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A new British constitution? :

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A NEW BRITISH CONSTITUTION?

AN EXAMINATION OF CONTEMPORARY BRITISH CONSTITUTIONAL REFORM IN LIGHT OF THE AMERICAN EXPERIENCE.

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ABSTRACT.

This study attempts to envisage a United Kingdom of the future. After opening with a history and description of the recently galvanized constitutional reform movement in that country, it projects an image of a Britain governed by conventions advocated by this vociferous thesis: a written and sovereign constitution, an entrenched and enumerated collection of individual liberties and judicial review. Because such an image would represent foundationless conjecture, it is then displayed through the lens of American history, society and culture; phenomena that are themselves essentially molded by the institutions called for by the revisions, in order to give it more dimension and shape. The result is a radical vision of a "new" United Kingdom.

Once this apparition has formed, the work attempts to evaluate the desirability and practicability of such a future, while all the time making references to the experience of the United States. Benchmarks such as democracy and British suitability are employed in order to make such a process more manageable and discussions of the feasibility and the effectiveness of enumerating rights and excavating judicial review give the appraisal of this vision increased depth. What remains is a series of results left behind by this evaluation and the number of intellectual and

empirical exercises that went with it. From this a conclusion is drawn.

Since the use of the American paradigm shows written constitutions, entrenched rights and judicial review to be undemocratic, rigid, ineffective and often impractical, and British society yields the contemporary constitutional reform movement's vision as unworkable in that country, this study, in its conclusion, looks elsewhere for a remedy to Britain's antiquated and over-centralized political system. The answer is not found in the federal approach that is also championed by the new force for change, but in a revision of the electoral system. What is seen at the end of this work is that Britain's problems can be resolved, to a certain extent anyway, with a more realistic, widely acceptable and democratic adjustment: the adoption of proportional representation.

PREFACE

In the autumn of 1988 a coalition of British politicians, academics, journalists and other professionals introduced, via the weekly left-wing periodical "Newstatesman and Society", a document named Charter 88. To these authors and initial signatories, Charter 88 represented the zenith of a burgeoning constitutional reform movement that had received momentum from the pan-Europeanism that had infiltrated British politics, the success of the Liberal and Social Democratic Party's "Alliance" and the reemergence of third party politics, as well as the thinking of such prominent personalities as Lord Leslie Scarman and Lord Quintin Hogg Hailsham. Now it had come to fruition riding the back of a wave of nonpartisan opposition to Margaret Thatcher's Conservative government: an opposition that had developed in response to the perceived erosion of civil liberties that the nation had experienced under the leadership of the "Iron Lady".

This essay is an attempt to describe Charter 88 and the rest of the contemporary British constitutional modification movement that is gathering influence in the wake of Mrs. Thatcher's "Electoral Dictatorship"[1]. In a two-pronged approach to the movement, it will outline the conditions

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[1] Lord Quintin Hogg Hailsham coined this phrase during a Dimbleby Lecture and in his book The Dilemma of Democracy, London: Collins, 1978.

that led to the arrival of this new philosophy, requisites that originate from both within and without the British system, and then examine the proposals put forward by Charter 88 et al. Amongst the most important of these proposals are the enumeration and entrenchment of a certain set of individual freedoms and, in a number of the components of the reform movement, the establishment of a written constitution and even the creation of judicial independence and review. After the initial treatment of the push for change, these proposals will be discussed and evaluated in detail. Although some influential elements of this new paradigm forward the adoption of a more decentralized, if not federal, complexion for the British system, this work will not scrutinize this component as it will the troika of a written constitution, bill of rights and judicial review. This is because the geographical dispersion of power does not pose such a radical challenge to Britain's constitutional status quo and envelopes an argument that is out of the realm of this body of work.

Throughout the essay, the vision of a system with a written and sovereign constitution, entrenched rights and judicial review will be referred to as American, modern or written constitutionalism[2]. Moreover, the assessment of this vision will come with an examination of the American

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[2] It should be realized that all written constitutions do not have to be of the American type.

experience, something that has unravelled under the auspices of a constitutional settlement that resembles, even if it does not exactly mirror, the "utopia" sketched in Charter 88, and the employment of certain episodes in American history or characteristics of that nation's society. The American model has been utilized because the United States is frequently referred to in so much of the literature produced by and critiquing Lord Scarman, Charter 88 and the other groups and individuals espousing reform. In addition, although it is realized that the use of two hundred years of history from a model that inhabits a different continent cannot be a truly adequate way of predicting a Britain of the future, it is also the most readily available and clearly parallels the reform movement's proposals. It is hoped that readers see enough similarity between the American model and the goals of the British constitutional reform movement to accept the comparison.

During the examination of the reform movement's thesis, several litmus tests, through the ubiquitous use of the American model as a signpost, will be employed. The essay will see if the adoption of a written constitution and the other provisions will be desirable for Britain, and here democracy, or perhaps more specifically western liberal democracy, will be the benchmark against which desirability will be measured. In another examination, employed to see whether the assumption of such a system will be practical,

the problematic nature of enumerated and entrenched rights and the political compatibility of British society and this system will be utilized. Through the use of these tests, a position that claims it is both undesirable and impractical for constitutional modification to be realized, will be established.

Finally, as way of a conclusion, the study will admit that there is a need for some sort of reform. Sensing that such an argument would, as it stands at this juncture, be too negative and rather one-dimensional, it will offer a prescription to the problems highlighted by Charter 88 and its allies. The work will begin, however, in an introductory chapter, by outlining the character and historical development of the British Constitution, the political climate of the Britain of the 1980s and the complexion and proposals of the new constitutional reform movement.

CHAPTER 1: BRITISH CONSTITUTIONAL HISTORY AND THE DISSENT OF THE 1980S.

Millions of people throughout the world view a constitution as a written, tangible and significant document that is entrenched in the political psyche of a society and that becomes a benchmark against which all behavior in that society is measured. As a resolute institution that plots the course of development for their societies, a constitution has, to many of these people, become synonymous with sacrosanctity and omnipotence, a collection of ideas that provides a concise portrait of the quintessential definition of what their nations are all about. In Britain, however, the meaning of constitution is neither tangible nor written, immutable nor omnipotent. Although the British live by a set of conventions and regulations and their rulers are confined by precedents and traditions that exude from a source of authority that seems to be somewhat objective and ubiquitous, they cannot, unlike Americans for example, accurately locate or see this source and they can neither instinctively repeat certain segments of it nor quickly convey its larger meaning. Whereas Americans, whose constitution is of the substantive type, are able to trace their right to trial by jury to a specific part of their constitution, the vast majority of Britons are unable to recall from where in British constitutional history a

similar right emanates.

This inability on the part of British citizens to regurgitate the constitutional authority for certain individual rights and governmental procedures comes from the fact that the British Constitution is not anchored by an embedded document but is interpreted from precedent, patterns of behavior, tradition and conventions. This is shown by illustrating that while the American Constitution, designed to control the actions of rulers and the ruled and protect the rights of citizens[1] into the future, was explicitly and completely (apart from the twenty-six amendments that have been added) set out by the Founding Fathers in one place, Philadelphia, at one time[2], 1787, the British Constitution consists of a kaleidoscope of acts of Parliament, common law and unwritten practices which have varying degrees of constitutional importance, differ in their lucidity and were adopted at disparate points in the development of the society. In addition, such an ad hoc construction is also highlighted by the fact that the British Constitution clearly matures as a reaction to events and situations and not because it guides or provides the stimulus to such events and situations. Just as the Magna

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[1] It should be noted that the Constitution did not recognize Indians or blacks as citizens.

[2] The Constitution did in fact take three months to write.

Carta, although provoking war, was an attempt by King John to foster peace in a tense political climate, so the Great Reform Acts of the nineteenth century were responses by the establishment to the call for political reform by such social movements as Chartism.

The reactive and haphazard complexion of the British Constitution had not, however, until recently, led to a proliferation of criticism. Indeed, to many scholars of law, society and politics, Britain clearly had a superior system since it had survived for an extremely long period of time and had been thoroughly receptive to input from all levels of society. Similarly, since Britain's Constitution was not conceived in a single founding moment but has evolved in this rather indeterminate way, it has often been referred to as a "living organism". Therefore, just as in 1904, Sidney Low disapproved of the rigidity of the American approach by calling it, "a solid building to which a room may be added here, or a wing there"[3], so personalities like Walter Bagehot and Lord Bryce have seen the British constitution as a flexible and elastic creature that has adapted itself subtly to different circumstances without causing a perceptible break in continuity. The veneration of this

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[3] From Low's "Governance of England" quoted from, Marshall, Geoffrey and Moodie, Graeme C. Some Problems of the Constitution, London: Hutchinson University Library, 1967, p. 18.

"pouring new wine into old bottles"[4] postulate is also espoused by Lord Hailsham who, after illuminating upon the inflexibility of written constitutions, states:

> An unwritten constitution or legal system is like a growing plant. It has its growing points and its withering points. It is, as it were, furry at the edges. On the boundaries of what is permissible or impermissible you do not know quite where you stand, though you do know that you overstep the boundaries at your peril. There is room for advance, and for retreat, and for a temporary stance in uncertainty.[5]

Even the most perfunctory glance at British history reveals why the Constitution is continuously viewed as a marvel of malleability by its students. From the Viking and Norman invasions, through the Constitutions of Clarendon which bolstered the Crown's ultimate power over the church during Henry II's reign, to the murder of Thomas Becket, British constitutional history continued to manoeuver between the assertion of the King's authority over the church and papal supremacy. In a different vein, King John, in 1215, signed the Magna Carta, a political document designed to protect such fundamental individual rights as due process of law and habeas corpus[6], but which, due to the

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[4] Hanson, A.H. and Walles, Malcolm. Governing Britain, Oxford, England: Fontana Paperbooks, 1984, p. 12.

[5] Lord Hailsham. The Dilemma of Democracy, London: Collins, 1978, p. 134.

[6] For a treatment of habeas corpus and the *Magna Carta* see, Meador, Daniel John. Habeas Corpus and Magna Carta: Dualism of Power and Liberty, Charlottesville, Virginia: University Press of Virginia, 1966.

nature of the Constitution, was susceptible to erosion or extension by future royal decrees. Therefore, although the Great Charter remains as part of the foundation of English common law and the words, "no free man shall be taken or imprisoned or disserved or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land"[7] still provide the basis of the concept of due process in much of the western world, future monarchs were able to dilute certain components of the document or, as Charles I did in 1628 with the Petition of Right or William and Mary of Orange did in 1689 under the Bill of Rights[8], promote specific parts.

The evolutionary, flexible and diverse nature of the Constitution can also be viewed by examining sources other than royal decree. The way in which Britons live and are

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[7] Translated from Latin from Chapter 39 of the *Magna Carta*. Taken from Holt, J.C. Magna Carta, Cambridge, England: Cambridge University Press, 1965, p. 327.

[8] To many critics, the Bill of Rights was in fact not an affirmation of individual rights but merely a description of the Revolution and a defining of the relationship between the Crown and Parliament. For an example of such an interpretation see Pinkham, Lucille. William III and The Respectable Revolution, Cambridge, Massachusetts: Harvard University Press, 1954.

For good collections of the various arguments on the 1689 Bill of Rights see, Pocock, J.G.A. (ed.), Three British Revolutions: 1641, 1688, 1776, Princeton, New Jersey: Princeton University Press, 1980, and Straka, Gerald M. (ed.), The Revolution of 1688 and the Birth of the English Nation, Lexington, Massachusetts: D.C. Heath and Company, 1973.

ruled today has also been painstakingly constructed by other institutions and mechanisms. Sir Edward Coke's assertion of judicial power and changes through case law, for example the establishment of the supremacy of Parliament over the courts in all matters concerning the internal affairs of Parliament in Bradlaugh v. Gossett[9], show how the judiciary have influenced constitutional development. Furthermore, the extension of the franchise in 1832, 1867 and 1884 serve as reminders of how, since the securing of the sovereignty of Parliament, legislation conceived in Westminster consistently affects the complexion of the Constitution. Finally, there have been less explicit sources from which this impetus of change has emanated. For instance, the change to cabinet government during the Hanoverian succession was due to the cumulation of governmental action and monarchical ineptitude.

Foundations of Dissent.

Yet, as has been hinted at, such a reverent postulate has recently found itself lacking both substance and subscribers as, during the last twenty years, a small but growing number of British politicians, educators, scholars and professionals have turned away from the advocacy of the evolutionary, reactive and ad hoc nature of the British Constitution and have looked for their society to adopt the

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[9] Queen's Bench Division 29, 1884.

American, written approach. Initially, this position of doubt took root in the years immediately following World War II. As the United States and, more importantly for the purposes of this work, its political philosophy began to assume a position of hegemony in the international system, many Europeans began to question the older approaches of reflexive and pragmatic responses to events. Allied liberation of France, Germany, Italy and Japan and the subsequent imposition of American sponsored political institutions, as well as a new distrust for those established methods that had provided the environment for the rise of fascism[10], meant that not only was a salient questioning of old approaches created but a modern, efficient and seemingly more democratic alternative made available. Therefore, inevitably, much of western Europe and Japan began to construct new political processes under the auspices of the American constitutional model and soon much of the non-communist world had adopted the new system.

Britain, however, was an exception. It trundled through the post-war era on a straight road, its political heritage in tact and its population as satisfied as ever with the vitality and flexibility of its adamantine constitution. Such a trajectory was caused by three phenomenon. First, as

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[10] For more on the post-war trend of constitutionalism that swept across the world see the opening chapter of McWhinney, Edward. Supreme Courts and Judicial Law Making: Constitutional Tribunals and Constitutional Review, Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1986.

a victorious and unoccupied power during the war, the United Kingdom had not experienced the same cataclysmic events as, for example occupied France or Nazi Germany had. Secondly, apart from rather mundane switches between the mild social democracy of the Labor Party and the diluted economic liberalism of the Conservative Party, the British political system had survived the Depression and the war in relatively good health and hence had not been susceptible to the intense scrutiny that its European counterparts had. And finally, because of its geographical location and its intimate relationship with the United States, Britain was not seen by American leaders as a vulnerable target of communism and was consequently viewed as a country which was in no need of a fresh injection of democracy. Clearly, the United Kingdom had not found modern constitutionalist thought so contagious.

However, as has been pointed out, such "trundling" and complacency was not shared by all. The impetus to constitutional change that the war had given continental Europe began to, if be it extremely gradually, infiltrate Britain as Adenauer, De Gaulle, the Japanese and others began to build virile economies at the same time as the United Kingdom found itself grasping proudly to the ignominity of playing a cameo role in world affairs. By the 1960s, the envious eyes of Britons began to contrast the economies and living conditions of a vigorous West Germany

to those of a listless Britain and search for a logical explanation for this phenomenon. In addition, the rise of European integration, born out of the Council of Europe and realized by the European Economic Community, inevitably furthered Anglo-continental comparisons and augmented the sets of jealous eyes and, as European success and British decline continued, the search for an answer was intensified.

The mere existence of foreign success stories and a new inclination for Britons to look abroad and ignore their splendid isolation could not, however, provide the catalyst for the formation of an organized and significant dissenting voice that could shout insults at the British constitutional system. This would take, as shall be seen slightly further on, an intransigent Prime Minister, a powerful executive, an impotent opposition and a form of, even if it seems somewhat mild, political authoritarianism. Yet it did provide one part of a two-legged foundation. In 1950, Britain signed the Council of Europe sponsored "European Convention for the Protection of Human Rights", a document that, taking inspiration from the United Nations Universal Declaration of Human Rights of 1948, attempted to force all signatories to recognize certain fundamental rights that their citizens had, and which gave these citizens power to take offending administrations to the European Court of Human Rights in Strasbourg so that a redress of any grievances could be granted. This was significant because not only did it

symbolize an early British intention to become more enveloped in European integration, but it resembled an entity that was fundamental to the American constitutional model: an entrenched bill of rights. Therefore, although the new convention was not enforceable in British courts and the United Kingdom was not obliged to abide by the rulings of its tribunal, a concept at the kernel of modern constitutionalism was introduced into the British psyche and hence support for change was augmented. Indeed, it was the attempts to make the European Convention enforceable in the courts of Britain that wrote part of the prelude to the contemporary constitutional reform movement. On several occasions, most notably in 1970, 1975, 1981 and 1987, such dignified politicians as Lord Wade, Lord Arran, Alan Beith and Sir Edward Gardner introduced "bills of rights" into the House of Commons in an effort to photocopy the European Convention onto the statute books of the country. By claiming that, "what we have done is to put ourselves in the hands of judges at Strasbourg instead of putting ourselves in the hands of judges in Westminster and Edinburgh"[11], these maverick legislators utilized the feeling of national embarrassment that the country blushed with every time it

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[11] Lord Hailsham quoted in The Times. 4 February 1987, p. 1.

was chastised in France[12] in an attempt to construct a number of individual rights that could not be altered or erased by parliamentary action. Unfortunately for them, however, in each instance the attempts were defeated; whether it be by individuals like Enoch Powell who feared the erosion of parliamentary sovereignty, by the Labor Party who feared that the fortification of such rights could prove to be an obstacle to centralizing socialism, or by old-fashioned expediency and pragmatism. As T.E. Utley said of the failure of the 1987 attempt:

> It was a fearful dilemma for those simple, decent legislators on both sides of the House. How could one know which side in British politics a human rights bill would ultimately favour? And that, after all, was all that mattered in British politics.[13]

The other limb upon which the challenges to Britain's constitution were rested was purely domestic in character. Before Margaret Thatcher moved into Downing Street in 1979, Britain was a nation with a recent history of politically and socially stable administrations, a factor that mirrored a pervasive national consensus and the public's satisfaction with the political system. This consensus and satisfaction, built upon the religious and ethnic homogeneity of the

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[12] As of the end of 1988, Britain had been found in violation of the Convention on twenty-two occasions but had, even if begrudgingly, abided with the Court's decision in all but one. New York Times. 30 November 1988, p. A19.

[13] The Times. 6 February 1987, p. 16.

country, the remarkable similarity of two political parties that resembled, "two great monolithic structures (that) face each other and conduct furious arguments about the comparatively minor issues that separate them"[14], and the dilution of class affinities that was accelerating dramatically in the aftermath of the war, was in turn, caused by an eclectic pot pourri of factors. For example, the success of organized labor and its cooption into British politics by the corporatist postures of successive governments led to the "gradualism" of the Labor Party, or, in other words, the willingness of working class leaders to accept the mechanics of recognized political institutions and procedures[15]. Furthermore, the major systemic wars of the twentieth century seemed to direct a vast array of viewpoints into a singular and unified national interest in which differences were of tone rather than of fundamental hue. More crucially, the threat of fascism focused people's attention on the evils of political, economic and social tyranny and encouraged Britons to become more egalitarian and collectivistic, factors which were reflected in the support for the welfare state and Beveridge proposals. And finally, unlike its European counterparts, Britain's

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[14] Robert McKenzie quoted from Punnett, R.M. British Government and Politics, London: Heinemann Educational Books Ltd., 1983.

[15] For more on this argument see, Miliband, Ralph. Capitalist Democracy in Britain, Oxford, England: Oxford University Press, 1983.

political middle ground did not give way during economic disaster and military confrontation and in fact, with the rise of the Keynesian postulate to the zenith of economic philosophy, managed even to attain a position of hegemony where Labor politicians were forced to accept that, "the Welfare State should not stifle incentive, opportunity and responsibility, in establishing a national minimum"[16] and Tories often supported the nationalization of industry.

Yet, during the 1970s British politics began furiously to shift direction and a violent and destabilizing polarization occurred in which the consensus was shattered and the satisfaction with the political system fractured. This disintegration happened primarily because two major components of the previously ubiquitous consensus, the traditionally pragmatic complexion of the two predominant political parties and the emphasis in Westminster of power over dogma, began to deteriorate in a process that attacked the conventional character of government from a number of angles. Initially, complacency in the system as it existed then was undermined. Strains on the two party system and the increasing volatility of the electorate, a phenomenon caused by the blurring of class lines, the rise of a new mass-media and widespread affluence, meant that by 1979 both of the

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[16] Sir William Beveridge quoted from Cmnd. 6404 in Kavanagh, Dennis. Thatcherism and British Politics: The End Of Consensus, Oxford, England: Oxford University Press, 1987, pp. 45-46.

major parties had only half as many people who strongly identified with them as they did in 1964[17]. Moreover, the crippling inflation and unemployment that the oil crisis of the early 1970s brought with it generated populist attacks on big government and inefficient bureaucracy and a belief that the British political system was becoming overloaded. There was a widespread sense that the country was suffering, "from an excess of popular expectations and demands and lacked adequate authority and resources to meet these pressures"[18] and this allowed for the development of even the most nonpartisan critique of the status quo.

With this atmosphere of restlessness intensifying, it became fairly easy for ideologues, especially those from the right of the political spectrum, to enhance their positions and spread their gospels. Armed with a contempt for the political banality of Westminster and a belief in the need of a somewhat populistic approach, these pioneers began to fine tune a postulate that would have both dynamism and mass appeal. Believing that, "an ideology simplifies, organizes, evaluates and gives meaning to what otherwise would be a

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[17] The actual figures are: in 1964, 48% of Conservative voters expressed a feeling of strong identification with the party compared to 23% in 1979, while 45% of Labor voters expressed this feeling in 1964 compared to 27% in 1979. Ibid., p. 144.

[18] Ibid., p. 124.

very confusing world"[19], they, in many instances under the symbolic leadership of Enoch Powell, attempted to espouse a politics that would constantly refer to a simplistic fulcrum of economic laissez-faireism and fervent nationalism: thus giving them a vigorous doctrine. All that was required then was to strike an accord with the British people and in 1968 Powell provided much of it. In transit between the Conservative Party, where his deploring of Tory centrism incurred the wrath of Harold Macmillan and Sir Alec Douglas Home, and the Ulster Unionist Party, he gave an anti-immigration speech famous for its vivid reference to "rivers of blood". During the tirade, he successfully highlighted how much political debate in Britain had become divorced from its high streets and pubs and how it was mainly the domain of the left-wing intelligentsia.

Soon, seeing the infinite potential of such a credo and set of tactics, Powell's approach had collected many new adherents. Espousing the philosophies of Friedrich von Hayek and Milton Friedman[20], the Conservative Party, persuaded by such influential figures as Margaret Thatcher, Sir Keith Joseph and Lord Harris, formed a number of "new right" think tanks such as the Center for Policy Studies and the Institute of Economic Affairs. Furthermore, the populist

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[19] Dolbeare, Kenneth M. and Metcalf, Linda J. American Ideologies Today, New York: Random House, 1988, p. 3.

[20] Two figures who are, ironically, both liberals and far from conservative in the British sense of the word.

dimension allowed the doctrine to permeate popular ideology and, with the editorial support of such influential papers as "The Daily Telegraph" and "The Times", public opinion began to move sharply to the right on issues like immigration, law and order and capital punishment[21], gathering more momentum as the "new right" exposed economic, political and social failure as a product of corporatism, centrism and pragmatism. As inflation and unemployment rose in the 1970s, this new faction, now becomingly rapidly co-opted into, and indeed even taking over, the Conservative Party, staged a celebrated coup as the Labor government under James Callaghan was forced to begin the abandonment of Keynesian-type beliefs and submit to the need to control the money supply and cap government expenditure. By 1979, with the welfare state being increasingly seen as a drain on productive investment and a contamination of Britain's work ethic and sense of self-reliance, old-style pragmatic and scientific corporate centrism was dead. The "Winter of Discontent"[22] and Labor's inability to control the powerful

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[21] In his "Adversary Polls, Public Opinion and Electoral Cleavages" in Kavanagh, Dennis and Peele, G. (eds.), Comparative Government and Politics, London: Heinemann, 1984, David Robertson states that seventeen issues were presented to the public in a study of October 1974. When, in May 1979, these issues were once again presented, Robertson found that the populace had noticeably moved to the right in all but two of the issues.

[22] "The Winter of Discontent" took place during 1978-1979. It was a time when numerous unions, including some which provided the necessities of life, took costly and lengthy industrial action. During this time the press portrayed the

and delinquent trade unions finally assured that there would be no more "beer and sandwiches at Number 10".[23]

With the consensus broken and the infallibility of the British way of doing things exposed, the road towards the mobilization of a constitutional reform movement had found a departure point. Yet it still only had geographically and culturally distant models and a far from united Europe to draw encouragement from. In addition, the realignment that was a product of Margaret Thatcher's 1979 landslide had forged a new consensus that, although more ideological and smaller than the old one, was just as resolute. It seemed that the vision of a written constitution, entrenched bill of rights and British Supreme Court was still despondently murky.

The Conception of Opposition to Mrs. Thatcher.

As was stated earlier, the Thatcher dynasty provided the catalyst for the formation of the new reform movement. Yet in its early days, the new Conservative government did not even attract substantial opposition of a partisan nature, let alone provoking a vociferous clamor for constitutional modification. Labor's crushing defeat in May 1979 had left

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incumbent Labor government as impotent and the striking unions as disruptive and selfish.

[23] "Beer and Sandwiches at Number 10" was a common phrase used to convey the intimate relationship that government, big business and organized labor shared during the height of British corporate, or tripartite, policy-making.

the party severely wounded and soon, with the defection of top personalities like Roy Jenkins and Shirley Williams to the newly formed Social Democratic Party, Labor seemed to be close to relegation to third party status. As if to exacerbate the problem, its image in the media was also suffering greatly. The advent of the "loony-left", or Militant as they preferred to call themselves, and the rise of young radical and uncompromising figures such as Ken Livingstone and Derek Hatton gave the regional and parliamentary components of the party a new virile edge but also meant that it became the target of ridicule and hatred. Within a couple of years of the 1979 debacle this media portrayal had mobilized much of the British public into viewing the Labor Party as "out of control"; a political institution that had been hijacked from under the nose of an "incompetent scarecrow"[24] by a conspiracy of middle class Marxists intent on taking the party away from the average, decent working Briton.

As time progressed however, Labor's perennial internal problems and the Conservative Party's continual success at the polls found it increasingly difficult to kill off opposition to Mrs. Thatcher's leadership. Inaugurally, this

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[24] The leader of the Labor Party at the time that it hit this nadir was Michael Foot. Foot was constantly portrayed in the press as a man who would have been more at home in a university than in the Commons, his lack of presence, intensely intellectual approach and scruffy attire often becoming the butt of Fleet Street's jokes.

opposition was meager, fragmented and adhered to the conventional scheme of British politics: criticizing governmental policy and philosophy but never questioning "the rules of the game". From the opposite end of the political spectrum came the radical left, represented in the ailing Labor Party by Militant, but also present and quite potently too, in universities, the trade union movement and the inner cities. Despite suffering public condemnation for its role in the "Winter of Discontent"; witnessing the disintegration of strikes in the mining, rail and other industries[25]; losing hundreds of thousands of members[26]; and being on the receiving end of numerous pieces of aggressive legislation[27], organized labor was able to maintain a

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[25] The famous National Union of Mineworkers (N.U.M.) strike lasted a year and made its President Arthur Scargill a topic of the public's conversation but ended in the bifurcation of the union and the realization of the National Coal Board's (N.C.B.) wishes to streamline the industry. The rail strike of 1982 reflected the unions' less resolute side. It was broken when the National Union of Railwaymen (N.U.R.) agreed to British Rail's new "flexible rostering" work schedule while the other rail union (ASLEF) and its leader Ray Buckton refused to accept it.

[26] National union membership fell from 13,289,000 in 1979 to 10,402,000 in 1987. Towers, Brian. "Running the Gauntlet: British Trade Unions Under Thatcher 1979-1988" Industrial and Labor Relations Review, Vol. 42, No. 2 (1989) p. 175.

[27] Examples of the Conservative Party's legislative attack on organized labor included the 1980 Employment Act, which stated that British employers were no longer compelled to recognize or bargain with unions; the 1982 Employment Act, which streamlined the definition of industrial action and the immunities that came with it; the 1984 Trade Union Act, which outlawed secondary picketing; and the 1988 Employment Act, which provided the catalyst to the Trade Union Congress

constant and antagonistic resistance to the hegemony of Thatcherism. In a similar vein, the monetary policies of the Conservatives which facilitated an unemployment mark of over three million by January 1981[28] and contracted a ruthless approach to the controlling of government expenditure, so incensed much of the underprivileged community that during the summer of 1981 many of Britain's urban areas were beseiged in violent rioting. It is no wonder that Herbert Stein, an eminent American economist, warned:

> Thatcherism is not a bonbon (to be) selected from a box of equally attractive chocolates... (It) is a pill known to be bitter, (to be) taken after decades - some would say a century - in which other medicines had failed.[29]

Mrs. Thatcher's opposition did not only originate from external sources. Her single-minded monetarist approach created a feeling of discontent so strong that it even penetrated the cabinet. As early as 1981, fiscal stubbornness, the accelerating unemployment and sterling rates had sparked such substantial protest in Whitehall that dissent seemed to escalate almost daily. Soon backbenchers and cabinet members alike were subscribing to John Cole's

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(T.U.C.) split in September 1988 when "new realists" like the electricians' union (E.E.T.P.U.) split from the traditional approach.

[28] Holmes, Martin. The First Thatcher Government 1979-1983, Boulder, Colorado: Westview Press Inc., 1985, p. 151.

[29] From Leach, Richard H. "Thatcher's Britain" Current History: A World Affairs Journal, Vol. 80, No. 466 (1981) p. 198.

sentiment that the Prime Minister was, "sailing into the eye of the storm, bound to the mast, her ears waxed against the siren songs of ministers claiming that they were running towards the rocks"[30]. And yet even when these opponents, known affectionately as the "Wets", threw explicit parallels to Captain Ahab at Mrs. Thatcher, they were not in a good position to exploit her myopia. In a number of parliamentary manoeuvers and cabinet reshuffles, the dissent was slowly alienated and pushed out into the political wilderness. Norman St. John Stevas, Francis Pym and Sir Ian Gilmour lost their jobs while other figures, like Peter Walker and Jim Prior were exiled to the ministerial backwaters of Agriculture and Northern Ireland respectively. Even in 1986, when Mrs. Thatcher faced her worst personal crisis over the Westland Helicopters affair[31], she was able to shrug off the claims of a clandestine and unethical approach to public government and survive a personal showdown with her highly popular Defense Minister, Michael Heseltine.

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[30] Cole, John. The Thatcher Years: A Decade of Revolution in British Politics, London: B.B.C. Books, 1987, p. 45.

[31] The Westland affair of 1986 concerned dual take over bids for the British helicopter company of the same name. One bid, from the American firm Sikorsky, was backed by Mrs. Thatcher and the Industry Secretary Leon Brittan, while the other, made by a European consortium, was avidly supported by the Defense Minister Michael Heseltine. A split in the cabinet ensued and, in an attempt to tarnish the popular Heseltine publically, a letter from the Solicitor-General to the Defense Minister was leaked, seemingly due to orders from the Prime Minister's Office. What followed was a widespread attack on Mrs. Thatcher's conduct and Heseltine's resignation.

The Importance of the Alliance.

The final, yet most crucial, component of this opposition came from a more central orientation and packed a more forceful punch. In 1981, two years after Mrs. Thatcher's victory had polarized British politics in dramatic fashion, four prominent Labor personalities who were discontent with that party's jolt to the left, Bill Rodgers, David Owen, Shirley Williams and Roy Jenkins[32], broke away from their traditional allegiance and formed the Social Democratic Party (S.D.P.). As this new party grew, it began to drift towards a point of fusion with the established centrist party, the Liberal Party. The new consolidation, known as the Alliance, then started to move forward in a forceful attempt to break the Conservative-Labor stranglehold on Downing Street. Taking advantage of the still significant nostalgia to return to consensual politics; the dilution of party identification as a cue in the electorate's voting behavior and the existence of a newly formed and huge vacuum at the center of Britain's political spectrum, the Alliance utilized an appeal to a constituency that emanated from a myriad of demographic, racial, socio-economic and geographical sources[33], becoming a sanctuary for

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[32] Collectively known as the "Gang of Four".

[33] For a more detailed description of this diverse constituency see, Bogdanor, Vernon. Multi-Party Politics and The Constitution, Cambridge, England: Cambridge University Press, 1983, pp. 59-61.

disillusioned Labor Party voters and centrist Tories. Very quickly, the momentum of the Alliance had snowballed and soon after the Limehouse Declaration[34] the S.D.P. had 78,205 members[35]. Moreover, by March 1982 both Jenkins and Williams were back in the Commons[36] and the Alliance had taken the Tory bastion of Croydon North-West from the Conservatives and in the 1983 general election the parties received 25.4% of the popular vote[37]. The impact was so dramatic that by 1985 Donald Shell was proclaiming that, "while Westminster and Whitehall continue to function according to the norms of the two-party system, at the popular level the three-party system has arrived"[38].

Despite Shell's optimism, by 1988 the bubble had burst. A series of disappointing seconds in crucial by-elections, the recovery of the Labor Party under Neil Kinnock and a belief that, regardless of public support, the Alliance would not be able to muster enough seats in the Commons to form a

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[34] The Limehouse Declaration, announced 25 January 1981, officially launched the S.D.P..

[35] Ingle, Stephen. The British Party System, Oxford, England: Basil Blackwell Ltd., 1987, p. 179.

[36] Williams lost her seat as a Labor M.P. during the May 1979 general election when her Hitchin constituency deposed her. She returned to the Commons as a S.D.P. M.P. in November 1981, winning Crosby. Jenkins was the President of the European Economic Community until 1981 and he returned to Westminster winning Glasgow Hillhead in March 1982.

[37] Cole, op cit., pp. 174-175.

[38] Shell, Donald. "The British Constitution in 1985" Parliamentary Affairs, Vol. 39, No. 3 (1986) p. 253.

government, had led to a frustration that had fragmented Britain's center into three less influential parties. Just as quickly as the Alliance had risen so it was dead, replaced by the S.D.P., the Social and Liberal Democrats and the Green Party.

The Alliance did leave an important legacy however. Whereas the far-left and the "Wets" had laid a foundation of dissent that was crucial to the conception of the new constitutional reform movement, the appeal and the influence of the Alliance was of much more importance. When Roy Jenkins made his precipitous Dimbleby Lecture in 1979, an event that led to much of the surreptitious diplomacy before Limehouse, he called for Social Democrats to initiate a movement that was intent on breaking down the hegemony of the two great inflexible, centralized and bureaucratic coalitions that dominated the political leadership of the country. Saying that Britain was unable to adapt to public opinion and shifts in the political environment because of its political structure, Jenkins was one of the first to step outside the boundaries of the traditional constitutional paradigm, when he called for a decentralization of power and an adoption of proportional representation as the nation's electoral system.

Jenkins's call for a new method of selection was absorbed by the Alliance because it realized that, despite popular appeal, a centrist party could never form a government while

Britain had a plurality system in which the country was split into a number of small constituencies and the candidate which received the most votes in a constituency, however small his plurality, was able to take his seat in Parliament. Such a system provided an impasse to the Alliance because a string of second places manufactured by a core of public support was both inevitable, considering the demography and politics of the United Kingdom, and did not facilitate the arrival of substantial power. In this way the philosophy was not welded into the Alliance's manifesto because of an altruistic desire for revolutionary constitutional metamorphosis. However, before the Alliance withered and died after the 1987 general election, the two parties were beginning to espouse forms of constitutional revision based upon the Jenkins desire for decentralization and proportional representation. By 1986, in his book A United Kingdom, David Owen was stating that, "we are badly governed, not because the malice or lack of forethought of our leaders, but because the structure of our government and our society is fundamentally flawed"[39].

The failure of the Alliance made it clear that the new centralism, as opposed to traditional British corporatism and pragmatism; the breakdown of the established consensus; latent opposition to the Thatcher government and an abundance of political models and other forces, only touched

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[39] Quoted from Ingle, op cit., p. 181.

upon the prospects for change. For example, while the Alliance had suggested a new electoral system and a type of decentralization or federalism and the European Convention on Human Rights had invoked the idea of a bill of rights, these new proposals existed as autonomous and unorganized concepts that, although sensing a kinship with the American, modern constitutional approach, lacked force and coherence. What was needed, therefore, during the irreversible decline of the Alliance, was a fresh and more vigorous catalyst. Margaret Thatcher proved particularly munificent in this respect.

"Electoral Dictatorship" and Contemporary Constitutional Reform.

During the Dimbleby Lecture of October 1976, Lord Quintin Hogg Hailsham[40] coined the phrase "Electoral Dictatorship" to describe the British political system. Later, expanding upon this term in his book, The Dilemma of Democracy, Hailsham suggested that the phenomenon concisely described the considerable concentration of power into the hands of the executive component of British politics. Taking the concept of parliamentary sovereign as his starting point, the peer began to paint a detailed portrait of a process in which power is constantly flowing towards the Prime

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[40] Among a multitude of accomplishments, Lord Hailsham was a leading contender for the Conservative Party leadership in 1963 and served as Lord Chancellor.

Minister. Parliament, he said, was the first absorber of political power because, "its powers are restrained only by the consciences of its members, the checks and balances of its different parts and the need, recognized in practice if capable in theory of being deferred, for periodical elections"[41]. Next power was sucked from the Lords by its fellow legislative chamber, the Commons, which, in turn, had its efficacy absconded by the governing party. In its final stages, the crystallization of authority, this picture stated, goes through a series of relationships between backbenchers and cabinet ministers until it reaches its destination: the Prime Minister.

Hailsham's model was not accepted in all circles of British life but there were many individuals who were wary of the possibility of a forceful government hijacking parliamentary power and legitimacy in a bloodless coup that would only require election victory by a vigorous party determined to be successful. To them such an event represented a return to absolutism and monarchy and could occur since, whereas the American political system separates its executive and legislative branches, in Britain the executive is a component of the legislature, making it possible, if the government is resolute enough, for the executive to virtually become the legislature. Moreover, such a scenario could also conceivably allow a cabinet, and

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[41] Hailsham, op cit., p. 126.

perhaps a Prime Minister, if he or she had enough support and was willing to ignore constitutional prerogatives concerning cabinet government, to put into action, free from parliamentary and partisan checks, whatever policies they wanted to. To those with such an imagination it became clear that Britain's political system was a fragile mechanism of concentric circles in which the epicenter could become omnipotent, given the right environment, and render all other institutions, the cabinet, the parliamentary opposition, the local party, the Lords, and the public, susceptible to its every whim and fancy.

It was the realization of this fear under Margaret Thatcher's government that brought the contemporary constitutional reform movement to fruition. Originally, Mrs. Thatcher's power, although substantial, was seen as legitimate. Painful as they were to many people (especially to those, as was seen earlier, who comprised the left-wing opposition to the Tories), the ruthless containing of government expenditure, the escalation in the number of those without a job and the violent battles with trade unions were viewed as a justifiable attempt by the Conservatives to actualize pre-election promises. Yet soon these policies were not only being criticized in a partisan sense but, more crucially, for their constitutional propriety. As an earlier description of the "Wets" and their discontent illustrated, Mrs. Thatcher's style of government

was myopic, egotistical and unrelenting; and personnel in her government began to question its legality and protocol. After resigning in the aftermath of the Westland affair, Michael Heseltine, speaking of the Prime Minister's approach to cabinet government and collective responsibility, voiced a complaint that had been previously shared by people like Sir Ian Gilmour and Edward Heath:

> Collective responsibility has been removed, and the Prime Minister's will to impose her views has been put in its place. You can't accept that. That's not the way we govern this country.[42]

Beginning at around the time of the Falkland's War, Mrs. Thatcher's attack on constitutional convention and her repudiation of ministerial self-restraint were exposed to more than just her Conservative government. Whereas her contempt for protocol and tradition had previously been witnessed within Whitehall, by the second half of her first term as Prime Minister many people began to realize that she was intent on curbing power, freedom and rights that had been granted to the population by many years of custom and convention. To these individuals, a catalog of disturbing events and sagas was to prove this statement by Ronald Dworkin chillingly accurate:

> The very concept of liberty... is being challenged and corroded by the Thatcher

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[42] Cole, op cit., p. 167.

Government.[43]

The incidents that contributed to this erosion of liberty are too numerous to discuss here. However, it is useful, in order to be aware of the scale of the Thatcher attack on the constitutional tradition that protects the liberty of British citizens, to describe a few of them. For example, there has clearly been a conscious attempt to drain power from regional, metropolitan and local government. In a series of moves which Roy Jenkins called acts of "civic degradation"[44], Mrs. Thatcher abolished Britain's metropolitan councils[45] and embarked upon centralizing projects such as the so called "poll tax"[46] and the national

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[43] Quoted in Atlas, James. "Thatcher Puts A Lid On Censorship In Britain" New York Times Magazine, 5 March 1989, p. 37.

[44] Jenkins, Roy. "The Encroaching Power Of Government" Index On Censorship, Vol. 17, No. 8 (1988) p. 25.

[45] In April 1986, three years after the conception of the highly controversial legislation, Mrs. Thatcher's government was able to abolish the Greater London Council and Britain's other metropolitan counties.

[46] The "poll tax", or community charge as it was officially titled, was introduced by the government to change the rating system in Britain. Previously, the amount of rates to be paid by citizens was based upon the size and location of their property. Under the new system, each individual adult is to be charged a set amount according to where in the country they live. This will mean that local government may lose up to half of their revenue and hence a corresponding proportion of their influence.

curriculum for schools[47]. In addition, the government seemed to be somewhat eager to restrict the freedoms of speech and press that are sacredly guarded in the United Kingdom and there have been a plethora of examples of this. Peter Wright, for instance, after writing a book on his life as an assistant director of MI5, found the government successfully obtaining injunction after injunction to prevent its publication. The Prime Minister even attempted to get the book banned in Australia, and it was only after a long battle in which several newspapers got their wrists slapped for releasing excerpts, that the text became readily available in the United Kingdom. In a similar episode Anthony Cavendish, who like Wright had served in British intelligence, found his memoirs banned. Despite the fact that the contents seemed relatively harmless, the government claimed that Cavendish had broken his commitment to lifelong confidentiality and was able to enjoin "The Sunday Times" and "Granata", a Cambridge literary magazine, from printing segments.

Aging former intelligence agents were not the only ones to feel the force of Mrs. Thatcher's control of the media. In April 1988 the Prime Minister attempted to block the broadcasting of a Thames Television program called "Death On

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[47] The national curriculum, adopted in September 1989, allows for the government to force school students to spend approximately 70% of their time studying Whitehall-approved subjects.

The Rock". The show, which examined the shooting of three Irish Republican Army (I.R.A.) members by British servicemen in Gibraltar seven weeks earlier, was screened, but only after a last minute mobilization of government resources was fended off by the Independent Broadcasting Authority (I.B.A.). In another case, police raided the home of journalist Duncan Campbell and the offices of B.B.C. Glasgow and "The New Statesman" magazine after Campbell had put together a television program about the government's covert attempts to construct the spy satellite Zircon. Indeed, the situation deteriorated so much after the media were banned from interviewing suspected I.R.A. terrorists in October 1988, that Donald Trelford, editor of "The Observer", remarked that, "knowledge is an offense now. Information is Government property"[48].

As if to make matters worse, the pervasiveness of this suppression seemed to go even deeper than the banning of Spycatcher or protest to the screening of television programs. According to a hypothesis that saw a discernable pattern to all of this control, Mrs. Thatcher was attempting to extract as much of the power, freedoms and rights she could from opposing organizations, groups and individuals in order to further her party's hegemony. In Britain's universities, for example, freedom of thought has become an issue as academic liberty has been stifled by the proposed

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[48] Quoted from Atlas, op cit., p. 38.

abolition of tenure and the 1988 Education Reform Bill[49] [50]. The right to freedom of assembly was also restricted by the 1986 Public Order Act[51] and in another area, one which has become a favorite of the government, Mrs. Thatcher has been using the issue of national security to silence public officials. The revision of The Official Secrets Act's Section Two has affectively widened the amount of material that comes under the umbrella of national security while diminishing the public's interest[52]. Furthermore, public officials, like foreign office clerk Sarah Tisdall who was sent to jail for six months for revealing to "The Guardian" the arrival date of cruise missiles in Britain, and workers at the Government's Communications Headquarters in Cheltenham, who were deprived of the right to join a union, fell victim to the uncompromising new stance.

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[49] The 1988 Education Reform Bill also abolished the Inner London Education Authority and provided for a scheme of "contracting out", a policy that was tantamount to forcing universities and polytechnics to comply to certain standards before they could receive funding.

[50] For a more in depth look at Mrs. Thatcher's policy on higher education see, Griffith, John. "The Threat to Higher Education", The Political Quarterly, Vol. 60, No. 1 (1989) pp. 50-62.

[51] The Public Order Act of 1986 increased the number of acts of assembly punishable by law and gave police greater powers to restrict demonstrations and picketing.

[52] For a detailed look at the historical treatment and contemporary status of the Official Secrets Act see, Tant, Tony. "Constitutional Aspects of Official Secrecy and Freedom of Information: An Overview" Essex Papers in Politics and Government, University of Essex, Colchester, England. No. 52 (1988).

These numerous examples of what seemed to many as authoritarianism provided the final push towards the conception of the current constitutional reform movement. Suddenly, to a large proportion of the United Kingdom, Lord Hailsham's vision of "Electoral Dictatorship" had been alarmingly realized and what was needed now was the implementation of new regulations to stop the exodus of power to the kernel of the peer's metaphorical set of concentric circles. Suggestions for these new measures came in many forms, but the notions of a written constitution, designed to alter the structure of a British political system that had been so easily abused, and an entrenched bill of rights, to protect the fundamental prerogatives of ordinary individuals from government encroachment, were by far the most popular. It was because of this that Britain, in the form of this new movement, finally adopted a significant push for a system, one that has been labelled the modern American constitutional model, forty three years after the original impetus was injected.

Proposals for Constitutional Reform.

There had been, to be sure, salient and consequential versions of this constitutional modification argument prior to the late 1980s. Academics like Muhammad Abul Fazal, for example, called for a United Kingdom federation in which three units, England and Wales, Scotland and a united

Ireland, would, all within the framework of a written constitution and an entrenched bill of rights, "retain their distinct national identity with adequate powers and resources to govern their own affairs while submitting themselves to a common federal government over matters that concern the whole of the British Isles"[53]. Moreover, many MPs demanded, as was seen earlier, the incorporation of the European Convention on Human Rights into the British Constitution via an act of Parliament, and in a similar vein, other individuals attempted to encourage judges to actively implement the Convention in issue areas where they were not bound to follow statute but were relatively free to shop around for precedents and interpretations[54]. What is more, The National Association for Freedom, established in 1975 in the wake of Ross McWhirter's murder, promoted the protection and consecration of civil liberties[55]. In fact

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[53] Abul Fazal, Muhammad. "A Federal Constitution for the United Kingdom" Transnational Perspectives, Vol. 8, No. 2 (1982) p. 19.

[54] See, for example, Jacobs, Francis G. "Towards a United Kingdom Bill of Rights" Thomas M. Cooley Lecture, delivered at the University of Michigan Law School on 2 November 1983. Reprinted in "University of Michigan Journal of Law Reform" Vol. 18, No. 1 (1984) pp. 29-49.

[55] Despite its apolitical name, the National Association for Freedom is an extremely political organization. Although it crusades for the protection of individual liberty, the cases it undertakes are really only those where a right-wing greivance exists. For example, it was at the center of the vociferous debate to abolish the closed shop practice, took out injunctions against postal workers who refused to sort mail bound for South Africa and in 1981 promoted the appeal of Joanna Harris, a standards inspector in the poultry

there was such a phalanx of suggestions that rotated around this theme of embedded constitutions and sacrosanct bills of rights, whether it be in a federalist framework or not, that conjecture about prototype British constitutions became a favorite pastime amongst political scientists.

The most influential and crucial of these early proposals came from one of Britain's foremost legal figures. In 1974, whilst giving the Hamlyn Lectures[56], Lord Leslie Scarman used a complex critique of contemporary English common law as his vehicle to justify constitutional reform. Building from a reference to a number of modern challenges to English common law such as the growth of international law and supranational institutions, the rise in the belief in the righteousness of social justice, the increased visibility of environmental issues and technological changes in society, Scarman slowly constructed an equation from which the need for a written constitution and entrenched bill of rights issued forth. For example, while talking about foreign challenges, he highlighted how human rights in Britain, safeguarded by entrenchment in America and much of western Europe, could expose the common law as powerless in defending traditional individual rights from statute that

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industry who was dismissed for refusing to join a union.

[56] Lord Scarman's 1974 "Hamlyn Lectures" and the argument that is paraphrased here are from Scarman, Lord Leslie. English Law -The New Dimension, (The Hamlyn Lectures, Twenty-Sixth Series 1974) London: Stevens and Sons, 1974.

was determined and accurate enough to dilute these rights. Similarly, with reference to the social challenges, Scarman underlined the common law's rather one-dimensional tendency to emphasize distributive justice and adjudication in conflicts between individuals and neglect the fact that with the advent of mass government, predominantly in the form of the provision of social services, the state is often a participant in a dispute. He even, sensing the crisis that our natural surroundings are going through, took the common law to task over environmental issues. Picking up on the fact that the common law reduces the environment to property Scarman showed how, firstly, the environment can only be protected if an individual has the money and stamina to activate litigation on its behalf and, secondly, how the environment is subordinate to private property interests.

As has been stated, Scarman's solution to the inflexibility and vulnerability of English common law was a form of constitutional revision. Using a delicate balance of a written constitution, entrenched rights and, perhaps paradoxically, ultimate parliamentary sovereignty as his framework, he specifically called for four major proposals. First, the basis of his proposition would be the entrenchment of certain provisions such as a bill of rights and European treaties. Second, despite the entrenchment of these provisions, they would all be susceptible, in line with parliamentary sovereignty, to repeal or amendment but

only, in line with the concept of entrenchment, by a substantial parliamentary majority. Thirdly, Scarman called for a Supreme Court, presumedly made up from either the Judicial Committee of the House of Lords or the Privy Council, which would have the power to invalidate unconstitutional legislation and regulate jurisdictional disputes made necessary by a scheme of federalism[57]. And, finally, the powers of this Supreme Court would be diluted by a change in the legal system whereby, instead of being the exception, statutory law would become the norm and the foundation on which common law is based.

For all the scholarly qualities of Scarman's and the other earlier models, it was not until recently that constitutional reform, riding the wave of authoritarianism mentioned above, was able to undertake a prominent position in British political debate. Conceived of in the autumn of 1984, the Constitutional Reform Center, now headed by Lord Scarman, began this trend by galvanizing a group of nonpartisan individuals into an agency designed to evaluate the structure, operation and inter-relationships of Britain's public institutions. When this project found fault with the country's constitution, the organization altered its emphasis and started to call for the entrenchment of

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[57] Like Fazal and a myriad of other proponents, Scarman proposes a form of federalism in his modifications. However, for reasons that were explained in the introduction, this study is not going to directly discuss such reforms.

individual rights and freedoms. The subsequent construction of a larger constituency through the production of a great deal of propagandist literature[58] allowed the Reform Center to become very popular amongst writers, journalists and other professionals who were finding it increasingly difficult to breathe under Mrs. Thatcher's style of leadership. Because of this, by the middle of 1988 a bevy of intellectual think tanks such as "Samizdat"[59] and John Mortimer's "Twentieth of June Group"[60] had been formed around the topic.

It was not until late 1988 however that this restlessness had permeated through the confines of elite circles. On 29 November of that year[61], the newly formed "Newstatesman and Society"[62] periodical launched Charter 88, a document of about one thousand words that called for a new

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[58] Such literature includes, Holme, Richard and Elliott, Michael (eds.), 1688-1988: Time For A New Constitution, London: The Macmillan Press Ltd., 1988. Also, a periodical published by The Constitutional Reform Center called "Constitutional Reform, The Quarterly Review".

[59] "Samizdat" is a newsletter that, it says of itself, was formed to, "challenge the divisiveness of the Government and the fear of the new of so many of its opponents". Quote from, Atlas, op cit., p. 36.

[60] This group was formed by a number of unsatisfied writers who convened for dinner at the playwright Harold Pinter's home in the summer of 1988.

[61] Charter 88 was launched in "Newstatesman and Society's" 2 December 1988 issue.

[62] "Newstatesman and Society" was previously two separate periodicals, "New Statesman" and "Society", that merged in the summer of 1988.

constitutional settlement. In this thesis, executive powers and prerogatives would be subjected to the rule of law; government would become more open; proportional representation would be instituted; the Lords would be reorganized and become an elected chamber; the judiciary would be reformed and its independence assured; and power would be greatly decentralized. Furthermore, Charter 88 insisted that a bill of rights, complete with such provisions as the freedom of association and freedom from discrimination, should be added to the list and then, along with the other proposals, be entrenched in sovereignty[63].

The new charter, whose name was inspired by "Charter 77", a Czechoslovakian document authored by some of that country's politically active middle-class, based this argument mainly on the intrinsic paralysis of the political system rather than the performance of the Thatcher government. In this way, it was therefore able to attract support from all parts of the political spectrum and as a result it became very popular. Born with two hundred and forty signatories, including Lord Scarman, John Fowles, Peggy Ashcroft and Julie Christie, the charter had attracted thousands within a matter of months. Clearly the use of the language illustrated below had struck an accord, ranging from Salman Rushdie to Roy Jenkins, throughout British

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[63] To view the Charter in its entirety see, "Newstatesman and Society", 2 December 1988, pp. 10-11.

society:

> An accumulating weight of evidence suggests that the feudal survivals, the over centralised governing structures, the distorting electoral procedures and the vestiges of imperial presumption in our institutions have for decades blocked not only democratic rights but also economic progress and social cohesion.[64]

As, "a bold attempt to tackle the problem of securing the survival of our human and constitutional freedoms and the complexities of modern British society"[65], Charter 88 symbolized a multitude of watersheds. It marked, simultaneously, the vocalization of a previously latent discontentment with the status of individual liberty in the United Kingdom; a sudden realization by a significant part of the British population that the "living organism" approach to constitutionalism was fatally flawed; and the convergence of a number of forces, such as the rise of Europeanism, the disintegration of a political consensus, and the nature of Thatcherism, that pushed the constitutional reform movement into motion. In another way, it brought together, under one umbrella and in a unitary expression, the main components of this diverse movement: a written constitution, an entrenched bill of rights and the need for a supreme arbiter of these documents or, to put it

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[64] "The New Chartists", editorial "Newstatesman and Society", 2 December 1988, p. 4.

[65] Scarman, Lord Leslie. "Why I Signed The Charter", The Observer, 22 January 1989, p. 12.

differently, a simulation of the American model. And, although it did not capture the entire imagination of the British public, the topic of constitutional revision and even replacement had definitely arrived on the public agenda.

The story of the maturation of the challenges to British constitutionalism has therefore been brought up to date. Having studied the character and heritage of this push for modification, this work will now embark upon its main task; namely the more detailed examination of the movement's main proposals in the light of their potential desirability and practicability in a British context. These main proposals, the establishment of a written constitution, the entrenchment of a bill of rights and the forming of the logical corollary of a British Supreme Court will be first tested for desirability. Utilizing the American model adopted, as was stated in the preface, because so much of the move for constitutional reform models itself on the American system, the study will use the promotion of democracy as the litmus test that the new form of constitution must pass if it is to be labelled "desirable".

CHAPTER 2: WRITTEN CONSTITUTIONS, BILLS OF RIGHTS, JUDICIAL REVIEW AND DEMOCRACY.

It would be somewhat fatal to base any argument for contemporary constitutional reform in Britain on the assumption that it would be less democratic than the present system. This is because democracy and desirability have, for a long time, been dealt with by political philosophers as synonymous concepts. The provision of outlets and vehicles through which a community can form and control its government has been viewed since at least the middle of the nineteenth century as a most judicious and potentially congenial way of running a society and from James Mill to Peking's class of 1989, democracy has aligned itself with the lighter side of human nature in a violent and bitter battle with tyranny and authoritarianism. Indeed, in modern times, this view has become so institutionalized into our political psyche, that it is very difficult to argue that some vague form of democracy does not enhance the quality of life in a society. The vast majority of students of political science, whether they be from Boston, Budapest, Bogota or Birmingham, can reach a tenuous consensus that some degree of public participation, ideological competition and political equality are good for a community.

In this way therefore, an attempt to see if the realization of Charter 88 and its fellow proposals would be

beneficial for the people of the United Kingdom must base its examination upon the fundamental questions: Are the new proposals more democratic than the constitutional elements they are designed to replace? Do the concepts of an embedded constitution and entrenched Bill of Rights augment the ability of British citizens to choose and monitor their government? Do these quintessential components give the public more choice? Does the Scarman proposal of a type of judicial review, an obvious necessity in a system where a supreme interpreter of the Constitution is going to be needed, promote democracy or tyranny? Does the concept of a written constitution nurture other elements such as individual liberty and freedom, necessary for the growth of democracy? It is the task of this chapter to embark upon such a study and answer these questions. Yet before it can do this it must highlight the claim that the reform movement is inherently more democratic than the established British method and then form a widely acceptable and working definition of democracy so that these claims can be adjudicated.

Modern Constitutionalism's Historical Claim to Democracy and Justice.

The American, modern or written constitutional model's claim to be democratic pivots around two fulcrums. The first of these emanates from the principle that power corrupts

people who rule and that they will always attempt to enhance their position, even if it means that they will sidestep certain convention and traditions and abuse constitutional protocol by doing so. In this way the entrenchment of rules or the political system within a written constitution can deter avaricious executives and legislators. The second fulcrum suggests that in a democratic society people should be guaranteed certain fundamental rights and this is done by the reserving of these prerogatives within an omnipotent bill of rights.

The development of these two central themes can be seen and their claims to be democratic examined, if the historical foundations for this type of constitutionalism are unearthed. For example, the roots of the concept of controlling power were born in the sixteenth century as common law began to develop alongside liberalism and revolutionary changes in political, social and economic structures started to rock established arrangements. In what has been called an, "alliance of lawyer and puritan"[1], the people of this epoch commenced upon the exercise of fusing a belief in the omnipotence of God to a catalog of certain ethics that they suggested should describe codes of monarchical behavior. As time progressed and these new ideas undermined the power of some rulers, many societies

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[1] McIlwain, Charles Howard. Constitutionalism, Ancient and Modern, Ithaca, New York: Cornell University Press, 1940, p. 99.

experienced the arrival of new centers of authority or, in less dramatic circumstances, a sharing of power between several institutions. This necessitated the further promotion of constitutional philosophy since many people saw that, in order for societies to survive, political systems needed to become flexible, in a manageable and controllable way, so that they could meet new circumstances. As Carl Friedrich says, constitutionalism was born out of the need, "to turn such change to good account, how to adapt political life to the changing social context in order to secure the greatest satisfaction for the people"[2].

In the following years, as power shifted frequently and spectacularly, the concept of ethical, restrained and responsible leadership gathered momentum. The demise of the church and hence the most dependable check on monarchical absolutism accelerated constitutional theory, as did a new pragmatism that began to infiltrate the thought of leaders intent on maintaining power but wary of forceful challenges to their legitimacy. Moreover, not only were monarchs facing the mobilization of new counter-balancers created to fill the ecclesiastical vacuum and being forced to cede certain amounts of power in order to quell discontent, but with the advent of natural law, individualism and a fledgling capitalism it was suggested that all individuals were given

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[2] Friedrich, Carl J. Constitutional Government and Democracy, Waltham, Massachusetts: Blaisdell Publishing Company, 1968, p. 6.

certain rights, over the heads of monarchs, by God. As a cornerstone to the new constitutionalism, this belief in the individual as a sovereign entity joined with the view that man-made law was subordinate to natural law to espouse a new doctrine in which people had certain prerogatives, such as protection from interference in the public sphere and the right to a political conviction, that could not be legitimately taken from them.

By the end of the American Revolution, and in the shape of the American Constitution, a theory of modern constitutionalism was completed and its marriage with democracy and justice cemented. At the base of this polished theory was the old idea that justice emanates from a "higher" or "natural" law that can never be altered by inherently self-interested, corrupt, or arbitrary rulers. The American Constitution was especially instrumental in perfecting this notion as it embodied its political institutions, and later its citizens' rights[3], in natural law that was, via the sovereignty of the constitution, superior to man-made law which itself was susceptible to perversion and dilution by narcissistic leaders. Subscribing to the notion that power, by definition, corrupts

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[3] In the Bill of Rights of 1791.

individuals, American Revolutionaries[4] insured that the concept of natural law, captured so eloquently in the emotive war-time rhetoric of "The Declaration of Independence", was employed and the provisions of the Constitution put out of the grasp of mortals. Edward S. Corwin's prose describes the nature of this "higher law":

> There are... certain principles of right and justice which are entitled to prevail of their own intrinsic excellence, altogether regardless of the attitude of those who wield the physical resources of the community. Such principles were made by no human hands; indeed, if they did not antedate deity itself, they still so express its nature as to bind and control it. They are external to all Will as such and interpenetrate all Reason as such. They are eternal and immutable. In relation to such principles, human laws are, when entitled to obedience save as to matters indifferent, merely a record or transcript, and their enactment is not of will or power but one of discovery and declaration.[5]

From this source, the rest of the argument surrounding modern constitutionalism's inherent democracy, and consequently justice and desirability, flowed. In his work The Spirit, Baron Charles Louis de Secondat Montesquieu forwarded the idea that constitutions should not render

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[4] For more on this see, Main, Jackson Turner. The Antifederalists, Chapel Hill, North Carolina: The University of North Carolina Press, 1961, pp. 127-128.

[5] Corwin, Edward S. The 'Higher Law ' Background of American Constitutional Law, Ithaca, New York: Great Seal Books, 1955, pp. 4-5. It should be realized that although Corwin's statement is useful in an analysis of natural law, it was written during the aftermath of the Second World War. This was a time when such arguments were a little naively elevated to a position of hegemony.

societies political systems which are vulnerable to a hijacking by majorities, but should construct mechanisms which prevent power from congregating into a small number of hands. Montesquieu, despite his love of England and monarchy, went on to describe a "separation of powers" in which government was divided into three distinct power centers; the executive, the judiciary and a bicameral legislature, that were joined in a series of complex relationships in which legislative powers were purely statutory, executive abilities merely limitative and judicial jurisdiction only concerned with moderating inter-branch squabbling[6]. Together with a similar philosophy espoused by John Locke, this concern of abuses of power and the regulation of the roles of governmental institutions found its way, through the American Constitution, to the vanguard of modern constitutionalism.

The "separation of powers" approach was fused into the American Constitution in a background of skepticism and distrust for authority. After freeing itself from a very concentrated and tyrannical source of authority, segments of American thought was by nature antithetical to centralization and so its champions, especially James Madison, set out to further the case of fragmentation, even

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[6] For a concise but lucid explanation of Montesquieu's "separation of powers" theory see, Loy, J. Robert. Montesquieu, New York: Twayne Publishers Inc., 1968, pp. 104-111.

if they were aware of a need to create some form of unity at a decision-making level. With the belief that individuals are self-interested, corruptible and infatuated with power and with faith in Montesquieu's design, the new American political system took on the complexion of a desultory and asymmetrical mechanism as a majority of the cautious delegates at Philadelphia injected safeguard after safeguard into the document. The creation of the federal system[7], the detached executive and legislative branches, the independence of the judiciary[8], a bicameral legislature and the presidential veto completely echoed these prevailing thoughts of the time:

> The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.[9]

Montesquieu, Locke and Madison's "separation of powers" and "checks and balances" thesis also provided mortar for the other column of democracy that modern constitutionalism rests on. This was so because the protection of a minority by preventing the accumulation of power by a single individual, group or interest neatly dovetailed into the

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[7] See James Madison's "Federalist 46".

[8] See Alexander Hamilton's "Federalist 78".

[9] James Madison in "Federalist 47", quoted from, Cooke, Jacob E. (ed.), The Federalist, Middletown, Connecticut: Wesleyan University Press, 1961, p.324.

individualistic component of constitutionalism that emanated out of the American document courtesy of John Locke. Locke had written, especially in his Second Treatise of Civil Government, that the right to rule essentially comes from the consent of the governed and, so it follows, a rational citizenry has a prerogative to chose its government. With this right established, Locke saw the need to establish other rights for a population and since a community's smallest unit is the individual, he expressed the opinion that these other rights belonged to the person and not the society. Soon the philosopher was stating that society consisted of a myriad of atomic units all with the inalienable right to self-preservation and the accumulation of property[10].

Other philosophers shared this belief, even if they arrived at the same conclusion via a different route. John Stuart Mill, for instance, espoused an individualism that developed from a less social origin. Concerned with the "principle of insulation", Mill, who although writing in nineteenth century England contributed much to the theory of modern constitutionalism, stated that individuals had a right to be protected from government interference so that

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[10] There are those who believe that Locke was an authoritarian who espoused majoritarianism to such an extent that it would crush individual rights. For an example of this argument see, Kendall, Willmoore. John Locke and The Doctrine of Majority Rule, Illinois University Studies in Social Sciences, Urbana, Illinois, Vol. 26 (1941).

their uniqueness could reign uncontrolled in a way that would allow the human race to progress. In a rather radical look at human behavior, he stated, in Political Economy, that the individual has an absolute right to say or do as he pleases as long as it makes no difference to others and summed up his brand of individualism thus:

> Whatever theory we adopt respecting the foundation of the social union, and under whatever political institutions we live, there is a circle around every individual human being which no government, be it that of one, of a few, or of the many, ought to be permitted to overstep.[11] [12]

These theories of individualism and individual rights and the "separation of powers" approach were therefore the two major ways in which the modern constitutionalism began to link itself to democracy. Although distinct, these two components both put forward the argument that democracy could only exist if majoritarianism was tempered, power was not abused and individuals had a baseline of rights and privileges that could never be eroded. From the roots of "natural law", these two elements combined the two disconnected principles of the fragmentation of power sources and the entrenchment of individual rights into a message that was full of democracy and the related qualities

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[11] From Principles of Political Economy, Book V, Chapter 11, Section 2. The Collected Works of J.S. Mill, Volume 3, Toronto: University of Toronto Press, 1965, pp. 937-938.

[12] Mill's philosophy is best seen in his most famous work On Liberty.

of justice and liberty. Justice because individual rights were fair and egalitarian, liberty because the spheres of freedom around people allowed them to act as they wished, and, most crucially, democracy because the power of majorities becomes artificially amplified and is permitted to crush and manipulate minorities.

A Workable Model of Democracy.

If the current task is to see whether Charter 88 and the rest of the current constitutional reform movement would be, if realized, desirable for Britain and if the means of doing this is to measure this philosophy's democratic content, then a workable and acceptable model of democracy must be found. This may sound a rather effortless occupation, but theories of democracy are abundant. Moreover, any discussion of a topic such as this must be careful not to pick any postulate that resembles a simple paraphrasing of a criticism on either the present American or British models. It is for these reasons that a cross-section of differing and common theories are presented and discussed before the litmus test is outlined.

To many political theorists, the United States, as sculptured by the Constitution of 1787, meets a vague and broad set of prerequisites that form the baseline to a definition of democracy. J. Roland Pennock lists a number of

necessary conditions for the existence of democracy[13] that are shared by these theorists and it is clear that American society passes all these tests with flying colors. In rejecting absolutism, despotism and authoritarianism and adopting the evolution and stability of constitutionalism and a relatively widespread franchise, the American Constitution, for example, meets a number of political criteria, while creating an open society with a great deal of individual autonomy in the private arena; a large, educated and urbanized population; an independent and pervasive mass-media[14]; and indigenous social mobility, the Constitution allowed the founders of the United States to give the country a liberal democratic complexion. Moreover, the United States surely fits secular credentials since as, "religion, is for the (d)emocrat, a realm of private affairs"[15], democracy becomes a set of secular beliefs in a community where religious conviction and domination is a matter of individual choice, and in this way the separation of church and state is intrinsically democratic since

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[13] Pennock, J. Roland. Democratic Political Theory, Princeton, New Jersey: Princeton University Press, 1979, pp. 213-259.

[14] For more on the role of urbanization, literacy and the mass-media in the maturation of democracy see, Lerner, Daniel. "Urbanization, Literacy, Participation" from Rejai, M. Democracy: The Contemporary Theories, New York: Atherton Press, 1967, pp. 248-250.

[15] Shields, Currin V. "Democracy As A Secular Belief" from Rejai, ibid., p. 235.

democracy, "cannot be very well stated if there is an appeal to religious dogma"[16]. According to other theorists, there are other fundamental qualities that the United States clearly has:

> A necessary condition for the existence of a democratic government is widespread agreement (approaching 100 per cent) among the adult members of society on at least the basic questions about how political power is won.[17]

None of these fundamental criteria, however, are particularly useful except in suggesting that the United States is clearly a democracy in the most loose definition of the term. Overused to the point of ambiguity, employment of the term has, in this way, allowed the United States to become grouped with societies such as Mexico, South Africa and India under the umbrella of democracy. What is clearly needed, in order to create a workable definition of the phenomenon, therefore, is a process of fine-tuning and a specifying of these certain prerequisites. Only then will the American constitutional model be adequately pitted against democracy.

As was stated earlier, despite the existence of a consensus on what democracy basically is, detailed versions of the concept abound. From one school of thought emanates the notion that in democracies governments receive their

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[16] Ibid., p.237.

[17] Prothro, James W. and Grigg, Charles M. "Democratic Fundamentals" from Rejai, ibid., p. 270.

legitimacy and cues from the public. J. Roland Pennock[18], for example, outlines one such interpretation when he states that "government of the people" is realized only in cases where rulers are determined by and accountable to the population, there are free elections at fairly frequent intervals, freedom of expression and speech exists and all individuals are equal under the rule of law. Others, such as Robert Dahl, equate democracy with pluralism and the galvanizing of interests into a kaleidoscope of competing factions that freely compete for influence[19], while more classical renditions (for instance those of Rousseau and Mill) see that democracy is achieved when a government is formed as a mirror to the community in microcosm, an offshoot of this being the notion of majority rule which, "argues that there is a virtue in numbers when they are used in a pattern of activities designed to produce joint action among a heterogeneous people (and that)... a connection between numbers and justice clearly exists"[20]. In a similar vein, adherents to this "grass roots" school of thought such as A.D. Lindsay suggest that democratic systems emphasize the process of decision-making rather than its ends and

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[18] Pennock, J. Roland. Liberal Democracy: Its Merits and Prospects, New York: Holt, Reinhart and Winston, 1950.

[19] See, Dahl, Robert A. A Preface To Democratic Theory, Chicago: The University of Chicago Press, 1956.

[20] Spitz, Elaine. Majority Rule, Chatham, New Jersey: Chatham House Publishers Inc., 1984, p. 216.

allow elections, referendums or pluralistic interaction to make policy and force governments to purely administer[21]. As H.B. Mayo illustrates, there are also theories that combine a variety of these different postulates:

> ... a democratic political system is one in which public politics are made, on a majority basis, by representatives subject to effective popular control at periodic elections which are conducted on the principle of political equality and under conditions of political freedom.[22]

Another school of thought that inhabits the expansive territory of democratic theory basis itself, in a manner that is juxtaposed to the approaches of Dahl and Pennock, on the study of leadership rather than the electorate and states that initiative filters down rather than up through the system. The father of this type of theory is Joseph Schumpeter who, in his book Capitalism, Socialism and Democracy, states that, "the democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote"[23].

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[21] See, Lindsay, A.D. The Essentials Of Democracy, London: Oxford University Press, 1951. and The Modern Democratic State, London: Oxford University Press, 1943. For a contrasting view see, Macpherson, C.B. Democratic Theory: Essays in Retrieval, London: Oxford University Press, 1973.

[22] Mayo, H.B. An Introduction to Democratic Theory, New York: Oxford University Press, 1960, p. 70.

[23] Schumpeter, Joseph A. Capitalism, Socialism and Democracy, New York: Harper and Brothers Publishers, 1950, p. 269.

By doing this, Schumpeter shows that in western societies it is not the electorate that defines issues but political parties, elites and interest groups and that instead of voters influencing the positions their representatives take, politicians present the passive public with a fait accompli. However, Schumpeter is of course not saying that such a scenario is undemocratic. He insists that democracy does not have to involve a strong ideological relationship between voter and representative and a rational electorate but that, all that needs to exist is that people have a free choice for who they want to vote for and candidates are involved in an uninhibited competition for these votes. In this way, therefore, democracy can encompass manipulation, prejudice and irrationality, as long as it involves "free competition for free votes"[24]. As E.E. Schattschneider says:

> Democracy is a competitive political system in which competing leaders and organizations define the alternatives of public policy in such a way that the public can participate in the decision making process.[25]

From this philosophical quagmire, a workable, acceptable and unitary theory must be pulled if this study is to ultimately be able to evaluate the American constitutional model. Naturally, such an exercise could yield any one of the previously mentioned approaches but it should only

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[24] Ibid., p. 271.

[25] Schattschneider, E. E. The Semisovereign People, New York: Holt, Reinhart and Winston, 1975, p. 142.

accept the Schumpeter postulate warily. This is because the notion that democracy filters downwards is more descriptive than prescriptive and is a dilution of democratic theory so that it more resembles reality rather than an attempt to make contemporary society more democratic. Consequently, since the Schumpeter supposition should really be seen as an empirical account of how democracy has been weathered, a wiser choice would be to pick from the myriad of more classical alternatives. From these, a theory espoused by two American political scientists, Austin Ranney and Willmoore Kendall, seems to be appropriate[26].

Ranney and Kendall see democracy as revolving around four principles, "popular sovereignty, political equality, popular consultation and majority rule"[27], and state, as do a majority of other theorists, that democracy does limit power and assure the protection of minority rights. Yet this doctrine does not propose the construction of procedural safeguards and entrenched rights, but suggests that the electorate can protect prerogatives and prevent the abuse of power given the right opportunity. This opportunity can only occur when the voter is making a real choice, something that itself only happens when the elector has, "the presence of genuine alternatives before him; the opportunity to find out

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[26] See, Ranney, Austin and Kendall, Wilmoore. Democracy and the American Party System, New York: Harcourt, Brace and World, 1956, pp. 23-37.

[27] Ibid., pp. 23-37.

about the nature and probable consequences of each alternative; and full freedom to choose whichever of the alternatives seems to him - for whatever reasons he deems sufficient - the most desirable"[28]. It is at this point that the majority should prevail and constitutional parameters should be rescinded as, "any attempt to see *formal* institutional limitations upon the 'absolute' power of popular majorities logically results in the establishment of *minority* rule".[29]

This approach therefore promotes the essential democratic ingredients of majority rule representative government, frequent elections, political accountability and political equality. On top of this it attempts to maximize the control and input of the voter by replacing procedural safeguards and governmental prerogatives with mechanisms that allow the citizenry to determine and protect their own rights and powers. By providing a variety of choices from across the political spectrum, the populace can do this as majorities will be fragmented and interests will not be compromised as they are by the co-opting nature of present monolithic party politics, whether in the United States or Great Britain. Democracy will then be pervasive as government accountability is tied more closely to the electorate, voters are allowed more input into the system and individual

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[28] Ibid., p. 32.

[29] Ibid., p. 34.

rights are protected by fractured majorities and political egalitarianism.

This definition of democracy has been outlined as it will be used, throughout this essay, as the launchpad for the critical analysis of the American constitutional model. Whenever the institutions of a written constitution, bill of rights or judicial review are discussed, all of the arguments will emanate from this origin. Throughout the study these provisions will be examined by employing implicit and explicit references to the design just presented and by treating it as if it were the exclusive definition of democracy. In this way therefore, this postulate must remain foremost in readers minds during the rest of this work. This is what, as has been stated (even if, because of the brevity of this work, in a rather perfunctory and unsatisfactory a manner), democracy is and how Charter 88, the American Constitution and the related models will be judged. The departure point for this critical examination concerns conventional arguments against the democratic and justiciable nature of written constitutions, viewpoints that this essay shares.

Are Written Constitutions Democratic?

Up until now, the modern constitutional model has been viewed by this essay in a rather insouciant way and the only real treatment of it has discussed its rise to hegemony, its

development in the United Kingdom and its composition. It is at this point however, that the work embarks upon its main argument and begins critically to assess the components of the approach, simultaneously activating the definition of democracy and putting it into use. Moreover, it is also at this point that the use of the American model as a litmus test for the desirability and the practicability of the contemporary British constitutional reform movement commences. Subsequently, from now until the end of the essay, the American political system and experience will become the vehicle through which the British movement will be judged.

Disapproval of the American Constitution is not abundant in the literature of political science[30], a fact that primarily stems from the development of American hegemony and the economic and political success that the document yielded. However, despite this, the Constitution has been attacked as undemocratic since its conception. Initially the notion of constitutionalism was assaulted by a heterogeneous, unorganized collection of states-rights colonists who based their fear of constitution on a bed of paranoia for centralization, urbanization and the abolition of slavery. Farmers, plantation owners and a multitude of other demographic and occupational groups were wary of the

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[30] For a critique of the United States Constitution see, Beard, Charles A. An Economic Interpretation of the Constitution of the United States, New York: Macmillan, 1936.

Constitution for many reasons and so based their arguments against its desirability in a variety of vocabularies. To some the settlement would mean mob rule, to others the end of their plantations, and to many a regrettable erosion of state autonomy. By the early 1780s however, just as the society was on the verge of nationhood, this disparate critique became more forceful and more homogenous, until it provided the first vigorous arguments highlighting the undemocratic nature of the new Constitution.

Thomas Jefferson was particularly active in vocalizing his concerns about the new Constitution, and it is his argument that is to be used as the first to illustrate the undemocratic nature of written constitutions. In a letter to James Madison during his tenure as Minister to France in 1789, Jefferson stated that he believed that no generation had the right to bind another since, "*the earth belongs in usufruct to the living*"[31]. Under this principle Jefferson's philosophy developed to incorporate the notion that the dead should not be able to determine dispersion of resources or indebt its successors since they had no jurisdiction to influence and affect a society in which they took no part. In accordance with this, communities should set up a network of inheritance laws in which the property of the deceased would revert automatically to the society to be distributed

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[31] Quoted from Matthews, Richard K. The Radical Politics of Thomas Jefferson, Lawrence, Kansas: University Press of Kansas, 1986, p. 20.

as it wished. Moreover, such logic had consequences for constitutional theory in that Jefferson wanted society either explicitly to reaffirm support for the present system, and hence he rejects the principle of tacit consent, or construct new statutes and institutions every twenty years so that each generation can control its own destiny rather than let it be decided by a preceding generation. This "earth belongs to the living"[32] approach had other ramifications and Jefferson utilized it as the fulcrum to the rest of his attack on the new Constitution, an attack that also enveloped a need for laws and conventions to be malleable and reflect contemporary situations and a desire for all individuals of all epochs to participate in public life so that they can attain self-fulfillment. Richard Matthews paraphrases Jefferson's "the earth belongs to the living" principle thus:

> By this bold innovation, he hopes, first, to sustain every man's interest in governing himself, as opposed to being either politically and economically ruled from the grave or being governed by a permanent aristocracy; and second, to keep the positive laws of society in harmony with the evolutionary progress of man.[33]

Jefferson's ideas have witnessed many retorts. Charles P. Curtis, for example, sees the American Constitution as

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[32] This is what Matthews calls this central part of Jefferson's attack on the Constitution. Indeed, he names Chapter 2, ibid., pp.19-29 after it.

[33] Ibid., p. 22.

having an independent meaning in which the Constitution is the voice of the present generation, just as a document that they themselves had written would be[34]. Similarly, John Hart Ely maintains that the framers injected flexibility into the Constitution that allowed for contemporary autonomy[35] and Alexander Bickel detects, "an awareness on the part of the framers that it was a *constitution* that they were writing", and states that this, "led to a choice of language capable of growth"[36]. However, Jefferson was not alone in his criticism of the new Constitution during the revolutionary era and there existed postulates that are equally useful in illuminating the undemocratic constituents of the American Constitutional model.

At the vanguard of this allied philosophy were the Anti-Federalists[37], a heterogeneous group of constitutional dissenters who, although often being fatally split over a number of issues, did have a forceful and popular array of arguments. The first of these was particularly reputable and concerned the quintessential notion that the creation of a

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[34] For more on Curtis's argument see, Barber, Sotirios A. On What The Constitution Means, Baltimore: The Johns Hopkins University Press, 1986, pp. 17-19.

[35] For more on Ely's argument see, ibid., pp. 19-37.

[36] Quoted from, ibid., p. 23.

[37] For more on the Anti-Federalist approach see, Storing, Herbert J. What the Anti-Federalists Were For, Chicago: The University of Chicago Press, 1981, and Main, Jackson Turner. The Antifederalists, Chapel Hill, North Carolina: The University of North Carolina Press, 1961.

massive new union rendered republican government impotent and democracy and individual liberty either weathered or completely destroyed. Although this argument is specific to the United States and does not really attack the democratic value of constitutions in general, the Anti-Federalists used their intrinsic belief that small republics were, by definition, conducive to a virtuous citizenry, a responsible government and the forging of a common good or "res publica" to act as a base for the rest of their doctrine. Such a tactic can be seen as a second argument unravelled. By making the republic larger, the Constitution had to delegate power more frequently, subsequently divorcing power from the people. In this way authority would move away from the citizenry into an aloof federal government full of elites. Based on their belief that power would move, for the worst, from the states and local politicians to a national government made up of a cosmopolitan elite, the Anti-Federalists then stated that sovereignty would also shift. This is of particular interest in this study because the argument highlighted how an entrenched document itself, regardless of whether federalism existed or not, could direct power and sovereignty away from the citizenry. In this way an embedded constitution is clearly undemocratic as it weakens the ability of a people to govern themselves, giving power to a piece of paper, its authors, and those entrusted with the task of its interpretation.

Other more sophisticated arguments on the undemocratic nature of consecrated constitutions have also been developed. As a means by which a system of government is projected upon future generations, Jefferson stated that constitutions carve in stone the complexion of a society and usurp sovereignty. Picking up on this theme, more recent critics have suggested that such entrenchment becomes so institutionalized, since it is immune to challenge, that it establishes a stranglehold on public debate that, in turn, forms an immutable consensus on values, morality and political philosophy. In what Arthur Selwyn Miller calls "the tyranny of technology"[38], this phenomenon has been exacerbated in the United States via a business and political elite that, having an obvious motive to maintain the hegemony of a constitutional system that has provided them with power, constantly reinforce the consensus by their control of every component of public life, including the media and educational system. In this way, therefore, a written constitution becomes a moment in time when certain values are frozen for eternity. By writing the document of 1787, the Founding Fathers wrapped and enshrined the dominant values of the period in protective clothing, elevated them to a position of supremacy and consequently

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[38] See, Miller, Arthur Selwyn. "Democratic Dictatorship: The Emergent Constitution of Control" from Goldwin, Robert A. and Schambra, William A. (eds.), How Democratic Is The Constitution?, Washington, D.C.: American Enterprise Institute For Public Policy Research, 1980, pp. 171-182.

removed the dynamism of ideology and counter-ideology, revolution and counter-revolution, out of American politics.

Although convincing in their own right, these arguments on omnipotency, sovereignty and inflexibility were not the only approaches that undermined American constitutionalism's link to democracy. Much of the opposition to the Constitution of 1787 pointed to the vagueness and brevity that such a document was forced to encompass. Because the Founding Fathers, and indeed any subsequent producers of similar institutions, did not have the knowledge, resources or time to formulate a document that would be able to cover every conceivable dispute, eventuality or circumstance that it would have to make judgement upon, any such piece of paper would have to be short. Furthermore, since these authors were unable to predict issues and events that could challenge the Constitution on the day after it was born, let alone hundreds of years later, the Constitution had to be an abbreviated and perplexing creation in order to give it room to meet unknown future economic, social, political, environmental and technological developments. With this in mind, many of its opponents viewed the Constitution as furthering elite control and extending the disintegration of democracy. This was done because not only did the document, as was mentioned in the sovereignty argument, sever the link that allows the public to confine its government but it also, after this disconnection, leaves the constitutionally,

but not democratically, restrained political system susceptible to hijacking by any interest powerful enough to usurp the reins of interpretation. The Albany Anti-Federal Committee believed that such undefined powers as those granted by the Constitution were, "capable of being interpreted to answer the most ambitious and arbitrary purposes"[39], and were particularly wary of the "necessary and proper"[40] clause. Even the possibility that Congress or the judiciary would safeguard the neutrality of the Constitution were dismissed. As Melancton Smith astutely said of potential judicial power:

> It appears to me that this part of the system is so framed as to *clinch* all the other powers, and to extend them in a silent and imperceptible manner to anything and everything.[41]

To many, John Marshall's manufacturing of judicial review and the assumption of the Supreme Court to the position of ultimate arbiter of the Constitution could be seen to have, in that it safeguarded the document for neutrality, quelled any fears that this final scenario would be realized. It is now the task of this essay, in light of the fact that Lord Scarman, among others, has called for Britain's potential

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[39] Main, op cit., p. 153.

[40] This wariness of the elasticity of the "necessary and proper" clause was well founded. The provision from Article I Section 8 of the Constitution was interpreted so as to extend Congressional power by almost every Supreme Court.

[41] Main, op cit., p. 156.

new constitutional settlement to incorporate a form of judicial independence and power, to discuss the validity of this argument. Having highlighted the undemocratic nature of entrenched constitutions, this work will now examine, once again by employing the American experience, whether judicial review is democratic and therefore passes the ultimate test of desirability.

Judicial Review and Democracy.

Lord Scarman's call for judicial independence and power[42], coupled with the obvious fact that a new constitutional settlement would require a meridian arbiter of the fledgling document, seems to point to the eventuality that if Britain's present constitutional reform movement is to be satisfied, then judicial review will be a necessary by-product. Moreover, this scenario seems to be furthered by the fact that any written constitution is going to need a vigorous, independent and neutral guardian and interpreter in order to prevent itself falling prey to partisan manipulation and arbitrary utilization[43]. It would be a complete waste of effort if, say, Charter 88's creation was left vulnerable since much of the new reform movement's argument bases itself not so much on the fact that Britain's

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[42] Lord Scarman, during his Hamlyn Lectures, does call for a version of a British Supreme Court. See, above at p. 44.

[43] Of course, this raises the issue of whether there is such a thing as a neutral arbiter.

present constitution is unwritten, but on the notion that it is susceptible to compelling interests that are able to use it for their own gain. In this way, whatever may be murmured to the contrary, the realization of this new movement's utopia must involve a certain amount of judicial review.

The experience of the United States is an ideal benchmark by which to measure the democratic propensity of such an institution as a law court interpreting a constitution. This is because although the American Constitution does not mention the concept of judicial review, some of the Founding Fathers seemed to intend the judiciary to play an important role in the political system. Those at Philadelphia dedicated the whole of Article III of the document to the topic and, if we are to believe Madison and remember Montesquieu's contribution, seemed to subscribe to the concept of a strong independent judiciary being an essential part of a balanced separation of powers mechanism. Indeed, the wording, "The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made"[44], does seem to furnish the way for judicial integrity and, more importantly, sovereignty. Consequently, it is not so difficult to visualize how John Marshall was able in 1803 to pronounce that, "it is, emphatically, the province and duty

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[44] Article III Section 2 of the Constitution of the United States.

of the judicial department, to say what the law is", and therefore conclude that since the Constitution is, "fundamental and paramount law of the nation... an act of the legislature, repugnant to the Constitution, is void"[45].

Once established by Marshall's brash political manoeuvering, judicial review in the United States began to be scrutinized for its relevance in a liberal democracy. The definition of democracy that this study uses would clearly dismiss both the United States Supreme Court or Scarman's Judicial Committee of the House of Lords or Privy Council "Supreme Court" as inherently undemocratic since a select, unelected body of people would be allowed to declare popularly devised legislation as unconstitutional. And yet, despite this, Americans have constantly viewed judicial review as conducive to democracy, seeing Supreme Court justices as mere lenses through which an impartial interpretation of the Constitution passes and as people whose job it is to see that the rule of law is upheld and the rule of self-interested and corruptible men subordinated. In fact, although this indigenous American viewpoint may be somewhat naive, there are certain democratic qualities to judicial review that does allow the institution to sit more comfortably with democracy. For example, despite the enormous power Supreme Court justices have, it would seem that they are severely restricted by

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[45] Marbury v. Madison, 1 Cranch 137, 177 (1803).

certain checks.

Several of these constraints are built into the system to prevent a complete judicial usurping of power. Such official preclusions can, for example, emanate from the Supreme Court itself as do the impedances of only permitting justices to adjudicate on constitutional issues when there is a plaintiff asserting some right or claiming an injury, and of making a Court decision only legally binding to the two parties directly involved. Others are external checks such as constitutional amendment and interdepartmental restrictions. Amendment can, with the mobilization of Congress and the state legislatures[46], change the Constitution so as to circumscribe and redirect the freedom within which justices are able to roam, while the executive branch and Congress can check the Supreme Court in a number of other ways. After all, the President does appoint justices and this appointment process includes the need for the support of a majority of the Senate before a nominee can take a seat on the Court. This means that, even if quite indirectly, a potential justice's political philosophy, since this would have to reflect the ideology of the President and the Senate; legal aptitude, since this is

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[46] In order to be passed an amendment commonly needs to be approved by a two-thirds majority in both chambers of the federal legislature and by three-quarters of the states' legislatures. This, in reality, makes the use of amendment as a way of restricting judicial behavior naturally very difficult.

measured by an American Bar Association scale that influential figures in the nominating process pay close attention to[47]; social standing and moral principles; are scrutinized by democracy. In turn this has lead to the defeat of a number of nominations. Clement Haynsworth, because of his ideological posture and ethical indiscretions[48], and G. Harrold Carswell, because of the mobilization of liberal interests against his appointment and his perceived incompetence, were defeated during the Nixon Presidency. In addition, Douglas Ginsburg and Robert H. Bork were rejected as Reagan nominees because of an admission to having once smoked marijuana and an intense conservative dogma respectively.

More ammunition for the argument that judicial review can be democratic comes in the shape of more informal boundaries to judicial liberty. After the Marshall and Taney eras, epochs when the Supreme Court's power was still on the rise and judicial review was becoming institutionalized into the American psyche, the Court found it expedient to impose certain restrictions on itself. After the controversial

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[47] The American Bar Association's Committee on the Federal Judiciary plays an informal but widely recognized role in the nominating process by evaluating the qualifications of nominees and then making these evaluations known to Senators.

[48] Haynsworth's major ethical mistake was to hear two cases involving subsidiaries of companies in which he had stock. In one case, he actually bought the stock in the time between his court made a decision in favor of the corporation whose shares he purchased and the public announcement of this verdict.

"Dred Scott" decision[49], many individuals and political institutions had become wary of the increasing power of the Court and were concerned that it might commence upon an encroachment into matters that were, for example, exclusively the realm of, say, Congress. Responding to the threat that other branches of government may meet judicial power and attempt to isolate the Court, justices therefore started to use influence more sparingly, especially on issues that antagonized partisan debate[50]. Robert McCloskey describes such a change in strategy when he talks of the Court's new posture in two military trial cases[51] during the Reconstruction period:

> The Court tacitly acknowledges an informal but very real limit on its jurisdiction: the most explosive issues are non-justiciable.[52]

Judicial self-restraint was not only a collective thing

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[49] Dred Scott v. Sanford, 19 Howard 393 (1857).

[50] It was not only during the politically sensitive era of Reconstruction, with "Dred Scott" fresh in its mind, that the Court was aware of its role in ideological and partisan issues. Justice Harlan Fisk Stone's dissent in United States v. Butler, 297 US 61 (1936) is one of a myriad of passages that are illustrative of this:

> ... it is (not) the business of courts to sit in judgement on the wisdom of legislative action. Courts are not the only agency of government that must be assumed to have the capacity to govern. (at p. 87.)

[51] Ex Parte Milligan, 4 Wallace 2 (1866) and Ex Parte McCardle, 7 Wallace 506 (1869).

[52] McCloskey, Robert. The American Supreme Court, Chicago: University of Chicago Press, 1960, p. 111.

however, and many individual justices came to Washington with personalities and philosophies that saw passivism and strict interpretation of the Constitution as the correct direction in which to travel. Perhaps the most dedicated of these individuals was Felix Frankfurter, a man who saw the Constitution as strictly neutral, an institution that espoused neither an ideology nor a value-system. Arriving on the Court just after the explicitly laissez-faire rulings of the early twentieth century, Frankfurter believed that judges should restrain themselves in order to, firstly, prevent subjectivity from undermining legitimacy, power and independence, and, secondly, allow public policy to mirror public opinion, something that only elected officials could do. Furthermore, he was a democrat and he viewed the imposition of social and economic biases on the population by justices that strictly represented an elite class as antithetical to majority rule[53]. His views on judicial self-restraint and democracy are evoked by his emotive dissent in the famous flag salute case of 1943 when the Supreme Court ruled that mandatory flag salutes violated Jehovah's Witnesses' freedom of and from religion[54]:

> If the function of this Court is to be

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[53] For more on Frankfurter's beliefs see, Macleish, Archibald and Prichard, E. F. (eds.), Law and Politics: Occasional Papers of Felix Frankfurter, New York: Harcourt, Brace and Company, 1939.

[54] West Virginia Board of Education v. Barnette, 319 US 624 (1943).

> essentially no different from that of a legislature, if the considerations governing constitutional construction are to be substantially those that underlie legislation, then indeed judges should not have life tenure and they should be made directly responsible to the electorate.[55]

There were other Supreme Court justices who shared Frankfurter's posture, even if they did not carry it to such an extreme. Benjamin Cardozo, for example, although recommending that judges ignore antiquated rules and use their own sapience in some areas, did offer a framework that contained "principles of selection" designed to stifle judicial freedom and to guide justices who are unable to lean on readily available common law, precedent, statute or constitutional provision. In these grey areas where no conventional cues existed, he suggested that those entrusted with making decisions should mold their conclusions around such principles as the historical treatment of the issue under review or contemporary social mores[56]. Similarly, like Cardozo, who, in his incorporation of those rights that were "of the very essence of a scheme of ordered liberty" during the Palko v. Connecticut[57] decision, illustrated a position somewhere between restraint and activism, Oliver Wendell Holmes fluttered among total passivity and mild activism.

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[55] Ibid., p. 652.

[56] For more on Cardozo's judicial philosophy see, Cardozo, Benjamin N. The Nature of the Judicial Process, New Haven, Connecticut: Yale University Press, 1921.

[57] 302 US 319, 325 (1937).

Viewing the Constitution as a neutral document, he, like Frankfurter, believed the employment of due process and liberty of contract provisions to promote the free market philosophy of the early 1900s was intrinsically wrong. To Holmes, the Constitution merely purveyed a set of regulations, not an ideology or ethical theory as his famous dissent in Lochner v. New York[58] highlights. Yet, as was hinted at, Holmes did preach action, especially when the states threatened harmony:

> I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.[59]

As well as the self-restraint that the Court from time-to-time imposed upon itself, another informal constraint fenced in judicial liberty. During the era of laissez-faire rulings that Frankfurter and Holmes despised so much, the Court had ruled against a myriad of regulatory measures but by the mid-1930s, the public was becoming increasingly impatient with such a posture. The country was suffering in a severe depression from which a majority believed the only salvation came in the form of direct governmental intervention into the economy and, more importantly, it had

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[58] 198 US 45, 74-76 (1905).

[59] Holmes, Oliver Wendell. Collected Legal Papers, Norwood, Massachusetts: Harcourt, Brace and Howe, Inc., 1920, pp. 295-296.

elected a President that shared these views. By 1937, despite the clear need to allow Franklin D. Roosevelt to alleviate the misery, the intransigent Court was still holding its position on economic matters, labelling federal government regulation as either depriving citizens of due process or interfering with freedom of contract. Therefore with legislation being repeatedly held unconstitutional[60], the popular President, viewing the Court as aloof and undemocratic, saw that it was necessary to allow public opinion to overrule judicial philosophy and in an unprecedented action he threatened to transform the entire complexion of the Court[61]. Although Roosevelt's plan was defeated in Congress, the Court soon realized that without the support of public opinion and popularly elected officials it would find its legitimacy and power diluted. Justice Owen Roberts, under constant pressure, switched from the slim five-to-four majority in a decision that held state minimum wage statutes for women unconstitutional[62] so as to

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[60] For example the National Industrial Recovery Act in Schechter Poultry Corporation v. United States, 295 US 553 (1935) and the Agricultural Adjustment Act's processing tax in United States v. Butler, 297 US 61 (1936).

[61] Roosevelt's plan included a provision to appoint an extra judge for every judge on the Court who was over seventy years old and would not voluntarily retire. Being able to add an extra six justices would have allowed the President to create a pro-New Deal majority.

[62] Morehead v. New York, 298 US 587 (1936).

make such legislation enactable[63] and Justice Willis Van Devanter was forced to retire. Although later Roberts claimed that he only switched position because he believed the plaintiffs in the second case had explicitly asked for the overruling of the predominant precedent from Adkins v. Children's Hospital[64] while those in the first had asked him to merely distinguish, something he could not do[65], there could be no doubt that the Court had been brought in line with hegemonic public opinion and by the mid-1940s Roosevelt's Second New Deal legislation was being almost unanimously approved by a new "rubber stamp" Court.

Such confinements on judicial independence, whether they be formal or informal, have all led, as was stated earlier, to an American consensus that believes judicial review is democratic. Alexander Bickel, for example, states that judicial review has allowed the Supreme Court to pull from the malaise of individualism that affects all other components of American society, a commonweal or public good

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[63] West Coast Hotel Company v. Parrish, 300 US 379 (1937).

[64] 261 US 525 (1923).

[65] For more on Roberts's motives for this switch in position see, Leonard, Charles A. A Search For a Judicial Philosophy: Mr. Justice Roberts and The Constitutional Revolution of 1937, Port Washington, New York: Kennikat Press, 1971.

that the rest of the political system fragments[66], while Howard H. Dean bases his thesis of judicial review and democracy on the fact that the community's support for, "fundamental law itself is greater than its support for any casual, transient majority"[67]. Yet, despite these approaches and the existence of restraints, judicial review is, in reality, an awesome power that lies, vulnerably, at the disposal of an unelected body. Although the Supreme Court has, on many occasions, declined to activate the privilege and always seems to deploy it advisedly, the power nevertheless exists and the Court sits, omnipotently waiting to strike down any act of Congress or any state legislature that it views, through a case or controversy, as unconstitutional according to a document that, it must not be forgotten, is brief and vague and consequently allows for much freedom of interpretation.

An argument that labels the concept of judicial review as undemocratic could start from its chronological roots and Justice John Bannister Gibson's dissent in the Pennsylvania Supreme Court case of Eakin v. Raub of 1825[68]. Although much of Gibson's argument is idiosyncratic to the American

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[66] For more on Bickel's argument see, Bickel, Alexander. The Least Dangerous Branch, Indianapolis, Indiana: The Bobbs-Merrill Company, 1962. Chapter 4, pp. 111-198.

[67] Dean, Howard E. Judicial Review and Democracy, New York: Random House, 1966, p. 57.

[68] 12 Sargeant and Rawle (Penna.) 330.

Constitution and therefore not particularly useful in this context, for example he brings up the perennial point that nowhere in the Constitution is the notion of judicial review explicitly referred to, some of it does look under democratic stones. Primarily, Gibson states that sovereignty, in a democracy like the United States, emanates from the people and that therefore they should, presumedly through the ballot box, "correct abuses in legislation by instructing their representatives to repeal the obnoxious act..."[69]. He then goes on to say that, since absolute power resides in the people and that because the judicial branch, in conventional democracies anyway, plays the role of administrator and distributor, the elected legislative branch in government should determine the complexion of policy. As he says:

> Inequality of rank arises not from the manner in which the organ has been constituted, but from its essence and the nature of its functions, and the legislative organ is superior to any other, inasmuch as the power to will and to command, is essentially superior to the power to act and to obey...[70]

Picking up from Gibson's prologue, this argument gathers momentum and becomes more convincing. Although, as was illustrated earlier, Supreme Court justices are appointed by directly elected officials, they are nevertheless appointed

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[69] Ibid., p. 354.

[70] Ibid., p. 351.

and this process, despite often yielding judges that mirror public opinion, permits them freedom and autonomy from democratic influences. This liberty is based upon a life tenure which cannot be reversed by distasteful political philosophy or impending old age and hence actively encourages the Supreme Court's estrangement from the mainstream of the political system. Theoretically justices can be impeached, "for Treason, Bribery, or other high Crimes and Misdemeanors"[71], but in reality it is difficult to mobilize a concerted effort against a justice, especially when one considers the sanctity with which the American public regards the Supreme Court and the lack of success the country's most popular President, Franklin D. Roosevelt, had when challenging the institution. There has been only one real attempt to impeach a justice, that being when staunch Federalist Samuel Chase was charged with highly partisan offenses in 1804, but then, even after the House found Chase guilty, he was acquitted by the Senate[72].

Similarly, in addition to the difficulties that external forces experience when attempting to bring a justice in line with majority rule, the members of the Supreme Court themselves have little incentive to relinquish power. This

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[71] Article II Section 4 of the Constitution of the United States.

[72] The impeachment motion against Chase was passed by a majority of forty in the House but he was acquitted by the Senate in March 1805.

motivation can stem from ideological conviction, as William Brennan's tireless defense of the libertarian dynasty of the Warren empire in the face of invading Reaganism illustrates, or from, as Henry J. Abraham notes, human nature:

> It is human to cling to power and influence, and it is particularly human to enjoy a role of such significance and nationwide esteem.[73]

The undemocratic nature of judicial review becomes even more ubiquitous, and therefore proportionately more disconcerting, when it is realized that the American Supreme Court, an unelected body, has, by its assertion of judicial review and the need for a strong independent judiciary in a constitutional settlement such as the United States, been able dramatically to shape the national agenda. Formally, such a manipulation is done through the Court's ability to choose what cases it wants to hear and subsequently the legal and constitutional issues that the media, the rest of the political system and the public are going to pay most attention to. During the nineteenth century the Court was forced to adjudicate nearly every case on its docket, but since the early 1900s the institution's caseload has been infinitely inflated and now it can only arbitrate in a small percentage of those cases. In 1925, the Judge's Bill gave the Court the freedom to decide what cases it would hear fully, hence keeping the reducing process in judicial hands,

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[73] Abraham, Henry J. The Judicial Process, New York: Oxford University Press, 1986, p. 43.

and soon it was regulating its workload and pruning the docket in conjunction with its own preferences. It was able to do this because cases in its appellate jurisdiction, that is disputes that reach the Court through a maze of lower state and federal tribunals and because of an aggrieved party's persistence, could, after 1925, be rejected if the Court agreed with the decision handed down by its immediate subordinate, or merely dealt with rapidly, if the case did not evoke a substantial federal question. This was tantamount to allowing the Court decide which issues, interstate commerce, civil rights, freedom of contract for example, raised the most salient national questions. Furthermore, the creation of the writ of certiorari in the 1925 act permits justices to hear cases that have not come up through appeal, at their discretion[74]. In this way not only have unelected justices, through judicial review, the ability to make policy, but so the size of its docket and the assumption of discretionary powers has given them the choice of what they should make policy on. Clearly, the Supreme Court is likely to hear cases in which it has an interest or in which it feels a lower court has passed up verdicts it sees as repugnant.

This ability to have a certain amount of influence on Congressional, Presidential and public debate has not only

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[74] See, the Supreme Court's Rule 17, Section 1, which concerns, "Considerations Governing Review on Certiorari".

stemmed from the power to hear cases that it wishes to hear, but also certain dynamics that the Court has. Because it is small, cohesive and occupies a position at the zenith of American public life, the Supreme Court has been able to rapidly pick up on issues and forcefully project them into public debate and, on several occasions, it has actually been able to define public morality and viewpoints. During the Warren Court, for instance, justices found the ability to simultaneously present the democratic process with its issues and become the vanguard for conventional ethical and political postures. In the area of civil rights, the Court of that time brought the issue out of its isolation in the Jim Crow South and onto the national stage. Just as Plessy v. Ferguson[75] had been the prelude to segregation, so the momentous Brown v. Board of Education Topeka, Kansas[76] decision of 1954 precipitated a black struggle for racial equality and thrust civil rights under the country's microscope. Similarly, as the rest of Washington, with partisan allegiances and Southern Congressional power foremost in its mind, was treating the race issue with kid gloves, so the Court went in its maverick and crusading style to right other wrongs. Soon minorities and the powerless individual, often left out of the political process, were being empowered by the Court. In a number of

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[75] 163 US 537 (1896).

[76] 347 US 483 (1954).

cases, such as Mapp v. Ohio[77], where the justices ruled that evidence gathered from an illegal search and seizure should be excluded from the evidence submitted to a state tribunal, and Gideon v. Wainwright[78], where the Court assured a defendant's right to counsel, justices explicitly incorporated the criminal provisions of the Bill of Rights into state constitutional law and in Baker v. Carr[79], a dispute in which gerrymandering was seen as unconstitutional, the Court ensured that all people, rich or poor, black or white, would be politically equal. Archibald Cox says of this period:

> Although the justices have differed sharply upon the propriety of using the bench as a "bully pit", one suspects that the course of decision is sometimes influenced, in great cases, by the realization that the influence of the Supreme Court's opinions goes far beyond the formal limits of its decrees. The Court is often the voice of the national conscience. The Justices shape, as well as express, our national ideals. Brown v. Board of Education restated the spirit of America and lighted a beacon of hope for Negroes at a time when other governmental voices were silent.[80]

With the enormity of judicial liberty in mind, this foundation of judicial power, sovereignty and autonomy has,

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[77] 367 US 643 (1961).

[78] 372 US 335 (1963).

[79] 369 US 186 (1962).

[80] Cox, Archibald. The Warren Court, Cambridge, Massachusetts: Harvard University Press, 1968, pp. 26-27.

despite the several checks to Supreme Court power, allowed justices to, "proceed on an ad hoc basis to implement (their) personal views of national policy"[81]. In this way therefore, judicial checks on personal self-interest and ideological affinity, whether they be conscious or sub-conscious, are not enough to prevent biases, prejudices and political sympathies from providing the ultimate cue to action and discretion has not been used as much in wielding such awesome power as is sometimes believed. Such a phenomenon is perhaps the most vivid example of the undemocratic nature of the Court and can be illustrated by showing how, without references to traditional cues like stare decisis, common law or constitutional guidelines, tendentious justices clearly inject their own personal whims into decisions. Although it is always difficult to show whether a verdict has been reached via political biases or a well-trodden path of precedent, frequent switching of judicial position can throw some light on the issue.

The Constitution is, it must be admitted, an evolutionary concept and not a static one. In this way it is therefore justifiable for the Supreme Court to fall in line with subtle shifts in public opinion, which has been shown it does not always do, or alter lines of precedent to suit contemporary social norms and climates. The Roberts switch

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[81] Lusky, Louis. By What Right?, Charlottesville, Virginia: The Michie Company, 1975, p. 21.

in "Morehead"[82] has been seen to be perhaps an exception to this, but examples do abound. In "The Slaughter House" cases of 1873[83] a small, but important, dissenting voice, personified by Justices Stephen Field and Joseph Bradley, gave birth to the notion that the due process clauses of the Fifth and Fourteenth Amendments rendered state and federal governments unable to regulate economic activity. Not only, as Holmes and Frankfurter were later to show[84], did such a postulate inject a political philosophy into the Constitution and mark the explicit attempt by justices to impose their personal interests onto society but it provided the prelude to some very traumatic and inconsistent use of due process precedent. As was suggested, the laissez-faire approach of Field and Bradley was dismissed in "Slaughter House" but soon it would be erected. Initially the Court did not have the legal ammunition to shoot down economic regulation with due process bullets, so it began to undermine it by utilizing the less controversial commerce clause as a vehicle and by 1895 the Court had precluded states from granting telegraph monopolies[85] and regulating

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[82] See, above pp. 85-86.

[83] 16 Wallace 36 (1873).

[84] See, above pp. 82-84.

[85] Pensacola Telegraph Company v. Western Union Telegraph Company, 96 US 1 (1878).

interstate railroad rates[86] and Congress from interfering with production practices[87]. However, even when the due process doctrine seemed to be victorious in the Allgeyer v. Louisiana case of 1897[88], the Court wrestled with its political philosophy, discriminating between the desirability of various types of regulation and oblivious to precedent and the status of the due process and freedom of contract provisions. Thus, "Allgeyer" seemed to be overturned in Holden v. Hardy[89] when the Court upheld a Utah law limiting the length of a miner's work day; "Holden" was, in practice, overruled in Lochner v. New York[90], which held a New York state law restricting the hours that bakers work unconstitutional; and "Lochner" seemed reversed in Muller v. Oregon[91], which permitted an Oregon law regulating the working hours of women[92].

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[86] Wabash, St. Louis and Pacific Railroad Companies v. Illinois, 118 US 557 (1886).

[87] United States v. E.C. Knight Company, 156 US 1 (1895).

[88] 165 US 578 (1897).

[89] 169 US 366 (1898).

[90] 198 US 45 (1905).

[91] 208 US 412 (1908).

[92] Although this ebbing and flowing seems to be a monument to judicial inconsistency and self-interest, such a conclusion should be somewhat qualified. As Robert G. McCloskey states (op cit., pp. 136-139.) there did seem to be some logic to these switches of position; a "judicial dualism" that was caused by attempts to balance political necessity against undesirable state paternalism.

The Court's undemocratic activity can even be said to have gone further than this. In the "Brown" case[93], the Supreme Court, by relying on evidence presented by sociologists and psychologists, not only imposed its morality to subordinate fifty-eight years of precedent, however ethical this actually was, but it actually usurped legislative power in its 1955 addendum to the original decision which decreed that states should insure, "with all deliberate speed"[94] a peaceful end to segregation. The Court also seemed to be legislating in the abortion case of Roe v. Wade[95]. Although the creation of the right of abortion under certain constitutional protections that constitute the right to privacy looked to be justified as legitimate judicial action, the justices did step on a few Congressional toes by establishing a timetable that drew the line between legal and illegal abortions. As John Hart Ely stated, the Court in "Roe", "manufactured a constitutional right out of whole cloth and used it to superimpose its own view of wise social policy on those of the legislatures"[96].

To conclude therefore, despite the checks that the political system puts on judicial review and the impedances

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[93] See, above p. 92.

[94] 349 US 294, 301 (1955).

[95] 410 US 113 (1973).

[96] Ely, John Hart. "The Wages of Crying Wolf: A Comment on Roe v. Wade" Yale Law Journal, Vol. 82, No. 5 (1973) pp. 920-949.

of a more informal nature, the existence of judicial sovereignty and autonomy is inherently undemocratic. Although this study does not attempt to suggest that the American system is as intrinsically faulty as John Marshall's baby, judicial review itself does not fit into the definition of democracy that this work has adopted. This is so because the power is exercised by unelected individuals who have life tenure and is often abused, in this case by an American Supreme Court that consciously influences the national agenda and justices who impose their personal biases on policy. In this way, like the institution of a written constitution, judicial review, which is necessitated by the former, is undemocratic and consequently undesirable. It is now the task of this essay to depart from this examination and pick up on the discussion of whether the concretization of Britain's constitutional reform movement is feasible, asking how practical are the modifications suggested by Charter 88 et al? Are they simple to enforce and make work? Would they work in Britain? To answer these questions, the American experience is once again the model, but this time, as seems fitting in this eclectic romp through modern constitutionalism, the Bill of Rights will be the vehicle.

CHAPTER 3: THE INHERENT PROBLEMS OF ENUMERATING RIGHTS AND THE INABILITY OF BILLS OF RIGHTS TO PROTECT RIGHTS.

Some of the elements of the British constitutional reform movement have in fact anticipated the same problems with written constitutions and judicial review that this essay has illustrated. These components are quick to identify and admit to the inflexibility of ensconced procedures and regulations, especially during periods of considerable change; are aware of the usurping of sovereignty that such a scenario would establish; and to some extent fear an enhancement of judicial power and integrity. Because of this, they, and the posture of Charter 88 would seem to fall into this category, want to, despite much dilution, retain the fundamental intimacy between Parliament and sovereignty. What these parts are intensely concerned with however is the recent Mrs. Thatcher-sponsored tendency towards the erosion of traditionally protected and celebrated civil liberties. It is here that their protestations and proposals are at their most vociferous. As the numerous attempts to push the European Convention on Human Rights through the House of Commons, the nature of the present public discontentment and the nonpartisan complexion of the reform movement highlight, the entrenchment of individual rights is the most vigorous and vital ingredient of the constitutional modification

standard-bearers repertoire.

Indeed, most inhabitants of liberal democracies would find it extremely difficult to conceive of, let alone mobilize, opposition to an argument that suggests impervious protection for fundamental rights. Although "bills of rights" have been consistently defeated in Parliament, their losses have been due not so much to a concerted counter-argument, but to partisanship and an ephemeral and heterogeneous espousal. Moreover, what principle impediments there have been to consecrating rights have been slowly weathered by the swelling concern shown by the British people who have recently witnessed the undermining of free speech, press and assembly rights and the due process provisions that traditionally fair legal systems grant. Surely, although it may be possible to show how the embedding of a set of rules for the complexion of a nation's political system may seem arbitrary, out-moded and undemocratic, any creditable postulate cannot present an attack on the undesirability or irrelevance of essential human rights. Yet, even though this essay believes that civil liberties and prerogatives are neither undesirable nor irrelevant, it will now go on to suggest that their entrenchment can be ineffective, impractical and even harmful in a democratic society.

The first rounds fired by this argument concern the fact that by enumerating rights, any omnipotent approach would

provoke the question: Is anything that is not explicitly mentioned by a charter of rights by definition not a right? Continuing the usage of the American experience, it can be seen that the deliberate reserving of certain rights often gives rise to inherently undemocratic scenarios, especially in this time of changing technology and complex societies. It does this since enumeration can lead to the belief that what is not uttered at conception is not included or, at best, a fierce public debate over the question. An example of this problem can be seen by American society's handling of the abortion issue and how the idea of a right to an abortion has been dealt with by the Supreme Court.

It was clearly the case that when they adjudicated the watershed Roe v. Wade[1] dispute in 1973, the Supreme Court justices of that time, or at least those in the plurality, believed that the creation of an abortion right would be ethically correct, politically expedient and legally desirable. Consequently, with these assumptions foremost in their minds, they began an attempt to construct such a right from the very fragile and vulnerable constitutional foundation of the right to privacy. This right had been conceived of during the Griswold v. Connecticut[2] case when, Justice William O. Douglas had suggested that the right to privacy was not protected by a single constitutional

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[1] 410 US 113 (1973).

[2] 381 US 479 (1965).

provision but emanated from a penumbra of rights granted by the Constitution and which carved a zone of exclusion[3]; Justice Arthur Goldberg had stated that the Ninth Amendment protected privacy; and Justice John Marshall Harlan had forwarded the notion that the due process clause of the Fourteenth Amendment alone created privacy. In "Roe" the justices incorporated abortion into this sphere of personal privacy that had been created by "Griswold" and was already inhabited by, "the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing"[4], by utilizing Harlan's Fourteenth Amendment mechanism. This action was tantamount to stating that the right to abortion was reserved and consecrated, however indirectly, by its intimate relationship with privacy and, subsequently, certain provisions of the Bill of Rights that seemed to suggest that the Founding Fathers wanted some sort of right to privacy to exist.

Indeed, the justices' posture attracted a multitude of subscribers, many of whom centered their approval around

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[3] This penumbra was constructed out of the First Amendment (right of association is an assertion of the right of privacy), Fourth Amendment (the provision securing individuals from illegal searches and seizures creates privacy in one's own home), Fifth Amendment (right to protection from self-incrimination creates a zone of privacy in which the government is not allowed to force a person, "to surrender to his own detriment"), the Ninth Amendment and the Fourteenth Amendment's "due process" clause. For more on this see, Justice William O. Douglas's majority opinion in "Griswold" at p. 484.

[4] Paris Adult Theater I v. Slaton, 413 US 49, 65 (1973).

either the notion that the right to abortion flows from the liberty in the Fourteenth Amendment's due process clause or Justice Harlan F. Stone's famous footnote number four in United States v. Carolene Products[5] which gives extraordinary constitutional protection and grants certain prerogatives to those that are unlikely to receive adequate consideration in the political process.[6] Similarly, another argument stemmed from the fact that, "the capacity to maintain and support (an) enclave of private life marks the difference between a democratic and totalitarian society"[7] and therefore privacy and the freedom to do what one wants to in a particular sphere is essential for democracy. Yet however fervent and vigorous were the claims that a right to abortion did exist in the United States, they could not command a place on the list of constitutionally protected rights.

This was to prove a problem of substantial dimensions. Although those who believed there was an intrinsic right to abortion now had precedent on which they could rest their

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[5] 304 US 144, 152 (1938).

[6] This argument suggests that such special protection be granted to pregnant women. There are arguments however (see, for example, Ely, John Hart. "The Wages of Crying Wolf: A Comment on Roe v. Wade" Yale Law Journal, Vol. 82, No. 5 (1973) pp. 920-949.) that believe the protection should be provided to the fetus.

[7] Emerson, Thomas I. "Nine Justices in Search of a Doctrine" Michigan Law Review, Vol. 64, No. 1 (1965), pp. 219-234.

argument, they were still faced with the task of protecting privacy and abortion from an onslaught which dangerously threatened the fledgling right. Since it was not part of the catalog of prerogatives explicitly mentioned by the Constitution, abortion was simultaneously attacked as an arbitrary and artificial appendage to the Bill of Rights and weakened because of its inability to attach itself to the Constitution. Justice Hugo Black's dissent in "Griswold" was the first criticism of the right to privacy's new found status:

> ... I get nowhere in this case by talking about a constitutional "right of privacy" as an emanation from one or more constitutional provisions. I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision.[8]

The fact that a right to abortion was not anchored by the Constitution meant that it was susceptible to a much more concerted attack than, say, the right to free speech would ever be. After 1973, abortion's lack of reference in the Bill of Rights allied itself to the widespread belief that the "Roe" decision marked an illegal extension of judicial power through the usurping of legislative prerogative and to the new social conservatism that manifested itself in powerful right-to-life groups, the Reagan administration

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[8] Justice Hugo Black's dissent in Griswold v. Connecticut, 381 US 479 (1965) pp. 509-510.

and, perhaps more crucially, new Supreme Court appointees like Antonin Scalia. This, in turn, led, perhaps inevitably, to the Court undermining "Roe" in a July 1989 case Webster v. Reproductive Health Services[9]. Speaking for the plurality of the Court, Chief Justice William Rehnquist issued an opinion that was tantamount to taking the issue of abortion out of the hands of the judiciary and once again making it a political issue. In destroying a large part of the hope that certain segments of the community had in seeing abortion become a protected right, the Chief Justice stated that:

> ... the goal of constitutional adjudication is surely not to remove inexorably "politically divisive" issues from the ambit of the legislative process, whereby the people through their elected representatives deal with matters of concern to them. The goal of constitutional adjudication is to hold true the balance between that which the constitution puts beyond the reach of the democratic process and that which it does not.[10]

It would seem that a major reason for the erosion of "Roe" was the fact that a right to abortion or privacy is not explicitly mentioned in the Constitution[11]. Such a predicament meant that, firstly, by missing the boat in 1791, whether because of the technological primitiveness of the era or because the Founding Fathers intended there to be

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[9] 57 LW 5023, 3 July 1989.

[10] Chief Justice William Rehnquist Ibid, p. 23.

[11] Perhaps the primary reason for the erosion of "Roe" was the arrival of the Reagan appointees (O'Connor, Scalia and Kennedy) on to the Court.

no such right, abortion was going to find it extremely difficult in adding itself to the select number of rights that had, by the adoption of the Bill of Rights, fused themselves into the pervasive American consensus. In this way, whereas freedom of the press, the right to counsel and the protection from illegal searches and seizures had been accepted by all as unremovable, the right to abortion would always, even if the Court were to see it on several occasions as a fundamental prerogative, be challenged and attacked. Secondly, because of its inability to claim a place among the constitutionally immutable elite, the right to abortion and privacy could actually be seen as an "anti-right". Many individuals have argued that by not enumerating rights, the Founding Fathers were actually stating that these rights were expressly not reserved. This argument is naturally undermined by the Ninth Amendment which states that, "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"[12], but is not altogether demolished when it is realized that those who framed the Bill of Rights could have been referring to as little as two rights.

Even with such a provision as the Ninth Amendment, the problem of the to enumerate or not to enumerate dichotomy remains. Although the Supreme Court saw that the Amendment

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[12] The Ninth Amendment of the Constitution of the United States.

provides the foundation to the right of workers to organize[13] and the right of a citizen to retain his own property against taxation for the support of private industry[14] and Bennett B. Patterson believes that the facility is a grandiose design that grants human rights that are fundamental for a free people living in a social compact[15], the Ninth Amendment actually confuses the matter. If it was injected as a way of giving the Constitution a certain amount of elasticity in the wake of technological, political and social changes, then the Amendment becomes a way by which entrenchment envelops flexibility and renders itself susceptible to evolution, but, more critically, also an undermining of the very principle on which the reasoning behind the consecration of liberties is built. Bills of rights are authored to protect specific rights and the Ninth Amendment, in its admirable realization of the possible need to add further prerogatives, neither specifies nor emphatically safeguards such rights. Moreover, the amendment process and its cumbersome nature, as the disappointments of

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[13] National Labor Relations Board v. Jones and Laughlin Steel Company, 301 US 1 (1937).

[14] Savings and Loan Association v. Topeka, 87 US 686 (1875).

[15] Patterson, Bennett B. The Forgotten Ninth Amendment, Indianapolis, Indiana: The Bobbs-Merrill Company Incorporated, 1955, pp. 55-62.

the Equal Rights Amendment show[16], certainly furthers the viewpoint that entrenchment encourages rigidity.

It can be argued, of course, that the first eight amendments of the Constitution were to provide a baseline of rights which could never be eroded, except perhaps by further addendum, and that the Ninth Amendment was to be the vehicle through which the Bill of Rights could, at certain times, expand. However, if the first argument put forward by this study to illustrate the intrinsic problems connected with the entrenchment of rights does not seem watertight, then a second, more forceful argument, can be added. This other postulate is particularly cogent because it concerns itself with the bifurcating and mutually exclusive concepts of individual rights and public good and suggests that the ensconcement of civil liberties can often prove to be an obstacle to collective welfare.

The most obvious example of the tensions that are created between individual privileges and the health of the community can be seen in the American Constitution's Second Amendment. Stating that, "a well-regulated militia being necessary to the security of a free state, the right of the

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[16] See, for example, Mansbridge, Jane J. Why We Lost The E.R.A., Chicago: University of Chicago Press, 1986, and Berry, Mary Frances. Why E.R.A. Failed, Bloomington, Indiana: Indiana University Press, 1986.

people to keep and bear arms shall not be infringed"[17], this constitutional provision has, despite its entrenchment, surprisingly experienced numerous attacks on its inviolability. The Supreme Court, for instance, has overruled the right for an individual to own a gun on several occasions[18] and there have been many pieces of state and national legislation, ranging from New York's precipitous Sullivan Law of 1911 that regulated the carrying, sale and possession of deadly weapons, through the Gun Control Act of 1968 that, in the light of the Kennedy assassinations and the murder of Martin Luther King, outlawed the interstate trafficking of firearms, to the recent wave of state regulation[19]. However, despite this bombardment of the right, the prerogative still remains. Stemming from the words of the Amendment itself and the belief that the right to bear arms fits nicely into the

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[17] The Second Amendment of the Constitution of the United States.

[18] For example, in United States v. Cruikshank, 92 US 553 (1876) the Court stated that the right to bear arms was not granted by the Constitution; in Presser v. Illinois, 116 US 252 (1886) the Court upheld a state's right to regulate fire arms; and in United States v. Miller, 307 US 174 (1939) the Court stated that the taxing power could be used by Congress to control the movement of certain types of weapons. In Quilici v. Village of Morton Grove, 695 F.2d 261 (1981) the Court denied certiorari and consequently sustained a federal district court's ruling that there was no individual right to bear arms.

[19] This was initiated in April 1988 by Maryland legislation that effectively banned the manufacture and sale of short barreled and inexpensive handguns.

macrocosmic design of the Bill of Rights since it, just like the rest of the provisions, arrests the encroachment of government into the individual and state realm,[20] powerful interests have been mobilized in order to protect the integrity of the Amendment. The National Rifle Association (N.R.A.), through the frequent deployment of political action committees and ebullient lobbying, has been particularly successful in maintaining the kernel of the right in response to Supreme Court attacks. In 1986 the N.R.A. successfully diluted the Hughes Amendment, an attempt to extend the 1968 Gun Control Act, and in 1988 it blocked the Brady Amendment, a proposal to impose a seven day waiting limit for potential handgun purchasers, by extensively organizing its membership and spending an influential three million dollars.[21]

Therefore, despite energetic assaults on the right to bear arms, the Second Amendment survives. However, this victory of individual freedom has signalled the defeat of collective good as a variety of statistics and incidents illustrate. In 1985, for example, 8,092 people were killed

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[20] For more on the historical origins of the Second Amendment see, Kennett, Lee and Anderson, James Laverne. The Gun in America: The Origins of a National Dilemma, Westport, Connecticut: Greenwood Press, 1976.

[21] For more on the N.R.A.'s lobbying techniques and its ability to transfer this into real power in Washington see, Leddy, Edward F. Magnum Force Lobby: The National Rifle Association Fights Gun Control, Lanham, Maryland: The University Press of America, 1987.

by handguns in the United States, a country of 239 million, while only eight out of Britain's fifty-seven million died in this fashion[22]. In more vivid examples, a normally law-abiding gun owner, William Bryan Cruise killed six people and wounded ten others in April 1987 in a shopping mall in Palm Bay, Florida and Patrick Purdy killed five elementary school students with a semiautomatic weapon in California during January 1989. There are surely no more dramatic examples of the potential destructive power of individual liberty.

The American experience yields other examples of how the rights of individuals impede the community's well-being. During the 1960s, for example, when the Warren Court was slowly incorporating the provisions of the Bill of Rights and making them applicable to the states via the due process clause of the Fourteenth Amendment, the Supreme Court declared that the Fourth Amendment protection from illegal searches and seizures was assured in state as well as federal jurisdictions. In Mapp v. Ohio[23], a case in which a woman had pornographic material seized from here home by police officers who were not carrying out a warranted search, Justice Tom C. Clark established an "exclusionary rule" in which the defendant in a case is protected from the

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[22] Church, George C. "The Other Arms Race" Time, Vol. 133, No.6, 6 February 1989, p. 20.

[23] 367 US 643 (1961).

state or federal prosecution's use of evidence obtained via unlawful means. This clearly marked the zenith of individual rights over societal encroachment in this particular issue area but also brought with it certain reservations. Benjamin Cardozo had expressed doubts about this interpretation of the "exclusionary rule" during his tenure on the New York Supreme Court when he stated that, "(t)he criminal is to go free because the constable has blundered"[24], and soon after "Mapp" many critics were worried that a multitude of those who had clearly committed a crime against the community would be released because their protection from illegal searches and seizures subordinated any collective interest.

Because of the fact that the community's welfare may have been subjected by more potent individual liberties and the errors of law enforcement agents, there became a need to redress this imbalance. In New York v. Quarles[25] the Supreme Court introduced a "public safety" exception to the "exclusionary rule"[26]. In this particular case a suspected

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[24] People v. Defore, 242 NY 13, 21 (1926).

[25] 467 US 649 (1984).

[26] In fact, the Court ruled that in cases where public safety was at risk, the suspect did not have to be read his "Miranda" rights (see, next footnote). However, since "Miranda" had ruled that only evidence garnered after the reading of the rights could be employed in court, this was tantamount to carving a "public safety" exception out of the "exclusionary rule".

The difference between the waiving of "Miranda" and the fact that "Miranda" is a prerequisite for admissible evidence is important, as Justice Sandra Day O'Connor revealed in her concurring opinion. Although she agreed that the disputed

rapist who was thought to be armed was pursued into a supermarket and frisked, handcuffed and interrogated before being read his "Miranda rights"[27]. Although under the "Mapp" doctrine the evidence gathered before the explanation of "Miranda" would be impermissible in a court of law, Justice William Rehnquist created an exception to the "exclusionary rule", realizing the need for the public's protection to be secured by the police before an apprehended criminal's legal rights are read. In a similar incidence[28], the Supreme Court introduced a "good faith" exception to the rule, stating that if the law enforcement officer genuinely believed he was acting in accordance with Fourth Amendment regulations, then the evidence that is gathered unlawfully, yet unintentionally so, should still be admissable. Such an extension of the collective right over its individual counterpart was based on the logic that the "exclusionary rule" is designed purely to deter the police from acting with misconduct and therefore, if this deterrence has

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evidence collected in this case should be admitted, she believed that this should not be so because "Miranda" ought to be suppressed, but because the evidence in this case, a gun, was nontestimonal.

[27] The Miranda Rights are a set of prerogatives that a police officer should make aware to a suspect who he is arresting. Established in Miranda v. Arizona, 483 US 436 (1966), the four rights that should be read before an arrest is made include the right to counsel and the right to remain silent (that is the right of protection from self-incrimination).

[28] United States v. Leon, 468 US 897 (1984).

worked, all evidence garnered should be legitimate.

These tensions between community and individual rights consequently present one of the largest dilemmas for the entrenchment of rights. Moreover, this emphasis on individuality, an accentuation that is clearly experienced in American history and one that is the direct product of the elevation of individuality to a position of hegemony by the Bill of Rights and the American consensus, has broader implications for society. The creation of a myriad of legal entities armed with a number of rights has resulted in the proliferation of a multitude of litigation and the subsequent over-burdening of the legal system as individuals, rather than utilizing their rights as a shield against government zeal, have employed constitutionally granted prerogatives against each other. This, in turn, has resulted in even greater problems as the community has been sliced up into a kaleidoscope of warring units that have been able to suffocate the concept of community and the public interest. Out of the individualism inherent in American society since the era of Puritan self-reliance, and that was petrified and epitomized by the Bill of Rights, has therefore come anomic individuals who, deprived of the norms of social responsibility and civic consciousness, have relied on personal instincts to achieve goals that, because of the individualistic posture of American society, are

clearly private and individual in nature[29]. The ultimate result, according to David Riesman, is a "Lonely Crowd"[30]; a society in which the community is fragmented, made up of atomistic individuals unable to make contact with and perceive the feelings of others, and that has no conception of community interest.

The belief in the need to encourage individual autonomy over community interest may have had more relevance in an earlier epoch. During the nineteenth century, the western hemisphere, and most notably Britain, was undertaking a dramatic metamorphosis in which quiet, uncomplicated rural life was being overhauled by a more complex industrial existence designed to tap an unlimited supply of material riches. Life was becoming viewed entirely through an economic lens as the system moved forward in an uncoordinated fashion, the laissez-fairism of David Ricardo and Adam Smith encouraging people to become more conscious of the individual as the unit of analysis and creating a scenario whereby, "a vast, uncontrolled, inchoate, thrusting, surging growth and change, in which adventurous, masterful men gained place and fortune, and the country as a

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[29] For more see, especially, Merton, Robert K. Social Theory and Social Structure, New York: The Free Press of Glencoe, 1957.

[30] For more see, Riesman, David. The Lonely Crowd, New Haven, Connecticut: Yale University Press, 1950.

whole moved to new pinnacles of wealth and power"[31]. However, in the late twentieth century irresponsible individualism and haphazard expansion seem to be somewhat dated. No longer is society on the edge of capitalism looking into a chasm of wealth that has no parameters and infinite resources. The fracturing of the community that Victorian economic liberalism either brought to or as, in the case of the United States, quickened in western societies was essential for material growth during the era in which the wealth of the west was based on the small entrepreneur and innovator. But today the world needs to gather its expertise and carefully plan the future of its environment and its people so that continued prosperity can be assured and human progress maintained. Challenges posed by a deteriorating environment and limited resources make coordinated and collective efforts, like the European Community and agreements to control the amount of chloroflurocarbons released into the ozone layer, increasingly more desirable.

The need to compromise individual liberty with collective welfare can be seen no more vividly than in environmental issues. Entrepreneurial capitalism has pushed the world to the brink of environmental disaster and the continuation of individualistic and uncoordinated assaults on the earth's

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[31] Evans, R.J. The Victorian Age 1815-1914, London: Edward Arnold Ltd., 1958. p. 18.

resources will surely push society into the precipice. Currently in the United States, where the entrenchment of rights has given the individual a great advantage over the common interest, American citizens are protected by the Fifth and Fourteenth Amendment provisions which prevent the federal and state governments respectively from taking private property for public use "without just compensation"[32]. This has meant that, except in a few cases where justices have allowed federal and state governments to prohibit "noxious" use of private property[33], the Supreme Court has been able to protect private property rights from encroaching collective interest such as the defense of the environment[34]. Moreover, individual rights can dominate environmental interests because, as Lord Scarman has stated[35], the environment has no power or prerogatives in a court of law and therefore needs a party with such rights to bring litigation on its behalf. This being the case in Britain at the moment, as well as of course the United States, a move towards the entrenchment of individual rights

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[32] This is known as the "takings clause" of the Fifth and Fourteenth Amendments.

[33] For example, Penn Central Transportation Corp. v. City of New York, 438 US 104 (1978), Agins v. Tiburon, 447 US 255 (1980), and Mugler v. Kansas, 123 US 623 (1887).

[34] For example, Monongahela Navigation Company v. United States, 148 US 312 (1893), Kaiser Aetna v. United States, 444 US 164 (1979) and United States v. Causby, 328 US 256 (1946).

[35] See, above p. 43.

could provide the catalyst to the further dilution of a communal interest in protecting the environment. That, in turn, could prove fatal.

Not only does the entrenchment of individual rights clash with, and ultimately subdue, collective interests, but it also leads to the proliferation of a multitude of other dilemmas, this time concerning conflicts between individuals. The most prominent of the questions raised by such a scenario revolves around the troublesomeness of etching the line between where a person is justified in exercising his or her constitutional rights and where they have exceeded this sphere and are invading the liberty of others. An example of this perplexing problem has come when the American Supreme Court has had to adjudicate in cases where one party asserts an absolute power to the exclusive or free use of its private property and an opposing argument claims that the First Amendment right to free speech subordinates this assumption. Such a clash of individual rights is made even more difficult to evaluate because the entrenchment of rights gives little indication if a hierarchy in which these provisions are assembled exists. Furthermore, even if such a ranking did occur, the granting of certain values to prerogatives would not overcome the problem of in which particular situations one right should yield to the exercising of another. Although free speech may be seen, by some constitution writers for example, as being

more important than the right to own property, it cannot, surely, be allowed to subject private property to secondary status in every conceivable incidence. The right to freedom of speech may be the more important value to country X, but that does not mean that Mr. Smith should be allowed to rush into the Browns' bathroom and start advocating socialism while Mrs. Brown is taking a shower.

As was stated, the Supreme Court has had difficulty during its intervention in private property versus free speech disputes and it has experienced inscrutible problems when etching the boundaries between one individual's exclusive right to make use of his own property and another's constitutional prerogative to free speech. Although dealing with the tensions between public property and free speech rights, the cases of Edwards v. South Carolina[36] and Adderley v. Florida[37] are vivid illustrations of how the United States's highest tribunal has struggled over the concepts of clashing individuals and dueling rights. In "Edwards", for example, the Court stated that by arresting several black protestors at the site of the South Carolina state legislature, that particular state had violated the demonstrators's inalienable liberty to express themselves as they desired. In "Adderley", however, a number of black students who were protesting the jailing of several

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[36] 372 US 229 (1963).

[37] 385 US 39 (1966).

of their college mates were arrested as they vocalized their dissent on the jail driveway. In this latter case the Court stated that, despite the existence of a pro-desegregation protest on public grounds, "Edwards" should be distinguished. According to Justice Hugo Black's opinion, the fine line between First Amendment rights and the prerogatives of local authorities to restrict the use of public property should be drawn between municipal properties that are open to the whole public and those that are generally not[38]. Therefore, since a prison is a place not usually open to citizens, First Amendment rights were not applicable there[39].

Besides the problems of unenumerated rights, the frequent subordination of the common good, and the dilemma of adjudicating between the relative importance of certain rights and where an individual's right ends and another's begins. the American experience reveals another fallible feature of the entrenchment of rights in a bill of rights. This vulnerability bases itself on the notion that the enumeration of these constitutional provisions requires, in

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[38] Ibid., p. 41.

[39] The Court also distinguished "Edwards" because the Florida trespass statute that the petitioners in "Adderley" were found guilty of could not be seen as a broad, indefinite and loose law as the breach of peace charge in "Edwards" was. The trespass statute was aimed at the conduct of one limited kind and was not vague and all-embracing, something that the point of law in "Edwards" was accused of being. (see ibid., p. 42.)

order to be affective, a society that furnishes an atmosphere that is conducive to the protection of the prerogatives and that is able to make their exercise meaningful. Clearly American history divulges a catalog of episodes that have either rendered the first ten amendments of the Constitution helpless to concerted attack and unavailing in the light of social, economic or political conditions.

During the McCarthy era, for instance, the entrenchment of individual rights did little to protect both people or liberty. The Cold War atmosphere, intensified by "the fall" of China, the Korean War and the end of America's nuclear monopoly and whipped into a frenzy by Senator Joseph McCarthy's Wheeling speech in 1950, made a particularly brutal attack on the political, academic and religious freedoms supposedly guaranteed by the First Amendment. Julius and Ethel Rosenburg were executed and intellectuals like C. Wright Mills and Norman Mailer were isolated. In a similar vein, radicals like Henry Wallace were either forced rightward in a frenetic wave of paranoia and hysteria or faced fines and imprisonment by states, interrogation by the federal government's House Committee on Un-American Activities and dismissal by petrified employers. Nowhere was the weathering of political freedoms more explicitly portrayed than in the Supreme Court's opinion of the Dennis

v. United States[40] case of 1951. On this occasion, eleven Communist Party members who had been convicted under the Smith Act that outlawed the advocation of political revolution, had their lower court sentences sustained. Although the Court based its reasoning on the notion that the communists, by espousing their political theory, posed a threat to public safety, it is clear that the justices were unable to use the First Amendment to protect rights in an episode where a majority believed that a minority should not have such rights; the very circumstance that the Bill of Rights was constructed to prevent happening. As Justice Hugo Black astutely noted in his dissent in "Dennis", entrenched rights only protect individuals when society wants them to:

> Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later court will restore the First Amendment liberties to the high preferred place where they belong in a free society.[41]

Not only has the American experience unleashed explicit offenses on enumerated rights, but it has created a society that has made the granting of such privileges often worthless. Such a contingency can be witnessed if the treatment of the First Amendment's freedom of press provision is utilized. In the United States all media

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[40] 341 US 494 (1951).

[41] Ibid., p. 581.

facilities, whether they be television or radio stations or newspapers, are privately owned. This, of course, fits nicely into the notion of a mass media free from the constraints of government control and hence the spirit of the First Amendment, but because of the nature of market economics, means that all components of the media must be financially successful to survive. With this prerequisite foremost in their minds, owners are constantly at the mercy of subscribers and advertisers, people whose favor they rely on for their livelihood. Consequently, in order to reach as many people as possible, and hence be as profitable as possible, the media tends to direct itself into the niche on the political spectrum that the majority of Americans occupy and reflect the homogenous and hegemonic values of what has been repeatedly called the American consensus in this essay. In this way therefore, economics has forced the media to predominantly legitimize and reflect prevailing values (it does of course reinforce and subtly manipulate them on occasions too) rather than becoming a platform for diverse public debate and providing an environment for the encouragement of the publication of all viewpoints. This can be clearly seen by the fact that on American television seventy per cent of the characters are middle-class, men outnumber women by three to one and most women are

housewives.[42]

An examination of media ownership in America also illustrates why its press is not really "free". Although, before the advent of television, the American media was dispersed amongst philanthropic millionaires, partisan businessmen, labor unions and conscientious journalists, it is now concentrated very much in the hands of a small number of extremely powerful corporate conglomerations. The three major networks NBC, ABC, and CBS, control much of televisions watched output and with the relaxation of Federal Communications Commission regulations on ownership concentration in 1984, the newspaper industry is now controlled by a few massive corporations such as the Gannet Group which owned ninety-three daily newspapers in the United States in 1985[43]. Such concentration was also aided as the newspaper industry began to become increasingly profitable with competition being snuffed out and sources from which news and comment originated unified; as William Randolph Hearst, Jr. estimated, if competitive morning and evening papers, each making a profit of one hundred thousand dollars were merged, they would net not two hundred thousand

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[42] Gerbner, George , Gross, Larry , Morgan, Michael and Signorelli, Nancy. "Charting the Mainstream: Television's Contributions to Political Orientations" from Graber, Doris (ed.), Media Power in Politics, Washington, D.C.: Congressional Quarterly Press, 1984, p. 119.

[43] Graber, Doris. Mass Media and American Politics, Washington, D.C.: Congressional Quarterly Inc., 1989, p. 45.

dollars but half a million[44]. However, such a phenomenon was naturally detrimental for media diversity and freedom. Just as the demands of profitability have influenced the content of media output, with huge conglomerations in control, the composition of the actors in the field are shaped by corporate politics. Business empires are the ubiquitous king-pins and television entrepreneurs and newspaper pioneers are either suffocated into liquidation by more competitive and efficient operations or coopted into one of the massive coagulations[45].

What this argument on the freedom of the press constitutional provision illustrates is that the enumeration of rights requires the simultaneous existence of a framework of democracy, political diversity and a socially and economically just society in order to be authentic and meaningful. This viewpoint is further enhanced when it is realized that the right to freedom of the press in America is even more diluted by the fact that around seventeen to twenty million American adults cannot read[46] and twenty seven and a half million live in poverty, unable to afford

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[44] Hodgson, Godfrey. America In Our Time, Garden City, New York: Doubleday, 1976, p. 138.

[45] For more on media concentration in America see, Bagdikian, Ben H. The Media Monopoly, Boston: Beacon Press, 1983.

[46] "When mom and dad can't read", U.S. News and World Report, Vol. 100, No. 17, 5 May 1986, p. 9.

access to the media[47]. Added to the flaws in the entrenchment of rights that are highlighted by unenumerated rights, the individual-community interest dichotomy, and the inherent problems in defining a hierarchy of rights or spheres where private interest is predominant, this notion that reserved prerogatives are only given meaning by the society in which they are consecrated has shown that the fusion of a list of rights into a sovereign document is extremely problematic, if not undesirable. However, to many critics of the British Constitution, these arguments are not strong enough to crush the push for a United Kingdom "Bill of Rights" and therefore the next chapter will continue to deal with the topic of the entrenchment of privileges. In this case however, it will attempt to bring this together with the related concepts of written constitutions and judicial review and challenge the contemporary British constitutional reform movement by questioning the compatibility of British society and the American or modern constitutional model.

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[47] "Recalculating Poverty" Time, Vol. 133, No. 2, 9 January 1989, p. 29.

CHAPTER 4: WRITTEN CONSTITUTIONS, BILLS OF RIGHTS, JUDICIAL REVIEW AND BRITISH SUITABILITY.

Even if, the last two chapters of this essay aside, it is accepted that in theory the proposals forwarded by this new constitutional reform movement were congenial, the question must be asked as to whether such suggestions would prove workable in the United Kingdom. In this way, therefore, surmounting the difficulties of the myriad of tests so far employed in this work would still leave constitutional modification with the task of fitting smoothly into all aspects of the British way of life. Could sovereignty be gently coaxed out of Parliament and into a constitution? Would the British psyche be able to digest the new emphasis on individual liberties? Would the British people accept such revolutionary change? Is British society capable of making such a dramatic metamorphosis meaningful? These questions rip open a can of worms which illustrate that the implementation of these constitutional reforms is fraught with a kaleidoscope of dilemmas.

Before an attempt to garner and repatriate these worms is embarked upon, it may first be appropriate to undertake the study of a little legal philosophy. Law requires legitimacy if it is to elicit order from the populace, whether it be a system of coercive "norms" which emanate from the state and are coercive in that they force certain types of appropriate

behavior[1], or it is of the more natural kind that emanates from above the politically powerful and lives in the consciousness of the people. This is so since the only other means of creating order, coercion and unanimous agreement, have been destroyed by the ballot box and the size of modern societies. In turn, in order to be seen as legitimate, law needs to have other characteristics or sociologically valid elements[2]. It must stem from an arbitrary source, that is either an origin that has no overwhelming interest in the nature of the complexion of law or one that does have an explicit interest but has been given power by a large majority of the ruled; it must be stable or change only in an evolutionary manner and not fluctuate dramatically; and it must be approved of by a great proportion of the citizenry. Hence, to paraphrase, so as to maintain order, and therefore the bedrock of society, law must be seen as legitimate, a quality it gains from emanating from an objective source, being perched on top of a consensus and, perhaps most importantly, as Franz Neumann states, being relatively immutable:

> A *predictable action* of the state; i.e. *its measurable interference, even if oppressive, is to be preferred to*

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[1] For more on this definition of law, see Kelsen, Hans. General Theory of Law and State, Cambridge, Massachusetts: Harvard University Press, 1945. Translated by Anders Wedburg.

[2] Franz Neumann talks about such sociologically valid characteristics of law in The Rule of Law, Leamington Spa, England: Berg Publishers Ltd., 1986.

> *immeasurable intervention* (unpredictable, arbitrary action), *even if at one time benevolent*, as such immeasurable state of affairs creates insecurity.[3]

With this crude knowledge of legal philosophy in mind, it can be seen that the first obstacle that the instillation of the new reform would face would be perhaps its most considerable. Since the replacement of parliamentary sovereignty and erosion of constitutional tradition, however evolutionary the process, would surely undermine the legitimacy, and subsequently the power, of the superseding institutions, the actual assumption of a written constitution and the accompanying provisions proves to be monumentally problematic in its own right. Such British political institutions as the Speaker of the House of Commons, cabinet government, ministerial responsibility and the multitude of idiosyncracies in parliamentary procedure have all been slowly built upon by hundreds of years of tradition and convention, a fact that has given such institutions legitimacy in the eyes of the British people. Therefore, because power and legitimacy are constructed along an extremely ad hoc, pragmatic and languid path based upon custom, tradition and stability, the rather rapid imposition of these constitutional reforms may undermine their potency. Moreover, such a reaction could have even more far reaching effects. As soon as a dispenser of

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[3] Ibid., p. 32.

justice, in this case the Constitution, probably via a supreme court, is no longer seen as legitimate and is perhaps viewed as a tool of partisanship or a particular class interest, as are most sudden changes in the complexion of government, then the arbitrary and neutral mystique of the rule of law may crumble and society could begin to destabilize. Since British society, despite the frequent existence of debilitating political and social cleavages, is pulled together by the notion that democratically made law is distributed by insouciant judges, any corrosion of the rule of law could be disastrous.

The implementation of the American Constitution, by contrast, did not suffer from the need to establish itself on the ruins of a usurped system that had degenerated to a state of nature. Having helped push the British out of the thirteen colonies, the American Founding Fathers, for all the opposition to the Constitution, were creating a new system from mainly fresh materials, not the remains of a previous one and therefore the legitimacy of the new settlement was measured in other variables, such as popular sovereignty, nationalism and its suitability to the material expansion of the country. Similarly, nations such as West Germany, Japan, France and Rumania went, or are presently going, through a series of cataclysmic events that created a vacuum into which it was necessary that a new paradigm enter. Britain is today not experiencing such watersheds as

a devastating war defeat, a social revolution or the toppling of an omnipotent dictator. Nor is it, as is currently occurring in eastern Europe, listening to a vociferous, and nearly unanimous, cry for fundamental reform. The absence of such conditions, the entrenchment of the current constitutional complexion and the fact that legitimacy grows proportionately with stability has meant that the United Kingdom and the contemporary constitutional modification proposals hardly welcome each other with open arms.

The British judiciary provide a second hindrance to the adoption of the new proposals. The inevitable development of judicial independence and power, if not sovereignty, would be tantamount to handing over the running of society to a single class or interest since the British judiciary, unlike the more heterogeneous House of Commons, originate almost exclusively from a narrow band from within the upper echelons of the country's social spectrum. Although a recent trend towards the admission of personnel from lesser socioeconomic backgrounds has occurred, between 1820 and 1968 75.5% of British judges originated from the upper-middle-classes or the commercial and landed upper-classes[4] and in 1964 only three of fifty five High Court judges had not been to Oxbridge and nearly one third of the seventy

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[4] Harris, Phil. An Introduction to Law, London: Weidenfeld and Nicolson, 1984.

four County Court judges had been to the private schools of Charterhouse, Eton, Marlborough, Rugby, Shrewsbury and Winchester[5]. This has meant that, despite a recent opening up of the judiciary to democratic and egalitarian forces, there still remains a very upper-class and landed hue to the profession. Consequently, if it can be argued that judges already have the power to make law through their ability indiscriminately to distinguish cases or their substantial freedom in statutory interpretation[6], and it is realized that judicial review gives judges policy making and legislative powers, it is clear that the accumulation of power into the hands of a single and tightly-knit interest would be augmented.

Another obstruction to any potential assumption of the new reforms to the Constitution dwells in the depths of the British subconscious. Although seemingly contrary to the interests of its people, pervasive British values continually counteract a push for the entrenchment of certain individual rights, emphasizing a need for a level of

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[5] Abel-Smith, Brian and Stevens, Robert. Lawyers and the Courts, Cambridge, Massachusetts: Harvard University Press, 1967, p. 300.

[6] There is a lot of leeway given to judges by the ambiguity of statutory interpretation. Words can be defined in any number of ways, as shown by the debate over the meaning of the word "terrorism" in McKee v. Chief Constable of Northern Ireland, [1984] 1 WLR 1358 (House of Lords), and the intention of the statute can be interpreted in a similarly free manner, as shown by the debate between judges over the intent of the Domestic Violence and Matrimonial Proceedings Act of 1976 in Davis v. Johnson, [1978] 1 All E.R. 1132.

economic justice. Remarking that individualism is not as potent as it is in the United States, Max Hastings, editor of "The Daily Telegraph", illustrated such a trait when he stated that, whilst talking about the public outcry to the erosion of some prerogatives, "Thatcher is an extremely shrewd judge of what the public cares about and what it doesn't... these are issues it doesn't care about".[7] This argument is shown even more vividly when Hastings's statement is juxtaposed to the passion with which the British have protected collective and economic privileges such as the welfare state and The National Health Service. In April 1985, a decision by the Thatcher government to disassemble completely the student grant system and replace it with an American style loan mechanism was crushed by a coalition of Conservative backbenchers, middle-class parents and students. In a similar vein, a fervent and passionate opposition to Mrs. Thatcher's plans to privatize The National Health Service has also surfaced. Conservative backbenchers have once again been mobilized, trade unionists have marched and taken industrial action[8], and a majority of the British people have expressed a want to pay higher taxes

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[7] Quoted from Atlas, James. "Thatcher Puts a Lid on Censorship in Britain" New York Times Magazine, 5 March 1989, p. 97.

[8] In 1988 there was a nurse's strike; the National Union of Public Employees and COHSE, the health workers' union, took industrial action; and on 5 March 1988 fifty thousand trade unionists marched against National Health Service reform.

in order to rescue the declining public health monolith[9]. As an American journalist in simplistic and condescending, if nevertheless fairly accurate, terms put it:

> "The health service is the one thing that makes this class-divided society feel warmly egalitarian, and Britons of all political persuasions consider it the most sacred of national budgetary cows."[10]

The fact that the British do not tend to value individual and political freedoms as much as economic and social justice can be seen in more detail if the postures of American and British social movements are compared. Examples of these differences are abundant, but the employment of two nineteenth century working- class movements is particularly illuminating, despite their chronological distance.

The Chartist movement in the United Kingdom of the mid-nineteenth century was a working-class call for a number of political rights, such as universal manhood suffrage and equal electoral districts, that, superficially anyway, seemed very "American" in its objectives. However, whereas, for example, the black civil rights movement of the 1950s and 1960s for the most part forwarded such objectives within a framework that called for the granting of political and legal equality as a matter of right and an ends in itself,

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[9] A January 1988 Gallup Poll showed that 67% of Britons were willing to pay higher taxes if this revenue went directly to the National Health Service. De Young, Karen. "The British Love Their National Health Service: But Can It Survive?" Washington Post, 15 March 1989, p. 18.

[10] Ibid., p. 18.

Chartists demanded political parity as a stepping stone to power and ultimately, the correction of economic imbalance. In this way, the American civil rights movement, before 1963 anyway, called for restaurants to be desegregated but not for a black man or woman to be able to afford to eat there, while the Chartists described themselves in this rhetoric:

> An entire change in society - a change amounting to the complete subversion of the existing order of the world is contemplated by the working-classes. They aspire to be at the top instead of at the bottom of society - or rather that there should be no bottom or top at all.[11]

Such claims were made because the Chartists were not so much a bourgeois movement altruistically seeking ubiquitous political and legal equality but were, "the first great working-class political movement in the history of the world"[12]. Gathered under the pervading umbrella of Chartism were a myriad of radical intellectuals, such as William Thompson and Thomas Hodgskin; labor unions, like the Grand National Consolidated Trades Union; working-class movements, for example Feargus O'Connor's influential "Northern Star" newspaper and Luddite vandalism; and proletarian dissenters who opposed the cruel 1834 Poor Law and remembered the

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[11] Chartist leader Bronterre O'Brien quoted from Briggs, Asa. The Age of Improvement, London: Longmans Green and Co., 1959, p. 290.

[12] Ward, J.T. Chartism, New York: Barnes and Noble Books, 1973, p. 11.

injustice and bloodshed of Tolpuddle[13] and Peterloo.[14] All this resulted in a virile attempt to protect and promote rural and urban working-class interests and, in many ways, the traditional values of collective paternalism, toryism and economic and social justice, from the ruthless economic liberalism of Adam Smith and David Ricardo. As E.J. Hobsbawn has stated:

> The traditional view, which still survived in a distorted way in all classes of rural society and in the internal relations of working-class groups, was that a man had a right to earn a living, and if unable to do so, a right to be kept alive by his community. The view of middle-class liberal economists was that men must take such jobs as the market offered, wherever and at whatever rate it offered, and that the rational man would, by individual or voluntary collective saving and insurance make provision for accident, illness and old age.[15]

This dynamic between collectivism and economic justice, and individualism and the dominance of political and legal rights did not occur in American society, as the examination

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[13] The Tolpuddle martyrs were six Dorset laborers who, in 1834, were victimized by a government wary of labor and working-class discontent and found guilty of practicing secret oaths to uphold their union. They were transported to Australia as punishment.

[14] The "Peterloo Massacre", so called as it took place in St. Peter's Field in Manchester and was seen to resemble the bloodshed of Waterloo, took place in 1819 when the local yeomanry, who were supervising a huge and peaceable gathering that was calling for parliamentary reform, incited violence that led to the death of eleven protesters and injuries to hundreds more.

[15] Hobsbawn, E.J. Industry and Empire, 2nd. volume. New York: Pantheon Books, 1968, p. 69.

of that country's nineteenth century working-class movement illustrates. Although Grangerism and Populism, with their emphasis on cooperativism, the free coinage of silver, an equitable taxation system and government ownership of transportation and large utilities, resembled a discernable movement outside of the American paradigm and an explicit call for economic egalitarianism, these approaches were marginalized by middle- class and urban interests and then, through a process of osmosis, coopted by the ubiquitous and pragmatic Democratic Party.[16] Moreover, despite the fact that the American labor movement had its Peterloos and Tolpuddles, for instance the police brutality during the Haymarket Square riots in the Chicago of 1886[17], the shooting of striking steel workers by the hated Pinkertons at Andrew Carnegie's Homestead plant in 1892 and the violence of the Pullman Strike in 1894, it did not incorporate the deep rooted resentment of laissez-fairism and the belief in the need to furnish economic and social safety nets so that the poor, sick and elderly would not be left out of the system; as the Chartists did. To be sure, there were the Knights of Labor who united much of the

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[16] For more on Populism, see Lawrence Goodwyn's classic work on the movement Democratic Promise: The Populist Moment in America, New York: Oxford University Press, 1976.

[17] For more on the Haymarket Square riot see, Foner, Philip S. History of the Labor Movement in the United States, Volume 2: From the Founding of the A. F. of L. to the emergence of American Imperialism, New York: International Publishers, 1977.

American workforce, regardless of ability, race, sex and geographical location[18], and the International Workers of the World (I.W.W.) who preached Marxist hegemony and witnessed the omnipotence of class war[19]. Yet, for a number of reasons, American labor was unable to force British-type values into the mainstream of the American consensus.

Some of the reasons for this failure were structural and concerned such problems as the fragmentation of the I.W.W. due to internal squabbles over ideology and policy. However, the main driving force behind this inability to create some vignettes of class consciousness or a push for economic equality was the omniscience of the American consensus, something that was created by the constitutional settlement. To be sure, there were societal factors involved and the patchwork of religions, languages and cultures that was America was activated by racism and xenophobia that fractured class lines and polarized people around more ethnic interests as the material abundance and high standards of living that existed tended to reinforce the belief that poverty did not exist in the United States. But it was the value system and pervasive ideology that held the

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[18] For more on the Knights of Labor see, Foner, Philip S. History of the Labor Movement in the United States, Volume 1: From Colonial Times to the Founding of the American Federation of Labor, New York: International Publishers, 1977.

[19] For more on the Industrial Workers of the World see, Foner, Philip S. History of the Labor Movement in the United States, Volume 4: The Industrial Workers of the World 1905-1917, New York: International Publishers, 1980.

key. The fact that the epicenter of the American labor movement of the epoch in question, the American Federation of Labor (A.F.L.), excluded non-Protestants and non-whites, would only enlist skilled artisans and only pursued industrial democracy, fair salaries for members and humane working conditions and not social revolution or upheaval; simultaneously reflected and institutionalized conventional American values. In adopting a doctrine that was, "a rejection of socialism combined with a search for respectability for labor in its acceptance by American society as a whole"[20], the A.F.L.'s leader of the time, Samuel Gompers, both catered for and espoused the belief in the right to private property, the justice of equality of opportunity and the inducement of sloth that equality of condition brings, as well as the righteousness of political and legal equality.

If a comparison of English and American working-class movements reveals the importance of a value system and a national ideology in the emphasis of individual liberties, then the current constitutional system that Britain leans on provides a final reason for why the conception of the American constitutional model is not practical in the United Kingdom. Despite the recent criticism of it, Britain's constitutional mechanism has been extremely resilient and

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[20] Dick, William M. Labor and Socialism in America, Port Washington, New York: Kennikat Press, 1972, p. 113.

consistently successful in protecting individual rights and civil liberties. This is because such provisions have been embedded in common law and legal tradition to such an extent that statute has been unable to remove them, whether it be because the nation is unwilling to see the removal of law which is so entrenched or that this law defies removal itself. For example, habeas corpus is granted in Britain as a right, not through an explicit declaration such as a bill of rights, but from a privilege that stems back from the Norman invasion and the roots of common law. Whereas many people would believe that it was established with the passing of the Habeas Corpus Acts of 1679 and 1816, the right to habeas corpus has in fact grown as the common law has developed, allowing statute not to determine the direction and velocity of its growth but merely to fine tune the character of the right. In this way, the evolutionary doctrine of the British Constitution seems to be somewhat more able to secure civil liberties than a verbal or written declaration of habeas corpus. This is because the ammunition of a mature common law tradition backed up by forceful legislation secures the exercise of a freedom much more than any universal declaration of the existence of such rights as they are aimed more towards the elevation of the right rather than merely recognizing its actuality. As A.V. Dicey states:

> There is no difficulty, and there is often very little gain, in declaring the

> existence of a right... The true difficulty is to secure its enforcement.[21]

British society and its whole constitutional, legal and political machinery can not only secure the exercising of certain individual rights better than a system that attempts to entrench liberties, but may also cultivate an environment in which such rights can be more effectively practiced. Employing the right to the freedom of the press in America as an example, the last chapter explained how the existence of individual freedoms is only really meaningful if the society that states that it allows them in principle creates certain favorable political, economic and social conditions to help nurture them in actuality. With this in mind, whereas the United States, utilizing the modern constitutional system, has yielded a society in which freedom of the press really only exists totally in theory and not quite fully in practice, the United Kingdom has provided a society in which freedom of the press is not explicitly granted but does exist in reality.

This argument naturally recognizes that it is not entirely the construction of a type of political system and constitutional set-up that produces such differences. Nevertheless, such factors do play significant roles. Whereas the right to print, publish or broadcast anything is

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[21] Dicey, A. V. Introduction to the Study of the Law of the Constitution, London: Macmillan and Company Ltd., 1965, p. 221.

lucidly outlined by the First Amendment to the United States Constitution, the British system, whether it be in common law or parliamentary statute, only seldomly mentions this liberty. However, juxtaposed to this scenario, the United States finds it difficult to protect such a right, as the reasoning of the last chapter and the material presented on the McCarthy era has highlighted. On the other hand, the prerogative, although not quite as freely exercised during the Thatcher era as it has been during earlier governments, is more liberally performed in Britain. Stemming from the fact that, "the so-called liberty of the press is a mere application of the general principle, that no man is punishable except for a distinct breach of law"[22], the growth of freedom of expression and the press has only been circumscribed by such laws as those concerning libel since there are really no explicit statutes that outlaw publication of certain viewpoints. On top of this, and with the earlier definition of democracy foremost in the mind, the British system has also proved itself conducive to providing the public with fairly meaningful vehicles to free expression. Being a society in which there exists differing and distinguishable ideologies, alternatives, political parties, classes and interests, Britain has always been, even if this has become more difficult from time to time, able to nurture and encourage the development not only of

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[22] Ibid., p. 248.

media, but also the publication and broadcasting of a myriad of diverse philosophies. Coupled with the state ownership of such mediums as the British Broadcasting Corporation (B.B.C.), this has meant that access to both print and an audience has been secured for both communists and fascists alike (indeed Britain does have its own widely circulated Communist daily newspaper, "The Morning Star"). These factors may not seem particularly significant, but when it is compared with how, in the United States, market forces, the pervasive consensus, and the two pragmatic and non-ideological mass parties help to stifle choice, an ingredient that was earlier seen to be an integral part of democracy, then perhaps it may be concluded that the British approach best secures freedom of the press.

Naturally the British way does not render the country a utopian nation complete with equally competing and vociferous postulates as well as a diverse, well-informed and totally literate populace. Indeed, the problems that the American media has have been shown to exist in Britain. Independent publishers rely on the market, even if the diversity of it allows for more varied material to be produced, as much as their American counterparts do. Certain mediums, especially cable television and newspapers, are becoming increasingly susceptible to concentration, as the dynasties of Rupert Murdoch, Tiny Rowland and Robert Maxwell have illustrated. And television is far from being freely

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competitive, the B.B.C. had a monopoly before the advent of Independent Television in 1954 and is still, especially during the Thatcher era as the first chapter illustrated[23], perhaps too closely connected to the government[24]. However, what Britain does most crucially have, is the diversity and ideological complexity to make the right of freedom of the press consequential, at least in the theory of practice. As Peter Golding, whilst referring to the B.B.C., claims:

> ... big, even semimonopolistic media are necessary to supply the fourth estate arm of communications with the resources and weight required for its watchdog role. Thus investigative journalism requires massive industrial backing to lend it significance, confidence, and the ability to scale the other commanding height of the social structure.[25]

There are, subsequently, a number of ways in which contemporary British society and the proposals forwarded by the recent constitutional reform movement can be seen to be incompatible. Firstly, the imposition of a new system, in this instance in the guise of a written constitution and the by-products of entrenched and enumerated rights and judicial

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[23] For more on Mrs. Thatcher's relationship with the B.B.C. and how this has affected editorial freedom see, Walters, Peter. "The Crisis of 'Responsible' Broadcasting: Mrs. Thatcher and the B.B.C." Parliamentary Affairs, Vol. 42, No. 3 (1989) pp. 380-398.

[24] Although the B.B.C. operates independently of the government, its chairman and governors are appointed by Whitehall and it does depend on the executive for revenue.

[25] Golding, Peter. The Mass Media, London: Longman Group Ltd., 1974, p. 52.

review, would seem illegitimate to the society, since it would create instability and the belief that it emanated from the whim and caprice of a partisan source. This would, in turn, result in the undermining of the cohesive hegemony of the rule of law and, perhaps, the disintegration of order and society itself. Secondly, the assumption of judicial sovereignty, bearing in mind the complexion of the British judiciary, would be tantamount to delegating a substantial slice of power over to a small, professional and public school educated elite. Thirdly, the British tendency to accentuate collectivism and economic prerogatives means that the call for individual political and legal liberties is muffled and may, if implemented in the form of entrenchment, destabilize the society. Finally, the British postulate already secures, at least for the most part, the provisions that any bill of rights would attempt to safeguard from a concerted ideological and legislative attack by enveloping rights in centuries of protective common law and stare decisis. Parliament may be sovereign, but it is still manipulated by a public opinion that is strangely nostalgic and strongly influenced by tradition and convention.

These practical problems for the construction of the American constitutional model in the United Kingdom are, as the rest of this study has suggested, built upon other arguments that suppose that written constitutions, bills of rights and judicial review are flawed. Utilizing the

American experience and many episodes of American constitutional, social and political history as signposts, this essay has reasoned that such a system is intrinsically undemocratic and that the entrenchment and enumeration of civil liberties is inherently problematic. However, as the examination of the contemporary constitutional reform movement and the political and social climate that succored it have illustrated, there clearly exists both a need and a demand for reform. Therefore, recognizing that the termination of the work at this particular juncture would render it devoid of necessary prediction and prescription, the conclusion of this discourse will present its own version of what reform should look like, bearing in mind that it has already dismissed the doctrine espoused by Charter 88 and its allies.

CHAPTER 5: CONCLUSION: A DOCTRINE FOR THE FUTURE.

By delving frequently into the rich history of the United States, this work has attempted to discuss and evaluate the proposals forwarded by Britain's recently mobilized constitutional reform movement. It has also, by utilizing such benchmarks as democracy and the prevailing British value system, suggested that the imposition of a sovereign constitution containing enumerated individual liberties and the consequential resultant of judicial review would be neither desirable nor practical in the United Kingdom. And, what is more, this essay has seemingly shut the door on any attempt to extract sovereignty and power from the institution of Parliament, claiming that such an action is undemocratic, destabilizing and contravenes British traditions and values.

However, despite this, it should be realized that there does seem to be some need for reform. The "Spycatcher", "Zircon" and "Death On The Rock" cases that were mentioned in the first chapter illustrate a discernable weathering of the freedom of speech prerogative that Britons enjoy and during the 1980s, British citizens, of whatever race, sex or socioeconomic status, were being gradually and surreptitiously embezzled of a multitude of freedoms and rights that had been granted to them by hundreds of years of

struggle, compromise and triumph. Furthermore, Lord Hailsham's perceptive "Electoral Dictatorship" scenario is being vividly spotlighted by the almost authoritarian hijacking of the mechanics of Parliament and government by Mrs. Thatcher. In a substantial incrementation of power, the present Prime Minister has been able to alter the complexion of the political system and dilute the prerogatives of citizens as if by whim or fancy. By employing her unique personality and huge electoral mandate and exploiting the impotency of her parliamentary opposition and the vulnerability of a system which invests most of its power in the executive branch, she has been able to dictate change at will. Although this could all have been checked by the ballot box and potent parliamentary opposition, neither, except for the ephemeral rise of the Alliance, have been particularly forthcoming.

It is because of this recognition for reform that a qualification to the dismissal of Charter 88 and the rest of the constitutional modification movement's argument should be interjected. This qualification takes the form of an alternative view of adjustment and metamorphosis, one that, in light of the posture of this essay, is of a more modest complexion than the grandiose designs mentioned earlier. Nevertheless this prescription is certainly significant since, although it does not attempt to shift the location of sovereignty in the British political system, it does call

for a reforming of the electoral system in order to envelop proportional representation. Although this shift would continue to reflect majoritarianism and allow for the maintenance of stability in the mechanism, it would promote change by putting a check on the immense executive power that is inherent in Britain; something that would be done by preventing the amplification of parliamentary majorities and making them more reflective of public opinion.

Having identified a need for change and realizing that such alterations should come in the form of this revision of the electoral system, it remains to be asked as to how such proportional representation will work. At a macro-level it is clear that what proportional representation will do is fracture power in the House of Commons and make it more difficult for the government to enact its policies in a nonchalant and excessive manner. This will be achieved as power centers will emerge throughout the two legislatures, giving Parliament the character of a true debating chamber and not just a rubber stamp approving government policy. In addition, parliamentary sovereignty, majoritarian rule and the conventions and traditions that provide the cohesiveness for British society will be maintained since it will only be the way in which the voters elect their M.P.s and not the workings of government itself that shall be revolutionized.

Meanwhile, at a micro-level, Britain will become more democratic. Majorities that currently, under the simple

plurality system, can theoretically receive a minority of the votes cast will be toned down and susceptible to the backing of less well-supported parties and candidates. Whereas, as in 1979 and 1983, the Conservative Party in Britain formed governments with only 43.9% and 42.4% of the votes cast respectively[1] and the present constituency system can result in the party winning the most votes losing the election[2], proportional representation will make all votes cast, whether they be for a majority or a minority, count. Rather than allowing a candidate who wins a contest, such as a British by-election or American Presidential or Congressional race, to carry the whole of his constituency, this will be done by making the distribution of seats in the Commons reflective of the total national vote cast. For

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[1] Bogdanor, Vernon. What is Proportional Representation?, Oxford, England: Martin Robertson and Company Ltd., 1984, p.18.

[2] In the February 1974 general election, the Conservative Party received 308,000 more votes than the Labor Party (11,963,000 to 11,655,000) yet won five seats less than their opponents (296 to 301). (Hanson, A.H. and Walles, Malcolm. Governing Britain, Oxford, England: Fontana Paperbacks, 1984. p.28) In a similar example, the 1960 American Presidential election yielded a result in which John F. Kennedy received eighty-four more electoral college votes than Richard Nixon (303 to 219) but only 0.3% more of the popular vote (49.8% to 49.5%). With this in mind it is conceivable that Kennedy would still have got to the White House, even if he had received a smaller proportion of the popular vote than Nixon* (Wayne, Stephen J. The Road To The White House, New York: St. Martin's Press, 1984, p.290)

* N.B. Although in practice electoral college votes are bound by the popular vote to a particular candidate, this is not so in theory and therefore may feasibly not always be the case.

example, if the Conservatives win forty per cent of the nationwide vote, this can only be translatable into two-fifths of the seats in the House of Commons. Moreover, this will not only stop the over-amplification of majority sentiment but will also secure minority representation. For instance, if the Social and Liberal Democrats receive twenty five per cent of the vote in finishing second in all the constituencies in the country, it will not receive no seats, but will occupy one quarter of the Commons come the next Parliament, a scenario that can be juxtaposed with the 1983 election returns in which the Labor Party, which got 27.6% of the vote, won two hundred and nine seats and the Alliance, which mustered 25.4% of the vote, garnered only twenty-three seats[3]. As Joseph F. Zimmerman has said in his argument for the implementation of proportional representation in American local and city elections:

> The principle advantage of PR (proportional representation) is the fact the system elevates rather than submerges minority voting strength and relies on design rather than chance to produce direct and "fair" representation.[4]

There are a variety of proportional representation models that this new Britain could adopt. The Single Transferable Vote (S.T.V.), which is employed by the Republic of Ireland and in all Northern Irish elections except those that

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[3] Bogdanor, op cit., p.17.

[4] Zimmerman, Joseph F. "A Fair Voting System For Local Governments" National Civic Review, Vol. 68 (1979), p.507.

involve appointment to Westminster, is one such system and although the mathematics of S.T.V. are extremely complicated[5], what this approach basically entails is the ranking of candidate preferences by the electorate and a series of elimination rounds in which candidates that do not receive enough votes to continue in the race are pushed out and the voters who selected them have their votes transferred to other candidates according to who was next on the voters' hierarchy of choices. Similarly, the West German, or "additional member", system could be adopted. This postulate involves two ballot papers and two choices for each voter. The first vote is from a list of candidates and the winner, whether he has an absolute majority or not, is selected as the legislator for that constituency; hence maintaining the link between government and local constituency needs and wishes that many opponents of proportional representation say it actually severs. Yet, in West Germany only one-half of the Bundestag is filled in this way since the second vote is used to choose the other half. In this instance, the vacant seats are filled so as to ensure that the number of seats given to each party is proportional to the votes cast for it in both ballots. This is done by computing how many seats each party would have won on a strictly proportional basis during the second vote

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[5] For more on S.T.V., see Bogdanor, op cit., chapter 5, pp. 75-110.

and then subtracting from this total the number of seats each party won in the constituency contests.[6]

Any detailed discussion of a choice between S.T.V. and the West German system lies outside the jurisdiction of this work, even if it is interesting to note that the "additional member" method maintains the constituency-central government nexus and prevents the proliferation of minor parties by not allowing any party that did not secure at least five per cent of the total vote across the country to take up the allocation of seats that it gained in the second ballot. What is important however, is to highlight several estimable characteristics of proportional representation and to rejoin some of the criticism that is often aimed at this particular electoral system. Clearly, despite the many, almost comical, references to the instability of Italian governments elected by proportional representation, this system selects administrations that are able to rivet a nation's political mechanism and produce some semblance of coherent and consistent policy-making. Neither Dublin nor Bonn have been pulled away from responsible policy-making by extremist minorities such as Sinn Fein and the neo-Nazis respectively, and both have yielded coalitions that have been able to construct forceful and meaningful legislation. In addition, West Germany's system is clearly conducive with the building

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[6] For more on the "additional member" system, see Bogdanor, op cit., chapter 4, pp. 46-74.

of a dynamic economy through a planned and managed approach. The domination of a coalition of the Christian Democrats, Free Democrats and Social Democrats, that is obviously of a different consistency at different times, has sculptured a broad consensus in West German society that has forged a sense of nationalism and identified national problems and discovered national solutions. In this way, proportional representation, as the West Germans have illustrated, does not fracture society into a kaleidoscope of single-issue and extremist parties but emphasizes the sharing of power and responsibilities and accentuates cooperation rather than competition, commonweal rather than self-interest. As Vernon Bogdanor states:

> The central strength of proportional representation is that it makes for the sharing of power at governmental level. This inculcates attitudes that spread outwards into society so that power in the economy and in industry also comes to be shared. Advocates of proportional representation tend to see it as a political concomitant, and indeed pre-requisite, of power-sharing policies in the economic and social sphere...[7]

To end on the recommendation of proportional representation as the solution to the problem in hand would not reveal the whole story and so, before this work draws to a close, it is perhaps worth remarking upon another factor that makes the proposed constitutional refurbishment less agreeable and, in turn, the alternative of proportional

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[7] Bogdanor, op cit., pp.154-155.

representation more desirable. Since 1973, when Edward Heath signed the Treaty of Rome and Britain joined the European Economic Community, the United Kingdom, and more importantly its citizens, have been relinquishing economic, political and legal sovereignty to a body of European judges, politicians and economists who reside in such cities as Strasbourg and Brussels. The European Court of Justice (E.C.J.) and the European Court of Human Rights, which itself is not part of the European Community (E.C.) but to which Britain releases sovereignty because of the signing of the European Convention on Human Rights in 1950, have swelling jurisdictions that are beginning to infiltrate Britain. Although these two institutions merely deliver declaratory rulings and have no enforcement powers, being dependent as they are on the acceptance of their verdicts by member countries, they have the ultimate authority to define the Treaty of Rome and the European Convention on Human Rights respectively, and hence a nation's treaty obligations. As the arbiter in intra-E.C. disputes and the interpreter of E.C. laws and treaties, the E.C.J. will, as Europe becomes one market in 1992 and E.C. law begins to subordinate national statute in some issue areas, commence in an unprecedented fashion to increase its power and the number of cases and personalities answerable to it.

Despite the fact that, as was seen in chapter one, the European Convention on Human Rights has not been

incorporated into British law, the Strasbourg court that enforces the treaty is able to dictate Anglo jurisprudence. As of the end of 1988, Britain had been found in contravention of the European Convention on twenty-two occasions[8] and only once had it declined from accepting the Court's ruling. In this particular instance Mrs. Thatcher's government refused to agree with the institution's disapproval of the provision of the 1974 Prevention of Terrorism Act that permitted the prearranged detention, for up to a week, of individuals suspected of terrorist activity because, not only was the administration convicted to a course of stiff anti-terrorist measures, but the public, in the aftermath of the Pan-Am 747 explosion over Lockerbie, demanded a counter-attack against all forms of terrorism. Meanwhile, in the other twenty-one rulings, Britain fell in line, answering to Strasbourg rather than Whitehall, Westminster or its own courts. In February 1982, for example, the Court stated that corporal punishment in schools breached the Convention after a Scottish mother had brought litigation to defend her son's refusal to be beaten with the tawse, a leather strap. The decision resulted in a flood of cases being brought to Strasbourg by all types of individuals who had experienced corporal punishment in British schools and, ultimately, due to a great amount of pressure, the phasing out of such means of castigation in

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[8] New York Times. 30 November 1988, p. A19.

the United Kingdom's educational system.

The examples of the European Community, European Court of Justice and the European Court on Human Rights neatly tie up the argument of this essay. Already susceptible to a usurping of sovereignty by a written constitution that Charter 88 and its allies are proposing, the British people, through their representative body, the House of Commons, are also facing the prospect of sovereignty and power flowing to European institutions, whether they be the legal ones mentioned above or their political and economic counterparts such as the European Parliament. With 1992 looming and the first major step towards a United States of Europe completed, it would seem that the establishment of modern constitutionalism would have the amplified effect of almost draining Parliament of power and influence and taking away from the country's people the only way in which they can control the destiny of their own and their nation's future. By repatriating sovereignty in an entrenched document that would be interpreted by a judiciary equipped with the ability to review legislation, the new constitutional reform movement does not only comply with the arguments against it that this essay has illuminated but, if the swelling restlessness and impatience of the forces of European unity are taken into account, would be tantamount to taking the last remnants of power out of the hands of the British voter. Sovereignty that once resided in Westminster would be

scattered throughout Europe and the pages of a new constitution and Parliament would be relegated to a meaningless, impotent institution. In this way surely a change in the electoral system, not constitutional complexion, is in order, because, if Charter 88 gets its way, democracy in Britain will be in a much worse state of health than it would be after any mauling that Mrs. Thatcher could ever imagine to give it.

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APPENDIX.

CHARTER 88

We have been brought up in Britain to believe that we are free: that our Parliament is the mother of democracy; that our liberty is the envy of the world; that our system of justice is always fair; that the guardians of our safety, the police and security services, are subject to democratic, legal control; that our civil service is impartial; that our cities and communities maintain a proud identity; that our press is brave and honest.

Today such beliefs are increasingly implausible. The gap between reality and the received ideas of Britain's "unwritten constitution" has widened to a degree that many find hard to endure. Yet this year we are invited to celebrate the third centenary of the "Glorious Revolution" of 1688, which established what was to become the United Kingdom's sovereign formula. In the name of freedom, our political, human and social rights are being curtailed while the powers of the executive have increased, are increasing and ought to be diminished.

A process is underway which endangers many of the freedoms we have had. Only in part deliberate, it began before 1979 and is now gathering momentum. Scotland is governed like a province from Whitehall. More generally, the government has eroded a number of important civil freedoms:

for example, the universal rights to habeas corpus, to peaceful assembly, to freedom of information, to freedom of expression, to membership of a trade union, to local government, to freedom of movement, even to the birth-right itself. By taking these rights from some, the government puts them at risk for all.

A traditional British belief in the benign nature of the country's institutions encourages an unsystematic perception of these grave matters; each becomes an "issue" considered in isolation from the rest. Being unwritten the constitution also encourages a piecemeal approach to politics; an approach that gives little protection against a determined, authoritarian state. For the events of 1688 only shifted the absolute power of the monarch into the hands of the parliamentary oligarchy.

The current administration is not an un-English interruption in the country's way of life. But while the government calls upon aspirations for liberty, it also exploits the dark side of a constitutional settlement which was always deficient in democracy.

The 1688 settlement had a positive side. In its time the Glorious Revolution was a historic victory over Royal tyranny. Britain was spared the rigours of dictatorship. A working compromise between many different interests was made possible at home, even if, from Ireland to India, quite different standards were imposed by Empire abroad. No

criticism of contemporary developments in Britain should deny the significance of past democratic achievements, most dramatically illuminated in May 1940 when Britain defied the fascist domination of Europe.

But the eventual victory that liberated Western Europe preserved the paternalist attitudes and institutions of the United Kingdom. These incorporated the popular desire for work and welfare into a post-war consensus. Now this has broken down. So, too, have its conventions of compromise and tolerance: essential components of a free society. Instead, the inbuilt powers of the 1688 settlement have enabled the government to discipline British society to its ends: to impose its values on the civil service; to menace the independence of broadcasting; to threaten academic freedom in the universities and schools; to tolerate abuses committed in the name of national security. The break with the immediate past shows how vulnerable Britain has always been to elective dictatorship. The consequence is that today the British have fewer legal rights and less democracy than many other West Europeans.

The intensification of authoritarian rule in the United Kingdom has only recently begun. The time to reverse the process is now, but it cannot be reversed by an appeal to the past. Three hundred years of unwritten rule from above are enough. Britain needs a democratic program that will end unfettered control by the executive of the day. It needs to

reform a parliament in which domination of the lower house can be decided by fewer than forty per cent of the population; a Parliament in which a majority of the upper house is still determined by inheritance.

We have had less freedom than we believed. That which we have enjoyed has been too dependent on the benevolence of our rulers. Our freedoms have remained their possession, rationed out to us as subjects rather than being our own inalienable possession as citizens. To make real the freedoms we once took for granted means for the first time to take them for ourselves.

The time has come to demand political, civil and human rights in the United Kingdom. The first step is to establish them in constitutional form, so that they are no longer subject to the arbitrary diktat of Westminster and Whitehall.

We call, therefore, for a new constitutional settlement which would:

Enshrine, by means of a Bill of Rights, such civil liberties as the right to peaceful assembly, to freedom of association, to freedom from discrimination, to freedom from detention without trial, to trial by jury, to privacy and to freedom of expression.

Subject executive powers and prerogatives, by whomsoever exercised, to the rule of law.

Establish freedom of information and open government.

Create a fair electoral system of proportional representation.

Reform the upper house to establish a democratic, non-hereditary second chamber.

Place the executive under the power of a democratically renewed parliament and all agencies of the state under the rule of law.

Ensure the independence of a reformed judiciary.

Provide legal remedies for all abuses of power by the state and the officials of central and local government.

Guarantee an equitable distribution of power between local, regional and national government.

Draw up a written constitution, anchored in the idea of universal citizenship, that incorporates these reforms.

Our central concern is the law. No country can be considered free in which the government is above the law. No democracy can be considered safe whose freedoms are not encoded in a basic constitution.

We, the undersigned, have called this document Charter 88. First, to mark our rejection of the complacency with which the tercentenary of the Revolution of 1688 has been celebrated. Second, to reassert a tradition of demands for constitutional rights in Britain, which stretches from the barons who forced the Magna Carta on King John, to the working men who drew up the People's Charter in 1838, to the women at the beginning of this century who demanded universal suffrage. Third to salute the courage of those in Eastern Europe who still fight for their fundamental freedoms.

Like the Czech and Slovak signatories of Charter 77, we are an informal, open community of people of different opinions, faiths and professions, united by the will to strive, individually and collectively, for the respect of civil and human rights in our own country and throughout the world. Charter 77 welcomed the ratification by Czechoslovakia of the UN International Covenant on Political and Civil Rights, but noted that it "serves as a reminder of the extent to which basic human rights in our country exist, regrettably, on paper only".

Conditions here are so much better than in Eastern Europe

as to bear no comparison. But our rights in the United Kingdom remain unformulated, conditional upon the goodwill of the government and the compassion of bureaucrats. To create a democratic constitution at the end of the twentieth century, however, may extend the concept of liberty, especially with respect to the rights of women and the place of minorities. It will not be a simple matter: part of British sovereignty is shared with Europe; and the extension of social rights in a modern economy is a matter of debate everywhere. We cannot foretell the choices a free people may make. We are united in one opinion only, that British society stands in need of a constitution which protects individual rights and of the institutions of a modern and pluralist democracy.

The inscription of laws does not guarantee their realisation. Only people themselves can ensure freedom, democracy and equality before the law. Nonetheless, such ends can be far better demanded, and more effectively obtained and guarded, once they **belong to everyone by inalienable right.**

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