definition that would not be covered by the Constitution Committee’s or King’s definitions.

Testing these definitions against the UK constitution, it is clear that the approach of the Constitution Committee and King creates potential problems. The years since 1997 have seen a surge in the amount of constitutional legislation, regulating many major and minor aspects of the constitution in ever more intricate detail. Not all of this detail would fall within King’s ‘most basic rules’ criteria or the Constitution Committee’s ‘basic institutions of state’ restriction. Examples include the rules creating IPSA and the regulation of the system of parliamentary expenses. Despite its continuing political importance, constitutionally, it is difficult to equate in importance rules that determine whether MPs can claim for first-class rail fares, with rules that regulate Britain’s relationship with the EU, or govern when General Elections are held.

The question then becomes, if such institutions and regulations are to fall outside the term ‘most important rules’, how else are they to be categorised? Clearly, they are matters of law and so are more than exclusively political issues. Yet, the relationship of these rules to the activity of politics and the business of ‘governing’ means that they do not sit easily within any other area of law. This makes Wheare’s ‘whole system of government’ definition of constitution more attractive. On a theoretical level, this definition is consistent with Loughlin’s ‘Pure Theory of Public Law’, the notion that Public Law ‘rests on the singular character of its object – the activity of governing’. It appears that

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13 One example are the provisions on party funding in PPERA 2000, although the level of detail is clearly necessary to achieve the objectives of the statutory regime.
Loughlin uses the phrase ‘Public Law’ to describe what Wheare considers as ‘constitutional’. From different perspectives, the two terms describe the same territory. If a law relates to the activity of governing, it is ‘constitutional’ in nature. However, the term ‘constitutional’ will continue to be used in this thesis, as it remains the most common term discussed in the relevant literature.

Ironically, given the above, the Constitution Committee itself arguably adopted a Wheare-esque definition of the constitution when they considered that the Health and Social Care Act 2012, when introduced into Parliament, risked ‘diluting the Government’s constitutional responsibilities with regard to the NHS’. Essentially, Wheare gives credence to Maitland’s statement that there ‘is hardly any department of law which does not at one time or another, become of constitutional importance’. If a Government department is seeking to change the relationship between different parts of the state or the relationship between the state and the individual then, in some form or another, whether intentionally or not, that department becomes engaged in a constitutional issue.

When such issues are considered, they are usually determined within their own particular fields, such as healthcare law, education law or immigration law. This can have the consequence of several changes being made in different areas, without any appearance on the constitutional radar. However, when taken together, a collection of changes can result in a significant shift in the relationship between constituent parts of the state or the state and citizen. Jowell argues that the creation of bodies to regulate newly privatised industries to avoid monopolistic practices, such as the Office of Gas, and the Office of

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19 Constitution Committee, *Health and Social Care Bill* (HL 2010-12, 197) 3 emphasis added. Interestingly, the Constitution Committee did not address the question as to how the Government’s responsibilities with regard to the NHS were constitutional in nature, given the working definition adopted by the Committee.


21 For example, when the Education Reform Act 1988 which required local education authorities to teach a ‘core’ National Curriculum, it was said ‘that an education minister in the dying Soviet Union congratulated Kenneth Baker (then Education Secretary) on the degree of centralisation that he achieved’. Vernon Bogdanor, *The New British Constitution* (Hart 2009) 255.
Water Services, resulted in a significant strengthening of state power and more rather than less regulation. Individually, such changes may appear to be only constitutional issues in a minor and broad sense. Yet, collectively and over time, such developments can pose a sustained constitutional challenge to pre-conceived perceptions about how the country is governed. Responses to such developments are themselves of a constitutional nature. One example was the adoption of the Citizen’s Charter, which formed a clear constitutional response to the encroachment of the quango on the rest of Government. Restricting the scope of the word ‘constitutional’ in the way that King and the Constitution Committee have done ultimately becomes self-defeating.

The discussion above focuses on the institutional framework that allows decisions about gas or healthcare to be made. This reveals a possible demarcation, one that separates issues of a constitutional nature from the rest of public policy. Constitutional issues are those that have a relationship with, or create, the framework by which other decisions are made. This means that the rules regarding issues, such as party funding, fall within the definition of constitutional, although they do not form the framework by which other decisions are made. This is because they have a relationship with the framework of decision-making; i.e. they ultimately have a relationship with activities and the composition of Parliament.

1.2. The Non-Legal Constitution

A common feature of the definitions cited above is that explicit reference is made to the fact that the term ‘constitution’ extends beyond formal legal

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22 The Office of Gas is now the Office of Gas and Energy Markets, Office of Water Services is now known as Water Services Regulation Authority (Ofwat).


24 Christopher Foster, British Government in Crisis (Hart 2005).


sources. All codified constitutions are surrounded by an evolving ‘variety of customary rules and practices which adjust its working to changing conditions’.  

From the outset, it has to be remembered that when the non-legal elements are grafted onto the legal constitution, the resulting outcome can be very different. As Oliver states, something which is said to be unconstitutional could mean that it is ‘contrary to constitutional law. But we could mean that it is contrary to the values and principles of the constitution, even though it is legally valid’. 

Where an uncodified constitution begins to depart from a written constitution is a particularly heavy reliance upon customary rules or conventions. This has led Brazier to conclude that ‘the whole system of British central Government is based on practice, not law’. For this reason, ‘the opinions of Ministers, civil servants, politicians, historians and other academic writers are as helpful in divining the meaning of the British constitution as the views of those who may be learned in the law’. This remains the case, despite the rapid increase in statutes relating to constitutional law since 1997. 

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27 Bradley and Ewing (n 4) 4.

28 Dawn Oliver, ‘United Kingdom’ in Carlo Fusaro and Dawn Oliver (eds) How Constitutions Change: A Comparative Study (Hart 2011) 330. In Madzimbamuto v Larder-Burke [1969] 1 AC 645, 722, Lord Reid stated, it is often said ‘that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid’.

29 Joseph Jaconelli, ‘Do Constitutional Conventions Bind?’ [2005] 64 CLJ 149. However, even this distinction may not be conclusive, as a written constitution could over time depart from its fixed text as to become as customary as the UK. It has been argued that although ‘[t]ypically offered as a paradigm of a nation with a written constitution, the United States actually operates with a constitution that is more similar to, than different from, the paradigmatic unwritten constitution of the United Kingdom’, Mark Tushnet, The Constitution of the USA: A Contextual Analysis (Hart 2009) 1, quoted in Bradley and Ewing, (n 4).


31 ibid.

also means that the sources of the constitution are many and varied. *In extremis*, this can include such sources as a letter to the Editor of The Times,\(^{33}\) and a decision of the Chairman of Ways and Means in the House of Commons.\(^{34}\) When this reliance on conventions is combined with Wheare’s broad definition of a constitution, the scope of sources, matters and issues that are of constitutional interest, becomes enormous.

Again, Wheare’s definition is consistent with Loughlin’s Pure Theory of Public Law, as:

‘... public law is neither a code of rules nor a set of principles, but a practice. Understood as the law relating to the activity of governing, public law can be defined as that assemblage of rules, principles, canons, maxims, customs usages and manners that condition, sustain and regulate the activity of governing’.\(^{35}\)

It is against this whole background that this thesis considers constitutional change. However, as no thesis could consider adequately the whole ambit of constitutional change, this thesis will focus on how the central rules of the constitution are changed, as an allegory for the broader constitution. The discussion of these central rules has the benefit of falling squarely within the ambit of Wheare’s definition of ‘constitutional’ and the fundamental activity of ‘governing’, from Loughlin’s Pure Theory of Public Law. The discussion of these central rules will make the broader points, which can then be applied to other, possibly minor areas of the constitution. Once it is established what the

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\(^{33}\) Sir Alan Lacelles (writing as ‘Senex’), *Factors in Crown’s Choice*, (The Times, 2 May 1950) 5.

\(^{34}\) Following the 1975 referendum on membership of the EEC, the Chairman of Ways and Means, ruled on a Point of Order that the decision to allow the amendment to the Bill providing for devolution to Scotland and Wales required a referendum was in order despite the citations of previous precedents from Erskine May that stated ‘amendments to a Bill proposing that the provisions of a Bill should he subject to a referendum have been ruled out of order as proposing changes in legislative procedure which will be contrary to constitutional practice’. The basis for ruling the amendment in order was on the basis ‘that the Referendum Act 1975 has largely destroyed the basis upon which the previous rulings were given’. Sir David Lidderdale (ed), *Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (19th edn, Butterworths, 1976) 523, citing HC Deb 10 February 1975, vol 925, col 674.

methodology for constitutional change should be for significant constitutional rules, there should be little reason in theory why without the necessary adjustments, similar processes could not be used for other, minor constitutional issues.

2. ‘Change’

The language used to refer to constitutional development is surprisingly diffuse. Party manifestos show little inclination to use the phrase ‘constitutional reform’ Instead, preferring phrases such as modernising ⁶⁶ or ‘renewing politics’. ⁶⁷ There has also been a movement towards proposing ‘a new politics’, particularly after the MPs’ expenses scandal. ⁶⁸ Academic literature, on the other hand, has embraced the use of the term. ⁶⁹ Given the discussion above of the term ‘constitutional’ it is quite clear that ‘constitutional reform’ is within the same semantic field as modernising or renewing politics.

However, the use of ‘reform’ is problematic. Its use is particularly well established in relation to the electoral system, as discussion of various electoral systems often takes place under the banner of ‘electoral reform’. ⁷⁰ Discussion of House of Lords reform is also well practiced. Yet, ‘reform’ could be taken to be approving in meaning, as Jowell states; ‘the notion of reform often implies that you are moving in some way to a higher plane. One may disagree’. ⁷¹ It is in this sense that the word has made its way into the short title of legislation. ⁷² As Lord Crickhowell stated in relation to House of Lords reform:

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³⁶ Liberal Democrats, Manifesto 1997.
³⁷ Liberal Democrats, Manifesto 2010.
³⁹ See amongst many others Rodney Brazier, Constitutional Reform (3rd edn, OUP 2008), Dawn Oliver, Constitutional Reform in the UK (OUP 2003), and Raymond Plant and Robert Blackburn (eds), Constitutional Reform - The Labour Government’s Constitutional Reform Agenda (Longman 1999).
⁴⁰ The establishment of the Electoral Reform Society emphasises this point.
⁴¹ Constitution Committee The Process of Constitutional Change (HL 2010-12, 177) para 6, and Rodney Brazier’s written evidence, CRP 6, para 3.
⁴² For example, the Constitutional Reform Act 2005 and Constitutional Reform and Governance Act 2010. This has also extended across into different areas of public policy, with examples
‘A Minister … wanting to introduce change will of course describe it as reform. By doing so they will be saying it is so important, because we really have such an indefensible position and people have been arguing this for a hundred years that nobody … should stand in the way of something that is so obviously necessary, because it is reform. So you immediately get into a conflict’.\textsuperscript{43}

Essentially, the problem is that ‘reform’ is merely a ‘change that you like’.\textsuperscript{44} This baggage makes ‘reform’ an unsatisfactory description and an alternative needs to be found. A more neutral phrase is ‘amendment’, yet the application of this term to the UK can yield some strange results. The Scotland Act 1998 could not be described as an ‘amendment’, as it placed a new institution, the Scottish Parliament, within an existing constitutional framework.\textsuperscript{45} This is because ‘amendment’ presupposes the existence of a text to amend.\textsuperscript{46} In legal terms, ‘amendment’ can only be used accurately to describe changes made to existing legislation. In this sense, the Scotland Act 2012 can be described as an ‘amendment’ as it amends the devolution settlement as created by the Scotland Act 1998.\textsuperscript{47} Given the problems indicated in the Introduction, using the word ‘amendment’ would have the effect of excluding the more significant constitutional events in recent history, as they created new constitutional structures rather than amending them. It would be strange if only the Scotland Act 2012, and not the Scotland Act 1998, was considered to fall within the scope of the thesis.

\footnotesize{\textsuperscript{43} Constitution Committee, \textit{The Process of Constitutional Change} (n 41) Q61.}

\footnotesize{\textsuperscript{44} Ibid, Q93.}

\footnotesize{\textsuperscript{45} Including the Act of Union 1706, and Scotland Act 1998, s 28 (7) explicitly preserves the principle of parliamentary sovereignty.}

\footnotesize{\textsuperscript{46} Constitution Committee, \textit{The Process of Constitutional Change} (n 41) Q93.}

\footnotesize{\textsuperscript{47} Also, the Government of Wales Act 2006, as discussed in the introduction this Act significantly amended the Government of Wales Act 1998.}
‘Change’ avoids these problems. Any definition of change includes the ambit of reform, but without the implied approval. It avoids the difficult issues of categorisation that come attached with ‘amendment’, and is a broader term than ‘reform’. Conceptually, both ‘amendment’ and ‘reform’ only include deliberate decisions to amend or reform. In this context, such a decision usually results in an Act of Parliament. However, this is only part of what is considered as ‘constitutional’. Conventions or practices are sometimes ‘created’ deliberately, but they can also emerge over time without a definitive event sparking the difference in question. The advantage of ‘change’ is that it clearly includes both types of developments.

3. ‘Constitutional Change’

These two terms ‘constitutional’ and ‘change’ can now be compacted to create the term ‘constitutional change’. Based on Wheare’s definition, ‘constitutional change’ is when there is an alteration to legal or non-legal rules that establish and regulate the government. However, the definition of ‘constitutional’ as discussed above, including Wheare’s, make clear that it is the content of the rule, rather than its form, that determines whether the rule is of a constitutional nature. The effect of this is to compact two broad categories of rules into the term ‘constitutional’. The difficulty is that when considering the issue of how constitutional rules can be altered or created, the form of the rule becomes of fundamental importance. This means that it is necessary to distinguish between formal and informal rules. Formal rules are those found in formal constitutional texts, such as a codified constitution or statutes that deal with constitutional matters. These rules have a distinctive procedure by which they can be altered, repealed or created. Informal rules are rules found

48 A straightforward example is the Sewel convention, which regulates the relationship between the Scottish Parliament and Westminster.

49 The notable example of the change in the conventions that regulate the deployment of armed forces overseas is discussed below.

50 There is an issue as to whether the mere inclusion of an issue within a codified constitution gives that issue a constitutional element. Whether this does largely depends on what definition of ‘constitutional’ is adopted.

51 Introduction, fn 47.
elsewhere, for example through case law or convention, and changing them is a more plural enquiry.

3.1. Formal Constitutional Change

A rule that falls within the formal portion of a constitution can be amended in one of two ways. The most obvious is to follow the constitutional amendment process proscribed by the codified constitution in question. Similarly, the ordinary legislative process can change rules contained in a constitutional statute. This can be described as legislative constitutional change. Without a codified constitution, changing a constitutional statutes is the only form this category of legislative constitutional change can take.

The second method of formal constitutional change is a change in interpretation of a rule within the formal part of the constitution. This is a well established process within the American constitutional system.\(^{52}\) A possible example from the British constitution is *R (Jackson) v Attorney General*. Although obiter, the House of Lords interpreted the Parliament Act 1911 so as to exclude the use of its provisions to amend or repeal s 2 (1) of the same Act.\(^{53}\) Should a future court come to a different interpretation of the Parliament Act, this would constitute a formal constitutional change, as the interpretation of the formal part of the constitution has changed. Ultimately, changes in the interpretation of a statute could ultimately have the same effect as a formal amendment of the text itself.\(^{54}\)

As this thesis focuses on enhancing the methodology of constitutional change in the UK, the first form of formal constitutional change will be considered. Using primary legislation for constitutional change is not a new development but, since 1997, it has become the dominant method by which


\(^{53}\) [2005] UKHL 56, [2006] 1 AC 262 see paras [57]-[59], [79], [118], [164], [175], [194].

\(^{54}\) A possible example of this could be found in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 A.C. 557. The House of Lords used the powers of interpretation under s 3, Human Rights Act 1998, to interpret a statute which defined ‘spouse’ as ‘his or her wife or husband’, to mean those living as husband and wife in a homosexual relationship.
constitutional change has occurred. Further, political parties have developed definitive policies regarding the constitution, meaning that legislative constitutional change becomes more likely, as the Government of the day seeks to implement its manifesto. This also reflects the fact that the detailed provisions of constitutional legislation can be changed by Parliament with relative ease,\(^55\) reducing the demand for the courts to use interpretative devices to make statutes fit modern conditions. Further, recent legislation can clarify or expand on a provision of constitutional statutes to update the law to modern needs.\(^56\) This restricts the need for interpretative constitutional change.

Most interpretative constitutional change that occurs in the UK involves the courts interpreting the provisions of the European Convention on Human Rights as required by the Human Rights Act 1998.\(^57\) While human rights falls within the term ‘constitutional’ as indicated above, space prevents this subject being treated with the respect it deserves. It is also an area of law that receives considerable analysis and comment in its own right.\(^58\) As this thesis focuses on the legislative, rather than judicial, process, the interest in human rights is its impact upon the legislative procedure.

Under the Human Rights Act 1998, s 19 (1), a Minister when introducing a Bill must make a ‘statement of compatibility’, stating that the Bill complies with convention rights; or, if it does not, that the Government wishes to proceed ‘nevertheless’. The ill-fated Bill introduced to Parliament by Nick Clegg to reform the House of Lords is a rare example of this. He was unable to make the statement of compatibility because the provisions for elections to the House of Lords would have continued the absolute ban on prisoner voting,\(^59\) which has

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\(^{55}\) See fn 14 for an example.

\(^{56}\) For example, see how the Defamation Act 1996 restricted the scope of the Bill of Rights, Article IX.

\(^{57}\) Although litigation involving devolution disputes, considering whether the devolved institutions have fallen outside their legislative competence is increasing, see AXA v Lord Advocate [2011] UKSC 46 and Local Government Byelaws (Wales) Bill - Reference by the Attorney General for England and Wales [2012] UKSC 53.

\(^{58}\) For example, Richard Clayton and Hugh Tomlinson The Law of Human Rights (2nd edn, OUP, 2009) and Helen Fenwick, Gavin Phillipson and Roger Masterson (eds) Judicial Reasoning Under The UK Human Rights Act (CUP 2007).

\(^{59}\) House of Lords Reform HC Bill (2012-13) [52], cl 6.
been found to contravene the ECHR in *Hirst v UK (No. 2)*. Human rights can also have a substantive influence on legislative constitutional change. A change in the interpretation of the ECHR could require the amendment of constitutional statutes already in force, or require the adoption of new laws. Under the analysis above, this would either inform or trigger the first category of formal constitutional change; legislative constitutional change. Human rights become another input into the methodology of legislative constitutional change. However, it highlights the relationship that can exist between interpretative constitutional change and legislative constitutional change.

It is for these reasons that throughout this thesis the term ‘formal constitutional change’ is used to describe legislative constitutional change.

### 3.2. Informal Constitutional Change

Informal constitutional change can be defined as constitutional change that is not a result of formal constitutional change. In the British context, this means change that is not the result of an Act of Parliament or the interpretation of an Act of Parliament. The most obvious form of informal constitutional change is a change in constitutional convention. A clear example is the change in convention that regulated the appointment of the Prime Minister. When Alec Douglas-Home renounced his peerage in order to take a seat in the House of Commons, allowing him to become Prime Minister, his actions reflected the prevailing view of 1963 that the Prime Minister must sit in the House of Commons. However, it remains unclear as to when the position changed from when the Marquesses of Salisbury, who sat in the House of Lords, resigned as Prime Minister in 1902.

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61 Indeed, the Human Rights Act, s 10 delegates power to Ministers to amend primary and secondary legislation and correct any incompatibility with Convention rights by order.

62 Between 1902 and 1963, there were two occasions when a potential candidate for Prime Minister was passed over in favour of an MP. The first occasion was when Stanley Baldwin was chosen over Lord Curzon in 1923, with the second being in 1940 when Winston Churchill was preferred over Lord Halifax. Sometimes it is stated that the choice of Baldwin in 1923 confirmed the precedent, however, as Geoffrey Marshall states, there were ‘other adequate reasons for Curzon’s rejection’ so it is not possible to say the convention that the Prime Minister must come
However, even this example is open to criticism. For between 1902 and 1963, significant formal constitutional change took place. Firstly, the primacy of the House of Commons over the House of Lords was furthered and enshrined in law under the Parliament Act 1911, to be increased again with the Parliament Act 1949. Secondly, the franchise was extended through the Representation of the People Acts 1918 and 1928, which further increased the political legitimacy of the House of Commons over the unelected (and then) almost exclusively hereditary House of Lords. It could be argued that the change in the convention of appointing the Prime Minister could fall within formal constitutional change as indicated above, either as a consequence of the enactment of constitutional legislation, or a change in the interpretation of constitutional statutes. However, such claims would be misplaced as the change in convention and the legislation in question lacks a sufficiently direct relationship to state definitively that the Parliament Act 1911 or the enfranchisement of women brought about the change in convention. This means that such a change does not qualify as the first category of formal constitutional change. Moreover, it does not qualify as the second category of formal constitutional change as there is no direct interpretation of the statute that is said to bring about the change in convention, which is critical for a change to fall within the category of formal constitutional change. This distinction is important, as conventions can arise directly from statutes. Although the Sewel Convention arose directly out of s 28 of the Scotland Act 1998, it remains an informal

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from the House of Commons was confirmed in 1923. Further, in 1940, Lord Halifax’s close relationship with Chamberlain and support for appeasement also undermined his position. Indeed, Marshall writing in 1984, goes as far to suggest that ‘we shall never know whether or not there was any convention against Peers as Prime Ministers between 1923 and 1963. Today there almost certainly is such a convention, but it rests on principle rather than precedent’. Geoffrey Marshall, Constitutional Conventions: The Rules and Forms of Political Accountability (OUP 1984) 29. Although it must be stated that Wheare, writing in 1951 stated that a ‘Prime Minister holds office because and for so long as he retains the confidence of a majority of the House of Commons’. Wheare, (n 5) 2. See also Joseph Jaconelli, ‘Conventions - Continuity and Change’ in Matt Qvortrup (eds) The British Constitution: Continuity and Change: A Festschrift for Vernon Bogdanor (Hart 2013) 124-128.

63 The House of Lords Act 1999 changed the Lords from being a largely hereditary chamber to being predominantly appointed.

64 The issue of courts considering conventions and its consequence for informal constitutional change is considered in Section 2 of this Chapter.
constitutional change, due to its political nature and the lack of any change in judicial interpretation of the provision.

The convention of the Prime Minister requiring a seat in the House of Commons is also an example of how constitutional change can take place without any statute. A recent example of informal change taking place instead of formal change is in the role of the House of Commons in decisions on starting military action. The rejection of the House of Commons of the Government’s proposed military action in Syria, and the reaction from the Prime Minister, makes clear that a convention has now emerged; whereby, if practical, the consent of the House of Commons is needed before certain types of military action can be taken. The emergence of this convention, despite a concerted attempt to introduce legislation to bring this constitutional change following the Iraq War, shows that there is a practical and political limit to the scope of formal constitutional change. This issue is explored in more detail in Chapter 2.

The second category of informal constitutional change is case law, meaning the development of the common law as opposed to the interpretation of constitutional statutes. Within the constitutional context, the most significant development in the common law over the past century has generally been considered that of judicial review. Attempts to enhance the methodology of this form of informal constitutional change would involve discussing changes to

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66 In response to the announcement of the vote, the Prime Minister stated that he accepted that the House of Commons ‘does not want to see British military action … and the Government will act accordingly’, ibid, col 1556-7.
67 Numerous private member’s bills were introduced following the Iraq War, Clare Short’s Armed Forces (Parliamentary Approval for Participation in Armed Conflict) HC Bill (2004-05) [16]; Neil Gerrard’s Armed Forces (Parliamentary Approval for Participation in Armed Conflict) HC Bill (2004-05); Lord Lester’s, Executive Powers and Civil Service HL Bill (2003-04) [15] and Constitutional Reform (Prerogative Powers and Civil Service etc) HL Bill (2005-06) 143. In addition, the Constitution Committee considered the issue proposed a resolution rather than legislation see Waging War: Parliament’s Role and Responsibility (HL 2005-06, 236-I). By contrast, the Public Administration Committee proposed legislation see Taming the Prerogative: Strengthening Ministerial Accountability to Parliament (HC 2003-04, HC 422). The Government outlined a resolution and legislation in HM Government, War Making Powers and Treaties: Limiting Executive Powers (Cm 7239, 2008).
68 Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, 641 per Lord Diplock. For an excellent summary of the 20th Century development of judicial review, see Jowell (n 23).
the legal system aimed at improving the output of the system; case law. This is a very different and specialised inquiry from the one that this thesis will embark upon. For such an inquiry would consider issues such as the composition of the judiciary, the structure of the courts system, legal education and the legal profession. There is a significant amount of excellent work undertaken in this area, and the judiciary engage in this field themselves. \footnote{For two examples see Lord Sumption, \textit{Home Truths About Judicial Diversity}, Bar Council Law Reform Lecture, November 2012 [\url{http://supremecourt.uk/docs/speech-121115-lord-sumption.pdf}] and Lord Neuberger, \textit{Reforming Legal Education}, Lord Upjohn Lecture, Association of Law Teachers, November 2012 [\url{http://supremecourt.uk/docs/lord-neuberger-121115-speech.pdf}].} However, considering these issues would do little to solve the problems highlighted in the Introduction of enhancing the political, legislative and other processes regulated by law that deliver constitutional change.

For the purposes of this thesis, the most important issue is the relationship of judicial review with constitutional change. Towards the end of the 20th century, judicial review developed to the extent that it may pose a substantive issue when considering constitutional change. \textit{Leech}\footnote{\textit{R v Secretary of State for the Home Department, ex p Leech (No 2)} [1994] QB 198.} recognised the right to communicate in confidence with a solicitor and \textit{Witham}\footnote{\textit{R v Lord Chancellor, ex p Witham} [1997] 1 WLR 104.} the right of access to the courts as forming ‘constitutional rights’. In doing this, the courts ‘rested their decisions upon the constitutional foundations of a properly democratic state and invoked principles of democracy (other than parliamentary sovereignty alone) upon which to ground their decisions’.\footnote{Jowell (n 23) 392.} This means that attempts to restrict by legislation the scope of such fundamental rights are likely to receive a strong level of scrutiny from the courts.\footnote{Indeed, under the Human Right Act 1998, s 6 it is unlawful for the courts to act in a way that is incompatible with Convention rights. The courts use s 3 to interpret legislation as far as possible to give effect to Convention Rights, and s 4 to declare Acts of Parliament incompatible with the Convention if it cannot be interpreted in a way that complies with Convention rights. The interesting aspect of ‘constitutional rights’ is that they are found at common law and not based on the Convention.} This means that when Parliament delegates power to a public authority, it must exercise that power in a way that complies with this category of constitutional rights and the rule of law.\footnote{\textit{R v Secretary of State for the Home Department, ex p Simms} [1999] 3 All ER 400.} As the category
of ‘constitutional rights’ is thus far indeterminate, the effect is to increase considerably the scope for judicial intervention into the decisions of public authorities, doing so on constitutional terms.

More recently still, there has been judicial speculation that this notion of ‘constitutional rights’ could go further, with implications for the scope for formal constitutional change. Although obiter, some judges have argued that there could be areas of the constitution that cannot be abolished by Parliament. In Jackson, Lord Steyn argued that if faced with ‘an attempt to abolish judicial review or the ordinary roles of the courts … [this could be a] constitutional fundamental which even a sovereign Parliament acting at the behest of a compliant House of Commons cannot abolish’.75 If Lord Steyn is correct, then there could be a theoretical limit as to what can be achieved through formal constitutional change. For the purposes of this thesis, however, it is difficult to envisage circumstances where Parliament entering this territory would ameliorate any of the problems outlined in the Introduction.

4. Summary

It has been shown that the term ‘constitutional’ has a broad meaning, relating to the rules that create the ‘whole system of government’ of a state. It can also be seen that there are several versions or types of ‘constitutional change’. In order to probe the problems outlined in the Introduction, this thesis is focused on formal constitutional change, in particular change in constitutional legislation. The thesis is more focused once the term ‘methodology’ (as defined the Introduction) is considered, as the thesis considers how the processes used to deliver that legislative change can be improved or enhanced.

75 R (Jackson) v Attorney General [2005] UKHL 56, para 102, see also AXA General Insurance v The Lord Advocate [2011] UKSC 46, especially Lord Hope [42] - [52] and Lord Reid [142] - [154].
Chapter 2 - The Limits of Formal Constitutional Change: Pulling Iraq Up By Its Bootstraps

‘I have insisted, as Leader of the House, on the right of this place to vote on whether Britain should go to war. It has been a favourite theme of commentators that this House no longer occupies a central role in British politics. Nothing could better demonstrate that they are wrong than for this House to stop the commitment of troops in a war that has neither international agreement nor domestic support’.

Robin Cook’s Resignation Speech over the Iraq War

As outlined in Chapter 1, there is a distinction to make between formal and informal constitutional change. As described, informal constitutional change is the negative of formal constitutional change, by being change that is not fashioned by legislation. In line with the character of most constitutional change in recent times, this thesis focuses on formal constitutional change; however, informal constitutional change needs to be explored to appreciate fully the context within which formal change operates. This is because formal constitutional change may not always be the most appropriate answer, either because informal change is preferred or considered to be more feasible. It can also be the case that a formal change has consequences for other aspects of the constitution, which may not be readily apparent at the time of the change. This adds to the need for formal constitutional change to be approached with a holistic view of the constitution.

Consequently, this Chapter considers informal constitutional change; in particular, changes in constitutional conventions with a focus on one of the main

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1 HC Deb 17 Mar 2003, vol 401, col 728.
developments with constitutional conventions in recent years, namely the role of Parliament when the Government decides to embark on military action. This is a particularly interesting example, as it has been a combination of deliberate and unintentional change, and for the past twelve years there has been an ongoing debate as to whether this change should be formal or informal in nature. All of this implies that there may be practical or political limits to the scope of formal constitutional change. In order to focus on the constitutional change aspects of the issue, the consideration of constitutional conventions is, by necessity, selective.²

1. What are Constitutional Conventions?

In order to discuss constitutional conventions, it needs to be clear what is meant by the term. It is, of course, well known that, although he was not the first to discuss constitutional conventions, the phrase was coined by Dicey when he described ‘conventions of the constitution’ as being ‘customs, practices, maxims or precepts which are not enforced or recognised by the courts’.³ Wheare provided a sophistication of this by splitting this in to two categories, with a convention being limited to a ‘binding rule, a rule of behaviour accepted as obligatory by those concerned in the working of the constitution’ and a usage being ‘no more than a usual practice’.⁴ Jennings provided a three-stage test to

² There is much material on conventions to which the reader can refer, but in addition to the literature referred to in this section, see in particular, Charles Sampford and David Wood, “Codification of Constitutional Conventions in Australia” [1987] PL 231; Colin Munro, ‘Laws and Conventions Distinguished’ (1975) 91 LQR 218; Nick Barber, Laws and Constitutional Convention (2009) 125 LQR 294.


⁴ Kenneth Wheare Modern Constitutions (OUP 1951) 179. Brazier also emphasised this distinction between a mere practice and a convention see, Rodney Brazier, ‘The Non-Legal Constitution: Thoughts on Convention, Practice and Principle’ (1992) NILQ 262, 267. Jaconelli considers that the category of constitutional conventions should be restricted to matters governmental in nature, Joseph Jaconelli, ‘The Nature of Constitutional Convention’ (2006) 19 LS 25. This means that whether it is the Prime Minister or the Cabinet who advises the monarch as to when a dissolution of Parliament is to take place is not a governmental issue (at 37, of course this is now governed by the Fixed-term Parliaments Act 2011). Brazier takes a more liberal view of what matters are matters of convention, and disagrees with Jaconelli in finding that ministerial resignations as a result of personal misconduct are matters of constitutional
determine whether something was a convention. This considered the precedents, whether the actors felt that they ‘were bound by a rule’, and whether there is a reason for the rule.\textsuperscript{5} From a constitutional change point of view, Jennings’s test provides for the immutable and changing nature of conventions. A new precedent could enlarge the scope of a convention, or a series of precedents thought of as practices at the time, can be ‘pulled up by their bootstraps’,\textsuperscript{6} if later actors view those precedents as imposing an obligation they should be followed. However, it remains the case that changes in practice can still be of importance.\textsuperscript{7}

Whilst the reason for a convention could be reasonably straightforward to ascertain, the difficulty with conventions is in establishing what series of precedents are considered binding by the actors in those situations, or to obtain a conclusive account of the series of precedents in question. As Feldman states, they are ‘not fully articulated’ as even the seemingly clear convention that a Minister must not ‘knowingly’ mislead Parliament,\textsuperscript{8} is subject to conjecture.\textsuperscript{9} A view within Whitehall is that some information can be withheld

\textsuperscript{5} This test was accepted in \textit{Attorney General v Jonathan Cape Ltd} [1976] 1 QB 752, and more recently by the Upper Tribunal in \textit{Evans v Information Commissioner} [2012] UKUT 313 (AAC).


\textsuperscript{7} An example of a practice could be the processes of internal government decision making. In contrast to the previous Labour government (particularly under Blair), the current Coalition Government has seen a partial return to traditional practices of decision making within government, with a particular revival in the use of cabinet committees. However, it has not been said that the previous government was in breaching any conventions. It seems far better to explain this in terms of a practice. See Peter Hennessy, \textit{The Prime Minister: The Office and its Holders Since 1945} (Penguin 2000) esp Ch 18 and 20 and Robert Hazell and Ben Yong, \textit{The Politics of the Coalition - How the Conservative - Liberal Democrat Government Works} (Hart 2012).


from Parliament, arguing that ‘half the story can be true and not misleading even if it gives a different impression form the whole story’,\textsuperscript{10} and if security considerations are involved, ‘the harm done lying to one of the Houses has to be balanced against the harm that would result from telling the truth’.\textsuperscript{11} Westminster would not accept such an approach, considering this would undermine the ability of Parliament to scrutinise the Government. This highlights how conventions are pictures painted on a limitless canvass. They always have room for extra details that change the scope of the whole convention. As new precedents emerge, the picture of the convention becomes larger or more detailed.

The other aspect is that many, but not all, conventions regulate dynamic relationships between different institutions of Government. This means that a document that describes these relationships merely takes a snapshot of these relationships at any given time. However, given the dynamic nature of the relationship between institutions, the older the document becomes, the less likely the snapshot will remain accurate. It is for this reason that the Cabinet Manual contains a Foreword from the then Cabinet Secretary, stating that if it is to ‘continue to play a useful role [as] a guide to the operations and procedures of government, it will need to be updated periodically to reflect such developments’.\textsuperscript{12}

\textsuperscript{10} ibid.
\textsuperscript{12} Cabinet Office, Cabinet Manual (1st edn, 2010), v.
2. Commons Approval of Military Action

This section considers the role of the House of Commons when decisions are made by Government to start military action; specifically, the recent Syria vote, whereby the House of Commons voted against the Government’s proposal for military intervention in the Syria. The view taken is that this is the probable confirmation of a new convention, which was a process started by votes supporting military action in Iraq in 2003.

For the purposes of this thesis, this example of an informal change is worth considering for two reasons. Firstly, being a very recent event, it serves as an example of current constitutional development and practice, it is an example of ‘what happens’ (to use Griffith’s phrase). Secondly, it is also interesting because this issue highlights the relationship between informal and formal constitutional change. It is arguable that this informal constitutional change has taken place within the context of other formal and informal changes. Thirdly, a curious feature of this change is it is informal despite a concerted attempt for legislation in this area, and the trend for formal change since at least 1997. This highlights that there could be political or practical restraints that limit the scope of formal constitutional change. Finally, it is the first example of a significant change in a convention during the time of the Cabinet Manual, the closet thing yet to an authoritative statement of conventions.

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13 The phrase used in this section is ‘military action’ rather than ‘war’, although ‘war’ is popularly used to described conflict. This is because ‘war’ is a term of art in both national and international law. In international law, ‘war’ is used to grant legal equality to those states involved in the conflict, and differentiate those states from state not taking part in the conflict (the ‘neutral’ states). However since 1945 the UN Charter, which prohibits the threat or use of force in international relations, has made declarations of war almost redundant. In terms of national law, a declaration of war made by the Prime Minister in the monarch’s name acting under the prerogative. The last time Britain declared war on another state was Siam (now Thailand) in 1942. Because of developments in international law, it is highly unlikely that a declaration of war will ever be made again. See Constitution Committee, Waging War: Parliament’s Role and Responsibility (HL 2005-06, 236-I) paras 9 and 10.
2.1. The Change in Convention

Firstly, the change in convention needs to be explained. The underlying reason for this area of the constitution to be governed by convention is the same as for many others; the gradual evolution of the royal prerogative being exercised on behalf of, rather than by, the Monarch, whilst still retaining its legal form as emanating from the Crown.\(^{14}\) Because these powers stem from the Crown, Parliament's role is limited to one of holding those exercising the prerogative to account rather than having any formal role over the exercise of the powers themselves. Further, until the GCHQ case, the courts regarded the exercise of powers under the prerogative as unreviewable.\(^{15}\) Even so, some acts, particularly those related to national security, remained unreviewable.\(^{16}\) Brazier highlighted the lack of a role for Parliament in relation to military action when he stated that:

'How odd - perhaps bizarre - it is that the approval of both Houses of Parliament is required for pieces of technical, and often trivial, subordinate legislation, whereas it is not needed at all before men and women can be committed to the possibility of death or disfigurement'.\(^{17}\)

The House of Commons was largely restricted to general oversight and supply with an Armed Forces Act required every five years.\(^{18}\) Decisions whether to deploy those forces were for the Government to take. The convention was clear: the Prime Minister will decide to exercise the royal prerogative on behalf

\(^{14}\) Indeed, Dicey went as far to argue that conventions posed 'one common quality or property; they are all, or at rate most of them, rules for determining the mode in which the discretionary powers of the Crown (or of the Ministers as servants of the Crown) ought to be exercised'. Whilst this is an important aspect of conventions, Dicey is clearly overstating the case, Dicey (n 3) 281.

\(^{15}\) *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

\(^{16}\) ibid. However now see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61; [2009] 1 AC 453.

\(^{17}\) Rodney Brazier, *Constitutional Reform* (1st edn, OUP 1991) 103.

\(^{18}\) An Armed Forces Act passed every five years fulfils this requirement. The Armed Forces Act 2011, s 1 extends the life of the Armed Forces Act 2006 until 2016.
of the Crown after consultation with the Cabinet. The Prime Minister and the Government would account to Parliament for the exercise of the prerogative in the normal way, by making statements to the House of Commons, informing that forces have been deployed, with further statements updating the House. Usually, any votes on military action were on Government-led adjournment motions, with any vote on the motion ‘that this House do now adjourn’ rather than on a substantive motion on military action itself.

However, the Iraq War was approached in an entirely different manner, with three debates on substantive motions being held and carried out before military operations began in March 2003. It appears that the reasons for doing this were political rather than constitutional. As Lord Goldsmith, then Attorney General, stated in answer to a parliamentary question:

‘The decision to use military force is, and remains, a decision within the royal prerogative and as such does not, as a matter of law or constitutionality, require the prior approval of Parliament’.

As Philipsson notes, the Government ‘did not normatively admit to the existence of a convention that it was bound’ to seek the approval of Parliament. The addition of ‘constitutionality’ also appears to displace any idea that Government felt they were setting a foundational precedent that must be followed in future, failing the Jennings test detailed above. However, since 2003, the Iraq precedent appears to have been (to use Waldron’s phrase)

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20 An exception was during the Gulf War when a debate on a substantive motion was held four days after military action had started. As regards Afghanistan there was no vote until the Backbench Business Committee called one in September 2010. See Clare Taylor and Richard Kelly, Parliamentary Approval for Deploying the Armed Forces: An Introduction to the Issues (House of Commons Library, Research Paper 08/88, 2008) 8 [http://www.parliament.uk/documents/commons/lib/research/rp2008/rp08-088.pdf].


‘pulled up by its bootstraps’ and acquired the status of forming part of a constitutional convention.

Before action in Libya, debate over Parliament’s role was concluded by the then Leader of the House, Sir George Young, who was unequivocal:

‘A convention has developed in the House that before troops are committed, the House should have an opportunity to debate the matter. We propose to observe that convention except when there is an emergency and such action would not be appropriate. As with the Iraq War and other events, we propose to give the House the opportunity to debate the matter before troops are committed’.24

It seems clear the Syria vote in August 2013, by being held before the start of military action, falls squarely behind the Iraq precedent and the formation of a convention by Sir George Young. Further, the text of the substantive motion stated that ‘every effort should be made to secure a Security Council Resolution backing military action’, but that ‘before any direct British involvement in such action a further vote of the House of Commons will take place’.25 This seems to be a clear indication that the Government felt that it needed the approval of the House of Commons before taking military action. This notion is strengthened when, in response to hearing that the Government had lost the vote by 285 votes to 272, the Prime Minister stated that he accepted that the House of Commons ‘does not want to see British military action … and the Government will act accordingly’.26 This is the clearest precedent that not only does the House of Commons have the right to be asked the question, but that the Government feels bound by the answer.

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26 ibid, 1556-7.
Although described by some as the precedent that confirmed the Iraq precedent, the Libya vote in 2011,\(^27\) fits less easily into the convention as expressed Sir George Young. What is of interest here is that the vote occurred after, rather than before, the start of military action. The Commons was informed of military action in a statement made by the Prime Minister on 18th March 2011,\(^28\) with action starting the following day. The vote was then held on 21st March 2011. The Cabinet Manual, written before the vote on Syria, documented this, stating that:

>'In the two most recent examples of significant military action, in Iraq and Libya, Parliament has been given the opportunity for a substantive debate. Debates took place in Parliament shortly before military action in Iraq began in 2003...\(^29\)

The *Cabinet Manual* then refers to the Leader of the House’s acceptance of a convention.\(^30\) What is clear is that the Libya precedent serves as further precedent of the Commons voting on military action. However, it is not clear that the formulation of Sir George Young encompasses the Libya deployment. It states that the Government would observe the convention that the House of Commons should have the opportunity to debate the proposed military action, except when ‘there was an emergency and such action would not be appropriate’. Does this mean that there would never be a debate, or that a debate would be held shortly after the start of military action? The Libya precedent would indicate the latter, and this would fall within the spirit of the convention; supporting greater parliamentary involvement in deployment decisions. Greater clarity would be welcome here, but such ambiguity is

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\(^{27}\) Phillipson (n 23). Phillipson considers that Libya confirms Iraq, and all doubt was removed by Syria.

\(^{28}\) HC Deb 18 Mar 2011, Vol 525, Col 611-3.


\(^{30}\) ibid. The 1st Edition of the Cabinet Manual should be compared to the draft version, which only mentioned military action at para 150, stating that decisions to take military action was the kind of issue that ‘would normally by considered by Cabinet’.
inherent in a convention with few precedents to draw upon.\textsuperscript{31} Although for practical, political purposes and given the strength of the convention on holding a debate prior to military action, the pressure on Government to hold a debate after military action has started in an emergency situation would be considerable.\textsuperscript{32}

2.2. How Did the Convention Change?

Having established how the convention changed, the interesting question is to try and consider why this change occurred, and why as a convention. How did the Iraq precedent became foundational and develop from being a political concession from the Government, that left the ‘law or the constitutionality’ of decisions to start military action unchanged, to forming the basis of a constitutional convention? The Iraq vote cannot be viewed in the same way as the formation of Sewell Convention, which was a declaration of future Government action. This was later complied with, meaning that upon the first instance of compliance, the convention immediately sprung into existence.\textsuperscript{33} There must be an alternative explanation.

One explanation can be gleaned from the nature of conventions themselves. A convention is constitutional when it relates to the system of Government or an aspect thereof. A significant part of the role that conventions play in the constitution is to regulate the relationships between different institutions of Government. If those relationships are static, then the conventions that regulate this relationship will not change. An example of a static relationship is that between the Monarch and Parliament in their

\textsuperscript{31} Lord Hurd suggested a convention that would have clarified this. See Public Administration Committee,\textit{Taming the Prerogative: Strengthening Ministerial Accountability to Parliament} (HC 2003-04, HC 422) para 20.

\textsuperscript{32} The persuasive weight of the Gulf War precedent, where a vote was held shortly after military action had started is debatable, as this was followed by a long line of deployments that saw no substantive vote being held.

\textsuperscript{33} Paul Bowers, \textit{The Sewel Convention} (House of Commons Library Standard Note, SN/PC/2084, 2005). See also HL Deb 21 Jul 1998, vol 592, col 791. An alternative view is that the mere declaration of a convention that would be followed in the future would be a creation of a convention. However, the view stated in the main text is to be preferred on the grounds that it complies with the Jennings’s test more easily, because there is a precedent and the actors felt bound by the declaration of future action, the rule.
legislative capacities, as the Royal Assent to legislation has not been refused for over 300 years.\textsuperscript{34}

However, the relationship between Parliament and Government is far more fluid, formed of many moving parts. Perhaps unnoticed until more recently, there has been a gathering of momentum for a rolling programme of modernisation to parliamentary procedure.\textsuperscript{35} The main effect of these reforms has been to increase the ability of the House of Commons (in particular) to scrutinise Government decisions more effectively. The effect of these reforms has been to increase the expectations of Parliament when considering its relationship with the Government on particular issues. This makes Brazier’s statement ever more prescient; if Parliament is scrutinising more effectively those areas of Government action that it has always done, it increasingly calls into question those aspects of Government action that cannot be scrutinised in these ways. Against this backdrop, the position relating to ‘war powers’ becomes increasingly incongruous. To adopt the Jennings test, there becomes a more pressing ‘reason’ for the new constitutional rule.

Perhaps to an extent not appreciated at the time, at least by the Government, the Iraq vote prompted a serious consideration of how the power to deploy military forces was used with a consensus emerging towards increasing Parliament’s role. The signals from Parliament were that it wanted greater powers over the decision to embark on military action with Private Member’s Bills and reports from the Public Administration Select Committee arguing strongly in that direction.\textsuperscript{36} This was also matched by signals from the

\textsuperscript{34} When Queen Anne refused consent for the Scottish Militia Bill in 1707. For discussion of the circumstances of this, see Rodney Brazier, ‘Royal Assent to Legislation’ (2013) 129 LQR 184, 198-200.

\textsuperscript{35} Griffith describes how Government, Parliament and the judiciary have ‘enjoyed more and less influence over each other’ at different times. With the Government being dominant in the ‘immediate post-war period and during the 1980s’. Parliament being more influential during the 1960’s and 1970’s. The judiciary grew in strength during the 1960’s declining in the 1980’s. However the ‘1990s saw weak and strong Governments with correlative strong and weak Parliaments, with the Judiciary recovering some of its influence’. John Griffith, ‘The Common Law and the Political Constitution (2001) 117 LQR 42. The role of Parliament today is discussed in more detail in Chapter 4.

\textsuperscript{36} See Tam Dalyell’s Military Action Against Iraq (Parliamentary Approval) HC Bill (1998-99) [35]; Tony Benn’s Crown Prerogatives (Parliamentary Control) HC Bill (1998-99) [55]; Clare
Government, particularly when Gordon Brown was Prime Minister, when the Green Paper, *The Governance of Britain*,\(^\text{37}\) was followed by a consultation on the specific issue of war powers.\(^\text{38}\) The Government’s eventual preference was for a resolution to give the Commons a greater role over the use of war-making powers.\(^\text{39}\) This was matched by the opposing political parties.\(^\text{40}\) To the extent that Sir George Young was making a leap when describing the convention, he was making a leap to safe territory, for most of the significant actors had moved towards that position.

More generally, in relation to the royal prerogative, the scope of the prerogative has been reduced. The Constitutional Reform and Governance Act 2010 limited the prerogative when ratifying treaties,\(^\text{41}\) placed the Civil Service on a statutory footing,\(^\text{42}\) and the Fixed-term Parliaments Act 2011 has abolished the prerogative power to dissolve Parliament. Without the new convention, war powers would look increasingly out of step in this updated constitutional environment. This is an example what Hazell described as the ‘dynamics of constitutional reform’, of when a constitutional change in one area has effects in

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\(^{41}\) ss 20-25, codifies the Ponsonby Rule and requires that treaties have to be laid before Parliament for 21 days before they can be ratified. In addition, European Union Act 2011, Part 1, regulates the development of Britain’s relationship with Europe at the expense of the Prerogative.

\(^{42}\) In Part 1.
other seemingly unconnected areas. Not only does formal constitutional change lead to a demand for further formal constitutional change, but formal constitutional change can lead to informal constitutional change to take account of the new settlement.

2.3. The Desirability of Formal and Informal Change

The possibility of common law limits to formal constitutional change has been discussed above, but another interesting aspect of the war powers debate is the reluctance to legislate, despite demands for greater clarity of Parliament’s role. This is in stark contrast to most constitutional change since 1997, and raises the prospect of political or practical limits to the domain of formal constitutional change in favour of informal constitutional change.

Most countries have specific provisions in law dealing with the domestic legalities for taking military action. The fundamental problem with any proposed legislation in the UK is that it places an existing (and developing) non-legal process into the legal domain. Supporters of such legislation have to show how a legal process is preferable to a non-legal process, which has demonstrated flexibility and adaptability. This is why the key provision of any proposed law has been the ‘emergency provisions’, which attempt to replicate in law, the flexibility of conventions. However, once the discussion moves to these provisions, the argument is probably already lost, as it is almost impossible to satisfactorily replicate a convention, which by its nature, is ‘not wholly articulated’. This problem applies with equal force to a parliamentary

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44 In Chapter 1.
45 For example, the US War Powers Resolution of 1973 (50 U.S.C. 1541-1548), s 4, requires the President to give notice to both houses of Congress no later than 48 hours after military action has started. Then, under s 5, each house has sixty days to approve the military action.
46 Public Administration Committee, Taming the Prerogative: Strengthening Ministerial Accountability to Parliament (n 31) para 18 - 23, and clauses 5-7 of the suggested Ministers of the Crown (Executive Powers) Bill attached to the report.
47 David Feldman (n 9) 110.
resolution. The main benefit of a resolution over legislation is being able to rely on Article IX of the Bill of Rights, to exclude the oversight of the courts.

Essentially, due to these problems, it has been left to informal constitutional change to bring the desired change into effect. However, this is one of the first major changes in convention to emerge during the era of the Cabinet Manual. If conventions are the outcome of a negotiation between institutions, in the particular case of war powers between the Government and Parliament, then there is a problem with the status of the Cabinet Manual. In the words of the Prime Minister, the ‘Cabinet has endorsed the Cabinet Manual as an authoritative guide for ministers and officials’, and is intended by the Cabinet Secretary as ‘primarily a guide for those working in Government, recording the current position rather than driving change … [and] intended to be the source of any rule’. It has often been said that conventions, by not being written down in an authoritative document, naturally develop according to circumstances. However, the Cabinet Manual, emblazoned with the Royal Coat of Arms on its front cover, has (at least) a veneer of official authority, with the potential to become a key reference point for those seeking an ‘authoritative

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48 As suggested in HM Government, The Governance of Britain - Constitutional Renewal (Cm 7342-I, 2008). Clauses stated that Commons approval is not needed if in an emergency, or that that public disclosure of the proposed military action would prejudice ‘the effectiveness’ of the proposed action or inter alia the security or safety of members of the UK forces. Whether these exceptions would apply, would be for the ‘Prime Minister to determine’ (clause 3 (5)) who would later send a report to Parliament accounting for his decision (clauses 8 - 11). This resolution has been described as ‘riddled with exceptions’, David Jenkins (n 39), 156-8. Also, there is an issue both for legislation and a resolution if Parliament is in recess and has to be recalled. Furthermore, an exception has to be made for if Parliament has been dissolved under the Fixed-term Parliaments Act 2011, s 3 (1) in advance of a General Election.

49 Historically, the courts have shown great reluctance to become involved in such decisions, see China Navigation Co Ltd v A-G [1932] 2 KB 197, Chandler v DPP [1964] AC 763 and Crown Proceedings Act 1947, s 11. However, legislation in this area could change things, the courts are extremely reluctant to give effect to any ‘ouster clause’ and view the interpretation of statutes as a matter peculiarly for the courts. See R. (on the application of Cart) v Upper Tribunal, [2009] EWHC 3052 (Admin); [2011] Q.B. 120, Laws LJ [38], although the case later went to the Supreme Court [2011] UKSC 28; [2012] 1 A.C. 663 this statement was neither approved nor disapproved.

50 Cabinet Office, Cabinet Manual (n 12) iii.

51 ibid, iv.
account of conventions'\textsuperscript{52} This threatens the organic development of conventions in two ways.

Firstly, it is a document ‘by the executive for the executive’\textsuperscript{53} There is a danger that despite and because of the Cabinet Manual’s status, it expresses the executive’s view of conventions, when other valid opinions could be available, most notably from Parliament.\textsuperscript{54} The difficulty is that these opinions are likely to be more difficult to find, being buried in Select Committee reports or Hansard. As future editions are published, the Government could use the increased visibility of the Cabinet Manual to tweak aspects in its favour. However, if for this reason, the Cabinet Manual fell into disrepute, the status of the document would be severely diminished. Consequently, some have argued that any document of this nature should be owned by or, at the very least, have some involvement of Parliament and not be wholly drafted by the executive.\textsuperscript{55} In this light, the 1st Edition was published after considerable parliamentary scrutiny, by being subject to three select committee inquiries,\textsuperscript{56} with Sir Gus (now Lord) O’Donnell conducting a full consultation exercise inviting responses from the public and academics.\textsuperscript{57} However, it is always open for future generations of politicians and civil servants to approach the consultation

\textsuperscript{52} As the former Cabinet Secretary Lord Butler said, ‘I shall put it on my bookshelf and, when I want to remember what the conventions are for use in Parliament or other ways, I shall look at it. In that respect, as Lord Armstrong said, it is a useful work of reference.’ Constitution Committee, The Draft Cabinet Manual (HL 2010-11, 107) Q41. See also Andrew Blick, ‘Cabinet Manual and the Codification of Conventions’, (2014) 61 Parliamentary Affairs 198-199.


\textsuperscript{54} This was notable during the aftermath of the 2010 General Election, when Lord Hennessy described how he and Robert Hazell ‘had to impersonate the British Constitution for five days in television studios after the election’ and that it would have been ‘very difficult for us to have said what the constitutional understandings where if we hadn’t had that bit of paper in our hands’, Blick, (n 52) 198.

\textsuperscript{55} Political and Constitutional Reform Committee, Constitutional Implications of the Cabinet Manual (HC 2010-11, 734) Rodney Brazier’s evidence, Ev w2.

\textsuperscript{56} In addition to the two inquiries referred to at fn 123 and fn 126, see also House of Commons Justice Committee, Constitutional Processes Following a General Election, (HC 2009-10, 396).

\textsuperscript{57} Indeed, the embryonic first chapter of the Cabinet Manual was the chapter that dealt with Government formation especially in the event of a Hung Parliament.
exercise very differently, and the Government does not always treat the constitution in line with best practice, as described in later chapters.

The second danger is that the Cabinet Manual stalls the future development of conventions. As stated above, the new convention on war powers as stated by Sir George Young requires embellishing in relation to emergency action. The Joint Committee on Conventions warned that the codification of conventions could ‘inhibit the capacity to evolve conventions’ in the future.\(^{58}\) This can apply to the Cabinet Manual, as behaviour not in line with the Cabinet Manual is likely to receive criticism; conversely, those with an obligation to comply with conventions could seek to comply with the terms of those conventions, as stated in the Cabinet Manual. This could potentially inhibit changes in conventions, and ultimately lead to calls for formal constitutional change to bring about the desired development.\(^{59}\) A related aspect is that conventions not mentioned are downgraded by virtue of their omission. Should the document be treated as comprehensive, particularly by those to whom conventions apply, they may take the view that if it is not included in the Cabinet Manual, it is not a convention. A possible example of this approach is the Ministerial Code, where the question as to whether or not the Code has been breached, is often the key factor in whether a Minister should resign.\(^{60}\)

3. Conclusion

This discussion of informal constitutional change shows how the Government has a strong influence over constitutional development as they are the main actors in the process. Whilst rationales for informal constitutional change can be found in the 2005-2006 First Special Report on the role of the Prime Minister and the Cabinet Office, it is clear that the Government has a role in shaping the development of conventions. The Cabinet Manual, in particular, plays a significant role in shaping the way conventions are treated and the solutions to any perceived issues that may arise.

\(^{58}\) Joint Committee on Conventions, First Special Report (2005-06, HL 265, HC 1212) para 279 - 283.

\(^{59}\) War Powers in the period following Iraq could be seen as an example of this. The Government attempted to assert that constitutionally speaking nothing had changed, the response of Parliament was several Private Members bills on the issue, and parliamentary committees holding inquiries.

\(^{60}\) Especially under Para 7.2 of the Code, which states that the Independent Adviser on Ministerial Interests can be asked to investigate any alleged breaches of the Ministerial Code and provide ‘advice’. For details on how this quasi-enforcement mechanism works, see Oonagh Gay, The Ministerial Code, (House of Commons Library Standard Note, SN/PC/03750, 2012).
change are advanced, they are liable to be reverse engineered and explained with the benefit of hindsight. At the risk of doing just that, it is arguable that the present Government sought to clarify the conventions relating to military action in an attempt to distinguish itself from the previous administration and the particular controversies that engulfed the Iraq War. Given the particular emphasis on such evolutionary constitutional development in the UK constitution, with political considerations driving change, there is an increased need to take a holistic view when embarking on a formal constitutional change to take account of the developing conditions.

The changing role of the House of Commons over decisions to take military action highlights how formal constitutional change operates within a broader change process. Moreover, formal constitutional change is not the only way in which constitutional change occurs. The evolving role of the House of Commons over decisions on military action, shows how informal change can occur in place of formal change, especially when attempts to make a formal change fail. It is also an example of when informal change is viewed as being more desirable than formal change, as enacting legislation can have unintended consequences. When considering the form of constitutional change to be pursued, the advantage for politicians of informal change is that it allows for political issues to remain firmly within the political arena; minimizing the role of the law and the courts. While formal constitutional change has been the predominant form since 1997, the changing role of the House of Commons over decisions to take military action is a reminder that it is not the only form of change. With this in mind, formal constitutional change can now start to be scrutinised.
Chapter 3 - The Whitehall Machinery

1. Introduction

The previous chapter concluded by suggesting that formal constitutional change is not always the preferred form, and that the scope of formal change may have boundaries imposed upon it by reasons of practice and politics rather than law. Taking a broad historical view, it is clear that these limitations on formal change are immutable. During the 19th Century, significant constitutional change took place through a combination of formal and informal processes; whereas the 20th Century saw an accelerating trend for formal constitutional change, which shows little sign of abating early in the 21st. Constitutional policy shares this characteristic with many other areas of public policy, such as health or education, which have seen similar increases in statutory regulation.

From a comparative perspective, the shift towards using the parliamentary process as the main driver of constitutional change is not unusual. However, unlike many constitutions around the world, this increase in formal change operates under the doctrine of parliamentary sovereignty. This means that the increase in activity does not, as a matter of law, have to be accompanied with any extra substantive checks such as a referendum. As Dicey stated famously:

‘The principle of Parliamentary sovereignty means neither more nor less than this, namely that Parliament … has,

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1 The rise in the dominance of the House of Commons over the House of Lords, cumulated in 1911, the Government of Ireland Act 1920 and Life Peerages Act 1958, the amount of constitutional legislation increased dramatically at the end of the century with the reforms passed by Labour following the 1997 General Election as discussed in the Introduction. This continued into the 21st Century with measures including the Constitutional Reform Act 2005, and the Coalition Government has continued in this vein with the European Union Act 2011, Fixed-term Parliaments Act 2011, Crime and Courts Act 2013, Justice and Security Act 2013 and the Succession to the Crown Act 2013.


3 The use of referendums and their status within the constitution is discussed in Chapter 6 below.
under the English constitution, the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.  

As is well understood, the principle of parliamentary sovereignty has positive and negative aspects. The positive aspect is that Parliament can ‘make or unmake any law whatever’ as within the uncodified constitution, there is ‘no marked or clear distinction between laws which are not fundamental or constitutional and which are fundamental or constitutional’. This means that the principle of parliamentary sovereignty ‘appears to be the fundamental rule of constitutional law’ meaning that Parliament can make or unmake any constitutional law that it chooses. The negative aspect of parliamentary sovereignty is that no one can question the validity of an Act of Parliament.

‘Electors have no legal means of initiating, or sanctioning or of repealing the legislation of Parliament. No Court will consider for a moment the argument that a law is invalid as being opposed to the opinion of the electorate; their opinion can be legally expressed through Parliament and Parliament alone’.

The other element is that the courts cannot declare an Act of Parliament invalid on the grounds that it is inconsistent with, or contrary to, the

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6 ibid, 37.

7 Bradley and Ewing, *Constitutional and Administrative Law* (15th Ed, 2011) 55. An example of this includes the Fixed-term Parliaments Act 2011, which repealed the Septennial Act 1715 and amended the Parliament Act 1911. Further, it is a consequence of the decision in *R (Attorney General) v Jackson* [2005] UKHL 56; [2006] 1 AC 262 is that the Parliament Act 1911 procedure provides an alternative method to pass legislation with constitutional implications, whereby under s 2 (1) the a Bill (other than a Money Bill or a Bill to extend the life of Parliament beyond five years) is an regular Act of Parliament notwithstanding the lack of approval of the House of Lords, rejecting the idea proposed by William Wade in ‘The Basis of Legal Sovereignty’ [1955] CLJ 172 that such Bills become a form of subordinate legislation.

8 Dicey (n 5) 17.
constituency. Clearly, membership of the European Union, and the Human Rights Act 1998 both call into question this traditional view of parliamentary sovereignty, but a lack of space prevents a more thorough discussion of these issues. However, these issues do not materially affect the positions taken about the methodology of constitutional change in this thesis. For example, as already discussed in the Introduction, Parliament could withdraw the UK from the EU and repeal the Human Rights Act 1998 withdrawing from the ECHR.

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9 This is meant as the courts striking down legislation in the sense that the United States Supreme Court and other Supreme Courts around the world can do.

10 The European Communities Act 1972 raises the question of the extent to which membership of the European Union contradicts the Diceyan idea of parliamentary sovereignty. Especially as EU law enjoys supremacy over the law of each Member State (see Case 6/64 Costa v ENEL [1964] ECR 585) and certain provisions of the treaties have direct effect in the legal systems of the Member states (See Case 26/62 NV Algemene Transport en Expedite Onderneming van Gend & Loos v Netherlands Inland Revenue Administration [1963] ECR 1). For example, the House of Lords in R v. Secretary of State for Transport, ex p. Factortame (No. 2) [1991] 1 All ER 70 ‘disappeared’ an Act of Parliament and held that a latter Act of Parliament could not implicitly repeal the 1972 Act. See further, Sir William Wade, ‘Sovereignty - Revolution or Evolution’, (1996) LQR 568.

However Factortame does not alter the fundamental premise that a further Act of Parliament could repeal the 1972 Act, making EU law no longer part of the law of the UK, see the European Union Act 2011, s 18, and the comments of Laws LJ in Thoburn v Sunderland v City Council [2002] EWHC 195 (Admin) [59]. However, there is a general consensus that politically an Act withdrawing from the EU could only be passed by Parliament after a referendum where a majority vote for withdrawal and this point is discussed in detail in Chapter 6.

11 The Human Rights Act 1998 does not give the courts the power to strike down an Act of Parliament, but to make, under s 4, a ‘declaration of incompatibility’ when they hold that a statute is inconsistent with the ECHR. Such statutes still remain an operative Act of Parliament binding on the parties to the case in question. The onus is on Parliament to resolve the incompatibility, and usually through the remedial order procedure under s 10 and Sch 4. In substance, this means that there has been a substantial power shift from Parliament to the courts on matters of human rights. Human rights matters are substantially more complex than as detailed above, see the human rights law references indicated at fn 58 in Chapter 1.

12 In particular the ‘new view’ associated with Jennings and Heuston, see R.F.V. Heuston, Essays In Constitutional Law (2nd edn, Stevens and Sons, 1964) and Sir Ivor Jennings, The Law and the Constitution (5th edn, University of London Press, 1959). This theory proposes that Parliament may establish binding conditions as to the ‘manner and form’ of future legislation. For the present inquiry, this suggests that Parliament could provide for the contingent entrenchment of legislation, for example by requiring that an Act of Parliament could only be repealed by a 2/3’s majority in both Houses. In R (Attorney General) v Jackson, (n 7) [163], Baroness Hale gave some obiter support to manner and form when suggesting that as legislation made under the Parliament Act procedure is a regular Act of Parliament, when Parliament has ‘redefined itself downwards’, ‘it may very well be that it can redefine itself upwards…to require a particular parliamentary majority’. For a discussion of the orthodox and the new views see, Michael Gordon, ‘The Conceptual Foundations of Parliamentary Sovereignty: Reconsidering Jennings and Wade’ [2009] PL 519. Clearly the ‘manner and form’ theory raises the methodological issue that Parliament may have to follow a procedure to be followed before legislation can be validly passed. However, it does not address whether a particular procedure should be followed and what form that procedure should take.

13 Indeed withdrawal from the European Union is explicitly provided for under TEU Article 50. This would now appear to exclude the analysis provided by Allen that should the EU ever
Indeed, the central question of this thesis is how this power to change the constitution is used in practice, and whether the procedures and methods employed when using this power can be enhanced.

This means that to discuss formal constitutional change considering the parliamentary and political processes is critical, as Parliament is the arena through which this takes place. However, this arena contains some remarkable characteristics that frame how formal constitutional change is approached. Firstly, it is a bicameral legislature, which is dominated politically and legally by one of its chambers; the elected House of Commons. A determined House of Commons can use the Parliament Act procedure to bypass the House of Lords, even for constitutional legislation.\textsuperscript{14} Further, the majority of bills are introduced into the Commons first, allowing the Commons to set the legislative agenda, with the House of Lords restricted largely to revising legislation passed by the Commons.\textsuperscript{15} On the whole, the Lords continue to give effect to the Salisbury Convention, which means that the Lords will grant a Second Reading to Bills that are implementing a manifesto commitment of the Government.\textsuperscript{16} This is a reflection of the fact that the Commons is made up of elected Members of

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\textsuperscript{15} Robert Blackburn and Andrew Kennon, Griffith and Ryle on Parliament (2nd edn, Sweet & Maxwell 2003) at para 6-126 states that ‘highly political bills usually start under in the Commons’. Clearly most significant constitutional bills fall into this description. At para 12-128 they go on to state that ‘the elected Commons expects major bills, the subject of party political differences, to be discussed there in the first instance’.

\textsuperscript{16} The Salisbury convention is discussed in Chapter 5, text to fn 16.
Parliament, whereas the Lords is made up of a combination of hereditary peers, Bishops, former law lords and Life Peers.\textsuperscript{17}

The other relevant consideration for present purposes is that the House of Commons is, of course, dominated by the Government. Through the fusion of the legislative and executive branches, the Government remains in office as long as it retains the confidence of a majority of the House of Commons. When, as usually is the case, the Government has a workable majority, it can be reasonably certain that the Commons will pass legislation it proposes. This is because an MP’s loyalty to their party is strong, meaning that they can be reluctant to take action that might damage the Party. Those MPs who with hopes of rising up through the Party and ultimately becoming Ministers will not want ‘to acquire the reputation of being unreliable’.\textsuperscript{18} The party whips also have their well-known ‘levers of persuasion’ to coax those who are contemplating going against the party line, by dangling carrots such as suggesting members for delegations abroad, or selecting who can represent the parliamentary party in the media, coupled with sanctions of reprimands or withdrawing the party whip from the Member. Further, a consequence of the doctrine of collective responsibility is that all members of the Government must vote with the Government (known as the ‘payroll vote’). Including Parliamentary Private Secretaries, this currently delivers approximately 140 of the votes needed for the Government to pass their measures.\textsuperscript{19}

\textsuperscript{17} Since the House of Lords Act 1999, which saw the removal of all but 92 hereditary peers, it has been argued that the House of Lords has become more ‘assertive’, as the outgoing hereditary peers have been replaced with life peers who play a greater role in the business of the House, and feel that they have a greater sense of legitimacy and so are likely to exercise their functions more robustly. This was most notably seen with the Prevention of Terrorism Bill in March 2005 when the Government lost 18 different divisions held on amendments to the Bill. See Meg Russell and Maria Sciarra, The House of Lords in 2005: A More Representative and Assertive Chamber? (Constitution Unit, 2006) 10-12 [http://www.ucl.ac.uk/spp/publications/unit-publications/132.pdf].

\textsuperscript{18} Robert Blackburn and Andrew Kennon, Griffith and Ryle on Parliament (2nd edn, Sweet & Maxwell 2003) para 4-024.

\textsuperscript{19} There is no formal definition of the payroll vote, but it can be as high as 140 when Parliamentary Private Secretaries (‘PPS’) are included. Although they are not members of the Government, they remain bound by the doctrine of collective responsibility. The number of PPSs at any given time can be hard to determine as they are subject to change without public notice, and positions can often be vacant for several weeks or months. See Keith Parry and Richard Kelly, Limitations on the Number of Ministers and the Size of the Payroll Vote, (House
An important part of a discussion of formal constitutional change is to consider how these norms play out when Parliament is considering a proposed constitutional change. However, as noted above, the Government's dominance of Parliament means that it controls the legislative timetable; therefore, only its Bills stand a realistic chance of becoming law.  

This means that is necessary to consider how Parliament deals with proposals for formal constitutional change. This also means that considering how the Government reaches the point of introducing a Bill to introduce into Parliament becomes of equal importance. Consequently, this Chapter explains the Whitehall machinery for constitutional change, with the following chapter considering how that machinery has been used in recent years to develop proposals into Bills. Chapter 5 then discusses how Parliament responds to Bills presented by the Government. Each chapter contains proposals to enhance each part of the formal change process. Over the next three chapters, it should be clear that what happens outside of Parliament when developing constitutional policy, will have a significant impact on how Parliament responds to it.

2. Before 1997 and New Labour

Traditionally, within Whitehall, there was no single Minister with day-to-day responsibility for the constitution, unlike many other areas of public policy, such as health or defence. There are many reasons for this. After the partition of Ireland laid the issue of Home Rule to rest and until the 1970s, the two main political parties shared a consensus of broad satisfaction with the constitution. This approach of ‘constitutional conservatism’ can be seen in the manifestos of this period, which made little reference to constitutional affairs. Politicians were well versed in the writings of Bagehot, Dicey and Low, all of whom

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20 Generally, Private Members’ Bills stand a more realistic chance of becoming law if they attract the support of the Government.


resembled the work of ‘traditional biblical scholars: they expounded what they revered and revered what they expounded’. The politicians’ perspective was most effectively set forth in Leo Amery’s, *Thoughts on the Constitution*, which maintained this reverential tone. Historically, the public largely mirrored the views of their politicians, particularly of the more visible areas of the constitution, such as the monarchy and Parliament. When sections of the public were dissatisfied with politics, it was generally with the way politicians used the tools at their disposal, rather than the tools themselves.

Another reason was the nature of the unwritten constitution. There was (and still is) a general lack of constitutional functions prescribed to particular Ministers. It was ‘unusual to talk of constitutional responsibility’. The only exception was the Lord Chancellor, who through his position as Head of the Judiciary had ‘particular responsibility for the preservation and protection of judicial independence and integrity’. Indeed, Lord Chancellors viewed their role as preserving this arrangement, to the extent that they felt that ‘if he does it

26 King, *The British Constitution* (n 21) 32.

26 Leo Amery, *Thoughts on the Constitution* (OUP 1953). This prevailing view was shared across the political spectrum. Labour’s 1945 manifesto was directed at working with the pre-existing constitution to implement its socialist policies and made little mention of constitutional matters. Indeed, Labour’s use of the machinery of government during Attlee’s tenure as Prime Minister caused the malcontents on the left such as Harold Laski, to temper their views in favour of the pre-existing constitution, as his posthumously published Reflections on the Constitution (Manchester University Press 1951), showed no desire to radically change the constitution, focusing instead on the Civil Service, and even this was saved from any proposal for a radical overhaul, as discussed in King, *The British Constitution* (n 21) 32-33.

27 Each month since 1974, IPOS Mori have conducted polls into what the electorate consider to be ‘important issues facing Britain today?’ Throughout this period, the Scottish/Welsh Assembly/Devolution/Constitutional Reform category has routinely been chosen by less than 0.5% of those polled. This is in contrast to the ‘Race Relations/Immigration/Immigrants’ category, which in recent years has been chosen by as many as 41% of those polled, or the ‘Economy/Economic Situation’ category, which was selected by 71% in May 2010. The figure for the Constitutional Reform category maybe compressed slightly by ‘Common Market/EU/Europe/Single European Currency’ being a separate issue, but the highest this category has polled since May 2010 is 12% in June 2014. It must be noted that interest in the ‘Constitutional Reform’ category has increased to 4-5% since February 2014, possibly due to Scottish independence. The archive of polls can be found at [http://www.ipos-mori.com/researchpublications/researcharchive/2905/Issues-Index-2012-onwards.aspx?view=wide](http://www.ipos-mori.com/researchpublications/researcharchive/2905/Issues-Index-2012-onwards.aspx?view=wide)


well, he is a good Lord Chancellor’. 30 The Lord Chancellor provided the fundamental links between the judiciary, Parliament and Executive. As other Ministers were also members of the legislature, the main dialogue between politicians and the judiciary took place through Parliament. If the law was unsatisfactory in an area, Ministers could change the law through Parliament. As long as the Government remained satisfied with this arrangement, there was little need to change or discuss the issue.

Finally, compared with today, there was little administration of the constitution that was required by Whitehall. Elections were, and still are, conducted by local government, operating under statute, 31 political parties did not need to be registered, 32 and there was no need to manage relationships between Whitehall and devolved institutions. Those specific constitutional functions that did exist, saw specific ministers covering those functions. For example, the Prime Minister has a constitutional duty to inform the Monarch of the business of Government, and pre-devolution, the needs of Scotland and Wales were considered through the Scotland and Welsh Offices; however, neither of these offices was seriously considered as fulfilling a constitutional function in the way that the devolved institutions do today. 33 The main political parties did not seriously question the underlying constitutional structure until the 1970s. This meant that there was no responsibility for the overall constitutional settlement within Whitehall, and (apart from the Lord Chancellor) those Ministers with specific functions seldom saw them as constitutional in character.

Exceptionally, constitutional change did occur during this period. The Life Peerages Act 1958 was foreshadowed with a somewhat cryptic reference in the Conservative Party’s 1955 manifesto, which stated ‘we believe that any changes made … should be concerned solely with the composition of the

31 The main statute is the Representation of the People Act 1983.
32 This changed with the Registration of Political Parties Act 1998, now see the PPERA 2000, ss 22 - 40.
33 Northern Ireland was by its nature a different matter where constitutional issues were never far off the agenda, and frequently took enormous amounts of the Prime Minister's time.
This was a singular response to a singular problem, the need to increase the number of ‘working peers’. However, there was no one Minister or holder of an official title who was responsible when these exceptions occurred. The Leader of the House led the Commons debates on the 1958 Act (who was also Home Secretary), \(^3\) and the Peerge Act 1963 (who was also Chancellor of the Duchy of Lancaster). \(^4\) It was the Home Secretary (who was not the Leader of the House) who was responsible for the (famously misnamed) Royal Commission on the Constitution to consider devolution to the nations. \(^5\) It is unclear what Harold Wilson had in mind, when, as Prime Minister, he moved the Parliament (No. 2) Bill at Second Reading, stating that ‘in accordance with precedent, Mr. Speaker, that any major legislative proposals involving major constitutional change, reform of our parliamentary system, the constitution and powers of another place, should be presented to the House by the Prime Minister of the day’. \(^6\) Brazier sums up the position perfectly; ‘whenever a Government decided to embark on a constitutional change it made ministerial dispositions especially for that purpose, and wound them up when that purpose had been achieved (or failed)’. \(^7\)

Whilst this state of affairs could be considered acceptable up to 1997, thereafter this could no longer apply. The Labour Government was elected with a commitment to deliver extensive constitutional change, which would require an unprecedented amount of legislation. Despite being unlike anything envisaged in modern times, there was no consideration of creating the appropriate machinery to bring about such constitutional change. \(^8\) Decisions were made against creating a central point, co-ordinating the process. For

\(^3\) *Conservative Party General Election Manifestos 1900 - 1997*, 125; Amery, (n 26) 61-63.

\(^4\) Rab Butler was also Lord Privy Seal, HC Deb 12 February 1958, vol 582 cols, 402-522.

\(^5\) Iain McLeod, HC Deb 19 June 1963, vol 679, cols 461-556.


\(^7\) HC Deb 03 February 1969, vol 777, col 43, 44. Wilson later withdrew the Bill after it was clear that the proposals lacked support from backbenchers from both sides of the House. HC Deb 17 April 1969, vol 781, col 1338.


example, the idea of a declaratory White Paper ‘embracing, describing and linking the whole rolling process’ was decided against.\(^{41}\) One reason could have been the Government’s intention to begin legislating for change as quickly as humanly possible. Within 18 months of taking office, there was legislation for devolution to Northern Ireland,\(^ {42}\) Scotland\(^ {43}\) and Wales,\(^ {44}\) with referendums,\(^ {45}\) a referendum in London on the creation of a Greater London Assembly,\(^ {46}\) human rights,\(^ {47}\) and the registration of political parties\(^ {48}\). This meant that the \textit{ad hoc} approach to the constitution reigned like never before. Across Whitehall, different departments were responsible for different parts of the constitutional legislative programme, without entrusting the project to a single department,\(^ {49}\) nor was there a ‘Minister entirely responsible for constitutional affairs’.\(^ {50}\) For a Government intent on legislating as quickly as possible, there is a great advantage is that if a single department was responsible for this entire agenda, it would have to compete with other departments for parliamentary time. The only possible source of overall responsibility would be the Prime Minister himself, under the general principle of being responsible for the actions of his Ministers. However, as stated in the Introduction, paradoxically a Prime Minister who was uninterested in the constitution led these reforms.\(^ {51}\)

Considering that the period following the 1997 general election was largely exceptional (at least until 2010), a department focused solely on the constitution

\(^{41}\) Peter Hennessy, \textit{The Prime Minister - The Office and Its Holders Since 1945} (Penguin 2000) 510.

\(^{42}\) Northern Ireland Act 1998.

\(^{43}\) Scotland Act 1998.


\(^{45}\) Scotland and Wales (Referendums) Act 1997.

\(^{46}\) Greater London Authority (Referendum) Act 1998.


\(^{48}\) Registration of Political Parties Act 1998, see now Political Parties, Elections and Referendums Act 2000, ss 22 - 40.


\(^{50}\) Brazier, \textit{Constitutional Reform} (n 39) 138.

\(^{51}\) Introduction fn 18. See also Peter Hennessy, \textit{The Prime Minister - The Office and Its Holders Since 1945} (Penguin 2000) 510.
and constitutional change was deemed likely to be too small to be worthwhile. A better way is to consider constitutional issues within the broader field of legal affairs. However, this had become a quagmire. Although departments are responsible for legal affairs within their remit, the archetypal issues within legal affairs of the civil law, criminal law, the judiciary, prisons, human rights and law reform were split in an almost nonsensical way. The Home Secretary would be responsible for the criminal law, policing, prisons and civil rights, with the Lord Chancellor responsible for the judiciary, legal aid and the state of the civil law. The Law Commission reported directly to the Lord Chancellor, which meant that when the Commission prepared a report on criminal law, it was given to a Minister who did not have overall responsibility for that area. 52 Like the constitution in general, no Minister had responsibility for the law, who could spark their Ministerial colleagues into action when necessary.

Again, the reason for this is the lack of public interest in this area and the lack of political capital to be gained by a Government taking action. This has broader consequences Whitehall, which is structured according to issues of political importance. As this is an immutable category, the allocation of responsibilities between departments is subject to change. Even long-standing departments are not immune to significant change. For example, international aid and development were transferred from the Foreign Office to a new Department for International Development in 1997. That such changes can be made with ease reflects the fact that this is an area of the royal prerogative, which is under the control of the Prime Minister. 53 This gives the Prime Minister maximum flexibility. The Ministers of the Crown Act 1975 at s. 1 (1) (a), provides that the functions of a Government department can be transferred by Order in Council from one Minister of the Crown to another. Similarly, under s. 1 (1) (b), Government departments can be dissolved, with their functions being

52 Law Commission Act 1967, s 3 requires the Law Commissioners to ‘promote the reform of the Law’ which includes the criminal law.

transferred to another department. Section 5 (5), by providing that nothing in the Act ‘shall prejudice any power exercisable by virtue of the prerogative of the Crown in relation to Ministers of the Crown’ makes clear that the prerogative power to create a new Secretary of State remains unchanged.54

Essentially, the vast majority of Government functions can be transferred across Whitehall with relative ease.55 While this allows for Governments to reflect any changes in its policy aspirations,56 the ease by which functions can be transferred is ‘always a temptation for Prime Ministers in trouble, who find it irresistible to show who is in charge by rebadging departments or shifting their boundaries’.57 This is particularly the case when used in concert with the Prime Minister’s power to hire and fire Ministers in a Cabinet reshuffle.58 This is not conducive to a thorough consideration of where to place issues on the periphery of departments. This means that the allocation of ministerial functions is seldom, if ever, optimal.59 This is especially the case for issues such as the constitution and legal affairs, which lack a natural ‘home’ amongst Whitehall departments, and lack the political salience to be a key consideration for Prime Ministers exercising their power to re-arrange Whitehall. This means that the dynamic tends to be that Government functions are allocated to departments through consideration of previous practice, precedent and politics. If there is

54 Brazier, Ministers of the Crown (n 28) 38-41.
55 Internal Whitehall advice states that ‘Machinery of government change is disruptive and costly for the organisations involved and can distract them from delivery for some time afterwards. As such, there needs to be a clear explanation of why a machinery of government change is the best solution to current challenges’. See Cabinet Office, Machinery Government Change - Best Practice Handbook (undated) [https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61287/moghand
book.pdf]. However the speed with which machinery of government changes occur, particularly after a general election suggest that this advice may not always be followed. For an admission of this fact from a former Cabinet Secretary, see Constitution Committee, Cabinet Office and the Centre of Government (2009-10, HL 30) ev 85, Memorandum from Sir Gus O’Donnell.
56 For example the replacing the Department of Social Security with the Department of Work and Pensions in 2001 reflecting a shift in Government policy to create greater links between working and welfare.
57 Peter Hennessy, Distilling The Frenzy (Biteback, 2012) 110.
59 For example the Department of Business, Skills and Investment has responsibility for Higher Education and Universities not the Department of Education. This reflects the current desire amongst Government to try and encourage greater links between business and universities.
little political need for substantive reform in an area, then previous practice and precedent prevail, even if it is unsatisfactory. This has been the case particularly with legal affairs and the constitution.

3. Department for Constitutional Affairs

There was then the most curious development. Highlighting the extent of the powers of the Prime Minister under the Minister of the Crown Act 1975, the Prime Minister’s Spokesman surprised everyone with the announcement in June 2003, that:

‘Derry Irvine (the then Lord Chancellor) was retiring from Government and he would be replaced by Charles Falconer in what will be a new Department for Constitutional Affairs’.  

The assembled journalists were then informed that the office of Lord Chancellor was to be abolished, and a new Supreme Court, replacing the Appellate Committee of the House of Lords, would be created following consultation during that summer. During the interim period, Charles Falconer would not hear appeals, nor would he sit as Speaker of the House of Lords.  

Finally, the role of the Lord Chancellor in selecting judges would be transferred to a Judicial Appointments Commission.

The timing of the announcement took ‘most people by surprise – including members of the Cabinet’. Further, the proposals were not included in the 2001 Labour Party manifesto, and the sitting Law Lords and other senior members of


61 The first Lord Speaker, Baroness Hayman was appointed in 2005. For details of the transition from the Lord Chancellor to Lord Speaker see Select Committee on the Speakership of the House, Speakership of the House of Lords (HL 2002-03, 199).

62 This became Parts 4 & 5 of the Constitutional Reform Act 2005.

the judiciary were not consulted or informed before the announcement.\(^{64}\) The deep irony, ‘apparently unnoticed within government, [was] that reforms justified as aiming to enhance public perceptions of judicial independence were announced as an executive fiat’.\(^{65}\)

The most baffling aspect of this, is why were these changes were approached in such a rushed manner considering their clear and understandable rationale.\(^{66}\) An inquiry by the Constitution Committee failed to ‘discern a consistent picture from the evidence received of what happened’.\(^{67}\) But, according to the evidence received from the main protagonists, it appears that the main concern of the Prime Minister was to avoid news of any suggested changes being leaked to the media,\(^{68}\) with the Cabinet Office conducting some preparatory work before June 2003.\(^{69}\) This appears to have involved some consultation with officials from the Lord Chancellor’s Department,\(^{70}\) but pointedly not the Lord Chancellor, Sir Hayden Philips, his Permanent Secretary, nor any members of the judiciary.\(^{71}\) It could be argued that, from the Prime Minister’s point of view, Lord Irvine needed to be convinced about the abolition of his post, and so was viewed as an obstacle to conducting fuller preparations, as it would have been difficult for the judiciary to have been consulted behind the Lord Chancellor’s back.\(^{72}\) It is clear from Irvine’s evidence that he was as affronted by the process and far from confident that the Prime Minister had realised fully the implications of the proposals. It would also be the case that


\(^{66}\) A rationale for separating the highest appeal court from the legislature was put forward by Lord Bingham in 2001, see Chapter 5 text to n 87.

\(^{67}\) Constitution Committee, *Cabinet Office and the Centre of Government* (2009-10, HL 30) para 213.

\(^{68}\) ibid, ev 87, Memorandum from Tony Blair.

\(^{69}\) ibid, ev 85, Memorandum from Sir Gus O’Donnell.

\(^{70}\) ibid.

\(^{71}\) ibid, ev 82, Memorandum from Lord Irvine, para 7.

\(^{72}\) ibid, para 206.
had Irvine been involved, he would have slowed the process down, as his alternative proposal suggested.\textsuperscript{73}

This has been described as an ‘object lesson in how not to approach constitutional reform’,\textsuperscript{74} and it is difficult to imagine that such significant policies would be approached in this way in other areas. Fundamentally, the evidence from Lord Turnbull, the Cabinet Secretary at the time of the Committee’s inquiry, or from Blair himself, all fail to explain adequately why there was a need for these proposals to be rushed. It would seem that a better way of proceeding would have been to follow the usual model of the Lord Chancellor’s Department running a full process of consultation and policy development through a Green Paper, White Paper and a Bill. If Lord Irvine would not support this policy, or not as vigorously as the Prime Minister may have wanted, it would have been open to the Prime Minister to appoint another Lord Chancellor. As the Constitution Committee states, it ‘would be a bizarre negation of Cabinet Government for a responsible minister to be kept in ignorance of an important policy because he might initially oppose it’.\textsuperscript{75}

However, despite the bungled announcement of the proposals, it has to be stated that, for the first time, there was a Minister with clear responsibility for the constitution and law reform to implement those proposals. The Department for Constitutional Affairs was led by a Minister focused largely on his ministerial brief, which was ‘unambiguously, the Government department responsible for the state of the Constitution’.\textsuperscript{76} Further, the holder of this constitutional brief would be accountable to the House of Commons, as the Constitutional Affairs Select Committee oversaw the new department. Once the proposals became law through the Constitutional Reform Act 2005, future Lord Chancellors could have a seat in the Commons.\textsuperscript{77}

\begin{flushleft}
\textsuperscript{73} ibid, ev 84, Memorandum from Lord Irvine.
\textsuperscript{74} Brazier, \textit{Constitutional Reform} (n 39) 144.
\textsuperscript{75} Constitution Committee, \textit{Cabinet Office and the Centre of Government} (n 67) para 209.
\textsuperscript{76} Brazier, \textit{Constitutional Reform} (n 39) 14.
\textsuperscript{77} Constitutional Reform Act 2005, s 2. The three most recent Lord Chancellors, Jack Straw, Ken Clarke and Chris Grayling have all come from the House of Commons.
\end{flushleft}
This new department was described presciently ‘as really a Ministry of Justice, with the Scotland and Wales offices bolted on as an afterthought’. At the core of the department was the new Constitution Directorate ‘with around 120 staff’. This Directorate brought together issues which were distributed across different Whitehall departments, including human rights (previously Lord Chancellor’s Department and before that Home Office), electoral law and policy (strangely the Department of Transport, Local Government and Regions, before that Home Office), reform of the House of Lords (no fixed address), freedom of information and data protection (Home Office), Church and State (mainly Lord Chancellor), relations with the Channel Islands and Isle of Man (also Lord Chancellor).

Lord Falconer successfully piloted the Constitutional Reform Act 2005 through Parliament, dealt with the consequences of creating the Judicial Appointments Commission and the process of creating the Supreme Court. However, the Department of Constitutional Affairs was not to last. In a further example of how Ministries can be recast with ease, the Ministry of Justice was created in 2007, merging the Department of Constitutional Affairs with the Home Office functions of penal policy, criminal justice reform and criminal law. In its wake, the Home Office essentially became the Ministry for Public Safety, National Security and Immigration. The conclusion is one of an old problem in a new form, as the problem of a Secretary of State being responsible for the competing aims of civil liberties and punishment of offenders was merely

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79 ibid.
80 ibid.
82 As well as the Constitutional Reform Bill, the Queen’s Speech for the 2003-04 session also included a commitment (which was never realised) to reform the House of Lords, HL Deb, 26 November 2003, vol 655, col 655.
83 Lucinda Maer, Robert Hazell, Simon King et al (n 78).
85 See for example, Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, Article 3, Sch 1, para 3.
transferred from the Home Office to the Ministry of Justice via a two-stage process. The fundamental tension between those issues remains, only to be added with the theoretical threat of the Minister responsible for the judiciary wanting the judiciary to send fewer offenders to his prisons.\textsuperscript{86} Further, budgets for courts, tribunals and legal aid have to compete within the same department as prisons.\textsuperscript{87} However, for present purposes, it is the loss of that discrete department that was clearly responsible for the constitution where this development provokes concern. Other than during that period from 2004-2007, with a department focused on constitutional affairs, the constitution, under the Ministry of Justice, had to compete not only against other departments’ interests, but also within its own department against interests that are always more likely to garner headlines.

4. The Coalition and the Cabinet Office

The creation of the Coalition in 2010 with its own far reaching 27-point constitution agenda brought further changes as to how Whitehall deals with the constitution.\textsuperscript{88} This change can be explained by the dynamics and politics of the coalition between the Conservatives and the Liberal Democrats. This Coalition had, in terms of MPs, a Conservatives to Liberal Democrats ratio of 5:1. It is important to note that a different ratio of 3:1 or 10:1 would create a Coalition of a very different dynamic, and would have yielded a different outcome.\textsuperscript{89} When it came to the allocation of ministerial portfolios, the Liberal Democrats had

\textsuperscript{86}~Lord Philips, the then Lord Chief Justice stressed that the judiciary must not ‘be treated as a seamless part of the justice process and must remain, a distinct and separate branch of Government’, House of Commons Constitutional Affairs Select Committee, ‘The Creation of the Ministry of Justice’ (HC 2006-07 466) Ev 24.

\textsuperscript{87}~With the merger of the Courts Service and the Tribunals Service, they now share the same budget. Although as stated below the Lord Chancellor is under a duty under the Constitutional Reform Act 2005, s 3 (6) to ensure that the judiciary have sufficient resources. A strange consequence of the creation of the Supreme Court is that its funding is far more dependent on Government approval than the Appellate Committee as many overheads were shared with the House of Lords, see Graham Gee, ‘Guarding the Guardians: The Chief Executive of the UK Supreme Court’ [2013] PL 546, 551.

\textsuperscript{88}~The detail of this agenda is considered in Chapter 4 below.

decided to go for breadth across Government rather than depth in a few departments. With this principle in mind, Nick Clegg became Deputy Prime Minister based in the Cabinet Office, enabling him to take an overview of Government policy alongside the Prime Minister. This would aid co-ordination between the two parties, and allow for the political processes of Coalition to operate effectively.

However, this is office is not constitutionally required, and often came attached with a Ministry. However for the reasons outlined above, Clegg decided against taking on a Ministry, as this would compromise his capability to over the Government as a whole. Yet, he would require something to bolster his portfolio beyond negotiating Coalition policy for his Party. This made acquiring the title ‘Special Responsibility For Political and Constitutional Reform’ within the Cabinet Office appropriate. Politically, it signalled that the Liberal Democrats were taking advantage of their opportunity to deliver on constitutional reform - an area of long-standing special interest to them. Clegg could satisfy his party that an advantage of coalition was that they were going to have control of some of their long-standing policy objectives, implementing their key measures of House of Lords reform, fixed-term Parliaments and the Liberal Democrats’ main demand for entry into the Coalition, the referendum on electoral reform (albeit on AV and not STV). It also followed Clegg’s success,

90 ibid,
91 ibid, 49 - 71.
92 Willie Whitelaw was Home Secretary from 1979-1983 and continued as Deputy Prime Minister until 1988. John Prescott was Secretary of State for the Department of Transport, Environment and the Regions from 1997-2001.
93 There are partial precedents for this kind of arrangement. From 1995 to 1997, Michael Heseltine was Deputy Prime Minister and First Secretary of State without another substantive Cabinet role, and famously had the largest office within Whitehall. Tony Newton was Lord President of the Council from 1992 to 1997 (he was also Leader of the House during this period). The creation of the Coalition is a partial following of this precedent, as Nick Clegg Deputy Prime Minister and Lord President of the Council, sitting in the Cabinet Office, with William Hague, the Foreign Secretary becoming First Secretary of State. This can be contrasted to Lord Mandelson who, during the last days of the Brown Government, was Secretary of State for Business, Innovation and Skills, First Secretary of State and Lord President of Council, with both a departmental office, and an office in the Cabinet Office.
94 For the history of the Liberal Party, then the Liberal Democrats commitment to electoral reform, see Liberal Party Manifesto’s 1900-1997.
particularly during the Prime-Ministerial Debates, of campaigning for a ‘New Politics’ following the MPs expenses scandal.95

From a machinery of Government point of view, this required most of the Constitution Group, a group of Civil Servants working at Ministry of Justice, to transfer to the Cabinet Office, which gained responsibility from the Ministry of Justice for the following:

- fixed-term parliaments
- the referendum on AV
- equalising constituencies
- introducing a power for the electorate to recall their MP
- House of Lords reform
- individual voter registration
- considering the ‘West Lothian Question’
- statutory register of lobbyists
- supporting all postal primary elections.

In addition, the Deputy Prime Minister, gained policy responsibility for IPSA, the Boundary Commission and the Electoral Commission.96

In many respects, this allocation of responsibilities should be welcomed, as it follows the principle behind the creation of the Department of Constitutional Affairs of linking responsibility for constitutional change and (some) constitutional affairs. It also shows that, unlike in 1997, some consideration has been given to the machinery behind these reforms, albeit for political rather than doctrinal reasons. In a further contrast to 1997, this central focus created the

need for the sequencing of legislation as not everything could be achieved within the first session of the Parliament. Rather than a rush of constitutional Bills being introduced into Parliament, as in 1997, the central focus required prioritisation. Some issues, such as fixed-term Parliaments, were legislated for quickly,97 whilst other, less urgent, issues have been subject to Draft Bills.98

However, some significant questions remain. Proposals for a British Bill of Rights, and human rights more generally remain with the Ministry of Justice, which in addition to its judicial responsibilities, also retained the more minimal constitutional functions such as Church and State relations and those with the Isle of Man and the Channel Islands. As responsibility for the non-departmental public bodies has been transferred to the Cabinet Office, this creates a natural home for any further statutory regimes; for instance, a statutory register of lobbyists.99

Yet, the Cabinet Office is not a natural home for constitutional matters. Once matters move from the legislative to implementing policy, the Constitution Group begins to sit uneasily within the rest of the Cabinet Office. Historically, the Cabinet Office’s responsibilities have included:

‘…co-ordination of policy briefing for Cabinet and Cabinet committees, co-ordination of the security and intelligence service, preparation for economic summits, Civil Service security, top Whitehall and public appointments...’100

These are issues that are peculiarly within the Prime Minister’s remit and are functions that cannot easily be transferred to a Government department. Constitutional affairs do not sit easily with such company. They are not functions that a Prime Minister must do, indeed they are arguably functions that

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97 Fixed-term Parliaments Act 2011. This served to underline the aim that the Coalition was going to survive the whole five-year life of the Parliament. See Rodney Brazier, ‘A Small Piece of Constitutional History’ (2012) 128 LQR 315.

98 For example the legislation to introduce the power for constituents to recall their MP. Cabinet Office, Recall of MPs - White Paper and Draft Bill (Cm 8241, 2011). For a discussion of the use of draft bills see Chapter 5.

99 This has now been legislated for; see the Transparency of Lobbying, Non-party Campaigning and Trade Union Administration Act 2014, ss 1 - 15.

100 Peter Hennessy, Whitehall (Fontana Press, 1990) 388.
the Prime Minister *should not* do. The centre should not be seen to be dictating constitutional issues so directly. A long-standing criticism of the current constitutional change process is that the Government has the power to radically change the constitution without the need for consensus. This is illustrated even more starkly when responsibility for constitutional affairs is at the epicentre of government.

In addition, the Cabinet Office has, over the past 25 years or so, developed into ‘ever closer fusion’ with the Prime Minister’s office.101 John Prescott perhaps gave the game away when giving evidence to the Public Administration Committee. When asked ‘is the Cabinet Office now some big Prime Minister’s department by another name?’ He answered, ‘Is the Cabinet Office the Prime Minister’s department? The Cabinet Office is the department of the Prime Minister at end of day [sic]. Am I confused about this? What we have is the Prime Minister’s department in the Cabinet Office’.102 Peter Hennessy attributed this development to ‘that Thatcherian phenomenon - Government by unit’.103 Blair took this to new heights, as ‘a thoughtful Cabinet Office hand’ described, ‘there are thirty-two separate management units ... its like Gormenghast in there!’ 104 The aim of these units, was to tackle cross-departmental issues, with the Social Exclusion Unit being a notable example from the Blair era.105 Later, these these units morphed into ‘avowedly prime-ministerial bodies including the Forward Strategy Unit, Delivery Unit and Office of Public Service Reform’.106 The Coalition Government has, to a lesser extent (perhaps due to the nature of Coalition), continued this practice. Presently, the Cabinet Office remains focused on issues that are either inherently cross-departmental, such as government efficiency, or a particular responsibility of the

102 ibid, 145.
103 Peter Hennessy, *The Prime Minister* (n 41) 492.
104 ibid, 536.
105 ibid, 513; Cabinet Office, Social Exclusion Unit [http://webarchive.nationalarchives.gov.uk/+/http://www.cabinetoffice.gov.uk/social_exclusion_task_force].
106 Blick and Jones, *Premiership* (n 101) 145.
Prime Minister, such as national security.\textsuperscript{107} Although constitutional issues, by their nature, have significant consequences across Government,\textsuperscript{108} the functions of the Constitution Group are not cross-departmental in this sense. Further, with the current trend towards making constitutional change through legislation and the increasing administration of the constitution that recent change appears to entail, these constitutional functions are becoming more akin to those of an ordinary Government department.

5. Where Next?

The previous three sections have highlighted how historically, constitutional affairs have lacked a natural home within Whitehall and that the creation of the Department for Constitutional Affairs in 2003 was a clear departure from the past. Yet, this development has been partially dismantled; through the creation of the Ministry of Justice, and the transfer of many constitutional functions to the Cabinet Office. The reasons for the Cabinet Office acquiring these functions are solely political and particular to this Coalition Government. This means that as there are no reasons in principle for the Cabinet Office to have these functions, there are no reasons in principle that stand against the Constitution Group being moved elsewhere or dismantled. The royal prerogative and the Ministers of the Crown Act 1975 (as discussed above) allow for this to happen very quickly and easily. This means that is difficult to see this as a long-lasting arrangement. Once the political reasons for the Constitution Group falling within the remit of the Cabinet Office disappears, there is little reason for it to remain there. It is already the case that the importance of constitutional affairs within the Cabinet Office has been demoted. In October 2013, the specific post of Minister of State for Constitutional and Political Reform was abolished with responsibility for this brief being given to the Minister of State for Cities now titled Minister of State (Cities and Constitution). A new Government, of either a different coalition or a majority party, may wish

\textsuperscript{107} Indeed, this function of the Cabinet Office has increased with the creation of the National Security Council.

\textsuperscript{108} For example, human rights, devolution and freedom of information have all had a profound impact on nearly all government departments.
for the Cabinet Office to focus on other areas, creating the spark for the Constitution Group to move once again.\(^\text{109}\)

One option for an incoming Government is to break up the constitutional brief amongst different departments. There is little prospect for this. Having already been transferred around Whitehall several times as a set, following the increasing amount of legislation governing the constitution, there is now a collection of issues that must continue to be dealt with together. Also, whilst politicians continue to believe, rightly or wrongly, that political capital can be gained from pursuing ‘political reform’ for the foreseeable future, any move to diminish the importance of the constitution would appear regressive. Consequently, a new Government would have several options available. An obvious solution would be to transfer back the functions to the pre-2010 position where the Ministry of Justice took the lead. While remaining an improvement on pre-2003 structures, it would be imperfect, for the reasons stated above. However, it does have the considerable attraction of simplicity, which cannot be discounted, given that these issues are likely to be considered in the hubbub and bustle of a Prime Minister selecting or reshuffling his Cabinet.

The preferable but more difficult course would be to create a Department for Legal Affairs, improving on the Department for Constitutional Affairs.\(^\text{110}\) This would leave three departments; the Home Office (focusing on law enforcement), the Ministry of Justice (focusing on prisons and rehabilitation) and a new Department for Legal Affairs. Its foundation would be the merger of the constitutional functions of the Constitution Group from the Cabinet Office and the remaining constitutional and legal matters from the Ministry of Justice.

Opportunities for further rationalisation would emerge. The Law Commission, the Attorney General’s Office and the Treasury Solicitors would

\(^{109}\) Even a future coalition between the Conservatives and the Liberal Democrats is likely to be different to the current coalition both in terms of relative party strengths and personnel and negotiations between the parties will have an effect on what the priorities of any government will be.

\(^{110}\) Such a department could easily be called a Department of Constitutional Affairs, but the title Department of Legal Affairs is chosen here to distinguish between the old and the proposed departments.
both find a natural home in the Department for Legal Affairs.\textsuperscript{111} Parliamentary Counsel are considered a shared service, with the First Parliamentary Counsel also being a Permanent Secretary to the Cabinet Office.\textsuperscript{112} While the cleanest solution might be for Parliamentary Counsel to transfer across to the Department for Legal Affairs, the inherent cross-departmental nature of the role also makes the current arrangement the most logical. While departments would retain their departmental lawyers, the advantage of this new department would be to consolidate much of the legal and constitutional expertise currently found around Whitehall in one specialist department. The ultimate aim would be to create a department that would be the central focus for the law within Whitehall, similar to the way in which the Treasury is the central focus for taxation, public expenditure and economic policy. However, problems arise when considering the functions of the Lord Chancellor and Secretary of State for Justice.

The political arguments behind reforms contained in the Constitutional Reform Act 2005 included normalising the office of Lord Chancellor into a more ‘regular’ Secretary of State. However, as a matter of law, the 2005 Act not only ensured the survival of the office of Lord Chancellor, but that its many functions, as a matter of law can be exercised only by the Lord Chancellor. This can be seen though section 20 and schedule 7 of the Act, which prevents the Minister of the Crown Act 1975 from being used to transfer functions of the Lord Chancellor away to the generic Secretary of State.\textsuperscript{113} Moreover, after the 2005 Act was passed the relationship between the Lord Chancellor and the Secretary of State for Justice was further clarified, as more ‘legal’ functions were


\textsuperscript{112} Cabinet Office, Office of the Parliamentary Counsel, [https://www.gov.uk/government/organisations/office-of-the-parliamentary-counsel].

\textsuperscript{113} Such functions listed in Schedule 7 including the functions to ‘have regard of the need to defend judicial independence’ under s 3 (6). To transfer these functions away from the Lord Chancellor would require primary legislation. Section 20 also prevents the functions of the Lord Chancellor listed in Schedule 7 from being transferred in the ordinary manner under the Ministers of the Crown Act 1975. Other such functions that rely on this overarching duty include functions under the Legal Services Act 2007.
transferred from the generic Secretary of State to the Lord Chancellor.\textsuperscript{114} Furthermore, there is no requirement that the Lord Chancellor also has to be the Justice Secretary.

Consequently, the problems could be avoided by divorcing the Lord Chancellor from the Secretary of State for Justice, with the Lord Chancellor once again becoming focused solely on the law, heading a Department for Legal Affairs, with the Secretary of State for Justice focusing on prisons and rehabilitation. When compared with how the unreformed office was regulated by a mixture of convention and law, the effect of the 2005 Act is to solidify the office of the Lord Chancellor and distinguish between the roles of the Lord Chancellor and the Justice Secretary.

However, would a future government want to do this? The rationale behind uniting the offices of Lord Chancellor and Justice Secretary within a Ministry of Justice was to create ‘a single department to be responsible for delivering an end-to-end criminal justice system from first appearance in court right through to rehabilitation or release’.\textsuperscript{115} This was achieved through combining the remaining judiciary-related functions of the Lord Chancellor,\textsuperscript{116} with the criminal justice system and responsibility for court and rehabilitation of offenders. In a sense, this is not a new development, as the history of Lord Chancellors over the past 40 years or so is one of continually gaining more and more responsibilities.\textsuperscript{117} This has meant that the Lord Chancellor’s Department has evolved from a ‘small private office somewhat apart from Whitehall orthodoxies to a large, resource intensive department subject to the same public management regime of accountability, efficiency and value for money as any other government department’.\textsuperscript{118} As responsibilities grew and the nature of the department

\textsuperscript{114} Secretary of State for Justice Order SI 2007/2128, Art 4. Such functions transferred included nominating a member of the Criminal Procedure Rule Committee, at Art 4 (1) (c).

\textsuperscript{115} House of Commons Constitutional Affairs Select Committee, ‘The Creation of the Ministry of Justice’ (HC 2006-07 466) Ev 32.

\textsuperscript{116} Constitutional Reform Act 2005 s 3 (6), Courts Act 2003, s 1 and Tribunals, Courts and Enforcement Act 2007, s 39.

\textsuperscript{117} For example, it gained the responsibility for the administration of the courts in 1972, criminal legal aid in 1988, and human rights and information in 2001. For the history of the Lord Chancellor in the 20th century see Woodhouse, \textit{The Office of the Lord Chancellor} (n 28).

changed to a more ordinary Whitehall department, it became more focused on developing policy.\footnote{119} It appears to be the case that the rationale for reforming the office of Lord Chancellor was to improve the management of the Department, and tie the priorities of the Department more closely to implementing Government policy.\footnote{120} The change to the Ministry of Justice further increased the policy role of the office holder across a greater range of policy.

Gee, in a perceptive article, suggests that a Ministry of Justice with its fragmented policy remit gives the head of the department a greater opportunity to become more involved with policy, than previous Lord Chancellors who headed up a smaller department with a narrow policy remit. This is because the smaller the policy remit, the less scope there is for policy leadership as the Minister has to ‘rely on officials to formulate strategies that take account of technical, interconnected issues’.\footnote{121} However, this does not appear to be an obstacle to creating a Department of Legal Affairs. Firstly, it might be highly desirable that a Minister with responsibility for the constitution considers technical and interconnected issues. This is precisely the sort of approach that has been lacking with the constitution for many years.\footnote{122} Also, the policy remit for a Department for Legal Affairs would not be inconsiderable. It would firstly combine the remaining judicial and constitutional functions of the Lord Chancellor with the day-to-day operation of the constitution on a day-to-day


\footnote{120} Gee, ‘What Are Lord Chancellors For?’ (n 118) 19. See also the view of civil servants and politicians close to the matter discussing under the Chatham House rule [http://www.ucl.ac.uk/constitution-unit/research/judicial-independence/seminar-note-the-abolition-of-the-lord-chancellor]. Of course, this would only be possible if the Lord Chancellor was a more regular Secretary of State rather than Speaker of the House of Lords and Head of the Judiciary.

\footnote{121} ibid, 20.

\footnote{122} For example, the initial Fixed-term Parliaments Bill contained major flaws, including having the consequence of making a general election coincide with elections to the devolved institutions, without any co-ordination with Edinburgh, Cardiff or Stormont. Clause 1 of the draft Wales Bill provides for five-year terms for the Welsh Assembly with the next election due in 2016 rather than 2015 to avoid clashes with Westminster elections, HM Government, Draft Wales Bill (Cm 8773, 2013).
basis as discussed above.\textsuperscript{123} Moreover, like its predecessor, it would be the natural home for a Government to implement their policy goals as regards to the constitution. This is because a key focus of this department would be law reform. Unlike some departments, such as the Ministry of Defence or Transport, this one would require regular slots on the legislative timetable (to implement Law Commission proposals for example). This would mean that it would be intimately familiar with the legislative process. As much constitutional change is now a species of law reform, a Ministry of Legal Affairs would be better equipped to do this than others.\textsuperscript{124}

The remaining issue is whether the Lord Chancellor, leading a Department of Legal Affairs, needs to be a lawyer. The judicial role of the Lord Chancellor was the primary reason for the requirement of the Lord Chancellor to be not only a qualified lawyer, but also usually one with substantial experience.\textsuperscript{125} However, the focus on the policy and political role of the Lord Chancellor perhaps negates the need for a requirement of a legal qualification. After all, there is no requirement or expectation that the Secretary of State for Health is a qualified doctor,\textsuperscript{126} or for the Secretary of State for Education to be a teacher.\textsuperscript{127} Perhaps perversely, a department focused on law has less of a need to be headed by a lawyer than one where law is only a small part of a far larger brief. The head of the Department for Legal Affairs would be far more immersed in the

\footnotesize{\textsuperscript{123} Including being the sponsoring department for the increasing range of non-departmental bodies, such as the boundary commissions, Electoral Commission. This would also include responsibility for implementing Law Commission reports and would inherit the Protocol with the Law Commission from the Ministry of Justice.

\textsuperscript{124} As will be seen in Chapter 5, a department such as the Cabinet Office, which historically does not often present Bills to Parliament often has experienced difficulties in the legislative process. The example discussed in Chapter 5 is the Legislative and Regulatory Reform Act 2006, but other examples could Lobbying, Non-party Campaigning and Trade Union Administration Act 2014, and the ill-fated House of Lords Reform Bill 2011-12.

\textsuperscript{125} Brazier, \textit{Ministers of the Crown} (n 28) 74. Woodhouse (n 28) 9.

\textsuperscript{126} Although junior ministers could be, currently Dr. Daniel Poulter, Parliamentary Under Secretary of State at the Department of Health is a qualified doctor specialising in 'obstetrics, gynaecology and women's health' and 'continues to work in the NHS hospital doctor on a part-time basis' [https://www.gov.uk/government/people/daniel-poulter].

\textsuperscript{127} Indeed, Estelle Morris a former teacher resigned as Education Secretary because she felt that she was 'second best', and that her performance in her role had 'not been good enough', BBC News, ‘Education Secretary Resigns’ 25th October 2002 [http://news.bbc.co.uk/1/hi/education/2359695.stm] and BBC News, ‘Morris Didn't Always Enjoy the Job’ 23rd October 2002 [http://news.bbc.co.uk/1/hi/uk_politics/2355059.stm].}
law than the present Justice Secretary, and would come into daily contact with the department’s own lawyers, officials and, occasionally, the senior judiciary.\textsuperscript{128} The ‘old’ Lord Chancellors were seen as a ‘uniquely valuable constitutional pivot’,\textsuperscript{129} largely because they were from the legal community entering the political sphere. There seems no reason in principle why a politician entering the legal sphere (but one free from the prison brief) cannot function as that pivot from the political side.

The key here would be the choice of the Prime Minister when deciding on the Lord Chancellor. The first two Lord Chancellors under the new regime, Jack Straw and Kenneth Clarke, were both qualified lawyers,\textsuperscript{130} for whom this was their last substantive post, after previously reaching the heights of Foreign Secretary and Chancellor of the Exchequer respectively. A problem with the present position is that the Ministry of Justice is dominated by its prison brief, meaning that future Secretaries of State for Justice are likely to be ‘hardliners’ that play well in the media. It is also viewed as a mid-ranking Cabinet position, and a possible stepping stone to one of the Great Offices of State. Chris Grayling, the current office holder, and the first Lord Chancellor without a legal qualification since Lord Shaftesbury in 1673, could be more typical of the ‘new’ type of Lord Chancellor and Justice Secretary. In line with this possible ‘hard-line’ tendency, Grayling’s tenure has not been free from controversy and some policies have been met with fierce opposition from the judiciary and broader legal community. However, a Department for Legal Affairs, without the prison brief would have a different character, and be less attractive to ‘hardliners’ than Justice. Its profile would be lower and would fit with a Minister stepping down

\textsuperscript{128} This is especially the case if Ministers are in office for a substantial part of a Parliament as has been the practice of the current Coalition Government. This is a marked contrast to the Labour Government from 1997 when ministerial reshuffles were frequent, although this difference may be a consequence of Coalition rather than a deliberate policy.


\textsuperscript{130} Although Straw only practiced for a few years, and Clarke’s days at the Bar, although a QC, are now rather ‘distant’, Gee, ‘What Are Lord Chancellors For?’ (n 120) 16.
the Ministerial ladder (a la Straw or Clarke), or an alternative to those who become Leader of the House of Commons.\textsuperscript{131}

However, requiring the Legal Affairs Secretary to be lawyer is perhaps unduly restrictive. The Department would include the Attorney General’s Office, with the Attorney General, as the chief legal advisor to the Government would be able to advise the Secretary of State.\textsuperscript{132} As the Solicitor General can also exercise the functions of the Attorney General,\textsuperscript{133} this is done most effectively with both these office holders not only being lawyers, but also having higher rights of audience to allow them to regularly appear in court.\textsuperscript{134} Should the Secretary of State for Legal Affairs require a similar qualification, then there is the practical difficulty of ensuring that every government in future has MPs able to meet these qualifications.\textsuperscript{135} This is increasingly a concern as a modern political career and a practice at the Bar sit together more uneasily than in the past.\textsuperscript{136} Of course, appointments can be made in the Lords, but one of the rationales for changing the office of Lord Chancellor was to increase accountability in the Commons.

\textsuperscript{131} Indeed the skills of being Leader of the House, requiring close negotiation through the ‘usual channels’ when arranging parliamentary business is particularly good experience for the negotiations often required for contentious constitutional issues such as funding of political parties or the response to the MP expenses scandal. Further there is a policy link between the constitutional aspects of the suggested Department of Legal Affairs and the rolling programme of parliamentary reform that some Leaders of the House such as Robin Cook and Sir George Young have pursued.

\textsuperscript{132} Such advice could extend to policy advice, for example when the current Attorney General, Dominic Grieve QC had warned the Justice Secretary, Chris Grayling about his legal aid proposals, the proposals were dropped shortly afterwards.

\textsuperscript{133} The Law Officers Act 1997.

\textsuperscript{134} Dominic Grieve, the Attorney General has led for the Government in the Supreme Court, including in prisoner voting case \textit{R (Chester) v Secretary of State for Justice} [2013] UKSC 63; [2014] 1 AC 271.

\textsuperscript{135} Whilst the current coalition government has been able to draw its two Solicitor Generals (Edward Garnier and Oliver Heald) and its Attorney General (Dominic Grieve) from the Commons, the previous Labour Government appointed three of its four Attorney Generals from the House of Lords, Lord Williams, Lord Goldsmith and Baroness Scotland, with Sir John Morris coming from the Commons. The underlying difficulty is the emergence of the ‘career politician’, which whilst not a new phenomenon, Anthony King, ‘The Rise of the Career Politician in Britain - And it’s Consequences’, (1981) 11 British Journal of Political Science 249. For a recent take see Tony Wright, ‘What is it About Politicians?’, (2013) 84 Political Quarterly 448.

Another difficulty are the statutory duties imposed on the Lord Chancellor, to uphold the rule of law,\textsuperscript{137} and to have ‘regard to the need to defend judicial independence’.\textsuperscript{138} The issue is whether splitting the Lord Chancellor and Justice Secretary would adversely affect these duties. Following the reforms in the Constitutional Reform Act 2005, Lord Chancellors cannot be expected to do the bidding for the judiciary in Government like Lord Chancellors of old are said to have done, meaning that the Lord Chief Justice (as Head of the Judiciary) and the President of the Supreme Court have to be, and have been, more assertive when defending their own independence.\textsuperscript{139} It has to be remembered that Lord Chancellors are bound by collective responsibility, which means that any warning or rebuke to ministerial colleagues for criticising judicial decisions, has to occur in private.\textsuperscript{140}

This has happened on several occasions, including on one occasion when the Lord Chancellor warned the Home Secretary, copying in the Prime Minister to the letter after both of them had made some intertemperate remarks.\textsuperscript{141} Such warnings take place within a context of a ‘broad-based and long-standing appreciation of the importance of judicial independence’.\textsuperscript{142} Gee is correct when he states that politicians are more likely to understand this if they come into contact with judges and share with them the value of having an independent judiciary. The best way guaranteeing the independence of the judiciary is to have a politician, whether a lawyer or not, who is respected amongst other politicians.\textsuperscript{143} The greater the standing of the Lord Chancellor within Cabinet, the more effective the rebuke.

\textsuperscript{137} Constitutional Reform Act 2005, s 1.

\textsuperscript{138} ibid, s 3 (6) (a).

\textsuperscript{139} For example see Lord Philips, ‘Judicial Independence and Accountability: A View from the Supreme Court’, Lecture to the UCL Constitution Unit, February 2011 [http://www.ucl.ac.uk/constitution-unit/events/judicial-independence-events/lord-phillips-transcript.pdf].

\textsuperscript{140} According to Gee this has happened with Lord Chancellors, with Clarke and (perhaps surprisingly) Grayling in particular. Gee, ‘What Are Lord Chancellors For?’ (n 121) 23-24.

\textsuperscript{141} ibid.

\textsuperscript{142} ibid, 26.

\textsuperscript{143} Indeed, it could be argued that an MP by virtue of being elected, can have a greater impact when seeking to defend the independence of the judiciary as opposed to an eminent QC
All of this requires modern Lord Chancellors to have more finely tuned political antenna than the hagiographies of the old-style Lord Chancellor suggest use to be the case. This is provided for in the legislation. Whilst the Lord Chancellor must have regard to the need to defend judicial independence, they must also have regard to ‘the need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters’. Sometimes, the Lord Chancellor may have to face the judiciary and represent the public interest when these two interests diverge. What is best for the judiciary may not necessarily be the best when it comes to the public interest on certain issues. A Lord Chancellor that can reconcile these two interests when they differ, explaining his actions to both sides his actions is likely to be ‘a good Lord Chancellor’.

Although the qualifications specified in the Constitutional Reform Act 2005 give the Prime Minister a broad choice, they are a nudge towards seniority. While falling short of the demands from some Peers, the requirements ensure that the position cannot be a first ministerial post, unless you have a legal background. That appears to be the right mixture of requirements for a Lord Chancellor to lead a Department of Legal Affairs. However, whatever structures is in place, the essential political fact is that if a Government is serious about constitutional change, it would appoint a serious, heavyweight figure to lead that change.

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parachuted into the Lords, who on issues such as pay or pensions might be seen as merely seeking the best for their profession.

144 Constitutional Reform Act 2005, s 6 (3) (a).

145 ibid, s 6 (3) (c).

146 Pay and pensions and the closure of under used courts are obvious causes for tension.


148 Constitutional Reform Act 2005, s 2 requires that Prime Minister when appointing the Lord Chancellor has to take into account experience of being a Minister, a member of either House of Parliament, a qualifying practitioner, a teacher of law at a university or ‘other experience that the Prime Minister considers relevant’.
6. Conclusion

It is quite clear that the machinery relating to constitutional change has become increasingly elaborate since 1997, in line with the increase in constitutional changes enacted. The highpoint was the creation of the Department for Constitutional Affairs in 2003, which developed a central focus for constitutional change. This was led by a Minister, Charles Falconer, who became the last Lord Chancellor in its unreformed state. It is unfortunate that a combination of need to reduce the size of the Home Office, which used to be viewed as a ‘political graveyard from which resurrection is impossible’, and the creation of the Coalition Government, have led to a partial return to the pre-2003 position of a fragmentation of the constitutional brief by splitting it between the Cabinet Office and the Ministry of Justice.\textsuperscript{149}

One benefit of the current arrangement is the almost unambiguous designation of the Cabinet Office as the body responsible for constitutional change. In terms of methodology, this is a welcome change, in stark contrast to 1997, as it allows for rationalisation of constitutional change proposals, potentially enabling a broader view to be taken. However, this arrangement is unlikely to last as a new Government (in whatever form) is likely approach matters differently. Placing these issues with the Ministry of Justice, headed by a politician is less than ideal, as the constitution will join the law in struggling for attention in a department, with a main focus on prison and rehabilitation.

This means that the best way for Whitehall to approach constitutional change would be through a small, specialist department that views the constitution through the broader field of legal affairs. For the constitution, this could be the final destination along the meandering path that started in 1997. Will it reach this destination in 2015?

\textsuperscript{149} Rodney Brazier, Ministers of the Crown (n 28) 168.
Chapter 4 - The Politics of Constitutional Change

The previous chapter discussed the structure within Whitehall, and how this has developed over time in response to political considerations. In line with the increased focus on constitutional change, the Whitehall machinery has been refashioned several times, in line with Government priorities. This chapter seeks to consider how a Government decides its constitutional priorities and to which the Whitehall machinery is applied. This process is an almost exclusively political part of the methodology of constitutional change, which increases in importance during periods of coalition, as the parties seeking to form the Government attempt to establish an agreement over all areas of policy, including the constitution.

1. Cross-Party Co-operation

Constitutional policy, just like most areas of public policy, usually originates from discussions within political parties. The parties then develop these into a manifesto, which is presented to the electorate at a General Election. At this point, the electorate has the chance to approve or reject each manifesto.¹ The political parties compete actively against each other for votes, meaning that political conflict is hard-wired into the constitutional change process from the very beginning, with the party system accentuating the differences between the parties. This is exaggerated further by the particularly adversarial nature of British politics. However, in a theme developed in Chapter 6, which discusses referendums, a drawback of this process is that amongst all the demands of a General Election campaign, any detailed scrutiny of policy

¹ Not every constitutional development is included in the governing party’s (or parties’) manifesto (or manifestos). What became the Constitutional Reform Act 2005 was not foreshadowed by inclusion in the Labour manifesto for the 2001 General Election. Also events may require more immediate action, such as the MPs expenses scandal resulting in the need for the creation of IPSA under the Parliamentary Standards Act 2009.
tends to neglect constitutional issues.\textsuperscript{2} This means that a political party (or parties) gain office due to their overall popularity and are given the opportunity to impose the constitutional changes they wish to see. The approach to constitutional change is driven by the view of the constitution of the political party (or parties) in Government at any particular time.

However, this does not make cross-party consensus impossible. Outside of a coalition,\textsuperscript{3} a particularly strong form of cross-party co-operation is exemplified between the Liberal Democrats and Labour after the latter's profound rethinking of its constitutional policy during the 1990s. Labour moved towards several longstanding Liberal Democrat positions on constitutional issues, which was reflected to a lesser extent in other policy areas as Labour became ‘New’ Labour.\textsuperscript{4} As Blair stated, ‘I was closer in political outlook to some of them [the Liberal Democrats] than to parts of the old left of my own Party’.\textsuperscript{5} As both the Liberal Democrats and Labour were anxious to remove the Conservatives from office, the circumstances were conducive to some form of co-operation, as any co-operation would ease the creation of a coalition had one been required in 1997.

Under these conditions, the Liberal Democrats had abandoned their policy of ‘equidistance’ between the Labour and the Conservatives,\textsuperscript{6} with greatest area of agreement between the parties being the constitution. This took the form of the Cook/Maclennan Agreement, which established a joint position on

\begin{footnotesize}
\begin{enumerate}
\item This is largely due to a longstanding lack of interest on constitutional issues amongst the electorate; see Chapter 3, fn 27.
\item A coalition can mean a coalition government between two parties, or a formal electoral alliance when two or more parties are fighting an election jointly, as the National Government did in 1931 and 1935 and the Social Democratic and Liberal Parties did in 1987. A continuing coalition that fights elections together can be found with the Liberal / National coalition in Australia.
\item In their 1992 manifesto, the Liberal Democrats included voting reform, devolution to Scotland and Wales, regional government, House of Lords reform, freedom of information and a Bill of Rights, \textit{Liberal Party General Election Manifestos 1900 - 1997}, 315-319.
\item Tony Blair, \textit{A Journey}, (Hutchinson, 2010) 118.
\item Paddy Ashdown, in \textit{The Ashdown Diaries - Volume One 1988 - 1997} (Allen Lane, 2000) describes in great detail the machinations of Liberal Democrat politics and his relationship with Tony Blair on these issues. Blair and Ashdown contemplated entering into a voluntary coalition with Liberal Democrats taking cabinet positions, but ultimately the size of Blair's majority after the 1997 General Election, and the likely response from the 'rank and file' of each party prevented this from occurring (see esp. 554-561).
\end{enumerate}
\end{footnotesize}
devolution, the Human Rights Act, proportional representation for European Parliament elections, and House of Lords reform. However, the sheer size of Blair’s majority at the 1997 General Election made any co-operation far less essential than it might otherwise have been.

However, radically for Whitehall, once in Government, New Labour created the Joint Consultative Cabinet Committee, chaired by the Lord Chancellor, with five Liberal Democrat members. The purpose was to ‘take forward the two parties’ constitutional reform programme’, and many aspects of the programme were implemented. However, it is far from clear what impact Liberal Democrat membership of this Committee actually had, considering the breakneck speed with which constitutional change was undertaken following the 1997 General Election, and the lack of progress on electoral reform following the publication of the report from the Jenkins’ Commission. This lack of progress, along with the desire of Charles Kennedy (who became leader of the Liberal Democrats in 2001) to distance them from Labour, led to the Committee being disbanded. Perhaps this experiment is best viewed as an attempt by both the Liberal Democrats and Labour to use the support of the other party to see their policies being implemented, rather than being a genuine attempt to develop policy together.

2. Coalition Negotiations

However, just as elections may hardwire political conflict into the constitutional change process, they may, depending on the result, also partially resolve this conflict. If the results return a hung Parliament, then the ensuing negotiations may yield a cross-party agreement on constitutional issues. These negotiations, as shown in May 2010, are a relatively new, short, but important

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stage of the constitutional change process. The outcome of the 2010 negotiations had a profound effect on the substance of the constitutional change programme that the Coalition Government followed. This means that the process of negotiation needs careful analysis. However, any conclusions have to be fairly tentative, as 2010 is the only real precedent thus far, and a different result at the election could have led to a wholly different set of circumstances.

In terms of constitutional policy, the principle of negotiations between political parties with a view to forming a Government is arguably a positive development. If a consequence of single-party governments is that a single party can implement the constitutional changes they desire, then the very process of coalition negotiations raises an opportunity to challenge and revisit that view. Any resulting coalition can embark on constitutional change from a broader perspective, as any agreement will necessarily be a compromise from the perspectives of both parties. The extent to which this occurs increases when the negotiating parties are more politically diverse. In short, if coalition negotiations occur, then a form of cross-party agreement becomes an almost mandatory part of the constitutional change process.

The *Programme for Government*,\(^\text{10}\) which resulted from negotiations between the Conservatives and the Liberal Democrats, is a good example of negotiations between two political parties who occupy distinct parts of the political spectrum.\(^\text{11}\) It is possible to categorise the policies based on their genesis in each manifesto as the table on the following two pages demonstrates.\(^\text{12}\)


\(^{11}\) Although the two parties, independently of each other, had drifted closer together, as Cameron attempted to bring the Conservatives towards the centre ground, and the ‘orange book’ wing of the Liberal Democrats placed a greater emphasis on the role of the market, shifting the party closer to the Conservatives.

\(^{12}\) This table has been amended and adapted from Robert Hazell and Ben Yong, *The Politics of Coalition: How the Conservative Liberal Democrat Government Works* (Hart, 2012) 157.
<table>
<thead>
<tr>
<th>Programme for Government</th>
<th>Liberal Democrat Manifesto</th>
<th>Conservative Manifesto</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Category A - New Policy for Both Parties</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Referendum on AV</td>
<td>Introduce proportional voting system, preferably STV</td>
<td>Retain first past the post</td>
<td>New policy for both parties</td>
</tr>
<tr>
<td><strong>Category B - New Policy for Either Party</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fixed-term Parliaments</td>
<td>Fixed-term Parliaments</td>
<td>Make Royal Prerogative subject to greater parliamentary control</td>
<td>New policy for the Conservatives - but clearly in their favour</td>
</tr>
<tr>
<td><strong>Category C - Compromise</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Reduce the House of Commons to 600 MPs</td>
<td>Reduce to 500 MPs if elected by STV</td>
<td>Reduce to 585 MPs</td>
<td>Compromise</td>
</tr>
<tr>
<td>Commission on Bill of Rights</td>
<td>Protect Human Rights Act</td>
<td>Replace Human Rights Act with UK Bill of Rights</td>
<td>Compromise</td>
</tr>
<tr>
<td>Commission on West Lothian Question</td>
<td>Not mentioned</td>
<td>English votes on English laws</td>
<td>Compromise</td>
</tr>
<tr>
<td><strong>Category D - Agreement</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Statutory Register of lobbyists</td>
<td>Statutory register of lobbyists</td>
<td>Legislate if lobbying industry does not regulate itself</td>
<td>Agreement</td>
</tr>
<tr>
<td>Right of Recall for MPs</td>
<td>Power of Recall in the event of serious wrongdoing</td>
<td>Power of recall triggered by proven serious wrongdoing</td>
<td>Agreement</td>
</tr>
<tr>
<td>Introduce referendum on further Welsh devolution</td>
<td>Give Welsh Assembly primary legislative powers</td>
<td>Will not stand in the way of Welsh Referendum on further legislative powers</td>
<td>Broad agreement</td>
</tr>
<tr>
<td>Implement Calman Commission in Scotland</td>
<td>Implement Calman Commission in Scotland</td>
<td>White Paper on how to deal with Calman</td>
<td>Broad agreement</td>
</tr>
<tr>
<td>Legislate so that future EU treaties are subject to ‘referendum lock’</td>
<td>Hold in/out referendum next time UK signs up for fundamental change in relations with EU</td>
<td>Amend ECA 1972 so that future treaties are subject to referendum lock</td>
<td>Broad agreement</td>
</tr>
<tr>
<td>Programme for Government</td>
<td>Liberal Democrat Manifesto</td>
<td>Conservative Manifesto</td>
<td>Comment</td>
</tr>
<tr>
<td>--------------------------</td>
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<td>------------------------</td>
<td>---------</td>
</tr>
<tr>
<td>Reform of party funding</td>
<td>Seek agreement on comprehensive reform to include donations cap</td>
<td>Cap donations at £10k, limit spending through electoral cycle</td>
<td>Broad agreement as far as the commitment goes</td>
</tr>
<tr>
<td>Bring forward proposals for a wholly or mainly elected second chamber</td>
<td>Elected House of Lords</td>
<td>Build consensus for a mainly elected second chamber</td>
<td>Broad agreement as far as the commitment goes</td>
</tr>
</tbody>
</table>

**Category E - Conservative Led?**

<table>
<thead>
<tr>
<th>Hold referendums on elected mayors in 12 English cities</th>
<th>Not mentioned</th>
<th>Give citizens in England’s 12 largest cities chance of having an elected mayor</th>
<th>Conservative led?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prevent misuse of Parliamentary Privilege</td>
<td>Not mentioned</td>
<td>Introduce a Parliamentary Privilege Act</td>
<td>Conservative led?</td>
</tr>
<tr>
<td>Implement Wright Committee reform for House of Commons</td>
<td>Not mentioned</td>
<td>Establish Backbench Business Committee</td>
<td>Conservative led?</td>
</tr>
<tr>
<td>Speed up individual electoral registration</td>
<td>Not mentioned</td>
<td>Swiftly implement individual voter registration</td>
<td>Conservative led?</td>
</tr>
<tr>
<td>200 all-postal primaries</td>
<td>Not mentioned</td>
<td>All-postal primaries</td>
<td>Conservative led?</td>
</tr>
<tr>
<td>Petitions to Force issues onto Parliament's agenda</td>
<td>Not mentioned</td>
<td>Petitions to Force issues onto Parliament's agenda</td>
<td>Conservative led?</td>
</tr>
</tbody>
</table>

As Hazell stated when he conducted his similar exercise (from which this table is adapted), it is ‘inevitably a crude scorecard, listing all the reforms as if they were equal, when some are clearly more important than others’.  

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13 ibid, 157. Also, the nature of the exercise means that the result can depend on who conducts the exercise, for example, Hazell considers the AV referendum as a Liberal Democrat ‘manifesto commitment only partially incorporated’, but I differ and consider the AV referendum as a policy not included in either manifesto, on the grounds that AV is of such substantial difference to the manifesto commitment of STV as to constitute an entirely different policy.
Unsurprisingly, it is easiest to gain agreement about relatively minor proposals, such as a statutory register of lobbying.\(^{14}\) Also, the Liberal Democrat negotiators realised the limits of their negotiating position. As the junior party in the negotiations, they made no attempt to negotiate for their longstanding, overarching policy, contained in many manifestos, of creating a federal UK with a written constitution.\(^{15}\) They realised that the limit of their position was to negotiate for the alternative voting (AV) referendum and House of Lords reform. These were two Liberal Democrat mainstays, meaning that the Conservatives would have expected a strong position on both of these issues.

A Coalition raises significant issues of democratic legitimacy. It could be argued that as the Coalition is the combination of the efforts of two parties, it has a greater sense of legitimacy than a single-party Government, particularly if the likely alternative to a Coalition is a minority Government. It could be argued that as 58.1% voted for either party of the Coalition, it is a Government that has a majority of support amongst the electorate, thereby giving the Coalition a strong sense of democratic legitimacy.\(^{16}\) To some, this gives the Coalition a greater sense of legitimacy than many single-party majority Governments, whose share of the vote seldom exceeds 40%. At the heart of this discussion is how legitimacy is measured, for it can be in terms of parliamentary majority or share of the vote. As long as these two factors are not in alignment, (because of a particularly disproportionate electorate system) it will remain difficult to reconcile them.

However, the argument against this is that no one voted for this particular set of policies as contained in the *Programme for Government*. It is reasonable to presume that a Conservative voter desires a Conservative Government, not a Government that contains Liberal Democrats. Although a referendum on

\(^{14}\) This is now contained in the Transparency of Lobbying, Non-party Campaigning and Trade Union Administration Act 2014.

\(^{15}\) A written constitution has been a Liberal Democrat policy since 1979, *Liberal Party General Election Manifestos 1900 - 1997*, 190.

\(^{16}\) 36.1% voted for the Conservatives, 23% voted for Liberal Democrats, *British Electoral Facts 1832 - 2012*, 59 - 60.
electoral reform is desirable in principle,\textsuperscript{17} a referendum was particularly desirable in this case, as it contradicted the manifestos of both the Conservatives and Liberal Democrats.\textsuperscript{18} As Bogdanor states:

'It was to be the programme, not the party manifestos, that was to be the guiding document for the new Government. This, however, raised a problem. Not only had no one voted for the Coalition, but no voter had been able to endorse the programme. Whereas a single-party Government could claim, however implausibly, a mandate for its policies, the Coalition, it seemed, could claim no such mandate'.\textsuperscript{19}

If this argument is taken to its logical conclusion, the solution would be to hold a referendum on the whole \textit{Programme for Government},\textsuperscript{20} but this would run into the same problem as manifestos, as a voter may agree with some policies but not all, but has no way of indicating that in such a referendum. The real issue here is the extent of the difference between the party manifestos and the \textit{Programme for Government}. The greater the difference, more particularly the difference from the senior Coalition party’s manifesto, the more significant the issue of legitimacy becomes. The above table shows that there was a substantial amount of overlap between the two parties manifestos, but that the overall \textit{Programme} retains a strong flavour of the Conservative manifesto. The AV referendum is a special case, where a referendum with an ‘agreement to differ’ made that issue of a different order to the rest of the constitutional change programme. The items in Categories C and D of the table appear to be

\textsuperscript{17} Constitution Committee, \textit{Referendums in the UK} (HL 2009-10, 99). This is discussed in more detail in Chapter 5.

\textsuperscript{18} Indeed, in negotiations with Labour, Labour proposed adopting AV without a referendum, but this was rejected by the Liberal Democrats, firstly on the ground that it was not certain that Labour could bring their MPs to support AV, but secondly on the more principled ground that it required a referendum. David Laws, \textit{22 Days in May: The Birth of the Lib Dem-Conservative Coalition}, (Biteback, 2010) 152-153.

\textsuperscript{19} Vernon Bogdanor, \textit{The Coalition and the Constitution} (Hart, 2012) 46.

\textsuperscript{20} Churchill proposed a similar referendum on continuing with the Coalition through to the end of the Japanese campaign in World War Two.
reasonable compromises considering that they fall between the terms of the manifestos, with a particular use of commissions, to consider issues when a common direction could not found.21

The two policies that stand out from the Programme for Government are the provisions for fixed-term Parliaments and House of Lords reform. Fixed-term Parliaments was a major constitutional change that emerged out of the negotiations, being only included in the Liberal Democrat's’ manifesto. The main problem was the proposal that Parliaments would have five-year fixed terms, with a provision for an early Election if 55% or more of MPs vote in favour. There were two problems with this; firstly, the 55% threshold had the advantage of being above the 47% share of Conservative MPs, and just above the combined share of 53% for the Liberal Democrat and all other MPs other than the Conservatives. This meant that neither party could dissolve the Coalition themselves. However, the 55% share would have allowed the Liberal Democrats and the Conservatives to combine their votes and use their 56% share to call an election at the time of their choosing.22 This was correctly described by Peter Hennessy as ‘very very iffy politics indeed’.23 The second problem was that the proposed five-year term also would have caused a clash with devolution elections scheduled for 2015.24 It is worrying that, in line with the constitutional change framework discussed above, Coalition negotiations, conducted at speed can set a train of events in motion that are very difficult to derail. The decisions on fixed-term Parliaments highlight the real danger of not


considering the wider implications of a policy in such situations. This possibility is made all the more real, by the fact that the negotiating teams decided against the Civil Service becoming involved in negotiations.\(^25\)

House of Lords reform is perhaps the most difficult to categorise, but it probably is the biggest difference between this Coalition Government and a Conservative majority Government, which is the impetus of reform. Cameron had reportedly considered House of Lords to be a ‘third-term issue’,\(^26\) whereas it was presented as a priority for the Coalition. More generally, a Conservative majority Government would have probably left constitutional issues within the Ministry of Justice, with constitutional issues competing within the Ministry of Justice for attention. Despite the detailed policy proposals in the manifesto, most Conservative voters would probably have not expected this level of emphasis. However, the Coalition made constitutional reform a priority, stating that ‘we urgently need fundamental political reform’ and that the ‘political system is broken’.\(^27\) This is further reflected in the fact that the Deputy Prime Minister has ‘special responsibility for constitutional reform’. Furthermore, this was not merely rhetoric, as Nick Clegg focused his first 18 months in Government on constitutional policy.\(^28\) Many of the proposals in the Conservative manifesto were tentative, with action dependent on contingencies. For example, the statutory register of lobbyists was contingent on the lobbying industry not adequately regulating itself.\(^29\) Under the *Programme for Government*, this turned into a commitment to introduce a statutory register without giving the industry a further chance for self-regulation.\(^30\)

\(^{25}\) Laws, (n 18) 95-96. However the Cabinet Office was involved in the subsequent negotiations to produce the *Programme for Government*, over the two weeks that followed the interim agreement, Hazell and Yong (n 12) 199.


\(^{27}\) HM Government (n 10) 26.

\(^{28}\) Hazell and Yong (n 12) 59.


\(^{30}\) HM Government (n 10) 26.
The remaining issue is how the political parties will approach writing future manifests. An interesting aspect of the above table is that more Conservative policies were included, but this is largely due to the fact that the Conservative Party manifesto was more detailed. Many of the policies indicated in Category E, such as preventing the abuse of parliamentary privilege or implementing the Wright Reforms, have their origin in the Conservative manifesto, but they could hardly be considered offensive to mainstream Liberal Democrat philosophy. This creates the opportunity for Conservatives to argue that they have got more of their agenda through the negotiations, or that the Liberal Democrats conceded ground to the Conservatives, which might have increased their negotiating power in other areas. The central concern is that the constitution becomes a victim of horse-trading across the whole spectrum of policy. Future negotiations are likely to operate under a different dynamic. In the future, political parties are likely to incorporate Coalition planning when writing their manifestos; potentially, making future manifests less detailed, but with ‘flagship’ policies around which the negotiations will be based. It is notable that two and half years before the next General Election, the Conservatives already trailed their intention to hold an ‘in or out’ referendum on EU membership. This is going to be a ‘red-line’ for the Conservatives in any negotiations in 2015.

In summary, Coalition negotiations have the potential to ‘lock in’ a form of cross-party agreement into the constitutional change process. This is at the expense of a thorough consideration of policies that emerge from the negotiations, especially those that differ significantly from party manifestos. This is due to the speed at which the negotiations are conducted. The 2010 negotiations were framed by the need to form a Government quickly, or the financial markets would suffer the jitters. More generally, the UK has an

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31 See Chapter 5 fn 95 and 96. Further, the House of Commons passed James Wharton’s private members bill, European Union (Referendum) Bill (2013-14) 63, which at clause 1, provided for an ‘in or out’ referendum on Britain’s membership to be held after the next general election in 2015, but before 31st December 2017. The Bill reached the Committee Stage in the House of Lords, but ran out of time, see HL Deb 31 Jan 2014, vol 751 col 1545. However, David Cameron has been reported as saying that he would look at reintroducing the Bill into the Commons and use the Parliament Act procedure for the Bill to become law. See “Tories to force through referendum bill”, The Independent, 1 February 2014, [http://www.independent.co.uk/news/uk/politics/david-cameron-vows-to-continue-fight-for-eu-referendum-after-lords-block-bill-9101068.html].
established practice of a new Government being formed the day after a General Election.\textsuperscript{32} Whilst there may not always be such a pressing need for a Government to be formed at such pace in the future, given the public expectation of swift action,\textsuperscript{33} it is hard to envision Coalition negotiations being conducted over a significantly longer period of time.\textsuperscript{34} Perhaps the most that could be expected is that negotiations take place over an extra few days, meaning that negotiations last a week. However, as Hazell highlights, it was the interim agreement that took five days, but it took 15 days to produce the full Programme for Government.\textsuperscript{35}

3. Presentation of Policy by the Coalition

As discussed in Chapter 3, the Whitehall machinery for constitutional change is not amenable for Ministers to take a broad, overarching view of the constitution. Instead, each constitutional change is considered on its own merits, with little consideration of how each change, or a series of changes, fits with one another.\textsuperscript{36} Another factor against taking a broader view is that a

\textsuperscript{32} Although the electoral systems of the Scottish Parliament and the Welsh Assembly are expected to frequently deliver a coalition government, the Scotland Act 1998, s 46 (3) and the Government of Wales Act 2006, s 47 (3) both place a 28 day time limit on coalition negotiations. This has been criticised as imposing an artificial deadline on negotiations by Robert Blackburn, Ruth Fox, Oonagh Gay and Lucinda Maer, \textit{Who Governs? Forming a Coalition or Minority Government in the Event of the Hung Parliament} (Hansard Society & Study of Parliament Group, London, 2010) 5.

\textsuperscript{33} David Laws stated that the ‘fact is that we are not Germany, Italy or Malta. We are Britain. And the British press and the British people are used to seamless and smooth transfers of power’, Laws (n 18) 47.

\textsuperscript{34} Robert Hazell hopes that ‘five days is regarded as the minimum that is required for future negotiations rather than the norm’, Hazell and Yong (n 12) 199.

\textsuperscript{35} ibid.

\textsuperscript{36} One way in which this could be addressed is through a Cabinet Committee. However, under the Coalition the relevant committee has been the Home Affairs Committee, whose remit encompasses “issues relating to constitutional and political reform, and home affairs, including migration, health, schools and welfare”, Cabinet Office, ‘Cabinet Committee Membership List - 12 February 2014’ [https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279220/Cabinet_Committee_Membership_Lists_12_Feb_2014.pdf]. As meetings within Cabinet are confidential (although leaks do occur), and are exempt from the Freedom of Information Act 2000, s 35, it cannot be stated how much focus is placed on constitutional issues within this committee.
Government is keen to implement its own manifesto, and Ministers ‘increasingly assume that recourse to legislation, preferably a substantial flagship Bill, is required for any policy’,\(^{37}\) with success for an individual minister usually framed in terms of how they have implemented manifesto policy.\(^{39}\) Further, as we have seen above, manifestos are often lists of commitments, with any linking theme being too broad to constitute a working blueprint of an alternative vision of the constitution. For example, The Liberal Democrats’ manifesto stated:

‘Liberal Democrats are the only party which believes in radical political reform to reinvent the way our country is run and put power back where it belongs: into the hands of the people. We want to see a fair and open political system, with power devolved to all the nations, communities, neighbourhoods and peoples of Britain’.\(^ {39}\)

While many people would agree with the sentiment, it is so broad as to mean whatever the reader believes it to mean. This is inevitable when political parties are seeking to maximise their support at an election. As manifestos are a form of advertising, they are unlikely to be the most detailed or rational of documents. This takes on a greater importance as a Coalition Government drafts a *Programme for Government* drawing on the manifestos of the parties involved. This makes an overarching plan increasingly difficult to ascertain, as those seeking a compromise will find shelter amongst the generic. Perhaps due to its rushed production, the *Programme for Government* seeks refuge in the buzzwords of the day, of aiming to make ‘changes to our political system to make it more transparent and accountable’. The detailed proposals are then

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\(^{38}\) Korris (n 37) at 564, states that ‘[s]uccessive governments have legislated in order to meet explicitly political rather than legal imperatives, with ministers treating the legislative programme as a form of extended press release...In these circumstances, the quality of the statute they are producing is not always uppermost in ministerial minds; their primary objective is to get the law through to Royal Assent to demonstrate that the government has done something’.

\(^{39}\) The Liberal Democrats, 2010 General Election Manifesto (Liberal Democrats, 2010) 87.
listed without any rationale as to their order, concealing any broad overarching approach. For example, proposals to introduce a power of recall and all-postal primaries are clearly related in terms of enhancing the relationship between an MP and their constituency, and could constitute a response to MPs’ expenses scandal, but they are presented as two separate measures.\textsuperscript{40}

The horse-trading to form a Coalition also means that any interlocking constitutional changes can fall by the wayside. The Liberal Democrats proposed a 150-seat reduction in the number of MPs, as part of a move to a ‘Federal Britain’ and the adoption of the single-transferrable vote.\textsuperscript{41} After discussion with the Conservatives, this became a reduction of 50, without any discussion of a ‘Federal Britain’, and a referendum on the AV system. Furthermore, there is no evidence of any thought of how a chamber of reduced size, elected under the alternative voting system would operate within a Parliament that had fixed terms of five years. Based on the single precedent of 2010, it seems that an outcome of a Coalition can be a series of policies, where a clear rationale driving the changes is at best obscured or, more likely, not sought, as the need to come to an agreement is the overriding priority. It is likely that Coalition politics will exacerbate the piecemeal, \textit{ad hoc} approach to constitutional change that prevails in the UK.

However, a feature of the Coalition was an attempt to link the reduction in the number of MPs by 50 to 600, causing a redrawing of constituency boundaries and a referendum on the AV system.\textsuperscript{42} However, this was a nakedly political compromise; the Conservatives stood to gain the most from reducing the number of MPs,\textsuperscript{43} and the Liberal Democrats would have gained from the adoption of the AV.\textsuperscript{44} The inclusion of both policies in a single Act was an

\textsuperscript{40} Clearly, an advantage of not making the link explicit in this case is that should one of these policies fail, the other would, in purely political terms, be largely unaffected.

\textsuperscript{41} The Liberal Democrats (n 39) 88-90.

\textsuperscript{42} Parliamentary Voting System and Constituencies Act 2011.


\textsuperscript{44} David Sanders, Harold Clarke, Marianne Stewart & Paul Whiteley, ‘Simulating the Effects of the Alternative Vote in the 2010 UK General Election’ (2011) 64 Parliamentary Affairs 5.
attempt to ensure that both sides would achieve their share of the bargain. The curious aspect is that no attempt was made to portray these two reforms as a broader reform of the House of Commons. Instead they were portrayed as two separate reforms. However, there seems no reason why an attempted link between the two could not have been made. Whenever proposals to change the method of composition and the number of members of the House of Lords are introduced, they are always presented as reforms of the chamber.\(^{45}\) The core difference is that proposals to reform the House of Lords are usually presented after a more holistic consideration of the Lords as a Chamber of Parliament.

The remaining aspect is fostering continuing support within the Coalition as the Government continues in office. While this has not happened in the Coalition of 2010, it is perfectly possible for disagreements over others of policy to spill over into the constitutional sphere, as relations between the parties of the Coalition become strained.\(^{46}\) A significant strain on the Coalition has been House of Lords reform. Conservative and Labour backbenches made their opposition to the Bill clear, by refusing to back the programme motion, without which, as Clegg stated, made ‘the Bill impossible to deliver’.\(^{47}\) They had room for manoeuvre to do this, as under the \textit{Programme for Government} that committed the Coalition to ‘bring forward proposals for a wholly or mainly elected upper chamber’.\(^{48}\) Such was the level of opposition, that in a manner similar to Wilson in 1968,\(^{49}\) Nick Clegg was forced to abandon the Bill he

\(^{45}\) The House of Lords Reform HC Bill (2012-13) [52] is just one example. For more on House of Lords reform, see Chris Ballinger, \textit{1911-2011 A Century of Non-Reform} (Hart, 2012).

\(^{46}\) The Fixed-term Parliaments Act 2011 has made it more difficult for a Coalition to disintegrate, as the obvious release valve of the Prime Minister requesting a dissolution of Parliament has been abolished. If anything, it has been the constitutional change agenda that has sparked the most serious disagreement within the Coalition, including the nature of campaigning in the AV referendum, and House of Lords reform.

\(^{47}\) Clegg attempted to discuss the issue with Cameron and Miliband, but Cameron ‘could not’ convince his backbenchers to support the bill, and Miliband would only support individual closure motions as the bill was being debated rather than a programme motion for the whole Bill. The Liberal Democrats, ‘Nick Clegg Statement on House of Lords Reform’ (The Liberal Democrats, 6 August 2012) [http://www.libdems.org.uk/latest_news_detail.aspx?title=Nick_Clegg_statement_on_Lords_refo rm&pPK=0c87ef9b-cb6d-42d8-8f53-8ea673db397d]

A video recording is available at [https://www.youtube.com/watch?v=POwQEdZwpRs].

\(^{48}\) HM Government (n 10) 27.

\(^{49}\) HC Deb, 17 April 1969, vol 781, col 1338.
introduced, despite having a majority in the Commons at Second Reading on the Bill.\footnote{By 462 votes to 124. HC Deb, 10 July 2012, vol 548, col 274. The Bill was formally withdrawn on 3rd September 2012. HC Deb, 3 September 2012, vol 549 col 35.} The response of the Liberal Democrats was to veto the reduction in the number of MPs and the redistribution of constituency boundaries by making it clear that they would not approve the new boundaries.\footnote{This threat was first made by Lord Oakshott, on the BBC’s Sunday Politics, Andrew Neil, ‘Lord [sic] Reform Divides Conservatives and Liberal Democrats’ BBC News, 27 February 2012 [http://www.bbc.co.uk/news/uk-politics-17180361]. This threat was carried out, as the Electoral Registration and Administration Act 2013, s 6 (1) amended the Parliamentary Constituencies Act 1986, s 3 (2) (a) to the effect that new constituency boundaries and a reduction in the number of constituencies from 650 to 600 will only be in place for the 2020 General Election and not the 2015 General Election as planned.} This makes it more difficult to envisage a Government embarking on a programme of constitutional reform working to an clear overarching strategy as it is difficult to anticipate what the political climate will be three or four years into a Government, and what was possible earlier in a Government may not be possible towards the end. It was only at this point, that Clegg attempted to argue that there was an overall strategy of political reform:

‘Lords reform and boundaries are two, separate parliamentary bills … But they are both part of a package of overall political reform. Delivering one but not the other would create an imbalance – not just in the Coalition Agreement, but also in our political system. Lords reform leads to a smaller, more legitimate House of Lords. Boundary changes lead to a smaller House of Commons, by cutting the number of MPs. If you cut the number of MPs without enhancing the legitimacy and effectiveness of the Lords … All you have done is weaken Parliament as a whole … Strengthen the executive … And its over mighty Government that wins.’\footnote{n 47.}

However, this position does not stand up to much scrutiny. Firstly, it does not follow necessarily that reducing the number of MPs would strengthen the executive; it could have been coupled with a corresponding reduction in the
‘payroll vote’ to maintain the current balance in the Commons. Further, Clegg’s argument indicates that reducing the number of MP’s without reforming the Lords would weaken Parliament as a whole, but the Bill he introduced into the Commons stated that the powers of the House of Lords and the balance of the relationship between the two chambers were not going to change. Finally, Lords reform would have been phased in over the next 15 years, meaning that in the intervening period, the balance between Parliament and the Executive would, in the terms suggested by Clegg, not be optimal until the House of Lords was fully reformed, which would be 2030. This highlights that it is difficult to craft an overarching plan on to policies approached in a disparate manner.

This is explicitly a political rupture within the Coalition. It also reveals how, in a hung Parliament situation, each political party possess a veto on constitutional policy, making some form of cross-party agreement mandatory for a measure to pass through the Commons.

4. Lack of Consistent Process

This lack of consistency extends to the processes used within Government when developing constitutional policy. There are examples of better practice. What became the Constitutional Reform and Governance Act 2010 started out as the Green Paper, *The Governance of Britain*, which was followed by a White Paper, and then a Draft Bill, which was scrutinised by a Joint Committee. These steps took approximately one year, the Green Paper was introduced in July 2007, and the Joint Committee’s report was published in July 2008, after starting work in the March. There was then a year until the Bill was

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53 See Chapter 3, n 19.
54 House of Lords Reform HC Bill (2012-13) [52], cl 2, stated that the Parliament Act procedure would continue to apply.
55 ibid, cl 1.
56 Ministry of Justice, *The Governance of Britain* (Cm 7170, 2007).
introduced into the House of Commons, in July 2009, just before the summer recess, and Second Reading took place in October 2009. As will be seen below, this delay reduced the amount of time available to Parliament to consider the Bill, and was a major reason for the Bill being caught in the ‘wash up’ at the end of the Parliament.

One possible reason for the delay was the perceived need to respond immediately to the MPs expenses scandal, with the Parliamentary Standards Act 2009. This legislation was rushed through Parliament in June and July 2009, with the developing Constitutional Reform and Governance Bill taking a backseat. However, even allowing for this, there does not seem to be much consistency within Government on the length of time constitutional measures take to become developed into a Bill introduced into Parliament. The Fixed-term Parliaments Bill and the Parliamentary Constituencies and Voting System Bill were both introduced into Parliament in July 2010, from a Government that was formed in May 2010. While a precise timetable is probably impossible, and some measures will take longer than others, this further highlights a lack of established practices within Government when developing constitutional policy.

This lack of established practice is highlighted in detail by the Constitution Committee in their report, *The Process of Constitutional Change*. There are many stages available to a Government including public consultation, Green Papers, White Papers and Draft Bills, but none of these are used with any degree of consistency. Public consultation is often sidelined completely, or takes place after the main decisions on a policy have been taken. Other

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60 Constitution Committee, Constitutional Reform and Governance Bill (HL 2009-10, 98) paras 1 & 2.
61 Further, this was a Parliament which lasted the full five year term, meaning that the deadline was known, which could have allowed for some planning to have avoided this.
64 Fixed-term Parliaments Act 2011, Parliamentary Voting System and Constituencies Act 2011 are two recent examples.
65 The consultation regarding the creation of the Supreme Court was described by the House of Commons Select Committee on Constitutional Affairs as ‘too short’ with the broader ‘legislative
changes have taken place after Green Papers and White Papers, or attempted through a Draft Bill alone. As Sir Jeffrey Jowell stated, these processes should be ‘regularised’. In terms of incrementally improving the current processes within Government, the Committee proposed that when introducing a Bill to Parliament, Ministers should provide a written statement of whether or not a Bill contains significant constitutional changes and, if so, provide the following details:

- ‘what is the impact of the proposals upon the existing constitutional arrangements;
- whether and, if so, how the Government engaged with the public in the initial development of the policy proposals and what was the outcome of that public engagement;
- in what way were the detailed policies contained in the Bill subjected to rigorous scrutiny in the Cabinet Committee system;
- whether a Green Paper was published, what consultation took place on the proposals, including with the devolved institutions, and the extent to which the Government agree or disagree with the responses given;
- whether a White Paper was published and whether pre-legislative scrutiny was undertaken and the extent to

timetable is too restrictive to deal with changes which are so far reaching in their effects. The reason for haste seems to be primarily political’. House of Commons Constitutional Affairs Select Committee, Judicial appointments and a Supreme Court (Court of Final Appeal) (HC 2003-04, 48-I) 4. Neither did the consultation ask whether the principle of the Supreme Court was worth pursuing. Lord Lloyd of Berwick highlighted this, and when he asked Lord Falconer) about the principles of the bill, the Lord Chancellor implied that ‘consultation on the principles was not required because it was a matter of government policy’. HL Deb, 8 March 2004, vol 658, col 995-6.

67 House of Lords Reform HC Bill (2012-13) [52].
68 Constitution Committee, The Process of Constitutional Change (n 63) Q63.
which the Government agree or disagree with the outcome of that process;

- what is the justification for any referendum held, or to be held, on the proposals; and

- when and how the legislation, if passed, will be subject to post-legislative scrutiny.  

Further, this list should be taken to be a ‘comprehensive package from which the Government should depart only in exceptional circumstances’. The clear inspiration for this is s 19 of the Human Rights Act 1998, which requires Ministers to make a statement of compatibility that the Bill they are introducing is compatible with Convention rights. While not having the force of law, the aim of this recommendation is to focus the minds of Ministers and make it politically useful to give attention to these issues. For a failure to follow these requirements would provide those opposing the measure another line of attack. This is a useful idea, which, had it been adopted, would have improved some of the processes within Government. However, in its response to the report, the Government, while indicating general agreement with the fundamental commitment to greater transparency to the process behind policy making, disagreed with all the recommendations of the Committee, including the conclusion that constitutional legislation is ‘qualitatively different from other legislation’. 

The recommendation made in Chapter 3 for a Department for Legal Affairs would go some way to resolving the problem of inconsistency. The Department would be seen within Whitehall as the Department for the constitution and could ultimately develop a range of practices and when developing constitutional policy, eventually acquiring a distinctive methodology. Ideally, this would be

69 ibid, para 72.
70 ibid, Q73.
71 ibid, para 70.
along the lines proposed by the Constitution Committee. Should this process become established as the accepted method, it would become in the Government’s interest to follow this accepted method, as it would be the path of least resistance within Whitehall. A Department for Legal Affairs would be led by the Lord Chancellor and (a small) ministerial team, which would be accountable to Parliament and pilot any legislation through Parliament. Those ministerial careers would depend on their handling of their portfolios. Consequently, for no other reason than their own political standing, those Ministers would want to ensure the necessary preparation work was undertaken to allow for a smooth parliamentary passage of the Department’s legislation. Within Government and particularly within Cabinet, they would be more likely to argue for the proper process to be applied, as they would be faced with the consequences of a defective process. How Parliament reacts to proposals for constitutional change that have not undergone a thorough process within Government is discussed in the following chapter.
Chapter 5 - Parliament

The Bill is about legislation, and it reminds us that we are a legislative sausage machine here. Governments come along, they give us stuff, and they stuff it into the machine. We process it—more or less—and it comes out the other end ... We legislate badly, we scrutinise legislation inadequately, and we do not revisit it when we have passed it—we simply go on to the next bit. We all suffer because of that.

*Dr Tony Wright, 2nd Reading Debate on the Legislative and Regulatory Reform Bill*

‘[T]he procedures of Parliament and of the Commons in particular, are effectively, our constitution: or protection of the people and their liberties against the Executive’.

*Enoch Powell*

Within the parliamentary context, these two quotes strike at the very heart of the debate with which this thesis seeks to engage. If, as Dr (now Professor) Wright states, Parliament legislates ‘badly’, and is merely a ‘legislative sausage machine’, then it is difficult to see how the procedures of Parliament are the constitution in the sense of being able to restrain the Government in the sense that Enoch Powell argues. Implicit in these two statements are two different approaches. With Powell’s view, the decision of Parliament to pass legislation is bestowed with the authority of Parliament because that decision has been made through the procedures of Parliament. If Parliament decides to change the constitution, the legitimacy of Parliament is sufficient for that change to be legitimate. Wright is slightly dismissive of this principle, stating its ‘claimed that Parliament has decided on something or other’, and focuses on the substance of legislation. The question here is if Parliament in general legislates ‘badly’, is constitutional legislation any different from that norm? As outlined in the

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1 HC Deb 9 Feb 2006, vol 442, col 1073
Introduction, the constitution is an area of public policy that, while sharing some of the characteristics of other areas of policy, has a fundamental importance by being the rules by which other rules are determined. Consequently, if Parliament legislates 'badly', does it harm the legitimacy that Parliament grants to a formal constitutional change?

In practical terms, there is a particular need to consider the legislative process when discussing constitutional change, as a peculiar feature of constitutional policy is the finality that the legislative process brings. Often, when implementing a constitutional change, getting the required legislation on the statute book is the ultimate goal to be achieved rather than being an instrumental device that creates the powers and framework to achieve a policy goal. For example, to introduce fixed-term Parliaments, all that was required was for the Fixed-term Parliaments Act 2011 to be enacted, coming into force on the day it was passed.\(^3\) By contrast, in areas of policy such as social security, the aim of the legislation to provide the framework and legal powers for the Government to implement is policy; a process that can take many years.\(^4\) It is possible for the aims of legislation to be undermined by poor implementation or governance,\(^5\) but for many areas of constitutional policy, the Act itself is the critical component of a constitutional change.

However, at first glance, the structure of Parliament seems unsuited to providing the scrutiny required to provide the insurance of substantially sound constitutional change. The Government has the upper hand in its dealings with Parliament, primarily through their majority and their consequent control of the House of Commons, which in turn has the power to prevail over the House of Lords where the Government enjoys no such majority. Also, the Government has the power of its own resources behind it, and is bolstered by collective

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\(^3\) Fixed-term Parliaments Act 2011, s 7 (2).

\(^4\) For example, the introduction of Universal Credit is provided for by the Welfare Reform Act 2012, but is likely to be only introduced throughout the country by 2017. See House of Commons Work and Pensions Select Committee, *5th Report - Universal Credit Implementation: Monitoring DWP’s Performance in 2012-13* (HC 2013-14, 1209).

responsibility. By contrast, neither House of Parliament has a ‘recognised corporate legal personality’ but is instead a collection of members, whose main loyalty is to their party, rather than to Parliament itself. As the Hansard Society state, ‘Parliament lacks a corporate ethos which promotes collective functions such as imposing accountability on Government’. Any collective spirit is easily overridden by the needs of the party.

In the House of Commons, this has particular consequences, not only for the ordinary ebb and flow of parliamentary debate, but also for the procedures by which those debates are held, as through their majority the Government is able to block any procedural change in the Commons that might enhance the ability of the Commons to scrutinise the Government. As Kennon states, a ‘common misunderstanding is that the House has the ability to reform itself … [o]nly changes acceptable to the Government of the day are put into effect. This means that any changes made in the procedures of the Commons are led by persons whose ‘independence derives from the fact that their appointment to Government posts in the future is unlikely’ and with any changes being ‘concessions from the Government’. However, since 1997, there has been a rolling ‘modernisation’ programme led by the Modernisation Committee; a Select Committee of the House of Commons. One unusual feature has been that the Chair of this Committee has been the Leader of the House, a Cabinet Minister. This highlights how the role of Government is crucial to reforming the procedures of the Commons, and how the approach of the Leader of the House is crucial for reform to be taken seriously. More recently, the MPs’ expenses

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8 Andrew Kennon, *The Commons: Reform or Modernisation* (Constitution Unit, 2000) quoted in Dawn Oliver (n 6) 173.

9 Dawn Oliver (n 6) 173.

10 The House of Commons Modernisation Committee lasted from 1997 to 2010. It was not reformed after the 2010 General Election.

11 Alexandra Kelso, ‘The House of Commons Modernisation Committee: Who Needs It?’ 9 (2007) British Journal of Politics and International Relations 138, from 139 - 143 contrasts how the different Leaders of the House from 1997 to 2007 approached their tenures, with various degrees of success. The tenure of Robin Cook is correctly seen as a particularly high watermark, as he undertook a more consultative approach, which yielded reforms to sitting
scandal has created an opportunity for more profound changes in the working of the Commons, as it has become politically worthwhile to pursue reform as part of the broader agenda of ‘political reform’.\textsuperscript{12}

However, Parliament is considerably more than the House of Commons, and the House of Lords has several distinctive features that increase its ability to scrutinise legislation. The main difference is the tenure and composition of the House. Peers are mostly members for life,\textsuperscript{13} meaning they are not reliant on their party's support to contest any election. This gives a peer a greater ability to ‘rebel’ from the party line, as the consequences for regularly rebelling are limited, with whipping being generally far less strict than in the Commons. The party composition of the Lords is such that no party has an overall majority, as crossbenchers with no formal party allegiance hold the balance of power.\textsuperscript{14} In principle, this means that the Government must gain the support of others for its legislation to be passed. Indeed, between 1997 and 2012, the Government has experienced 506 defeats in the House of Lords compared with seven in the House of Commons over the same period.\textsuperscript{15} However, this ability is restrained

\textsuperscript{12} See the ‘Wright Reforms’ as detailed in House of Commons Reform Committee, \textit{Rebuilding the House}, (HC 2008-09, 1117) and in \textit{Rebuilding the House: Implementation} (HC 2009-10, 372). See also, Political and Constitutional Reform Committee, \textit{Revisiting Rebuilding the House: The Impact of the Wright Reforms} (HC 2013-14, 82).

\textsuperscript{13} The exceptions to this are the Lords Spiritual. Under the Bishoprics Act 1878, s 5, the Archbishops of Canterbury and York and the Bishops of London, Durham and Winchester are ex-officio. The remaining twenty-one bishops are allocated to those who English diocesan bishops who have served the longest. When a bishop retires from their see, they lose their seat in the House of Lords. Under the House of Lords Reform Act 2014, a Peer can resign (s 1) or lose their seat if they fail to attend once during a session (s 2) or are convicted of a criminal offence and are sentenced to imprisonment for more than one year (s 3).

\textsuperscript{14} As of 30th June 2014, there are 778 peers eligible to attend. Amongst this number are 218 Conservative peers, 217 Labour and 99 Liberal Democrats. There are 181 crossbenchers. See [\url{http://www.parliament.uk/mps-and-offices/lords/composition-of-the-lords/}].

\textsuperscript{15} Meg Russell, \textit{The Contemporary House of Lords}, (OUP 2013) 134. The Coalition suffered 48 of these defeats during the long 2010-12 session.
by the Salisbury Convention, which requires that Bills implementing a manifesto commitment to be granted a Second Reading.\textsuperscript{16}

It should be noted that following the House of Lords Act 1999 (which removed all but 92 hereditary peers), there has been an increase in Government defeats in the House of Lords. It might have been thought that this was due to the composition of the Government, as from 1979 to 1997 there was a Conservative majority in the Lords operating under a Conservative Government.\textsuperscript{17} However, the experience of the Coalition, particularly with the Welfare Reform Bill and the Public Bodies Bill, is an indication that the House of Lords as a chamber is becoming more assertive, and that the ‘chamber has a significant impact on policy outcomes in contemporary Britain’.\textsuperscript{18}

Finally, a note of caution, as John Griffith stated, ‘to write about an institution without having been a member of it is a dangerous business’,\textsuperscript{19} as the tacit practices that emerge in any institution are very difficult for an outsider to capture, especially when tackling such a large subject within such a small space. The study of how Parliament approaches constitutional legislation would be a substantial and worthwhile task in its own right. The following is necessarily a limited account, drawing upon some of the available literature. The aim of the following is to closely look at the passage of two particularly controversial Bills that have constitutional implications, the Constitutional

\textsuperscript{16} The Joint Committee on Conventions, described the Salisbury Convention as meaning that ‘in the House of Lords: A manifesto Bill is accorded a Second Reading; A manifesto Bill is not subject to ‘wrecking amendments' which change the Government's manifesto intention as proposed in the Bill; and A manifesto Bill is passed and sent (or returned) to the House of Commons, so that they have the opportunity, in reasonable time, to consider the Bill or any amendments the Lords may wish to propose’. See Joint Committee on Conventions, Report (2005-06, HL 265, HC 1212) para 99. See also, Glenn Dymond and Hugo Deadman, \textit{The Salisbury Doctrine}, (House of Lords Library, LLN 2006/006, 2006) [http://www.parliament.uk/documents/lords-library/hllsalisburydoctrine.pdf].

\textsuperscript{17} Further, Meg Russell’s analysis shows how the Wilson/Callaghan Government from 1974-1979 was defeated in the Lords more frequently than the Labour Government from 1997, which suffered over 120 defeats in the 1975-76 session alone; see Russell (n 15) 138. The influence of the Lords is more nuanced than merely measuring government defeats, as often the Lords back down if the Commons does not accept the amendment, and numerous defeats may be on relatively minor technical issues, making measuring defeats a very blunt instrument, but it does highlight the essence of the relationship between the two chambers.

\textsuperscript{18} Russell (n 15) 162.

Reform Act 2005 and the Legislative and Regulatory Reform Act 2006. What should emerge is how the rhythms of the legislative process and the procedure improved the substance of the proposals. The passage of both of these Bills was particularly interesting for the recourse to procedures in addition to the usual processes of Second Reading, Committee Stage, Report and Third Reading. Even nearly 10 years later, they remain the clearest examples of just how rigorous parliamentary scrutiny of constitutional legislation can be. As these two examples are discussed, broader questions, such as the relationship between the Lords and the Commons, are discussed.

In line with the general approach of this thesis of working with the current constitutional structure, some proposals for enhancements to the legislative process for constitutional legislation will be made. It might be the case that further enhancements could be brought about through more significant reform of Parliament, such as proportional representation being used for the House of Commons, as that would be likely to curtail the Government’s dominance of as by necessity parliamentary business would be conducted on a more consensual footing. Such issues are outside the scope of this thesis, as its aim is to consider the current constitutional structure and determine how significant constitutional changes (such as introducing proportional representation) should take place.

1. Legislative and Regulatory Reform Act 2006

The aim behind the Legislative and Regulatory Reform Bill appeared innocuous. It was described by the Government as a ‘reflection of our continuing commitment to maintain one of the best regulatory performances of any major economy’.\textsuperscript{20} However, Clause 1 (1) stated that; ‘a Minister of the Crown may by order make provision for … reforming legislation’. Legislation was defined at Clause 1 (3) as \textit{inter alia} ‘any public general Act or local Act’. It was further stated that an order under Clause 1 ‘may … make provision [for]

\textsuperscript{20} HC Deb, 9 Feb 2006, vol 442, col 1048.
amending, repealing or replacing any legislation’. 21 One MP described this Clause ‘astonishing’, 22 and six professors of law at Cambridge believed it would make it possible for the ‘Prime Minister to sack judges’. 23 Initially, the main defence from the Government was limited to a promise that these powers would not be used for controversial issues. 24 This meant that the Bill became a constitutional issue, and an interesting Bill to consider as it was amended heavily during the legislative process. Consequently, it becomes an example of how Parliament approaches threats such as this to the constitution. 25 For reasons of space, the following focuses on the most important aspects of the Bill, contained in Part 1, which in addition to the powers highlighted above, provided for an expedited procedure for proposed Bills from the Law Commission to make it on to the Statute Book. 26

1.1. From First Reading

The Bill was introduced on 11th January 2006, with Second Reading taking place four weeks later on 9th February. In this intervening period, some of the first concerns about the scope of the Bill were expressed by Lord Holme, Chairman of the Constitution Committee, who wrote to the Lord Chancellor, essentially warning Lord Falconer that the Constitution Committee was going to ‘give special consideration’ to this Bill. 27 The response from the Lord Chancellor

21 Clause 2 (1) of the Bill.
24 David Howarth (n 22).
25 For an excellent chronology, (upon which much of this section has been based) with benefit of interviews with some of key players, see Hansard Society, Law in the Making (Hansard Society 2008) Chapter 5.
26 Legislative and Regulatory Reform HC Bill (2005-06) [111] cl 1 (1) [as introduced to the House of Commons] stated that,
‘A Minister of the Crown may by order make provision for either or both of the following purposes—
(a) reforming legislation;
(b) implementing recommendations of any one or more of the United Kingdom Law Commissions, with or without changes’.
cl 1 (2) then defined ‘legislation’ as meaning ‘any Public General Act’.
27 Constitution Committee, Legislative and Regulatory Reform Bill (HL 2005-06, 194), 24, Letter from the Chairman to the Lord Chancellor, 23rd January 2006.
was unwavering. This was followed by the House of Commons Regulatory Reform Committee, who considered that the Bill was not in its nature a deregulatory Bill, but ‘essentially a law reform Bill that provides Ministers with a general power to amend, repeal and replace a whole range of primary legislation’. The Procedure Committee agreed with this analysis, and argued that as the Bill was of ‘major constitutional significance’, it should be taken into a Committee of the whole House, in line with the ‘long standing, and widely supported convention’. Both of the House of Commons committees made suggestions to narrow the scope of the law reform power, with the Regulatory Reform Committee suggesting that committees of either House should be able to veto an order, with a two-year cooling off period following any such veto. Jim Murphy, the Minister responsible for the Bill, said that he would consider these proposals.

The other strange aspect is that the Regulatory Reform Committee heard evidence from Jim Murphy a few weeks before the Bill was published. From the point of view of scrutinising Bills, it must surely be better to take evidence from the relevant Minister after the Bill has been published whenever possible. The potential difficulty is that if the time between First and Second Reading is short, this may not always be possible. The other aspect of this is the role of committees during the period before Second Reading. Committees provide the first guaranteed opportunity of subjecting a Bill to external scrutiny, with non-governmental input being introduced into the whole legislative process for the

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28 Ibid, Letter from the Lord Chancellor to the Chairman, 8th February 2006.
29 House of Commons Regulatory Reform Committee, Legislative and Regulatory Reform Bill (HC 2005-06, 878) 6.
30 House of Commons Procedure Committee, Legislative and Regulatory Reform Bill (HC 2005-06, 894) 3. The issue of a Committee of the whole House is considered below.
31 House of Commons Regulatory Reform Committee, Legislative and Regulatory Reform Bill (n 29) para 59.
32 House of Commons Procedure Committee, Legislative and Regulatory Reform Bill (n 30) 3.
33 For example, there was fifteen days between the First and Second Readings of the Terrorism Prevention and Investigation Measures Act 2011. HC Deb, 23 May 2011, vol 528, col 655 and HC Deb, 7 June 2011, vol 529, col 69.
first time. Parliamentary committees have the potential to raise awareness of potential issues to other Members of the House, in preparation of the Second Reading debate. In fulfilling this task, the independence of Select Committees from Government is of utmost importance and the recent moves made under the Wright Reforms to further the independence of Select Committees are to be welcomed. This is also an example of how incremental reforms to one aspect of Parliament can have effects throughout the parliamentary process.

1.2. Second Reading

As is well known, a Second Reading debate is described generally as ‘a wide debate on the principle and purposes of the Bill, what it does and what it does not do and how it will affect various interests’. It is not the occasion for detailed scrutiny of individual provisions, although the Opposition (or other members) can move ‘reasoned amendments’, when they ‘want to register particular areas of concern’, but they are seldom debated. Within these confines, the Second Reading debate on the Bill revolved around three key themes. These were the difference between the Government’s aim to reduce the regulatory burden and the fact that the Bill applied to all legislation with ‘no constraint on the reason behind upholding the law’. Secondly, the Bill allowed for the Government to select the parliamentary procedure to be used for each order, with Parliament having little influence over the process. Thirdly, the protections in the Bill were discretionary: the Minister making an order would

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34 The origins of the Bill can be found in the Hampton Review into burdens on business, and the consultation process that followed. See Philip Hampton, Reducing Administrative Burdens: Effective Inspection and Enforcement (HM Treasury, 2005), and a consultation exercise, Better Regulation Initiative, A Bill for Better Regulation: Consultation Document (Cabinet Office, 2005). However, this is not necessarily the same as giving proposals contained in a bill scrutiny.

35 In particular, the election of Chairs of Select Committees has been seen to have given increased their influence within the Commons. Political and Constitutional Reform Committee, Revisiting Rebuilding the House: The Impact of the Wright Reforms (n 12) paras 8 - 29.


37 ibid.

38 As identified by Hansard Society (n 25) 104.

39 ibid.

40 Legislative and Regulatory Reform HC Bill (2005-06) [111] [as introduced to the House of Commons] cls 13 - 16.
only need to satisfy themselves that they had fulfilled the requirements.\textsuperscript{41} The constitutional issues that Part 1 raised were repeatedly put to the Minister responsible for the Bill, Jim Murphy,\textsuperscript{42} who did not directly address these concerns, other than saying that the powers in the Bill would not be used for ‘highly controversial reforms’.\textsuperscript{43} In short, the Government could avoid the constitutional issues at Second Reading, because despite the warp and weave of the debate, the Government remains confident in securing the votes for the Bill at the end of it.

Instead of seeking to change minds, the aim of scrutiny in the Commons appears to be to encourage the Government to amend the Bill themselves. This approach is found in David Heath’s view that although he took a ‘dim view’ of Part 1, he would still vote for the Bill at Second Reading, because:

‘I ... believe that this Bill is capable of redemption, but if substantial changes are not made to Part 1, either in Committee or in Report, there is no way that I could advise my right hon. And hon. Friends to support the Bill on a Third Reading’.\textsuperscript{44}

Further, David Howarth said, an MP’s ‘function is more than just voting. One of our functions is to deliberate and discuss, and to influence the Government’s thinking’, and the other role of debate ‘is to require the Government to give reasons for their proposals in public’, giving ‘reasons that go beyond their narrow interest ... [and] that are intended to persuade, and to attract support across the political spectrum’.\textsuperscript{45} Further, the:

‘...embarrassment that Ministers sometimes feel when they do not have good reasons for their proposals -

\begin{itemize}
  \item \textsuperscript{41}ibid, cl 3.
  \item \textsuperscript{42}HC Deb 9 February 2006, vol 442, col 1050 (Rob Marris), col 1063 (Oliver Heald), col 1073 (David Health), col 1078 Christopher Chope.
  \item \textsuperscript{43}ibid, col 1058-59 (Jim Murphy).
  \item \textsuperscript{44}ibid, col 1073.
  \item \textsuperscript{45}ibid, col 1096.
\end{itemize}
reasons that they can explain to others - is a constraint that favours the democratic ideal.\textsuperscript{46}

In this sense, Enoch Powell was correct when he argued that ‘the procedures of Parliament … are effectively, our constitution’.\textsuperscript{47} The issue now is, once these concerns about the Bill were expressed, how well did the parliamentary procedure protect the people against the Executive?

1.3. Committee Stage

Just before the Standing Committee began, the Government made a response to the Regulatory Reform Committee, stating that the ‘Government will listen carefully to the views of Parliament and seek support in achieving the right balance between powers and protections’,\textsuperscript{48} and ‘will consult with stakeholders as the Bill receives scrutiny during its parliamentary passage’.\textsuperscript{49}

It may be surprising that the Government declined the option to commit the Bill to a Committee of the whole House, instead preferring to stick with their intention of taking the Bill to a Standing Committee.\textsuperscript{50} The Bill made little progress in the Committee. Despite Part 1 of the Bill being discussed for six of the eight sittings of the Committee, the ‘Government had been largely unwilling to accept that the concerns of the Opposition had any legitimacy, and other than the Minister’s occasional references to “considering the matter on report” there was little negotiation or compromise’.\textsuperscript{51} The Opposition pressed for 18 divisions and lost every one,\textsuperscript{52} with all votes made strictly according to party lines.\textsuperscript{53} This

\begin{itemize}
\item \textsuperscript{46} ibid.
\item \textsuperscript{47} ibid, col 1078, quoted by Christopher Chope.
\item \textsuperscript{48} House of Commons Regulatory Reform Committee, Government Response to the Committee’s First Special Report of Session 2005-06: Legislative and Regulatory Reform Bill (HC 2005-06, 1004) 5.
\item \textsuperscript{49} ibid.
\item \textsuperscript{50} The practice of a Committee of the whole House is discussed below. However, at this juncture, it should be stated that it would have been possible to have had a split committal of the Bill, with Part 1 being considered in a Committee of the whole House, with the remaining sections being heard in a Legislative Committee. The idea of split committals is considered below.
\item \textsuperscript{51} Hansard Society (n 25) 109.
\item \textsuperscript{52} ibid.
\end{itemize}
in and of itself does not provide much evidence for Parliament standing up to the executive, nor for the substance of Bills being improved during the legislative process.

It was not unusual for Standing Committees to operate in this way, leading to them being subject to substantial criticism. Ultimately, this led to their reformulation as Public Bill Committees. However, whatever the structure of the Committee Stage, the mere presence of further parliamentary stages means that a Minister can always ‘accept suggestions for an amendment in principle and undertake to bring forward provisions to achieve the desired effect at a later stage’. The advantage of this is that parliamentary counsel then have to draft the amendments as Government amendments, but can do so maintaining consistency with other provisions in the Bill. However, this does not explain the stridency of the Government frontbench in this Committee. The creation of Public Bill Committees to replace Standing Committees, which occurred in the following session, is discussed in Section 2.3.2.

1.4. Remaining Commons Stages

As the Bill came towards the end of its passage in the Commons, the Government’s Chief Whip in the Lords intervened, writing to the Prime Minister that ‘if there is no further scope for greater precision about the objectives of the Bill, I predict it will prove exceptionally difficult to secure its passage through the


56 Ibid, 686.
Further embarrassment was heaped on the Government when this letter was leaked to the Sunday Telegraph. The Procedure Committee then issued their report, timed 'to assist the House at the Report Stage of the Bill'. This report summarised both the problems with Part I of the Bill, and the stubbornness of the Government who obstructed any changes to the proposed legislation.

The intervention of the Lord’s Chief Whip led to wholly new clauses being introduced which dealt with the constitutional issues raised by the Bill and limited the scope of the power to regulatory issues only. This was welcomed by both Houses, as was the second concession of the Government to vary the programme motion and give the Report Stage and Third Reading two days rather than the original one. However, the Liberal Democrat MP, David Heath raised the issue that the new clauses and amendments were all to be considered on the first day of debate and asked that 'if we have two days for debate, we should order business in the most appropriate way to ensure a full debate on all the matters before the House'. There is clear concern about governments leaving such inevitable amendments to the latest possible stage, and then manipulating the procedure to make scrutiny more difficult. While, occasionally, it may be unavoidable, late and substantive Government

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57 Unpublished letter from Lord Grocott to the Prime Minister, 14th March 2006, quoted in Hansard Society (n 25) 109.
58 M. Kite, “Increased Ministers” Power a Mistake, PM Told’ (Sunday Telegraph, 19 March 2006).
59 House of Commons Procedure Committee, Legislative and Regulatory Reform Bill (n 30) para 6.
60 HC Deb, 15 May 2006, vol 446, col 709. These became s 1 (2) - (3), Legislative and Regulatory Reform Act 2006, which state, that the power to reform legislation can only be used for the purpose of ‘removing or reducing any burden, or the overall burdens, resulting directly or indirectly for any person from any legislation’. With ‘burden’ meaning, ‘a financial cost, an administrative inconvenience, an obstacle to efficiency, productivity or profitability, or a sanction, criminal or otherwise, which affects the carrying on of any lawful activity’.
62 ibid.
amendments to Bills ‘is a major obstacle to effective scrutiny and can lead to legislation which is constitutionally and procedurally deficient’. 63

A cynical observer might conclude that the Government approaches the legislative process as a game. Starting out with a proposal that constitutionally, was clearly unacceptable they nevertheless pursued it, safe in the knowledge that concessions would be made later on in the process. The later this climb-down came, the greater the chance of securing as broad a provision as possible, because the later the concession comes into the legislative process, the less opportunity there is to give any amendments sufficient scrutiny, or for time for any further amendments to be tabled. The Government is only able to approach the legislative process in this manner, due to their overwhelming control of the process in the Commons.

In this case, the fundamental aim was to increase the power of Government at the expense of the legislative competence Parliament, for the legitimate purpose of reducing the burden of regulation. The broader the powers the Government acquired under the Act, the easier it would be to achieve its objective. It could be argued that, in order to achieve the broad powers it desired, the Government introduced the original Bill containing the broadest powers possible, and refused any amendments that would restrict those proposed powers until the last possible moment. This effect of this approach is that the Chief Whip’s intervention brought forward amendments that would have been made in the Lords, to the final stages of the Bill’s progress through the Commons. 64

1.5. The House of Lords

The heavily amended Bill was introduced into the House of Lords to a chorus of concern, with one peer stating that ‘as a result of the concessions that the Government made in the other place, we now have what is tantamount to a


64 As Oliver Heald states, ‘It is good that a major concession has been made at this stage, rather than relying on their lordships in other place to make all the running’. HC Deb, 15 May 2006, vol 446, col 727-6.
fresh Bill to be considered by your Lordships’ House, so the onus is all the more on this House to consider it extremely carefully.’\textsuperscript{65} Two committees reported on the Bill,\textsuperscript{66} with the Constitution Committee being both highly critical but constructive. Concluding that although the amended Bill struck a better balance, the powers included remain ‘over-broad and vaguely drawn’.\textsuperscript{67}

An indication of the change of approach from the Government benches in the Lords as opposed to the Commons can be found with the way the Government accepted an Opposition amendment to remove the provisions regarding the Law Commission proposals. Baroness Ashton was ‘happy to eat humble pie and say we got this wrong’.\textsuperscript{68} As the Hansard Society states; ‘at a stroke, a large chunk of the Bill’s powers, which had been argued over at length in the Commons, had been conceded’.\textsuperscript{69} This really makes one wonder what value was gained from the Minister’s uncompromising attitude on these issues in the Standing Committee.

It is sometimes said that Bills arrive in the House of Lords from the Commons in an unsatisfactory state. The cause of this appears to be a natural reluctance to lose face to the Opposition in the intense party political atmosphere within the House of Commons, as amendments proposed are resisted, only to be accepted without a division in the Lords. In this vein, amendments aimed at increasing the power of parliamentary committees to veto proposed orders under the Bill were rejected in the Commons (despite commitments to accept this before the House of Commons Procedure Committee),\textsuperscript{70} only to be accepted without a division in the Lords at Committee Stage.\textsuperscript{71} From a constitutional perspective, at Report Stage, the Government


\textsuperscript{66} House of Lords Delegated Powers and Regulatory Reform Committee, \textit{Legislative and Regulatory Reform Bill (HL 2005-06, 192), Constitution Committee, Legislative and Regulatory Reform Bill} (n 22).

\textsuperscript{67} Constitution Committee, \textit{Legislative and Regulatory Reform Bill} (n 27) Para 5.

\textsuperscript{68} HL Deb, 10 July 2006, vol 684, cols 579-80.

\textsuperscript{69} Hansard Society (n 25) 113.

\textsuperscript{70} Both in the Standing Committee and at Third Reading.

\textsuperscript{71} Hansard Society (n 25) 112.
introduced a measure stating that the powers in the Bill cannot be used for a measure of ‘constitutional significance’. Overall, ‘the Bill passed Third Reading in the Lords sending 46 amendments back to the House of Commons for consideration, all of which passed without difficulty’.

The passage of the 2006 Act highlights the fact that the relationship between Government and Parliament is a complex and contradictory one. It depends on the issue at hand, the stage of the legislative process and which House of Parliament is engaged. As a Government gains its authority through the acquiring the confidence of the House of Commons, naturally a Government wants to appear in the Commons to be in a position of strength. The cumulative effect of frequent concessions or defeats on amendments, no matter how reasonable they appear, cannot be over-estimated; especially if a Government has a small majority. It is a far safer course for a Government to hold the Commons in a tight a grip for as long as possible. Bringing forward their own amendments rather than losing divisions or conceding the point, squares the circle of taking into account parliamentary opinion while retaining control of the process.

From the perspective of providing substantive scrutiny, this gives the Government, especially in the Commons, the discretion to choose which arguments to accept. The level of Governmental control remains tight. However, in the Lords, the Government can suffer defeats more regularly and amendments are accepted frequently without division. It is in the Lords that someone outside of Government has the opportunity to make substantive changes directly to a Bill. However, it should not be taken from this that the passage through the Commons is a mere formality, before the ‘real’ scrutiny takes place in the Lords. It is clear that in the case of the 2006 Act, these

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72 This closely followed a Liberal Democrat amendment that was rejected in the Standing Committee. However, the question asked by Lord Norton, is what is a measure of constitutional significance? Hansard Society (n 25) 114.

73 ibid.

74 This has been given statutory recognition in the Fixed-term Parliaments Act 2011, s 2.

75 For example, John Major’s Government was irretrievably damaged by the battle to pass the Maastricht Treaty through Parliament. See John Major, The Autobiography (Harper Collins 1999) see esp Ch 15.
amendments followed pressure on the Government,\textsuperscript{76} and had the Government not heeded this pressure and accepted its constitutional importance, the entire Bill might have been lost in the Lords.

The rhythm of the parliamentary process also means that it would not have been in the Government’s interest to be as intransigent in the Lords as they were in the Commons. Had the Bill been lost, the parliamentary time and the prized slot on the legislative timetable would have been wasted, particularly in the important first session of a Parliament, when a Government fresh from the election strives to implement its manifesto.\textsuperscript{77} Perhaps it is in this sense that the procedures of Parliament are ‘effectively our constitution’, although, it is the House of Lords and not the Commons who are the guardians. The parliamentary process is essentially an elongated negotiation process with the aim of improving (rather than initiating) legislation, subjecting it to scrutiny external to Government, while mindful of the Government’s mandate from the people. As a reserve measure, during that negotiation, Parliament, but specifically the House of Lords, can use delay to effectively veto a proposal.

A clear, but rare example of this is the Criminal Justice (Mode of Trial) (No. 2) Bill, which sought to restrict a defendant’s right to trial by jury. While the House of Lords did not reject the Bill outright, they agreed not to consider the Bill for a further six months.\textsuperscript{78} This second Bill followed an earlier Lords Bill, which was wrecked at Committee Stage.\textsuperscript{79} The Government chose not to pursue the Bill further. However, under s 2 (1) of the Parliament Act 1911 (as amended by the Parliament Act 1949), if a Bill first introduced into the House of Commons is rejected by the House of Lords is reintroduced during the following session of Parliament into the House of Commons and is rejected by the House of Lords a second time, that Bill can be sent for Royal Assent and become law;

\footnotetext{76}{Including external pressure, Hansard Society (n 25) 114-119}  
\footnotetext{77}{Although the Government could reintroduce the Act and trigger the Parliament Act procedure described below if the Lords rejected the Bill a second time.}  
\footnotetext{78}{HL Deb 28 September 2000, vol 616, col 961-1034.}  
\footnotetext{79}{HL Deb 20 January 2000, vol 608, col 1246-1298.}
notwithstanding the lack of approval from the Lords. In practical terms, this means that when Bills are introduced into the Commons first, the power of the Lords is one of delay and requiring the Government to reconsider the proposed legislation rather than being able to block it. This procedure has been used seven times to pass the Welsh Church Act 1914, Government of Ireland Act 1914, Parliament Act 1949, War Crimes Act 1991, European Parliamentary Elections Act 1999, Sexual Offences (Amendment) Act 2000, and Hunting Act 2004.

Looking at this list along with the Criminal Justice (Mode of Trial) (No. 2) Bill, it is clear that the House of Lords are more likely to at least attempt to delay legislation that is of a constitutional nature. The last two on the list above are notable for not as easily falling within the ‘constitutional’ as the others, but also for being on matters subject to a ‘free’ vote.

This delicate balance places great reliance on elected Parliamentarians to have an ‘historical and constitutional awareness ... [to ensure] that democratic protections are not eroded by inadvertence’ and it was the presence of such members, who were independently minded, that was ‘itself a likely factor in the alteration of the Bill’. This highlights the individual contributions made by certain members, and the need for members with sufficient knowledge and influence to lead opposition to a Bill. As Parliament and both its Houses lack a collective perspective (as considered above), there are few formal guarantees

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80 Section 2 does not apply to a Money Bill, or a bill extending the maximum duration of Parliament beyond five years. Also, there has to be a period of at least one year ‘between the date of the second reading in the first of those sessions of the Bill in the House of Commons and the date on which it passes the House of Commons in the second of these sessions’.

81 Interestingly, in 1948, Parliament was prematurely prorogued for one day (from 13 September to 14 September) so that the Parliament Bill, which became the Parliament Act 1949, could meet the requirements of s 2. See Erskine May 639.

82 If ‘constitutional’ has the meaning attached to it as described in Chapter 1. Rodney Brazier provides an alternative analysis, arguing that the Sexual Offences (Amendment) Act 2000 and the Hunting Act 2004 could be considered as “constitutional”, ‘by stretching the word to include any measure which concerns human rights’. The Hunting Act 2004 could be considered affecting human rights by affecting the right to property, as protected by Protocol 1, Article 1 to the ECHR. Constitution Committee, ‘Constitutional aspects of the challenge to the Hunting Act 2004’, (HL 2005-06, 141), Appendix 1: The Parliament Acts by Rodney Brazier, para 27.

83 Russell (n 15) 134. See also 165, fn 4.

84 Davis (n 55), 696.
that this expertise and interest will be present across Parliament. One small guarantee is that the House of Lords may deliberately appoint peers with the relevant expertise.\textsuperscript{85} However, the House of Commons is at the mercy of the electorate, party selection procedures,\textsuperscript{86} and the interests of those attracted to politics.\textsuperscript{87} Should there be a decline of expertise, then a reaction could be greater external influence on MPs to redress this imbalance.

In addition, as discussed in Chapter 3, previous decades saw little constitutional change, as the few politicians, such as Amery, that looked at the constitution saw very little to dislike.\textsuperscript{88} The constitution was often ‘unseen and unspoken, and simply taken for granted by establishment elites’.\textsuperscript{89} As shown in the Introduction, the constitution can no longer be taken for granted and constitutional debates involve a more ‘sharply differentiating form of position-taking and defending’.\textsuperscript{90} Inevitably, this leads to increasing the amount of legislation relating to the constitution.

\textsuperscript{85} The House of Lords Appointments Commission explicitly state in their criteria for crossbenchers that they must have the ability to make a ‘significant contribution’ to the work of the House of Lords, in their area of expertise, but also in ‘the wide range of other issues coming before the House’. They also much have ‘record of significant achievement within their chosen way of life that demonstrates a range of experience, skills and competencies’. House of Lords Appointments Commission, Criteria Guiding the Assessment of Nominations for Non-Party Political Life Peers, [http://lordsappointments.independent.gov.uk/selection-criteria.aspx].

\textsuperscript{86} At least in law, under the Equality Act 2010, s 104 there is a legal provision for positive discrimination to the benefit of under represented sections of society, for example this allows all-women short-lists as used by the Labour Party. The Conservative Party has pursued a similar party with the ‘A List’.

\textsuperscript{87} Davis makes the point that whilst the Government could make evidence obtained by torture admissible (for example), the Government would be required to ‘demonstrate that intention clearly and get it passed by both Houses. At that point, the fact that the Members are not completely the creatures of Government in power, and the fact that any amendment within the scope of a bill can be tabled, adds their own constraint’, Davis (n 55) 699-700.


\textsuperscript{89} ibid.

\textsuperscript{90} ibid. See also, David Feldman, ‘Constitutional Conventions’ in Matt Qvortrup (ed) Continuity and Change: A Festschrift for Vernon Bogdanor (Hart 2013) 104.
2. Constitutional Reform Act 2005

The rationale behind what became the Constitutional Reform Act 2005 could be seen to be a tentative example of common values and principles, which were tacitly understood as being formalised and written down in statute. Lord Bingham, when giving evidence to the Joint Committee on Human Rights in 2001, captured the rationale when discussing the restrictions on the Law Lords engaging in the legislative capacity of the House of Lords:

'It used to be accepted by their colleagues and, I think, by the public that people were perfectly capable of expressing an opinion in one capacity and acting with complete objectivity and impartiality in another. For a number of reasons that we could discuss there is a less ready and less widespread acceptance of that proposition and that inevitably means that those who sit judicially have to take greater care than was once perhaps taken to not only to consider what is always the first question of whether they themselves feel embarrassed in any way but whether it might look wrong'.  

The weakening of that common understanding was a contributory factor to the Constitutional Reform Bill being introduced into Parliament. The manner in which the proposals were announced to the public (and everyone else) has been discussed in a Chapter 3. Building upon the discussion on the Deregulatory and Legislative Reform Act 2006, the following discussion will focus on how the House of Lords gave scrutiny to this Bill.

2.1. The Introduction of the Bill

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91 Joint Committee on Human Rights, Minutes of Evidence Taken on 26th March 2001 (2000-01, HL 66-iii, HC 332-iii) Q106.
In a similar manner to the Legislative and Regulatory Reform Bill, the first question raised was the need for a Draft Bill. The House of Commons Select Committee on Constitutional Affairs published their report on 3 February 2004. It stated that:

‘The consultation process has been too short and the legislative timetable is too restrictive to deal with changes which are so far reaching in their effects. The reason for haste seems to be primarily political.

The Committee recommends that the Government proceed with the Bill as draft legislation to enable proper scrutiny of these fundamental changes’.92

Despite this, a Bill to implement the proposals was included in the Queen’s Speech for the 2003/04 parliamentary session, with the Bill introduced into the House of Lords on 24th February 2004. The main reasons for the lack of a Draft Bill was that it was expected (as events showed, correctly) that the next session of Parliament would be curtailed by a General Election being called by the Prime Minister, making it difficult for the Bill to be passed before the dissolution of Parliament.93 With the subsequent Fixed-Term Parliaments Act 2011 introducing fixed-terms of five years with 12 month sessions,94 the legislative programme across a Parliament can be better balanced, creating scope for introducing significant Bills in draft form in the third session of a Parliament, as there are still two sessions left for it to become legislation. This should create better opportunities for pre-legislative scrutiny, allowing Parliament to fulfil its scrutinising role more effectively.

The issue of parliamentary time also works in another way. The Queen’s Speech also included a proposal to remove the remaining hereditary peers from

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92 House of Commons Constitutional Affairs Select Committee, Judicial appointments and a Supreme Court (Court of Final Appeal) (2003-04, HC 48-I) 4.

93 It would also have been deeply unsatisfactory for this Bill to have been caught in the ‘wash-up’ before Parliament was dissolved.

94 This was the reason behind the extremely long 2010-12 parliamentary session.
the House of Lords and allow life peers to resign their peerage and membership of the Chamber.\textsuperscript{95} This was based on a Department of Constitutional Affairs consultation paper.\textsuperscript{96} Those against this second proposal would have a further incentive to oppose the Supreme Court proposal. Had the Lords not been as vociferous,\textsuperscript{97} it may have allowed time for this second Bill to be considered, and if the Constitutional Reform Bill had been given an easy passage through the Lords, the Government might have attempted to pass more radical reforms of the second Chamber.

However, such was the response to the Supreme Court proposals that the Government conceded defeat on the hereditary peers proposal,\textsuperscript{98} citing the votes on the Constitutional Reform Bill, as indications showed that the Lords were not going to let the Bill get through.\textsuperscript{99} This further emphasises the way in which Parliament and Government negotiate with each other through the parliamentary process, not only on individual issues but also across different pieces of legislation.\textsuperscript{100} As a further concession to the Lords, the Constitutional Reform Bill was introduced into the House of Lords, excluding the operation of the Parliament Act procedure.\textsuperscript{101} This was a ‘tactical decision’, as opposition in

\textsuperscript{95} Oonagh Gay & Liz Carless, Queens Speech 2003 (House of Commons Library Standard Note, SN/PC/2576, 2003)

\textsuperscript{96} Department for Constitutional Affairs, Constitutional reform: Next steps for the House of Lords - Consultation Paper [www.dca.gov.uk/consult/holref/holref03.pdf].

\textsuperscript{97} Andrew Le Seur, ‘From Appellate Committee to Supreme Court: A Narrative’ in Louis Bloom-Cooper, Brice Dickson and Gavin Drewry (eds), The Judicial House of Lords (OUP 2009), details the level an nature of the opposition to the proposals in the House of Lords.

\textsuperscript{98} BBC News, Blair Puts Lords Reform on Hold (BBC News, 14th March 2004) [http://news.bbc.co.uk/1/hi/uk_politics/3524834.stm]

\textsuperscript{99} The Bill had just been committed to the Select Committee on Second Reading.

\textsuperscript{100} In addition, during this period, relations between the House of Lords and the Government were not at their most tranquil. In the background was the ongoing saga of the Hunting Act 2004, which obtained Royal Assent in November 2004, after being rejected by the Lords in the previous session. Whilst, there are no restrictions on the use of the Parliament Act, its use has been so infrequent, a government would have to think carefully about using twice in quick succession, and on a bill as important as the Constitutional Reform Bill. See Constitution Committee, ‘Constitutional aspects of the challenge to the Hunting Act 2004’ (n 82).

\textsuperscript{101} Parliament Act 1911, s 2 (1).
the Lords ‘would only be exacerbated if the Bill were placed in the Commons first’.  

2.2. Second Reading and the Select Committee on the Constitutional Reform Bill

Alongside the level of criticism the proposals received, the most notable result during the Second Reading debate was a motion moved by Lord Lloyd of Berwick, that the Bill should be committed to a Select Committee. This was passed by 216 votes to 183.  

A Select Committee on a Public Bill is a seldom-used device, having only been used once on a Government Bill since 1945. The Committee’s remit extends to the Bill itself; it has powers to receive evidence on the policy of the Bill and can determine whether the Bill can proceed. It can have the assistance of a parliamentary draftsman, and can call upon a specialist adviser.  

One of the main reasons Lord Lloyd advanced for the Select Committee was that it would allow the Bill to receive the type of scrutiny it would have received had the Bill been published in draft form. The publishing of Bills in draft started in a more systematic form in 1997. The intention was that ‘public and parliamentary scrutiny of a Draft Bill in one session will lead to a better Bill being introduced and going through the normal legislative process in a later session’. It is also easier for any Minister to climb-down and make concessions to a Draft Bill, as the Government’s ‘prestige’ is not engaged in the

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102 Le Seur (n 97) 76.
104 Hare Coursing Bill: Blackburn, Kennon and Wheeler-Booth (n 31) 725.
107 This was Andrew Le Sueur.
109 For a discussion of draft bills see Section 2.3.3 below.
110 Blackburn, Kennon and Wheeler-Booth (n 36) 624.
same manner as when the Bill enters the formal legislative process.\textsuperscript{111} The use of such a lightly used procedure is an indication from the Lords to the Government of its serious concerns with the Bill, and the desire to ensure the Bill receives the appropriate level of scrutiny. It also serves to highlight how the Government cannot control the legislative procedure of the House of Lords.

The primary objection to the Select Committee proposal was that it would mean that the Bill would have no chance of receiving the Royal Assent before the end of the parliamentary session.\textsuperscript{112} However these arguments were neutered by the ‘carry-over’ procedure, first used for the Financial Services and Markets Bill 1999,\textsuperscript{113} which allows a Bill to continue in the next parliamentary session at the stage it reached during the previous session.\textsuperscript{114} In a manner of speaking, the Select Committee was the envisioned effect of the carry-over procedure. By providing that a Bill is not lost due to lack of time at the end of the session, it encourages Bills to be considered more thoroughly either before the legislative process begins or early on in the process. With the combination of the Fixed-Term Parliament Act 2011, the publication of Draft Bills and the carry-over procedure, the sessional structure of a Parliament is far less of an obstacle to detailed scrutiny of legislation. This is perhaps an example of Kennon’s point stated above, that the procedural reforms most likely to happen are those that the Government desires. Ultimately, all these reforms aid the passage of Government legislation.

\textsuperscript{111} ibid.

\textsuperscript{112} It was March 2004 and Parliament was prorogued on 18 November 2004. See List of Previous Commons Recess Dates available at [http://www.parliament.uk/about/faqs/house-of-commons/faqs/business-faq-page/recess-dates/recess/].

\textsuperscript{113} This became Financial Services and Markets Act 2000.

\textsuperscript{114} The House of Commons Modernisation Committee recommended that it should be possible to carry over a bill into the following session and complete its remaining stages. The aim was to increase the amount of time available to scrutinise legislation. See Third Report - Carry-over of Public Bills (HC 1997-98, 543). The rules on the carry-over of legislation can be found under Standing Order 80A which stated that the key restrictions on the use of the carry-over is that it cannot be made in respect of more than one bill, a bill carried-over from one session of Parliament cannot be carried-over into a further session of Parliament, and only government bills can be carried over. Standing Orders of the House of Commons - Public Business - December 2013 (TSO, 2013).
The Bill was committed to a Select Committee on three understandings; that it would not be ‘killed-off’, the Committee would report back within three months, and the Bill would be ‘carried over’. The composition of the Committee reflected the Lords' expertise in this area; six were former cabinet Ministers, one was a former Chief Whip, and seven had some background in legal practice. The main curiosity was the membership of the Lord Chancellor, Lord Falconer. As this was a ‘real’ Government Bill as opposed to being in draft, a Minister responsible for the Bill was required to be involved.

The Committee allowed a range of opinion to be heard, which would go some way to allay fears that the whole proposals were being forced through the Lords with the Government relying on the large Commons majority for the Bill to be passed. Also, given the nature of the membership of Lords, and consequently the Committee, no party had overall control, which can only have encouraged a more useful debate. In addition, a contrast can be made with the Standing Committee that considered the Legislative and Regulatory Reform Bill. By having a Government majority, this made little substantive progress, other than the Opposition members attempting to pressurise and influence the Government to amend the Bill.

However, in a short article, Zander was dubious about the usefulness of the exercise. He stated that:

‘...unsurprisingly, the Select Committee failed to agree on the main controversial topics. The arguments for and against are set out, but with no analysis or discussion of their merits. Where the Select Committee failed to agree, that fact is baldly stated without any indication as to which

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115 [W]e took the view early on that it was not appropriate in this case to prevent the Bill from proceeding to its next stage’ House of Lords Select Committee on the Constitutional Reform Bill (n 105) para 7.
116 ibid, para 6.
117 Le Sueur (n 97) 80.
118 ibid, 80. The party balance was reflective of the Lords as a whole, with five Labour, five Conservative, three Liberal Democrats and three crossbenchers.
individual members took what position, nor even of the numbers holding different views’.\textsuperscript{119}

However, this is distinctly uncharitable to the real progress made by the Select Committee. More than 400 amendments were made by agreement, ‘on the basis that they improve and clarify the Bill’.\textsuperscript{120} Zander also misses the point that issues on which the Select Committee did not agree; for example, the abolition of the Lord Chancellor and the creation of a Supreme Court, are matters for the Chamber to take a decision on rather than the Committee. As the Committee states in their report, ‘it will ultimately be for the House itself to take a view on these matters and we hope that our report will be a helpful aid in that respect’.\textsuperscript{121}

The Committee did two things. Firstly, it did much of the heavy lifting for the Chamber by taking and compiling evidence of the debate on each issue for the benefit of the Chamber to inform the later stages of the parliamentary process. Secondly, while not making a decision on the issues of the Lord Chancellor or the Supreme Court, it took the line that should a Supreme Court be established, then it should operate in a particular manner, in terms of its composition, the creation of the Court’s rules and so on. This appears a reasonable approach to take. It is preferable that more time in the Chamber is spent debating the more significant provisions of the Bill, for example, the role of the Lord Chancellor in upholding the rule of law rather than some of the more detailed provisions, or the involvement of the Lord Chancellor in the adoption of the rules of the Supreme Court.

When the Bill returned to the Chamber, it allowed their Lordships to consider the question of the Supreme Court with a clear view as to what form the Supreme Court would take. In accepting or rejecting the proposal for a Supreme Court, their Lordships would be aware of precisely what they were accepting or rejecting. It is possible that the details of the structure of the

\textsuperscript{119} Michael Zander (2004) 154 NLJ 1074.

\textsuperscript{120} House of Lords Select Committee on the Constitutional Reform Bill (n 105) para 7.

\textsuperscript{121} ibid, para 8.
Supreme Court, being refined and improved through bipartisan Committee, with the agreement of the Government through Lord Falconer, enabled the Supreme Court to become an established and accepted part of the legal landscape of the UK, in a remarkably short period of time.\textsuperscript{122}

The Select Committee came to some important conclusions. The Committee made a clear recommendation that the number of Supreme Court Justices should be 12, the same as the Appellate Committee. Further, that they should continue to sit in panels rather than sitting \textit{en banc}.\textsuperscript{123} The statute provides that there should be a minimum of three judges on a panel, but that the Court itself can decide to sit in a panel of a larger odd number for particular cases.\textsuperscript{124} In general, panels have five judges, with occasionally a larger panel for more important cases.\textsuperscript{125} The fact that the Select Committee felt it had to consider these issues shows how poorly the early stages of these reforms were handled. This was one of those issues that was central to the idea of a Supreme Court and how it should operate, as it has knock-on effect to the number of cases the Court could handle. This, in turn, could have had implications for the jurisdiction of the Court.\textsuperscript{126}

The Committee agreed that the \textit{ad hoc} Commission for the appointment of Supreme Court Justices should provide one name to the Lord Chancellor,\textsuperscript{127} who can then either accept or reject the recommendation or ask the

\textsuperscript{122} The only significant change to the structure of the Supreme Court since its creation has been to allow part-time Supreme Court justices, bringing it in line with the rest of the judiciary. The Crime and Courts Act 2013, s 20 and sch 13.

\textsuperscript{123} House of Lords Select Committee on the Constitutional Reform Bill (n 105) para 171.

\textsuperscript{124} Constitutional Reform Act 2005, s 42.


\textsuperscript{126} It could even have had consequences for what building a Supreme Court would be housed in, as it may only need one courtroom, as the US Supreme Courthouse does, rather than two that Middlesex Guildhall has. The old third courtroom of Middlesex Guildhall has been turned into the Supreme Court Library.

\textsuperscript{127} Constitutional Reform Act 2005, s 27 (10).
Commission to reconsider it.\textsuperscript{128} The Bill, when sent to the Committee, stated that the Commission must send to the Minister a list of ‘two and no more than five candidates’. The Government had an intention to amend this to ‘receive one name from the Selection Commission along with details of other candidates seriously considered’.\textsuperscript{129} It is interesting that although the proposals were to better reflect in the constitution the separation of powers, the original proposals sought to increase ministerial control over appointments to the Supreme Court.\textsuperscript{130} A further example was the requirement in the Bill as introduced into the Committee that the President of the Court would submit a draft of the Rules of the Court to the Secretary of State who ‘may allow, or disallow, them’.\textsuperscript{131} The Committee rejected this and the rules would ‘be made by the Supreme Court in consultation with the Minister who would have no power to amend them’.\textsuperscript{132} Both of these examples highlight the need to involve other interested parties in the legislative process, ideally before the legislation is introduced into Parliament. Nevertheless, these are examples that show how Parliament can help a Bill achieve its objective.

Ultimately, Lord Falconer, who piloted the Bill through the Lords\textsuperscript{133} and voted against committing the Bill to the Select Committee, accepted that it had resulted in a much better debate of the issues,\textsuperscript{134} and that the original proposal gave ‘too much power’ to the executive. He described serving on the Select

\begin{itemize}
\item[\textsuperscript{128}] ibid, s 29.
\item[\textsuperscript{129}] House of Lords Select Committee on the Constitutional Reform Bill (n 105) para 185.
\item[\textsuperscript{130}] Constitutional Reform Act 2005, s 27 has since been amended by the Crime and Courts Act 2013, which gives the power to the Lord Chancellor to pass regulations under the negative resolution for the composition of panels which select Supreme Court Justices. The current regulations are the Supreme Court (Judicial Appointments) Regulations 2013, SI 2013/2193. However, these followed very closely the original provision in the 2005 Act. Reg 19 of the regulations mirror s 27 of the Act, whereby the Lord Chancellor can be consulted over appointments of Supreme Court judges. When an appointments commission has chosen a name, the Lord Chancellor’s options remain the same under reg 20 as they were under s 29 of the Act.
\item[\textsuperscript{131}] House of Lords Select Committee on the Constitutional Reform Bill (n 105) para 249.
\item[\textsuperscript{132}] ibid, para 252, this became s 45 of the Act.
\item[\textsuperscript{133}] HL Deb, 8 March 2004, vol 658, col 1108.
\item[\textsuperscript{134}] F Gibb, ‘The cheerful chappie who rolls on undeflated’ The Times, 22 June 2004 [http://www.thetimes.co.uk/tto/law/article2211835.ece].
\end{itemize}
Committee as ‘difficult, challenging — but incredibly worthwhile’. However, it is clear that the Select Committee was no substitute for publishing the Bill in draft and embarking on thorough pre-legislative scrutiny. The main drawback beyond individual MPs submitting evidence is that the House of Commons was not a part of the Committee. Clearly, MPs would not be expected to be part of the Committee, as it was a Select Committee on a Bill introduced to the Lords. However, the effect of this is that backbench MPs had little influence over detailed provisions of the legislation. A key benefit of a Draft Bill is the opportunity to have a Joint Committee, combining the expertise of the Lords with the democratic legitimacy of the Commons.

In terms of constitutional reform methodology, the Constitutional Reform Act 2005 serves as a reminder of the importance of the House of Lords in preventing highly dubious reforms. In certain critical areas, the eventual Act achieves the claimed objectives more effectively. For example, in the name of the separation of powers, the original Bill provided for the Secretary of State for Constitutional Affairs, who need not be a lawyer, to choose from a list of between two and five candidates future Supreme Court Justices. The final version of the Bill required the Lord Chancellor, who now needed some experience in politics or law, either to confirm the choice given to them by the Appointment Commission or to ask them to reconsider their choice. That this second scenario is an immeasurable improvement is largely down to the role that the House of Lords played in providing close, detailed and robust scrutiny of the Government’s proposals.

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135 ibid.
136 Walters (n 106) 19.
137 An example of this is the Joint Committee that considered the Constitutional Reform and Governance Draft Bill. Joint Committee on the Draft Constitutional Renewal Bill, Report, (2007-08 HL 166; HC 551).
138 s. 2 (2) provides that the Prime Minister when appointing a Lord Chancellor ‘may take into account’ any of the following
(a) experience as a Minister of the Crown;
(b) experience as a member of either House of Parliament;
(c) experience as a qualifying practitioner
(d) experience as a teacher of law in a university
(e) other experience that the Prime Minister considers relevant.”
3. Combining Expertise with Scrutiny

3.1. Committees of the whole House - Providing Scrutiny?

A comparison of the parliamentary passage of the Constitutional Reform Act 2005 with the Legislative and Regulatory Reform Act 2006 reveal many threads that need to be woven together in order for conclusions to be made. Going back to first principles, the background is a Government wanting to make a constitutional change through ordinary legislation. However, unlike many other countries that impose particular requirements for legislation making ‘significant’ constitutional changes, such as two-thirds majority or a referendum, the only specific requirement, as matter of convention is that Bills of ‘first-class’ constitutional importance are, in the House of Commons, committed to a Committee of the whole House as opposed to a Public Bill Committee.

The passage of the Constitutional Reform Act 2005 raises questions about the utility of this procedure, as the Committee of the whole House on the Bill was notable at times for the lack of attendance during the three allotted days, but more importantly the ‘91 clauses, 8 schedules and 31 Government new clauses, 1 non-Government new Clause, 2 new schedules and 102 amendments’ that were ordered to stand as part of the Bill, without a debate or a division at the very end of proceedings in Committee. In short, even if the Government grants a Committee of the whole House, it does not appear to be a significant hurdle for the Government to overcome when enacting a

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139 As stated in Chapter 1, in a country with a codified constitution, this would usually take the form of an amendment to a constitutional text.
140 Although not a formal part of the legislative process, the Constitution Committee is appointed in each session with the remit to ‘examine the constitutional implications of all public bills coming before the House’. See also Jack Simson-Caird, 'Parliamentary Constitutional Review: Ten Years of the House of Lords Select Committee on the Constitution' [2012] PL 4.
141 For example, at one point no Conservative backbenchers were present, Le Sueur, (n 97) 88-89.
constitutional change. Furthermore, there appears to be no guarantee that a Bill is placed under any more scrutiny in the Commons than other Bills that go to a Standing (or now) Public Bill Committee.

Consequently, it is worth considering the utility of this procedure. The first issue is when a Committee of the whole House should be used. The convention that a specific category of Bills with ‘first-class constitutional importance’ should go through a Committee of the whole House emerged during the Attlee Government. In order to get its large reforming legislative programme through Parliament, all Bills would go to a Standing Committee, with the exception of ‘any Bill of first-class constitutional importance ... of the order ... of the Parliament Act 1911 or the Statute of Westminster 1934’. This fits the common theme that most changes to parliamentary procedure are those that are in the Government’s interest.

However, since 1945, there has been an increase in the number of constitutional Bills going to a Committee of the whole House, with 20 between 1997 and 2005. While this is partly explained by unprecedented amount of constitutional change, it ‘is hard to resist the inference that the definition may have become diluted over the years’. While this period clearly saw some constitutional changes of ‘first-class importance’, including the legislation implementing devolution, the Human Rights Act, House of Lords Act 1999 and the Constitutional Reform Act 2005, others that went to a Committee of the whole House clearly were not. It is hard to argue that the Greater London Authority (Referendum) Act 1998 or the Regional Assemblies (Preparations) Act 2003 rank in importance alongside the Parliament Act 1911 or the Statute of

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144 Those taken on the floor of the House, because they were either very short, or required to be passed urgently were not included. Had they been included, the number would have been 35.
145 Hazell (n 143) 19.
147 Its arguable, that had the Legislative and Regulatory Reform Bill had been enacted in its original form, it should have joined this list.
Westminster. Erskine May is of little help in this respect, stating merely that there is ‘no invariable rule...nor any settled definition of what “first-class” constitutional importance should be taken to mean’.\footnote{Erskine May, 555.} The fact that the Legislative and Regulatory Reform Bill (as originally introduced) was not subject to this requirement shows that the concept of ‘First-Class’ constitutional importance is unclear and contested, with the arbiter of whether a Bill qualifies ultimately being the Government who are introducing the Bill in question.

There is also the question as to how effective the Committee of the whole House procedure is in terms of delivering effective scrutiny. One advantage is that the procedure gives all MPs an opportunity to contribute. This is relevant to Bills of a particular geographical interest, as MPs from the areas affected can take part;\footnote{For example, Northern Irish MPs would have a very limited opportunity to take part at the Committee Stage of bills that relate to Northern Ireland. But this can be a factor for other legislation. For example, the Regional Assemblies (Preparations) Act 2003, had a split committal with part of the Committee Stage on the Floor, and part ‘upstairs’. However MPs from the two regions most immediately affected by the Bill, the North East and North West, although making significant interventions in the Committee of the whole House were relatively sidelined in standing committee. Hazell (n 143) 16.} however, the cost of this is that time is curtailed, with time on the floor of the House being in scarce supply. Conversely, giving all MPs the opportunity to contribute is also a disadvantage. Perhaps inevitably given the setting, debates in a Committee of the whole House have a strong character of a Second Reading debate. This leads to fewer amendments being passed, with five times more amendments being moved during a Standing Committee than in a Committee of the whole House.\footnote{Hazell (n 143) 25.} The common theme of this chapter is that Government will, perfectly naturally, choose the path of least resistance when accepting amendments to a Government Bill.

This raises the question of whether the original threshold should be reasserted. The great difficulty is how to do this. Determining the threshold in terms of choosing which Bills should go to a Committee of the whole House and which ones should go to a Public Bill Committee appears too blunt. A feature of modern constitutional legislation, for example with devolution, is that there are
some provisions of ‘first-class importance’ setting out the powers and structure of a new institution, along with highly specific provisions of legislation, fleshing out this basic structure. This raises the possibility of split committals, with the most important and foundational provisions being committed to a Committee of the whole House, and the detailed provisions being considered in a Public Bill Committee.\footnote{Standing Order 66 (3) allows for a bill to be committed to a Public Bill Committee for some of its provisions and to remain in the chamber in a Committee of the whole House for the remainder of the bill. \textit{Erskine May} at 555 states that such a split committal has become ‘normal practice in respect of Finance Bills’. In addition to the Greater London Authority Bill (1999-2000), this split committal procedure has been used for other constitutional legislation, including the Regional Assemblies (Preparations) Bill (2002-03), Electoral Administration Bill (2005-06) and the Northern Ireland Miscellaneous Provisions Bill (2005-06), \textit{Erskine May}, 566.} This delivers a range of options, but relies on sound judgement for the right approach to be taken. For example, the Government of Wales Act 2006 should (and was) considered by a Committee of the whole House as it substantially recast the structure of devolution in Wales.\footnote{The Government of Wales Act 2006, repealed most of the original Government of Wales Act 1998 effectively introducing a whole new scheme of devolution into law. The Act also provided for a referendum to be held on whether the National Assembly should gain some powers to make primary legislation, substantially changing the nature of Welsh devolution further. This referendum was held in March 2011.} By contrast, other constitutional Bills could follow the model of the Greater London Authority Act 1999, which had a split committal, with the foundational sections being considered by a Committee of the whole House, and the remaining sections being considered in a Standing Committee. The Scotland Act 2012 would be an example of a statute suitable for a split committal, as most of the provisions are of relatively minor importance;\footnote{The Scotland Act 2012 mostly reallocated certain powers between Westminster and Edinburgh. For example ss 1-3 increased the role of the Scottish Parliament over the administration of elections, s 11 made matters relating to Antarctica a reserved matter and outside the competence of Edinburgh and s 10 devolves certain powers over air rifles.} yet, the increased powers of taxation would be deserving of a Committee of the whole House.\footnote{Scotland Act 2012, s 25 increases the powers of the Scottish Parliament and introduces a Scottish rate of income tax. Under the terms of the Act, income tax rates in Scotland are reduced by 10%, but are topped up by the Scottish rate income tax. This means that the Scottish Parliament will have to set a Scottish rate of tax of 10% for rates of income tax to be the same as in the UK. This is an increase from the powers in the Scotland Act 1998 which gave the Parliament a power to vary the rate of income tax by 3%. It is expected that this new power will be given to the Scottish Parliament in 2016. See HC Deb, 14 March 2011, vol 525 col 95.} However, politics also plays a role, particularly within the context of a Scottish independence referendum
campaign; a split committal might appear to diminish the importance of Scottish affairs at Westminster.

When a Bill is published in draft, a positive development would be for the Government to ask the committees scrutinising the Bill for their recommendation as to which parts of the Bill should be committed to a Committee of the whole House or a Public Bill Committee. This could also be a role for an oft-mooted House Business Committee. This would be in the Government’s interest, as parliamentary time could be saved in the Commons for the rest of the legislative programme, whilst delivering more effective scrutiny on the detailed parts of the Bill.

3.2. From Standing Committees to Public Bill Committees

The issue then becomes one of how effective is the scrutiny in a Public Bill Committee? Public Bill Committees are a relatively new creation, replacing the old Standing Committees that were coming under increasing scrutiny. Tony Wright, stated ‘[w]e should thank our lucky stars’ that the public rarely saw what happened in Standing Committees, as they:

‘… never see the way in which legislation is routinely processed here: members of the Government side are required merely to be there and to say as little as possible in order to get the business through, and the Opposition, as far as they can, play a game of delay. Measures are taken through on whipped votes. We often vote for things that we do not think are very good’.156

As detailed above, the Standing Committee on the Legislative and Regulatory Reform Committee achieved little. However, the Select Committee

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155 This was proposed by the ‘Wright Committee’, House of Commons Reform Committee, Rebuilding the House (HC 2008-09, 1117) para 169. See also, Richard Kelly, House Business Committee (House of Commons Library, SN/PC/06394, 2014) [http://www.parliament.uk/briefing-papers/SN06394.pdf].
on the Constitutional Reform Bill, while described as a ‘procedural throwback’,\(^{157}\) was far more effective. This was partly because it tapped into a long but occasional debate in both Chambers of how to approach the Committee Stage of the legislative process. The House of Commons Procedure Select Committee in the late 1970s recommended that evidence on some Public Bills should be allowed at Committee Stage, before conducting line-by-line scrutiny.\(^{158}\) As Brooke states, this would allow members of the Committee to ‘have a much better chance of understanding the factual and technical background to the Bill they were considering’.\(^{159}\) However, after some initial success, the procedure fell into disuse by 1984. The House of Lords, during the 1990s made a similar experiment, with what became known as ‘Jellicoe committees’ to consider Bills of ‘technical nature largely devoid of party political controversy’, with ‘Law Commission Bills as obvious candidates’.\(^{160}\) However, unless such Bills were guaranteed to get a Second Reading in the House of Commons, the exercise would be largely pointless, and the procedure failed to gain longstanding acceptability. It remains the case that the House of Lords considers most Public Bills in Committee on the Floor of the House.\(^{161}\) It is arguable that the Select Committee on the Constitutional Reform Bill foreshadowed the creation of Public Bill Committees to replace Standing Committees in the House of Commons.

\(^{157}\) Walters (n 106).


\(^{160}\) ibid, 352.

\(^{161}\) There was an, interesting, if wholly politically motivated attempt, led by Lord Falconer to treat the Parliamentary Voting System and Constituencies Bill as a Hybrid Bill, meaning that it would be referred to the Examiners who would consider whether it was a Hybrid Bill, if found to be a Hybrid Bill, the Bill would progress to a select Committee after Second Reading. The effect of these delays would have meant that the referendum on the alternative vote could not be held in May 2011, as the required legislation would not have been passed in time. In the event, this attempt failed by 224 votes to 210, and the referendum was held according to the Government’s schedule in May 2011, HL Deb, 15 Nov 2010, vol 722, cols 522-544. Any bills not taken on the Floor of the House in the House of Lords are taken to a Grand Committee, where all Lords are free to take part, there are no divisions, with any amendments either agreed to unanimously or withdrawn. However, the most important bills, a category that includes constitutional legislation, are heard in the Chamber and not in Grand Committee.
This was an example of what could be achieved with input from witnesses and more consensual arrangement between Committee members. The Modernisation Committee realised the twin need for a better Committee Stage and greater input from witnesses on the technical aspects of Bills, and proposed the creation of Public Bill Committees.\footnote{162} The most significant change is that Public Bill Committees can receive written and oral evidence, before moving on to the detailed scrutiny of the Bill itself. This was an improvement from the previous position when only Bills sent to a Select Committee or special Standing Committee could have taken evidence.\footnote{163} It enabled a Committee member to become more informed about the content of the Bill. The major shortcoming of the Standing Committees was the lack of engagement from backbenchers, particularly Government backbenchers. Levy considers that ‘increased engagement on the part of members of Public Bill Committees is a developing phenomenon’,\footnote{164} with the first Public Bill Committees being little different to the Standing Committees, but by allowing members to become more informed of the Bill through evidence sessions, ‘there is evidence of greater engagement of backbenchers, although it is unlikely that “members” engagement...will match the consensual approach to scrutiny found in many Select Committees’.\footnote{165} Nevertheless, according to Philip Cowley, these reforms have the ‘potential to do more to improve the quality of parliamentary scrutiny of Bills than any other Commons reform in the last 20 years’.\footnote{166}

Public Bill Committees further increase the strength of the argument for the split committal of Bills, as there is an opportunity for expert scrutiny to be heard; particularly as legislation considered constitutional becomes increasingly elaborate and technical, the nuances of which some MPs may not be wholly

\footnote{162} House of Commons Modernisation Committee, \textit{The Legislative Process} (HC 2005-06, 1097).

\footnote{163} House of Commons Information Office, Factsheet L6 - General Committees, 6.

\footnote{164} Jessica Levy, ‘Public Bill Committees: An Assessment Scrutiny Sought; Scrutiny Gained’, 63 Parliamentary Affairs 534, 539.

\footnote{165} ibid, 539.

aware of.\textsuperscript{167} Few people would argue that although the Joint Committee on the House of Lords Reform Draft Bill had a particularly eminent membership,\textsuperscript{168} its work was not aided greatly by the evidence received. Committing Bills solely to a Committee of the whole House means that the opportunity is afforded to MPs on the Public Bill Committee to become more informed about the Bill.

Clearly, Public Bill committees are not perfect, far from it. Following the election of Select Committee chairs and members, these committees appear to be a poor relation. Just like the Standing Committees they replaced, the party whips via the Committee of Selection determine the membership of Public Bill Committees.\textsuperscript{169} The suspicion is that the whips strive to keep ‘troublemakers’ off committees. The experience of Sarah Wollaston is informative. In 2011, her request to serve on the Public Bill Committee for the Health and Social Care Bill was rejected, despite being a GP before entering Parliament and being able to bring some expertise to the Committee. She thought this was because she was not ‘willing to guarantee unconditional support for the Bill’.\textsuperscript{170} By contrast, with the power of selection to Select Committees being removed from the whips, in 2013 she could be elected as Chair of the Health Select Committee. Select Committees, driven by their elected membership (within party groupings) and elected chairs (by the whole Chamber), have been notably more assertive since 2010, with Andrew Tyrie (chair of the Treasury Select Committee), Margaret Hodge (Public Accounts Committee) and Keith Vaz (Home Affairs Committee) all contributing to the view that ‘Select Committees across the board have become more consequential political actors’.\textsuperscript{171} This has raised the question as to whether Public Bill Committee’s should follow the lead of Select Committees

\textsuperscript{167} Devolution is a particularly good example, as why should an MP from an English constituency be aware of the technicalities of Scottish or Welsh devolution?

\textsuperscript{168} Including the constitutional experts Lord Norton and Lord Hennessy.

\textsuperscript{169} Meg Russell, Bob Morris and Phil Larkin, \textit{Fitting the Bill: Bring Commons Legislation Committees In Line With Best Practice} (Constitution Unit, 2013) 11 [http://www.ucl.ac.uk/constitution-unit/research/parliament/legislative-committees/tabs/Fitting_the_Bill_complete_pdf.pdf].

\textsuperscript{170} ibid.

and have their membership elected, inviting candidates based on expertise or interest.\footnote{ibid.}

While there is much merit with this proposal, the benefits for constitutional legislation might be less obvious. Constitutional issues are usually highly contested, with MPs holding entrenched positions; making it far from clear that an elected Public Bill Committee would operate in the consensual manner that Select Committees generally have done. The debate within the Chamber could be transferred merely to the Public Bill Committee. While MPs from different parties might come together to scrutinise the actions of the Executive in a consensual manner during a Select Committee hearing, the more immediate need for the Government to pass its legislation might mean that the consensual approach may not transfer easily to an elected Public Bill Committee.

The core problem is that membership of Public Bill Committees is determined by the whip-dominated Committee of Selection. While elections could resolve this problem, they might also create new problems when considering constitutional legislation. One way to reduce the control of the whips over selection would be to increase the size of Public Bill committees. Currently, the membership of a Public Committee has to be between 16 and 50 members,\footnote{Standing Order 86.} and a quorum is fewer of 17 or one-third of a Committee’s membership;\footnote{Standing Order 89 (1).} however, usually, the membership of a Committee is around 20 members.\footnote{For example twenty-one members sat on the Public Bill Committee for the Deregulation Bill, which at the time of writing is currently progressing through Parliament.} There seems little reason why, for constitutional legislation, those parts of Bills committed to a Public Bill Committee cannot be required to go to a larger Committee, whose membership is closer to the maximum of 50. This would make it more difficult for the whips to consistently avoid selecting those they perceive to be ‘troublemakers’. This would also ensure the broad-based character of a Committee of the whole House is retained. Moreover, a larger membership would create more opportunities for those MPs with an interest in
constitutional issues to take part in the Committee, and in an informal manner become a ‘permanent member’ of Public Bill Committees that deal with constitutional legislation.\footnote{Standing Order 86 (2) states that when “nominating such Members the Committee of Selection shall have regard to the qualifications of those Members nominated and to the composition of the House”. One proposal is for Public Bill Committees to be reappointed with identical membership, Russell, Morris and Larkin (n 169) 48.}

The control of the whips would be further reduced if the relevant departmental Select Committee had the ability to nominate at least two members of the committees,\footnote{Conservative Party (2000), Strengthening Parliament: The Report of the Commission to Strengthen Parliament (Conservative Party) quoted in Russell, Morris and Larkin (n 169) 22.} and if the membership of a Public Bill Committee had to be approved by the Commons as a whole.\footnote{Political and Constitutional Reform Select Committee, Revisiting Rebuilding the House: the Impact of the Wright Reforms (n 12) para 36.} More fundamentally, the control of the whips over the Committee of Selection could be reduced by increasing the number of backbenchers, or conversely, by reducing the number of party whips on that Committee.\footnote{House of Commons Modernisation Committee, First Report (HC 2001-02, 224-II), Appendix 18: Letter from the Rt Hon Sir George Young MP to the Chairman of the Committee, quoted in Russell, Morris and Larkin (n 169) 22.} The reform of Public Bill Committees is likely to be the next significant procedural reform in Parliament, and it is important to consider how reforms will improve the ability of Parliament to deal with constitutional legislation.

### 3.3. Draft Bills

Another area for improvement is for more Bills to be published in draft; thus allowing expertise to be introduced at pre-legislative stage. Indeed, after calling for a Committee of the whole House, the second most frequent procedural complaint is that a constitutional Bill should have been published in draft beforehand.

Draft Bills started to be published more systematically from 1997, following the recommendation made by the House of Commons Modernisation Committee.\footnote{House of Commons Modernisation Committee, First Report (HC 2003-04, 48-I).} This was the formalisation of a process that began under the
Major Government, which published 18 Bills in draft between 1992 and 1997 for ‘outside consultation, but they were not subject to systematic consultation’.\(^{181}\)

The fundamental aim is that Draft Bills allow for the:

‘House as a whole, for individual backbenchers, and for the Opposition to have a real input into the form of the actual legislation which subsequently emerges, *not least because Ministers are likely to be far more receptive to suggestions for change before the Bill is actually published. It opens Parliament up to those outside affected by legislation*.\(^ {182}\)

In this sense, it follows the underlying theme of this section, which is of the negotiation between Parliament and Government. The value of a Draft Bill is that it reduces the political cost of a Government concession; thereby increasing the chance of input from outside Government. The other aspect is that it opens up the legislative process to those outside of Parliament, allowing for views to be taken into account. However, as Tony Baldry stated; ‘the proof of pre-legislative scrutiny is what the Government do with it ... Let us not start singing the Hallelujah Chorus until Ministers start taking notice of pre-legislative scrutiny’.\(^{183}\)

As Kennon explains, there is a presumption that the relevant Select Committee will consider the Draft Bill in the Commons, although this presumption can be rebutted if the Bill is of particular interest to the Lords, in which case a Joint Committee is appointed.\(^{184}\) The House of Lords Draft Bill is an example of this. The procedure is the same for any Select Committee inquiry. Written and oral evidence can be requested, opening out the Bill to broader scrutiny. Then, in the usual manner, a report is published detailing any

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\(^{184}\) There are other possibilities, but they are largely irrelevant for present purposes, see ibid, 481.
conclusions or recommendations.\textsuperscript{185} The one drawback of the Draft Bill procedure, as compared with a Public Bill Committee or Select Committee, is that there is no power to alter the text of a Bill, only to make recommendations. The Government decides whether they wish to accept the proposed amendments. Yet, the value of this process is that it forces the Government to give reasons for their rejection, which allows those outside Government to scrutinise the cogency of their thinking.\textsuperscript{186}

The issue for present purposes is whether Draft Bills are used for constitutional legislation and if they significantly impact on the eventual legislation. Firstly, there is the relationship between Draft Bills and ‘ordinary’ Bills, and the Government’s overall legislative programme. The Constitution is still dealt with largely in the \textit{ad hoc} manner considered above, with Bills emerging as and when the Government chooses. However, unusually for an area of policy, with constitutional issues, the concern is often not that legislation is caught up in a legislative traffic jam, but, as 1997 and 2010 showed, that constitutional Bills are often introduced into Parliament too quickly. This means that, for the most important constitutional Bills, there is little opportunity for a Bill to be published in draft first. As Kennon states, it is ‘unrealistic to expect that a Minister who stands a good chance of securing a place in the legislative programme for a high profile Bill will want to delay its enactment by going through the longer process of pre-legislative scrutiny’\textsuperscript{187} This does not mean that more minor constitutional Bills are not published in draft form, for an analysis of Draft Bills since 1997 show that 18 of those have involved the Constitution, with eight of those Bills receiving some form of scrutiny from a parliamentary committee.\textsuperscript{188}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{185} The only significant difference is that if a joint committee is set up, then both Houses have to pass motions, appointing members and setting the terms of reference. ibid, 482.
\item \textsuperscript{186} Text to Fn 45-46.
\item \textsuperscript{187} Kennon (n 181) 480.
\item \textsuperscript{188} See Appendix 2. This figure does not include the Draft House of Lords Reform Bill from the 2009-10 session which was not published. This also treats the three sets of draft provisions relating to individual voter registration published during the 2010-12 session as one single draft bill.
\end{itemize}
\end{footnotesize}
The Draft Bill that stands out in terms of constitutional importance is the House of Lords Reform Bill (2010-12). The Joint Committee that considered this Draft Bill is also notable for a lack of agreement on its fundamental principles,\(^{189}\) with a large minority of the Committee publishing an alternative draft report outside the confines of Parliament.\(^{190}\) The main concession from the Government was shown in the eventual Bill, which increased the number of members from 300 to 450, as recommended by the Committee.\(^{191}\) This gives further credence that notion that the role of Parliament is to influence the Government’s position, which accepts an amendment in a manner that causes least embarrassment to the Government.

However, a Draft Bill Committee cannot be expected to resolve matters of inter and intra-party controversy as the Committee becomes a microcosm of that very debate. Yet the Government failed to take heed of this, and proceeded to introduce the House of Lords Reform Bill only to have to withdraw it when it was clear that the necessary support was lacking from both sides of the Commons. Political considerations prevailed over taking the Joint Committee’s Report for what it was. The main value of the report, in a similar manner to the Select Committee on the Constitutional Reform Bill, was that it presented some agreement on particular matters of a wholly reformed House of Lords, including clarifying the possible legal relationship between the Lords and the


\(^{191}\) Deputy Prime Minister, Government Response to the Report of the Joint Committee on the Draft House of Lords Bill (Cm 8391, 2012) 11; Joint Committee on the Draft House of Lords Bill, Report (2010-12, HC 1313-I HL 284-I) para 114; House of Lords Reform HC Bill (2012-13) [52], cl 1. It also seems quite strange although the Joint Committee, (at para 147-153) largely accepted the proposal in the Draft Bill of adopting the single transferrable vote in elections the Bill introduced into the Commons (at clause 4 and schedules 1 and 2), made provision for a party list system for election in Great Britain.
Commons.\textsuperscript{192} These areas of agreement should be useful if Lords reform is ever revisited in this fashion.\textsuperscript{193}

The distinction between the Constitutional Reform Bill and House of Lords Reform Bill is that there was far greater (although far from unanimous) agreement on the principle of the reforms in question with the Constitutional Reform Bill, but the concern was with the methodology. This allowed the Government to make considerable concessions to improve the legislation. In contrast with House of Lords reform, the principles are so contested that within a politically febrile atmosphere, any concession is seen as a weakness and seized upon by opponents. This limits considerably the impact of a Draft Bill Committee on Government, because, for political reasons, they are unlikely to back down or change course. A Draft Bill Committee or a Public Bill Committee can certainly improve legislation, but a Committee cannot resolve contested principles. Unfortunately, the discussions of the other parts of the parliamentary process show that they are unable to resolve these principles either.

4. Conclusion

Anthony Sampson described Parliament at the start of the 21st century as appearing to ‘be no more than a sideshow to the main arguments between the Government and the media’.\textsuperscript{194} Based on the above, it can be seen that, in the constitutional context at least, this is too harsh a verdict on Parliament. Parliament seems to be effective at improving the substance of legislation, and can ultimately force the Government to back down on the detailed provisions of a Bill. At the most basic level, Parliament requires that the Government subjects its proposals to external scrutiny. It is clear that what happens within

\textsuperscript{192} The Draft Bill, s 2 (1) stated that it did not affect the ‘status of the House of Lords as one of the two Houses of Parliament’ or ‘the primacy of the House of Commons’. Following the Joint Committee’s report, the Bill introduced into Parliament made a the far simpler confirmation that the ‘Parliament Acts 1911 and 1949 continue to apply’, and that the preamble to the Parliament Act 1911 is repealed’.

\textsuperscript{193} Although the more incremental approach advocated by Lord Steel appears more likely at present.

\textsuperscript{194} Anthony Sampson, \textit{Who Runs This Place? The Anatomy of Britain in the 21st Century} (John Murray 2004) 2.
Government has a major effect on what happens in Parliament. Both the Legislative and Regulatory Reform Act 2006 and the Constitutional Reform Act 2005 are examples of Parliament responding to legislation that was poorly prepared within Government, with the constitutional consequences of each Bill not being properly considered.

However, the legislative process could be improved with further changes to the parliamentary process. There are two areas where the legislative process could be improved. In particular, the use of Draft Bills could be formalised and become the norm for all constitutional legislation in future. However, this would require governments not only to bring forward draft legislation, but to make this the norm would require the Government to introduce and then enforce a self-imposed ordinance. This is perhaps more likely with Department of Legal Affairs, as suggested in Chapter 3, which would be able to approach constitutional issues in a more organised manner. Secondly, the Committee Stage of the legislative process in the Commons needs to be revisited, not only for all Public Bills, but specifically for constitutional issues. Committees of the whole House play too large a role, when a Public Bill Committee, especially with the more detailed constitutional legislation, could better fulfil much of the Committee Stage. Split committals appear to be increasing and could play a greater role for constitutional legislation, particularly if the membership of the Committee is nearer the maximum of 50 rather than the norm of 20. The membership of Public Bill Committees should also be reconsidered, with the backbenchers playing a greater role in determining the composition of the Committee. Without a House Business Committee, the issue of which parts of a Bill should go to a Public Bill Committee and which parts remain on the floor of the House is left to be decided by the Leader of the House and the Whips, but the Select Committees considering a Bill before the Committee Stage should make recommendations as to where the sections of Statute are considered in Committee. The making of recommendations would not require the approval of Government, and should the Government depart from the recommendations they would at least have to justify that to the House.
Nevertheless, having gone through the parliamentary process and having gained the approval of Parliament, legislation obtains the legitimacy inherent within Parliament. What is also clear is that, as an institution, Parliament is less successful at harnessing conflicts and resolving constitutional issues. At the core of this problem is a lack of democratic legitimacy. If a constitution is to contain the rules ‘by which the community hath agreed to be governed’, it is not necessarily clear that the current process for constitutional change meets this test. Not only do governments introduce constitutional legislation not promised in their manifestos, but also a recurring issue in this thesis is the lack of interest amongst the electorate on constitutional issues questions very rationale of obtaining a mandate from the people on constitutional issues.

This can also be combined with the various structural factors that constrain the extent to which Parliament can ‘resolve’ a contested constitutional issue. The disproportionate nature of the first-past-the-post system used for elections to the House of Commons means that certain strands of opinion can be exaggerated beyond all others; theoretically, leading to a change in the constitution that may only have minority support. Furthermore, due to its lack of democratic accountability, the House of Lords (as outlined above) focuses on improving the substance of legislation rather than attempting to dispute the principles behind the change with the Government. This creates the situation, alluded to in the Introduction, of constitutional changes that lack the widespread acceptance amongst a substantial portion of political opinion and the broader population needed for constitutional stability. An example of this is Britain’s membership of the EU. Ever since Britain joined in 1973, approximately one-third of the British electorate would vote to leave the EU. However, that third has not had the opportunity to vote for a mainstream party whose manifesto has

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195 For example, the Constitutional Reform Act 2005 and the Fixed-term Parliament Act 2011.
196 Chapter 3, fn 27.
197 For example, the landslide Labour victories at the 1997 election gave Labour a majority of 178 with 43.2% of the vote. This was followed in 2011 with 40.7% of the vote giving Labour a majority of 166. It must be emphasised that under the Cook-Maclean Agreement, Labour was supported by the Liberal Democrats for many of their constitutional reforms, further enhancing the legitimacy of the Labour’s reforms. See Chapter 4 for further discussion of this.
198 For example, at the 1975 referendum on membership of the EEC (as it was then), 32.8% of the vote wanted to withdraw from the EEC, British Electoral Facts 1832-2012, 242.
advocated Britain’s withdrawal from the EU since 1983.\textsuperscript{199} Certainly, until a new wave of Conservative MPs more hostile to the EU Europe,\textsuperscript{200} that body of opinion has been underrepresented significantly in the House of Commons.\textsuperscript{201} Similarly, Parliament has been unable to resolve the issue of the composition of the House of Lords since 1911 (indeed if it is an issue that requires resolution).\textsuperscript{202}

It might follow that the logical consequence of the above is for Parliament to be reformed, and introduce elections to the House of Lords and proportional representation to the House of Commons. While this could solve some of these structural problems, introducing such change solely for that reason would be to view matters exclusively through the prism of constitutional policy. It must be remembered that developing constitutional policy is one policy area of many, and the ideal parliamentary structure to create policy for other areas, could well be radically different.\textsuperscript{203} There are also other aspects to Parliament than enacting legislation, such as sustaining Government and providing a link between a constituency and Government, which constrain the freedom of those proposing any reforms. All of these factors need to be considered when considering changes to the structure of Parliament, but thankfully, this question

\textsuperscript{199} This was Labour; see \textit{Labour Party General Election Manifestos 1900-1997}, 280-1.

\textsuperscript{200} This was a contributing factor that led to the European Union Act 2011, this is discussed in detail in Chapter 6.

\textsuperscript{201} Although backbench MPs such as the William Cash (Conservative) and Gisela Stuart (Labour) favour withdrawal, that is not official party policy. The Conservatives have promised a referendum on membership of the EU in 2017, see Chapter 6, text to n 97.

\textsuperscript{202} The preamble to the Parliament Act 1911 states that ‘it is intended to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of hereditary basis, but such substitution cannot be immediately brought into operation’. Ever since the House of Lords has been the subject of various schemes of reform, but only incremental reform has come to fruition. See Chris Ballinger, \textit{The House of Lords 1911-2011: A Century of Non-Reform} (Hart, 2013). Some commentators have described a wholesale reform of the House of Lords as ‘impossible’, see Rodney Brazier, ‘From Asquith to Clegg - Is Lords Reform Impossible?’, University of Manchester Law School Public Lecture Series, 21st February 2012, available at \url{https://www.yumpu.com/en/document/view/11493025/asquith-to-clegg-is-lords-reform-impossible-school-of-law-the-}.

\textsuperscript{203} For instance, the bicameral legislature effectively becomes a unicameral lecture for Money Bills, see Parliament Act 1911, s 1. In addition, the House of Commons can claim financial privilege when disagreeing with a Lords amendment which will involve spending more public money. See \textit{Erskine May} 792-4.
is outside the scope of this thesis, which focuses on enhancing the existing constitutional structure.\footnote{204}

One way in which this legitimacy problem can be resolved is through a greater use of referendums and this is considered in the next chapter.

\footnotetext{204 For example, the remit for the Jenkins Commission was to recommend an electoral system with the following factors in mind, broad proportionality, stable government, an extension of voter choice, and the link between MPs and geographical constituencies. See HM Government, \textit{The Report of the Independent Commission on the Voting System} (Cm 4090, 1998).}
Chapter 6 – The Use of Referendums in the UK

“The judge who should direct a jury that they could not properly give a verdict upon a most difficult case, unless they at the same time give a verdict on twenty others as difficult, would not be allowed to remain a day longer on the Bench. But, the behaviour which would argue madness in a judge when asking for the verdict of a jury, is considered the wisdom or astuteness of politicians when appealing to the verdict of the country”

A.V. Dicey

Chapters 3, 4 and 5 have each looked at different stages of the constitutional change process, with Chapters 3 and 4 considering how Whitehall approaches constitutional change and how politicians have used that machinery. It was seen that, on occasion, the substance of proposed constitutional changes has been inadequate and recommendations have been made to improve how Whitehall approaches constitutional issues. However, it was shown in Chapter 5 that Parliament could be highly effective at scrutinising Government proposals for constitutional change by improving the substance of the proposed change. This was shown by the passage of the Constitutional Reform Act 2005 and the Legislative and Regulatory Reform Act 2006.

However, within the existing political structure, the public acceptability of some constitutional changes since 1997 can be questioned. The paradigm example of this, referred to in the Introduction, is the Human Rights Act 1998, which has been contested ever since it came into force. Whatever one’s views on human rights, it is clear that a substantial portion of the electorate and political opinion oppose aspects of the Human Rights Act. Conversely, a portion of the electorate and political opinion would vehemently oppose watering down

the legal protection for human rights. Consequently, the second central concern that this thesis seeks to engage with is how the methodology of constitutional change can be enhanced to ensure that future constitutional change can proceed on a more consensual footing. As has been shown in previous chapters, the constitutional structure of the UK does not easily lend itself to consensual politics. Conflict is hardwired into the constitutional change process.

This problem could be resolved by requiring governments to obtain the approval of (at least) a majority of the electorate for a proposed constitutional change. However, the traditional approach has been to hold a General Election to resolve a constitutional question. It is more difficult to follow this approach in modern politics: not only are political parties often divided over constitutional issues, but also a political party can form a majority Government with less than 40% of the vote at an election fought on a kaleidoscope of different issues, with constitutional issues often being overlooked. In addition, there have been occasions when the electorate has been presented with little choice between the parties at a General Election. These factors diminish the notion that a General Election can resolve a contested constitutional issue.

All of the above leads to the obvious question, which is to propose the use of referendums for constitutional issues, just as many constitutions around the world require. However, in the UK the uncodified constitution leaves the question of whether to hold a referendum in the hands of the politicians. While politicians were of the opinion that the referendum was ‘a device so alien to all

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2 The failure of The Commission on a Bill of Rights to come to any clear conclusions encapsulates the contested nature of human rights protection in the UK.

3 For example, the 1910 General Election was fought on the issue of the House of Lords, although the Conservatives (including the Liberal Unionists and one independent Conservative) and the Liberals each won 272 seats meaning that the intervention of George V was required for the Parliament Bill to pass the Lords, British Political Facts 1832-2012, 19.

4 In 2005, Labour was elected on 35.2% of the vote, British Political Facts 1832-2012, 19.

5 For example, see the Australian Constitution, Art 128; Danish Constitution, Art 88; Irish Constitution, Art 47 (1); Spanish Constitution, s 167-8. Texts of constitutions were obtained from the Constitute Project [https://www.constituteproject.org].
our traditions’, holding one would remain an unlikely prospect. Yet, since the particular circumstances of Northern Ireland led to Edward Heath holding a ‘border poll’ in 1973 and Harold Wilson held a referendum on EEC membership in 1975, referendums have become an accepted part of the constitution, with several held on devolution and a continuing debate over a referendum on membership of the EU.

1. The Benefits of Referendums

In line with the general approach of this thesis, of going with the grain but enhancing current practice, this Chapter assumes that, as referendums have been used increasingly since 1997, the issue is not whether they will continue to be used, but how they should be used in future. The general benefits and disadvantages of referendums in the UK only need to be considered briefly as others have comprehensively dealt with this from a variety of perspectives.

Essentially, those that advocate the use of the referendum consider that if democracy means government by the people, then referendums can provide a ‘purer’ form of democracy than representative democracy. This is because the focus of the electorate is on the single issue of the referendum, and is not diluted by the structures of representative democracy such as elections and political parties. In theory, this means that the outcome of a referendum can be bestowed with a high level of legitimacy. The benefit of such a direct relationship between the issue and the voters and how this resolves some of the problems with the doctrine of the mandate is discussed in the Section 2 below.


8 Constitution Committee (n 7) Stephen Tierney 48.
However, those that argue for the referendum do so on the basis that it should supplement rather than supplant the ordinary process of representative democracy. The philosophical case for referendums on constitutional issues is that they are of a fundamental importance because they are about changing the rules by with other rules are made and as discussed in Chapter 1 relate to the activity of ‘governing’. Including a referendum in the constitutional change process reflects its extraordinary nature.

Limiting the use of referendums to constitutional issues reflects how referendums should supplement rather than supplant representative democracy. Not only is the use of the referendum limited, but also the referendum will only be used to approve or reject the outcome of the ordinary law making methods. In this sense, the referendum operates as a veto. Another constitutional justification for referendums is that they can provide a political restraint to parliamentary sovereignty, providing stability to the constitutional settlement. On a political level, it will be difficult for an incoming Government to reverse or repeal a decision of the previous Government that has been approved by the electorate without a further referendum. In this sense, it can protect the electorate against sudden lurches in policy that may result from a change in Government.

This argument can be taken further to suggest that referendums can ‘settle’ an issue for the foreseeable future. One example of this can be the 1975 referendum on Britain’s membership of the EEC, which Peter Kellner considered resolved the issue ‘for a generation ... as opponents of British membership accepted that verdict for a period and without the referendum it might have been reopened’. Furthermore, referendums can act as a constitutional safeguard against controversial decisions being made, and

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9 This clearly applies to referendums held after the legislative process has concluded, but this also applies to referendums, such as the Scottish and Welsh referendums in 1998, which were held before the legislative process began, as those referendums were pursuant to a clear manifesto pledge from the government.

10 Constitution Committee, Referendums in the United Kingdom (n 7) Q45. This point could be refined further to suggest that even with the current discussion over Britain’s membership of the EU, the basic features of the EU such as the internal market which were well established by 1975 are still politically uncontroversial.
provide the environment for the ordinary representative process to take place. One such example is Northern Ireland, which under the Northern Ireland Act 1998, has had a guarantee that unity with Ireland will only take place should the people vote for such a move at a referendum. As any referendum is unlikely to take place in the near future, this guarantee has created the room for the Northern Irish Assembly to focus on more immediate policy concerns.

There are also arguments that referendums can increase citizen engagement with the broader political process. This is particularly the case with referendums that might have profound consequences. The clearest example of this is the referendum on the Good Friday Agreement in Northern Ireland, which saw a high turnout of 81.1%. Such a large turnout also indicates a high level of awareness about the issue, and shows how referendums can be a mechanism to increase the electorates’ political knowledge of the issues. This is particularly the case if the campaign phase of the referendum is well managed. As there is longstanding concern at low levels of voter engagement with politics, these side benefits of referendums should not be ignored.

Those who argue against referendums, tend to base their arguments on technical and practical grounds rather than engaging with more principled arguments. Some arguments focus on how the referendum has been used as a tactical device by governments who have found themselves in difficulty over a particular issue. Yet, this not an argument against referendums themselves, for this argument could be met with clear rules on when referendums should held. However, as the following discussion will show, whilst referendums might have been held for tactical reasons, this argument is becoming harder to sustain as more referendums are held because previous referendums have generated expectations of when referendums should be held in the future.

An argument more focused on referendums themselves is that referendums can be susceptible to being dominated by elite groups. This can particularly be the case if voters have little knowledge over the issues, as

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11 British Political Facts 1832-2012, 247.

12 The regulation of campaigning at referendums is discussed in Chapter 7 below.
evidence shows that views of voters can be remarkably fluid during a referendum campaign. This makes the campaigning phase of referendums increasingly important, and that those who can finance campaigns, and the media, can play a critical role in determining the outcome of the referendum and there is a risk of simply pandering to populist sentiment. Similarly, it is inherent in the concept of the referendum that is the majority who is making the decision. Inevitably, this can pose a danger to the rights of minorities. One notorious example is proposition 187, a referendum in California that sought to remove access to all non-emergency health care, state education and other public services from illegal immigrants. Both of these arguments show how important it is not only for referendums to be properly controlled and regulated (this is discussed in Chapter 7 below) but that serious consideration should be given to when referendums should be held in the first place. Certainly as regards the UK, there is little appetite for referendums to be held outside of the constitutional context.

Yet referendums within the constitutional context do raise particular arguments against their use. It can be difficult to determine whether voters are actually engaging with the issue at hand, or simply offering their view on the Government of the day. However, the evidence suggests that voters can engage with the referendum question and approach it separately from their view of the Government. Also, many constitutional issues can be complex, and may have far-reaching and unintentional consequences. These issues may also be difficult to dilute into a straight “yes” or “no” answer, and elected representatives are likely to have the expertise, the time and the inclination to consider issues more thoroughly. However, elected politicians are also subject to party whips and the views of their constituents and some politicians are ‘concerned to use Parliament for the advancement of their political creed’. Ultimately, the idea

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14 Matt Qvortrup (n 7) 18.

15 See text to fn 122.

16 Vernon Bogdanor, The People and the Party System (n 7) 80.
that some issues are too complex for the electorate to decide sits uneasily with the principle of the democratic state. Nor does it take the argument much further than when Sir Henry Maine, writing about democracy in 1885, stated that,

‘if it were really possible to extract an opinion upon them from a great mass of men, and to shape the administrative and legislative acts of a State upon this opinion as a sovereign command, it is probable that the most ruinous blunders would be committed’.  

This is appropriate, because as Bogdanor states, ‘arguments against the referendum are also arguments against democracy’ because accepting the referendum is also an acceptance of the ‘democratic form of government’.  

Of course, referendums are no panacea for all issues of public policy; but it is clearly the case that referendums can fulfil a particular function to resolve disputes over constitutional issues.

2. Referendums and Constitutional Change

2.1. The Development of the Mandate

The traditional approach to constitutional change has been for the Government of the day to implement the constitutional changes they wish, as described in Chapters 2 and 3. When doing this, they are using the mandate they acquired at the General Election. This means that the concept of the mandate requires some scrutiny.

Dicey became interested in referendums when he personally experienced one of the fundamental weaknesses of the mandate. The voter is in a quandary when they broadly support a Party but oppose a particular policy that the Party

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18 Vernon Bogdanor, *The People and the Party System* (n 7) 94.
pursues. In Dicey’s case, this was when Gladstone pursued a policy of Irish Home Rule, with which Dicey, a committed Liberal, strongly disagreed.\textsuperscript{19} He remained a Liberal as he saw ‘no reason why his allegiance should be determined by this one issue’.\textsuperscript{20} Indeed, Dicey could have been describing himself when he wrote:

‘An election determines which of the two parties shall enjoy the advantages, and incur the responsibilities, of Government. Now it may well happen that men of sense and patriotism wish, on the whole, to keep a particular body of statesman in power, whilst severely condemning some legislative proposal which these statesmen advocate. These well-meaning citizens are at a General Election placed upon the horns of a dilemma from which there is no practical escape. They must either banish from office men whose policy they in many respects approve, or else sanction the passing of a law they believe to be impolitic’.\textsuperscript{21}

The value of a referendum is to distinguish an individual policy from politicians who propose that individual policy. A referendum would have allowed a Liberal opposed to Home Rule to vote for the Liberals with a clear conscience, knowing that they had an opportunity to express their view on Home Rule at a referendum.\textsuperscript{22} However, this view expresses an almost Burkean view that the purpose of an election is to elect representatives based upon their character and to trust them to enact the policies for the good of the country. A General Election is concerned purely with the representatives and not with policy. But as Dicey himself states, a ‘General Election is an appeal to the people, and may

\textsuperscript{19} AV Dicey, ‘On the Morality of Unionism’ \textit{The Spectator}, 24 December 1887.

\textsuperscript{20} Vernon Bogdanor, \textit{The People and the Party System} (CUP 1981) 12.

\textsuperscript{21} AV Dicey, ‘Ought the Referendum To Be Introduced into England?’ (1890) 57 Contemporary Review 489, 495.

\textsuperscript{22} Indeed, the Liberal Party became irreversibly split on this issue, with the Liberal Unionist Party being formed in 1886, and formed the Unionist Government in coalition with the Conservatives in 1895-1910. In 1912, the Liberal Unionists merged with the Conservatives to form today’s Conservative and Unionist Party.
under peculiar circumstances be made to serve, through an awkward and imperfect manner, the purpose of a referendum’.\textsuperscript{23} He cites the notion that the ‘Great Reform Bill was carried by the General Election of 1831, that the Irish Church was disestablished by the verdict of the electors in 1868’.\textsuperscript{24}

However, after the Third Reform Act in 1885, party machinery was becoming more elaborate. This was embraced not only by the Conservatives, but also by the radical Liberals and Labour who recognised that ‘the growth of organised and powerful political parties caused the old idea of direct popular agitation to be eclipsed by that of the electoral mandate’.\textsuperscript{25} Furthermore, organising different issues into programmes, ensured that ‘progress could be secured across the board.’\textsuperscript{26} In a curious way, this:

‘…combined features of the classical Burkian view of the representative with the populist interpretation of politics propounded by the crusading Victorian radicals. MPs were by no means delegates, but they were nonetheless responsible to the wishes of the electorate. They were to exercise their discretionary judgement, but at the same time they were to follow the will of the people as refracted through the prism of the party. In the early twentieth century this constitutional interpretation was accepted as the prevalent orthodoxy’.\textsuperscript{27}

Despite Williams and Greenway arguing that ‘since 1945 the doctrine of the party mandate has somewhat fallen into disrepute’, there are two developments which question this statement. Firstly, the central party authorities have become increasingly dominant over a political party as a whole,

\textsuperscript{23} Dicey, \textit{Ought The Referendum to be Introduced into England} (n 21) 494.
\textsuperscript{24} ibid.
\textsuperscript{26} ibid.
\textsuperscript{27} ibid.
particularly over the selection of parliamentary candidates.\textsuperscript{28} This has reduced the scope for individual MPs to express the Burkean aspect of their role and supports the notion that the party mandate is still strong.\textsuperscript{29} General Elections have long ceased to be a vote for the constituency candidate in favour of a vote for a party.\textsuperscript{30}

It seems unfortunate that, at the time when the doctrine of the party mandate is said to have fallen into disrepute, it became the very rationale behind the Salisbury-Addison convention, which governs the relationship between both Houses of Parliament. The convention is that the House of Lords will not prevent a bill, which was contained in their manifesto from being given a Second Reading.\textsuperscript{31}

As Viscount Cranbourne stated, after Labour’s landslide General Election victory in 1945:

‘Whatever our personal views, we should frankly recognise that these proposals were put before the country at the recent General Election and the people of this country, with full knowledge of these proposals, returned the Labour Party to power. The Government may, therefore, I think, fairly claim that they have a mandate to introduce these proposals. I believe it would be constitutionally wrong, when the country has so recently

\textsuperscript{28} This was a central part of the New Labour project - see Tony Blair, \textit{A Journey} (Hutchinson 2010). For the Conservatives, see Mark Low ‘The Intricacies of the Local Parliamentary Candidate Selection Process in the British Conservative Party: An Organisational Approach’ (Political Studies Association Conference, London, April 2011 [http://www.psa.ac.uk/journals/pdf/5/2011/1093_585.pdf].

\textsuperscript{29} Although MPs appear to show a greater willingness than they have done at any point since 1945, see Philip Cowley and Mark Stuart, ‘Parliament: More Revolts, More Reform’ (2003) 56 Parliamentary Affairs 188.

\textsuperscript{30} With the development of the Prime Ministerial Debates held before the 2010 General Election, it could be argued that an election is increasingly a vote on the country’s opinion on each party leader.

\textsuperscript{31} See also, Chapter 5, fn 6.
expressed its view, for this House to oppose proposals
which have been definitely put before the electorate.\textsuperscript{32}

It is the inclusion of a policy in the manifesto, which gives the Government
of the day the cloak of political legitimacy to implement a particular policy. The
theory behind the convention is that, as the House of Lords is unelected, it
should not prevent Bills from being passed that have had express approval from
the electorate, who are said to have granted the Government a mandate on
which to act. Implicit in this theory is that elections are fought more on policies
than the character of an individual candidate.

2.2. The Mandate in Practice

Consequently, the theory behind the mandate is worth considering in
detail. For the theory to operate, some basic assumptions have to be made.
Firstly, that when a voter casts their vote in favour of a political party, they are
aware of the policies detailed in that party’s manifesto, and secondly that the
voter supports all of that party’s policies in the manifesto. Both of these
assumptions are false.

As the inclusion within a manifesto gives the succeeding party the
legitimacy to pursue that policy, it must also be assumed that the electorate,
when voting for that party, are aware of those policies in the first place. This
assumption, at its highest, could assume that the electorate has carefully read
each party’s manifesto and made an informed choice on this basis.\textsuperscript{33} Clearly,
this is unrealistic and, at best, voters could be assumed to have some
awareness of each Party’s respective campaigns. Generally, awareness is
gained through the prism of the media, which focuses naturally on the policy
areas of most interest to the readers, listeners and viewers. These flagship
areas include the economy, education, healthcare and crime. As the electorate

\textsuperscript{32} HL Deb, 16 August 1945, vol 137, col 47.

\textsuperscript{33} It has been suggested that even candidates do not read manifestos - Lord Rippon stated ‘In
modern times election manifestos, as I know, have become increasingly long and turgid and
are rarely read even by candidates themselves.’ HL Deb, 19 May 1993, vol 545, cols 1787-1788.
is ‘notoriously uninterested’ in the constitution, the media does not provide the electorate with the same opportunities to become informed about how the parties approach constitutional issues. Indeed, any significant debate on constitutional change is spectacularly lacking during General Election campaigns. So, it must follow that the mere inclusion of a proposal in a manifesto should not give the Government of the day a mandate to enact significant constitutional changes, without there being something else to confer legitimacy upon the Government’s proposals.

The second assumption is that when someone votes for a party, they are taken to have accepted the whole of that party’s manifesto. However, in practice, a voter may disagree with a significant proportion of a manifesto, but is willing to forgo those elements for the rest of manifesto they do support. Yet, a voter has no opportunity to express such nuances at the polling booth. So, a voter may vote for one political party because of their economic policy, but disagree with their policy on animal rights. However, their vote is deemed to be a vote for that policy on animal rights, and the elected political party claims a mandate from that voter to act upon their policy on animal rights despite not having any support for that policy. In this example, the voter is sacrificing their views on animal rights, which is seen as a less important issue for their views on the economy, which is perceived to be the important issue. Because of the extremely low level of voter interest in constitutional issues, this has significant consequences on the theory of the mandate when applied to constitutional change. It means that when choosing who to vote for, concerns about a particular policy on the constitution will be swept away by a voter’s support for policies regarding the economy or healthcare. Yet, the Government may seek to


35 This is far from being a new issue. A.H. Birch in 1964, detailed how in a poll of voters in Greenwich in 1950, found that only 49% of those intending to vote Labour agreed with Labour’s policy on nationalisation, and found that 61% of Labour voters agreed with the Conservative proposition that ‘[o]ur foreign policy should be based on “Empire First”’. Representative and Responsible Government (Unwin University Books 1964) 119-20, quoting Mark Benney, AP Gray and RH Pear, How People Vote (Routledge 1956) 140-1.

36 See Chapter 3, fn 27. Also, Vernon Bogdanor cites a 1997 poll that asked the British people ‘to rate the priority of various issues’, the constitution was ranked 14th out of 14th. Bogdanor, The New British Constitution (n 34) 6.
claim a mandate for their proposed constitutional changes, but in reality they have no such thing, as the electorate cast their votes for other policies.

This problem is exaggerated when all three parties include the same or similar policy in their manifestos. At the 2010 General Election, all three parties included a commitment (to varying degrees) to a wholly elected House of Lords.\textsuperscript{37} Yet it cannot be believed that 88.1\% of the electorate in terms of votes cast, or 90\% in terms of seats won support this particular policy.\textsuperscript{38} At times, it appears that Dicey was correct when he argued that ‘an assembly of freely chosen electors may fail to represent the nation’.\textsuperscript{39}

There are also broader problems with the idea of a mandate. As FPTP is used for General Elections, governments have obtained sizeable majorities in the Commons on a share of the vote as small as 35\%.\textsuperscript{40} This is especially the case when more than two parties attract significant support.\textsuperscript{41} The disproportionality of the electoral system can mean that despite a party having a majority in the House of Commons, there could be a majority of opinion against a policy in the country (even when assuming that all those that voted for the governing party agreed with that policy). In short, the assumption that the inclusion of a policy of constitutional change in a manifesto bestows it with political legitimacy does not stand up to any scrutiny.

2.3. Referendums to Resolve the Deficiencies of the Mandate

Consequently, to ensure constitutional change has a broader level of public acceptance, something more is needed. Referendums, by being outside


\textsuperscript{38} \textit{British Political Facts 1832-2012}, 59-60.

\textsuperscript{39} AV Dicey, ‘The Referendum and its critics’ (1910) Quarterly Review 538, 541.

\textsuperscript{40} See (n 3).

\textsuperscript{41} A look at election results detailed in \textit{British Political Facts 1832-2012} highlights how the growth in the vote of the Liberal Democrats (formally Liberal) and the nationalist parties has been at the expense of the two main parties. The consequence of this is that the share of vote required to win a majority at a general election has decreased.
of the ordinary political process, reflect the distinctive nature of constitutional change. Being focused on a single issue, a referendum can neutralise both of the assumptions of the mandate and the problems with mandate discussed above. The media have little option other than to cover the referendum ‘story’. Compare, for example, the discussion on the AV surrounding the referendum in May 2011 and the discussion on the single transferable vote as offered by the Liberal Democrats in their manifesto,\textsuperscript{42} and on the AV as offered by Labour.\textsuperscript{43} The second problem of party loyalty, as Dicey encountered in the 1890’s, is solved by taking issues away from party politics. The clearest example of this can be found with the 1975 referendum on whether Britain should remain a member of the EEC. The campaigns created some unusual alliances on both sides. Roy Jenkins and Willie Whitelaw were President and Vice President respectively of the Britain in Europe campaign,\textsuperscript{44} while the National Referendum Campaign (in favour of withdrawal) drew support as diverse as Enoch Powell and Tony Benn.\textsuperscript{45} Referendums allow politicians and voters to release themselves from the straightjacket of political parties and focus on a specific issue.

3. Referendums in Practice

The prevailing view among writers has been that the referendum has been used in the UK for purely political reasons. ‘All the referendums that have been held so far,’ Anthony King argues, ‘have been held to suit the interests of one or other party ... No referendum has ever been held or even promised because the entire political class or sections of it have made out a convincing case, even to themselves, that abstract constitutional principles required one to be held’.\textsuperscript{46} It must be noted that King was writing in 2007. Since then referendums have been held on whether to increase powers to the Welsh Assembly and on

\textsuperscript{42} Liberal Democrats (n 37) 87-88.

\textsuperscript{43} Labour Party (n 37) 9:3.

\textsuperscript{44} David Butler and Uwe Kitzinger, \textit{The 1975 Referendum} (Macmillan 1976) 74.

\textsuperscript{45} ibid, 109.

\textsuperscript{46} Anthony King, \textit{The British Constitution} (OUP 2007) 295.
adopting AV for General Elections (both in 2011). Further, referendums are now a mandatory requirement under the European Union Act 2011. Consequently, it is worth revisiting the use of referendums and consider whether these recent developments either affirm or challenge this orthodoxy.

3.1. Europe

3.1.1. 1975

The circumstances surrounding the referendum on the Common Market in 1975 remain a clear example of the referendum being used for tactical purposes. In June 1970, the Conservative Government led by Edward Heath took up the invitation accepted by the previous Labour Government to formally begin negotiations to join the EEC.\textsuperscript{47} As far as the parliamentary process was concerned, a vote in favour of the principle of joining was held in the House of Commons in October 1971 and the details of the terms of the Accession were given political approval when the European Communities Bill received its third reading in July 1972 by majority of fifteen.\textsuperscript{48} However, these bare facts belie the more complex nature of the politics of the day. Whilst the Conservative Party had its own members who were doubtful about joining, the Party as a whole was going through its strongest pro-European phase, and it was Labour that was bitterly divided. Labour’s policy shifted to renegotiating the terms of entry, without a referendum.\textsuperscript{49} Then, opinion amongst the upper echelons of the Labour Party lurched suddenly towards a referendum, as the Shadow Cabinet rejected Tony Benn’s suggestion of a referendum on 15 March 1972, only to overturn this decision on 29 March 1972. This prompted the resignation of three members of the Shadow Cabinet, including the Deputy Leader, Roy Jenkins.\textsuperscript{50} The great schism was there for all to see, and the idea of a referendum was the punch bag over which to fight. As King states, the ‘pro-European section, led by Roy Jenkins, opposed the holding of a referendum because then state of public

\textsuperscript{47} Butler and Kitzinger (n 44) 6-7.
\textsuperscript{48} ibid, 7.
\textsuperscript{49} ibid, 13 - 17.
\textsuperscript{50} ibid, 18 - 19, describe in detail the manipulation of the party machinery and how two members of the shadow cabinet avoided the issue altogether simply by not attending shadow cabinet meetings.
opinion suggested that, if a referendum were held, the pro-Europeans would lose it. The anti-European section, led latterly by Tony Benn, favoured the holding of a referendum for the same reason.\(^5\) The referendum became ‘a rubber life-raft into which the whole party may one day have to climb’.\(^52\) Indeed, this rubber life raft sailed a long way away from Dicey or any constitutional principle.

At both General Elections in 1974, Labour made a commitment to renegotiate the terms of membership and then allow the British people to ‘decide the issue through a General Election or a Consultative Referendum’.\(^53\) Or just as vaguely, ‘at the ballot box’.\(^54\) Once a slim majority of four was secured after the October 1974 election, negotiations were concluded in March 1975, a referendum was legislated for and held in June 1975. Throughout this time, the Conservatives maintained a distant stance opposing the ‘principle of holding a referendum on the issue but ... went out of their way not to give the details of the enabling legislation too bumpy a ride’.\(^55\) John Peyton, the Conservative spokesman summed up the position thus:

‘I must remind the Government for how much they are indebted to the Opposition for the exceedingly reasonable, restrained and sensible way in which they received a Bill which was based on a rather unwelcome dodge and device adopted by the Prime Minister in a moment of difficulty for himself’.\(^56\)

Of course, this position was justified as the Conservatives began to see that they would be on the winning side.\(^57\) The irony remained that as the vote

\(^{51}\) King (n 46) 282.  
\(^{52}\) Butler and Kitzinger (n 44) 12.  
\(^{53}\) Labour Party General Election Manifestos, 1900 - 1997, 187 (February 1974),  
\(^{54}\) ibid, 211 (October 1974),  
\(^{55}\) King (n 46) 283.  
\(^{56}\) HC Deb 7 May 1975, vol 981, col 1579 quoted in Butler and Kitzinger (n 43) 67.  
\(^{57}\) King (n 46) 283.
was overwhelmingly in favour of retaining membership; those who initially campaigned for a referendum unwittingly gave the pro-Europeans the opportunity to remove any doubts over the legitimacy of the original decision to enter in 1972. Yet, some did not believe it created a precedent as in 1983, Labour advocated withdrawing from the EEC without a referendum.  

3.1.2. Two Referendums That Never Happened

The next time the issue of Europe became entangled with referendums was during the run-in to the 1997 General Election. This time, it was the Conservatives who were bitterly fractured into two camps. After the struggle to ratify the Maastricht Treaty, the next issue was whether to enter into the Economic and Monetary Union and the Euro as anticipated by the Maastricht Treaty. As the 1997 General Election approached, Major announced in 1996 that Britain would not join the Euro unless the people agreed in a referendum. Major had three reasons for this:

'I believed that entering the single currency was a constitutional change of such magnitude that consent for it could not properly be obtained in the broad-bush decisions of a General Election. Moreover, if we entered the single currency and, like the ERM, it went pear-shaped, the future of the party would be more secure if a specific mandate had been obtained. It must also be stated that I

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58 The vote was 67.2% in favour compared to 32.8% against, *British Political Facts 1832-2012*, 241-2.

59 *Labour Party General Election Manifestos, 1900 - 1997*, 281. However, it must be noted that Labour’s share of the vote in 1983, of 28.7%, is still Labour’s worst result since 1918, *British Political Facts 1832-2012*, 61.

60 For example, a vote on an opposition amendment to the Maastricht Treaty (European Communities) Amendment Act 1993 resulted in a tie on 317. This led the Speaker to cast her deciding vote against the amendment, inline with previous precedents one the basis that 'it is not the function of the Chair to create a majority on a policy issue where no majority exists amongst the rest of the House', HC Deb, 22 July 1993, vol 229, col 606. However, it was revealed a day later that the votes had been calculated wrongly, and the Government did indeed have a majority of 1 against the amendment, HC Deb 23 July 1993, vol 229, cols 621-2. See also *Erskine May* 420-3.
hoped the decision would ease the tensions within my own party’.\textsuperscript{61}

As King says; ‘the last reason was, of course, the first’.\textsuperscript{62} But the impact of this went far beyond Major’s party. It placed the Labour leader, Tony Blair in a difficult situation. Labour had adopted a more pro-European stance by this time\textsuperscript{63} and, personally, Blair was cautiously supportive of the Euro. However, the idea of the Euro remained resolutely unpopular with the British public, and with Blair remaining cautious about Labour’s prospects at the 1997 election, he decided that had no option other than to follow Major and promise a referendum.\textsuperscript{64} This had two main consequences: firstly, it ensured that a vote for Labour could not be viewed as a vote for the Euro,\textsuperscript{65} and secondly, it would guarantee the electorate that a referendum would be held before Britain joined the euro. Should a future Government have decided to join, the people would have had a veto over the Government’s decision. In this way, Dicey’s view that the referendum could become the ‘People’s Veto’ came to fruition.\textsuperscript{66} Once this situation has been reached, there is a sense of a continuing referendum. Once a referendum on the Euro was guaranteed, the ‘People’s Veto’ took effect immediately. As long as public opinion was against joining, the issue was seldom raised. All politicians knew that if their recommendation to enter the Euro were rejected by the people, then their position would become untenable. The harsh reality is that because the people were (and still are) against the membership, the referendum has never happened. Not making a decision to


\textsuperscript{62} King (n 46) 282.

\textsuperscript{63} For example, the manifesto commitment to sign The Social Chapter, \textit{Labour Party General Election Manifestos} 379.

\textsuperscript{64} The 1997 manifesto says ‘first, the Cabinet would have to agree; then Parliament; and finally the people would have to say, “Yes” in a referendum’, \textit{Labour Party General Election Manifestos}, 380. A critical part as to whether the Cabinet would agree would be the approval of Gordon Brown, who had set out ‘five economic tests’ that needed to have been met. See HC Deb 27 October 1997, vol 299, cols 583-4, and Ed Potton and Adam Mellows-Facer, ‘The euro: Background to the Five Economic Tests’ (House of Commons Library, Research Paper 03/53 [http://www.parliament.uk/documents/commons/lib/research/rp2003/rp03-053.pdf]).

\textsuperscript{65} William Hague’s 2001 General Election campaign based on ‘Keep the Pound’ largely failed because the electorate realised that Labour would offer a referendum on the issue anyway.

\textsuperscript{66} Mads Qvortrup, ‘A.V. Dicey: The Referendum As the People’s Veto’ 20 History of Political Thought 531.
hold a referendum can sometimes be as powerful as holding a referendum. In this way, the electorate has had a more profound impact upon one of the most significant economic and foreign policy issues of the past 20 years than it may immediately appear. In light of the financial crash of 2008 and its consequences for the Eurozone, perhaps Dicey was right when he said that; ‘the heart of England is sound, and hope that the veto of the nation, may ... rescue the constitution from the perils with which it is threatened.

While both Major and Blair offered a referendum for the politically expedient reason of wanting to avoid the issue dominating the election, the actual effect of this ‘gentleman’s agreement’ was actually a profound constitutional change. For the first time since the introduction of universal suffrage, it was agreed that an issue was of such significance that it transcended a General Election.

This profound change could be seen with how Blair approached the proposed EU Constitution. ‘With deep misgivings’ Blair later wrote, ‘I accepted we had to promise a referendum on it. We wouldn’t get the Constitution through the House of Lords without it, and even the Commons vote would have been in doubt’. This became the second referendum that never happened, as following the votes against the Constitution in The Netherlands and France, the Second Reading on the Bill providing for a referendum was delayed indefinitely. Instead of conceding a referendum as legislation progressed through Parliament (in the way devolution was handled in the 1970s), Blair was forced to offer a referendum from the outset in response to demand. This demand was as much sparked by ‘abstract constitutional principle’, as it was by consistency. If the people were offered their say over the Euro, they should be offered their say over the Constitution.

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67 King (n 46) 285.
68 AV Dicey, The Referendum and its Critics (n 39) 562.
69 Tony Blair, (n 28) 501.
70 HC Deb, 6 June 2005, vol 434, cols 991-992.
71 There is also the more prosaic issue of timing. If the people were to have their say, an election was required to be held within the following 18 months. The only way the views of the
After a ‘period of reflection’ the decision was taken by the European Council to abandon the idea of a Constitution and amend the existing Treaties to include many of the initiatives of the Constitutional Treaty.72 This sparked the question of whether this new Treaty would also require a referendum. Speaking to the Liaison Committee, Blair was clear that if certain objectives were achieved, it would not require a new referendum:

‘…[w]e will not accept a Treaty that allows the Charter of Fundamental Rights to change UK law in any way. Secondly, we will not agree to something which displaces the role of British foreign policy and our Foreign Minister. Thirdly, we will not agree to give up our ability to control our common law and judicial and police system. Fourthly, we will not agree to anything that moves to Qualified Majority Voting, something that can have a big say in our own tax and benefit system, we must have the right in those circumstances to determine it by unanimity. Now, those are four major changes, obviously, in what was agreed before... If we achieve those four objectives I defy people to say what it is that is supposed to be so fundamental that could require a referendum’.73

When he became Prime Minister, Gordon Brown continued with this approach, stating that if the four objectives raised by Blair were fulfilled then, ‘that means just in the case of all the other amending Treaties, the Nice and Maastricht and so on, that the people would not therefore expect there to be a referendum’.74

people could be ascertained in a timely manner, by voting was via referendum. This will become a more important consideration following the Fixed-term Parliaments Act 2011.

73 Liaison Committee, Oral Evidence from the Rt Hon Tony Blair MP (HC 2006-07, 300-ii) Q171.
These four objectives and the approaches of Blair and Brown reveal something interesting. If the four objectives were achieved in the negotiations, there would be nothing ‘so fundamental as to require a referendum’. This implies that had these objectives not been met, a referendum would be required. While it is arguable that the four objectives were framed in such a way as to ensure they would be fulfilled and a referendum would not be held, this could also have been the emergence of a doctrine regarding referendums and the EU. The possible adoption of the Euro and the Constitutional Treaty were of such fundamental importance to require a referendum, yet any Treaty that fulfilled these four objectives would not. In this sense, it can be argued that this is the point where Labour felt that the mandate obtained from the 1975 referendum ran dry. The net effect of the discussions over the Euro and the Lisbon Treaty is that both parties, particularly since the Maastricht Treaty, have kept dangling a referendum on the EU tantalisingly out of reach of the electorate, as it has been in the their political interest.

Yet, this prolonged debate since the 1990s has had one fundamental consequence. Unlike 1983, no political party will propose withdrawing from the EU without a referendum, not even UKIP whose entire raison d’être is to withdraw from the EU.\(^{75}\) While it is clear in which way a UKIP Government would campaign, UKIP accept that even the highly unlikely event of the UKIP majority would not be sufficient to withdraw from the EU, as a referendum would be required. In particular, the acceptance of a referendum on the Euro has solidified the requirement that a referendum would be required for withdrawal from the UK. A similar point can be made about the Scottish National Party and Scottish independence, whereby the SNP have campaigned for independence, appreciating that the election of a majority of MSPs or Scottish MPs would not be sufficient independence on its own, and that a referendum is required.\(^{76}\) The election of a majority SNP Government at Holyrood has given the SNP the

\(^{75}\) UKIP, General Election Manifesto 2010 (UKIP, 2010) 2. Although Nigel Farage has since described the 2010 manifesto as ‘drivel’, the core policy of UKIP of holding a referendum on EU membership remains. See BBC News, “Nigel Farage: 2010 UKIP Manifesto was “drivel””, (24 January 2014) [http://www.bbc.co.uk/news/uk-politics-25879302].

platform on which to hold an independence referendum rather than seek independence itself. Clearly, whether to promise a referendum on membership of the EU is a decision that is clearly highly political, but the environment in which that decision is made has been tightened since 1975 or 1983.

3.1.3. The European Union Act 2011

It is now clear that a referendum on withdrawing from the EU or adopting the Euro is required. However, the EU is a more complex issue than simply a question of being ‘In or Out’, or joining the Euro, especially as long as the commitment to an ‘ever closer Union’ exists. The EU is a dynamic collection of institutions, and through a series of treaty revisions has changed almost out of all recognition since Britain joined the EEC in 1973. The issue is whether there is an agreed threshold that will trigger a referendum before there is any further integration. At the very least, the ‘four objectives’ discussed above have received tacit agreement from the Conservatives (and by the Liberal Democrats by virtue of being in the Coalition) in the form of the European Union Act 2011. Firstly, the very enactment of the Act is an indication of Conservative acquiescence to the ratification of the Lisbon Treaty. In addition, the ‘four objectives’ are all covered by this Act. It does this by ensuring that should there be a major treaty revision that seeks to expand the objectives or competences of the EU, then that would trigger a referendum. Had a similar provision been in place at the time, a referendum would have been a legal requirement before the Maastricht Treaty could have been ratified. Moreover, the conferring of new shared competencies on the EU in the Constitutional Treaty in the fields of territorial cohesion, energy and space, would also have

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77 European Union Act 2011 s 6 (5) (e) requires in law a referendum on whether to adopt the euro.

78 Indeed, once it was ratified in December 2009, under international law, there was little the Conservatives could do when they entered government in May 2010.

79 Although there is concern about the application of the Fundamental Charter of Human Rights in UK Law, see House of Commons European Scrutiny Committee, The Application of the EU Charter of Fundamental Rights in the UK: A State of Confusion (HC 2013-14, 979).

80 European Union Act 2011, s 2 and s 4.

81 This is because the Maastricht Treaty conferred upon the newly created European Union competences in new policy in the two new ‘pillars’ of Justice and Home Affairs and Common Foreign and Security Policy.
triggered a referendum.\textsuperscript{82} In so far as the EU Act covers the ‘four objectives’, it could be argued that there are the tentative outlines of an agreement as to when a referendum would be required. However, the structure of the Act is such that any treaty amendment that transfers a further power or competency from the UK to the EU will, in certain circumstances, trigger a referendum.\textsuperscript{83} This goes further than the ‘four objectives’, but it appears that Labour have accepted the terms of the EU Act. In a speech, Ed Miliband has promised that a Labour Government would ‘legislate for a new lock. Not simply a referendum on any treaty change proposing a transfer of power … But a lock that guarantees that there will be no transfer of powers without an in/out referendum’.\textsuperscript{84} As yet, there are no more details of this policy, but this goes further than the EU Act. Considering Miliband's explanation, it could be enacted in law by amending the EU Act so that instead of the provisions of the Act triggering a referendum on the proposed treaty amendment,\textsuperscript{85} the referendum triggered by the Act would be an ‘In or Out’ referendum.

However, the point about tantalisingly dangling referendums in front of the electorate remains, for the arbiter of whether there should be a referendum under the EU Act is the Government of the day. As the explanatory notes to the EU Act stated:

‘A referendum would only be required if the Government of the day wanted to support the treaty change in question. If the Government of the day did not want to support the change in question, it would block the proposal at the negotiations stage.’\textsuperscript{86}

\textsuperscript{82} Treaty Establishing a Constitution for Europe [2004] OJ C316/1, Art 1-14.
\textsuperscript{83} European Union Act 2011, s 4.
\textsuperscript{85} European Union Act 2011, s 12 provides for separate questions 'in relation to each treaty or decision'. Sections 2, 3 and 6 are clear in that a referendum question would be held on the specific decision or treaty amendment.
\textsuperscript{86} Explanatory Notes to the European Union Act 2011, para 20.
They also stated that:

‘All the types of treaty change that are to be subject to the referendum provisions would have to be agreed by unanimity at the EU level, the proposal could not form part of a new treaty or a treaty change - and there would then be no need for a referendum’. 87

Consequently, referendums held under the EU Act are likely to be those that the Government believes it will win. Furthermore, a Treaty change that confers only on an EU institution ‘power to impose a requirement or obligation on the United Kingdom’, 88 or a ‘new or extended power to impose sanctions on the UK’, 89 will not be subject to a referendum, if in the Minister’s opinion the effect of the provision on the UK is not ‘significant’. 90 The reasons for such a decision must be contained in a statement presented to Parliament. 91

Of course, not everyone may agree with the Minister’s assessment raising the prospect a decision being judicially reviewed in a similar manner to R (on the Application of Wheeler) v Prime Minister and Foreign Secretary. 92 In Wheeler, an individual challenged the decision of the Prime Minister and Foreign Secretary not to hold a referendum on the Lisbon Treaty. The High Court was unmoved by the somewhat tenuous ground that because there was a promise to hold a referendum in respect of the Constitutional Treaty, there was an implied promise in respect of the Lisbon Treaty, 93 citing statements by the Prime Minister that if any new Treaty was merely a revising Treaty, it would not require a referendum. 94 The Court then considered whether there was any substantial difference between the two Treaties. The Court summarised the

87 ibid.
88 European Union Act 2011, s 4 (1) (i).
89 ibid, s 4 (1) (j).
90 ibid, s 3 (4) (b).
91 ibid, s 5.
93 ibid, [25] - [29].
94 ibid, [12].
factual differences but asked the question ‘how is it to assess the materiality of the differences that it finds?’ It concluded that; ‘[W]e doubt whether the correctness of such an assessment is a justiciable issue at all. At best it is a matter to be approached on a *Wednesbury* basis: and on that basis we are far from persuaded that the assessment is an unreasonable one’.  

In *Wheeler*, attention was focused on the European Parliamentary Elections Act 2002, s 12. This section, (now repealed by the EU Act 2011) required an Act of Parliament to be passed approving the ratification of any Treaty that increased the powers of the European Parliament. It was conceded by counsel for the Prime Minister and Foreign Secretary, Jonathan Sumption QC (now Lord Sumption SCJ), that a decision to ratify any such Treaty without the approval of an Act of Parliament would be amenable to review. This raises the possibility that any decision not to put a proposed Treaty amendment to a referendum on the grounds that it falls outside the scope of s 4, which states when a Treaty change attracts a referendum, would also be amenable to a review.  

The issue is to what level of scrutiny is the judgement of the Minister to be subjected. In *Wheeler*, the Court left this question open; ‘the limits of reviewability should be determined on a case by case basis if and when the need arises’. The nature of the decision asked by the Act could require the Courts to make a finely-balanced decision. For example, s 4 (4) (a) states that a Treaty or Article 48 (6) amendment does not trigger a referendum merely because it involves ‘the codification of a practice under TEU or TFEU in relation to the previous exercise of an existing competence’. But in the febrile atmosphere in which membership of the EU is increasingly being discussed, others could view what a Minister considers to be a mere codification as a

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95 ibid, [34].
96 ibid, [37].
97 ibid, [55].
98 Indeed the explanatory notes anticipate that ‘it would be possible for a member of the public to challenge in the Courts the judgement of the Minister as provided in the statement’. Explanatory Notes to the European Union Act 2011, [67].
99 Explanatory Notes to the European Union Act 2011, [55].
savage assault on the supremacy of Parliament. Further, even if the Courts continue to adopt a *Wednesbury* test,\(^{100}\) the policy of the Act, in a Machiavellian way, is still furthered. In other words, it makes it more difficult to transfer further competencies to the EU institutions, as any review would inevitably cause a delay.\(^ {101}\)

The EU Act may also lead to unforeseen consequences. Section 4 (4) (c) states that a Treaty or Article 48 (6) decision does not fall within this section merely because it involves ‘in the case of a Treaty, the accession of a new Member State’. However, the use of ‘merely’ indicates that should a Treaty do something more than this, consequent to the accession of a new Member State, then a referendum would have to be called. The Explanatory Notes to the Act support this notion.\(^ {102}\) Clearly, this section covers consequential amendments to the Treaties, but it does create some interesting questions. For example, would amending the number of commissioners beyond what is provided in the Treaties go further than merely allowing for the accession of a new Member State?\(^ {103}\) It also creates a far-fetched scenario whereby an independent Scotland wishes to accede to the EU, but the Accession Treaty triggers a referendum under this section.\(^ {104}\) Notwithstanding the above, the Act is a clear

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\(^{100}\) *Associated Provincial Picture Houses v Wednesbury Corporation* [1947] 1 KB 223.

\(^{101}\) In *Wheeler* (n 82), the Court was concerned that the ‘government might be intending to pre-judge or pre-empt the decision of the court by ratifying the treaty while the lawfulness of doing so without a referendum was still in issue before the court’ [58]. However the Prime Minister made it clear that ratification would only take place after the judgement was handed down.

\(^{102}\) The Explanatory Notes to the European Union Act 2011, at 64, gives the example of amending the number of Members of the European Parliament to accommodate a delegation from the new Member State.

\(^{103}\) One reason for the Irish rejection of the Constitutional Treaty was that it would mean that Ireland would not be guaranteed a commissioner in future. The Lisbon Treaty retained the principle of one Commissioner per Member State at least until October 2014, see TEU Article 17 (4).

\(^{104}\) Jean-Claude Piris, former Director General of the Legal Service of the EU Council, in written evidence to the Scottish Parliament’s European and External Relations Committee, describes how the ratification of an admission treaty to the EU must meet the requirements of each Member State’s constitution. In the case of the French Constitution, Art 88 (5) requires a referendum and not a vote of the French Parliament. However, the referendum requirement is negated if both houses pass a motion by three fifths to follow the procedure described under Art 89 (3) for a constitutional amendment. This allows for a constitutional amendment to be passed by both chambers sitting in Congress with a three fifths vote without a referendum, European and External Relations Committee, *Report on the Scottish Government’s proposals for an independent Scotland: membership of the European Union* (2nd Report, 2014, Session 4, SP Paper 530), Evidence of Jean-Claude Piris,
obstacle to any further competencies being transferred from the UK to the EU.\footnote{105}

Finally, given the emergence of UKIP,\footnote{106} the debate over the EU is turning increasingly towards holding an ‘In or Out’ referendum. The Conservatives are under increasing political pressure to hold a referendum,\footnote{107} with David Cameron promising that, if re-elected as Prime Minister in 2015, he would seek to renegotiate Britain’s terms of membership holding an ‘In or Out’ referendum in 2017. It would depend on the outcome of the negotiations as to which side of the argument he would campaign for.\footnote{108}

Considering that the 1975 referendum was considered to be an experiment not to be repeated, 40 years of political debate appear to be arriving at an almost identical position as in 1975, only with the referendum being promised by a different political party. From the above discussion, it can be seen that referendums and membership of the EU are intertwined in a complex and difficult relationship. The fact that the tone of the debate is about whether there should be an ‘In or Out’ referendum or that a referendum should be required before further powers are transferred to the EU, shows how much reliance is now placed on the referendum as the mechanism to resolve the issue. Clearly, politicians will choose when to hold a referendum, selecting a time that is most amenable to their objectives and campaign. However, David

\footnote{105}{Indeed, the Act anticipates that a treaty or simplified revision procedure (under Article 48 (6) TEU) amendment that only ‘applies only to Member States other than the United Kingdom’ would not trigger a referendum, see. s. 4 (4) (b). This section allowed the Government to approve without a referendum, the Article 48 (6) TEU Council Decision 2011/199/EU which amended Article 136 TFEU, to allow for the creation of a European Stability Mechanism for Eurozone countries. HC Deb 13 October 2011, vol 533, c42WS.}

\footnote{106}{As shown by the 2014 European Parliament elections, where UKIP came first with 27.5% of the vote (excluding Northern Ireland where the STV electoral system is used rather than regional party list system used in the rest of the UK), BBC News, Vote 2014.}

\footnote{107}{For example, David Cameron suffered a rebellion of 81 Conservative MP’s on a motion to hold a referendum on whether to remain, withdraw or renegotiate Britain’s membership of the European Union. HC Deb 24 October 2011, vol 534, col 140.}

\footnote{108}{David Cameron, EU Speech at Bloomberg, 23 January 2013.}
Cameron’s promise of a referendum in 2017 is symptomatic of politicians accepting that General Elections trigger referendums rather than resolving issues. It is now accepted that there are issues of such fundamental importance that it can be resolved only through a referendum.

3.2. Devolution

Unlike with the EU, many more referendums have been held on devolution. Indeed, the first one held in the UK was referred to as a ‘border poll’ rather than a referendum. This reflected the circumstances of the 1973 Northern Ireland Border Poll, which asked voters in Northern Ireland whether they wished to remain in the UK. It is perhaps natural to consider that the particular circumstances surrounding the 1973 poll meant that this was an exceptional case, with little in common with the rest of the UK’s experience of the referendum. However, this would be incorrect on two counts. Firstly, Butler and Kitzinger highlight how the Conservative Government discussed and announced the series of border polls envisaged by the Northern Ireland Constitution Act 1972. This was around the time the internal machinery of the Labour Party, particularly its National Executive, came to support the idea of referendum on entry into the EEC.\(^{109}\) While this may have been purely party political, aiming to take advantage of a difficult period for the Government,\(^ {110}\) the announcement of a referendum on one issue could only have encouraged those who were seeking a referendum on accession to the EEC. The second impact of the Border Poll was that it formed an expression of the principle of self-determination for the Northern Irish people, now guaranteed in law under s 1 of the Northern Ireland Act 1998.\(^ {111}\) This principle received, and continues to receive full support from all three major parties in Westminster, and the 1998 referendum in Northern Ireland on the Good Friday Agreement remain the clearest examples of the referendum being used for principled reasons in the

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\(^{109}\) Butler and Kitzinger (n 44) 18.

\(^{110}\) That of high unemployment, the aftermath of ‘Bloody Sunday’ and difficulties getting the Housing Finance Bill through Parliament - Butler and Kitzinger (n 33) 18.

\(^{111}\) s. 1 states, ‘[i]t is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section’. This re-enacts the constitutional guarantee contained in the Northern Ireland Constitution Act 1973, s 1.

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United Kingdom, and fulfil a role that representative democracy was singularly unable to do in Northern Ireland.

3.2.1. 1979

1979 saw referendums on devolution held in Scotland and Wales. Following the gains made by the nationalist parties in Scotland and Wales respectively, the Labour Government sought to respond to (what they viewed as) a resurgence of nationalist sentiment. To this end, the October 1974 Labour Manifesto contained a commitment to introduce directly-elected assemblies in Scotland and Wales. Again, the Labour Party, particularly the Welsh contingent, was deeply divided on a constitutional question. The original attempt at fulfilling this manifesto commitment was to introduce one Bill covering both nations as a Scotland and Wales Bill.\(^{112}\) This ensured the Welsh rebels would have to scotch a Scottish Assembly as well as the Welsh equivalent. This was not a popular course of action, as the Scottish Assembly was considered the only method by which the rapid emergence of the Scottish Nationalists could be contained. However, this position became unstable, and a Government with a majority of three was forced by the Welsh rebels to concede a referendum for both Scotland and Wales.\(^{113}\) This allowed those who were against the Welsh Assembly to vote for the Bill, safe in the knowledge that they could campaign against it in the following referendum. This led to the peculiar situation, as described by Enoch Powell of,

‘... members openly and publicly declaring themselves opposed to the legislation and bringing forward in the debate what seemed to them cogent reasons why it must

\(^{112}\) Bogdanor, *The People and the Party System* (n 7) 48.

\(^{113}\) In a stark example of how the 1975 referendum changed the constitution, The Chairman of Ways and Means, ruled on a Point of Order that the decision to allow the amendment to the Bill requiring a referendum was in order despite being cited previous precedents from Erskine May that ‘amendments to a Bill proposing that the provisions of a Bill should he subject to a referendum have been ruled out of order as proposing changes in legislative procedure which will be contrary to constitutional practice’. The basis for ruling the amendment in order was on the basis ‘that the Referendum Act 1975 has largely destroyed the basis upon which the previous rulings were given’. HC Deb 10 February 1975, vol 925, col 674, Sir David Lidderdale, *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (19th edn, Butterworths, 1976) 523.
prove disastrous, voted nevertheless for the legislation and the guillotine, with the express intention that after the minimum of debate the Bill should be submitted to a referendum of the electorate in which they would hope and strive to secure its rejection.\footnote{114}

Ultimately, the combined Bill ran out of time before the end of the 1976-1977 session.\footnote{115} In the following session, the Government was conscious of being short of parliamentary time, and so introduced separate Bills for Scotland and Wales that included provision for a referendum. The most interesting aspect of the reintroduced Bills was the Cunningham Amendment, which provided that should less than 40\% of the electorate voted ‘Yes’ for the Assembly, the Secretary of State shall lay an Order in Council for the repeal of the Act. Ultimately, this amendment thwarted the establishment of the Scottish Assembly from being established as only a narrow majority of 51.6\% of those voting voted in favour of the Assembly on a turnout of 63\%, which meant that only 32.8\% of the electorate had voted for the Assembly.\footnote{116} When the Conservatives returned to power, devolution and referendums remained off the radar.\footnote{117}

3.2.2. 1997 to 2011

A centrepiece of the manifesto of the Labour Government of 1997 was its commitment to introduce devolution in Scotland and Wales. Blair decided to change approach and hold a referendum on a Scottish Parliament and Welsh Assembly \textit{before} introducing the necessary legislation into Parliament with a pre-legislative referendum.\footnote{118} This had two complementary consequences. Firstly, it was an attempt to garner the level of support for the proposed

\footnote{114} Quoted in Bogdanor, \textit{The People and the Party System} (n 7) 50.

\footnote{115} HC Deb, 22 February 1977, vol 926, col 1362.

\footnote{116} The Certificate of the Chief Counting Officer (Cmnd 7530, 1979-80) cited in \textit{British Political Facts} 1832-2012, 243.

\footnote{117} However, there was a considerable support for a referendum on the Anglo-Irish Agreement in 1987, House of Commons Library, Northern Ireland: Developments Since 1972, (Research Paper 98/57) 31.

\footnote{118} Referendums (Scotland and Wales) Act 1997.
devolved institutions. If there were little support, then parliamentary time would not be wasted on a measure that was ultimately doomed to failure. The second consequence was to neuter opposition to the proposals once they received explicit approval of the electorate. While the timing may appear politically expedient, the holding of a referendum on devolution in and of itself by 1997 had become uncontroversial. This was because referendums were held on the very same issue in 1979, and one was likely to be held on a similar issue in Northern Ireland (albeit in very different circumstances). Referendums had become a necessary condition before the introduction of devolution in Scotland and Wales.

This was precisely the same rationale for holding a referendum before introducing elected regional assemblies in England. The White Paper drew upon the experience in Scotland and Wales as a justification for holding a referendum.\(^\text{119}\) The White Paper also indicated that as ‘interest in elected regional assemblies varies considerably across England’, it would not hold referendums in regions where the proposal was received with little enthusiasm.\(^\text{120}\) After initially indicating that referendums would be held in three regions,\(^\text{121}\) only one referendum, in the North East was held. The result was a resounding 77.9\% vote against a regional Assembly,\(^\text{122}\) leading to the proposal for elected regional assemblies being rejected, and the repeal of the legislation that provided for further referendums.\(^\text{123}\)

There are two interesting consequences of this referendum. Firstly, it provides a further precedent of a referendum on a further form of devolution. Should future governments revisit this issue, these precedents will be hard to


\(^{120}\) Ibid, para 9.2.


\(^{122}\) _British Political Facts 1832-2012_, 249.

ignore. The second consequence is that it provides a classic example of the weaknesses of the doctrine of the mandate, as discussed above. In the 2001 General Election, Labour returned 28 of the 30 seats from the North East on a 59.4% share of the vote.\textsuperscript{124} Yet, this amount of support for Labour was insufficient to ensure Labour’s policy of regional assemblies was implemented when separated from all other issues.

In many respects, compared with the other referendums, the two oddest devolution referendums held during this period are those on increasing the powers granted to the Welsh Assembly in March 2011, and the creation of the Greater London Authority and the office of the Mayor of London in May 1998. Their peculiarity is because the positive result in favour was never in doubt. For the 2011 Welsh Assembly referendum, the one applicant to become the ‘designated organisation’ for the ‘No’ campaign, under the Political Parties, Elections, Referendums Act 2000 was rejected by the Electoral Commission as the individual would have campaigned ‘No’ on the basis that the proposed law-making powers did not go far enough, because they would not equal the powers of the Scottish Parliament.\textsuperscript{125} In these circumstances, it was understandable that there was little tension when the inevitable ‘Yes’ victory was announced.\textsuperscript{126} Similar circumstances surrounded the referendum in London. As all three major parties were in favour of introducing the GLA and directly elected mayor, one London MP claimed that the low turnout at the referendum of 34.1% could be ‘attributed not to apathy but to certainty’.\textsuperscript{127}

\textsuperscript{124} \textit{British Political Facts 1832-2012}, 207.

\textsuperscript{125} This failed the requirement under the PPERA 2000, s 108 that the lead campaign groups has to adequately reflect the shades of opinion for that side of the argument, see Electoral Commission, ‘Board Minutes - No 3: 2011 Welsh Referendum - Designation’, (25 January 2011) 16 [http://www.electoralcommission.org.uk/_data/assets/pdf_file/0006/107934/Designation-Paper.pdf]. This meant that no campaign organisations for either side acquired designated organisation status, and the benefits that that status bestows under the PPERA 2000.


The issue then becomes one of why these two referendums were held. If, as the conventional view alleges, referendums are held when it is politically expedient to do so, it would follow that if the result is obviously in favour, the politically expedient course of action would be to just enact the policy in question rather than devoting time and resources to a referendum. Although, in both of these cases, the result was positive and line with Government policy, another analysis is needed. The political scientist, John Curtice, when discussing the Scottish referendum of 1997, provides such an analysis:

‘… one ingredient vital to the future success of devolution is that it should have the legitimacy in the eyes of the public. By this we mean that the public accept that the institutional arrangements under which they are governed are an appropriate mechanism for making political decisions, such that they accept the right of a body to made a decision even when they disagree with the outcome’.129

Both referendums were the method by which this legitimacy was ensured. Indeed, it is notable that the position of the Mayor of London has become a high-profile position that has made its two officeholders (thus far) into national political figures. As regards the Welsh referendum, this was a requirement under the Government of Wales Act 2006. This was a rare example of a procedure being designated for a fundamental constitutional change. It required 66% per cent of Assembly Members to vote in favour of a referendum before one could be held.130 The aim was to ‘settle for a generation the distracting debate over the extent over the extent of the Assembly’s powers’ and that by establishing a procedure for introducing primary powers, ‘the onus [was placed] on the supporters of change to win the argument’.131 These two instances are

128 The 2011 Welsh referendum was supported by both the Labour and Coalition Governments.


examples of referendums being held for a principled reason, which was to allow voters to have their say over how they are governed. While they clearly follow the previous precedents for referendums on similar issues, the reasons for those earlier precedents arising did not apply. These two referendums show how the referendum has moved away from being a resolution to an intra-party dispute, to something more positive, becoming a requirement for certain constitutional changes to ensure that the public accept the new institution.

3.3. The AV Referendum

The second UK-wide referendum was held on May 2011 on whether to adopt the AV system for future General Elections in May 2011. This referendum was a main demand of the Liberal Democrats before they felt that they could enter into coalition with the Conservatives after the 2010 General Election. Once the Conservatives offered this referendum, it made a Coalition Government with a large majority more likely than a minority Conservative Government governing under a ‘confidence and supply agreement’ with the Liberal Democrats. While the vote on the Bill to provide for the referendum would be whipped, in the words of the Coalition Agreement, this was ‘without prejudice to the positions parties will take during such a referendum.’ The Conservatives then campaigned against their Liberal Democrat Government colleagues during the referendum campaign, in a similar manner to how the Cabinet campaigned on different sides of the argument in the 1975 referendum.

Clearly, this is could be seen as an example of political expediency, a method to resolve an intra-Government split. However, it is of a different order to the 1975 referendum or the 1979 devolution referendums. Those resulted from intra-party splits, whereas the AV referendum was, in the Liberal Democrats’ view, a necessary condition on entering into Coalition. It is less an example of political expediency and more an example of political necessity. As

132 The negotiations that led to the creation of the Coalition have been discussed in Chapter 4.
no party obtained an overall majority at the General Election, no party gained the right to implement their policies. This means that if two parties are to form a Government but have a fundamental difference of opinion on an issue, then it seems entirely reasonable to put that particular issue to a referendum. The need for a referendum becomes even more pressing when the issue is constitutional and the proposed measure was contained in neither parties’ manifestos. Coalition Government will inevitably lead to referendums such as this.

The issue is whether this single instance has set a precedent that must be followed. Certainly, before the referendum, it was not clear that all parties accepted the need for a referendum on AV. During the Coalition negotiations, one of the Liberal Democrat negotiators, Chris Huhne, argued that ‘AV could be introduced immediately, including for by-elections, with a referendum later with a choice of the status quo AV, or a fully proportional system’. 135 In making this statement, Huhne could merely have been posturing and trying to extract as strong a commitment on electoral reform from Labour as possible. However, speaking for Labour, Lord Adonis considered that ‘any voting reform would need a referendum first’. 136 While it is possible that a convention can arise from a single precedent, meaning that conventionally, a referendum would be required before any change to the electoral system, it is unclear whether politicians in future negotiations would feel as bound as Lord Adonis by a requirement for a referendum before any electoral reform. Indeed, before the 2010 General Election, Brown suggested that he campaigned on a mandate that he would be Prime Minister for one year, during which time he would ‘tackle the economic crisis and reform the political system’ and ‘would put a range of constitutional reforms to a referendum and if he lost he would resign’. 138 It is unclear what constitutional changes were envisaged, but it is reasonable to

135 Laws (n 122) 152.
136 ibid.
137 As Sir Ivor Jennings stated, ‘a single precedent with a good reason may be enough to establish the rule’. The Law and the Constitution (5th edn, University of London Press 1959) 136.
assume that electoral reform would be one of them, given Brown’s interest in this area and that the House of Commons had just legislated for a referendum on AV.\textsuperscript{139} It is difficult to detach the politics from such an inquiry, and had this disagreement been the only obstacle before forming a majority Government, such concerns could easily be swept aside in pursuit of the more immediate, and ultimate, goal, without a clear convention or legislation requiring a referendum.

The curious aspect of this referendum is its subject matter. Why was AV chosen? Before the 2010 General Election, Nick Clegg described AV as a ‘miserable little compromise’ that fell far short of the Liberal Democrat manifesto commitment to STV.\textsuperscript{140} In addition, the Jenkins Commission felt that AV, rather than relieving disproportionality, is ‘capable of substantially adding to it’, and that its effects ‘are disturbingly unpredictable’.\textsuperscript{141} Clegg’s conversion to the AV cause appears to have been for political advantage. It is the one electoral system that retains single member constituencies, while making the conversion of Liberal Democrat votes to seats more proportional. This means that the Conservatives, who strongly support the existing FPTP system, could acquiesce to holding a referendum, retaining the right to campaign to retain FPTP. In addition, concerns about the effect of AV on the Conservatives were neutered by obtaining Liberal Democrat agreement to reduce the number of MPs and equalise constituency boundaries.\textsuperscript{142}

\textsuperscript{139} BBC News, ‘Gordon Brown outlines plans to reform UK voting system’ (2 February 2010) [http://news.bbc.co.uk/1/hi/uk_politics/8492622.stm]. A vote to including provision for a referendum on AV in the Constitutional Reform and Governance Bill was won by 357 votes to 182. HC Deb, 9 Feb 2010, vol 505, cols 790 - 867. However this clause was lost in the wash-up before the 2010 General Election.

\textsuperscript{140} Andrew Grice ‘I Want To Push This All The Way, Declares Clegg’ The Independent (22 April 2010) [http://www.independent.co.uk/news/uk/politics/i-want-to-push-this-all-the-way-declares-clegg-1950668.html].


\textsuperscript{142} The two elements of this agreement were legislated for together in the Parliamentary Voting System and Constituencies Act 2011.
It is clear that, here, the political expediency was not in holding a referendum on changing the electoral system, for there is a strong argument that MPs should not choose the method by which they are elected. Rather, the expediency is in setting the terms of the referendum restricting the options available. In the event, AV was roundly rejected by the electorate, and in response to Conservative opposition to House of Lords reform, the redistribution of constituency boundaries has been delayed until after the 2015 General Election. 143

4. Mandatory Referendums?

4.1. The Current Position

This tight control over the terms of a referendum might be loosened if they were made mandatory for certain constitutional changes. Apart from the European Union Act 2011, the only other referendum legally required at a national or regional level can be found in the Northern Ireland Act 1998, s 1 (1), which states that it is ‘hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll’.

As gleaned from the above section, the practice of referendums has been best established with devolution. To date, eight of the nine referendums have been held on the issue of devolution without being required by any prior law. Out of those eight, the Northern Ireland Border Poll in 1973 asked the question whether the electorate wished to remain part of the United Kingdom. The remaining seven have been about whether to establish a regional or national institution for a particular area. 144 Certainly, from this, it is possible to extrapolate certain principles. Should any other area of the United Kingdom wish for some form of self-governance (for instance, Cornwall or perhaps a

143 Parliamentary Constituencies Act 1986, s 3 (2) (a) as amended by Electoral Registration and Administration Act 2013, s 6 (1).

144 This includes the referendum held in London in 1998, and in the North East in 2004. It does not include the referendum held on 2011 on grant the Welsh Assembly primary legislative powers, as that was required by the Government of Wales Act 2006, s 103.
North of England Parliament), it can be said that by convention, a referendum would be required. Further, following the example of the Northern Ireland Border Poll, should any part of the UK wish to leave the Union then a referendum is definitely required. The SNP accept this position, and consider that their majority in the Scottish Parliament gives them the mandate on which to hold a referendum on independence rather than seek independence directly. In addition, the Edinburgh Agreement, agreed between the Scottish and the UK Governments and the accompanying Order in Council required to give a legal basis to the referendum, indicates that the UK Government accepts the right to self-determination and Scotland’s right to hold a referendum.

However, even this is murkier than it may seem. A referendum was, quite rightly, held on whether the Welsh Assembly should acquire primary legislative powers under the Government of Wales Act 2006; however, the provisions of the Scotland Act 2012, which provide for a significant devolution of tax-raising powers, did not require a referendum. There does appear to be a boundary for, taken as a whole, the Government of Wales Act 2006 is tantamount to a new system of devolution, whereas even with the provisions relating to income tax, the Scotland Act 2012 is not as significant, but it is difficult to determine precisely where that boundary lies. Considering these difficulties, establishing

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147 An Order in Council, passed under Scotland Act 1998, s 30, can modify the list of matters reserved to Westminster and outside the legal powers of the Scottish Parliament. Under the Scotland Act 1998, Schedule 5, Part 1, paragraph 1 the ‘Union of the Kingdoms of Scotland and England’ is a reserved matter. However, under the Edinburgh Agreement, the UK Parliament approved, the Scotland Act 1998 (Modification of Schedule 5) Order 2013, SI No 2013/242, Art 3, which inserts a new paragraph 5A which allows for the Scottish Parliament to legislate for ‘a referendum on the independence of Scotland’ if the date of the poll is ‘no later than 31st December 2014’ and that the question is a ‘choice between only two responses’. Aspects of the legal regulation of the referendum are discussed in Chapter 7.

148 One factor against holding a referendum on the tax raising powers of the Scotland Act 2012 is that the principle of tax raising powers was approved in the second question to the 1998 referendum.
when referendums are required is perhaps one of those ‘tacit understanding’ that are ‘not always understood’ as Sidney Low once described.\(^{149}\)

Yet, there has been a growth in the use of, and discussion about the use of referendums for devolution, EU membership and now electoral reform. As St Loe Strachey said, when writing about referendums to Lord Lansdowne in 1911:

> ‘[t]he natural way it seems to me for the referendum to come would be to have it applied at first occasionally and \textit{ad hoc} to particular Bills, and for then to gradually grow into a custom of the constitution’.\(^{150}\)

A century later, we can see that he was entirely correct. The common theme throughout the use of the referendum in the UK is that it has become a custom of the constitution through two inter-related paths that both relate to consistency. The first path is related to referendums being held or promised on similar issues sparking expectations that referendums would be held on similar issues in the future. This can be seen through the devolution referendums held in 1979, which meant they were necessary in 1997 and will continue to be required for future devolution issues. The second path is a broader version of this consistency argument. If referendums have been held previously, demand for them increases on other constitutional issues. This occurred in the 1970s when, despite being viewed as a unique event never to be repeated, the 1975 referendum on the EEC paved the way for the devolution referendums held in 1979.\(^{151}\) This has now branched out into other areas of the constitution such as changing the electoral system to the House of Commons. This leaves open the question as to when the referendum should be used in future. Nick Clegg resolutely refused to hold a referendum on his proposals to reform the House of Lords,\(^{152}\) which by changing the composition of a chamber of Parliament would

\(^{149}\) Sidney Low, \textit{The Governance of England} (T Fisher Unwin 1904) 12.

\(^{150}\) Bogdanor, \textit{People and the Party System} (n 7) 26.

\(^{151}\) For example, see (n 113) for evidence of how the 1975 referendum overturned previous parliamentary practice on dealing with referendums.

\(^{152}\) See Chapter 4.
in principle be consistent with the AV referendum. To use Strachey’s terms above, the referendum is growing into a custom yet to be fully formed.

4.2. Further Mandatory Referendums

The obvious solution to this would be to make it a statutory requirement that before certain constitutional changes could be made, there had to be a referendum. Currently, there is little prospect for a future Government to introduce such legislation, although the benefits could be significant. As the Conservatives may have achieved with the EU Act, such legislation may (as a matter of political practice, rather than law) constrain the hands of future governments. The natural question is then to consider on which constitutional changes referendums should be held.

This a 100-year old enquiry. An amendment to the Parliament Bill provided for non-money Bills to be put to a referendum if they have been rejected three times by the Lords.\(^{153}\) However, the problem was always that it would only be Liberal Bills that would be referred as the Unionists had a permanent majority in the Lords.\(^{154}\) During debates on the Parliament Bill in 1911, an amendment proposed by Lord Balfour stated that rather than the procedure in what became the Parliament Act, a referendum would held should the two Houses disagree over a ‘constitutional issue’. A ‘constitutional issue’ was defined as the following:

- The existence of the Crown or the Protestant Succession thereto; or
- the creation of a National Parliament, or Assembly, or a National Council in Ireland, Scotland, England or Wales with legislative powers therein; or
- the constitution or powers of either House of Parliament or the relation of the two Houses one to the other.\(^{155}\)

This approach was to be preferred above the earlier proposal that would apply to many bills, as it could have removed some of the politics out of the

\(^{153}\) HC Deb 22 April 1911, vol 24, col 1809ff.

\(^{154}\) Bogdanor, *People and the Party System* (n 7).

\(^{155}\) HC Deb 8 May 1911, vol 25, col 915ff.
issue. However, as long as the House of Lords retained an in-built Conservatives majority, the risk remained that only Liberal proposal would ever be sent for a referendum. This problem has been removed with the House of Lords Act 1999 which removed all but 92 of the hereditary peers and the expectation is that no party should have an overall majority of the upper chamber. This provides an opportunity for such a measure as proposed by Lord Balfour.

The opinion of the modern House of Lords does not appear to go much further than Lord Balfour’s. The Constitution Committee concluded that, ‘if referendums are to be used, they are most appropriately used in relation to fundamental constitutional issues’.156 Largely agreeing with the list above from 1911, a fundamental constitutional issue would include, but not exhaustively the following:

• the abolition of the monarchy,

• to leave the European Union,

• for any of the nations of the UK to secede from the Union,

• to abolish either House of Parliament,

• to change the electoral system of the House of Commons,

• to adopt a written Constitution,

• to change the UK’s system of currency.157

In light of the use of the referendum since 1997, such a list is hard to disagree with. However, the Committee recommended that because it would not be possible to state comprehensively what a ‘fundamental constitutional issue’ is, ‘it follows that it is impossible to set out in legislation an all-encompassing list of such issues that should be subject to a referendum.’158 Consequently, it

156 Constitution Committee, Referendums in the United Kingdom (n 7) para 94.
157 ibid.
158 ibid, para 111.
should remain for Parliament to ‘judge what issues will be the subject of referendums’. However, the Committee does appear to contradict itself, because its entire remit is to focus on ‘significant constitutional issues’ and considers that in ‘order to be considered significant, a constitutional issue needs to be one that is a principal part of the constitutional framework and one that raises an important question of principle’. Consequently, it appears that the Committee has to define a significant constitutional issue for its own purposes, yet such a task appears to be beyond Parliament as a whole. Neither does the Committee address the question of legislating for some issues to be subject to a referendum. Surely, a referendum lock for some issues is better than no referendum lock at all.

However, it is difficult to enunciate an underlying principle that embraces all of these issues. One attempt would be to cite John Locke’s liberal principle that:

‘... the legislature cannot transfer the power of making laws to any other hands. It was delegated to them from the people, any they aren’t free to pass it on to others. Only the people can decide the form of the commonwealth ... The power of the legislature, being derived from the people by a positive voluntary grant and institution, can’t be anything different from what that positive grant conveyed; and what it conveyed was the power to make laws, not to make legislators; so the legislature can have no power to transfer to anyone else their authority to make laws’.  

159 ibid, para 118.
160 ibid, para 117.
161 Indeed, one of the issues on that list has been legislated for, whether to adopt the euro in the European Union Act, see above.
While this is a valuable principle, and certainly applies to issues when the ‘legislature is transferring the power to others to make laws’ such as the EU and for nations that wish to leave the Union, its application is less amenable to more internal issues, such as the abolition of the Monarchy or the creation of some forms of regional government. Such issues appear to concern the national or regional identity, and certain specific principles that the electorate holds dear.

This Constitution Committee list contains some omissions. Perhaps due to it being a cross-party parliamentary committee the list omits any mention of human rights. But, it would be anomalous that those issues on the list required a referendum, but the repeal of the Human Rights Act would not. Indeed, while the clock cannot be turned back to 1997, it is arguable that the fundamental importance of the Human Rights Act required a referendum. With 21st century eyes, it appears inconsistent that the provisions of Schedule 4 of the Government of Wales Act 2006,\(^{163}\) have been put to the people in a referendum, but the Human Rights Act has never had the express approval of the people in the same manner.

Indeed, some have not warmly welcomed the Human Rights. As the Bill of Rights Commission states:

> ‘Few subjects generate more strongly-held views than that of human rights. Scarcely a week passes without the appearance of headlines supporting or condemning the latest human rights court judgement … The media, politicians, commentators, academics and lawyers queue up to deliver their views, at times in colourful language, on the latest human rights controversy.’\(^{164}\)

Liberty, in their submission to the Bill of Rights Commission, pinpointed one of the reasons for this continuing controversy. They highlight that there is a ‘lack of public understanding and ‘ownership’ of the Human Rights Act’, which

\(^{163}\)Which detailed the primary law making powers of the Welsh Assembly.

they attributed to an ‘almost complete absence of public education about the Act’ and argued that more should have been done ‘during or after the Act’s enactment to explain its effect to the British public. This might well have encouraged greater understanding and cultural attachment to the legislation’.  

A referendum might have resolved these issues. Had the electorate through a referendum, approved the Human Rights Act, it might have greater support across the political spectrum as those who oppose the Human Rights Act would appear undemocratic. The Act would have become an accepted part of the constitutional structure of the state, and form part of what Bolingbroke considers to be; ‘the rules by which the community hath agreed to be governed’. Furthermore, if the Act was approved by a comfortable majority, on a reasonable turnout, then constantly expressing concerns about the Act would not sit easily with the approach of Tony Benn, who during the 1975 referendum argued that ‘when the British people speak, everyone, including Members of Parliament, should tremble before their decisions’. In short, constitutional changes approved in a referendum have, by their very nature, a greater degree of acceptance amongst the electorate than an Act passed by Parliament is ever likely to have.

A key reason for the lack of a referendum on the Human Rights Act was the absence of any legal or conventional requirement to hold one. From the Government’s point of view, why expose a flagship policy to a referendum whose result would be hard to predict? However, had there been a requirement for a referendum, then in order to obtain the approval of the electorate for the Human Rights Act, the substance of the policy might have been reconsidered in an attempt to convince a sceptical electorate. One method by which electoral support would be more likely is if the Act was more accessible to the broader electorate. This could have been achieved by linking the Human Rights Act to

165 bid, para 32.
166 See Chapter 1.
168 Assuming a clear result based on a reasonable turnout. Issues relating to the conduct of the referendum are discussed in Chapter 7.
certain principles already enshrined in statute. Examples include the right to a jury trial, or the right to free education,\(^{169}\) or the right to NHS treatment, free at the point of delivery.\(^{170}\) Interestingly, all three political parties, realising this disconnect between the electorate and the ideals of the human rights regime, have proposed a British Bill of Rights.\(^{171}\) While all parties aim to improve the way in which human rights operate, the suspicion that one has is that all three parties are proposing this idea for different reasons, making it difficult for a British Bill of Rights to attract cross-party support.\(^{172}\) The other advantage of a referendum is the increased public understanding and education that campaigning at the referendum can bring. For this function to be fully realised, the campaigning at referendums has to be carefully managed; this is considered in Chapter 7. Unfortunately, the issue of a British Bill of Rights being subject to a referendum has, thus far, not been widely discussed.

## 5. Conclusion

Bogdanor states that the ‘referendum is now part of the new constitution. But it is a weapon for the political class, not the people’.\(^{173}\) That position was true during the 1970s (albeit to resolve intra-party disputes), but the more the

\(^{169}\) This right is contained in the United Nation’s Universal Declaration of Human Rights, which states at Article 26 (1), that ‘Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit’.

\(^{170}\) The National Health Service Act 2006, s 1 as amended by the Health and Social Care Act 2012, states that

“(1) The Secretary of State must continue the promotion in England of a comprehensive health service designed to secure improvement—

(a) in the physical and mental health of the people of England, and

(b) in the prevention, diagnosis and treatment of physical and mental illness.

(2) For that purpose, the Secretary of State must exercise the functions conferred by this Act so as to secure that services are provided in accordance with this Act.

(3) The Secretary of State retains ministerial responsibility to Parliament for the provision of the health service in England.

(4) The services provided as part of the health service in England must be free of charge except in so far as the making and recovery of charges is expressly provided for by or under any enactment, whenever passed.”

\(^{171}\) Labour, when in Government proposed the idea in HM Government, The Governance of Britain (Cm 7170, 2007).

\(^{172}\) Rodney Brazier, Constitutional Reform (3rd edn, OUP 2008) 135.

\(^{173}\) Bogdanor, The New Constitution (n 34) 196.
referendum emerges as a part of the constitution, the less persuasive this position becomes. For the key consequence from the debates over the use of the referendum are some expectations as to when referendums should be held. These expectations are based on political practice or convention, and some are founded on statute. It is clear that issues involving the principle of self-determination will require a new referendum, as will the creation of a new form of regional government. The European Union Act 2011 has, for now, clarified the position on Europe, codifying the pre-existing position regarding the Euro, and the emerging position over the four objectives. To the extent that the Act goes further than the four objectives, it is not yet certain that the Act has codified a consensus. The manifestos for the 2015 General Election will answer this question.

By contrast, the position regarding referendums on other constitutional issues is nascent. To date, there has been only one referendum on a non-EU/devolution matter: the 2011 AV referendum. It is difficult to extrapolate too much from this single precedent, but referendums on issues, such as the abolition of the monarchy, could easily be envisaged. However, the absence of a promise of a referendum on the Coalition’s ill-fated House of Lords Reform Bill highlights the fluidity of this situation. However, the AV referendum is the clearest example of a referendum being chosen exclusively by a small group of politicians without much consideration of outside views. A referendum will not resolve an issue if the electorate is presented with a contrived or restricted choice. Referendums are most effective if they allow issues to be debated fully and allow the electorate to make an informed choice from different options. The AV referendum could never achieve this aim, as the electorate was not presented with a real choice. There is a concern that further referendums could continue to be used in this tactical manner. For example, had a referendum been promised on the House of Lords Reform Bill introduced into Parliament in 2012, those supporting House of Lords reform might have been placed in a quandary: should they support a proposal that they considered had many

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174 Particularly in light of the Australian referendum on the monarchy in 1999. For a discussion of the process that led to this referendum see Chapter 7.
defects (due to the need for compromise and consensus), or support the status quo in the hope of a better proposal in the future? The problem with most of the referendums held thus far is that the proposed change has been presented as a fait accompli. How can a community be said to have agreed to the rules by which they are governed, if they have little choice over the options from which make their choice?
Chapter 7 - The Referendum Process

‘If the right people don’t have the power do you know what happens? The wrong people get it: politicians, councillors, ordinary voters…British democracy recognises that you need a system to protect the important things of life and keep them out of the hands of the barbarians’.

Sir Humphrey Appleby in Yes Prime Minister

Chapter 6 suggested that referendums are the most effective way to establish public acceptability of a proposed constitutional change. The key advantage of referendums is that they allow constitutional issues to be resolved through a procedure that runs in parallel with the ordinary process of general elections and the mandate. This has the effect of (at least partially) removing constitutional issues from ordinary party politics. However, in making constitutional change subject to a referendum, new sets of problems emerge. A referendum is a more elaborate process than the mere act of voting and declaring the result. Referendums are essentially a series of stages, each with their own challenges. The first stage is the ‘decision to initiate the referendum process’, the second stage is the ‘issue-framing stage’ where the terms of the question is set, followed by the campaigns, then finally, the act of voting and the declaration of the result. From the point of view of establishing the public acceptance of a proposed constitutional change, the first two stages in particular raise issues that, if not handled correctly, could compromise the legitimacy and effectiveness of a referendum.

The first two stages of the process, the decision to start the referendum process and the issue-framing stage, are the hardest to distinguish, particularly

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1 Parts of this Chapter have been derived from Craig Prescott, ‘The Union, Constitutional Change and Constitutional Conventions (and English Regionalism?)’ UK Const. L. Blog (3rd April 2013) (available at http://ukconstitutionallaw.org).

2 Series 2 Episode 5, Power to the People (1988).

3 Stephen Tierney, Constitutional Referendums (OUP 2013) 51.
in the UK. For some referendums, the two stages do not appear as distinct phases as the question is relatively straightforward to frame. Should a referendum ever be held on whether to adopt the euro as the currency, there would be no need to frame the question, as it is a binary question, with a “Yes” or a “No” answer. In this case, the decision to hold the referendum would also be the decision to frame the question. However, such issues are relatively rare. Another reason is that some referendums in the UK, such as the devolution referendums in 1979, dealt with these two stages in reverse. By introducing legislation into Parliament, the issue was framed by the Government and only then was a decision made on whether to hold a referendum.  

This confusion is a reflection of the fact established in Chapter 6 that the expectations of when referendums should be held are, at best, incomplete and still emerging. Some referendums are legally required, some are expected by convention, and it is assumed that some issues (such as the abolition of the monarchy) should be resolved only by a referendum. Yet, the fact that referendums have become required or expected in some circumstances gives rise the possibility of a more optimal process that separates these two phases. If certain constitutional changes can only be made subject to a referendum then the decision to embark or consider that constitutional change is also a decision to initiate the referendum process. This is what happened in Australia (where a referendum is required before any change can be made to the Constitution), when considering whether to replace the Queen as Head of State with a President. The political debate was on how the question should be framed, with the then Prime Minister, Paul Keating, preferring to offer the people the recommendation of the Government referring to ate with a Preittee, and John Howard wanting to establish a erntment referring to ate with a Preittee, of a more optimal proces This debate was resolved by the 1995 and 1997 General Elections, which saw John Howard lead a Liberal/National Coalition and this

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4 The circumstances of this have been described in Chapter 6.
5 Commonwealth of Australia Constitution Act, s 128.
provided the springboard from which to establish the 1998 Constitutional Convention.\textsuperscript{9}

There are many ways to choose the options to put to the electorate in a referendum, and so frame the question. However, the emphasis in this Chapter is on methods for which there are precedents and fall into the category of deliberative democracy. In recent decades, deliberative democracy has become an enormous field,\textsuperscript{10} and within the space available I cannot do justice to the scope of the literature available. Deliberative democracy has been defined as a form of government in which ‘free and equal citizens (and their representatives), justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible’ with the aim of reaching conclusions that are binding.\textsuperscript{11} This principle informs the procedures discussed below, particularly the citizenese available. D

The one key point that arises from the literature is that the focus of the literature on deliberative democracy is on the deliberation of small groups, with less focus on practical methods of deliberative democracy on mass scale.\textsuperscript{12} This is a real problem because, as shown below, the outcome of a deliberative process is usually subject to a referendum of the electorate, and the links between methods of deliberative democracy and referendums are not adequately reflected in the literature.\textsuperscript{13} By considering deliberative democratic methods (at both an elite and popular level) within the context of a referendum,

\textsuperscript{9} This convention is considered below.
\textsuperscript{10} John Dryzek, \textit{The Foundations and Frontiers of Deliberative Governance} (OUP 2012) in the preface states that a ‘lot more has happened in the second decade of the deliberative era since 2000; so much that it is hard to keep track of all the developments’. See also Robert Goodwin, \textit{Reflective Democracy} (OUP 2003).
\textsuperscript{12} A rare example of considering deliberative democracy at a mass scale can be found in John Parkinson and John Mansbridge (eds), \textit{Deliberative Systems: Deliberative Democracy at the Large Scale} (CUP 2012). In particular at Ch 3, Simone Chambers, Deliberation and Mass Democracy. For practical ideas, see Ron Levy, ‘“Deliberative Voting”: Reforming Constitutional Referendum Democracy’ [2013] PL 555.
\textsuperscript{13} Of course, it is possible for the outcome of a deliberative procedure to propose no change, in which case, no referendum is required.
this chapter aims to address this disconnect between deliberative process and referendums.

1. Initiating the Referendum Process

Naturally, within the Westminster system, politicians and the Government of the day will always play the key role in the decision to initiate a referendum.14 This is not only because referendums need to be established by primary legislation, but an official process to establish a body to frame the question may also require legislation.15 Also, the Government will seek to implement manifesto commitments or Coalition programmes, which may include a referendum.16 The problems with this have been discussed extensively throughout this thesis; particularly in Chapters 2, 3 and 5. However, one example, atypical for its clarity, is the Scottish independence referendum. The decision by both the Scottish and UK Governments to hold this referendum was a direct consequence of the 2011 Scottish Parliament elections where the SNP acquired a majority of seats with 45.4% of the constituency vote.17 The SNP is a rarity in the UK, as it is the only political party that has a realistic chance of forming a majority government at either Westminster or at a devolved level, whose entire rationale is a constitutional issue.18 Even if a portion of the

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14 In other jurisdictions, it is possible for the electorate not to rely on the legislature and have the power to initiate a referendum, as in California, Italy and New Zealand. However, the general approach of this thesis is to work with the current constitution in the UK. Whilst, there is a concerted attempt to increase engagement with politics, there has been little debate about a citizens’ initiative, and so is not discussed in this thesis.

15 Particularly if any conclusions are to bind the Government into holding a referendum in law. For example, in Ontario, Electoral System Referendum Act 2007, s 2 made a referendum mandatory should the Citizens’ Assembly recommend a new electoral system. In the event the Assembly proposed STV and the referendum was held alongside the 2007 general election. In British Columbia, the Citizens’ Assembly was approved by a motion passed by the Legislative Assembly which committed the Government to hold a referendum proposed new electoral system, Official Report of Debates of the Legislative Assembly, Vol 14, No 12, page 6355-74.


17 British Electoral Facts 1832-2012, 216.

18 Any government in Northern Ireland is required by law to be power sharing between the unionists and the nationalists. Regarding Welsh independence, Plaid Cymru is unlikely to have
Scottish electorate in the 2011 election voted SNP for reasons other than independence, they were doing so in the knowledge that the SNP would pursue independence but also knowing that this would be subject to a referendum.\textsuperscript{19}

More typically, constitutional issues tend to create division across rather than along party lines. House of Lords reform is the clear example of this, where (as shown by the withdrawal of the House of Lords Reform Bill in 2012), there is little agreement among the main parties, with only the Liberal Democrats being strongly in favour of an elected upper chamber. Instead, more incremental change has taken place.\textsuperscript{20} As discussed in Chapters 3 and 5, political parties have adopted increasingly elaborate upper chamber agendas, but the proposals are presented to the electorate as a fixed choice. The electorate lacks the ability to express their preferences or priorities on the Government’s constitutional change or...and 5, political parties h

Furthermore, even if the political parties are responsive to the electorate, public participation is generally seen to be a public good, as Tierney states:

‘... even in a political system that well reflects popular opinion the electorate, public participation is generally a healthy political system by boosting accountability; elites will be more attentive to the views of an informed and engaged public than an apathetic one.’\textsuperscript{21}

The concern is that it may not always be the case that politicians, as a group, are as responsive to the demands of the electorate as the electorate wishes; thereby creating the need for alternative inputs into the political process, which requires politicians to confront differences between themselves


\textsuperscript{20} House of Lords Reform Act 2014.

\textsuperscript{21} Tierney (n 3) 32-3.
and sections of the electorate. This means that the focus of this section is on how the electorate can function as an extra influence on politicians when considering constitutional issues; thus playing a role to initiate the referendum process.

1.1. Petitions

Between elections, constitutional policy is similar to other areas of policy. A voter concerned about a constitutional issue can use the ordinary processes to express their views on proposed constitutional changes, including writing to their MP or joining pressure groups that advocate constitutional changes, or responding to government consultations. However, as seen in Chapters 2 and 3, constitutional policy can be formulated so quickly, that even if a consultation exercise is run at all, it may not comply with the Governmental policy can be formulated so and may only take place after the key decisions have been taken. But here, the public remains in the role of the respondent rather than being the initiator, should a pressure group propose a constitutional change, its immediate effect is likely to be small.

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22 This is an application of the idea, as explained by David Easton in *A Systems Analysis of Political Life* (John Wiley and Sons 1965) that the political system can be described as a series of inputs, wants, which are aggregated via the political process into a series of outputs, policy and legislation. These outputs then in turn influence future inputs. Should the range of inputs be restricted, then it follows that the aggregation process and outputs are compromised.


24 Charter 88 (now Democratic Audit) was a particularly notable pressure group on constitutional issues. Although their efforts were not always appreciated by politicians, as Neil Kinnock once described the group as ‘whingers, whiners and wankers’, Stephen Howe, ‘Some Intellectual Origins of Charter 88’ (2009) 62 Parliamentary Affairs 552, 552.

25 No consultation exercise was undertaken before the Fixed-term Parliaments Act 2011 was introduced into Parliament.


27 This was a concern with the process that led to the Constitutional Reform Act 2005.

28 This could be seen in the response to the MPs expenses scandal, where the political parties proposed a whole range of proposals that beyond the creation of the Independent Parliamentary Standards Agency had little to do with the actual problem of the misconduct of MPs. In addition to the creation of IPSA, the one proposal that would address the issue directly, a right of recall of an MP, has remained off the statute book.

29 Along with the work of academics, ideas tend to ‘begin life on margins of politics...which then slowly filter into the hearing and imagination of journalists, backbench MPs, party policy
Consequently, something of a more collective nature is needed, and one of the most established forms of collective action in the UK is raising and signing a petition. Petitioning has a long history in the UK, with the ability to petition the Crown provided for in the Magna Carta, and being restated in the Bill of Rights. Petitioning Parliament appears to have started under Henry IV, and by the time of Charles I, ages, including wrimain methods of airing grievances by sections of society not represented in Parliament’. 30 Indeed, petitions were used in the campaign that led to the Great Reform Act 1832. 31 As one historian writes; the ne historian writese campaign that led to the Great R action; it was a crucial instrument by which MPs gained a parliamentary hearing for subjects of interest to their constituents’. 32 In more modern times, petitions have played a diminishing role. A Hansard Society survey found that only 3% of MPs thought that petitions were a played a diminishing role. A Hansard Society survey 33 The formal requirements for presenting a petition are also technical and outdated; in particular, attaching emailed signatures to a petition is an increasingly difficult hurdle. 34 Two parliamentary clerks describe petitions as a petition y survey found that only 3% of MPs thought that gained a parliamentary hearing for subjects of interest to their constituents'. he timee Ombudsman. 35

With the advent of the Internet, petitioning has seen something of a resurgence. In 2006, the Government introduced its own e-petitions system


32 ibid

33 House of Commons Procedure Committee (n 30) para 4 and ev 12.

34 Erskine May at 485 states that ‘signatures must be written on the petition itself, and not pasted on, or otherwise transferred to it’, making it difficult to accumulate signatures online. Theresa May described how these requirements prevented her from including 960 signatures on a petition she had gathered by email. House of Commons Procedure Committee (n 30) para 55 and ev 21.

whereby a petition can be started and signed exclusively online. This allowed the Government to communicate directly with petitioners through email. Some petitions had an impact on policy, such as the e-petition signed by 1.8 million people urging the Government to stop developing proposals to introduce a road charging scheme.\textsuperscript{36} The Prime Minister responded directly by email to the petitioners, promising a ‘debate’ on the issue.\textsuperscript{37} Eventually, the policy was formally dropped in 2009.\textsuperscript{38}

The problem with this e-petition system was that it was a dialogue between the government and the public, sidelining Parliament. As discussed in Chapter 5, the MP\textsuperscript{ionion} people urging the Governman examination of parliamentary procedure, with the aim of increasing the accessibility of Parliament to the electorate. This led to the introduction of a new e-petitions system. The Government continues to host the website, with petitions with over 10,000 signatures receiving a response from the Government, but those signed by over 100,000 people may be debated in the House of Commons. Whether a petition triggers a debate in the Commons depends on numerous factors, none of which are in the control of the petitioner.

Petitions with 100,000 signatures are directed to the Office of the Leader of the House of Commons, who notifies the Backbench Business Committee. Then, if there is an MP willing to support the petition, they will make a “pitch” to the Backbench Business Committee for it to allot some of its time in favour of debate on that petition. The Committee considers the topicality of the petition, the number of MPs likely to take part (including cross-party support) and the likelihood of whether a debate on the topic is likely to be arranged through another route.\textsuperscript{39} The amount of time the Committee has to allocate is dependent

\begin{itemize}
\item \textsuperscript{36} Number 10, E-Petition website, archived at [http://webarchive.nationalarchives.gov.uk/20110412161239/http://petitions.number10.gov.uk/traveltax/].
\item \textsuperscript{37} Number 10, ‘PM Emails Road Pricing Signatories’ archived at [http://webarchive.nationalarchives.gov.uk/20110412161239/http://number10.gov.uk/archive/2007/02/pm-emails-road-pricing-signatories-11050].
\item \textsuperscript{38} Robert Wright, ‘Adonis shelves road-price policy’ \textit{Financial Times} (25 June 2009) [http://www.ft.com/cms/s/0/0ebf2b32-6120-11de-aa12-00144feabdc0.html#axzz39X0xkTuh].
\item \textsuperscript{39} Parliament, ‘E-Petitions and the Backbench Business Committee’
\end{itemize}
on what the Government is willing to grant the Committee and scheduling is a constant problem.\textsuperscript{40} The mere fact that the petition has reached 100,000 signatures is just one consideration of several, and is not a guarantee of a debate, either in the chamber or in Westminster Hall.

Overall, this procedure does not match the description on the Government website consideration of several, and defines e-petitions as ‘an easy, personal way for you to influence government and Parliament in the UK’.\textsuperscript{41} Instead, a more apt description is that provided by the Hansard Society, as the Parliament in the UK’.\textsuperscript{eral}, and is not a guarantee of a debate, either in the chamber or in Westminster Hall.\textsuperscript{upport the42} This procedure does not allow Parliament to be petitioned directly. This also leaves an unbalanced relationship between the Government, Parliament and the petitioners. As the details of the petitioners remain with the Government, they can send a response via e-mail to the petitioners, while there is no way for the response of Parliament to be ‘pushed’ in a similar way to petitioners.\textsuperscript{43} Finally, this e-petition sits in parallel with the traditional paper-only petition process. Clearly, this is an area in which further reforms can be made. If the ultimate goal is to seek a debate in Parliament, it seems strange to send a prospective petitioner to a Government website, and to have separate procedures for paper and e-petitions.\textsuperscript{44}

To date, there has been one e-petition exceeding the 100,000-signature threshold involving a constitutional issue, the e-petition calling for a referendum

\textsuperscript{40} Backbench Business Committee, \textit{Provisional Approach: Session 2010-11} (HC 2010-12, 334) para 2.

\textsuperscript{41} HM Government, E-Petitions, [http://epetitions.direct.gov.uk]

\textsuperscript{42} Hansard Society, \textit{What Next for E-Petitions?} (Hansard Society 2012).

\textsuperscript{43} For example an email informing petitioners that debate on petition is due to be held, followed with an email containing hyperlinks to transcript and video recording of the debate.

\textsuperscript{44} Hansard Society (n 42) also contains many other recommendations for reform including allowing for a broader range of responses from Parliament beyond just holding a debate, but does not state what these new responses could be. One possibility could be that the matter is transferred to the relevant select committee to consider the petition, gather evidence (including inviting petitioners to provide evidence) and then requiring the Government to respond to their report in the normal way.
on Britain on Britain involving a constitutional issue, the e-petition calling for nt, it seems strange to send a prospective petitioner to a liament and the petitioners. As have resulted in David Cameron promising a referendum on EU Membership in 2017. E-petitions can force an issue to rise up the political agenda, providing a can force a’ function, giving citizens the ‘opportunity to air their views on a national platformca. However, in line with the notion of deliberative democracy discussed at the start of this chapter, some have highlighted the limitations of petitions as they provide only a ‘limited opportunity for deliberation on the issues raisedcy. In the constitutional context, this might be placing more weight on petitions than they are equipped to bear. If petitions provided for further deliberation, it would be likely that the lead petitioners would be the key actors in any deliberation, and it does not follow that such deliberation would be as broad based as constitutional issues require.

Another concern regarding petitions (whether electronic or otherwise) is that they are far more likely to be used for issues that the electorate are concerned about. Given the lack of immediate interest that the electorate tends to have on constitutional issues, it is unlikely that there will be many petitions

45 See Chapter 6, fn 95 and 96.
46 Hansard Society (n 42) cites the petition and debate requiring the Government to clarify their policy regarding the disclosure of documents relating to the Hillsborough tragedy as a particular example.
47 ibid, 9.
48 ibid.
49 In the Scottish Parliament, the lead petitioner can be called to give evidence to the Petitions Committee who then decides whether the petition requires further consideration and can be transferred to the relevant subject committee or seek a debate in the full chamber. The Committee clerks throughout the process assist the lead petitioner. For more details on the Scottish system, see Public Petitions Committee, Assessment of the Scottish Parliament’s Public Petitions System 1999 - 2006 by Christopher Carman (2007, SP Paper 654) [http://archive.scottish.parliament.uk/business/committees/petitions/reports-06/pur06-PPS-assessment-01.htm] and Christopher Carman ‘Barriers are Barriers: Asymmetric Participation in the Scottish Public Petitions System (2014) 67 Parliamentary Affairs 1.
51 Although there is the potential for interest. A poll showed that only 24% considered that the system of governing works ‘extremely or mainly well’ and previous audits have shown that
regarding constitutional issues acquiring significant levels of support. Furthermore, if people have little interest in constitutional issues or politics generally, it is difficult to see why all of a sudden they would actively engage with those issues over the internet. Overall, when it comes to constitutional issues, petitions are a valuable but blunt ‘fire alarm’, that can add to the general background of concern about an area of the constitution. In this way, like referendums, petitions supplement rather than supplant the ordinary process of representative democracy.

1.2. New Zealand - The Constitutional Advisory Panel

The limitations of petitions make the approach of the New Zealand Constitutional Advisory Panel (‘The Panel’) interesting. The Panelions make the approach of the New Zealand Constitutional Advisory Panel (ave little interest in constituconstitutional issues). By doing this, The Panel hoped to discover the views of New Zealanders on certain constitutional issues, and then report back to the Government, er the views of New Zealanders on certain constitutional issues,le interest. Instead of waiting for the public to express their view, the role of The Panel was to take the initiative and seek the views of the public. This means that any action taken by the Government following The Panel's report, such as the creation of a commission to consider an area in detail, is less of a Government-led initiative, as it is more of response to demand. Those opposed to the measure would have to engage with substance

two-thirds to three-quarters of the public believe that the system of governing needs a ‘great deal’ or a ‘lot of improvement’. Hansard Society, 2012 Audit of Political Engagement (Hansard Society 2012).


54 ibid, Appendix F, Terms of Reference, para 11. The issues to be considered include the size of Parliament, term lengths (and whether they should be fixed), Crown-Maori matters (including the role of the Treaty of Waitangi within the constitution), and the issue of a written constitution.

55 ibid, para 15.
rather than process. The Government becomes more of an administrator of the process than the initiator.

When The Panel reported, its main recommendations of continuing the conversation r. n process e initiative and seek the views of the public. This means that any action taken by the Government following The Panel’s report, such as the treaty of Waitangi, have been described as its main recommendations of cont and been de However, more substantive recommendations were made. For example, regarding the New Zealand Parliament, The Panel found a w of the public. This means that any actiorliamentary terms than the current three-year maximum. Tied into this is a need to commendations were made. For example, regarding the New Zealand Parliament, The Panel found a w of the public. This means that any actiorliamentary terms than the current The Panel’s report, such as treaty of Waitangi, with any change to a longer term being approved by referendum. Should the New Zealand Government consider a move towards longer terms, and the consequential issues that follow, The Panel might have been the start of a process that leads to a substantial recasting of a central aspect of the New Zealand constitution.

Given its task of establishing what the public thought about the constitution, The Panel adopted a methodology that was particularly open to the public. The Panel accepted that people have differing levels of interest in

56 Although it could be argued that the effect of creating the Panel is to move opposition to the process chosen from the creation of a commission (or other method to consider a change in detail) to the creation of the Panel itself. In New Zealand, the creation of the Panel and the broader process was part of the Relationship Accord and Confidence and Supply Agreement between the National Party and the Maori Party (November 2008). This has led to some to argue that the Panel has been skewed to the interests of the Maori population - see the Independent Constitutional Review campaign, a group led by academics [http://www.nzcpr.com/ConstitutionalReview.htm].

57 New Zealand Constitutional Advisory Panel (n 53) 8.


59 Ibid.

60 New Zealand Constitutional Advisory Panel (n 53) 17.

61 Ibid, 17.
constitutional issues, and will adopt different approaches accordingly. Leaving aside those who are already highly engaged with constitutional issues,\(^6^2\) the Panel engaged with those who are already highly engaged with constitutional issues,n tos'.\(^6^3\) Examples of active networks include church groups, sports groups, disability groups, professional organisations and business networks.\(^6^4\) The Panel contacted groups that those ed roups, professional organisations and business netword them to host ‘a conversation on constitutional issues’.\(^6^5\) The Panel supported these conversations by providing materials and training hosts to conduct the meetings. This appears to be an innovative attempt to engage systematically with a whole spectrum of different groups in New Zealand society. Those not connected to such networks remain the hardest to reach and The Panel fell back on using the internet and contributing to the media to try and create interest.\(^6^6\) In total, The Panel received 5,239 responses,\(^6^7\) showing that a concerted effort at public engagement can deliver a meaningful return.

At the time of writing, the New Zealand Government is yet to respond to the report, but The Panel may have given an indication to the Government as to the next steps to be taken. The options for the next stage are discussed in the following section that addresses the second stage of the process, the issue-framing stage. The novelty of this exercise for the UK is that the electorate has never been asked to approach constitutional issues in such a manner, but it is difficult to envisage the circumstances in which a similar exercise could be initiated in the UK. Suggestions for a new process move straight to the issue of the framing stage, with those making the suggestion already selecting the issue. Both Carwyn Jones, Welsh Assembly First Minister and the Political and Constitutional Reform Committee have suggested a constitutional convention to

\(^{6^2}\) As engaging with these people is likely to be straight forward and similar to how such people engage with constitutional change process in the UK.

\(^{6^3}\) New Zealand Constitutional Advisory Panel (n 53) Appendix H, Engagement Strategy, para 12

\(^{6^4}\) ibid, para 11

\(^{6^5}\) ibid, para 12

\(^{6^6}\) ibid, Para 16

\(^{6^7}\) ibid, 10.
consider the future of the UK in light of the result of the Scottish independence referendum.\textsuperscript{68} This is not necessarily a criticism, but it does highlight a difference between New Zealand and the UK, in that the UK has several constitutional issues in the air at present (including EU membership, Scottish independence, House of Lords reform and a Bill of Rights). The value of a process such as the Panel is likely to be the most during less constitutionally frantic times. There is also the issue of scale, for while the elaborate engagement strategy adopted by The Panel might be appropriate to New Zealand’s population of 4.5 million, it is difficult to envisage the will to fund such a strategy to engage with the UK’s population of 4.5\textsuperscript{69} Additionally, there is always the issue of time; a Government with a life span of five years, intent on constitutional change is likely to want to proceed with their plans conceived in opposition rather than wait two years for a report from a body such as The Panel.

Perhaps in a similar manner to New Zealand, a process such as The Panel is most likely to be the result of a cross-party agreement, possibly as a consequence of Coalition negotiations with the parties struggling to reach an agreement. The concern of such a process in a UK context is that by the time the process is concluded, the Government might start to focus on the next election and have little interest in any recommendations. However, the report could inform future party manifestos, particularly if any strong opinions on the constitution were discovered. In this way, a process such as The Panel would feed into the constitutional change process indirectly. This would be more concrete should there be a cross-party agreement that could allow for The Panel to do foundational scoping work, which could then be built upon towards the end of the first Parliament and continued after a General Election. Such explicit, cross-party and cross-Parliament commitment would distance

\textsuperscript{68} Political and Constitutional Reform Committee, Do We Need a Constitutional Convention for the UK? (HC 2012-13 371) and Carwyn Jones’s evidence at ev 147. For a discussion of Political and Constitutional Reform Committee’s report see Prescott (n 1).

\textsuperscript{69} BBC News, ‘UK Population Grows by More than 400,000’ (BBC News, 26th June 2014) [http://www.bbc.co.uk/news/uk-27972335].
constitutional issues from ordinary politics, which may increase the opportunity for interest in the process to be generated.

2. The Issue-Framing Stage

Once a decision has been made to consider changes to an aspect of the constitution, and such changes would require a referendum (or it is proposed that the issue would go to a referendum), the issue then becomes how to frame that issue for the referendum. Which options should be presented to the electorate? There is a tension between allowing the electorate to choose between the different possibilities and providing a referendum that is likely to deliver a clear and decisive answer. As asking an open-ended constitutional question is likely to yield numerous possible answers, the aim of the issue-framing stage is to narrow these possibilities to enable a referendum that delivers a clear and legitimate result. A key failure with some referendums held in the UK, is that this narrowing down process has been conducted at a purely elite level, with choices being made for party political purposes rather than to give the electorate a real choice that captures the issues. The Scottish independence referendum is the clearest example of this, where the question was framed by negotiations between the Scottish and UK governments, with the terms of the question being one bargaining chip, along with whether 16 year olds should get the vote and the date of the referendum. The outcome of the negotiations was that the referendum provides for a clear ‘yes’ or ‘no’ on independence, with no option to remain within the Union, but with further devolution, a proposal christened as ‘devo-max’. The advantage for the pro-Union side is that this allowed them to campaign for a ‘no’ vote, and promise ‘devo-max’ should Scotland vote against independence. This is as about as far away from deliberative democracy as possible.

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70 Part of the reason for this, is as Chapter 6 showed the debate over when referendums should be held in the first place.

2.1. UK - Commissions\textsuperscript{72}

However, there is an established practice of using more deliberative process within Government. When confronted with a difficult policy problem, there is a long history of creating a commission to investigate the issue.\textsuperscript{73} Usually a commission is tasked to consider an issue as set out in its terms of reference, gather evidence and then make recommendations. Members of commissions on constitutional matters are usually a combination of senior politicians, people with relevant experience and experts from relevant fields, usually from academia.\textsuperscript{74} In the past, the judiciary has also been involved.\textsuperscript{75} This ensures that there is a cross-party element, and that any commission is seen to be independent from Government. The following explains how three of the more significant Commissions in recent times, the Wakeham, Richard\textsuperscript{76} and Calman Commissions,\textsuperscript{77} have approached their tasks, including how they engaged with the broader public.

2.1.1. The Wakeham Commission

The Royal Commission on the Reform of the House of Lords ('Wakeham') was created in 1999 to consider the future of House of Lords reform after the New Labour Government fulfilled a manifesto commitment to remove all

\textsuperscript{72} “Commissions” in this context include Commissions set up by a government department (such as the Commission on a Bill of Rights) and Royal Commissions (such as the Royal Commission on House of Lords Reform), as little turns on the distinction for present purposes.

\textsuperscript{73} Rodney Brazier, \textit{Constitutional Reform} (3rd edn, OUP 2008) 3.

\textsuperscript{74} For example the Royal Commission on the Reform of the House of Lords ('Wakeham Commission'), \textit{A House For The Future} (Cm 4534) included amongst its members Lord Wakeham (former Leader of the House of Lords), Richard Harries (then Bishop of Oxford), Lord Hurd (former Foreign Secretary), Professor Dawn Oliver (University College London), Professor Anthony King (University of Essex), Lord Butler (former Cabinet Secretary) and Sir Michael Wheeler-Booth (former Clerk of the Parliaments).

\textsuperscript{75} The Royal Commission on the Constitution ('Kilbrandon Commission') included Lord Kilbrandon who became a Law Lord during the period of the Commission’s operation (Cmnd 5460, 1973).

\textsuperscript{76} Commission on the Powers and Electoral Arrangements of the National Assembly for Wales ('Richard Commission'), \textit{Report} (2004).

hereditary peers. However, to ensure the Government’s legislative timetable was not delayed, the Government conceded that 92 peers should remain.\footnote{House of Lords Act 1999, s 2. For the circumstance of this see Chris Ballinger, The House of Lords 1911-2011 A Century of Non-Reform (Hart 2012) 169-77.} The Commission was to ‘consider and make recommendations on the role and functions of the second chamber’, and the composition needed to fulfil those functions,\footnote{Wakeham Commission (n 74).} balanced against the need to retain the pre-eminence of the House of Commons and reflect recent constitutional changes such as devolution and the Human Rights Act 1998.

The Commission had around 10 months to complete its task. Considering the background of unprecedented constitutional change at the time, it was an almost impossible task to compile a comprehensive report based on these terms of reference.\footnote{Devolution to Scotland, Wales and Northern Ireland was barely a year old, the Human Rights Act would only come into force in October 2000, after the Commission had reported, and the use of proportional representation for European elections, the first for any UK wide election would take place in June 1999 whilst the Commission was operating. In addition, the Jenkins Commission had only reported in early 1998, and had the proposal of elections for the House of Commons being held under AV+ been implemented the House of Lords and Parliament as a whole would have been likely to be affected by the change, Independent Commission on the Voting System, Report of the Independent Commission on the Voting System, (Cm 4090, 1998).} Indeed, according to Ballinger, the view of the Commission was that ‘it was far too early for the implications for the new constitutional settlement to have come into focus for it to see how to take the settlement into account’.\footnote{Ballinger (n 78) 188 fn 37.} In addition, the Commission was created as the House of Lords Bill was in its early parliamentary stages, and the ‘existence of the Commission enabled the [Government] to claim it was serious about moving on to “stage two”’.\footnote{Lord Wakeham, (2000) 37 Representation 93, 93. See also Ballinger (n 78) 180.} However, as one member of the Commission said, this meant that the Commission’s task was like being ‘asked to carry out major repairs to a jumbo jet while it’s still in the air’.\footnote{Anthony King, ‘Serving on the Wakeham Commission: Some Personal Reflections (2000) 37 Representation 125.} Inevitably, by the time the Commission reported, a
view took hold that with ‘the hereditary peers largely removed from the chamber, the debate had already moved on’.84

In terms of substance, there was unanimous agreement that a report should be produced that was ‘intellectually coherent and politically realistic’.85 In addition, at least one member of the Commission was of the view that making recommendations without considering whether they would be ‘acceptable to those who would have to implement them’, would have been ‘immoral’,86 as they would be throwing away the chance to deliver ‘thoroughgoing but also permanent’ reform.87 This emphasis on being ‘practical reformers rather than righteous, but futile, idealists,’88 delivered a set of reasonable, well-argued proposals, including a predominantly appointed chamber, with the main change in the powers of the Lords being a suspensory veto of secondary legislation of three months rather than the absolute veto the House did (and still does) enjoy.89 While the report was unanimous, it provided the three options for the elected element of 60, 87 or 195 members being included in a chamber of around 550 members.90 The great difficulty is that by arriving at this compromise through ‘deliberation’ among the members of the Commission,91 those who engaged with the process compared it to their ideal solution and saw their own perceived shortcomings, instead of viewing it ‘as a practical and sensible compromise.’92 This led to a particularly negative reaction to the

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84 Meg Russell and Richard Cornes, ‘The Royal Commission on Reform of the House of Lords: A House for the Future’ (2001) 64 MLR 82, 99. Indeed, one of the peculiarities of the House of Lords reform is that once most of the hereditary peers were removed, it increased in legitimacy as it lost its Conservative majority and its conservative outlook and increasingly challenged government. This in turn has made further reform more difficult. Meg Russell, ‘A Stronger Second Chamber? Assessing the Impact of House of Lords Reform in 1999; Lessons of Bicameralism’ (2010) 58 Political Studies 866 and The Contemporary House of Lords (OUP 2013).

85 Parliamentary Archives WHE/1/1/15. RCHRHL (99), 1st Meeting, 1 March 1999, cited in Ballinger (n 78) 181.

86 Anthony King, (n 83) 126

87 ibid, 127.

88 ibid.

89 Wakeham Commission (n 74), para 7:36.

90 ibid, para 12:21 - 12:41.

91 King (n 83) 121.

92 Ballinger (n 78) 189.
report. This was perhaps inevitable considering that the Commission, when making recommendations had in mind their acceptability among the leadership of the main political parties. Trying to convince the commentariat, who in their opinion pieces are released from the burden of having to engage with the main issues, is a very different task.

Underlying these issues could be that House of Lords reform is a particularly difficult issue, and any commission would experience similar difficulties. Yet, there are some drawbacks to the use of commissions. The Wakeham Commission was a Royal Commission, which may ‘lead to a perception that the process would not be wholly independent of government’. This can be buttressed by the fact that the process of appointing a Commission is at best opaque. Indeed, Robin Cook, in his diaries, quotes Lord Irvine as saying that,

‘Tony [Blair] never wanted any elected members of the House of Lords. Wakeham let us all down. He was put in to find a formula by which every member of the House of Lords would continue to be appointed. It was Wakeham who let the genie out of the bottle’.

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93 ibid, 189.
94 King (n 83) 127.
95 ibid, King was scathing about the criticism of the report, describing how those who argued that nothing short of a wholly directly elected chamber would be worthless as ‘knee-jerk’ and ‘ill thought through’, who do not ‘reason’ but ‘merely shout louder’ not only because that would challenge the terms of reference of the Commission which was to retain to ‘have regard’ to pre-eminence of the House of Commons.
Perhaps Lord Irvine’s disappointment was amplified by the fact that Lord Wakeham ‘had, unsolicited, offered help to Number 10 in negotiating an inter-party agreement on Lords reform even before the Royal Commission had been mooted’. However, the idea that the membership of the Commission was predisposed to a wholly appointed House is not supported when the others members are considered. Ultimately, a Commission cannot make recommendations that fly in the face of evidence received, and always have the ‘potential to influence the policy agenda in ways that governments might find awkward or embarrassing’.

The Wakeham Commission carried on the practice of commissions travelling outside of Westminster to hear evidence from around the country. Wakeham considered that this was an ‘opportunity to probe and test many of the arguments that had already been presented to us in written evidence and to explore the implications of various proposals’. This indicates that the purpose behind the public hearings for Wakeham was not to systematically gauge public opinion, but rather to supplement the evidence already received. A benefit of public hearing is the generation of media interest and increased awareness about the work of the Commission. Members of the public are free to provide written evidence, with the number of respondents being usually in the high hundreds. Wakeham also allowed members of the public to contribute in public sessions; however, in common with those who submitted written evidence, many contributions were made by from retired academics, members of think-

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101 For example, Dawn Oliver was a part of the Liberal Democrat team that negotiated the Cook-Maclennan Agreement between the Liberal Democrats and the Labour Party before the 1997 General Election. The agreement at paragraph 82 stated that after the hereditary peers were removed, a joint parliamentary committee would ‘produce recommendations for a democratic and representative second chamber’.

102 Rowe and McAllister (n 98) 108.

103 The Kilbrandon Commission (n 75) held public hearings (although not in England), paras 35-6.

104 Wakeham Commission (n 74), para 1.14.

105 ibid.
tanks or other people already engaged in the process.\textsuperscript{106} Overall, there is little evidence that the broader public were engaged to any significant degree. Indeed, Lord Smith of Clifton argued that:

‘… as against a series of private meetings of assorted members of the political, legal and religious establishment, only 21 sessions in nine locations were held for the public. They were poorly publicised and attracted derisory numbers. Not surprisingly, some proposed sessions had to be cancelled or curtailed. It is likely that the Commission met more people from the establishment than members of the public at large.’\textsuperscript{107}

Although in the Commission’s defence, given the extremely tight timeframe by which it had to report, the opportunities for a more elaborate public engagement strategy was extremely limited. As shown by Robin Cook’s diary entry, the concern is that the creation of a commission is a matter for the Government of the day. This means that although commissions are independent of Government, and can embarrass the Government, they are only able to operate within the environment created by the Government. Even if a wholly elected chamber were considered the preferred route, it would have been very difficult to propose that, given the background of unprecedented constitutional change. Overall, the Commission allowed the Government to appear open to introducing elections to the House of Lords, while having little inclination to do so.

2.1.2. The Devolution Commissions

The Richard Commission, which considered the next phase of devolution to Wales, is an interesting departure from Wakeham, because the demand for

\textsuperscript{106} The comments from the floor at the Manchester Public Hearing, came from people already engaged with the issues. Comments came from \textit{inter alia} a signatory of Charter 1988, a representative of the National Board of Catholic Women, a member of the Liberal Democrats, a member of the Labour Party and the Editor of Republic Magazine. Wakeham Commission, (n 74) \textit{Transcripts of Public Meetings, Manchester, 22nd June 1999}.

\textsuperscript{107} HL Deb 7 March 2000, vol 610, col 1008.
the Commission came from the Welsh Assembly and the Welsh Government rather than Westminster. In part, this was a response to the difficulties of the ‘corporate body’ model of the Assembly, with powers restricted to making delegated legislation. The key difference between the Richard and the Wakeham Commissions was the political will to require Westminster and Whitehall to heed the concerns of the Assembly and pass the necessary legislation to implement Richard’s recommendations of primary legislative powers, and the creation of a more traditional parliamentary structure in the assembly.  

By contrast, an opposition motion created the Calman Commission, which considered the future of Scottish devolution. This was a response from the political parties to the (then) minority SNP Government’s National Conversation on the future of Scotland. It followed that Calman’s terms of reference excluded the possibility of discussing independence.

The Richard and Calman Commissions approached the issue of public engagement more comprehensively. Richard made clear that the views of the public were to be taken into account, but accepted that ‘the public meetings are not, of course, a representative sample of people in Wales - those who chose to come to our meetings, or respond to our consultation, were people particularly interested in the Assembly and its future’. For this reason, public opinion surveys were considered ‘vital because they provide scientific evidence of public opinion on devolution and how it has changed since 1999’. The value of holding public meetings was to ‘explore these issues in more detail with interested members of the public and to hear why people feel these issues

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108 This was already a process ongoing within the Welsh Assembly, within the confines of the corporate body model imposed by the Government of Wales Act 1998, see Richard Rawlings, *Delineating Wales: Constitutional, Legal and Administrative Aspects of National Devolution* (University of Wales Press, 2003) Ch 3. The Government of Wales Act 2006 implemented the Richard Commission’s proposals by creating two separate legal entities of the National Assembly for Wales at s 1 and the Welsh Assembly Government at s 45. Primary legislative powers were provided by Part 4 of the Act and under s 103 would come into force after a referendum on the issue.


110 This ultimately led to the SNP publishing a draft bill that provided for a referendum on Scottish independence, although they did not introduce this bill into the Scottish Parliament. Scottish Government, *Draft Referendum (Scotland) Bill - Consultation Paper* (n 19).

111 Richard Commission (n 76), 23.
matter’.\textsuperscript{112} By doing it in this order, Richard approached this stage with knowledge of the views of the general public obtained by the survey. This subtle change has the potential to make the views of the broader public more central to discussions. It also reflected the need for the Richard Commission to place greater emphasis of the views of the public as its remit of the future structure of Welsh devolution raised questions of identity and nationhood.\textsuperscript{113}

The Calman Commission developed this further. Meeting in 2009, it was the first Commission able to readily embrace the use of the internet, allowing evidence to be submitted and published online, with webcasts of some oral evidence sessions, held around Scotland. The website had ‘over 13,000 unique visitors and approximately 130,000 page visits’ over the 13-month period that the Commission was active.\textsuperscript{114} The Commission also realised that alternative strategies were needed to engage with those without easy access to the internet and distributed 150,000 copies of an information leaflet around Scotland.\textsuperscript{115} The use of a questionnaire structured responses from the public, with just under 1,000 responses. In a similar manner to the Richard Commission, they accepted that as respondents were ‘entirely self-selecting’ and so were ‘not necessarily representative of public opinion’, although the overall picture was consistent with public opinion surveys.\textsuperscript{116} In terms of engaging with the public, Calman appeared to benefit from having a dedicated task group focusing on engagement.

The Richard and Calman Commissions are both models which can be built upon for future Commissions. Solely looking at public engagement, it can be seen that the levels of engagement with commissions remains low. The Calman Commission received fewer than 1,000 responses compared to the 77,000 who

\textsuperscript{112} ibid.

\textsuperscript{113} There was also the practical consideration that Richard recommended that a referendum of the people in Wales would be required for its proposals to be enacted, making the need to understand public opinion all the greater.

\textsuperscript{114} Calman Commission (n 77) para 1.26.

\textsuperscript{115} ibid, para 1.28.

\textsuperscript{116} ibid, para 1.30.
responded to proposals for gay marriage. Consequently, it remains difficult to conclude that the general public has been engaged convincingly with these Commissions, but it is clear that the engagement with the public that did occur allowed the Commissions to obtain the general views of the public. With the proposals of the Richard Commission ultimately being approved in a referendum, they can be seen to have reflected the will of the majority of the Welsh people.

The potential caveat as to the usefulness of Richard and Calman Commissions as precedents from which to draw is that they both had relatively specific remits and operated within a broader political climate where the future direction of travel of the issues was reasonably clear. It was likely that any review of the powers of the Welsh Assembly, operating under the original Government of Wales Act 1998, would have recommended the abandonment of the ‘Corporate Body’ model of the Assembly, and a reorganisation its powers. This is in stark contrast to the more divisive issue of House of Lords reform where, 13 years after the Wakeham Commission, the fundamental issues remain unresolved. In this respect, it would have been interesting to have seen a Calman-esque approach to public engagement in the Wakeham Commission, considering the difficulties nature of House of Lords reform, to see if a way ahead could have been indicated by the public when asked specifically about this issue. However, it is clear that commissions are no panacea, and a clear and decisive report is not guaranteed.

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117 Scottish Government, Registration of Civil Partnerships, Same Sex Marriage: Consultation Analysis (2012) [http://www.scotland.gov.uk/Resource/0039/00397030.pdf] para 5. It is also clear that over 76,000 of those responses were from members of the public. This can also be contrasted to the 30,219 responses received for the consultation on the referendum for independence in Scotland. See Scottish Government, Your Scotland, Your Referendum: An Analysis of Consultation Responses (2012) [http://www.scotland.gov.uk/Resource/0040/00405470.pdf].

118 This was held in 2011, see Election Commission, Report on the Referendum on the Law-making Powers of the National Assembly for Wales (2011) [http://www.electoralcommission.org.uk/__data/assets/pdf_file/0019/118603/Wales-ref-report-FINAL-web-mail.pdf].

119 The problems of the initial structure of the Welsh Assembly are discussed in the Introduction, but also see Richard Rawlings, Delineating Wales (n 108).

2.2. Australia - 1998 Constitutional Convention

In much the same way that the UK has a varied history of commissions, Australia has a long history of conventions. Delegates sent from the colonial legislatures formed the National Australasian Convention of 1891, and this was followed by a directly elected convention in 1897. The Australian Constitutional Convention of 1998 merged both of these models, with half being elected and the other half being directly appointed. The political circumstances of the convention have been discussed in the introduction to this Chapter. The Convention’s main task was to consider whether Australia should become a republic. In particular, the ‘major goal of this Convention should be to reach a clear view on which republican model ought to be pitted against present arrangements at a constitutional referendum’.

The eventul model of an indirectly elected president was rejected at the referendum, by 55% to 45%, despite opinion polls tracking a long-term trend towards increasing support for a republic.

The interesting aspect of this convention is the mixture of elected and appointed members. 76 members were elected using the single transferrable vote, conducted on a state-by-state basis. Unusually for Australia, voting was not compulsory and took place by post. On a turnout of 47%, 46 seats

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121 Constitutional Convention, Transcript of Proceedings - 2 February 1998 [http://www.aph.gov.au/~/media/02%20Parliamentary%20Business/23%20Hansard/con0202.pdf] page 3 John Howard. The Convention also considered whether there should be a new preamble to the Constitution, but as this is of less relevance for present purposes, this is not considered in this chapter.


124 Constitutional Convention (Election) Act 1997, s 11.

125 ibid, s 65.
went to those who had declared themselves to be a republican, 27 went to monarchists and three were uncommitted.127 Of the 76 appointees, 20 came from the Commonwealth Parliament, 20 from the state legislatures (including the Premier, opposition leader and a third parliamentarian nominated by the Premier from each state) and 36 were non-parliamentary members. These 36 were intended to represent ‘a broad range of groups and opinions’.

As Renwick states, the composition of the Convention meant that it was not designed to be a deliberative body as ‘most members were tied from the start to a particular conclusion’,128 ensuring that debates were ‘fractious’,129 with much time spent ‘speechifying’.130 There was no attempt to reconcile the alternative viewpoints, and working parties served as ‘opportunities for members with precise viewpoints to work up precise proposals’.131 As the elections had delivered a pro-republican majority, and the purpose of the convention was to develop a republican scheme to put towards the people in a referendum, naturally the focus was on developing such a scheme. Given the structure of the Convention, this was perfectly proper, as the Convention had a specific mandate from the people and the terms of reference were for the Convention to do precisely that.

The problem with the structure of the Convention is that it is unclear what the role of the monarchists should be in the Convention. In many ways, they were effectively spare parts to the real nub and substance of the debate as their preferred option of retaining the monarchy was guaranteed to be an option at any referendum. How should these engage with the debate as to the form that a republic should take? Should they engage at all, for their mandate was to

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127 ibid. 33-34.


130 Renwick (n 128) 78. Particularly as each delegate was allowed to make an address to the rest of the convention.

131 ibid, 79.
support the continuation of the monarchy, should they work with the republicans to deliver what they perceive to the be best republican scheme,\textsuperscript{132} or does their mandate stretch to working tactically for the republican proposal that (they perceive) might be less likely to succeed at a referendum? It is notable that, as the Convention operated, all members were entitled to vote on the various proposals for the presidency;\textsuperscript{133} giving rise to the possibility of exploiting any divisions among those advocating change.\textsuperscript{134} Yet, this does not appear to have happened in this case, as although the Convention’s choice of an indirectly elected president was contentious,\textsuperscript{135} the decision to put that proposal to a referendum was more consensual.\textsuperscript{136} This shows that the delegates respected the process and were ‘prepared to endorse the outcome of the votes taken: agreement to, if not with the result of the deliberations’.\textsuperscript{137} The referendum result, whereby 55\% of the electorate voted to retain the monarchy despite a background of increasing republican sentiment, shows that a majority of the public preferred to retain the monarchy than support the indirectly-elected model offered by a majority of the Convention.

More broadly, the Convention was seen as a success, as it ‘emphasised the sovereignty of the Australian people and the scope for them to change their system of government’.\textsuperscript{138} It was covered extensively in the media, with the major television networks, including ABC, devoting prime time television to cover each day’s events, which in turn increased awareness of the issues

\textsuperscript{132} This was the approach of the former Governor General Bill Hayden, who voted against the principle of Australia becoming a republic, but proposed a directly elected model of president at the Convention. Constitutional Convention, Transcript of Proceedings - 13 February 1998, page 948 [http://www.aph.gov.au/~media/02%20Parliamentary%20Business/23%20Hansard/CON1302_PDF].

\textsuperscript{133} ibid.

\textsuperscript{134} An example of this, in a different context could be seen during a series of votes on House of Lords reform, when in the House of Commons no majority could be found for any combination of elected and appointed appears, including a wholly appointed or wholly elected House, and various combinations in between, HC Deb, vol 399, col 243, 4 February 2003.

\textsuperscript{135} Constitutional Convention (n 132) 982. It was adopted by 73 votes to 57 with 22 abstentions.

\textsuperscript{136} ibid, 992. By 133 votes to 17, with 2 abstentions.

\textsuperscript{137} Tierney (n 3) 209.

\textsuperscript{138} George Williams, (n 123).
among the electorate, raising knowledge of the issues in advance of the referendum. It is also evidence that the novelty of an extra-parliamentary process can generate interest. If the aim is to break with the past, then using an extra-ordinary process, external to Parliament, highlights this.

In terms of the UK, there is a case for a similar process to be used in the UK, particularly for issues that have several possible solutions, such as House of Lords reform. One issue with House of Lords reform is that often the leadership of political parties and their backbenchers have taken diverging views; a convention that reflected this may have more chance of succeeding where previous attempts at reform have failed.

However, the Australian Convention was the conclusion of a sustained political and public debate over the monarchy, which was brought to the fore in 1993 with the election of Paul Keating, who expressed a desire for a republic in time for the centenary of the Australian Commonwealth in 2001. This debate continued with the election of John Howard in 1995 as the leader of the Liberal-National Coalition. Although far less committed to the republican argument, he proposed the creation of a ‘people’s convention’ which became the Convention held in 1998. Supplementing this cross-party debate was the creation of two campaign groups, the Australian Republican Movement and Australians for Constitutional Monarchy, who campaigned on the different sides of the issues, with membership of each running into the 10,000’s. This created the natural platform on which to hold elections to the convention. While there has been a sustained debate on House of Lords reform, or other constitutional issues, there are no equivalent mass pressure groups around which elections can be fought. It would be likely that groups would have to be formed around which

139 See text to (n 5) to (n 9).
141 One possible reason for this is that both sides of debates are often reflected within the political parties. Also on issues such as Britain’s membership political parties, such as the Referendum Party and UKIP have been formed rather than pressure groups with a mass membership. One of the few single-issue pressure groups with anything approaching a mass
candidates could declare a grouping, particularly if proportional representation or a list system was used for the elections. For elections to the Australian Convention, turnout was 47%, which was described as ‘quite respectable’.\textsuperscript{142} However, given recent turnouts, it could not be guaranteed that this would be the case in the UK.\textsuperscript{143} A convention elected on a turnout of 15 or 20% would have to confront a serious legitimacy problem, and would be viewed as evidence of a lack of desire for change.

Overall, the structural weakness of the Convention was its composition; the Convention could have better ‘reflected the popular desire for direct election’,\textsuperscript{144} or raised the debate so that ‘broad public opinion understood the benefit of indirect election. But it did neither of these things’.\textsuperscript{145} Certainly, the first criticism is more valid than the second, for underlying the second criticism is that a better debate might have delivered a different answer, indicating that electorate delivered the wrong result in the referendum. The conduct of referendum campaigns is a specific issue, which is considered below, but a notable feature was how little effect the strongly pro-republican media appeared to have on the referendum result.\textsuperscript{146}

2.3. Canada - Citizens’ Assemblies

If a key problem with the Australian Constitutional Convention was that the it did not adequately reflect popular opinion, then the various citizens’ assemblies that have been held around the world have been a concerted effort

\begin{footnotesize}
\textsuperscript{142} Williams (n 123).
\textsuperscript{144} Renwick (n 128) 82. Indeed, the referendum results are notable for how markedly the pattern of voting differed between affluent metropolitan areas who voted for the republic and the poorer rural regions who voted to retain the monarchy.
\textsuperscript{145} ibid.
\textsuperscript{146} Kirby (n 140),
\end{footnotesize}
to address this. The three main examples have been citizens’ assemblies in British Columbia,147 Ontario148 and the Netherlands, which have all been set the task to consider electoral system. Perhaps other than cost,149 there seems little reason why citizens’ assemblies should be restricted to considering only the electoral system,150 and there have been some calls for Citizens’ Assemblies to consider other issues.151

The key feature of a citizens’ assembly, as the name suggests, is its composition. A comparison is often made to jury service, where members of the public are chosen at random. However, as the British Columbia example shows, this is not quite the case. The random element is that a large number of the electorate were asked to express their interest in taking part. In British Columbia, 15,800 were invited to take part with 1,715 expressing an interest. Those volunteers then attended a meeting where the process of the citizens’ assembly and what being a member would involve was explained to them. After attending these meetings, volunteers who still wanted to take part put their name forward. Then when finally selecting the members, it was ensured that there was an appropriate representation from different geographical areas along with an equal number of men and women. In British Columbia, one man and woman from each electoral district was chosen.152 From this, it can be seen that there was a substantial amount of self-selection. Yet, overall the selection


150 Remaining within election law, a citizen assembly could be part of a process to consider various issues such as votes at 16, postal voting, and e-voting. If the electorate are declining to vote in ever-greater numbers, perhaps the most effective way to tackle this is to ask them why and what measures could increase the turnout.


152 British Columbia Assembly (n 147) 10. In addition it was ensured that the assembly also included representatives of the aboriginal community.
process delivered a diverse membership, which was more varied than the British Columbia legislature.\(^{153}\)

Clearly, the participants of a citizens’ assembly will lack the knowledge of the issues possessed by the full-time politicians that formed the Australian Constitutional Convention. This means that a citizens’ assembly is a longer process, as the membership has to become informed about the issues. In British Columbia, this learning phase took three months, with meetings held at weekends. An observer has described the learning phase in detail,\(^{154}\) but the essential feature was a series of lectures delivered to the whole assembly by two academics,\(^{155}\) complemented by a discussion groups facilitated by graduate students from two local universities and private reading. This shows how the learning phase can be relatively extensive and demanding on members. In the Ontario Assembly, members spent around 90 hours in lectures or discussions throughout this phase. One criticism with the learning phase of the British Columbia Assembly is the lack of input directly from politicians. As it is the politicians who will have to work with the consequences of any new electoral system, being aware of the views of politicians as to the consequences of a change in the electoral system would have been a valuable input in to the discussion.\(^{156}\) In any other process, it would be strange not to at least hear the views of those affected most directly by a policy. It is notable that Ontario, which wanted to learn from the British Columbia experiment, held a session with three retired politicians to talk about their experiences.\(^{157}\) Overall, the political parties that will be most affected by any change to the electoral system, played very little role while the Assemblies sat. When politicians were asked about the

\(^{153}\) ibid, 40.


\(^{155}\) British Columbia Assembly (n 147) 65-9.

\(^{156}\) There is no mention of any presentations being made by politicians during the learning phase. Although the opposition parties, the New Democratic Party of British Columbia and Green Party did contribute to the public session phase, British Columbia Citizens’ Assembly (n 147) 174-5.

\(^{157}\) Ontario Assembly (n 148) 70.
Assembly, the usual reply was that ‘it was up to the public to decide the wisdom of the recommendation of the Assembly.\textsuperscript{158}

In line with most deliberative democratic methods, the proposals of the citizens’ assemblies were put to a referendum. The British Columbia Citizens’ Assembly proposed changing the electoral system from FPTP to STV, its Ontario counterpart proposed moving from FPTP to MMP, (FPTP supplemented with a party list system). In Ontario, the new electoral system was rejected by 63\% of voters, leading to one member of the Citizens’ Assembly to criticise the election authority’s public information campaign.\textsuperscript{159} In British Columbia, the referendum was a more positive experience, with 57.7\% voting in favour of the STV system. However, this did not meet the 60\% threshold for the change to come into effect.\textsuperscript{160} A second referendum was held in 2009, with only 39\% voting in favour of STV.\textsuperscript{161}

There are several different points to discuss here. It is interesting how two similar processes asked a similar question but delivered two different answers. This shows how there is no one right answer to electoral reform. In British Columbia, the obstacle to reform was not the lack of support, but the 60\% threshold. This means that the deliberative process did not, as some allege, fail in British Columbia. The real problem in British Columbia is the rules by which the referendum is conducted. It could be argued that given how there is no one right electoral system, getting over 50\% to approve one system could be viewed as quite an achievement. However, the Ontario result also reveals are more fundamental problem, which is why did not more people vote for the proposal given that a group of fellow citizens have dedicated time to consider the question and recommended the change they are asked to approve? It must be


\textsuperscript{159} Ottawa Citizen, Provence Blamed for Ignorance on Electoral Referendum (4 October 2007) [http://www.canada.com/ottawacitizen/news/story.html?id=acbd6830-a01d-41b9-b9e1-de52f813176a&__federated=1].


stated that while it is open to the electorate to disagree with the proposal of a citizens’ assembly, in other contexts, such as juries, citizens readily accept the decisions of other citizens who have been involved in making the decision. It is also the case that citizens’ assemblies have thus far only considered electoral reform and that considering other issues may yield different results.

One reason is that the link between the citizens’ assembly and the referendum may not be obvious to the electorate. The question in British Columbia made a reference to the Citizens’ Assembly.162 If the process is seen to be legitimate, impartial and independent from the Government, there seems little reason why a voter should not at least have to confront the fact that they are voting against the proposal recommended by a citizens’ assembly. Yet a surveys of voters in the two provinces, found that although ‘knowledge of the proposed alternative system and the citizens’ assembly was associated with support for change, very few voters were actually informed about either’,163 and a majority of voters believed that the assembly members had been chosen by the Government.164 This makes public information and campaigning at referendums critical to ensuring a legitimate contest. But a survey of newspaper coverage showed that in both Ontario and British Columbia less than half of newspaper articles referring to the referendum made mention of the Citizens’ Assembly, and even then little detail was provided about the Assembly in question.165 This reflected the fact that as no major party actively campaigned either for or against change at any referendum, the referendum ‘was essentially

162 Elections BC, Statement of Votes Referendum on Electoral Reform - May 17, 2005 (n 160) 2, the question was as follows, ‘Should British Columbia change to the BC-STV electoral system as recommended by the Citizens’ Assembly on Electoral Reform?’: Interestingly, the referendum question in 2009 held four years after the previous referendum and Citizens’ Assembly still made reference to the Citizens’ Assembly, giving voters a choice between ‘the existing system (first-past-the-post)’ and ‘The single transferable vote electoral system (BC-STV) proposed by the Citizens’ Assembly on Electoral Reform’, Elections BC, Statement of Votes Referendum on Electoral Reform - May 12, 2009 (n 161) 5.

163 Fournier, van der Kolk, Carty et al (n 158) 134.

164 ibid.

165 ibid, only one in ten articles made any point of detail about the referendum.
absent from elite political dialogue and remained a peripheral item on the media’s agenda."\textsuperscript{166}

2.4. The Irish Example

The Irish Constitutional Convention was part of the political response to the Irish economic crisis. There was a sense that the political system had failed to prevent the crisis and that constitutional change was required. The Fine Gael/Labour Coalition that took office at the 2011 General Election agreed to establish a Constitutional Convention to ‘consider comprehensive constitutional reform’.\textsuperscript{167} Although the \textit{Programme for Government} also made a commitment to hold a more immediate referendum (separate to any proposals of the Convention) on whether to abolish the \textit{Seanad},\textsuperscript{168} showing how the incoming Government wanted to retain some control over the constitutional change agenda. Indeed, this control was shown through the terms of the reference, which were as follows:

- Reducing the Presidential term of office to five years and aligning it with the local and European elections;
- Reducing the voting age to 17;
- Review of the Dáil electoral system;
- Giving citizens resident outside the State the right to vote in Presidential elections at Irish embassies, or otherwise;
- Provision for same-sex marriage;
- Amending the clause on the role of women in the home and encouraging greater participation of women in public life;
- Increasing the participation of women in politics;

\textsuperscript{166} ibid, 141.


\textsuperscript{168} ibid.
• Removal of the offence of blasphemy from the Constitution; and
• Following completion of the above reports, such other relevant constitutional amendments that may be recommended by it.169

David Farrell, who worked as Academic Director to the Convention described this list as ascribed this that this reflected those areas where the coalition parties could not agree.170 This means that there is no internal consistency in the list. Some items are of minor importance, such as considering the term of office of the President, a role which Farrell describes as having ‘less influence than the Monarch does in the UK’,171 whereas same-sex marriage is a controversial issue (particularly in a Catholic country), and reviewing the electoral system to the legislature is a complex constitutional issue.

The other feature is that the Convention was given 12 months to report on these topics, a target that unsurprisingly, given its task, was not met with the process lasting 16 months instead. Given the range of issues considered in this timeframe, it is difficult to see how the members of the Convention, particularly the public members, could have become informed about the issues to the extent that the members of the Citizensbour Coalition thrish Columbia or Ontario did on electoral reform. In Ireland, the Convention discussed electoral reform over meetings held across two weeks, whereas in British Columbia and Ontario, which focused solely on electoral reform, spent six weekends learning about different electoral systems.172 This might be explained by the different circumstances between the different processes. In British Columbia, it was widely felt that the current electoral system was not working and so there

170 David Farrell, ‘The Irish Constitutional Convention 2012-14’ (Presentation to UCL Constitution Unit, May 2014) [http://constitution-unit.com/2014/05/29/the-irish-constitution-convention/].
171 ibid.
172 British Columbia Assembly (n 147) 65
needed to be a detailed examination of different systems, which required an intense learning stage.\textsuperscript{173} As Ireland already has STV, any inquiry on the electoral system in Ireland has to prove that the electoral system needs to be changed, and indeed only small changes to the STV system were proposed.\textsuperscript{174}

The unique feature of the Irish Convention was its composition and the combination of 66 members of the public with 33 politicians of which four came from Northern Ireland. The remaining 29 reflected the balance of the parties in the lower house of the Irish Parliament. This provoked a barrage of criticism from the media who felt that mixing politicians and citizens would be disastrous, as naturally the politicians would dominate.\textsuperscript{175} This does not appear to have happened, as, viewing the proceedings online,\textsuperscript{176} it can be seen that although politicians did contribute to the discussion when the Convention met in plenary form, they did not steal the limelight with significant contributions being made by the public members. Also, the Chair, Tom Arnold, was adept at ensuring as many people as possible contributed. In addition, much of the time of the Convention was spent in smaller groups, discussing the issues among 7 to 8 people, with a trained facilitator, ‘whose role is to ensure that all members are given an equal right to participate in the discussions’.\textsuperscript{177}

The combination of the membership allowed for the public members to discuss the issues with politicians in a fluid manner, giving them the opportunity to understand the politician’s perspective.\textsuperscript{178} This is one potential weakness with


\textsuperscript{175} Renwick (n 128) 92.

\textsuperscript{176} Videos of all the plenary hearings of the Convention are available online at [https://www.constitution.ie].


\textsuperscript{178} One member of the Convention is quoted as saying ‘it gave me a better attitude towards politicians. I couldn’t tolerate any of them [before]. I always had the impression that they were
the exclusively popular membership as seen in Ontario and British Columbia model. When it comes to choosing an electoral system, there are many different constituencies that need to be considered. Most obviously, there is the electorate, but political parties and politicians should also have an input. They are best placed to explain how the choice of electoral system will impact upon how politicians conduct their role,\[^{179}\] and how political parties will contest elections. Once the Convention has finished its work, the politicians involved have become ambassadors of the process and have been the strongest supporters of the recommendations in the Irish Parliament.\[^{180}\] The combined membership created a connection between the Convention and the legislature ensuring that politicians did not sideline the Convention.

This bridge between the Convention and politicians has ensured the outcomes of the process have been respected. From the eight topics contained in the terms of reference, 38 recommendations were made, of which eighteen require a referendum. The Convention is advisory, with the Government committed to responding to each issue within four months of the report being submitted and responding to the during a debate in Parliament on the report. This is unlike the British Columbia and Ontario Assemblies, which were binding on the Government, with requirement that the proposal from those Assemblies was put to a referendum.\[^{181}\] This difference again can be explained by the difference in the remits, some issues, such as increasing the participation of women in public life do not necessarily yield recommendations that would lead to a ‘yes’ or ‘no’ response. However, the Government has accepted the Convention’s recommendations that same-sex marriage should be introduced and that the voting age should be reduced to 16, although the remit of the convention was only to consider reducing the voting age to 17. The Government

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\[^{179}\] A politician elected under a national party list system, without a local constituency will have a very different role to a politician elected under first-past-the-post, where the MP-constituency link is a core part of the role.

\[^{180}\] Farrell, ‘Irish Constitutional Convention 2012-14’ (n 170).

\[^{181}\] fn 15.
has promised referendums on these issues in 2015. At the time of writing, it is likely that further referendums will be held on the Convention’s recommendations.\textsuperscript{182}

Summary

From the above, it can be seen that there are various options, each with their advantages and drawbacks, and that there is no one ideal solution. The most optimal solution could be the Irish model, but as referendums are still to be held on its recommendations, it is difficult to reach any firm conclusion. However, the key advantage of the Irish model is that it addresses the problem with the Canadian model, which is the lack of a relationship between the citizens’ assembly and politicians. If the structure involves politicians, it is more likely to garner media interest, retain the attention of politicians once an assembly publishes its report, which in turn, continues media interest and increases public knowledge of the issues. This was shown with the Australian Constitutional Convention, which appeared to capture the interest of a large proportion of the electorate, attracting significant media coverage. Indeed, the rejection by the public of the indirectly elected model of a president in preference to a directly elected model is evidence of some popular knowledge of the issues. It also had the advantage of dealing with an accessible issue, the Monarch as head of state, whereas as electoral reform is a far more complex issue and difficult to gain the approval of the electorate. The Irish model also benefited from specific issues to consider rather than a broad term of reference. From this the presumption, it might be that the Irish model is to be preferred, but the more complex the model the more politicians should become involved. Should a full commission be proposed, the practice of the Calman Commission should form the basis of the public engagement strategy.

\textsuperscript{182} Olivia Kelly, Government to Hold Up to Half a Dozen Referendums Next Year’ \textit{The Irish Times}, (14 August 2014) [http://www.irishtimes.com/news/politics/government-to-hold-up-to-half-a-dozen-referendums-next-year-1.1896357].
3. Regulation of Campaigning at Referendums

As the outcome of a deliberative process to frame the question is usually put to a referendum, the focus turns to the process of referendums itself. In this context the legal framework should be the same whether the question has been framed by politicians or by a deliberative process. However, as this section will highlight, the fact that a referendum has followed a deliberative process could, if handled correctly have a positive effect of the referendum. But first, the key features of the referendum process need to be discussed.

It was accepted following a recommendation of the Committee on Standards in Public Life, that there was a need for some stand-alone regulation of referendums that will come into effect for each referendum.\textsuperscript{183} The response of Parliament was the Political Parties, Elections and Referendums Act 2000; freestanding legislation that provides for some of the core elements of a referendum. In addition to the Electoral Commission being consulted on the wording of the referendum question,\textsuperscript{184} the 2000 Act makes provision for two lead campaign groups, described in the legislation as ‘designated organisations’, who each receive a grant not exceeding £600,000 to spend on campaigning for their side of the campaign.\textsuperscript{185} They also have the ability to make referendum campaign broadcasts on television and to post one piece of campaign literature to the electorate free of charge.\textsuperscript{186} For the Scottish independence referendum, these designated organisations are subject to an absolute spending limit of £1,500,000.\textsuperscript{187} Political parties are allowed to register as ‘permitted participants’, who are subject to spending limits which are


\textsuperscript{184} Political Parties, Elections and Referendums Act 2000 (“PPERA 2000”) s 104.

\textsuperscript{185} ibid, ss 108-109.

\textsuperscript{186} ibid, s 110.

\textsuperscript{187} Scottish Independence Referendum Act 2013 (asp 14) s 11, sch 4, para 19.
calculated by the share of the vote at the last General Election.\textsuperscript{188} If other organisations wish to spend more than £10,000, they must also register as permitted participants and are subject to a limit of £500,000.\textsuperscript{189} Overall, this structure is a complex compromise between providing for groups to campaign as part of a functioning ‘marketplace of ideas’ and ensuring there is some even-handedness between the two campaigns.\textsuperscript{190}

The model in the 2000 Act has been described by some as ‘almost the gold standard’.\textsuperscript{191} However, there are areas where the Act could be developed further. It appears anomalous that despite all of these controls, there are no restrictions at all on what a designated organisation can state when campaigning.\textsuperscript{192} This became an issue during the 2011 AV referendum when, in an unedifying spectacle, both campaign groups avoided the main issues that might be caused by the AV electoral system. The Electoral Commission noted the concerns raised about the campaigning but are yet to engage with this issue.\textsuperscript{193} This is important, as the cues that assist voters to make their choice; the political parties and candidates, are absent, meaning that voters can be particularly susceptible to the campaigns. This is particularly the case for referendums addressing issues unfamiliar to voters. As Farrell and Schmidt-Beck state:

\textsuperscript{188} For the Scottish Independence referendum, political parties with representation in the Scottish Parliament can spend the greater of £150,000 or a sum calculated by reference to the votes cast for each party at the 2011 Scottish Parliamentary Elections, see ibid.

\textsuperscript{189} PPERA 2000, s 118, sch 14, para 1 (2) (c).

\textsuperscript{190} Although for the Scottish Independence referendum, the spending limits of the political parties largely cancel each other out, as the SNP can spend Scottish National Party £1,344,000 and the pro-Union parties Labour, Conservatives and the Liberal Democrats can spend £1,431,000 between them.

\textsuperscript{191} Constitution Committee, \textit{Referendums in the UK} (HL 2009-10, 99) para 198 and Matt Qvortrup 133. Navraj Singh Ghaleigh at 141 stated that the Act ensures that ‘the preponderance of income, expenditure and political elites do not determine outcome’.

\textsuperscript{192} By contrast there are certain restrictions for elections, see Representation of the People Act 1983 s 106, and \textit{R (Woolas) v Parliamentary Election Court} [2010] EWHC 3169 (Admin), [2012] QB 1.

‘... opinions cannot be activated but must be formed, and there is considerable scope for conversion through campaign information, leading to unpredictable outcomes. Where parties are internally divided and appear positioned on opposing sides of a referendum there is even greater potential for this kind of persuasion through campaigns’.194

There are two solutions that might minimise this problem. When it comes to designating campaign groups, one criterion for designation could be that applicants as part of their application would have to include indicative campaign material as part of their application. A second solution could be, an in extremis ability for the Electoral Commission to reduce the spending limit for the offending campaign group.195

Another problem is that the legislation assumes that there will always be a campaign group suitable to be designated for both sides of the argument. This was shown with the 2011 Welsh Assembly referendum, when the one applicant to be the designated organisation for the ‘No’ campaign would campaign on the basis that the increased powers to the Welsh Assembly would not equal those of the Scottish Parliament.196 The Electoral Commission has a duty to ensure the designated organisation ‘adequately represents those campaigning’ for that outcome at the referendum’.197 Consequently, the Electoral Commission designated no campaign group for the ‘No’ campaign.198 However, as the law is framed, no campaign group could be designated for the ‘Yes’ side, as the law

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194 David Farrell and Rüdiger Schmitt-Beck (eds), Do Political Campaigns Matter? Campaign Effects in Elections and Referendums (Routledge, 2002) 188. Indeed this analysis could be applied to the alternative vote referendum from 2011, when initial opinion polls indicated a majority in favour of AV, the result became a clear majority of 68% to 32% against AV.

195 Although the Electoral Commission have rejected any idea of acquiring powers in this area, Election Commission, Referendum on the Voting System for UK Parliamentary Elections - Report on the May 2011 Referendum (n 193) 106.


197 PPERA, s 109 (3).

states that designation could only take place if there are groups for each suitable to be designated.\textsuperscript{199} This meant that the benefits of designation, the grant and the opportunities to campaign (as discussed above) were not available to any campaign group; therefore, the electorate had fewer opportunities to become informed of the issues.

This problem reflects the confirmatory nature of this Welsh Referendum, as the referendum followed the report of the Richard Commission was provided for in legislation by the Westminster Parliament, and triggered by the approval of both Houses of Parliament and a two-thirds majority in Welsh Assembly.\textsuperscript{200} However, the Act is structured for a contested referendum,\textsuperscript{201} with the focus on two lead campaign groups aiming to compete against each other for votes. Yet, this referendum did not reflect this model. If there is a greater variation in the ‘types’ of referendum, then there needs to be greater flexibility in the law to reflect it. Here, a comparison can be made with election law, where the law reflects the different types of elections.

Given the Welsh experience, it follows that if there is a campaign group that meets the requirements for designation, then they should be designated regardless of the quality of groups campaigning for the other side. This would avoid the possibility of one side of the campaign deciding for tactical reasons not to apply for designation if they feel that the other side is more experienced in terms of campaigning. It would also prevent the possibility of one campaign group with the support of the political parties (who each have their own spending limits) not to seek designation, meaning that the campaign group for the other side would remain a permitted participant, and subject to the spending limit of that category and be deprived of the benefit of the campaign grant that

\textsuperscript{199} PPERA, s 108 (2).

\textsuperscript{200} Government of Wales Act 2006, s 103.

\textsuperscript{201} This is perhaps best explained by the context in which the proposal from the Committee on Standards in Public Life (n 183) and the legislation was drafted. It was during this period that a highly controversial referendum on the euro was being discussed which was a concern of the Committee (at para 12:2). At that time, confirmatory referendums such as the Welsh referendum in 2011 were not necessarily in the contemplation of the Committee or of Parliament.
comes with designated organisation status. Together, the political parties could significantly outspend a single permitted participant.\textsuperscript{202}

For the 2011 Welsh Assembly Referendum, the law provided for this eventuality and gave the Electoral Commission the duty to take steps to provide information to the electorate that is ‘likely to promote awareness among those persons about the arguments’.\textsuperscript{203} This information had to be provided by a means that is ‘most likely to secure (in the most cost-effective way) that the information comes to the notice of everyone entitled to vote in the referendum’.\textsuperscript{204} The Election Commission used this power to allow permitted participants to put statements on their website. Doing this attracted 10,162 hits to the website,\textsuperscript{205} out of an electorate of nearly 2.3 million. Considering that in 2011, 71\% of the Welsh public had broadband access whereas 93\% of the Welsh public listen to the radio,\textsuperscript{206} it is questionable whether the Electoral Commission ensured the ‘information came to the notice of everyone entitled to vote in the referendum’ as the law required.

However, the best solution to both of these problems is the greater provision of impartial information. If the referendum follows the deliberative process described in the section above, then this creates the possibility for the Electoral Commission to act as a bridge between the two phases of the referendum. There seems little reason (perhaps other than cost) as to why a report, or a summary of a citizens’ assembly or constitutional convention could

\textsuperscript{202} PPERA 2000, s 118, sch 14, para 1 (2). For a UK-wide referendum, a political party’s spending limit is calculated on the basis of their share of the vote at the last general election. For example a party with more than 30\% of the vote can spend up to £5 million on campaigning at the referendum, and a party with between 5 to 10\% could spend £2million. By contrast a permitted participant can spend up to £500,000.

\textsuperscript{203} Government of Wales Act 2006, Sch 6, para 8 (2).

\textsuperscript{204} ibid, para 8 (3).

\textsuperscript{205} Election Commission, Report on the Referendum on the Law-making Powers of the National Assembly for Wales (n 118) para 4.48.


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not be distributed to each household. This would also increase the accountability of campaign organisations as claims that contradicted the findings of a citizens’ assembly or constitutional convention would have to be explained and scrutinised. This is an example of how the small-scale deliberative process can impact upon the referendum, as they can initiate a sustained deliberation, ‘perhaps making it that much more difficult for referendum activists on both sides to get away with the simplifications of past referendum practice’. It might be thought that the sending of such a document might prejudice the outcome of the referendum in favour of the conclusion of the assembly or conventions. Yet, the very benefit of an extra-parliamentary process of a citizens’ assembly or convention is that it has been decided by citizens (sometimes working with politicians if the Irish model is followed) who have considered the issue in depth, independent from government and come to these conclusions. The benefit of this process is lost if those voting at the referendum have little knowledge of the particular provenance of the proposal on which they are voting. If this literature were distributed to the electorate, then it would follow that the referendum question or the preamble to the question should include a reference to the assembly or convention that triggered the vote. This would root the assembly or convention in the core of a referendum process.

4. Conclusion

This Chapter has shown that the benefits of increasing the role of the public in initiating and framing the issue at referendums are two-fold. Firstly, it ensures the options presented to the electorate at the referendum better reflect the broad political mood rather than the desires of small sections of the political elite. The second benefit is that the issues are considered separately from separately from the electoral cycle, allowing the electorate to express the views

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207 This could be either by post or by email. The introduction of online individual voter registration creates the possibility of obtaining individual email addresses which could be used to increase awareness of elections and referendums.

in between general elections. With regards to initiating referendums, the methods available allow the public to become an extra influence on politicians, rather than taking away the initiative from politicians themselves.

The issue-framing stage is more complex. There is a different range of options available, but also the more complex the procedure used the more difficult it is to execute it procedure effectively. Should a mixture of politicians and citizens be chosen for a convention, the questions that follow include, how many politicians and citizens should take part? How should the politicians and the citizens interact with each other? How should the politicians and citizens be chosen? Despite this complexity, the Irish Constitutional Convention shows that these issues can be navigated successfully. Although the overall outcomes of the Irish Constitution Convention are still be seen, as referendums are due to be held on some issues, and the Government is yet to respond to others, its composition could be seen as presumption around which to build. But it would be going too far to suggest that it is the ideal model that should apply to all constitutional issues. Much depends on the underlying politics and the nature of the issues and the involved. For example, with electoral reform, the two precedents of the Citizens’ Assemblies in Ontario and British Columbia were established after some concerns with the disproportionate effects of the existing FPTP system. By contrast, the politics of electoral reform in Ireland were different. It was felt that a contributory cause to Ireland’s economic problems might have been that the STV system had led to deputies in the Dáil Éireann to focus on constituency rather than national concerns. For such an inquiry, it might be more appropriate for a combination of citizens and politicians to consider the issue, rather than citizens alone. It seems sensible that the structures chosen reflect the differences in the underlying politics of the issue.

It must also be stated that complex issues should not result in a diminished role for citizens. It is curious that both of the Citizens’ Assemblies discussed chose STV and MMP respectively, which are two of the more complicated electoral systems. The fact that a group of citizens will little prior
knowledge of electoral systems, chose these systems, is evidence of a high level of engagement with the issue. However, more complex issues mean that the education of a convention or assembly becomes ever more important. Again this difference can be seen in the Irish example, where some issues, while controversial (such as gay marriage), its remit did not necessarily involve difficult concepts wholly new to the citizen members, unlike the Citizens’ Assemblies on electoral reform. This meant that the education phase for the Irish Convention was far shorter.

The most difficult question is why should a political party, in government for five years not seek to implement its manifesto and instead hold a constitutional convention or commission that will, at least, delay the Government for several months or even years? As referendums play an increased role in the constitutional change process, it might be that a Government will be more likely to implement its manifesto commitment should they use some of the processes discussed in this Chapter to develop that policy, as the Government could not be seen to have dictated the policy in the same way. Thus, removing the risk (and a criticism of referendums) that a proposal is voted against sends a signal to the Government of the day.

It is worth contrasting the distant stance of politicians in British Columbia to the personalised, politically led campaigns of the AV referendum in the UK. Had a proposed electoral system come from a citizens’ assembly or a convention rather than being the outcome of Coalition negotiations, the campaigns would have had to focus on the benefits or disadvantages of the electoral system itself rather than party political cues. As Coalition negotiations are more likely in the future, it might become in the interests of the party wishing to see a constitutional change that requires a referendum to propose that that issue is sent first to an assembly or convention. The advantage of this is that it distances the issue from the Coalition negotiations.

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209 In British Columbia, when asked on a ten point scale, ‘How informed about electoral systems do you feel?’ the average of the assembly members was 4.3. After the learning phase this had increased to 9.11, British Columbia Assembly (n 147) 68.

210 Text to fn 158.
This, in turn, highlights the links between the issue-framing process and the campaigning phase of the referendum. The value of a citizens’ assembly or a convention is lost if the referendum process leads to low turnouts with voters uninformed, or worse, misinformed as to the question. With the PPERA 2000, the UK fares reasonably well on this score, although the structure of the Act presumes a contested referendum (such as AV or Scottish independence) rather than confirmatory referendum (such as the Welsh devolution referendum in 2011). The campaign phase of a referendum following a convention or an assembly could be enhanced by ensuring the reasoning of the convention or assembly is presented to the electorate.

Overall, the processes discussed in this Chapter change the nature of the politics that surround the issue. While controversial issues remain will remain just that, but these processes funnel that controversy, allowing the arguments to be evaluated, and developing a reasoned conclusion which is then presented to the electorate. Using the processes suggested in this Chapter would also be a recognition of the specific nature of the constitution as being the rules by which all other decisions are taken.
Conclusion - The Last Chance for the Uncodified Constitution?

The one unanswered question in this thesis is why should a Government develop any of the enhancements proposed, when the existing methodology of constitutional change allows a Government to use its majority in the Commons to get the desired legislation through Parliament? As the focus of this thesis has been on working within the current constitutional settlement the Government will remain the ‘midwife of constitutional reform’,¹ this is a key question that must be addressed. Essentially, it has to be in the Government’s interest to adopt the proposals made throughout this thesis.

If, for the reasons argued in the Introduction, change is ‘going to occur anyway’, it becomes in the Government’s interest to deliver that change. Yet, the current methodology has become increasingly unpredictable. The increasing likelihood of hung parliaments and Coalition negotiations means that a political party is unlikely to implement its manifesto in full, and compromises on constitutional issues between political parties will be at the expense of an overarching vision of the constitution. Furthermore, the experience of the current coalition Government shows that the support of their MPs for all aspects of the Government’s constitutional change programme cannot be guaranteed. For example, in return for the Conservative MPs lack of support for House of Lords reform, the Liberal Democrats delayed the review of constituency boundaries and the reduction of the number of MPs to 600 until 2020. In addition to delivering constitutional change, a Government will want to ensure that any constitutional change is stable, accepted by the public and long lasting. As shown by the Coalition Government and calls to repeal the Human Rights Act, it cannot be said with confidence that the current methodology delivers on

these counts. This raises the prospect of a Government becoming receptive to proposals that enhance the methodology of constitutional change.

Delivering stable change is easier if there is a tried and tested process for developing constitutional policy. However, Chapter 3 has shown how the Whitehall machinery for constitutional change, once consolidated largely into a Department of Constitutional Affairs, has become increasingly dispersed. Again, an overarching view of the constitution is at risk, with changes likely to be piecemeal and *ad hoc* as a more consistent approach. The proposed Department of Legal Affairs would correct this, and allow a build-up of collective memory that is lacking currently with constitutional change. A future Government with an extensive constitutional change agenda may welcome the removal of constitutional issues from the centre of Whitehall at the Cabinet Office to its own Department; allowing the centre of Government to focus on cross-departmental issues, such as security, which are peculiarly within the responsibility of the Prime Minister.

The collective memory of a Department of Legal Affairs would be used to develop a more established process of formulating policy and consultation. A disadvantage for the Government is that it would have to compete with other departments for opportunities on the Government’s legislative timetable. However, this would create the chance for a more reflective approach for policies that would be likely to be pursued later in Parliament. This would allow for planning; meaning that if a constitutional convention or citizens’ assembly was established early in a Parliament, there would be the time for a Draft Bill (if needed) and legislation before the end of the Parliament. Two unrelated changes have made such planning more possible than ever before. The Fixed-Term Parliaments Act 2011, by setting in law when the next election takes place, allows governments to plan the later sessions of a Parliament and avoid the worst excess of the legislative ‘wash-up’ at the end of a Parliament. The second development is the ‘carry-over’ procedure; whereby a Bill that has not completed all of its stages in the legislative process can be re-introduced in the

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next session of Parliament to complete the remaining stages. Together, these two changes mean that the *ad hoc*, rushed approach to constitutional change (as seen, ironically, with the Fixed-term Parliaments Act 2011) is more unjustifiable than ever.

The carry-over procedure is just one reform to parliamentary procedure that has allowed Parliament, as a whole, to scrutinise legislation more effectively than before. The discussion in Chapter 5 of the parliamentary passage of the Constitutional Reform Act 2005 and the Legislative and Regulatory Reform Act 2006, shows how Parliament can respond to proposals from Government. It is the role of Parliament to take constitutional issues seriously and effectively scrutinise Bills that affect the constitution. As reforms to parliamentary procedure increase the effectiveness of Parliament, governments will have to engage with Parliament more effectively; otherwise, if not defeated outright, they will be embarrassed more frequently. From the Government’s point of view, there is little sense in expending increasing political capital on issues that do not engage the electorate.

An ongoing example (at the time of writing) supports this. The Draft Deregulation Bill at Clause 51, would have allowed a Minister, by order, to ‘provide for legislation to cease to apply if the Minister considers that it is no longer of practical use’. This was a clear Henry VIII power, which lacked any objective safeguards and, according to Lord Norton, would have allowed the Government to ‘get rid of Acts with relatively limited parliamentary scrutiny’. Inevitably, the Joint Committee described the Clause as ‘too wide’, with the safeguards being ‘inadequate’ and should be removed from the Bill. This could have been a repeat of the Legislative and Regulatory Reform Act saga, but being a Draft Bill, the Government were able to accept this recommendation

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3 Chapter 5, text to fn 109 and 110.
4 HM Government, *Draft Deregulation Bill* (Cm 8642 2013).
6 ibid, paras 33 and 67.
without losing face in the Commons, and these provisions went no further. As the Bill has also been subject to the carry-over procedure, creating the time for a Draft Bill, it is an example of how the enhanced methodology can work and how it is in the interest of Government to engage with Parliament. Given the experience of the Legislative and Regulatory Reform Act, it is a modern take on what Reginald Brett, later Viscount Esher, wrote in 1910; the uncodified constitution, ‘rests upon precedent and reasonableness’.8

Yet, there are still areas where Parliament could improve. In the Commons, the Committee Stage for Bills with constitutional implications remains a particular concern. The practice of Committees of the whole House should be revisited, as debates in the Chamber are often poorly attended and retain the character of a Second Reading debate, rather than conducting line-by-line scrutiny. The introduction of Public Bill Committees used for most Bills has so far had only limited effect, and is an area ripe for further reform. There is scope for the specialisation of members, who would sit routinely on Public Bill Committees for constitutional Bills. This would enhance scrutiny. In addition, split committals with the relevant Select Committees (or possibly, a House Business Committee) recommending which parts should go to a Public Bill Committee, and which parts are left on the floor of the House should be considered. The benefit would be better scrutiny of legislation; particularly if Public Bill Committees are further reformed. While this may not appear to be in the Government’s interest, a split committal would free up parliamentary time for the Government’s other legislative priorities. More generally, how Parliament scrutinises constitutional legislation now these procedural changes have been made is an area that requires further investigation.

The preceding paragraphs have highlighted how this thesis has dealt with the methodology of formal constitutional change and how it could be improved and enhanced in terms of the policy making and detailed scrutiny of

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8 Quoted in Peter Hennessy, The Hidden Wiring - Unearthing the British Constitution (Victor Gollancz 2005) 203.
constitutional legislation. This applies both to minor and detailed constitutional legislation as much as it does to fundamental constitutional issues. However, fundamental constitutional issues tend to be more controversial and Parliament struggles to resolve these controversies. This is due largely to structural factors. As a Government can have a large majority with as little as 35% of the vote, the ordinary legislative process does not require the Government to seek consensus. By contrast, to succeed at a referendum, those arguing for a proposal must garner a consensus. This, in turn, requires addressing the controversy inherent in those fundamental constitutional issues. If it is accepted that referendums are required (which is a complex enquiry discussed in Chapter 6) for certain constitutional changes, then the question as to whether a referendum is in the interest of the Government or not is irrelevant. It is a hurdle to be cleared, just like the parliamentary process.

This means that if a Government wants to deliver constitutional change on a controversial constitutional issue, then commissioning any of the processes indicated in Chapter 7, such as a citizens’ assembly or a constitutional convention, would be the most effective way of garnering that consensus, with the Irish Constitutional Convention being a very interesting model to build upon. There is also a link with the proposed Department of Legal Affairs, which, by being focused on the law and the constitution, would be the natural sponsor of any Citizens’ Assembly or Constitutional Convention. Considering the rest of the proposed Department’s responsibilities, it would be particularly suitable to this role, as generally it would not deal with party political issues, meaning that it could function as a bridge between a process of citizen engagement and the rest of Government. The remaining part of the process is the referendum following a convention or assembly. To take full advantage of the benefits of the overall process, the referendum must be integrated into the rest of the process and not seen as a separate stage. This is another area that deserves further investigation.

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9 Super majorities have not been considered in this thesis due to a lack of space, but the experience of the Scottish referendum in 1979 and the infamous “Cunningham Amendment” shows that they can be fraught with problems.

10 Text to Chapter 3, from text to fn 110.
Citizens’ assemblies and constitutional conventions have the benefit of being focused on consensus building and being unambiguously separate from ordinary politics. This means that a proposal for such a process may have a greater chance of success at a referendum than a proposal determined entirely by Government. This means that an assembly or convention could be the key that unlocks the door to the constitutional change that the Government seeks to make. While this is an unpredictable process, as any assembly or convention must be separate from Government and be free to make proposals that the Government may not welcome, a pragmatic Government, given the problems with the current methodology, may well believe that a citizens’ assembly or constitutional convention is a risk worth taking.

Finally, there is the issue as to what constitutional issues a Government should address. Currently, this is not an issue as the issues are largely obvious, but this may not always be the case. Given that the electorate at General Elections tend not to consider constitutional issues, there is a particular need to consider how the electorate can convey their concerns about the constitution. E-petitions on EU membership have already had an impact, and show how the electorate can become an extra consideration for politicians between elections. This is another area worthy of further consideration.

Taken together, the enhanced methodology suggested throughout this thesis is perhaps the last chance for the uncodified constitution in its present form. Proposals to create a more rigid process contain some superficial attraction, but they are fraught with problems. For example, creating a House of Lords veto over ‘constitutional legislation’ would require much of the consensus building discussed above, but the process of deciding what would fall into the category of ‘constitutional legislation’ would be akin to creating a form of a codified constitution.

If this enhanced methodology (or something similar) is not taken up by Government, the problem of an ‘increasingly ragged’ constitution, envisaged in the Introduction would be realised and make a codified constitution ever more likely. Certainly, if a codified constitution was sought because of the problems of the methodology of the uncodified constitution, there is a risk of falling into the
paradox mentioned in the Introduction.\textsuperscript{11} What would be the methodology to adopt a codified constitution, and why could that process not be used to make changes to the uncodified constitution? Whilst a codified constitution could be a positive development, and may yield many benefits, it should be undertaken for the benefits it would bring, and not as a response to any resolvable issues of the uncodified constitution.

As Hazell states, we

‘... should nurture our unwritten constitution as a precious part of our heritage; and as with the rest of our heritage, each generation should seek to pass it on in better order to the next’.\textsuperscript{12}

To achieve this noble aim, the methodology to deliver that nurturing requires refinement.

\textsuperscript{11} Introduction, text to fn 50.

### Appendix 1 - Draft Bills with Constitutional Implications Since 1997

<table>
<thead>
<tr>
<th>Draft Bill</th>
<th>Committee</th>
<th>Eventual Bill or Act</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1997-98</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Criminal Justice (Terrorism and Conspiracy)</td>
<td>Commons: None Lords: None</td>
<td>Criminal Justice (Terrorism and Conspiracy) Act 1998</td>
</tr>
<tr>
<td><strong>1998-99</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Local Government (Organisation and Standards)</td>
<td>Joint Committee</td>
<td>Local Government Act 2000</td>
</tr>
<tr>
<td>Freedom of Information</td>
<td>Commons: Public Administration, Lords: Temporary Committee</td>
<td>Freedom of Information Act 2000</td>
</tr>
<tr>
<td>Political Parties, Elections and Referendums</td>
<td>Commons: None Lords: None</td>
<td>Political Parties, Elections and Referendums Act 2000</td>
</tr>
<tr>
<td><strong>1999-2000</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>International Criminal Court</td>
<td>Commons: None Lords: None</td>
<td>International Criminal Court Act 2001</td>
</tr>
<tr>
<td><strong>2001-02</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Local Government</td>
<td>Commons: Transport, Local Government and the Regions Select Committee Lords: None</td>
<td>Local Government Act 2003</td>
</tr>
<tr>
<td><strong>2002-03</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Civil Contingencies</td>
<td>Joint Committee</td>
<td>Civil Contingencies Act 2004.</td>
</tr>
<tr>
<td><strong>2003-04</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Euro Referendum</td>
<td>Commons: None Lords: None</td>
<td></td>
</tr>
<tr>
<td>Regional Assemblies</td>
<td>Commons: None Lords: None</td>
<td>Regional Assemblies Act 2004</td>
</tr>
<tr>
<td><strong>2005-06</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tribunal, Courts and Enforcement</td>
<td>Commons: None Lords: None</td>
<td>Tribunal, Courts and Enforcement Act 2007</td>
</tr>
<tr>
<td><strong>2007-08</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Counter-Terrorism (Temporary Provisions)</td>
<td>Commons: None Lords: None</td>
<td></td>
</tr>
<tr>
<td>Draft Bill</td>
<td>Committee</td>
<td>Eventual Bill or Act</td>
</tr>
<tr>
<td>------------------------------------------------</td>
<td>----------------------------------------------------</td>
<td>-----------------------------------------------</td>
</tr>
<tr>
<td>Constitutional Renewal</td>
<td>Commons: None Lords: None</td>
<td>Constitutional Reform and Governance Act 2010</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2009-10</td>
</tr>
<tr>
<td>House of Lords - Never Published.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>2010-12</td>
</tr>
<tr>
<td>Detention of Terrorist Suspects (Temporary Extension)</td>
<td>Commons: None Lords: None</td>
<td></td>
</tr>
<tr>
<td>Electoral Administration Provisions</td>
<td>Commons: Political and Constitutional Reform Select Committee Lords: None</td>
<td>Individual Voter Registration Act 2013.</td>
</tr>
<tr>
<td>Further Draft Electoral Administration Provisions</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Draft Individual Electoral Registration</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Enhanced Terrorism Prevention and Investigation Measures</td>
<td>Will be considered during the 2013-14 session.</td>
<td></td>
</tr>
<tr>
<td>Recall of MPs</td>
<td></td>
<td></td>
</tr>
<tr>
<td>House of Lords Reform</td>
<td>Joint Committee</td>
<td>House of Lords Bill (2010-12)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2012-13</td>
</tr>
<tr>
<td>Voting Eligibility (Prisoners)</td>
<td>Joint Committee</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>2013-14</td>
</tr>
<tr>
<td>Deregulation</td>
<td>Joint Committee</td>
<td>Deregulation Bill (2013-14, carried over to 2014-15).</td>
</tr>
<tr>
<td>Wales</td>
<td>Commons: Welsh Affairs Select Committee Lords: None</td>
<td>Wales Bill (2013-14, carried over to 2014-15).</td>
</tr>
</tbody>
</table>

Appendix 2 - Results of Referendums

National Referendums

**June 1975 - Referendum on Membership of the European Economic Community**

**Question:** ‘Do you think that the United Kingdom should stay in the European Community (The Common Market)?’

<table>
<thead>
<tr>
<th>Turnout:</th>
<th>Yes:</th>
<th>No:</th>
</tr>
</thead>
<tbody>
<tr>
<td>% 25,903,194</td>
<td>% 17,378,581</td>
<td>% 8,470,073</td>
</tr>
<tr>
<td>% 64.0</td>
<td>% 67.2</td>
<td>% 32.8</td>
</tr>
</tbody>
</table>

Note: These figures do not include ‘Service Votes’. Special arrangements were made to allow members of the armed forces to cast their vote whether or not they were included in the electoral register as service voters. But as Rallings and Thrasher state, these votes were counted in such a way that separate ‘yes’ and ‘No’ votes were unavailable. Consequently, service votes are excluded from the table above.

**May 2011 - Referendum on Parliamentary Voting System**

**Question:** ‘At present, the UK uses the “first past the post” system to elect MPs to the House of Commons. Should the “alternative vote” be used instead?’

<table>
<thead>
<tr>
<th>Turnout:</th>
<th>Yes:</th>
<th>No:</th>
</tr>
</thead>
<tbody>
<tr>
<td>% 19,172,806</td>
<td>% 6,152,607</td>
<td>% 13,013,123</td>
</tr>
<tr>
<td>% 42.0</td>
<td>% 32.1</td>
<td>% 67.9</td>
</tr>
</tbody>
</table>

Regional Referendums

**March 1973 - Referendum on Northern Ireland Remaining Part of the United Kingdom**

**Question:** ‘Do you want Northern Ireland to remain part of the United Kingdom? OR Do you want Northern Ireland to be joined with the Republic of Ireland outside the United Kingdom?’

<table>
<thead>
<tr>
<th>Turnout:</th>
<th>Remain in UK:</th>
<th>Join Ireland</th>
</tr>
</thead>
<tbody>
<tr>
<td>% 604,256</td>
<td>% 591,820</td>
<td>% 6,463</td>
</tr>
<tr>
<td>% 58.7</td>
<td>% 98.9%</td>
<td>% 1.1%</td>
</tr>
</tbody>
</table>

**March 1979 - Referendum on Devolution for Scotland**

**Question:** ‘Do you want the provisions of the Scotland Act 1978 to be put into effect?’

<table>
<thead>
<tr>
<th>Turnout:</th>
<th>Yes:</th>
<th>No:</th>
</tr>
</thead>
<tbody>
<tr>
<td>% 2,387,572</td>
<td>% 1,230,937</td>
<td>% 1,153,502</td>
</tr>
<tr>
<td>% 63</td>
<td>% 51.6%</td>
<td>% 48.4</td>
</tr>
</tbody>
</table>

Note: Despite a majority of votes in favour, the Scotland Act 1978 was not implemented due to the requirement that not less than 40% of the electorate had to vote in favour of the Scotland Act 1978. The ‘Cunningham amendment’ has been discussed in Section 4.2 above.

**March 1979 - Referendum on Devolution for Wales**

**Question:** ‘Do you want the provisions of the Wales Act 1978 to be put into effect?’

<table>
<thead>
<tr>
<th>Turnout:</th>
<th>Yes:</th>
<th>No:</th>
</tr>
</thead>
<tbody>
<tr>
<td>% 1,202,687</td>
<td>% 243,048</td>
<td>% 956,330</td>
</tr>
<tr>
<td>September 1997 - Referendum on Establishing a Scottish Parliament</td>
<td></td>
<td></td>
</tr>
<tr>
<td>---------------------------------------------------------------</td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>I agree that there should be a Scottish Parliament</em></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>OR</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>I do not agree that there should be a Scottish Parliament.</em></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Turnout: 2,401,431</td>
<td>Agree 1,775,045</td>
<td>Do Not Agree 614,400</td>
</tr>
<tr>
<td>% 60.2</td>
<td>% 74.3</td>
<td>% 25.7</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>September 1997 - Referendum on Establishment of Welsh Assembly</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>I agree that there should be a Welsh Assembly.</em></td>
</tr>
<tr>
<td><strong>OR</strong></td>
</tr>
<tr>
<td><em>I do not agree that there should be a Welsh Assembly.</em></td>
</tr>
<tr>
<td>Turnout: 1,116,116</td>
</tr>
<tr>
<td>% 50.1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>May 1998 - Referendum on Establishment of Greater London Authority</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Question:</strong> ‘Are you in favour of the Government’s proposals for a Greater London Authority, made up of an elected mayor and a separately elected assembly?’</td>
</tr>
<tr>
<td>Turnout: 1,735,350</td>
</tr>
<tr>
<td>% 34.1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>May 1998 - Referendum on Northern Ireland Assembly and Associated Changes</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Question:</strong> ‘Do you support the agreement reached at the multi-party talk on Northern Ireland and set in Command Paper 3883?’</td>
</tr>
<tr>
<td>Turnout: 953,583</td>
</tr>
<tr>
<td>% 81.1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>November 2004 - Referendum on Establishment of a Regional Assembly for the North West Region Northern Ireland Assembly and Associated Changes</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Question:</strong> ‘Should there be an assembly for the North East Region?’</td>
</tr>
<tr>
<td>Turnout: 906,367</td>
</tr>
<tr>
<td>% 47.7</td>
</tr>
</tbody>
</table>
### March 2011 - Referendum on law-making powers of the National Assembly for Wales.

**Question:** *Do you want the Assembly now to be able to make laws on all matters in the 20 subject areas it has powers for?*

<table>
<thead>
<tr>
<th>Turnout:</th>
<th>815,597</th>
<th>Yes:</th>
<th>517,132</th>
<th>No:</th>
<th>297,380</th>
</tr>
</thead>
<tbody>
<tr>
<td>%</td>
<td>35.6</td>
<td>%</td>
<td>63.5</td>
<td>%</td>
<td>36.5</td>
</tr>
</tbody>
</table>

Referendum due to be held

### September 2014 - Referendum on Scottish Independence

**Question:** *Should Scotland become an independent country?*

**Note:** All turnouts include spoilt ballot papers.

**Source:** Colin Rallings and Michael Thrasher, *British Electoral Facts 1832-2012* (Biteback 2012) 240-249.
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Parliament Act 1949
Crown Proceedings Act 1947
Life Peerages Act 1958
Law Reform (Husband and Wife) Act 1962
Law Commission Act 1967
Family Law Reform Act 1969
European Communities Act 1972
Northern Ireland Constitution Act 1973
Referendum Act 1975
House of Commons Disqualification Act 1975
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