

**POLICY INSTITUTE**

# **Taking Liberties**

**How Modern Democracy Leads To Big Government**

**Craig F Smith**

## *Taking Liberties*

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#### *Synopsis*

Modern democracy has acquired a legitimacy of its own. It is commonly assumed that an elected or popular majority justifies government action. But common sense tells us that in certain circumstances, individual liberty should prevail, whatever the popular mandate. In Britain and America, elections were devised as a check on government power. But over time they have undermined those very liberties they were designed to protect. Today, democratic governments routinely use law to pursue administrative ends. The incentives in democratic politics are to higher taxes and an ever greater volume of legislation. This erodes individual freedoms and undermines material and moral self-reliance. Created on the swelling tide of modern democracy, Scotland's parliament is a classic case in point. We must think of new constitutional rules to limit the scope and powers of democratic government.

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## *Introduction*

**‘There is a limit to the legitimate interference of collective opinion with individual independence: and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs, as protection against political despotism.’** John Stuart Mill<sup>1</sup>

The philosopher David Hume once noted that politics in all ages is little more than a ‘perpetual intestine struggle’ between liberty and authority.<sup>2</sup> This paper argues that the struggle is currently being lost by the cause of liberty in Britain and other Western style democracies. While we champion the spread of democracy East and South, at home it erodes those very liberties we claim as the ‘core values’ of our civilisation.

For there is something intrinsically flawed in the make-up of modern democracies. They inevitably tend towards more government power and less individual freedom. This paper exposes the faulty mechanism of democracy, and describes how it has affected us, particularly in Scotland. It suggests that we need a liberal revolution to change the way we are governed.

## *Democracy v Liberalism*

Today we flatter ourselves that we’ve solved many of the problems of politics, that our laws and our democratic elections secure individuals their freedom while providing order in society. The people elect the government and the government serves the people and defends their rights. This belief that democracy is a good thing is one of the central assumptions of modern, Western culture.

Many take it for granted that a democratic majority in general elections, or even just in parliamentary votes, confers legitimacy on a government and its actions<sup>3</sup>. We regularly hear politicians and others defend government policy on the grounds that it is supported by a majority,

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<sup>1</sup> Mill 1991: 9 Footnotes refer to the publication mentioned in the bibliography at the end of this paper except where specified.

<sup>2</sup> Hume 1985: 40.

<sup>3</sup> Few UK governments are elected by a popular majority. The current one only achieved 37% of the vote, cast by 22% of the electorate. But few would question its legitimacy, even in purely democratic terms, because it has a parliamentary majority of 67.

either in parliament or in the country at large. People or institutions that oppose the will of the majority are scorned and belittled, sometimes with startling intensity.<sup>4</sup>

But we should be clear that democracy is not always a universal good that bestows unquestionable legitimacy on the acts of government.

For example, we quite rightly believe that a majority cannot be used to justify persecution on racial grounds. Any sane conception of government must include more than the simple idea that the majority's view should prevail – the assertion that might (in strength of numbers) is right. In certain circumstances the rights of the individual must prevail over the democratic will.

Modern democracies use popular elections to select representatives who legislate on behalf of their constituents. But liberal philosophers like John Stuart Mill and Alexis de Tocqueville have long noted the potential danger of a 'tyranny of the majority' in an unlimited democracy.<sup>5</sup> And this tyranny becomes a very real danger if democracy is allowed to exist untrammelled. Government must be bound by liberal rules intended to limit the scope of the governing majority's potential to abuse its position.

Liberalism and democracy are not the same thing. Indeed they often oppose each other.<sup>6</sup> It is this opposition that lies at the heart of this paper. For a liberal democracy to lose sight of this and fall under the misapprehension that anything is justified so long as a 'majority' – whether in parliament or opinion polls – supports it is a danger that opens the way to a form of tyranny.

### *The Rise Of Democracy And The Decline Of Liberalism*

To see what has gone wrong we should remind ourselves of how democracy came about in the modern West, and how it has come to undermine the liberal states which fostered it.

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<sup>4</sup> Recent examples of this are the Scottish Executive's attitude to those who oppose a ban on smoking in public places or the Westminster government's scorn for those who defend hunting with dogs.

<sup>5</sup> See Mill 1991: 8 and de Tocqueville 1998: 101.

<sup>6</sup> Liberalism is primarily concerned with the limitation of the powers of government while democracy concerns itself with the question of who is to direct government. These are quite clearly different and come into conflict where a democratic mandate extends the powers of government beyond the bounds sanctioned by liberalism.

Modern democracy<sup>7</sup> has developed slowly through a tortuous historical process. What is interesting about this development is that the nations that have secured democracy for the longest period, and which have arguably brought it to its greatest refinement, were liberal *before* they were democratic.

Here we take two examples, Britain and the United States, to show how democracy gradually subverts the liberal institutions which foster it.

### **Britain: The Betrayal Of Liberalism**

In the case of Britain a long historical process of struggle for power between the Crown, the nobles and the commons led to limitations on executive power through the rule of law. The key features of this process - the recognition of equality before the law, the limitation of the discretionary powers of government and the development of an independent judiciary - were slowly accumulated through the centuries.

After emerging from the Civil War and the Glorious Revolution, the British state developed an unwritten, or more accurately an un-codified, constitution that divided power into various branches of government and recognised the rights of the individual.

The French philosopher Montesquieu praised this system as the most perfect form of government yet developed precisely because it limited the use and abuse of power and protected individuals from tyrannical behaviour by their rulers. Britain possessed a liberal constitution long before it became recognisable as a modern democracy.

Indeed, according to John Stuart Mill, democratic elections developed *as a part* of this system of liberal checks on the power of rulers. Liberalism set 'limits on power' by identifying 'political liberties or rights' that could not be infringed and creating 'constitutional checks' on the power of government.<sup>8</sup>

One of these checks was a system of election and representation that secured the consent of the people and rendered the government accountable. Democracy was

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<sup>7</sup> As opposed to the ancient version, which flourished in various guises in some classical states in the Mediterranean before the rise of the Roman Empire.

<sup>8</sup> See Mill 1991: 6.

therefore instituted as a means to an end.<sup>9</sup> It was understood as a *check* on the government that also allowed a peaceful change of regime. Instead of having to rise up against an oppressive government the people were able to vote them from office.<sup>10</sup>

Elections, therefore, gained acceptance only as one of many tools designed to limit the power of government. Democracy was not supposed to legitimise any form of government in itself. But this growth of democracy had unintended consequences that were to threaten the basis of the liberal order.

The defining feature of the British constitution is that it is not codified, and so changes continually. Parliament was only bound by rules of its own making. For a certain period this system operated well as parliamentarians were limited in their behaviour first by an intransigent monarchy, then by economic self-interest, and finally by custom.

However as the House of Commons gradually extended its democratic mandate with extensions of the franchise, it became increasingly clear that the traditional checks and balances between the Crown, the Lords, the Commons and the Judiciary would gradually collapse in the face of the Commons' claim of a democratic mandate. The belief arose that if the Commons possessed a democratic mandate then this alone would act as a sufficient check on its behaviour. As a result the Commons became increasingly dominant and throughout the twentieth century gradually shed most of the checks on its power save that of the general election.

Meanwhile, the growing strength of the party system has ensured that the Commons itself is usually dominated by the leader of the largest party, who becomes Prime Minister. Great power has thus been concentrated in the hands of one individual.

### **America: The Ghost In The Machine**

When the American Revolutionaries began their campaign against the British Crown they made it clear that they viewed themselves as claiming their rights as British subjects in the face of a government that had abused its

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<sup>9</sup> For a recent discussion of this point see Michael Munger's *Democracy is a Means, Not an End* (2005) which draws on FA Hayek's classic discussion (Hayek 1960: 107).

<sup>10</sup> In Britain, of course, this process came about through hundreds of years of political accident, rather than design.

power. When they successfully concluded their military campaign they set about creating a political system that drew on the gradually developing liberal system of Britain, but which avoided the flaws that allowed abusive government. Chief among these flaws, they thought, was the absence of a written constitution that clearly set out the scope of government.

The Constitutional Convention produced a document that aimed to correct the defects of the un-codified British system. One of its chief supporters, James Madison, believed that the key to its success would be the clear checks and balances between different centres of divided power. He wrote that: '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.'<sup>11</sup> The constitution created a federal system where the various branches and levels of government were clearly separated and where their 'jurisdiction is limited to certain enumerated objects'.<sup>12</sup> These enumerated powers were limited and delegated to the government by the people.<sup>13</sup> The constitution was intended to prevent the abuse of power by ensuring that the role of the Federal Government was clearly defined. There could be no creeping accrual of power by any one arm of government, as has happened with the Commons in the UK.

Madison was clear that what the Americans had created was not a Democracy, but a Republic.<sup>14</sup> It was a government comprised, or constrained, by laws and not merely the expression of the will of a majority. Once again, as with Britain, the United States possessed a liberal constitution long before it truly became a democracy.

However, as the development of the American polity demonstrates, Madison's faith in the constitution's ability to maintain a liberal system has proved optimistic. Though a written constitution is more clearly defended than an un-codified, traditional constitution, and has to some extent preserved the separation of powers, it has still proved able only to delay, not reverse, the democratic malaise.

As the nineteenth and twentieth centuries progressed, the Federal government began to make use of judicial

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<sup>11</sup> See *The Federalist Papers* - Madison et al 1987: 303.

<sup>12</sup> See Madison et al 1987: 143.

<sup>13</sup> For a discussion of this see Boaz 1997: 121.

<sup>14</sup> See Madison et al 1987: 126.

interpretations that moved away from the founding fathers' original intention of creating a clear delineation of the powers of the Federal government.

Robert Higgs has provided an illuminating description of this process. He describes how various national crises, such as the world wars and the great depression, provided the federal government with a justification to extend the scope of its powers through re-interpretation of the constitution. According to Higgs this led to a 'ratchet' effect whereby the size and powers of the federal government increased with each crisis, but failed to return to the pre-crisis level after the problem had passed.<sup>15</sup>

The problem of judicial interpretation was compounded as the Supreme Court became increasingly politicised and unwilling to declare the actions of activist Presidents unconstitutional.<sup>16</sup> More often than not the appearance of the phrase 'promote the general welfare' in the preamble to the constitution was pointed to as a license for Congress and the federal government to introduce increasing amounts of central direction.<sup>17</sup> Each of these interventions produced results that were also held to be the province of central government and led to a growing apparatus of federal level administration. This process continued until, by the early 21<sup>st</sup> Century, the United States' great constitutional republic had become virtually indistinguishable in nature from the other democracies of the West.

The problem of creating and maintaining a suitable balance between liberalism and democracy has become more pronounced in all Western democracies as the belief that a democratic election provided absolute legitimacy became widespread. In the twentieth century many ceased to regard democracy as simply a way of appointing leaders, a means to liberal ends, and came to regard it as a political ideal that should be extended into every area of human activity.

### *Confusing Law With Administration*

Democracy has removed the restraints on the powers of Western governments such as Britain and the US. How have these powers subsequently been used? As we shall see later, democracy has led to huge increases in both the number of laws which govern us, and also overall levels of taxation.

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<sup>15</sup> Higgs 1987: 30.

<sup>16</sup> Higgs 1987: 220.

<sup>17</sup> Boaz 1997: 123.

Behind this lies a growing confusion of the two separate functions of government.

There is a crucial distinction that lies at the heart of all government, but which is seldom noticed and even less often understood. This is the distinction between law, understood as general rules of conduct between individuals, and law understood as administrative commands to secure a public service.

Legislatures have come to assume both functions. For example the same government may be involved in passing a law criminalising murder while at the same time administering the provision of armed forces to defend the country. As the Nobel prize-winning economist and philosopher F.A. Hayek has noted, these two functions differ considerably in their nature<sup>18</sup>. However, with the rise of legislatures that claim a democratic mandate, the two functions have been increasingly undertaken by the same branch of government. The result of this process has been that democratically elected legislatures have become the arena where both laws are made and the provision of public services determined. The inevitable result of this has been that the two functions have become increasingly confused.

So governments increasingly regulate our behaviour in order to achieve the delivery of public services. Box 1 below gives an example of this confusion in action – the case of the Scottish Parliament’s ban on smoking in public places.

**Box 1: Smoking Bans - Using Law To Deliver Public Services**

A classic example of this confusion in action is the proposed ban on smoking in public places by the Scottish Parliament. The reason for the ban is administrative - the Executive runs the National Health Service, and wants to make its stewardship seem

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<sup>18</sup> Hayek describes law, properly understood, as ‘purpose-independent rules which govern the conduct of individuals towards each other, are intended to apply to an unknown number of future instances, and by defining a protected domain of each, enable an order of actions to form itself wherein the individuals can make feasible plans.’ (Hayek 1993 vol. 1: 85-86). This is clearly not the same as the issuing of administrative directives to ensure the organisation and funding of services for the attainment of public goods. In the early development of liberal systems there was a generally understood distinction between the role of the judiciary, in articulating the general rules and precedents that were to facilitate individual interaction, and the role of the legislature as a body that acted to control and regulate the activities of the executive in the administration of public funds and services. With the growing belief that a democratic mandate provided all the legitimacy and constraint that was necessary in a political system, we have reached a situation where almost any action of government that secures mass approval is considered legitimate and can easily pass into ‘law’.

more effective by reducing smoking-induced illness. But the justification given is legal. The law is being passed on the specious grounds that smoking in confined spaces might damage the health of others in the area. No consideration of the freedom of adults to consume what they want or be where they want is taken into account. And the logical implication for other voluntary activities, such as drinking or eating unhealthily, are ignored because the move is not seen in terms of setting legal precedent - the motivation behind it is pragmatic and administrative. Law and Administration have become confused, and liberty undermined.

### *Why Democracies Take Liberties*

The development of legislatures that claim an exclusive right both to lay down the general rules of conduct in society and to administer the provision of public services has changed the nature of Western societies. As we shall see, there are two inevitable outcomes of the current democratic system: an increase in taxation to between 35% and 50% of GDP, and an ever-expanding body of law.

One way of understanding why this change came about is to look at how politicians, voters and civil servants react to the incentives created by a democratic political system.<sup>19</sup>

Politicians react to a series of incentives built into the idea that mass democratic election provides legitimacy. Put crudely the result of this is that politicians attempt to 'buy' the votes of the electorate by passing laws and funding expenditure that benefits particular groups within society who may then be counted upon to re-elect the politician in question.<sup>20</sup> The benefits of these projects are experienced directly by the groups in question while the cost is distributed through the whole of society. As a result the cost to the public at large is small and widely spread, while the benefits are targeted at the favoured group.

So the system of democratic election creates a series of incentive pressures on politicians that encourages them towards activism. Electoral pressures lead to politicians and

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<sup>19</sup> The Nobel laureate James Buchanan and Gordon Tullock looked at this process closely. Their 'public choice' theories analyse government and political action through the basic premises of economic theory.

<sup>20</sup> 'Throughout recorded history whenever leaders have been chosen by some method of voting, the aspirants for leadership have bought votes. Traditionally they have bought votes either with their own money or with a patron's money. To some extent they still do so. But something new has been added. Since the 1930s, the technique of buying votes with the voter's own money has been expanded to an extent undreamed of by earlier politicians.' Friedman 1985: 49.

political parties attempting to form coalitions of support among the electorate based upon their ability to turn the apparatus of government, especially the tax expending, service providing element of the legislature's activities, to their advantage. While this model might appear at first glance somewhat cynical, we should bear in mind that it is an explanatory model of the way politicians act and not a judgement on their motivations. Politicians who have the best interest of the public at heart are just as subject to the incentives towards activism as more self-interested politicians. This is because the need to secure re-election and command a majority in the legislature compels the actors to secure the support of groups of electors before they are able to enact their favoured policies.

On one level this is all very well. It demonstrates that the system of democratic elections works to keep political representatives constantly in service of the interests of voters and provides clear accountability at election time.

However, what it also does is provide a constant pressure on politicians towards activism. Politicians must act, must legislate and must spend on benefits and 'free' public services, if they are to secure the support necessary for them to remain in office. Box 2 below shows how this process has famously been described in the United States as 'pork-barrel politics'.

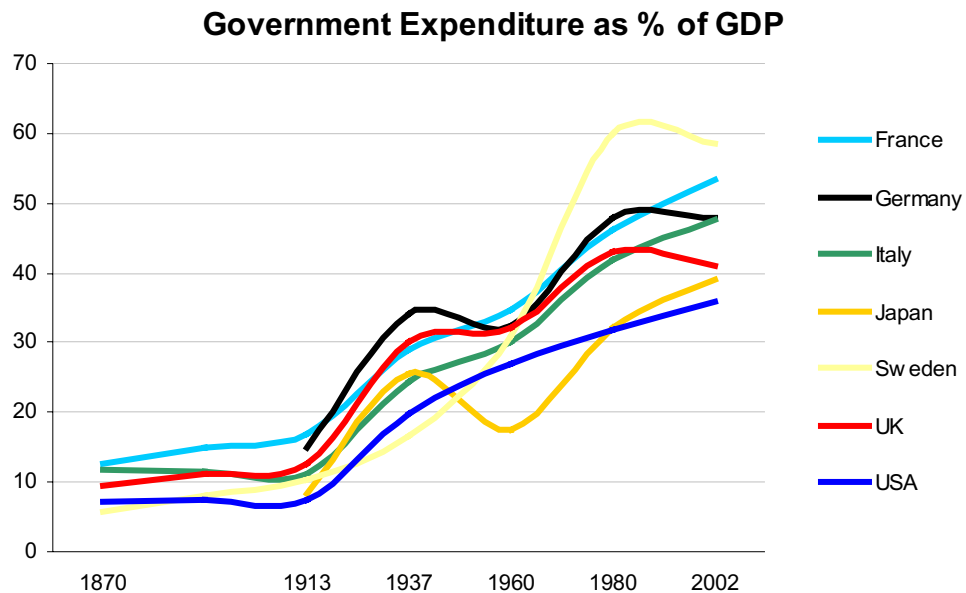
#### **Box 2: Pork-Barrel Politics**

In the United States political scientists have produced a number of studies of what is known colloquially as 'pork'. 'Pork' comes from the old idea of 'pork barrel' spending by congressmen. Under this model there is an incentive for senators and representatives to 'bring home the bacon' for their constituents. That is to say, to secure federal funds to finance projects in their home states or to attach their name to popular legislation in order to secure re-election. Because federal expenditure is financed by the nation as a whole, voters in a particular state feel a large benefit at the expense of a small cost. However, because this incentive acts on all congressmen, the cumulative result is a constant rise in government expenditure and a consequent rise in taxation. Moreover the voters tend to credit their own representative with securing the benefit, while blaming the federal government for the rise in taxation that is the cumulative result of all politicians acting in the same manner.

## The Inevitable Cost

One inevitable result of the process described above is that taxation will rise. The graph below illustrates how the twentieth century saw a steep rise in the levels of government expenditure in all of the major western-style democracies, levelling out in the 35% to 50% range<sup>21</sup>. This process began with the establishment of universal suffrage in these countries in the decades around 1900. As long as income inequality exists, and a majority remain net recipients of tax-and-spend, taxes tend to rise. But note that if taxes go above 50%, the majority must be losing out, as happened in Sweden in recent years. The electoral incentives go into reverse until levels of tax fall below 50% again.<sup>22</sup>

### The Burden Of Democracy



Source: *Britain's Relative Economic Performance, Crafts, IEA 2002. OECD*

## Too Much Government

A second result of these pressures has been the constant, and apparently irreversible rise of the amount of legislation passed. The body of law is inexorably growing. This is hastened by the rise of professional politicians. As democracy has grown in legitimacy, so its representatives have demanded more time and money to smooth their path.

<sup>21</sup> It is perhaps no accident that in the 2005 UK general election all main parties advocated an increase in government spending as a proportion of GDP.

<sup>22</sup> Of course, from a radical socialist point of view, this leaves the glass half empty. In democracies it is hard to increase taxes beyond 50% of GDP. But presumably most are comforted that they cannot fall much below 40%.

Box 3 below looks at the rise of professional politicians, and how they seek to maximise the production of legislation.

### **Box 3: The Rise Of A Professional Political Class**

The incentives towards activism that are inherent in modern democracies have led to the emergence of what we might regard as a class of professional politicians. These individuals often spend the whole of their career as full time activists employed by political parties. By the time that they secure elected office they are well versed in the skills necessary to secure the electoral support of interest groups and constituency voters through targeted expenditure and special interest law. They also depend on politics as their source of income.

In order to be successful these individuals, whatever their original idealistic motivations, are compelled to react to the incentives that drive modern democracy. They become full time legislators and as such are constantly in search of new areas to legislate on in order to fill their time and to attract and secure the support of groups within their constituency. Regulation becomes the lifeblood of these professional politicians.

In order to facilitate the increasing levels of legislation the practice of Parliament is altered to facilitate the quick passage of legislation. One clear example of this is the introduction of parliamentary committees. On one level these committees make sense as they allow specialised discussion in a small group who then report back to the whole House. However, before their introduction, all legislation was discussed by the whole House. The result is that the committee system facilitates the passage of a greater volume of legislation than would otherwise be possible. This innovation is often accompanied by an extension of the time parliament spends sitting. The result is that politicians spend more time passing more legislation more quickly, thus generating an ever-increasing level of regulation and expenditure.

### *Democracy And The Rise Of Dependency*

Quite apart from the philosophical problems of tyranny associated with excessive government power, it poses serious dangers to the material and moral well-being of individual citizens

As long ago as the eighteenth century the Scottish philosopher Adam Ferguson noted: 'Even with the best intentions towards mankind, we are inclined to think that their welfare depends, not on the felicity of their own inclinations, or the happy employment of their own talents, but on their ready compliance with what we have devised for

their good.’<sup>23</sup> Ferguson observed that without the checks and balances of a liberal constitution we face the potential danger that government will devolve into a tyranny in the pursuit of the public good.<sup>24</sup> The focus on the legitimising power of a democratic majority has led to the development of what we might call a ‘ban’ culture of paternalism. Politicians claim a right to regulate increasing areas of individual behaviour in the name of the democratic majority acting in the public interest.

The result is a greatly expanded role for government in almost every aspect of life and a consequence of this is that people look increasingly to the political process as a source of potential opportunities and largesse. The liberal philosophers had, of course, foreseen such a potential danger. Mill argued that the ‘most cogent reason for restricting the interference of government, is the great evil of adding unnecessarily to its power. Every function superadded to those already exercised by the government, causes its influence over hopes and fears to be more widely diffused, and converts, more and more, the active and ambitious part of the public into hangers-on of the government, or of some party that aims to become the government.’<sup>25</sup>

Consequently, individuals have become increasingly dependent on the state as both a service provider and a regulator of preferred forms of behaviour in society at large. Society’s material and moral self-reliance has been endangered as a result.

### *Modern Democracy In Action: The Scottish Parliament*

Perhaps the best example of these trends is to be found at home - in the experience of Scotland itself. Created on the swelling tide of modern democracy, and designed by people

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<sup>23</sup> Ferguson 1994: 250.

<sup>24</sup> Many liberal thinkers have noted that tyranny can easily arise from the best-intentioned acts of public minded people. For example, J.S. Mill argues that ‘The disposition of mankind, whether as rulers or as fellow citizens, to impose their own opinions and inclinations as a rule of conduct on others...is hardly ever kept under restraint by anything but want of power.’ Mill 1991: 18. Mill opposes this with the liberal belief that: ‘Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest. Mill 1991: 17. And more recently Milton Friedman has observed: ‘It is the internal threat coming from men of good intentions and good will who wish to reform us. Impatient with the slowness of persuasion and example to achieve the great social changes they envision, they are anxious to use the power of the state to achieve their ends and confident of their ability to do so.’ Friedman 1982: 201.

<sup>25</sup> Mill 1991: 122.

steeped in the tradition of the legitimacy of the popular will, the Scottish Parliament exemplifies many of the problems inherent in democracy.

When the Scottish Parliament came into existence much was made of the new style of politics that would be practised. In some respects this has been justified, with proportional representation and consultation processes altering the conduct of business at Holyrood and providing it with a character distinct from the practice at Westminster.

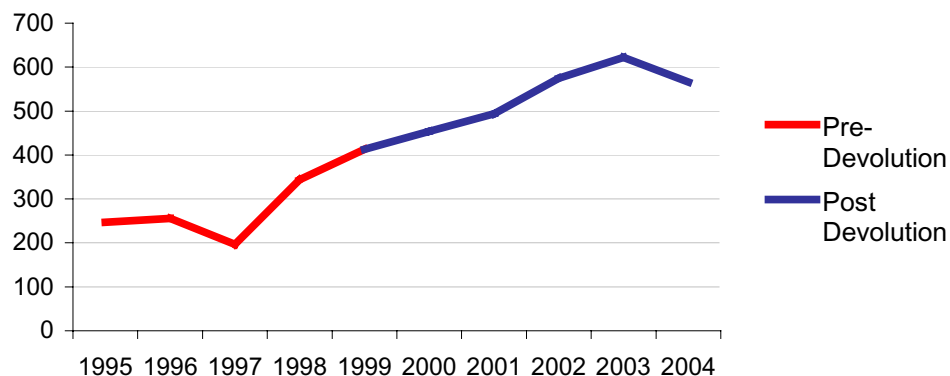
However, in other important respects the Scottish Parliament has merely accelerated along the same path as other Western legislatures. The incentive pressures towards activism that we have described above are even more apparent in the devolved parliament than they are elsewhere. The addition of 129 MSPs who are all subject to the pressure to legislate may very well be an extension of democracy, but it bodes ill for liberty in Scotland.

Like all democratic legislatures, the Scottish parliament is limited in jurisdiction. But within its remit, it is one of the most powerful in the world. On devolved matters, there are almost no constitutional limits<sup>26</sup> to its powers save four yearly elections and the constrictions of time.

The graph below shows the rise of statutory instruments applied in Scotland since the parliament's establishment, which is one measure of the activism of our politicians.

More Democracy, More Government

#### Statutory Instruments Applied In Scotland



Source: HM Stationery Office

<sup>26</sup> For example, it has no second chamber to amend, delay or reject legislation.

## **More Government, Less Freedom**

In addition, the Parliament passed 62 bills in its first term (1999-2003). Perhaps a quarter of these made adjustments to the 'general rules of conduct between individuals'<sup>27</sup>, and a further quarter changed existing administrative arrangements for various public services. But most of the rest extended the powers of the executive at the expense of the individual. These measures included greater interference in property rights, increased Executive powers over education and healthcare, intervention in industries such as fishing, and outright bans on hunting and fur farming. Only two bills appear unambiguously to have extended individual liberty – the Marriage Bill, which relaxed the rules on civil marriages, and a member's bill allowing the University of St Andrews to award postgraduate medical degrees.

Of course, any such assessment of the parliament's legislative programme is subjective, but on any analysis there can be no doubt that the trend is for more governmental power over Scotland's people<sup>28</sup>.

### *Conclusion*

Our surrender to the notion of democratic legitimacy has had a profound effect on the practice of politics. By understanding democracy as a necessary guard against tyranny we have become blind to the fact that there is a danger of a tyranny of the majority that disregards the rights of individuals. When we think of the abuse of individual rights we often dwell excessively on the most obvious infringements such as torture or false imprisonment. We fail to see that the increasing creep of regulation into aspects of our lives that were hitherto seen as private is a more subtle and insidious form of tyranny. The danger, to use Fareed Zakaria's terms, is that we are witnessing the 'rise of illiberal democracy' not just in the established Western systems but also in newly developing democracies.

The old liberal view that there are some things, no matter what the supposed public good, that governments simply should not be allowed to do appears to have passed from our political landscape. The problem that faces democratic politics today is that the formal and informal checks and

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<sup>27</sup> See 'Confusing Law And Administration' and footnote 17 above.

<sup>28</sup> See [www.scottish.parliament.uk/business/bills/billsPassed/billsum-s1.htm](http://www.scottish.parliament.uk/business/bills/billsPassed/billsum-s1.htm) for a summary of these bills.

limitations on the activities of government have become moribund or have been sidestepped by increasingly activist politicians of all party persuasions. What we need is a new debate about the proper scope of government activity: about the line that ought to be drawn between individual rights and what a democratic vote can legitimise. The time may have come for us to rethink many of the cornerstones of our constitution and to rescue liberal principles from the misunderstood version of democracy that threatens them.<sup>29</sup>

We should remember here that what this paper is criticising is not the democratic mechanism of electing leaders per se. Rather the problem is not so much with elections, but with the idea that a government legitimised only by a democratically elected majority should have a free hand to produce whatever laws it wants and to fund whatever services it wants. If this is the case, then even the best intentions of politicians acting for the public good will lead, because of the incentives of the system, to a situation where the scope of government activity will approach tyrannical levels.

If we are to avoid this danger we must begin a debate about the best means to defend the liberal traditions of this country. We need serious ideas for reform that can be discussed and debated in the best liberal fashion.

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#### **A Liberal Constitution For Scotland**

If democracy is not working, what should we have in its place? As a sequel to this piece, the Policy Institute is planning a paper suggesting liberal, constitutional mechanisms to safeguard individual freedoms and limit the power of political leaders. These should be applicable whatever the future status of Scotland relative to the UK. Contributions and suggestions are most welcome.

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<sup>29</sup> A good example of this is John Meadowcraft's contribution to the recent book *Towards a Liberal Utopia?* Meadowcraft suggests a number of constitutional reforms aimed at defending the liberal order from encroaching legislation.

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