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## Preface

When the history of the new Labour governments comes to be written, constitutional reform is likely to be regarded as one of the big success stories. New Labour has undoubtedly presided over one of Britain's most radical periods of constitutional reform, which has transformed much of the political landscape. Yet, paradoxically, constitutional reform has never been a major priority, especially when compared with the politically charged realm of the public services, and the government rarely seems to champion its record. But modesty in itself is not a problem. Instead, problems arise in thinking that constitutional reform is a static event, and that once implemented it is safe to walk away. In fact constitutional reform is emphatically not static, but is a dynamic process. It unleashes powerful forces that create new challenges and tensions, with both anticipated and unanticipated consequences.

Devolution – perhaps the most significant piece of constitutional reform – is a case in point. Famous for its smooth and relatively painless implementation, it has nevertheless created new anomalies. Chief among these is the position of England in a post-devolved UK. Without its own political institutions, England continues to be governed by Westminster in much the same way as it was before. Viewed from the House of Commons, it might be said that devolution appears to be more of an event than a process.

But the formidable challenges that devolution has thrown up for the way in which

This briefing seeks to investigate and unpack these difficult issues. Taking a partly historical perspective it demonstrates that the current debate in fact contains little new. A closer reading of history shows that such territorial anomalies, and arguments about them, have long existed. But these arguments have tended to be driven largely by concern for political expediency, rather than some deep-seated commitment to constitutional principle. History also shows that resolving such anomalies is much harder than people think. It was Gladstone who first proposed the 'in and out' policy which has since been repackaged by the Conservatives. But he ultimately dropped it, concluding that it was unworkable. Here we survey this and other solutions that have been proposed over time and demonstrate that, more often than not, such proposals come with profound and far-reaching implications of their own.

This briefing is an adapted version of a chapter to appear in the forthcoming book edited by Robert Hazell, entitled *The English Question* (Manchester University Press, 2006). We are grateful to Manchester University Press for permitting us to publish it in this form, and to the other contributors to the book for their comments on earlier versions. We are also grateful to the Leverhulme Trust for their funding of the project 'The Impact of Devolution on Westminster', which enabled us to conduct the research.

We hope that the briefing proves timely, and helps shed some light on the rather fraught and complex issue which it seeks to deconstruct.

## Executive Summary

- Since devolution in 1999 much attention has focussed on its impact on the Westminster parliament. This briefing seeks to explore the issues, by analysing contemporary data and also taking a historical perspective on the 'West Lothian Question'.
- There has in fact been little change in procedure or behaviour at Westminster since devolution. Territorial forums for Scotland and Wales continue to exist as before. There is some sign that Scottish and Welsh MPs are less well represented in the business of
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- In Wales problems have less frequently occurred, due to the more interconnected nature of English and Welsh law: for most purposes England and Wales is a single legal entity. This remains the case now, despite devolution, and makes the position of Welsh MPs often ambiguous with relation to contemporary debates.
- In looking at historical examples we see that the political protagonists have tended to support positions for instrumental rather than principled reasons. In particular looking at the debates on Wilson's proposal we see the positions of the two main parties completely reversed compared to where they stand today. The same can be seen over previous debates on Scotland. The minor as well as the major parties adopt such instrumental positions.
- There are many obstacles to the proposal of 'English votes on English laws', some of which were explored during the home rule debates, and by the Kilbrandon Commission in the 1970s. In technical terms it is difficult to isolate which clauses in bills relate to which part of the UK, and to judge where there is indirect impact elsewhere. Politically, it is difficult to envisage the circumstances where the practice would apply. Constitutionally, it could result in a UK government which was unable to legislate on many matters, leading to a 'parliament within a parliament' or a need for coalition government, or both.
- In practice 'English votes on English laws' would therefore effectively create an English Parliament, albeit by the back door. A more transparent solution would be to consciously and explicitly adopt this change. However, it has relatively little public support and even less support amongst English MPs.
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## Introduction

In debates about England since devolution in 1999, few issues have received greater attention than the country's proper governance at Westminster. While Scotland and Wales (and intermittently Northern Ireland, since 1998) received their devolved institutions, and thus changed their relationships with the UK government, no consequent changes were



cent that might occur randomly, although the same could also be said for some all-UK departments. In terms of select committee membership, and the pattern of questions, there has been almost no change in the territorial representation across departments. And although there is some indication of specia

matters – such as the Treasury, the Foreign Office and the Department for International Development – as well as resulting from the slimming down of the Scottish (now Scotland) Office itself. Certain departments always were, and remain, largely English. However, devolution has focused attention on breaches of this convention. Notably there was much comment from the opposition and the press when John Reid, an MP representing a Scottish seat, was made secretary of state for health in June 2003.<sup>4</sup> The Department of Health is not concerned wholly with English matters, as issues such as human genetics and abortion continue to be reserved. Howe025nid, 5 5

political arithmetic at Westminster has potent





of debates if a future Labour government had a smaller majority. As the largest group, and seen as very loyal to the government, the Scots have been the main focus of attention, although some tensions have also arisen with respect to the involvement on English-only matters of Welsh and Northern Irish MPs. At times of controversial votes the Conservative opposition has been particularly critical of Scottish MPs' involvement and, along with the protests of some Labour rebels, this has attracted the interest of the press. For example, following the failure of the first foundation hospitals rebellion the *Scotsman* suggested that the 'English public would be outraged'.<sup>16</sup> Following the second vote the *Daily Mail* front-page headline suggested that the government had been 'humiliated': 'Blair Rocked As Hospitals Bill Is Saved by Scots MPs'.<sup>17</sup> Such interest on the part of the press is potentially important in turning the issue into one of wider public debate.

The Conservative Party's response is to suggest a policy of 'English votes on English laws', whereby MPs from outside of England are formally barred from voting on English matters. Although this has not proved to be a high-salience issue, the proposal appears to have public support. By 2003 some 60 per cent of English people and 48 per cent of Scots believed that 'Scottish MPs should no longer be allowed to vote on English legislation' (Curtice 2006). Even





In analysing these examples it is useful to distinguish between three factors which have fuelled territorial tensions. These may also help us to better understand the anomalies that

London (which would also retain control over

Table 5: Election results 1945 - 2005 in Wales, Scotland and Northern Ireland

Election	Wales							Scotland							Northern Ireland <sup>d</sup>					
	Con	Lab	Lib	PC	Other	Total	Maj <sup>a</sup>	Con	Lab	Lib	SNP	Other	Total	Maj <sup>a</sup>	ConU <sup>c</sup>	U	N	Other	Total	Maj <sup>a</sup>
1945 <sup>b</sup>	4	25	6	0	0	35	Lab	27	37	0	0	7	71	Lab	8		2	2	12	ConU
1950	4	27	5	0	0	36	Lab	31	37	2	0	1	71	Lab	10		2	0	12	ConU
1951	6	27	3	0	0	36	<b>Lab</b>	35	35	1	0	0	71	<b>NOC</b>	9		2	1	12	ConU
1955	6	27	3	0	0	36	<b>Lab</b>	36	34											



had never been devolved and continued to be dealt with through Northern Ireland bills at Westminster. Under the Northern Ireland Act (1974) matters that had previously been devolved were to be implemented through Orders in Council.<sup>28</sup> Although the second condition for territorial tension was no longer met, there were now new anomalies. While questions might be raised about Northern Irish involvement in English, Welsh and Scottish legislation, MPs from other areas continued to be involved in Northern Irish bills while much other Northern Irish business received little parliamentary scrutiny at all.

Following the election of February 1974, Conservative Prime Minister Edward Heath sought to hold on to power by forming a coalition. As well as talking to the Liberals as potential partners he approached some of the Northern Irish Unionists (who had severed their formal links to the Conservative Party due to serious policy differences). Alan Clark reports how 'Heath offered the Conservative whip ... to seven of the Unionists, excluding the four Paisleyites' (1997: 439). However, the Unionists refused to co-operate. Had these manoeuvres succeeded, controversies would almost certainly have flared up again on the Labour side about a government in London dependent on Northern Irish votes. Instead the Conservatives did not face this problem until the latter days of the Major government, in the 1990s, when cross-party support for peace negotiations made any Labour protests muted.

## **2.2. Scotland**

Scotland offers a contrasting example. Here there was no separate legislative assembly until 1999. However, the two other criteria for creating territorial tensions at Westminster have long applied.

The Union of the Crowns in 1603, and then the

As with Northern Ireland, some territorial tensions emerged during the Wilson governments in the 1960s. In 1969 the Conservatives opposed Labour's abolition of school fees in Scotland, despite the government's overwhelming majority north of the border. Asked whether it was not inappropriate to use English votes in the attempt to defeat the policy, Conservative spokesman Michael Noble responded: 'I do not find it an atom embarrassing to have to ask my English colleagues to come to the House this evening and vote against the clause' (quoted in Keating 1975: 33).<sup>29</sup> Such tensions also applied in reverse. For example, many Scots did not refrain from voting on Leo Abse's 1966 Private Member's Bill on homosexual law reform, although it had – specifically in order to avoid their opposition – been drafted to apply only in England and Wales (Keating 1975).

Conflicting majorities between Scotland and the UK as a whole have also been frequent. Scotland voted consistently Liberal from 1832 to 1885, and has voted consistently Labour since 1959, thus bringing it into conflict with all Conservative governments during those periods (Rallings and Thrasher 2001). On many occasions distinctly Scottish law has therefore been decided by a hostile political majority. Although this was often handled with sensitivity, hostilities reached their height under the Thatcher governments. The most famous example relates to the piloting of the poll tax in Scotland before it was introduced in England and Wales. The Abolition of Domestic Rates (etc.) Scotland Bill was introduced into parliament in 1986, against protests from Scotland where Labour held 41 out of 72 parliamentary seats. Donald Dewar, Shadow Scottish Secretary, derided the Conservative government for its determination to 'lumber us with and penalise us by a scheme that is without friends or supporters in Scotland'.<sup>30</sup> However, Malcolm Rifkind, the Scottish Secretary, rejected the idea that the Conservative government did not have a mandate with which to pursue its policy in Scotland. He argued that, since 'no Labour government bar one has had a majority in England since 1951 – that corresponds to the position of the Conservative Party in Scotland – the Hon. Gentleman must apply his new, curious

first created, in 1967, its members included no Scottish MPs. Two Scots were later added, however, 'for their interest in the formation



exclusively to English business. This, combined with England's numerical dominance in the House of Commons, led to few pressures for exclusively English fora to mirror those created for Scotland, Wales and Northern Ireland. Where England's government has been decided by the balance of votes in Scotland or Northern Ireland – as in the examples above – the same has applied to Wales, with which it shared its legal system.

There have, of course, been a small number of bills that affect England alone. McLean and McMillan (2006) have drawn attention to the defeat on Celtic votes of the 1928 *Book of Common Prayer*, despite Scottish MPs' awareness that their action was controversial. This, they suggest, may have been an example of the Celts achieving 'rough justice' in revenge for the repeated blocking by the English of Welsh disestablishment.

### 3. Prospects for resolving the English Question

A review of historical precedents is informative for various reasons, but above all it probably teaches us two things. First, that the puzzles facing us now are not new, are not a result solely of devolution and are not easily solved. Second, that interest in these questions often has been driven more by instrumental political motives than by constitutional purism alone.

We see that territorial tensions at Westminster have existed at various times in the past as a result of the UK's history as a union state, and have occurred particularly when one of three conditions were met. With respect to Scotland the opportunity for tension has long existed thanks to the

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Conservative leader Michael Howard then took up the proposal and expanded on how it would be enacted. Under these arrangements the Speaker would be responsible for certifying bills as not applying to Scotland, and MPs representing Scottish constituencies would be required to abstain.<sup>38</sup> As already indicated, public opinion polls show that such a measure has support both north and south of the border.

There are, however, a number of intractable difficulties with this approach, which account for its rejection by all previous authorities that have considered it. As already noted the suggestion was dismissed by the Attorney General in the 1960s, despite the Prime Minister's support; it was also considered unworkable by the Royal Commission on the Constitution (the 'Kilbrandon Commission') in 1973. Tam Dalyell, responsible for reviving the question in the 1970s, believed that such a solution would be 'indefensible' (1977: 250). Gladstone's attempts to implement the 'in and out' solution forced him to conclude that it 'passes the wit of man' (quoted in Bogdanor 2001: 30).

providing health care in Wales, and the Act thus allowed that constituencies for representation on trust boards may include areas the other side of the Welsh border. Under an 'in and out' arrangement there is thus no clear conclusion to be drawn as to whether Welsh MPs should participate in this area of policy.

In addition to these two direct effects on areas technically not covered by a bill, there may also be indirect effects through policy transfer from one part of the UK to another. For all of these reasons many Scottish MPs have argued that they have interests in English and Welsh legislation. The SNP, which has a policy of not voting on England-only legislation – which the partyesen115idi h

on an equality whereby all members, as members of a single parliamentary body, can vote on all matters, regardless of the territorial extent of their application. Devolution ended the reciprocity of this arrangement with respect to English and Welsh members' ability to vote on many Scottish matters. Further unravelling of the principle would have profound consequences. Taken to its logical conclusion this would require only MPs from London to have voted on the Greater London Authority Bill, or only MPs from the North East to be entitled to vote on the Bill to create a North East regional assembly. Such a decision (which would amount to legislative devolution to the regions) should be taken consciously as a matter of constitutional principle, rather than be made a matter of short-term political convenience.

At present the tensions between England and the remainder of the UK are limited, as numerically at Westminster England remains a Labour country, albeit less strongly Labour than in 1997 and 2001. The votes of Scottish and Welsh members may be used to boost the government's majority, but on most matters they are unlikely to have a decisive influence. A return to the arithmetic of 1964 or 1974, where Labour is unable to command a majority in parliament without the support of Scottish (or Welsh) MPs, is a more difficult prospect. The Kilbrandon Commission noted: 'A further difficulty would arise if the exclusion of some Members of Parliament from participation in certain issues were to deprive the government of the day of its majority in the House of Commons' (Royal Commission 1973: 247). An 'in and out' solution in these circumstances would result in a government that could control the Commons on reserved matters, but not on matters that had been devolved to Scotland and/or Wales. As government depends on the confidence of the Commons this would readily lead to a constitutional crisis, likely to be averted only if Labour could form a coalition with majority support in England (and/or England and Wales), probably through the support of the Liberal Democrats.<sup>43</sup> But this would bring about a profound change to the culture of government in England. While the electors of Scotland and Wales chose devolution, the electors of England (and Wales) were not consulted on whether they wished to accept what amounts to a parliament within a parliament, frequently under coalition control when not controlled by the Conservatives. Again, a change of this magnitude would demand serious reflection, and require a strong indication of consent from the electors of England – which is so far not apparent.

### **3.2. An English Parliament**

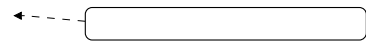
Changes to voting conventions would therefore create in effect separate bodies operating within Westminster, subject to distinct coalitions to secure a voting majority. In these circumstances it would be far more transparent and democratic to create an English Parliament, subject to its own elections. This would allow the English a direct choice over who controlled the executive on English matters, while a separate executive, elected for the purpose, would control the UK House of Commons. A complication, of course, is that the current settlement includes many English and Welsh matters. However, an 'English and Welsh Parliament' would create new 'in and out' problems of its own with respect to the Welsh. In order to avoid West Lothian-type problems altogether, an English Parliament, a Welsh Parliament and, presumably, a Northern Irish Parliament would need to have equivalent power to that of the Scottish Parliament – creating a strongly devolved federal state.

The idea of 'home rule all round', with powerful parliaments in all four nations of the UK, was floated during the debates at the end of the nineteenth century. However, this would be a substantial constitutional change. An English Parliament is a model which wins little

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<sup>43</sup> Indeed, it potentially leads to three different government formations: one to govern England; one England and Wales (the more commonly required); and one to govern the UK.









govern undisturbed, such a solution might not be out of the question.<sup>54</sup> However Conservative interests – instrumental as history may show them to be – seem unlikely to allow this to happen.

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<sup>54</sup> Such a situation applied at both elections in 1910, in 1929, in 1951 and February 1974 (Rallings and Thrasher 2001).

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