DIVIDED WE STAND?

DECENTRALISATION, FEDERALISM AND A UNION-STATE

Nicholas Kilford

Abstract

This thesis undertakes an analysis of the UK's territorial constitution, specifically the ways devolution decentralises constitutional authority within the state. It analyses the UK's territorial history, especially its rejection of federalism, a concept which it suggests has been sorely excluded from its constitutional conscience in preference for incremental, piecemeal development. It suggests that devolution, which itself has changed much in its short life, constitutes a fundamental shift for the UK's constitution. This fundamentality, however, is not completely recognised in the political realm, even though the judiciary have found normative space to allow it institutional respect. Although mechanisms for self rule, and some mechanisms for shared rule, do exist, neither—especially the latter—can achieve their full benefits so long as a unitary, sovereignty-endorsing perspective prevails at Westminster. This perspective appears to unjustifiably deny the significance of the devolved institutions, preferring to subordinate and disregard them, asserting instead its own institutional hierarchy and proving capable of manipulating the flexible procedures that devolution has put in place. Federalism once properly understood as constitutionally accommodating and encouraging diversity within a community, rather than a prescriptive state-form, will provide for the necessary respect for institutions in order to allow the UK's shared rule dynamics to prosper. The cooperative opportunities of the constitution can and should be realised once this federal 'mindset' is adopted, especially in Westminster.

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Nicholas Rex Kilford

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[*] Mumford and Sons, 'Guiding Light' (2018)

For James: Friend and brother; lost too soon, never forgotten.

INTRODUCTION

'THE BEGINNING OF SOMETHING'

'[T]he question is not only about what the United Kingdom might become,

but also about what it already is.' [1]

What is the optimal structure of the modern constitutional state? How can architecture, power structures and systems of interaction between the different levels of the state define—and be defined by—its constitutional vision? There are many possible answers to these questions, and many more possible directions of enquiry beside them. Research on constitutional structures is neither new, nor rare, but it is of fundamental importance: it can help comprehend and prescribe the basic pressures and responses of modern constitutional government; those of state formation, secession, union, disunion, cooperation, frustration and conflict. In the United Kingdom the crucial importance of constitutional architecture, and therefore the value of scholarship which can understand it, is on the rise. This rise in importance is aptly summed up by the leader of the Scottish National Party in the House of Commons who, following his ejection from the chamber after protesting about the lack of time being given to debate of Brexit's devolution issues, said simply: 'This is the beginning of something, not the end.'[2]

The United Kingdom's long and often troubled relationship with territorial governance, despite its sometimes-lacklustre scholarly attention, is among the most important and defining elements of the UK constitution's past, present and future. Beyond simply outlining the shape the UK takes and the land it occupies, the architecture of the UK constitution reflects the deeper divisions,

[1] Nicholas Aroney, 'Reserved Matters, Legislative Purpose and the Referendum on Scottish Independence' [2014] Public Law 422, 423.

[2] Ian Blackford MP, quoted in Pippa Crerar, Peter Walker and Libby Brooks, 'SNP MPs Walk out of Commons in Protest over Brexit Debate' *The Guardian* (14 June 2018) <https://www.theguardian.com/politics/2018/jun/13/snp-mps-walk-out-of-commons-in-protest-over-brexit-debate> accessed 9 May 2019. The point is also made above: Aroney, 'Reserved Matters, Legislative Purpose and the Referendum on Scottish Independence' (n 1).

commonalities and relationships within the state and between the levels of government inside—and beyond—its borders, understanding of which may be crucial to the survival of the UK and, certainly, in recalibrating its relationship with the individuals it represents. This thesis unpicks the internal architecture of the UK in order to make sense of the relationships between the highest interior levels of government[3] to highlight their challenges and provide for possible new ways forward. It is not the intention of this work to simply *understand* the devolution arrangements as they currently exist; there have been numerous attempts to do this and each can be quickly outdated.[4] Nor is it this work's aim to simply describe the theoretical undercurrent at play in pursuit of labelling the UK 'unitary', 'federal' or 'something else'; this is of little value if its real implications are not understood. Much modern public law scholarship is devoted to rights issues rather than structural concerns and this is no bad thing: rights matter, but architecture matters too. Constitutional structures are not disconnected from these other issues either, for example the separation of powers doctrine clearly impacts on how rights are handled within a constitutional order and, by extension, which rights exist and who can exercise them. However, even so, and with considerable scholarly attention being diverted to questions about judicial overreaching,[5] or engaging with the endless perplexities of Brexit itself,[6] the nature and shape of our power structures themselves—let alone as actual policy choices by peoples and governments—are sometimes neglected. As this thesis shows, such an analysis can bear tremendous fruit in helping understand the constitution and its future, as well as being able to provide simple and focused answers to many of the pressing questions of our time.

[3] Local government, though important, is not the central focus of this piece.
[4] For example, many of Kenneth Campbell QC's predictions in have been disavowed in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5: Kenneth Campbell, 'The "Scotland Clauses" and Parliamentary Supremacy' (2015) 3 Juridical Review 259. Equally, though it remains influential, Bogdanor's seminal piece has not retained perfect contemporary accuracy: Vernon Bogdanor, *Devolution in the United Kingdom* (OUP 1998).
[5] See for instance, Policy Exchange, 'Judicial Power Project' <https://judicialpowerproject.org.uk> accessed 29 September 2019. See also Ran Hirschl, 'The Fuzzy Boundaries of (Un)Constitutionality: Two Tales of Political Jurisprudence' (2012) 31 University of Queensland Law Journal 319.
[6] See, among others, Mark Elliott, Jack Williams and Alison Young (eds), *The UK Constitution after Miller: Brexit and Beyond* (Hart Publishing 2018).

The argument of this thesis is threefold; firstly, it is that federalism, once it is properly understood as a deeper claim beyond 'state-form', is less out of step with the UK's constitution (especially given its history) than its critics might suggest. Secondly, devolution has institutionalised and constitutionalised the 'self-rule' element of federalism such that it can no longer be ignored by Westminster: the fundamentality of the change in territorial constitutionalism may have been downplayed because of its implementation, but this has not deterred the courts—nor should it deter the political institutions—from recognising the significance of devolution. Thirdly, the suggestion that federalism is a 'mentality' means that it can help reflect the problems with the UK's decentralisation programme, and the nature of the intergovernmental relationships that have formed as a result. The suggestion here is that, though some institutions *do* exist to realise that other core element of federalism, shared rule, the absence of a federal mentality at Westminster that accepts (or even encourages) the fundamentality of the devolved institutions and respects their views, mean that the full benefit of shared rule is not yet realised. This is especially so given the dominance of political mechanisms throughout the settlement, and Westminster's retention of significant, if perhaps only *de jure* power. And, it is contended, the benefits this mindset are considerable.

In terms of structure, this thesis is formed of three chapters, the first of which has two core functions. Firstly, it undertakes an analysis of federalism, and secondly it is a genealogical enquiry into the UK's constitutional past. It is important at the outset, since this thesis alludes to it throughout, to undertake an assessment of what federalism means, and what some have thought it might mean. It will be seen that a proper understanding of the concept warrants far more interest in the UK than it has been given and makes its rejection—especially in the 19th Century—unjustified. It suggests that federal scholarship is moving away from the limited 'state-form' approach and towards a deeper, more flexible (in some cases normative) approach to the concept. It also sews the seeds of the aspects of devolution that might be considered in some way 'federal'.

Following its analysis of the better and worse understandings of federalism, this first chapter will consider how the union came to be, and what that might mean for present practices. Notably, it suggests that the UK has not been as stable as some might assume; it has been marked by important attempts at decentralisation and has always battled with competing understandings of the state but, for various reasons, has navigated these without asking the more existential questions about the union's purpose or its nature resulting in the rejection of federalism and its benefits. In the second chapter, devolution will be explored as a legal-political structure that has, along with increasing 'constitutionalisation' in the UK more generally, fundamentally changed the UK in a way that requires recognition at the centre. At its core, devolution is a recognition that the territories have a right to their own views, both of themselves and, by extension, of their place in the union. Devolution means therefore that such views cannot be denied, especially by Westminster, if it is to continue to persuade the territories that they are 'better together'.[7] Taken together these chapters show that, despite the fundamental shifts in the UK's territorial constitution, reform that might reshape the UK *as a whole* has not been forthcoming. Leyland suggests that even that most recent attempt at reconstitution—devolution—'was not undertaken as part of a wider strategy of constitutional transformation', but rather 'represented a distinct and pragmatic attempt to solve particular problems and aspirations'.[8] This pragmatism has been a persistent and powerful force throughout the UK's history, allowing the influence of the less welcome forces of short-sightedness and limited political ambition. That the UK's constitution can be altered by mere political weather or climate is one of its defining features,[9] yet it is also one of its most destabilising. It is arguable that no real constitutional 'thinking' or 'conscience' has ever gone into reforming the architecture of the state, and that, instead, it has been tweaked or overturned in pursuit of what is most convenient for those in or seeking power. Having already

[7] This phrase was the slogan of the 'No' campaign during the Scottish Independence Referendum.
[8] Peter Leyland, 'The Multifaceted Constitutional Dynamics of U.K. Devolution' (2011) 9 International Journal of Constitutional Law 251, 251–252.
[9] I am grateful to Dr Benedict Douglas for his interesting distinction between 'constitutional climate change' and the more temporary, changeable (and far less dangerous) 'constitutional weather'.

outlined what federalism has come to mean, and how the concept speaks to deeper claims about the accommodation of diversity rather than prescription of institutional forms, the final chapter considers what lessons of federalism—when properly understood—can benefit the institutions and interactions at the heart of the UK's territorial constitution. It will be seen that the focus on unitary sovereignty obscures engagement with different perspectives and deters rather than encourages shared rule which, will be seen, is the most significant benefit of federal 'thinking'.

Now that the structure of the piece has been determined it is worth taking the time to outline some core themes and argumentative 'threads' that run through it. Possibly the strongest of these are the themes of diversity, respect and subordination, and cooperation. In the first chapter it will be seen that federalism is itself the acceptance—and the pursuit of accommodating—diversity. Federal 'thinking' suggests that constitutional structures can allow for the distribution of authority along the lines of the diversities within a community; for instance, along the lines of sub-state national 'units'. It suggests that the exchange of the perspectives of these institutions should be encouraged and they should be respected. The first chapter, however, demonstrates how this respect and exchange was not at the heart of the UK's foundation, which was marred by England's subjugation and subordination of those other nations and their ideas of the union. However, this chapter also demonstrates that the union is, itself, a demonstration of the (attempted) accommodation of diversity, at the very least being a battleground for different conceptions of the state. In chapter 2 it will be seen that this accommodation reaches new heights of constitutionalisation. It is through devolution that these diversities are finally enshrined by both political and legal mechanisms, and cooperation between them becomes significant. This chapter will also demonstrate that Westminster's subordinating approach—arguably informed by, again, the UK's preference for piecemeal development over existential re-constitution—does not do justice to the federal characteristics of the union or the significance of the role now played by the devolved institutions, something which has in fact been well recognised by the courts. It will be

seen that this unitary approach to the territorial constitution harms the cooperative opportunities offered by devolution and this cooperation is the central focus of the third chapter which demonstrates the advantages of adopting a cooperative, accommodating perspective of the union, one that must be adopted by Westminster in order to be effective.

It is hoped that this work can provide an informative, interesting and (with luck) useful addition to scholarship in an area that's importance necessitates far more exploration than it is currently gifted. This thesis will not be able to answer every question it raises, and, though there is value nonetheless in raising awareness of the problems facing the constitution, it is hoped that this work will help shape new enquiries and responses in this field of law; indeed this thesis, it is hoped, much like the phenomena it concerns itself with, is '[t]he beginning of something, not the end.'[10]

[10] Crerar, Walker and Brooks (n 2).

CHAPTER 1

FROM INTEGRATION TO AUTONOMY?

'The only direct utility of legal history… lies in the lesson that each generation has an enormous power of shaping his own laws. I don't think that the study of legal history would make men fatalists; I doubt it would make them conservatives: I am sure it would free them from superstitions and teach them that they had a free hand' [11]

INTRODUCTION

The UK constitution has, throughout its long history, undergone considerable change. Though its salient constitutional fundamentals are often regarded as unchanging, for instance: the separation of the courts and Parliament,[12] the political accountability of ministers to Parliament and, of course, parliamentary sovereignty itself. Yet equally, much of the constitution has historically been in an almost perpetual state of flux. The UK's is a constitution that is not 'amended' in the same way that codified ones can be. Instead, its constitutional shifts are more subtle, less explosive or revolutionary, but no less fundamental. Much like many other constitutions in the world, the UK's can transform by interpretation alone, or under the noses of even those charged with its care. The territorial constitution is no exception, having perhaps undergone the most transformative, far-reaching and constant changes in the UK's constitutional history. Territorial constitutional change has found expression in terms not only of the shifting shape of the UK itself, but also in understandings of its nature and its practical operation. Before considering the constitutional history of the UK, this chapter will consider the most significant theory for accommodating constitutional diversity: federalism. It briefly considers the history of the theory and reveals why

[11] Letter from Frederic Maitland to Albert Venn Dicey (13 July 1909); Hugh Tulloch, 'A. V. Dicey and The Irish Question: 1870-1922' (1980) 15 Irish Jurist 137, 164.
[12] This principle is 'embodied' in Article 9 of the Bill of Rights 1689 according to *R (HS2 Action Alliance Limited) v The Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324 [79] (Lord Reed).

this 'state-form' assumption took hold. It then considers what federalism is coming to mean, in line with a new school of thinking that sees it as a flexible, perhaps even normative concept that can better inform constitutional practice—and even deeper sociological realities—than the legalist definition ever could.

This chapter then seeks to outline the genealogy of the territorial constitution; it suggests that the UK has often found difficulty in reconciling its centralised vision of sovereignty with communities' desires for self-rule, with theory (especially in England) more obviously being constructed to support the former over the latter. It briefly traces the beginnings of the UK, formed through blood, conquest and treaty, before turning to the next significant question for the territorial constitution: Irish Home Rule. This, mapping closely onto questions about the future of the Empire led to a great deal of thought on the layers of legitimate authority and, ultimately, the circumvention of an existential crisis. As this is unpacked it will become clear that competing notions of constitutionalism, assumptions about rigidity and stability, along with the avoidance of such existential questions has led also to the unnecessary rejection of federalism. This rejection of federalism, it will be suggested, can also be partly blamed on a misconstruction of the concept as a prescriptive, legalist mechanism that's requirements are beyond accommodation in the UK, as well as the dominance of English perspectives of the union.

The evasion of the territorial question raises its head again in the next section, the first, ill-fated attempts at devolution under the Labour Government of the 1970s, with referendums introduced in 1979. It will be seen that the fact that no grand planning permeates reform of the UK does not mean to say that there has been no thematic development or traceable trajectory. It will here be clear that the UK's preference for piecemeal, disintegrative decentralisation is nothing new.

THE IDEA OF FEDERALISM

Before undertaking an exploration of the UK's own history, it is necessary to consider federalism, one of the central ideas in multilevel constitutionalism. This is necessary in order to highlight those elements of the UK's history, and its current constitutional settlement that have federal characteristics, as well as in order to make sense of the misunderstanding, considered later in this chapter, that led to federalism's neglect in the UK. To put the point at its glibbest, federalism is complicated.[13] It is an idea that has consumed a great deal of historical, legal and political theory for centuries and, along with it, ideas of state-form and constitutionalism in the round. The UK's own relationship with federalism has been uneasy, marred by mistiming, theoretical dogma and its apparent incompatibility with parliamentary sovereignty. Federalism, it will be seen, was quickly dismissed in British constitutional thought; it was neither instrumental during the creation of the United Kingdom, nor influential on its development, being denied a role to play in Irish Home Rule and generally seen as out of step with the UK's history: Wales subsumed, the Scottish Parliament abolished, and Ireland conquered; not quite the alliance seemingly required by the *fœdus* at federalism's core. The theory has also struggled to win supporters in the contemporary constitution where parliamentary sovereignty reigns, and the relations between the tripartite separation of powers are seemingly more worthy of attention than the territorial layers of governance.[14] Further, the dominance of England, both in terms of democratic representation and of political ideology, seems to make a balanced allocation of powers between territories unsustainable. These stumbling blocks have, however, not silenced scholars who consider time focussed on the UK's relationship with 'the federal idea' not to be time wasted.[15] However, it also continues to draw scholarly crowds who find it useful both as a way of defining what the UK has

[13] 'Conceptualising federalism is contentious and difficult.': Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (CUP 2009) 17.
[14] Although, for an interesting commentary on the relationship between the two principles, see Jessica Bulman-Pozen, 'Federalism as a Safeguard to the Separation of Powers' (2012) 112 Columbia Law Review 459.
[15] A formidable example of such attention, from which this phrase is also drawn, can be found in the form of Robert Schütze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018).

become in the wake of its new territorial constitution, and as a way of understanding what further changes might be needed. Federalism seems, in these instances, to be consigned to tasks to which it, on a proper assessment of the theory, it is not wholly suited: definition and prescription. It often fails on both counts: that 'federalism still encounters strong resistance from British political parties, who claim its complete extraneousness to the peculiar political conditions of the United Kingdom'[16] is a common theme to be detected in literature of both scholarly and policy design. However, it is here suggested that federalism has more to offer than merely definition and prescription; rather, it can be useful for us to understand how the UK operates and how its problems might be better tackled, by thinking in federal terms. The following discussion will therefore explore what federalism really means and how a proper understanding of it does not warrant its exclusion from constitutional thinking in the UK.

What is federalism? The first thing that must be noted is the lexicological minefield that surrounds the concept: federalism, federation, confederation, federacy, quasi-federal, among others, all seem very clearly to be talking in federal terms, but about subtly different things.[17] Indeed, it will be seen that it was not always clear what people meant when they said federalism or, indeed, if they meant the same thing, and this was a death-knell for the theory's popularity at the time of the Irish Home Rule crisis. However, this problem continues to persist, with scholars disagreeing on exactly what federalism is, and each seeming to have their own definition, or even their own terminology; 'federality', for instance, is the term uniquely used by Henry Sidgwick, of which he thought the US

[16] Simone Pelizza, '"What Federalism Is Not": British Imperialists and Ireland, 1910-22' (History Postgraduate Colloquium, University of Leeds 2012) 11.

[17] This linguistic ambiguity is not helped by Constitutions themselves: 'It should be added that the original text [of the Swiss Constitution] even in a single language is by English standards carelessly drafted. The same expression (e.g. 'Federal supervision') is occasionally used to describe different things, while the same thing (e.g. 'within the Federal competence alone') is rendered by a number of different expressions… without plan and without consistency between the French and German text. Swiss jurists, however, in general refrain from making distinctions where the authors of the Constitution intended none, unless for good cause… The German text uses the words 'Bund' and 'Eidgenossenschaft' indifferently, and these are both usually translated by *Confédération* in French, with the adjective *fédéral*. 'Eidgenossenschaft' means literally 'oath-fellowship', that is to say, a society formed by oath rather than, for example, contract.': Christopher Hughes, *The Federal Constitution of Switzerland* (Clarendon 1945) 1–2.

constituted the 'decisive model'.[18] Much time and ink has been spent trying to define the concept, and the work often begins at the origins of the word itself.[19] From the Latin term '*fœdus*', meaning 'pact', 'federal' seems to have its origins in a voluntary agreement between states to unify. Despite its Latin origins, 'there was no theory of federalism in antiquity; and in the medieval world,[20] the federal principle found but little light to grow. Modern federalism emerged [(perhaps ironically)] with the rise of the European State system.'[21] As for the ancient world, '[i]n Greek political philosophy, the federation or *koinon* is overshadowed by the city-state or *polis*,[…]. In Imperial Rome, the *foedus* was a treaty of alliance by which imperial Rome secured its aggrandizement. The political communities sworn into alliance—the *con-federati*—would promise help in times of emergencies and crisis.'[22]

The origins of the theory have been studied by lawyers and political scientists alike, yet it is the lawyerly approach to the concept which is demonstrated in its most conventional definition:

> 'The basic idea is that of a political system in which governmental power is divided between two territorially defined levels of government, guaranteed by a written constitution and arbitrated by an institution independent of the two spheres of government, usually a court of final jurisdiction.'[23]

In the English-speaking world, examples of support for this definition, or something very similar, are not difficult to obtain. The most influential is probably KC Wheare's which he outlined in his

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[18] Henry Sidgwick, *The Development of the European Polity* (Macmillan and Company 1903) 430.
[19] For instance, Solomon Rufus Davis, *The Federal Principle: A Journey through Time in Quest of a Meaning* (University of California Press 1978); R Koselleck, 'Bünd-Bündis, Föderalismus, Bundesstaat' in O Brunner, W Conze and R Koselleck (eds), *Geschichtliche Grundbegriffe: historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, vol 1 (Klett Verlag); Murray Forsyth, *Unions of States: The Theory and Practice of Confederation* (Leicester University Press 1981); B Voyenne, *Histoire de l'idée Federalist: Les Sources* (Presses d'Europe, 1973).
[20] 'The Middle Ages preferred adding the prefix 'con' to 'federal'. This was a pleonasm designed to underline that an association was formed by men 'with' other men,': Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (OUP 2009) 14.
[21] ibid.
[22] ibid.
[23] Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (n 13) 17.

in his seminal work entitled *Federal Government*. This work, in which he attempted to unpick the American experience of federalism and contrast it to that of the UK, defined 'the federal principle' as 'the method of dividing powers so that the general and regional governments are each within a sphere co-ordinate and independent'.[24] This is not dissimilar from the approaches of Dicey or Bryce,[25] and has been popular with others such as Finer, Bodganor and Rudden.[26] Dicey made the claim that '[f]ederalism, lastly, means legalism'[27] and that '[m]odern federalism is indeed little short of a discovery or invention in the art of constitutional architecture, and may be looked upon as a curious and complicated *legal mechanism*.'[28] Clearly this legalistic definition has appeal, perhaps at least 'on account of its simplicity and scope',[29] and that as a formula it is broad, general and 'is thought to capture an important set of features of a wide range of political systems that are commonly regarded as being 'federal' in nature.'[30] However, this approach seems somewhat circular, and simultaneously both too broad and too narrow. Aroney, for instance, criticises this conventional approach for its failure to account for the modern 'marble-cake' operation of federalism, and that it fails to provide for any particular power allocation.[31]

The 'federal principle' then quickly 'comes to represent a legal structure which attempts to find "unity in diversity"'.[32] The evolution of the theory, in collision with geo-political circumstances—such as wars of independence (or not)—pushed the theory into three distinct waves.[33] The first

[24] KC Wheare, *Federal Government* (4th edn, OUP 1963) 11. Tierney calls this the 'classical test': Stephen Tierney, 'Drifting Towards Federalism? Appraising the Constitution in Light of the Scotland Act 2016 and Wales Act 2017' in Robert Schütze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 107.
[25] AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1920) 134–67, 476–80; James Bryce, *The American Commonwealth* (Macmillan 1914) i, 432.
[26] Samuel Finer, Vernon Bogdanor and Bernard Rudden, *Comparing Constitutions* (Clarendon Press 1995) 6, 372–6; Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (n 13) 17.
[27] AV Dicey, *Introduction to the Study of the Law of the Constitution* (9th edn, Macmillan 1939) 175.
[28] AV Dicey, 'Federal Government' (1885) 1 Law Quarterly Review 80, 80 (emphasis added); Pelizza (n 16) 4.
[29] Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (n 13) 17.
[30] ibid 18.
[31] ibid.
[32] Schütze (n 20) 14.
[33] For this observation I am grateful to Professor Schütze. For a far more thorough and insightful account of federalism's evolution than can be offered here, see ibid 15–40.

prioritised the idea of indivisible sovereignty, but this could not do justice to certain 'constitutional oddities': 'In order to bring Federal Unions into line with the new idea of State sovereignty… they were forced into a conceptual dichotomy: they were either an international (con)federation or a sovereign unitary State'.[34] This reading saw federalism as a contractual relationship between independent states and pushed the concept into the international plane leading to philosophers like Kant to suggest that peace should be 'formally instituted' in a federation on that plane.[35] From this came an intermediate second stage, the result of the intensity of the theoretical challenge posed by the American Union, which saw federalism as a "middle ground' between international and national organisational principles.'[36] Here, a dramatic terminological transformation took place in order to realise 'the mad 'project of visionary young men"[37] to create a 'more perfect union' distinct from the earlier attempt which was clearly (albeit with some caveats)[38] in the form of the first, international reading of federalism. In that first iteration of the US Constitution, the 'Articles of Confederation and Perpetual Union', '[e]ach state retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated […]'.[39] Madison, through formidable linguistic and analytical footwork, argued that the new Union would be distinct from the old in being more of a 'constitution' than a treaty, ratified by people(s) rather than governments;[40] it would have a majority-voting amendment procedure, representatives of both the states themselves and their peoples, and provide for the federal government to have powers of limited scope (and therefore not of 'national', unlimited scope, even though the *nature* of the powers themselves would be of national character). This

[34] ibid 17.
[35] Immanuel Kant, 'Perpetual Peace' in HS Reiss (ed), *Political Writings* (CUP 1991) 98, 102–4.
[36] Schütze (n 20) 15.
[37] Pacificus [FS Oliver], 'The Constitutional Conference - VI: Federal Home Rule' *The Times* (1910) 9; Pelizza (n 16) 8.
[38] See Schütze (n 20) 22.
[39] Articles of Confederation 1777 Article II. Schütze (n 20) 22.
[40] Schütze (n 20) 24.

'mixed character' of the new Union[41] came to define federalism, with the American experience remaining influential even in the contemporary.[42] The meaning of the word 'federal' changed hands from a disintegrated, international contract to a more 'middle-ground' idea, one which divided sovereignty between the States and the Union itself, and where '[t]wo sovereignties are necessarily in presence of each other'.[43] However, this, upon its importation across the Atlantic, was too much for nineteenth century Europe's 'obsession with sovereign States'[44] and, in its third stage, federalism became embroiled in the European traditions of indivisible sovereignty and, as a consequence, the equivocation of federalism with a particular kind of state: 'Federation here came to mean Federal State.'[45]

Federalism as a state-form (whether called 'federation' or not) has a degree of magnetism: it allows us to distinguish between different types of governance structures, the degree of centralisation or of decentralised authority, as well as allowing us to make sense of the territorial structure of the state, for instance whether or not it recognises regional diversities. However, it is clear that the binary distinction between unitary states and federal ones is an oversimplification. What about those constitutions that have territorial structures, constitutionally recognised, but not to the extent of a divided sovereignty? Spain, Italy and the UK for instance all pose challenges for this binary system, weakening its analytical value. What about those unions also that are far 'looser', requiring unanimity for constitutional amendment and perhaps providing for unilateral secession of the

[41] James Madison, 'No. 39' in Terence Ball (ed), Alexander Hamilton, James Madison and John Jay, *The Federalist* (CUP 2003) 185.
[42] See for instance, Kalypso Nicolaidis and Robert Howse (eds), *The Federal Vision* (OUP 2001); which compares the European experience to the definitive one of the US.
[43] Alexis de Tocqueville, *Democracy in America*, vol 1 (Phillips Bradley ed, Vintage 1954) 172.
[44] Martti Koskenniemi, *From Apology to Utopia* (CUP 2005) ch 4; Schütze (n 20) 30.
[45] The result, Schütze suggests, is the distinction between *con*federation and federation: Schütze (n 20) 15. He also notes that '[o]riginally, the two concepts were synonyms.': ibid 30. Martin Diamond, 'The Federalist's View of Federalism' in George CS Benson (ed), *Essays in Federalism* (Claremont College Press 1962) 1274: 'The Federalist and the whole founding generation saw no more difference between confederalism and federalism than we see, say, between the words inflammable and flammable; nothing more was involved than the accidently presence of a nonsignifying prefix'.

component territories? This latter question has been considered at length in the literature, with scholars grappling with the distinction between a 'federal state' (*Bundesstaat*) and a 'confederation' (*Staatenbund*). This distinction, for some time, seemed to rest of the location of supremacy within the system. As Hughes puts it, '[t]he claim that the Cantons are sovereign stands or falls with the claim that the Constitution is a contract'[46] owing itself to this distinction between confederation and federation.

However, this categorisation of states into federations, confederations and unitary states is not as persuasive as its simplicity might suggest. When one is aware of the variations, the degrees to which each category can vary, and the extent one bleeds into another, it becomes very difficult to sustain. It is certainly conceivable that at the extremes of the spectrum of integration there are definitive characteristics: at one extreme lies an homogenous unit with one locus of authority and of sovereignty; at the other a disintegrated collection of 'states', similar to the international order, each with their own legally equal independent spheres of government. Despite it not being necessitated by the European idea of indivisible sovereignty,[47] '[w]hile American federalism accepted gradations on the spectrum between a (con)federation and a unitary State, semantic fluidity was unacceptable to European conceptual legal science (*Begriffsjurisprudenz*).'[48] For Kelsen, though, '[w]hat distinguished the one from the other was only their degree of (de)centralization.'[49] To him, there is little value in trying to distinguish between those systems that inhabit the middle-ground: they all exist on a spectrum, exhibiting varied characteristics and satisfying various theoretical requirements, transcending any useful intermediary boundaries. Any system that exists between the extremes of unitarism or disintegration must, on Kelsen's logic, be 'federal', that is to say that they, to some extent, divide power amongst recognised composite communities. Schmitt

[46] Hughes (n 17) 3.
[47] See Hans Kelsen, *Das Problem Der Souveränität Und Die Theorie Des Völkerrechts* (Mohr 1920) 64–6.
[48] Schütze (n 20) 32; where Kelsen's ideas are explored at length.
[49] ibid 36.

pushed this question further in pursuit of undermining 'the tautological nature of European federal thought',[50] looking to the federal principles *behind* the 'two' concepts. For him, the more useful question is not what a federation is, but what *federalism* is, since this was what informed 'both' ideas (of federation and confederation).[51] For Schmitt, it was the 'dualism' endorsed by federalism that was key: federalism meant a foundational treaty that was both international and national in character, law that existed on both levels, and a dual political existence: 'In each federal union, two kinds of political bodies co-exist: the existence of the whole federation and the individual existence of each federal member. Both kinds of political existence must remain coordinate in order for the federal union to remain alive.'[52] For Schmitt, the sovereignty question was necessarily suspended in a federal union too.[53]

Clearly, embarking on an analysis that sees federalism as a simple state-form is no easy task, since it quickly becomes entangled in ideas of statism and sovereignty that make its crucial endorsement of a 'halfway house' difficult to explain or justify.[54] And so scholars must, as Schmitt did, consider what these federal characteristics are. Certainly, modern scholarship is quickly endorsing a view of federalism as a deeper principle than simply a descriptive claim about how power is distributed within a state.[55] This claim has been made through an illumination, as before, of the terminological distinctions at play. Some of these are highlighted by Burgess: firstly, between the federal 'principle'

[50] ibid 38.
[51] See generally ibid.
[52] Carl Schmitt, *Verfassungslehre* (Robert Schütze tr, Duncker & Humblot 2003) 376–8; Schütze (n 20) 39.
[53] Schmitt (n 52) 376–8; Schütze (n 20) 39–40.
[54] Daniel Elazar makes the following claim, noteworthy for its distinction between federalism and federation: 'Federation, indeed, is federalism applied to constitutionally defuse power within the political system of a single nation. Federation became synonymous with modern federalism because the modern epoch was the era of the nation-state when, in most of the modern world, the ideal was to establish a single centralized state with indivisible sovereignty to serve single nations or peoples.': Daniel J Elazar, *Constitutionalizing Globalization: The Postmodern Revival of Confederal Arrangements* (Rowman & Littlefield 1998) 39. Elazar's contention is that federalism can be applied beyond just the state, and that *federalism* is not necessarily followed by *federation*.
[55] See Raffaele Bifulco, 'Federalism' in Roger Masterman and Robert Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law* (CUP 2019).

and the federal 'spirit', and secondly, between 'federalism' and 'federation'.[56] The broadness of the stroke to define federalism as including *all* of these aspects is troublesome, and is the reason that scholars like Burgess have gone to such lengths to distinguish between them. This distinction is not new, even Dicey referred to 'the federal spirit' as 'the principle of definition and limitation of powers harmonises so well with the *federal spirit* that it is generally carried much farther than is dictated by the mere logic of the constitution'.[57] The claim of this branch of scholarship, however, is that federalism is clearly something deeper than a state-form. Not only this, but it is surely something that can inform things other than just states.[58] There are, it can easily be claimed, 'federal dynamics' existent in systems and structures beyond states. For instance, international organisations can be in some way federal,[59] and there are, in just the same way, federal dynamics in states that might not obviously regard themselves as federal (or apparently federal states that do not exhibit federal characteristics).[60]

Some scholars have taken the concept much further, suggesting that federalism is a social phenomenon recognised (and enhanced) by these organisational structures, rather than simply being a way of understanding those structures themselves. To these scholars, the crux of federalism is a kind of territorial (or even sociological) plurality. This means that what others recognise as federal institutions—dual or cooperative governments, federal and territorial legislatures and

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[56] Of the first, see Michael Burgess, *In Search of the Federal Spirit: New Comparative, Empirical and Theoretical Perspectives* (OUP 2012). Of the second, see Michael Burgess, *Comparative Federalism: Theory and Practice* (Routledge 2006).

[57] Dicey, *Introduction to the Study of the Law of the Constitution* (n 25) 152 (emphasis added).

[58] See Armin Cuyvers, 'The EU as a Confederal Union of Sovereign Member Peoples: Exploring the Potential of American (Con)Federalism and Popular Sovereignty for a Constitutional Theory of the EU' (PhD, Leiden University 2013).

[59] See Roger Masterman, 'Federal Dynamics of the UK/Strasbourg Relationship' in Robert Schütze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018).

[60] Jan Erk, 'Austria: A Federation Without Federalism' (2004) 34 Publius: The Journal of Federalism 1. The debate over the federal nature of the European Union one is not an unfamiliar one to many, but to Professor Schütze at least, '[t]he European Union is indeed based on a conception of divided sovereignty and in strictness neither international nor national, 'but a composition of both'. It represents an (inter)national phenomenon that stands on—federal—middle ground.' Schütze (n 20) 73; Alan Dashwood, 'The Relationship between the Member States and the European Union/Community' (2004) 41 Common Market Law Review 355, 356: 'a federation of sovereign States'; Tanja Börzel and Thomas Risse, 'Who Is Afraid of European Federation? How to Constitutionalise a Multi-Level Governance System' (Jean Monnet Working Paper No7/00 2000).

administrations, differing legal rules across and within the State and clearly enforced or recognised boundaries within the State—are reflective of deeper sociological undercurrents. To scholars such as Livingstone and Elazar, these 'instrumentalities', as the former calls them,[61] are separate from the characteristics of a State ('diversities') that make them necessary. To Livingstone particularly, '[t]he student of federalism must probe deeper than the institutional patterns, for these are but the products of the diversities in the society; it is to the pattern of these diversities that we must go if we would assess the federal qualities of the society.'[62] However, this is not to suggest that the examination purely of legal structures is ink wasted,[63] rather, as he rightly suggests, the legal structures in place are illustrative (but not definitive) of federal characteristics. Livingstone intriguingly suggests that these characteristics are likely to have a powerful symbiotic relationship with a state's institutional forms (its 'instrumentalities'): 'The Constitution, which endows the states with the characteristics of diversity, treats them indiscriminately and thus tends to create diversity where none previously existed.'[64] And so it is that not only can federal structures themselves encourage federal attitudes, as has arguably been the case in Wales,[65] but also that the very existence and support for these institutions is something which forms a considerable part of these federal attitudes. Thus, '[i]t is no longer merely an instrumentality serving to protect and articulate the diversities; it has itself become a part of that complex of values which *is* the pattern

[61] Livingstone's use of 'instrumentalities' is broad, he suggests that 'the word includes not only the constitutional forms but also the manner in which the forms are deployed; it includes the way in which the constitution and its institutions are operated. Beyond this, moreover, it includes many things that are far from constitutional in importance in the ordinary sense of the word. It includes things such as habits, attitudes, acceptances, concepts and even theories.' Essentially the distinction is between the social distinctiveness of a territory, and how it finds formal expression; the former being what he terms 'diversities' and the latter being the 'instrumentalities': William S Livingstone, 'A Note on the Nature of Federalism' (1952) 67 Political Science Quarterly 81, 91.

[62] ibid 95.

[63] Livingstone does acknowledge the problem here: 'Thus the problem of the student of federalism is made much more difficult, for he cannot clearly distinguish between society and the instrumentalities it employs.': ibid.

[64] He uses the US as an example: 'Although at the time of their entry these later states may not have been sufficiently diversified to justify such special treatment, they rapidly acquired such *consciousness of individuality* that they would now be unwilling to part with the instrumentalities that permit the expression of that individuality. It is doubtful that the two Dakotas warranted the dignity of separate statehood at the time of their entry into the union; but who can deny now that, having lived as states for a number of years, they would look with disfavour upon any proposal to deprive them of their individuality by merging them into one?' ibid (emphasis added).

[65] Initial support for Welsh devolution was very low, whereas now the support of its continued existence and the enhancement of it is considerable.

of diversities and which determines the pattern of the instrumentalities.'[66] The creation of federal structures therefore directly affects the existence, or otherwise, of federal sensibilities within a community.[67] Aroney has used Australia as a good example of this, with the formative base of the federal mentality going on to directly orchestrate the creation and functioning of the federal system there.[68] It is unwise to think that emboldening regional institutions will not embolden regional senses of individuality, alert them to the benefits of self-government, or that they will not change the shape or essence of the union itself, or the various interpretations of it. Indeed, it is federalism's ability to allow for such distinctions and continue to justify continued union that is one of its greatest magnetisms.

A crucial lesson of this is federalism's recognition of difference, of diversity and of change: 'Society is never static but changes constantly in accordance with the interplay of the various dynamic forces within it'.[69] That a constitution evolves to continue to represent these changes is a key *raison d'être*, especially—it is famously known—in the UK. It might seem that federalism points against flexibility, requiring, as Dicey recognised, a codified constitution.[70] But this is to conflate, legalisation with federalism. Though constitutional rigidity might be necessary to ensure the stable division of powers, it is not a necessary precondition of federalism. This, of course, does not mean that federalism is a panacea for managing and balancing diversities and internal divisions—it causes far too much political discord and litigation to support such a claim—but it does provide a way of framing the questions.[71] Debates follow about how much diversity can be accommodated, whether

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[66] Livingstone (n 61) 95.
[67] Livingstone notes the problem 'of the statesman; he cannot devise means to accomplish new ends without disturbing the old relationship, for the old means have themselves become ends and the old techniques have become values.': ibid.
[68] Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (n 13) 63.
[69] Livingstone (n 61) 93.
[70] It is important to avoid '[t]he intellectual error of supposing that a change or improvement in the form of the Constitution would remove evils due to social and economic causes': Dicey, *Introduction to the Study of the Law of the Constitution* (n 25) 141, 175. Livingstone also, when demarking the traditional boundaries of scholarly engagement with federalism, notes how it seems to require that 'the constitution must be rigid': Livingstone (n 61) 82.
[71] AV Dicey, *England's Case Against Home Rule* (3rd edn, John Murray 1887) 129.

a territory is so distinct as to warrant its secession, where sovereignty lies within the system and how to reform or improve it, as well as the more pressing legal questions about who has what power, informed by dual or cooperative approaches to governance. These can be provided structure, frame and, in many cases, response flexibility by federalism. This might have an unsatisfactory obscurity to it, but it is important since the problem is then reframed as a political one, regaining the essential involvement of multiple perspectives, (the existence of which is a precondition for federalism itself), rather than silencing or dismissing as subordinate the views of minorities or peripheries, even where they clash with the views of the centre:

> These two demands or forces—the one impelling toward autonomy and independence for the component units, the other impelling toward centralization and the suppression of diversity—meet each other head on; the result of their conflict is the federal system. The federal system is thus an institutionalization of the compromise between these two demands, and the federal constitution draws the lines of this compromise.[72]

Some academics, such as Livingstone and Aroney, have perhaps gone a little too far in broadening the definitional net of federalism such that it becomes difficult to find circumstances that do not meet its requirements. Their contention that federalism is borne from basic sociological realities is well-placed,[73] but this is where federalism comes from, not what it is. If the principle is to be applied with any utility, it must be precise, and federalism especially has surely suffered enough at the hands of ambiguity and conceptual contestation. If it is to be of relevance as a constitutional theory, it must be clarified in those terms: the coexistence of multiple layers of legitimate authority within a single territory must be its essential claim. Subsidiarity is a principle which is quick to follow but this is a way of understanding the relationships between those authorities; it therefore requires that they exist, but federalism predicates their existence before subsidiarity can prescribe

[72] Livingstone (n 61) 90.
[73] Nicholas Aroney, 'The Federal Condition: Towards a Normative Theory' (2016) 61 The American Journal of Jurisprudence 13.

how they should interact. It is often suggested that federalism lacks a distinctive, well-developed definition as a constitutional theory,[74] and present discussion has perhaps done little to mitigate those challenges. But, as Tierney suggests, and in line with the recent trajectory of scholarship,[75] it has been seen that federalism 'is a more flexible device than it is often taken to be in British debates'.[76] Rather than being a state form, it is an idea, 'a variable template for different, but related forms of political practice'.[77] This is not an uncontentious claim, and there are those who remain sceptical; Kyle Scott for instance, contends that 'there is no theory of federalism'[78] even though the problem is surely that there are too many theories of it. However, as modern scholarship has abandoned the 'somewhat static and legalistic interpretation' of Wheare and Dicey[79] it has moved to understanding what federalism is *for,* beyond institutional forms, and what sociological phenomena it seeks to make sense of. It may go too far to suggest federalism is 'innate' in human relations, but it can surely be accepted that it is a way of encouraging and legitimising dualities that do exist within systems, at the very least as they find expression in institutional forms. It is this institutional recognition of pluralism and coexistence that is the core of federalism, and it is a recognition that the UK is sorely in need of. The claim that follows is simply this: the UK's rejection of federalism is unjustified; it is based on a conception of federalism that extends to (and only to) a certain state-form when this clearly does not do the concept justice. However deep into

[74] Anna Gamper, 'A "Global Theory of Federalism": The Nature and Challenges of a Federal State' (2005) 6 German Law Journal 1297, 1299; Tierney (n 24) 106. To Michael Burgess, there is 'no fully fledged theory of federalism. At best there is a partial theory based upon rigorous conceptional analysis and the pursuit of terminological precision. At worst there is crass empiricism rooted in the failure to develop concepts and define the key terms.': Burgess, *Comparative Federalism: Theory and Practice* (n 56) 1.

[75] See Dimitrios Karmis and Wayne Norman (eds), *Theories of Federalism* (Palgrave-Macmillan 2005).

[76] Tierney (n 24) 106.

[77] ibid.

[78] Kyle Scott, *Federalism; A Normative Theory and Its Practical Relevance* (Continuum 2011) 1; See also Malcolm Feeley and Edward Rubin, *On Federalism: Political Identity and Tragic Compromise* (University of Michigan Press 2008).

[79] Michael Burgess, 'Federalism and Federation' in Michael Burgess and Alain Gagnon (eds), *Comparative Federalism and Federation: Competing Traditions and Future Directions* (Harvester Wheatshead 1993) 3–14; Dicey believed that federalism was merely (or at least primarily) about the definition and division of powers: Dicey, *Introduction to the Study of the Law of the Constitution* (n 25) 152–3.

sociological waters one thinks the theory might extend,[80] it is clear that it cannot be simply a state-form[81] and it therefore follows that its lessons, its ideas and its normative persuasions *can* be applied to the UK, since outright rejection can no longer be tenable. It is certainly the pursuit of homogony that rejects federalism, and the endorsement of pluralism that accepts it, whatever the given reasons (legitimate or otherwise) of this perceived homogeneity.

Despite the perceived extraneousness of federalism to the UK the UK's history has not been the pursuit of homogeneity and has borne the scars of a long conflict between its union and unitary conceptions. However, British thinking has been slow to realise the deeper meanings of federalism as the institutional accommodation of plurality, preferring instead the more prescriptive 'state-form' approach which, coupled with disagreement about what exactly it prescribed, led to its marginalisation; a marginalisation that, it will be argued, is not fitting with either its constitutional past or present.

CONSTITUTIONAL BEGINNINGS: THE UNITED KINGDOM(S)

What exactly the United Kingdom is, was, or might become is a topic of furious debate amongst scholars, politicians, lawyers and citizens, from all parts of the UK. It is a question that is as important as it is old but this is not to suggest it is enigmatic—most of those groups seem to have an idea about what the UK is, or, at least what they think it ought to be, but it seems that they do not often agree.[82] The 'United Kingdom' is not an ancient union, only taking its current form in

[80] That federalism (or unitarism) spoke to some deeper sociological phenomena was not lost on Dicey who, 'perhaps unawares, imbibed Freeman's racial justification for this methodology, that of proving the innate and unique capacity of Anglo-Saxon stock for spontaneous and ordered self-government': Tulloch (n 11) 145.

[81] Even the early supporters of imperial federalism had adopted a notion of federalism that went beyond prescriptive state-form. For a comprehensive list of proponents and opponents, see Ged Martin, 'Empire Federalism and Imperial Parliamentary Union, 1820-1870' (1973) 16 The Historical Journal 65, 67–8.

[82] Although it is worth noting that there is some confusion about what exactly the UK *means*: 'probe a little way and you find that what everyone thinks they know about the Union is decidedly fuzzy—especially in England. People in England have a lot of trouble with the nouns England, Britain, and United Kingdom and with the adjectives English and British. For a start, there are three nouns but only two adjectives—Tom Nairn's coinage Ukanian has never caught on.' Iain McLean and Alistair McMillan, *State of the Union* (OUP 2005) 2.

1921 when the Irish Free State left the union. However, *a* United Kingdom had existed in these Islands long before. The apparently distinct cultural identities of Wales and England were the first to come to constitutional heads, as McLean and McMillan explain:

> Wales was unilaterally incorporated into England in 1536. It had never been a political unit. Eastern Wales, like eastern Ireland, had been governed by marcher lords licensed by English kings to control their western frontiers by whatever means they saw fit. But the writ of the barons of Ludlow or Montgomery never ran into northern and western Wales. Edward I conquered it and set up the massive castles at Caernarfon, Harlech, Beaumaris, and Conwy to keep the Welsh subdued. But Owain Glyndwr's revolt against English rule broke out in the early fifteenth century. Where Edward I had failed, Henry VIII, whose father had been a Welsh baron, succeeded. All institutions of separate Welshness disappeared, except the language and the culture. The Welsh language is still concentrated in the pockets of north and west Wales that Edward I found hardest to subdue.[83]

Wales was, indeed, 'subdued' and assimilated rather than being accommodated as a separate constitutional entity.[84] That England expanded to consume Wales as a Principality is represented by Wales' lack of representation on both the union flag and the various official coats of arms of the UK.[85] As will be seen, the impact of the lack of clearly defined historic 'Wales', and any constitutionally recognised distinction from England has had an impact on the territorial relationship between the two.[86]

The story has been very different, however, for Scotland. Unlike Wales, Scotland has an historic claim to a monarchy, a Parliament, and what are regarded as core elements of nationhood such as

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[83] ibid 1–2.

[84] See the seminal work, Frederic William Maitland, *The Constitutional History of England* (First Published 1908, CUP 2008).

[85] Interestingly, however, '[i]n Scotland a different version of the Royal Standard is used, with two Scottish quarterings instead of two English quarterings' '[n]ot a lot of people know that last fact.': McLean and McMillan (n 82) 1.

[86] For instance, England and Wales have long been regarded as having the same legal system, though this may be changing: Richard Rawlings, 'The Strange Reconstitution of Wales' [2018] Public Law 62; Gwynedd Parry, 'Is Breaking up Hard to Do? The Case for a Separate Welsh Jurisdiction' 57 Irish Jurist 61.

a permanent population, a defined territory, government and capacity to enter into relations with other states, as well as a legal system and a church.[87] Though it was conquered by England, Scottish victory at the battle of Bannockburn in 1314 ensured this was not a permanent subjugation. Only when Queen Elizabeth I died and left no heir was King James VI of Scotland also crowned King James I of England.[88] This 'Union of the Crowns' was merely a personal union and the Acts of Union of 1707 would be the real genesis of the more fundamental shift in the constitutional relationship between the two 'states'.[89] Before this union could be established, however, it needed to be necessary. Scotland's economic fortunes had not been as strong as in its past: it had attempted to compete with English colonial designs with its own colony on Panama, but this failed at great economic cost and added to other economic pressures that made Scotland incapable of resisting the English pursuit of union.[90] Though there was lively debate on either side of the border, the conclusion for the majority of politicians on both was that a Treaty of Union should be drafted, as it was in 1706, uniting the two states into one, and given domestic effect by an Act of Union in each Parliament.[91] Scotland and England had differing ideas about how this union might work and what it might look like:

[87] The first four of these criteria are owed to Article 1 of the Montevideo Convention 1933, the latter two were crucial elements protected in the Acts of Union. See JD Ford, 'The Legal Provisions in the Acts of Union' (2007) 66 Cambridge Law Journal 106.

[88] Despite his predecessor having his mother executed. This also means that the current Queen is only Queen Elizabeth I of Scotland, which has been something of a sore point for some Scottish nationalists: David McLean, 'Lost Edinburgh: The Queen and the Exploding Post Box' *The Scotsman* (Edinburgh, 3 September 2014) <https://www.scotsman.com/lifestyle-2-15039/lost-edinburgh-the-queen-and-the-exploding-post-box-1-3529276> accessed 6 June 2019. Indeed it was the basis of the litigation in *MacCormick v Lord Advocate* [1953] SC 396.

[89] It is worth at this juncture indicating that the modern 'state-centric' system, with its basis in sovereignty and territorial control, as well as shared identification of borders, is often thought to have originated at the Treaty of Westphalia in 1648, but nonetheless the ideas of 'statism' and sovereignty were not as developed, or as universally recognised as they are today, see: Derek Croxton, 'The Peace of Westphalia of 1648 and the Origins of Sovereignty' (1999) 21 International History Review 569.

[90] 'The Darien Scheme' (so-called because it was established on the Gulf of Darien) was run by the Company of Scotland and backed by approximately 1/5th of all the money in Scotland, meaning its collapse was a catastrophe for the Scottish economy. The land that constituted it remains almost completely uninhabited. See Lord Sumption, 'The Disunited Kingdom: England, Ireland and Scotland' (Denning Society, Lincoln's Inn, 5 November 2013) 10.

[91] King William had written as early as 1702 that 'nothing can contribute more to the present and future peace, security, and happiness of England and Scotland than a firm and entire union between them.': cited 'Lords Journals xxii, p 57' in AV Dicey and RS Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920) 125.

> Scotland generally favoured a 'federal' union with two independent parliaments, while the federal idea was deeply irritating to England. For not only had seventeenth century English constitutional theory come to insist that sovereignty could not be divided; in political practice, there was no English appetite to 'share' power on equal terms.[92]

In practice, however, the political dominance of England meant that the incorporating union presided, but the political and national identity of Scotland remained strong. Crucially, one Parliament was created to replace both of its predecessors, representing the united will of the nation(s). Prominent supporters of the Union on both sides of the border suggested that the Acts were supreme, quasi-entrenched documents, semi-constitutional in their nature. Defoe, for example, suggested,

> [N]othing is more plain than that the articles of the Treaty…cannot be touched by the Parliament of Britain; and that the moment they attempt it, they dissolve their own Constitution; so it is a Union upon no other terms, and is expressly stipulated what shall, and what shall not, be alterable by the subsequent Parliaments. And, as the Parliaments of Great Britain are founded, not upon the original right of the people, as the separate Parliaments of England and Scotland were before, but upon the Treaty which is prior to the said Parliament, and consequently superior; so, for that reason, it cannot have power to alter its own foundation, or act against the power which formed it, since all constituted power is subordinate, and inferior to the power constituting.[93]

This is reinforced by the text of the Acts themselves, which are at pains to ensure the permanence of the Union between the two nations. However, because of the dominance of the peculiarly English approach to constitutionalism, the status of the Acts of Union remains unclear. With its tradition of parliamentary sovereignty,

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[92] Schütze and Tierney (n 15) 3; James Hodges, *The Rights and Interests of the Two British Monarchies* (Caledonia Coffee-House 1703) 2–4, 8; Andrew Fletcher, *State of the Controversy Betwixt United and Separate Parliaments* (1706 — reprinted for the Saltire Society by Blackwood Publishing 1982); JR Tanner, *English Constitutional Conflicts of the Seventeenth Century, 1693–1689* (CUP 1962).

[93] Defoe 1786: 246, quoted in McLean and McMillan (n 82) 7–8.

> [n]either the Act of Union with Scotland nor the Dentists Act, 1878, has more claim than the other to be considered a supreme law… each can be legally altered or repealed by Parliament… Should the Dentists Act, 1878, unfortunately contravene the terms of the Act of Union, the Act of Union would be *pro tanto* repealed.[94]

Dicey's ideas about the unrestricted remit of the Westminster Parliament are well known,[95] but there were not so widely accepted at the time of the Acts. Scotland also had a different tradition of sovereignty to that of England, based on notions of popular sovereignty and,[96] by Dicey's own admission, division of sovereignty between the church and state.[97] So it might seem that, not only are the Acts of Union (at least semi-) constitutional documents in Scottish eyes, protected from repeal, but they also suggest that the union is a consensual coming together of two sovereign nations who, by their ability to withdraw from the Treaty at the Acts' core, can secede—in obvious contrast to Wales which had any sovereignty it previously might have possessed evaporated by its integration into England. However, though some have argued that Scotland might be able to unilaterally secede from the Union,[98] this is not *conventional* wisdom.[99] It is complicated by the fact that the Scottish Parliament, despite a brief period of consideration of separate, dual parliaments in Scotland and England,[100] and much like its subsequent Irish equivalent, legislated for its own dissolution and for it to be replaced by a combined UK Parliament in Westminster (albeit in

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[94] Dicey, *Introduction to the Study of the Law of the Constitution* (n 27) 141. There is also suggestion within the Articles that they form part of a higher law, beyond the reach of Parliament itself: Union with England Act 1707 Art XXV: 'That all Laws and Statutes in either Kingdom so far as they are contrary to or inconsistent with the Terms of these Articles or any of them shall from and after the Union cease and become void and shall be so declared to be by the respective Parliaments of the said Kingdoms. It is interesting to note that this declarative power is bestowed on the Parliaments rather than the courts.

[95] The oft-cited phrase being 'Parliament… has the right to make or unmake any law whatever; and, further that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.' Dicey, *Introduction to the Study of the Law of the Constitution* (n 27) 39–40.

[96] 'the principle of unlimited sovereignty of Parliament is a distinctively English principle and has no counterpart in Scottish constitutional law.': *MacCormick v Lord Advocate* (n 88) (Lord Cooper).

[97] Dicey and Rait (n 91) 21–22.

[98] Aroney, 'Reserved Matters, Legislative Purpose and the Referendum on Scottish Independence' (n 1).

[99] When this question arose in 2014 in the form of whether the Scottish Parliament had competence to initiate the referendum on its independence, the question was avoided by an Order in Council that gave Holyrood the competence for the referendum, if it did not already possess it.

[100] Dicey and Rait (n 91) 123–4.

exchange for additional representation there). However, the English Parliament also dissolved itself and was reestablished as the British Parliament on the same site;[101] there was clear ambition to ensure that the union was 'complete and intire'[102] and this was to be achieved by making the island 'subject to one Sovereignty and represented by one Parliament'.[103] Therefore, it is predominantly the view (in England at least) that the Acts of Union, read together with the Articles, dissolved the old states and created a new one. The outcome was a situation where '[n]either the English nor Scottish Parliament could legislate for the new state of Great Britain.'[104] Instead, this state, though it inherited characteristics of the old,[105] was a new nation, and has in practice since preferred the Diceyan understanding of sovereignty. That said, Lord Cooper famously had 'difficulty in seeing why it should have been supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament'.[106] It seems that the English view has dominated in practice, but in truth uncertainties remain and it is at the very clear that there is disagreement about the nature of the union at even the most fundamental levels.

For Ireland, the picture was different still, yet played an even more considerable role in cementing English constitutional theory. It had received populations of Protestants since Elizabeth I, Lords of whom attempted to govern portions of the North of the island. Yet, its status remained disputed, with *Calvin's Case*[107] confirming its colonial subordination to England, while Irish

[101] The Act of Union 1707 is clear that 'one kingdom' had been created. 'Importantly, and unlike Wales, Scotland was not 'incorporated' into England, but both England and Scotland were equally incorporated into the new state. However, for many this formal equality masked a marked political asymmetry, see only: AI Macinnes, *Union and Empire: The Making of the United Kingdom* (CUP, 2007) esp 5 as well as 316: 'Scottish representation was less than that for the counties of Devon and Cornwall, a tangible indication that Union marked the culmination of England's intrusive hegemony throughout the seventeenth century.': Robert Schütze, 'Introduction: British "Federalism"?' in Robert Schütze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) n 17.
[102] [sic] Union with Scotland (Amendment) Act 1707.
[103] ibid.
[104] Elizabeth Wicks, 'A New Constitution for a New State? The 1707 Union of England and Scotland' (2001) 117 Law Quarterly Review 109, 123.
[105] CR Munro, *Studies in Constitutional Law* (1st edn, Butterworths 1987) 65.
[106] *MacCormick v Lord Advocate* (n 88) 411 (Lord Cooper). See also HL Deb 1 July 1997, vol 581, cols 117-120.
[107] *Calvin's Case* 77 ER 277, (1608) 7 Co Rep 1a (QB).

thinking cast its relationship with England as more of an executive union of the monarchy, supported by the Irish House of Lords.[108] England responded with a view that:

> Ireland was 'a distinct kingdom, though a dependent subordinate kingdom'; and this meant, with regard to Westminster parliamentary sovereignty, that 'where Ireland is particularly named, or is included under general words, they are bound by such acts of parliament.' This British right to 'superiority' was seen to derive from 'the right of conquest: a right allowed by the law of nations, if not by that of nature.'[109]

And, despite a brief period of recognition of Ireland's right to govern itself, it eventually joined the Union officially in 1800[110] but its time there was short and tumultuous. Following persistent debates over 'Irish Home Rule', a civil war and a revolution, the Irish Free State emerged independent of the United Kingdom in 1921.

History, then, has clearly shaped the Union in a number of ways. It is at the very least clear from the UK's history that it has never been the monolithic unitary state some (particularly English) constitutional theorists might suggest. Instead, it has been shaped by union, secession, internal distinctiveness and competing ideas of what the union is, what it is for and how it should operate. Further, it has not remained unchanged since time immemorial, being instead in an almost permanent state of flux.[111] Although its various Acts of Union have not been of the same pedigree as the Articles of Confederation in the United States, with the first Act of Union being born more out of political necessity than any idea of constitutionalism, this is not to say its history has been the pursuit of homogony. As King William suggested in 1702, the union was, at least for Scotland, negotiated.[112] It was not solely the result of a conquest or absorption, being instead coordinated

[108] Thanks to Professor Schütze for this point: Schütze (n 101) 5; William Molyneux, *The Case of Ireland Being Bound by Acts of Parliament in England, Stated* (1698); MS Flaherty, 'The Empire Strikes Back: Annesley v Sherlock and the Triumph of Imperial Parliamentary Sovereignty' (1987) 87 Columbia Law Review 593.
[109] Schütze (n 101) 5.
[110] Act of Union 1800.
[111] See Michael Fry, *The Union: England, Scotland and the Treaty of 1707* (Birlinn 2006).
[112] Dicey and Rait (n 91) 125.

by the Monarch, with the Parliaments each invited to draft Acts of Union and bound together by a peculiar combination of treaty and legislation. Scotland especially had its own interests protected in the Union: its own legal system, its church, its own educational system; it remained, as did Ireland, a distinct element within a larger whole, not dissolved. It must be forgiven, surely, that federal divisions of sovereignty did not enter the discourse at this time since it was only by way of a war of independence, an experiment in statecraft and a constitution later that *The Federalist* was able to gain persuasive influence in the United States.[113] Some, such as Forsyth, have noted that there may have been comparative interest in the Helvetic Republic or the United Provinces of the Netherlands, but this would not form a template for the union.[114] Yet, clearly the unions with England, at least of Scotland and Ireland, have been well within the realms of constitutional union, and not so extraneous to federal thinking as could be assumed. This presumption, and the dissonance between the views of England and the rest of the Union, as well as its insistence of avoiding the existential constitutional questions, were to come to heads in the 'Irish Question', explored next.

THE IRISH QUESTION AND THE FEDERAL AVERSION

As early as the 19th Century, regional governance had become a key question again with self-rule finding waves of support in the UK, perhaps in response to the growing centralisation of government more generally.[115] One of the most significant attempts at institutionalising some kind of self-government was the Liberal Party's divisive policy of giving home rule to Ireland, allowing

[113] The current Constitution of the United States is not, it is often forgotten, the first Constitution, but the second. The first, 'The Articles of Confederation' were more dependent on the consent of the Several States who each had a powerful veto. *The Federalist,* and the Constitution which followed it, by contrast vested *some* sovereignty in the federal Union.
[114] Forsyth (n 19).
[115] Lord Hodge, 'Legal Implications, Advantages and Disadvantages of Independence, Devolution and Federalism' (British German Jurists' Association Conference, Edinburgh, 16 May 2014) 5–6.

it to govern itself within the United Kingdom. This territorial question was a microcosm for larger problems in the UK's constitutional conscience:

> [T]he fierce debate over Irish self-government showed the "chronic weakness" of the British imperial centre, constantly dependent upon the unstable balance of local politics, and it also underlined the danger of wide-ranging policies based on "rival notions" of power and legitimacy, destined to break up the complex system of government put in place during the Victorian era.[116]

It is, as this excerpt implies, naïve to think of the Irish Home Rule question as an isolated incident, unconnected to the broader questions surrounding the governance structure of the UK or the British Empire. Yet, even just for Ireland, home rule faced considerable opposition.[117] Ireland's choice was not necessarily 'in or out' in the same way as Scotland's was to be in 2014; instead, 'the fate of Ireland remained closely intertwined with that of the Empire', with many in the political realm attempting 'to develop a moderate solution to the problem of Irish self-government, integrating Dublin into a projected imperial union between Britain and its main overseas Dominions.'[118] This was the first time federalism became a real option in constitutional thinking in the UK:[119]

> 'This solution was especially founded on a complex notion of "federalism", inspired by the North American experience, which aimed to reorganize the political machinery of the imperial

[116] Pelizza (n 16) 1; J Darwin, *The Empire Project: The Rise and Fall of the British World-System, 1830-1970* (CUP 2009) 300–1.
[117] As an example of the virulence of the opposition, consider this quotation: 'When we have said...that we would not have Home Rule, we have been indulging in no mere platform rhetoric, in no empty platitude – we have been expressing the deep and innermost conviction that Home Rule in any form would be a danger to the Empire, would imperil the growing prosperity of Ireland, and would involve the most cowardly betrayal of a vast number of our fellow-subjects, and we have pledged ourselves to resist any attempt to force such a measure upon the country with all our power.': Walter Long, 'Unionists and Home Rule' *The Times* (29 October 1910) 12.
[118] Pelizza (n 16) 2.
[119] '[B]efore 1870, as after, the idea was never consistently to the fore, but enjoyed short bursts of popularity.': Martin (n 81) 65.

> metropolis on a new decentralized basis, capable to deal effectively both with local and international affairs'[120]

The Irish question raised further questions about the UK's internal territorial dynamics, as well as those larger questions about the status of the Empire. Pelizza uses the same label as Dicey does for the Westminster legislature: the Imperial Parliament,[121] and in many senses the formal structure of the Empire as somewhere between state and international organisation seemed to lend itself to federal thinking—of course this halfway point is exactly what enabled the American Founding Fathers to institutionalise federalism there.[122] The idea of an imperial federation was on the rise as simultaneously a guarantee of the survival of empire, and a way of formalising its relations.[123] It was broadly envisaged that the UK would form but one part of the larger federation, but the more specific issues of how this would happen or what it might look like were never properly illuminated or agreed on.[124] For Dicey, however, the federal option was an overt endorsement of Irish Home Rule and was therefore incompatible with unionism: 'there is something shocking to common sense and to political morality in any statesman trying to persuade himself that he can remain a Unionist while adopting Home Rule under the alias of Federalism.'[125] Dicey's work initially, given Westminster's unlimited legal sovereignty, seemed to provide for the creation of subordinate

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[120] Pelizza (n 16) 2.

[121] The claim of Westminster as the heart of the Empire mirrored that of London as the imperial capital. See for instance, John Eade, *Placing London: From Imperial Capital to Global City* (Berghahn Books 2001).

[122] An interesting example of the transnational nature of the empire is how migration around the empire developed, particularly during its closing stages. For instance, after Kenya's independence in 1963 and a concerted programme of racial discrimination there, many Indian settlers returned home not to India but to Britain. Around 100,000 did so in the late 20th century, see Robin Cohen, *The Cambridge Survey of World Migration* (CUP 1995) 71. The famous (and contemporarily important) 'Windrush Generation' that resulted from the British Nationality Act 1948—the Act that gave British citizenship to all those living in the UK and its colonies—is another pertinent example.

[123] Lord Selborne wrote, for instance, that '[i]f we succeed [in this reform] it will mean that there will exist a true Imperial Parliament, in which the United Kingdom and the Dominions of the Empire will be represented on some basis of population or wealth, and that it will be concerned exclusively...with the Foreign Policy of the Empire, the defence of the Empire, the rule of India and the dependencies of the Empire, and possibly at some future stage with the trade of the Empire.' DG Boyce (ed), *The Crisis of British Unionism: Lord Selborne's Domestic Political Papers, 1885-1922* (The Historians' Press 1987) 90–1.

[124] Pelizza (n 16) 3–4; Tulloch (n 11) 139: 'to the Liberals it implied federation—both of the United Kingdom and of the British empire—as a solution to an overpowerful and overburdened centralism. Lord Acton was the high priest of this liberal ideology, Gladstone its prime implementer, and Ireland its chosen testing ground.'

[125] John Kendle, *Walter Long, Ireland and the Union, 1905-1920* (McGill-Queen's University Press 1992) 59–60.

legislatures—indeed he had actually written on them as a demonstration of Parliament's unrestricted remit:

> In the vital distinction he drew between sovereign and non-sovereign law-making bodies which he developed in chapter 2 of the *Law of the Constitution,* Dicey placed the American congress in the same constitutional class as the legislatures of colonial dominions and the Great Western Railway Company as all exemplifying non-sovereign bodies endowed however with a degree of self-government. John Morley notes that Gladstone read this chapter with particular interest in 1886, for it suggested that Westminster could bestow a substantial degree of autonomy on a newly created Dublin parliament without in any way impairing its own ultimate sovereignty.[126]

Of course, Gladstone was right to suggest that Parliament's sovereignty meant it could not be restrained in its desire to establish subordinate institutions,[127] though 'it must have been especially galling for such a committed Unionist as Dicey to have his work quoted to justify and legitimise a policy he deplored';[128] Dicey was therefore at pains to argue that Irish Home Rule was not to be encouraged. He was sympathetic to other constitutional visions but made it clear he did not endorse them writing, '[i]f I were an Irishman I have little doubt I should be an out-and-out Nationalist, and therefore anger and indignation at fair nationalism is out of place in my mind … What I am an authority about is the effect of certain lines of action in England'.[129] Further, he wrote, 'My knowledge of Ireland is merely the knowledge—perhaps it would be better to say the ignorance—of an educated Englishman'.[130] This did not, however, deter Dicey from attempting to resolve the Irish question from his English perspective. Tulloch suggests that '[t]he overwhelming primacy of English interests and consequences took precedence over any further

[126] Tulloch (n 11) 141–2.
[127] He declared so in a speech on the 8th April 1886: 'There is nothing that controls us, and nothing that compels us, except our conviction of law, of right, and of justice.' ibid 142.
[128] ibid.
[129] Dicey, quoted in ibid 146.
[130] ibid.

consideration of Irish grievances… [Dicey] also took it as axiomatic that Ireland's problems were social and agrarian rather than political or nationalist, and hence amenable to English solutions.'[131] Yet, he nonetheless remained undeterred. In order to defeat the 'fragmenting spirit' of federalism,[132] Dicey 'urg[ed] a Referendum Act which enumerated a variety of bills which parliament could not alter without recourse to a referendum … and which he urged every court in the empire to endorse should parliament attempt to contravene it…',[133] a truly striking change for the Professor.

Ultimately despite enthusiasm for it, the federal solution to the Empire's problems would never amount to anything, held back as it was by poor lexicological clarity, and, though it may have always been an aspect of imperial thought,[134] it could not overcome attacks from the heavyweight advocates of unitary homogeneity, such as Dicey:

> [A] last attempt for a federal solution collapsed during the inconclusive Conference on Devolution of late 1919…
> … by 1922 it was clear that the federal alternative was useless both for domestic and imperial affairs, due to the traumatic conclusion of the Irish question and to the increasing self-assertion of the Dominions on the international scene. Thus federalism ended up again in the limbo of British political debates…[135]

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131 ibid.
132 ibid 143.
133 ibid 165. He continues: '[Dicey] managed at one stroke to define and modify by means of "those feeblest of all chains, the restrictions of a paper Constitution" to rigidify the constitution, negate parliament's legal sovereignty, and draw the judiciary substantially into the political area—all those dire consequences in a word which he employed as ample hypothetical reasons for rejecting home rule.'
134 Martin (n 81) 92.
135 Pelizza (n 16) 10–11: 'although it returned briefly to the forefront in 1940, when Winston Churchill offered a sort of federal union to France on the eve of Hitler's decisive victory in the West. However, the so-called "Anglo-French Union"—partially inspired by the ideas of the Round Table—never materialized, while the following approaches of Britain to ambitious projects of European federation remained always ambivalent, showing a persistent hostility toward any serious change of its traditional constitutional structure.' See also Andrea Bosco, *Federal Union and the Origins of the 'Churchill Proposal': The Federalism Debate in the United Kingdom from Munich to the Fall of France, 1938-1940* (Lothian Foundation Press 1992). See also Kendle (n 125) 217–20.

However, this did not put an end to the Empire's relationship with federal principles; the constitutional legacy of much of the Empire fascinatingly remains its export of federalism.[136] South Africa, India, Australia and Canada and of course the United States all underwent federal 'conversions' during their journeys towards independence; it seems that of all of them the experience of Canada may have been most persuasive as a blueprint for British internal restructuring.[137] The Canadian experience showed how federalism might be compatible with traditional 'British' constitutional ideas, such as the infamous Westminster-style Parliament system. Here federalism's flexibility became attractive. It was, to some, a way of 'protecting local autonomy in domestic affairs and maintaining a common system of representation in international relations'[138] and, as such, it was capable of winning supporters on both sides of the debate surrounding Ireland's future. Nationalists could use federalism as a way of promoting divergence from the mainland,[139] whereas unionists and conservatives could use it as a way of keeping the union, along with the Empire, together.[140] However, in contrast to advocates of pluralism such as Acton,[141] Dicey saw what he called 'unitarianism' as crucial to effective and efficient government. The alternative, he thought, would deprive 'English' institutions 'of their strength, and their life; it

[136] Pelizza (n 16) 12: 'Indeed, it is important to note that similar disruptive patterns developed later into other parts of the British Empire, where different ethnic or religious groups refused to follow the unitary or federal options offered by their colonial rulers, pushing instead for a violent partition of their own territories along the lines set originally by Ireland in 1922. From this point of view, the fate of Muslim Indians in 1947 does not seem too different from that of Irish unionists twenty-five years earlier, including the same unfortunate support for a federal solution of their respective problems. Therefore it becomes extremely relevant to reassess the federal debate on Ireland and the United Kingdom in the early twentieth century through a broader historical prism, acknowledging its permanent legacy for the political development of modern Britain and its former colonial empire.'

[137] See ibid 5.

[138] ibid.

[139] For instance, Isaac Butt wrote that '[t]he time is come when it is essential to the interests of both countries that there should be a re-adjustment or modification of the Union arrangements. I believe that a very large proportion of the Irish people are willing to accept such a Federal Union between the countries as would give an Irish Parliament control over all the domestic affairs of Ireland, while an Imperial Parliament still preserved the unity and integrity of the United Kingdom as a great power among the nations of the world.' Isaac Butt, *Irish Federalism! Its Meaning, Its Objects, and Its Hopes* (3rd edn, John Falconer, 1871) 17.

[140] See for instance, A Radical [Chamberlain], 'A Radical View of the Irish Crisis' (1886) 39 Fortnightly Review 273.

[141] Acton wrote that 'the combination of different nations in one State is as necessary a condition of civilised life as the combination of men in society': John Dalberg-Acton, 'Nationality' in John Neville Figgis (ed), *The History of Freedom and Other Essays* (Macmillan 1909) 291.

weakens the Executive at home and lessens the power of the country to resist foreign attack'.[142] Dicey's concerns about imperial federalism and Home Rule were, therefore, principally about their existential consequences for the rest of the Imperial Centre: it was 'a plan for revolutionizing the constitution of the whole of the United Kingdom' which would (or at least *could*) 'be adverse to the interests of Great Britain'.[143] This inflexion, and the acceptance of the competitive dimension has not disappeared: Demands for territorial government in one region have continued to prompt changes across the union. Indeed, as soon as Irish Home Rule became a significant question, the Scottish Office was founded in London; equally, the day after the 'No' vote to Scottish independence, the Prime Minister announced plans for English votes for English laws.[144]

It seems then that Britain's first collision with federalism was hampered by poor timing, political crisis, lack of intellectual appetite (or comprehension) and a desire, particularly from English and conservative quarters to avoid the existential questions it gave rise to. It did, however, demonstrate an interest in the idea, and a reflection of what it meant for Britain's place in the world. '[T]he complex story of federalism in Edwardian Britain shows a certain fascination for this political concept, *learned in relation with the outside world and later integrated into domestic political discourses*.'[145] The Irish question, when it was restricted to a question about Empire was tolerable but imprecise in its requirements; when it became an inflected, existential question about regional identities and parliaments within the union, it became an untenable crisis of conscience. Those, such as Chamberlain, who began advocating for devolution to all the territories of the UK, did so in line with an imprecise definition of 'federation' that pursued imperial as well as national unity and were not able to overcome the challenge posed by Dicey's (Anglo-Centric) constitutional orthodoxy.

[142] AV Dicey, 'Home Rule From an English Point of View' (1882) 42 Contemporary Review 66. See also Michael O'Neill, 'Great Britain: From Dicey to Devolution' (2000) 53 Parliamentary Affairs 69, 69.
[143] See Arthur Aughey, 'Fifth Nation: The United Kingdom between Definite and Indefinite Articles' (2010) 5 British Politics 265, 273.
[144] Lord Hodge (n 115) 6; Tierney (n 24) 115.
[145] Pelizza (n 16) 11 (emphasis added), he continues: 'Of course, this integration was often limited and confused, betraying a superficial appreciation of modern federal theories.'

This history seemed set to repeat itself in devolution's next stage, as a floundering Labour Party tried to amass support for devolved legislatures in the 1970s.

DEVOLUTION'S FALSE START

Historically, the fact that government had been conducted so far from the 'nations' of the UK had not been much of a talking point; although 'the previous 100 years had been a series of failed attempts to do devolution',[146] government had been small and uninvolved, and those policies that had local significance and impact were conducted and managed at a sub-state level, like management of education,[147] though the exception to this is can be found in Northern Ireland, which 'opted out' of the Free State and had its own Parliament (and Prime Minister) since 1922. In Britain, however, along with economic hardship came a need for more welfare support and government involvement, making significant the previously unimportant distance between the governors and the governed. Following economic problems in the regions and growing secessionist sentiment[148] a Royal Commission on the Constitution reported in 1973 that there might be good cause to create elected legislatures in Scotland and Wales. Its proposals were to be implemented by the Labour government in the following way:

> Separate devolution Bills for Scotland and Wales (1978), subsequently combined in a Scotland and Wales Bill (1979), proposed greater home rule for Scotland than Wales. There were to be directly elected assemblies in both countries by first-past-the-post (1978), some legislative competence and executive discretion for Scotland over devolved Scottish Office functions (local government, social policy and infrastructural matters), but only local government-style committees in Wales. Neither assembly was to have fiscal competence. The Secretaries of

[146] Institute for Government, Interview with Tony Blair, 'Tony Blair: Devolution, Brexit and the Future of the Union' (14 April 2019) 3 <https://www.instituteforgovernment.org.uk/sites/default/files/publications/tony-blair_0.pdf> accessed 30 April 2019.
[147] Lord Sumption (n 90) 19, 21.
[148] DG Boyce, 'Dicey, Kilbrandon and Devolution' (1975) 46 The Political Quarterly 280, 283: 'one of the decisive factors was the increasing successes of the S.N.P. and Plaid Cymru in the General Elections of February and October 1974.'

> State, likewise, retained formidable powers. Westminster's sovereignty was underlined by retention of the prerogative to legislate on any devolved matter. The judicial committee of the Privy Council would arbitrate in any dispute between the centre and the territories.[149]

There was, of course, political benefit in these reforms,[150] but at the more abstract level, the foundation of these institutions was in direct opposition to Dicey's view that 'there was not, and could not be, a halfway-house between Union … and separation'.[151] At its core, devolution was based on 'the assumption that it is not necessary to have a uniform system of government in the whole United Kingdom.'[152]

This was the core of the Kilbrandon Report which argued, in frank opposition to Dicey's claim that decentralisation would spell the end of the UK, that 'a generous measure of devolution … would be more likely to strengthen than to weaken the unity of the United Kingdom'.[153] It made the reasons for devolution plain: there was a need to recognise the diversities within the UK.[154] The communities that were to be represented by their own institutions were apparently not only sufficiently distinct but were also sufficiently self-aware to know self-government was the right path for them. However, Backbenchers who opposed these proposals ensured that the so-called 'Cunningham Amendment' to the legislation was passed, setting minimum thresholds for supporting them at 40% of the registered electorate; in the event, none of these thresholds were met. Following the defeat of these proposals the Conservative Party, led by Margaret Thatcher, took power with their agenda of small, heavily centralised government.[155] Devolution, seen by

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[149] O'Neill (n 142) 73. These institutions were to have powers 'transferred' (as opposed to a reserved powers model).
[150] ibid 72.
[151] Boyce (n 148) 281.
[152] ibid; *Report of the Royal Commission on the Constitution 1969 – 1973* (Cmnd 5460, 1973) paras 1109–1110.
[153] *Report of the Royal Commission on the Constitution 1969 – 1973* (n 152) para 1152.
[154] According to the report, Wales was 'a distinctive community with its own needs and interests, and with a culture and language to preserve and foster' (para 1152, p 343) and devolution 'would be a response to national feeling in Scotland and Wales' (at para 1102, p 331)
[155] O'Neill (n 142) 73: 'Motivated by a blend of strident British nationalism and a neo-liberal agenda, Thatcherism set about harnessing the machinery of the state to a supply-side, business-led offensive against the postwar bipartisan settlement. As such, subnational identity was discounted as misplaced sentimentality, an obsolescent provincialism,

them as an 'irritating anomaly',[156] was postponed until the New Labour government of 1997. Although, therefore, the scheme fell through, 'Kilbrandon's proposal for asymmetrical devolution set the pattern for future reform of the Kingdom.'[157]

CONCLUSION: A 'UNION-STATE'[158]

This chapter's aim has been simple: to highlight the turmoil and evolution at the heart of the UK's territorial constitutional history and demonstrate the diversities that have long existed within it. This has an equally simple purpose; it demonstrates that the union is not permanent, nor is it inflexible. Instead, it is the fragile child of political convenience and organic development. Certainly, the United Kingdom has frequently demonstrated a formidable survival instinct, but its survival has not been the design of constitutional architects or 'founding fathers', it has been the result of political pragmatism and flexible approaches to ideas. However, the insistence that the UK is immune from major constitutional renewal, that its flexibility makes it uniquely equipped to avoid upheaval or crisis is clearly unfounded. Whatever one's views on the matter, it is clear that the UK's struggles with self-rule have never been handled with the delicacy or competence they deserved and, for the people of Ireland at least, this had devastating consequences. The fundamental lesson that this chapter hoped to impart is that the territorial constitution *matters*. The union's governance structures have an impact on nearly every aspect of life here, and these in turn are shaped by our perception of the union, its permanence and its fragility. It is not accurate to think of the union as eternal or ancient, nor is it wise to think that it can simply be disregarded or

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and devolution was staunchly resisted as another tier added to already overblown bureaucracy.' Interestingly, consider how the Labour party's 'lurch to the left— an instinctive reaction both to defeat and to Thatcherism—saw a reversion instead to a convenient ideological prescription which explained territorial nationalism as a class reflex by the economically deprived, socially disadvantaged periphery against the beneficiaries of the core economy.'

156 James Mitchell, 'Conservatives and the Changing Meaning of the Union' (1996) 6 Regional and Federal Studies 30, 39.

157 O'Neill (n 142) 72. There were some adjustments made nonetheless, however: 'A Scottish Affairs Select Committee was added in 1979 as part of UK wide administrative reforms, rationalised by London, in response to nationalist stirrings, as proof positive of the special 'Scottish dimension' of British government.': ibid 70.

158 This term was popularised in Neil MacCormick, *Questioning Sovereignty* (OUP 1999).

replaced with some notion that it is 'one nation'. Rather, it is far more helpful to understand it as a consensual union of peoples and nations, whose history and cultures have brought them together, but who still retain (and enjoy) diversity. Admitting this is no bad thing and is a far more accurate picture of its history. However, the UK's reticence to internalise the existential question, to ask its *raison d'être*—the ultimate cause of its rejection of federalism—has had consequences before and may have more yet. To some, the British attitude towards federalism is 'neurotic', resulting in a situation where 'misconceptions and myths blind British political elites to its potential benefits'.[159] This chapter has argued, in spite of such opposition, that once it is understood that federalism is not merely a state-form it is clear that its rejection in the UK is no longer justified. The essential claim of the 'federation' is that it is a state that applies federalism; however, this seems to be unhelpful—it requires us to think about those states that do or do not express a particular set of institutional forms, usually legalist in their tradition, that actually tell us very little about the constitution or the political community it represents. It also encourages us to demark powers and allocate them exclusively to particular branches, rather than encouraging interaction between them. The scholarly contribution can very quickly become a taxonomical or categorisation exercise that asks us to identify those states that do not meet its contentious definition as 'unitary' or *sui generis*. When one understands federalism as a deeper claim, however—the rejection of homogony, and the encouragement of dialogue between recognised communities—one can access an analysis that is far more insightful. All of these things, it has been suggested, are demonstrated in the UK's history. Although it has demonstrated a great capacity for change, a near-permanent state of flux and the constitution's ability to flex as necessary, its instability and political pragmatism have caused as many problems as they have solved. The UK has no untarnished record; sometimes it has been successful, sometimes it has not, and it is not possible to extrapolate any formula for uniform success. The battle for the UK's territorial constitution has been long and, it would seem,

[159] David Marquand, 'Federalism and the British: Anatomy of a Neurosis' (2006) 77 The Political Quarterly 175, 83.

remains unfinished. The following chapter interrogates that next stage of the UK's constitutional trajectory through which it would finally recognise and constitutionalise its internal diversities: devolution.

CHAPTER 2

CONTEMPORARY DECENTRALISATION: SELF-RULE ACHIEVED?

'The UK is acquiring some federalist characteristics despite official denials.' [160]

INTRODUCTION

It is often suggested that the UK's territorial arrangements, to their detriment, lack the kinds of structured certainty, balance and 'grand planning' that would be present in a more purposively far-reaching and general overarching scheme, of the kind found in federations. Such deliberate structured architecture would not easily be tolerant of the asymmetry and imbalance that epitomises the UK's territorial constitution. However, the UK's constitutional idiosyncrasies—incrementalism, 'flexibility' and its dependence on political realities—make wholesale and symmetrical reform unlikely. Further, the UK's territorial history has not, as has already been demonstrated, been marked by equality or a willingness to engage in the broader existential questions but rather an inclination to circumvent these by preferring political bargaining and a persistent focus on 'unitarianism'. This chapter will explore the realities of the UK's contemporary territorial government structures; it argues that devolution represents an important transformation in architecture that is arguably more constitutional in nature than it may have been intended to be. Rather than a purely incremental, political settlement—though it has been anything but settled—devolution has significantly changed the fabric of the UK, with much of the progress being positive, embracing of subsidiarity and strengthening democratic legitimacy of new and existing power structures. However, the full opportunities of devolution as a model for shared government

[160] Martin Laffin and Alys Thomas, 'The United Kingdom: Federalism in Denial?' (1999) 29 Publius: The Journal of Federalism 89, 106.

and positive, cooperative intergovernmental interaction are not yet being realised, held back by Westminster's continuing emphasis of hierarchy and unitary parliamentary sovereignty.

Although these elements are arguably restricting devolution's transformative power, they are a natural consequence of its origins. Firstly, its *ad hoc*, asymmetrical 'design' is in line with a desire to ensure the devolved arrangements themselves mirror the demand-led nature of devolution itself, responding to regional desires for powers and, particularly evident in England, providing no devolution where none is demanded. Secondly, it is arguably the result of the focuses on autonomy, self-government and subsidiarity, rather than an attempt at implementing a broad scheme of shared rule—devolution was intended to only make sense in each instance within the territory concerned, not 'generally'—but it is not clear to what extent this can viably be maintained. The challenge of perspective also remains apparent: on one reading, devolution is a way of allowing a particular territory a particular set of powers to govern itself in a particular way, with little interaction with other territories or adjustment required at the centre. After all, if devolution is a method of accommodating difference and encouraging self-rule, then the way the territory in question conducts itself is of little interest to the centre that gave it (or restored to it) its powers in the first place. On this view, seeking a 'grand plan' to devolution is therefore misplaced: each territory can govern itself in a different way and has different powers in line with its differing needs. The alternative conception is of devolution as a partial reconstitution of the United Kingdom, an uneasy middle-ground towards a federal Britain where asymmetry must give way to uniformity just as political expediency and short-term ambition must step aside for a more considered assessment of the future of the union. On this alternative view, the diversity-recognition dynamics of devolution must give way to ideas of integrity and symmetry of power allocation, though not necessarily in pursuit of uniformity.

This chapter will explore how both of these perspectives are balanced in the UK's contemporary territorial constitution. There are examples of the first in the initial allocation of competences and institutional designs, and the explicit rejection of some kind of federal settlement in favour of an informal arrangement. There are examples of the second in judicial dicta which sees the settlement as a broader, more fundamental and 'coherent' arrangement, as well as in scholarly attempts to make sense of devolution in the round. However, even if this is the direction of travel for devolution, there remain significant caveats such as the persisting supremacy of Westminster and the often necessary or unavoidable asymmetry between the territories and arrangements.[161] It will be seen that the constitution has been so obviously affected in all its corners that continuing to see devolution as an improvised, unimportant 'quirk' of politics is no longer tenable, and that policies that pursue this line of disregard are increasingly difficult to justify. For a time, this view might have been reasonable; minor powers were transferred (especially for Wales), the sovereignty of Parliament at Westminster was unchallenged, and the constitutional character of the devolved institutions was either non-existent or clearly subsidiary.[162] This is clearly no longer the view of the territories who are increasingly powerful, increasingly in search of guaranteed constitutional character, and increasingly fundamental to government in the UK. That England may be of a different view of the constitution, especially given its socio-political and economic dominance within the union (and in Westminster) is becoming a source of tension. These disagreements may have always existed, but devolution has institutionalised and, arguably, empowered them through the creation of forums for debating and legislating for policy divergence, and the demonstration of a territory's ability to govern itself. If these disintegrative pressures are to be managed, Westminster must take note.

[161] This is, of course, especially pertinent for Northern Ireland.
[162] Though it is considered in depth below, consider *Whaley v Watson* [2000] SC 340.

The following chapter is divided into two parts: the first explores the origins of devolution as the political ambition of a ruling party that had long since seen the government benches, and which was meant to reflect the desires of each particular territory. This first section explains how devolution came about, and how it has evolved into its current form in each of the territories. It will be seen that the pace and extent of devolution has varied across the union, with England and the 'centre' receiving little attention as the full significance of devolution was not properly recognised.

The second section explores what these changes mean for the UK's constitution. This second section first undertakes an evaluation of the space 'between' the different settlements, considering how the different institutions interact and where they (can and do) cooperate. This is undertaken in three parts, the first is concerned with how the settlements have been shaped, the second with consent and 'sovereignty' and the third considers intergovernmental relations. This section then goes on to consider how what 'constitutional space' devolution now occupies and in the eyes of the judiciary, gleaning principles that seek to respect the constitutional significance of devolution from the case law. Finally, this chapter looks to a particular case-study—withdrawing from the European Union—as a demonstration of a new trend, or perhaps an anomaly, that illuminates the extent to which normative hierarchy persists within the UK's territorial constitution. It also highlights how, despite the courts' willingness to provide institutional respect, and the existence of political channels for cooperation, the immense power of Westminster, when coupled with a mentality to deploy it, remains able to disregard the fundamentality of the territorial constitution.

Origins, Purposes and Implementation

Before the many facets of devolution can be explored, it is beneficial to consider the context in which one of the most significant constitutional reforms in the UK's history took place, what

factors informed its implementation and what its purpose was. Indeed, as will be seen, many of the idiosyncrasies of the reforms have their origins in the thinking and processes that led to devolution. Of course, the first thing to note is that devolution was not—as it is hopefully already clear—the first attempt at institutionalising territorial government in the UK, indeed, Lord Hodge has spoken of how '[devolution] can be seen as the resumption of the interrupted business of 1880-1914'.[163] However, after a long period of largely centralised government, devolution needed more than continuity to be justified.

As with the last attempt at devolution in the 1970s, the years preceding it had led to economic decline and neglect for the peripheries of the union as heavy industries collapsed, despite the prosperity of financial industry intensely focussed in London and the South East. The 1980s' economic centralisation was also closely entwined with governmental centralisation, with layers of government being perceived as unnecessary impediments to growth. This led, as before, to a growth in dissatisfaction and in secessionist movements. The Scottish Constitutional Convention and the Campaign for a Scottish Assembly served as indicators of this rising sentiment and a desire, if not to have more territorial powers, to give those powers more democratic legitimacy. Faced with this challenge, not only was there a sense that Westminster was out of touch, there was also a sense that it was uninterested:

> After years of apparent indifference by London, territorial identity had acquired political momentum. The mindset of Scotland, and to a lesser degree in Wales, had irrevocably shifted. There was now resistance to gesture politics and to cosmetic attempts to flatter but not assuage territorial sensibilities.[164]

[163] Lord Hodge (n 115) 6; Linda Colley, *Acts of Union and Disunion* (Profile Books Ltd 2014).
[164] O'Neill (n 142) 76.

This 'indifference' was epitomised by a conservative, English dominated, unitary vision of government. That, infamously, John Redwood——the Secretary of State for Wales—refused to sign documents that had been prepared in Welsh, was the embodiment of Westminster's disinterested approach towards the territories.[165] The result was a spike in support for nationalism in Scotland and Wales. New Labour, by the time it was taking aim at Whitehall,[166] was fully aware of both the dangers of independence and the need, for its own electoral advantage, to undercut the secessionists. Its renewed promise of devolution was intended to be popular with those who might otherwise support nationalism. Tony Blair personally was not overly interested in constitutional revolution but recognised the danger of independence both on the Union as a whole, and on the Labour party's electoral future, relying as it does on support outside of England.[167] This was paired with the fact that Labour's vision is closely aligned with the progressive politics of the nationalist parties. According to Tony Blair,

> 'The purpose of devolution was to bring about a new settlement between the constituent parts of the UK so that decision making was brought closer to the people who felt a strong sense of identity. And politically, also, to ward off the bigger threat of secession.'[168]

It is clear even here that, in stark contrast to the thinking that informs confederation, there was no grand constitutional plan, no exercise in constitutional theory akin to the *Federalist,* instead, principle was to be balanced with pragmatism and electoral expediency, as Blair put it 'essentially, I took the view that it was right in principle and necessary politically'.[169]

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[165] Roger Masterman and Colin Murray, *Constitutional and Administrative Law* (2nd edn, Pearson 2018) 366; O'Neill (n 142) 76.
[166] 'New' Labour had made a number of considerable changes in order to make itself electable. It had altered 'Clause IV' of its Constitution to remove its commitment to socialist nationalisation in 1995, and 'was prepared to jettison excess ideological baggage and rethink its radical mission. It was now more favourable to post-modern notions of community politics, cultural pluralism and democratic empowerment.': O'Neill (n 142) 77.
[167] Institute for Government, 'Devolution at 20' (2019) 2. The Conservative Party is far less reliant on voters outside of England, in 2015 they were able to form a majority government with just one seat in Scotland.
[168] Institute for Government, Interview with Blair (n 146) 3.
[169] ibid.

Although O'Niell suggests that the intentions behind this second round of Labour-supported devolution were informed by some different factors to those that had informed its previous attempt,[170] there were clearly similarities between the two proposals. At the very least there remained the absence of any appetite for wholesale, broad-stroke constitutional reform; instead, devolution was to be a system of incremental developments across the territories, responding to each of their needs and desires. Lord Falconer was clear, for instance, that 'the government was not concerned about the question of 'constitutional symmetry' but was committed to the practical accommodation of 'difference and rough edges'.[171] Certainly, devolution was not initially seen as part of a grand constitutional reform that would remake the United Kingdom in a new way. Instead, as Bagehot noted in the *Economist,* it was led by no general White Paper.[172] The fragmentation of the approach to reform was indicated by Lord Irvine of Lairg who found that '[t]he strands [of reform] do not spring from a single master plan, however much that concept might appeal to purists,'[173] indeed, some have suggested it was therefore not the exercise in deferential, collaborative engagement with the territories it might ought to have been.[174] The Lord Chancellor, however, dismissed the claim that the reforms lacked coherence, suggesting that such proposals did not need to be read together in order to be in some way 'coherent', the priority was on meeting needs, rather than on creating a new constitution:

> 'Many of the measures are responses to particular problems which are the product of lengthy and complex prehistories of their own… In a sentence: our objective is to put in place an integrated programme of measures to decentralise power in the United Kingdom, and to enhance the rights of individuals within a more open society.'[175]

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170 O'Neill (n 142) 76.
171 Aughey (n 143) 274.
172 Bagehot [Adrian Wooldridge], 'A Heath Robinson Constitution' *The Economist* (18 April 1998) 34.
173 Lord Irvine, 'Government's Programme of Constitutional Reform', *Annual Constitution Unit Lecture* (1998) 8.
174 Kenneth MacKenzie, 'How the Reforms Came About' in Andrew McDonald (ed), *Reinventing Britain: Constitutional Change under New Labour* (University of California Press 2007) 116.
175 Lord Irvine (n 173) 8.

The lack of grand planning was precisely because these proposals were incremental, independent and contextual, and of underplayed significance. This has continued to be the view of Westminster when it comes to devolution and; as Tierney rightly indicates, '[t]he system of devolution since 1998 can be characterised as ad hoc, reactive and incremental.'[176] Many of the flaws in devolution's institutional balance and intergovernmental relations, as well as difficulties for the judiciary when it comes to making sense of the settlement(s), stem from this essential claim, that is most popular at the constitutional 'centre':[177] 'Ministers and the political class generally are treating the government's constitutional reform programme as a restructuring of *existing* political culture rather than seeing it as the cultural transformer it is almost certainly going to be.'[178] In fact, devolution was laboured under '[t]he assumption that a separate political space already existed in Scotland, that it merely required a democratic decision-making body'.[179]

This pursuit of *legitimacy* is, however, precisely the real significance of devolution.[180] There are many ways to 'do' governmental decentralisation;[181] government can be outsourced, or it can be shared across institutions and none of this need be done on territorial lines.[182] If it is to be done territorially, powers can be distributed on an exclusively executive level, with implementation of

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[176] Tierney (n 24) 104.

[177] For instance, as will be explored further later, Lord Hope's claim that the settlement was designed to be 'coherent, stable and workable' is clearly at odds with Lord Falconer's view that its coherence was never an ambition, nor a necessity: *Imperial Tobacco Ltd v The Lord Advocate* [2012] UKSC 61, [2013] 1 AC 792 [14] (Lord Hope).

[178] Peter Hennessy, 'Re-Engineering the State in Flight: A Year in the Life of the British Constitution, April 1997-April 1998', *unpublished lecture at Lloyds TSB Forum* (1998); (MacKenzie [n 174] 127).

[179] This 'suggests that the federal notion of separate but equal authorities might have been palatable to devolution campaigners. A different settlement was sought and established in Wales.': Ailsa Henderson, 'A Porous and Pragmatic Settlement: Asymmetrical Devolution and Democratic Constraint in Scotland and Wales' in Andrew McDonald (ed), *Reinventing Britain: Constitutional Change under New Labour* (University of California Press 2007) 154.

[180] Others also indicate that federalism, in much the same vein, is not interested in the extent or otherwise of divergence or uniformity, but in the devolution of power for legitimacy reasons. See for instance Charlie Jeffery, 'Devolution in the United Kingdom: Problems of a Piecemeal Approach to Constitutional Change' (2009) 39 Publius: The Journal of Federalism 289.

[181] For devolution as the democratisation of pre-existing administrative territorial differentiation, see Hennessy (n 178); (MacKenzie [n 174] 127).

[182] See RAW Rhodes, 'The Hollowing out of the State: The Changing Nature of the Public Service in Britain' (1994) 65 The Political Quarterly 138.

centre-made rules being pushed to the fringes.[183] Yet, despite a potential (and temporary) caveat in the form of early Welsh devolution, this is not what devolution has been about. It is, crucially, the decentralisation of *democratic* authority. However much or little this may have been recognised at the outset, it has set in motion a serious constitutional transformation that is, as far as some readings go, irreversible and also more closely tied to federalism than its implementation (or implementors) might admit.[184] Indeed, devolution did, in reality, come to 'embody', and enhance certain important principles:

> Devolution embodied the tendency 'towards decentralisation as a means of achieving greater democratic legitimacy within the component parts of the union state'. It also expressed the trend toward 'a right to self-determination within the UK constitution' which can be seen as 'a modern reconciliation of the need to pay regard to the wishes of the people (as a group as well as individually)'.[185]

These principles came to be represented at a number of levels. For instance, although 'the establishment of the Scottish Parliament would enable necessary reforms to Scottish law to be made with more urgency (as well as better scrutiny)',[186] the institutions themselves 'were designed to give expression to the distinct identities of the devolved nations and to foster a more collaborative, consensus-based politics than at Westminster'.[187] In this way, devolution has, arguably, come to embrace a more collaborative, multi-layered constitutional atmosphere than that which is nurtured in the 'sovereign' Parliament and its primary partner, England. This is represented by its inducement by external developments that

[183] Henderson (n 179) 152; Jeffery also makes the distinction between territorial administration and territorial politics, the latter being the real significant change of devolution, one that is not sufficiently recognised at the centre: Charlie Jeffery, 'The Unfinished Business of Devolution' (2007) 22 Public Policy and Administration 92.
[184] See Mark Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, OUP 2019).
[185] Aughey (n 143) 275.
[186] Institute for Government (n 167) 60.
[187] ibid 19.

> have facilitated political change. Reorganisation of the EU's structural funds (1988 and 1992) to ensure some compensation for peripheral regions, outwith the mainstream of Single Market expansion, favours member states with a concerted regional strategy. The European Union offers a fiscal inducement, and provides an increasingly important institutional arena, for regional interests. Multi-level governance encourages regions to operate on their own initiative, above as much as within member states, with inducements to participate in trans-European networks, to liaise directly in the Committee of the Regions, and to work directly with the Commission.[188]

Despite the claim that 'there has never been a clear articulation of the overall purpose of devolution',[189] devolution is clearly an attempt at constitutionalising regional variation and allowing the different peoples of the UK to govern themselves. In this sense it is clearly an expression of subsidiarity and, at least implicitly, recognition that the different parts of the UK want (or need) different things. Interestingly, and in contrast to a federal model, the actual implementation of devolution varied across the territories. This may itself be an expression at a higher level of policy: if the territories are different and need to be able to implement different policies, why should the actual structures of decentralisation be uniform? An obvious instance where this has been necessary and beneficial, given its unique circumstances, can be found in Northern Ireland, where a unique history has made its challenges quite different to those faced in the other 'parts'[190] of the UK. In traditional British constitutional fashion devolution has been crafted so as to avoid wholesale reform, existential re-evaluation of the role of the union and the shape of the nation, and a lack of any genuine commitment to stable long-term change. However, this has created a complex system that seems to be in constant flux, and which has often failed to be recognised as the constitutional revolution it really is. Further, devolution, though regionally sensitive, seems to

[188] O'Neill (n 142) 77.
[189] Tierney (n 24) 120.
[190] This is the terminology of the Constitutional Reform Act 2005, see Lady Hale, 'Devolution and The Supreme Court – 20 Years On' (Scottish Public Law Group 2018, Edinburgh, 14 June 2018) 1.

lack any overarching clear message of what the union is for. The asymmetric, idiosyncratic approach to decentralisation seems, therefore, to underplay the constitutional importance of the new arrangements. In practice, as will be seen, it has arguably amounted to the fundamental transformation it was never intended to be. Because of the differentiated, asymmetric settlement in place, and the differing nature and pace of the changes that have been undertaken, the different pathways of each territory can be considered in turn.

Scotland

It is well known that 'devolution is a process, not an event'[191] and, though it may not be clear whether this is to its credit, it is certainly true that devolution has undergone a great deal of change in its short life. In Scotland, the system in place has been probably the most stable—the creation of a powerful regional Parliament,[192] it being bestowed with legislative powers[193] and adopting a 'reserved powers' model—have all remained fairly secure from the outset.[194] This is probably largely because of the amount of thought that went into Scotland's settlement. A six-year Scottish Constitutional Convention[195] was able, in light of its history, to draw up provisions for a new/re-established legislature to be founded. Proposals to (re-)establish a legislature were accepted in a referendum held in September 1997 where a decisive majority supported them. The Scotland Act 1998 which can be conceived as either restoring democracy or building a new democratic

[191] Ron Davies, *Devolution: A Process Not an Event* (Institute of Welsh Affairs 1999). This terminology has been adopted elsewhere: David Torrance, '"A Process, Not an Event": Devolution in Wales, 1998-2018' (House of Commons Library 2018) Briefing Paper CBP 08318.
[192] Making it 'one of the most devolved territories anywhere in Europe': Tierney (n 24) 104.
[193] *Cf* this to the position at the beginning of Wales' devolved life, below.
[194] David Torrance, 'Reserved Matters in the United Kingdom' (House of Commons Library 2019) Briefing Paper CBP 8544 7. There was prior experience of the 'reserved' powers model in British (and imperial) constitutional experience, having its genesis in the Colonial Laws Validity Act 1865. The Government of India Act 1919 and the Malta Constitution Act 1932 are examples of statutes allocating powers in this way.
[195] Many major stakeholders participated, including representatives of different religious groups and all the major political parties in Scotland attended apart from the Conservative Party, who, in government at the time, attempted to challenge (unsuccessfully) the local authority's financing of the Convention: *Commission for Local Authority Accounts in Scotland v Grampian RC* [1994] SC 277. The SNP withdrew upon the rejection of independence as an option: Peter Lynch, 'The Scottish Constitutional Convention 1992-5' (1996) 15 Scottish Affairs 1.

foundation for a subnational unit, created the Scottish Parliament at Holyrood. Rather than 'enumerating' which powers the institution would have, the 1998 Act listed only those powers which were 'reserved' to Westminster.[196] In Schedule 5 of the Act, these reserved powers are divided into categories of 'general reservations' and 'specific reservations'. *Inter alia* general reservations include international relations and aspects of the constitution; specific reservations include areas such as energy, employment and home affairs. The 1998 Act's Explanatory Notes provide detail about what is reserved and why and on top of these reservations, Schedule 4 lists those 'protected enactments' that are beyond the Scottish Parliament's power to 'modify'.[197] The powers that have not been reserved map quite closely onto those powers previously possessed by the Secretary of State for Scotland, or those powers that had historically (such as education) been regulated without much attention from Westminster. Although in the 1978 legislation the Secretary of State retained a powerful influence, being able to step in effectively 'on the basis that he did not like the policy that was being followed by the Scottish Parliament',[198] the 1998 Act created a more muted power, with the Secretary of State being able instead to prevent Royal Assent if a Bill's provisions 'make modifications of the law as it applies to reserved matters and which the Secretary of State has reasonable grounds to believe would have an adverse effect on the operation of the law as it applies to reserved matters.'[199]

Although the devolved settlement in Scotland has been largely stable, this does not mean it is without flexibility. Section 30 of the 1998 Act allows Orders in Council to make 'modifications of Schedule 4 or 5' which are 'necessary or expedient', subject to approval from both legislatures.[200] This has been used to make some adjustments to the settlement, as has amendment of the Act

[196] See The Constitution Unit, *Scotland's Parliament: Fundamentals for a New Scotland Act* (UCL 1996) 35–39.
[197] This is because the Scottish Parliament can modify Acts of the Westminster Parliament so far as this is within devolved competence, see Elliott (n 184).
[198] HC Deb 12 May 1998, vol 312, col 274.
[199] Scotland Act 1998, s 35
[200] See Torrance, 'Reserved Matters in the United Kingdom' (n 194) 14–15.

itself by subsequent unilateral legislation from Westminster. The Scotland Act 2012, for instance, which devolved certain additional tax-raising powers, permitted the devolved regulation of airguns and reserved the issue of Antarctica.[201] There is also room for Scottish involvement in some central areas of policy, such as granting of foreign aid or encouraging investment from abroad.[202] Of course, regardless of the extent of devolved competence, Westminster retains the right to legislate in devolved areas per s 28(7).[203]

Following the 2014 independence referendum in Scotland, the Smith Commission was assigned with the task of reviewing devolution in Scotland; it recommended an extension of fiscal powers, welfare devolution along with an extension of other competences, and enshrining the permanence of the Scottish Parliament in legislation. Westminster implemented some of the changes recommended by the Smith Commission in the Scotland Act 2016; the Scottish Parliament was given powers to legislate for its own elections,[204] greater tax powers,[205] welfare[206] and its permanence has been formally codified.[207] On top of this, further powers in policy areas relating to energy, employment, [208] abortion[209] and Tribunals[210] have been devolved. Though these reforms have certainly increased devolved autonomy, Professor Tierney has suggested that this Act is 'yet another instalment of a process of radical reorganisation of territorial authority carried out on the

[201] There were also changes made to reduce the role of the Supreme Court in light of the independence of the Scottish legal system, meaning criminal references to the Supreme Court can only be considered there on the compatibility issue and then referred back, though this also now excludes Convention or EU law compatibility, adding further complication to the 'already variable geometry formed by the devolution arrangements': Brice Dickson, 'Devolution' in Jeffrey Jowell, Dawn Oliver and Colm O'Cinneide (eds), *The Changing Constitution* (8th edn, OUP 2015) 256.
[202] See David Torrance, "'The Settled Will"? Devolution in Scotland,1998-2018' (House of Commons Library 2018) Briefing Paper CBP 08441 16–17.
[203] See below for an extensive analysis of the operation of this provision.
[204] Ss 3-10
[205] Ss 13-19
[206] Ss 22-31
[207] S 1: It is not to be abolished except with a referendum. Statutory recognition of the Sewel convention is given in s 2. The exact legal value of this enshrined permanence in light of Westminster's sovereignty is doubtful, but it certainly has some *constitutional* significance. This is discussed below.
[208] SA 2016, Part 4
[209] S 53
[210] Clause 39

hoof.'[211] Although devolution in Scotland has often coincided with further devolution elsewhere, particularly in Wales, there has been 'no serious attempt to link these two processes'.[212]

Wales

The devolved system adopted in Wales was shaped largely, as in Scotland, by the nature and extent of the support for territorial differentiation, demonstrated at the referendums held before the proposals were implemented. In Wales they were supported, but only marginally, with only 50.3% voting 'yes' to devolved democracy. Despite it not necessarily being clear that limited support indicated a preference for weaker powers, rather than expressing a preference for strong ones, the Government of Wales Act 1998 that followed did not devolve nearly the same powers as those devolved to Scotland. Instead this Act devolved those powers previously held by the Secretary of State to a new, unicameral 'Welsh Assembly', which many have suggested functioned more like a local authority than a regional legislature.[213] The Welsh Assembly had extremely limited powers and, rather than being a fully-fledged legislature, it operated exclusively as an executive body, with secondary law-making powers and no separate government or cabinet of its own. The source of law in Wales after the first wave of devolution there remained unquestionably Westminster. Not only was the structural arrangement quite different, but so too was the functional allocation of powers; in Wales these powers were 'conferred'[214] to the Assembly, rather than reserved to Westminster, clearly representing an institution that was distinctly subordinate to its counterparts elsewhere, at least as it was initially created. The limited powers of the Assembly, combined with its dependence on Westminster, have meant that since its initial, albeit toothless origins, Welsh

[211] Tierney (n 24) 104.
[212] ibid.
[213] Consider Jeffery (n 180).
[214] Aroney has commented on the significance of the power conferral models on the understanding of the institutions in question in Nicholas Aroney, 'A Federal Constitution for the United Kingdom? Constitution-Making within a Westminster-Derived Context' (2013) 9 Jus Politicum 1, 8–9.

devolution has been playing 'catch-up' with the other devolved institutions, seeing its power strengthened and its reliance on Westminster reduced.

Although a *de facto* 'Welsh government' had effectively been developed inside the assembly since 2002, the Government of Wales Act 2006, the result of cross-party support for a change of arrangements,[215] formalised the separation of powers between the executive and the legislature. The Assembly was thence able to seek 'legislative competence orders' to extend its competences with the consent of the Secretary of State for Wales and the Westminster Parliament.[216] Clearly the Assembly was still far more at Westminster's service than the Scottish equivalent was, with legislative competence orders being 'cumbersome', unpopular and ultimately short-lived.[217] The 2006 Act, however, also included an alternative approach to legislative devolution, allowing the Assembly primary law-making power. This could only be obtained after a confirmatory referendum, which was held in March 2011. The result was persuasively in favour of more powers being devolved and as a consequence the Assembly was granted legislative competence in over 20 'subjects', conferred in Schedule 7 of the Act. The Silk Commission, which was tasked with reviewing the progress and success of Welsh devolution recommended moving to the reserved powers model adopted in Scotland[218] and its findings were largely implemented in the Wales Act 2014[219] which made provision for a referendum for the devolution of fiscal matters, and a more formal separation of the Welsh Government. This referendum was quickly undertaken and resulted in the devolution of more fiscal powers.

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[215] Torrance, 'Reserved Matters in the United Kingdom' (n 194) 17.
[216] Government of Wales Act 2006 s 95.
[217] Torrance, 'Reserved Matters in the United Kingdom' (n 194) 17.
[218] Commission on Devolution in Wales, 'Empowerment and Responsibility: Legislative Powers to Strengthen Wales' (2014) ch 4. The same had been recommended by the Richard Commission in 2004: 'Report of the Richard Commission' (Commission on the Powers and Electoral Arrangements of the National Assembly for Wales 2004) 250.
[219] The change in language, even in the title of the Act, from 'Government of Wales' to simply 'Wales' in 2014 is notable, arguably reflective of a broader shift in the perceived significance of the institution. Of course, this also added to the symmetry of the arrangements, bringing it more into line with Scotland and Northern Ireland, which had both been accordingly respected at the outset of devolution in 1998.

In 2015 Westminster accepted that a shift towards the reserved powers model was overdue [220] and implemented this change along with the recognition of the Assembly's permanence, and of a separate body of Welsh law, in the Wales Act 2017. The Act also contains provision for a future change of the Assembly's name to 'Parliament'. The powers reserved to Westminster are broadly similar to those in Scotland, generally bringing Wales more into line with the other institutions even if some do not consider it finished business.[221] Interestingly, the reforms to Welsh devolution are the only pieces of Welsh-specific legislation the UK Parliament has passed since devolution[222] and have meant that Welsh devolution has gone from an afterthought to an established, permanent part of the territorial constitution. This newfound fundamental importance is clearly not what was intended by the original settlement at its inception, mirrored by its lack of electoral support, but the forces of symmetry, competition[223] and integrity have led to an arrangement which can only be regarded as constitutionally significant,[224] though still not (yet) on the same level as Scotland or, next to be considered, Northern Ireland.

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[220] HM Government, *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales* (Cm 9020, 2015) para 2.1.2.

[221] Torrance, 'Reserved Matters in the United Kingdom' (n 194) 19: 'In October 2016, the National Assembly's Constitutional and Legislative Affairs Committee concluded that the (then proposed) list of reservations did not amount to "a lasting or durable settlement", predicting that both the UK Parliament and Assembly would "need to return to address these matters sooner rather than later"… The Welsh Government also argued that justice measures ought to be removed from Schedule 7A. In September 2017, the then First Minister Carwyn Jones established a Commission on Justice in Wales to review the operation of the justice system in Wales, including the prospect of a separate jurisdiction. It is scheduled to report in 2019. …In a 2015 report, the Wales Governance Centre suggested that: 'A Welsh legal jurisdiction might be distinct, but need not be separate from that of England, nor need it necessarily be established as a devolved matter under the control of the National Assembly. (It might be both separate and devolved, but that is a policy choice.) It could remain a 'reserved' matter, under Westminster's control, and continue to share judges, legal professions and other institutions with England."; Constitutional and Legislative Affairs Committee, 'Report on the UK Government's Wales Bill' (National Assembly for Wales 2016).

[222] Institute for Government (n 167) 61.

[223] For instance, Wales' First Minister said that he saw 'no reason why the Smith Commission offer in Scotland should not be made to Wales': House of Commons Political and Constitutional Reform Committee, *The Future of Devolution after the Scottish Referendum* (HC 2014-15, 700) para 29, Evidence Q366.

[224] For an interesting indicator of the significance of the Welsh settlement see: The Supreme Court, 'UK Supreme Court to Sit in Wales This Summer' (22 July 2019) <https://www.supremecourt.uk/news/uk-supreme-court-to-sit-in-wales-this-summer.html> accessed 1 March 2019.

Northern Ireland

Northern Ireland is usually considered somewhat enigmatic within the UK's constitutional arrangements, with devolution being no exception.[225] Irish devolution was, of course, marked first by the Home Rule debates that caused such trouble for Dicey at the turn of the 20th Century and Ireland's subsequent, protracted and violent detachment from the union.[226] Legislation to create a single devolved Irish Parliament had been unsuccessful and so The Government of Ireland Act 1920 had intended to do in two steps what its predecessor had been unable to do in one by allocating powers to the Northern and Southern Parliaments, with more to be later transferred to a devolved united Ireland. These plans were scuppered, however, when Ireland became independent and only the Parliament in the North gained powers from Westminster.[227] However, this Parliament was controlled overtly by protestant-unionists, leading to discriminatory policies against Catholics and nationalists, and '[i]n 1972, the UK Government formally requested that control of law and order in Northern Ireland be transferred—or reserved—to Westminster. When the Government of Northern Ireland refused, Stormont was at first prorogued and then abolished in 1973'[228] as a result of 'the Troubles'.[229] The Northern Ireland Constitution Act 1973 made provision for a power-sharing assembly based on the competence allocation arrangements of the 1920 Act, but (despite remaining law) no assembly was successfully established and so the Northern Ireland Act 1974 made provision for the same distribution of power but for devolved competences to be held by the Northern Ireland Department under the direction of its Secretary of State.[230] The challenges that face and divide the island of Ireland are deep and complex, and cannot be done adequate justice here, but it is certain at the very least that the 'Irish Question' has

[225] Lady Hale, for instance, notes the unique complexities of Northern Ireland's case: Lady Hale (n 190).
[226] See Tulloch (n 11); Lord Sumption (n 90).
[227] For a notable example of the Northern Parliament's operation, see *Gallagher v Lynn* [1937] AC 863.
[228] Torrance, 'Reserved Matters in the United Kingdom' (n 194) 8; David Torrance, 'Devolution in Northern Ireland, 1998-2018' (House of Commons Library 2018) Briefing Paper CBP 08349 14. See also Schedule 6 of the Northern Ireland Constitution Act 1973
[229] 'The Troubles' is a sadly unrepresentative name for a conflict that killed more than 3,600 people and injured thousands more; yet it remains the most conventional terminology for this period.
[230] Torrance, 'Reserved Matters in the United Kingdom' (n 194) 8–9.

remains a contentious issue that has been a considerable influence on the devolution arrangements in Northern Ireland.

The entire 'power-sharing' arrangement currently in place is predicated on the 'Good Friday Agreement' that ended the Troubles. The result of peace-brokering between Prime Ministers, leaders and representatives of the communities and even an American President, the resultant agreement relies on the institutionalised sharing of authority between the protestant, unionist; nationalist, republican and catholic communities, as well as the cooperation of the Irish Republic and the UK governments.[231] The system in place in Northern Ireland is, as a consequence of its troubled past, unique in a number of ways. Firstly, it depends on the institutional recognition of its different communities. For instance, it requires the parties to declare, and therefore maintain, their allegiances within the communities since these are important for the formation of the power-sharing Executive and for various voting requirements. Arguably, though this requirement helps ingrain these differences rather than diminish them, it may well be a long-term ambition to diffuse the differences between the communities and it is certainly understandable that the initial arrangements operated the way they did and, indeed, it was a remarkably successful peace-brokerage. However, it has led to some unusual systems, such as the 'petition of concern' procedure, which is helpfully explained in a recent Institute for Government report:

> Any 30 members can also create a requirement for a vote to be taken on a cross-community basis by tabling a 'petition of concern'. Thirty members is more than 40% of either the unionist or nationalist groups in the Assembly, so the 30 signatories to a petition of concern are effectively able to exercise a veto. … The petition of concern process has been used on a range of different issues, including votes on issues of symbolic importance to one community or the other. For example, in 2001, members used a petition of concern to block a Democratic Unionist Party (DUP) motion that Easter lilies, a nationalist symbol, should not be displayed at Stormont. In other cases, members have used a petition of concern on contested policy

[231] The Agreement is also heavily dependent on EU regulation and ECHR adherence, as well as the British Irish Council.

questions. In November 2015, a majority of Northern Ireland Assembly members voted in favour of same-sex marriage, but the DUP used a petition of concern to stop the proposal from being approved.[232]

The second definitive characteristic of the Northern Irish arrangements is the model of power-allocation there. In Northern Ireland this follows a three-fold system, in contrast to the models utilised in Scotland and Wales. There are 'transferred' matters, 'excepted' matters[233] and, finally, 'reserved' maters. The first of these is straightforward, being the list of competences bestowed on Stormont. The second are also easily comprehended, being the powers retained at Westminster.[234] These powers are negatively defined, as in Scotland, with everything being transferred but that which is not. However, the third category is the most interesting and, confusingly, does not have the same meaning as in the other statutes. Here the powers that are envisaged as potential candidates for future transfer are listed.[235] This threefold system allows for far more flexibility than the systems in place elsewhere throughout the union and is in place in order to encourage the successful operation of the Northern Ireland Assembly. Reserved matters can be transferred, as long as there is cross-community support, by Orders in Council but, as is the case in Scotland and Wales, the allocation of competences is ultimately flexible because of Westminster's technically unbridled legislative competence. Under s 4 of the 1998 Act, the Secretary of State can draft an Order in Council to move a matter from 'reserved' to 'transferred' or from 'transferred' to 'reserved'.[236]

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[232] Institute for Government (n 167) 29; Consider also ibid 30: 'In 2014, Sinn Féin raised objections to [a] bill and tabled a number of amendments. The DUP used a petition of concern 47 times to block these amendments. When the bill reached the final vote, the Social Democratic and Labour Party (SDLP) decided to join Sinn Féin in a petition of concern. Together, they brought down the whole bill on a cross-community vote. The UK Treasury fined the Executive for failing to comply with budgetary rules and the Executive and Assembly eventually agreed that the legislation should be taken through Westminster instead.' The 'Fresh Start Agreement' which attempted to improve the Petition procedure so it would only be used exceptionally with an explanation has not been fully implemented.

[233] Schedule 2 of the Act.

[234] The terminology here is, confusingly, inconsistent with the other devolution statutes.

[235] Schedule 3 of the Act.

[236] On the 12th April 2010, most policing and justice powers were removed from Schedule 3 (and therefore transferred to the Assembly). Because of the sensitive nature of policing and justice, this transfer also needed cross-community support, which it duly received. Corporation Tax is due to be removed from Schedule 3 by the Corporation Tax

The third idiosyncrasy of the devolution settlement in Northern Ireland is how frequently the power-sharing Executive has collapsed as the communities looked to more extreme representatives, though there has seldom been a return to violence. The governance of Northern Ireland by direct rule from Westminster through orders in council[237] has been controversial, as has its ability to legislate in the absence of an Executive since 2017. For instance, if the Executive is not restored by 21st October 2019, same-sex marriage (an especially sensitive matter in the region) will be extended to Northern Ireland on 13th January 2020 as a result of Westminster passing legislation requiring the Government to extend same-sex marriage regulations to include Northern Ireland. Self-rule, it seems, has not been a cure-all in the region but it is certainly a channel for progress, and a pathway through which solutions might be found.

Northern Ireland paints a unique picture of the power and purpose of devolved government in the UK. The adaptability, flexibility and tolerable asymmetry of the system has allowed the development of an arrangement which is in tune with its context, rather than being simply pasted as part of a more general, less contextually sensitive scheme. Not only has devolution been able to respond to local demands in its implementation, but it has itself enabled a community to govern itself, and to trust itself to govern, along with concerted support from external forces such as the UK and Irish Governments. The resultant 'ownership' of governance in the troubled region has been a powerful protector of peace there, but the settlement's technicalities and reliance on division in the community have led to stagnation and collapse, with the return of direct rule being both unfavourable and frequent. Despite occasional governmental side-lining of Northern Ireland's challenges, the general trend of mutual interest in the restoration and protection of the regional government—or at least in peace in the region—is positive and has led to insights that

(Northern Ireland) Act 2015 when it is commenced. This will only occur once the Executive is restored and can demonstrate the sustainability of its finances.

[237] These, on average, took 90 minutes to pass through the Commons: Institute for Government (n 167) 61.

could be of benefit in other divided regions around the world. Although the benefits and challenges of self-government, it can safely be claimed, are epitomised in the experiences of Northern Ireland, one part of the UK remains broadly untouched by legislative independence and self-government. England, along with the constitutional 'centre' at Westminster have been largely insulated from the changes that have marked the rest of the UK.

England and 'the Centre'

England represents yet another enigma, or even a 'black hole'[238] at the core of devolution, having no territorial legislature of its own beyond that in Westminster which consists of representatives from all corners of the union,[239] while being by far the largest of the four countries with considerable dominance and influence in those institutions in London. England, through the sovereign Parliament it dominates, has ultimate power to remake the entire constitution, even on some readings without the support of any of the devolved regions.[240] The asymmetry of the UK, and the sheer dominance of England, both in terms of its multilateral relations with the other nations, and in terms of its bilateral relations with Westminster, have historically proved quite the problem for decentralisation. For instance, an English Parliament, it is often suggested, would prove a genuine rival to Westminster's dominance representing almost as many people as the latter.[241] If England is treated as simply an equal to the other nations—for instance if a national veto system were adopted—the people of England would be sorely underrepresented; and if the intergovernmental systems in place are only representative of population, the other devolved

[238] Dickson (n 201) 268.
[239] Although Sinn Féin, the largest of the Nationalist parties in Northern Ireland, refuse to take up their seats in Westminster since to do so would require them to make an oath to the Crown which they, as republicans, do not recognise.
[240] This is more plausible when it is remembered that the constitution remains the exclusive competence of Westminster, but the persistence of Westminster's sovereignty is considered in detail below.
[241] Michael Burgess, 'Constitutional Change in the United Kingdom: New Model or Mere Respray' (1999) 40 South Texas Law Review 715, 730–3.

nations will struggle for a voice in policy. In order to circumvent this conundrum, the devolution reforms set in motion by New Labour, and developed by successive Conservative-Liberal Democrat and Conservative governments have largely avoided the problem, making very few changes to English regional government. Yet this approach leaves much to be desired. It is one of the great ironies at the heart of devolution that '[a]ll is change in the state of the Union except in its dominant English Heartland'.[242] It is here, both in terms of the English territory/ies, and in terms of the constitutional centre at Westminster, that there has been minimal adjustment for devolution.[243] Ironically, this has meant that the most significant player in the Union has been able to maintain its unitary perspective—England only knows one layer of democratic government within the UK and has never demonstrated a desire for more than this.[244] If England's role and status within the union makes its representation as a nation problematic, there are also problems with subnational devolution too:

> Social geography complicates the politics of subnational governance. One persistent stumbling block to setting up regional authorities is the absence in England of either a distinct cultural identity or obvious geographical boundaries demarcating distinct regional entities, in marked contrast to the well-defined historic nations.[245]

This alternative approach of dividing England into composite regions, and governing those separately to the 'nation', was piloted in the North East at the outset of devolution but collapsed in the wake of comprehensive rejection.[246] The trial, which was intended to be replicated across the English regions was then abandoned, the lack of any clear, obvious or meaningful territorial

[242] O'Neill (n 142) 89.
[243] Institute for Government (n 167) 4: 'Whitehall and Westminster were also barely affected, at least initially, and the UK and devolved governments created few formal mechanisms for joint working between them.' ibid 6: 'England has largely been ignored in the devolution process'
[244] Arguably, as was indicated at the outset of this paper, there is an exception in local councils and authorities that have elections, but the focus here is on the higher levels of government.
[245] O'Neill (n 142) 90.
[246] See Dickson (n 201) 268.

distinctions in England have meant that it has historically been unreceptive, or at best, ambivalent towards any kind of large sub-state democracy. The exception to this rule of course being the implementation of a mayoral system in some of England's biggest cities[247] and the 'Northern Powerhouse' which, perhaps, mark a new phase in regional devolution there.

The asymmetry of representation has been significant in the Westminster Parliament where English Members were not able to vote on laws affecting exclusively devolved territories (in those areas where competence had been devolved) while Members representing devolved territories could vote on legislation affecting only England, since no competences had been removed from Westminster's immediate business. This paradox has been called 'The West-Lothian Question',[248] and has been the basis of much debate concerning the procedures and systems that are operable in that Parliament.[249] Opponents suggested that if English MPs were to be granted a veto (or equivalent power) the historic equality between MPs would be broken, with some Members having powers or voting rights that others did not possess. However, despite these concerns, a system of 'English votes for English Laws' (EVEL) has been put in place so that English-only issues can be voted on by only English MPs. This solution, that Tony Blair rejected over his own Party's more 'idiosyncratic British solution',[250] is an example of reactive devolution, where solutions are apparently improvised as problems arise. The Institute for Government has made the following claim about its operation:

> '… EVEL has not made a significant difference in practice. There have been no cases of English MPs voting against a law that the House of Commons as a whole has voted for, and the process – for now – is a barely noticed technicality. An academic study found that

[247] London and Manchester, for instance, both have Mayors that are checked by a committee.
[248] Named after the constituency of the MP who first noted the problem in the chamber.
[249] For instance, see Roger Masterman and Robert Hazell, 'Devolution and Westminster' in Alan Trench (ed), *The State of the Nations 2001: The Second Year of Devolution in the United Kingdom* (Imprint Academic 2001); Vernon Bogdanor, 'England May Pay Dearly for Staying United with Scotland' *Financial Times* (24 July 2014).
[250] Institute for Government, Interview with Blair (n 146) 9. 'But', he continues 'I feel it works better than the alternative'.

> proceedings on English parts of bills, which take place a new English 'Legislative Grand Committee', lasted an average of around two minutes… EVEL has "failed to provide meaningful English representation at Westminster—particularly in relation to supplying England, and its MPs, with an enhanced 'voice'"… if the parliamentary arithmetic were different, for instance if a future Labour-led government had a UK-wide majority but no majority in England, then the EVEL process could become more significant, since English opposition MPs would hold a veto power over legislation in important areas of domestic public policy.'[251]

This problem has been highlighted in the past, when New Labour were only able to pass legislation for foundation hospitals and university tuition fee top-ups in England with support *outside* of England, because a majority of English MPs voted against the policies.[252] The effects have been relatively minor, but EVEL, used for 35 bills since 2015, represents 'a rare example of a procedural change that the UK Parliament has made as a result of devolution.'[253] Indeed, other changes have not been forthcoming[254] and EVEL represents more the exception than the rule.[255] It might be argued that the principle role of the centre in light of decentralisation might need to be more adhesive than it may have been previously, yet there has been 'no concentration upon the central institutions of the state and their role in binding the union together'.[256] There have been other changes, but these have largely been 'reactive and responsive',[257] rather than wholesale and general. The enhanced role of the territorial select committees, and the persistence of the territorial

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[251] Institute for Government (n 167) 63. See also The McKay Commission, 'Report of the Commission on the Consequences of Devolution for the House of Commons' (2013).
[252] Institute for Government, Interview with Blair (n 146) 9.
[253] Institute for Government (n 167) 63.
[254] Tony Blair himself has subsequently recognised the significance of his Party's neglect of the English question: 'one of the things when you do devolution is you've got to look for ways of binding the UK together. If I have a criticism of our own position on this it's that we didn't look for enough ways, culturally and socially, of keeping the UK feeling we're part of one nation at the same time as being individual nations within that collective. That's why I was always resistant to more concessions to English nationalism because I think the Union only works if you accept that there is an essential imbalance between England, that it is so much more dominant than all the other parts of the UK put together.': Institute for Government, Interview with Blair (n 146) 9.
[255] There have been occasional indications that the House of Lords could be reformed to take on the character of a federal territorial chamber, where the territories are more equally represented, the Labour Party Manifesto for 2015 for instance argued for an 'elected Senate of the Nations and Regions to replace the House of Lords' but this has never gained significant traction: Labour Party, 'Britain Can Be Better: Labour Party Manifesto 2015' 84–85.
[256] Tierney (n 24) 102.
[257] Masterman and Hazell (n 249) 197.

Secretaries of State and their departments are examples of central devolutionary dynamics, but arguably these changes only scratch the surface of the disintegrative problems posed by decentralisation. Although some effort is being made—even in the Supreme Court, devolution has left its mark[258]—the centre must accommodate for the changed constitution, even if it is held back by Westminster's unitary-oriented conception of devolution. Indeed, 'the focus since 1997 has been almost exclusively upon autonomy and not on the role of the devolved territories at the centre'.[259] EVEL, for instance, *does* take account of the more fundamental realities of devolved government, marking 'arguably the first, and certainly the most significant, adjustment to the central law-making process that takes account of the reality of devolution' recognising that 'a more formalised categorisation of state-wide legislation on the one hand and 'devolved' or sub-state legislation on the other—a distinction common to most federal systems—will become part of the UK's constitutional architecture'[260]

Clearly then the place of England and the 'constitutional centre' is complicated.[261] England operates as a 'sub-national' territorial unit of its own, like the other devolved territories, while also representing the majority of the 'unitary' state; it operates as the 'union' level where the centre conducts policies on international relations and other typical federal level policies;[262] and it also operates as a meeting point for the devolved institutions: in the House of Commons, every devolved territory is represented and debates on policies that can affect all of them. It might be suggested that these problems would be reduced if England could be distinguished in some way

[258] Constitutional Reform Act 2005 s 27(8): 'In making selections for the appointment of judges of the Court the commission must ensure that between them the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom.'
[259] Tierney (n 24) 105.
[260] ibid 116.
[261] Even this terminology itself is contentious, perhaps demonstrating the difficulties in abandoning on 'unitary' language.
[262] Locke for instance identified the 'federative power' as 'the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth': John Locke, *Two Treatises of Government* (Awnsham Churchill 1690) s 146.

from the 'centre' and, though EVEL makes some attempt to do this, broadly this seems impossible. Yet, either way, it is clear that insufficient attention has been given to the union as a whole, or to the impact of devolution in one region on the others.[263] It is England where the unitary conception of the UK is most powerful, and it is there that, given the influence of the Westminster Parliament, this conception is most problematic. England continues to demonstrate tendencies endorsing the incremental non-fundamental approach to devolution, an approach that does not seem to require wholesale reform at the centre. The risk, however, is that, as Tierney suggests, the pursuit of self-rule without adequate provision for shared-rule, or even any kind of formal engagement between the centre and peripheries, risks making 'the UK state seem, respectively, irrelevant and unreachable to the devolved territories',[264] something that, as history demonstrates, cannot afford to be unnoticed. The devolution 'settlement' is, it has been seen, a complex system of variable territorial powers that is applied, for better or worse, differently in each region. There are 'gaps' in the arrangements—namely in England and the constitutional centre—and there has been an evolution of the system towards a more symmetrical, constitutionally fundamental approach. In order to justify this claim, and to explore how effective (or not) devolved government has been in practice, the reality of devolved government must be unpacked.

DEVOLUTION IN PRACTICE: 'A PROCESS'

The role of the previous section was to indicate 'what' devolution in the UK *is*. Broadly, it described the various arrangements in each of the regions and emphasised some core features of them—asymmetry, territorial sensitivity, and change over time among them—rather than analysing how devolution has worked in practice. This latter issue is the function of the following section which looks to unpack the 'how' of devolution by interrogating its operation, with

[263] Tierney (n 24) 104; House of Lords Constitution Committee, *Proposals for the Devolution of Further Powers to Scotland* (HL 2014-15, 145) para 13.
[264] Tierney (n 24) 105.

particular focus 'between' these institutions. First, the ways in which the institutions interact and cooperate will be considered, to review the extent to which hierarchy continues to persist in the UK's territorial constitution and how dependence on political mechanisms alone does, in fact, leave room for cooperation to develop, but that the political will to encourage cooperation does seem to be lacking. Second, the case-law that has arisen as a consequence devolution must be considered to understand how the judiciary—so important in federal systems—makes sense of the new constitution and of their role within it. Though the political nature of much of the arrangements, and Westminster's retention (at least as a matter of pure law) of sovereignty might seem to warrant a dismissive approach towards devolution, the courts, it will be seen, have taken an approach that is far more textured, thorough and nuanced, and which understands the true constitutional significance of devolution. However, it will finally be seen that even the judicial, protectionist understanding of devolution is not enough to protect it from central institutions that feel willing to use the reliance of devolution on political mechanisms to disregard devolved autonomy.

Interaction, Cooperation and the Persistence of Hierarchy

Devolution, it has been noted, is asymmetric, *ad hoc,* and leaves Westminster firmly in a position of dominance. Couple this with the politically charged nature of any institutional interaction where the leading parties disagree on matters of policy or have political gains to make from maltreatment or failed negotiation, and the opportunities for cooperation seem limited. In the event, the power of political constitutionalism and its restraints, such as those sourced in convention, on viably 'constitutional' activity, despite Westminster's retention of legal supremacy, actually have the ability to enable effective intergovernmental interactions. There are examples, however, of political dependency providing a stumbling block for the effectiveness of intergovernmental relations, as

has been the case for the Joint Ministerial Committees which have provided an ungainly, temperamental source of intergovernmental engagement. But the shape of the settlements, and Westminster's deference to the territories in terms of both the initial arrangements and their development (particularly in Wales) has demonstrated a willingness to understand their problems and play a positive role in implementing their solutions. However, departure from the European Union—importantly meaning the removal of a fundamental source of law from the UK, upon which much of the devolution settlement depends—has demonstrated a willingness in Westminster to return to unitary, Anglo-centric ideas of the constitution. This section will consider these elements in turn, first briefly addressing Westminster's shaping of the settlements themselves, before secondly considering its retention of 'sovereignty' and the impact of the concept of legislative consent. Thirdly, extra-legal intergovernmental relations will be considered to interrogate what political mechanisms exist to allow for cooperation between the different legislatures before the judicial approaches are considered.

1. Shaping the Settlements

Westminster has proven itself as a principally deferential force in the creation and amendment of the devolution settlements. Firstly, in legislating for and subsequently adhering to the referendum results, Westminster has demonstrated a keen desire to ensure the devolution arrangements are not 'imposed' but develop where they are needed and in response to the needs of the territory in which they operate.[265] This is not a point that needs labouring at this stage since it has been made already, but, beyond the laudable goals of self-government and subsidiarity inherent in any process of devolution, Westminster's responsiveness to desire and need has demonstrated an impressive willingness to cooperate with local communities and stakeholders, if not governments. Secondly,

[265] 'In November 2013 the UK government admitted that it "has not continued pursuit of regional devolution because previous efforts have not received popular support". That is why it abolished Regional Development Agencies and Government Offices for the Regions.': Dickson (n 201) 269.

once the settlement was in place, adjustments and modifications, many of which have been outlined above, have themselves also been in pursuit of regional need, rather than as a symptom of systematised symmetry. For instance, the changes to the Welsh Assembly's powers from secondary to primary legislative authority were led by demands there, and ultimately a referendum. The arrangements beforehand were heavily reliant on cooperative interaction between the two institutions, but this proved more of an extra hurdle to effective government than an additional source of legitimacy. The same can be said for Northern Ireland where police and justice powers were only transferred with the consent of the communities represented there (indeed, this is something required by the Northern Ireland Act 1998).[266]

The flexibility of the devolution arrangements, sometimes criticised as making them unstable, has actually often led to positive interaction between the different legislatures. For instance, the Order in Council used under s 30 of the Scotland Act 1998[267] enabled the two legislatures to provide for the Scottish independence referendum of 2014 by temporarily extending the powers of the Scottish Parliament as they were needed. This also conveniently circumvented the problematic and fundamental question of whether Holyrood possessed the competence to legislate for such a referendum.[268] However, it is significant that the progress of devolution has been in (generally) one direction: more powers are incrementally granted with little consideration for how these might add to centrifugal and disintegrative pressures in the union.[269]

[266] The reservation of Antarctica in 2012 in Scotland may have been more of a correction in hindsight than a needs-based modification.
[267] Scotland Act 1998 (Modification of Schedule 5) Order 2013.
[268] Essentially there are two lines of thought on this: A referendum might be within competence if its main purpose is to gauge public opinion, but it might be beyond competence if its main purpose was to provide for independence (since the Union and Constitution are both reserved matters). See Aroney, 'Reserved Matters, Legislative Purpose and the Referendum on Scottish Independence' (n 1).
[269] Tierney (n 24) 102.

2. Legislative Consent and Sovereignty

While the 1998 Scotland Bill was on its way through the Commons, Tam Dalyell suggested that '[t]he idea that Westminster is the ultimate authority will be little more than a formality'.[270] There is not sufficient space to expand in great depth on the nature and meaning of parliamentary sovereignty in the UK, but it is worth indicating that a number of developments have changed how it is understood (at least judicially) in the UK. Firstly, judicial interpretation has, arguably, applied various restrictions on the operation of sovereignty. Second, developments since the late 20th Century such as membership of the EU have led to practical limitations on the operation of Parliament's ability to 'make or unmake any law whatever'[271] and thirdly (and connectedly) Parliament has sometimes *itself* put limitations of some kind on its own legislative omnipotence.[272] These developments, particularly the passing of the devolution legislation, might seem to impinge upon Parliament's sovereignty; for instance, devolved legislation can override aspects of UK legislation that resonate in devolved areas: 'an Act of the [Northern Ireland] Assembly may modify any provision made by or under an Act of [the UK] Parliament in so far as it is part of the law of Northern Ireland.'[273] Westminster has in response gone to lengths to ensure its 'ultimate authority' is protected and each piece of foundational devolution legislation contains a provision protecting its supremacy.[274] Such an assurance, though it may seem superfluous under conventional

[270] HC Deb 28 January 1998, vol 305, col 367.
[271] These developments, it is worth remembering, have not always been in the direction of 'juridification', but instead in the direction of 'constitutionalisation' as political and even parliamentary oversight of arbitrary power in the constitution has grown, rather than merely judicial power. See Roger Masterman, 'Labour's "Juridification" of the Constitution' (2009) 62 Parliamentary Affairs 476.
[272] Consider the obiter comments (especially of Lord Hope and Lord Steyn) in *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262.
[273] Northern Ireland Act 1998 s 5(6); Mark Elliott, 'The Principle of Parliamentary Sovereignty in Legal, Constitutional and Political Perspective' in Jeffrey Jowell, Dawn Oliver and Colm O'Cinneide (eds), *The Changing Constitution* (8th edn, OUP 2015) 41: 'Equivalent propositions hold true in relation to Acts of the Scottish Parliament and Acts of the Welsh Assembly: they can modify repeal or replace UK legislation in so far as it affects matters upon which those devolved bodies are competent to legislate.'
[274] Scotland Act 1998 s 28(7); Government of Wales Act s 107(5); Northern Ireland Act s 5(5).

constitutional theory, is nothing new.[275] It is well known that while the Scotland Bill was being passed Lord Sewel, a minister in the Scotland Office, suggested that he 'would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament.'[276] This convention operates more as a restriction on legitimate legislative action, rather than as a limitation of any formal legislative *competence* but, nonetheless, it has caused controversy in legal and political circles. Indeed, there are differing views on not only the implications of the convention, but also on what it means.[277]

The Sewel convention can be seen as a political constraint on the otherwise apparently unbounded power of the Westminster Parliament, stipulating that Westminster may only legislate in an area within devolved competence with the permission of the legislature concerned.[278] However, as explored further below, this operates merely in the political sphere, and is not judicially

[275] Boyce (n 148) 286: 'the 1920 Government of Ireland Act explicitly states in section 75 that "the supreme authority of the Parliament of the United Kingdom shall remain unaffected and undiminished over all persons, matters and things in Ireland and every part thereof."'

[276] HL Deb 21 July 1998, vol 592, col 791.

[277] Tierney (n 24) n 51: 'It is notable that the Sewel convention is set out here in relation to "devolved matters". This is a more narrow definition than that recognised by the UK Government in Devolution Guidance Note 10, which suggests that the convention covers a proposed bill which: 'contains provisions applying to Scotland and which are for devolved purposes, or which alter the legislative competence of the Parliament or the executive competence of the Scottish Ministers.' …The UK Government seems to have accepted that the convention covers bills that will change the legislative competence of the Scottish Parliament either restrictively or in an empowering way. The Scottish Government also takes an expansive view of the convention. …These differences in understanding could be a source of future disagreement and potentially of legal dispute.'

[278] The Institute for Government explains the procedure effectively: 'The normal process followed in cases where legislation at Westminster falls within the scope of the convention is that there is consultation between the UK and devolved administrations before publication of the legislation. When the bill is introduced, devolved ministers set out their view of whether and why consent should be given in a 'legislative consent memorandum'. In some cases, this leads to amendments being made in the UK Parliament to deal with devolved concerns. The devolved legislature then votes on a 'legislative consent motion', which can either grant or decline to grant consent to the bill. The UK Parliament has the power to ignore the denial of devolved consent and to legislate regardless, but has very rarely taken this option.': Institute for Government (n 167) 64. It also explains the operation of the 'legislative consent motions' (LCMs): '… 202 Acts of Parliament (including 17 private members' bills) over the first two decades of devolution (until the end of March 2019) had been subject to consent motions in at least one of the three devolved legislatures. This includes 155 bills in the case of Scotland, 61 for Wales and 65 for Northern Ireland (a figure that would have been significantly higher had it not been for the regular collapses of devolution in Northern Ireland). In 60 cases, consent had been voted on in more than one of the devolved legislatures, including 19 where consent had been granted in all three nations.': ibid.

enforceable, even though it has now been codified in statute.[279] In political practice, though, the Sewel convention has proven quite fertile ground for cooperation:

> [O]n just 10 occasions has consent been denied, in part or in full.
>
> On other occasions, however, concerns raised by devolved ministers have led to amendments or other commitments at Westminster to resolve devolved objections. For example, the Public Pensions Act 2013 as originally introduced would have applied to certain pension schemes under devolved control. The Scottish Government argued that it had not been consulted sufficiently and informed the UK Government that it would not recommend consent. The bill was amended to take out the Scottish provisions, and no consent motion was ever debated. Also in 2013, the UK Government had the Marriage (Same Sex Couples) Act amended to remove Northern Ireland from certain provisions, in light of opposition at the devolved level.
>
> The Scotland Act 2016 and Wales Act 2017 were also held up by threats to withhold consent, until agreement was reached on the financial implications of the legislation… The Northern Ireland Assembly has only voted against consent once, on the Enterprise Bill in 2016, which was then amended to exclude Northern Ireland from the disputed parts. There was a similar outcome when the Scottish Parliament withheld consent from parts of the Welfare Reform Bill 2011/12: UK ministers agreed to amend the bill and consent was secured…
>
> The normal pattern since 1999 has been for Westminster to respect the Sewel Convention, and for the devolved bodies to grant consent to UK bills where required, often after concessions by UK ministers over the terms of the legislation.[280]

Use of the Sewel convention has not always been branded as cooperative,[281] but the result of these developments in sum is that, as Professor Elliott suggests, although Parliament's legal powers remain technically unfettered the 'constitutionality' of its activities is more open to question. As a

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[279] Section 2 Scotland Act 2016 inserted into the Scotland Act 1998 s 28(8) which reads: 'But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.' Section 2 of the Wales Act 2017 inserted into the Government of Wales Act 2006 s 107(6) equivalent, terminologically sensitive terms.

[280] Institute for Government (n 167) 65–6.

[281] Andrea Batey and Alan Page, 'Scotland's Other Parliament: Westminster Legislation about Devolved Matters in Scotland since Devolution' [2002] Public Law 501, 501: '… in nearly the first three years of its existence the Scottish Parliament [had] agreed almost as many Sewel motions as it has enacted bills. This has prompted criticism that it is simply abdicating its legislative responsibilities to Westminster. Letting powers drift back to Westminster is the way one commentator described it in The Scotsman. "This is Scotland's Parliament; let Scotland's Parliament legislate" is the nationalist plea.'

result, the position is more one where Westminster '*shares* such competence with devolved institutions',[282] than one where exclusive legislative domains are completely insulated, with the Sewel convention operating as a more collaborative mechanism in practice than might have been first thought, mediating these levels of government.

A further attempt that has been made to limit Westminster's practical omnipotence, and to enhance some element of institutional respect, is the enshrined permanence of the devolved legislatures. Following the Scottish independence referendum, as part of a raft of changes made to bolster Scotland's place in the union, s 1 of the Scotland Act 2016 inserted a s 63A into the Scotland Act 1998, apparently enshrining the permanence of the Scottish Parliament.[283] These permanence provisions were also transposed onto the Welsh settlement,[284] yet the problem of asymmetry continues to be an issue here since, because of the likelihood of direct rule in Northern Ireland and because of devolution's acceptance the self-determination of the Northern Irish population (and its provision for unification), permanence clauses are not likely to be forthcoming there.[285] There is debate over the legal effect of these provisions and there is no need to explore all the possible legal implications here: It may be that the Westminster 'Parliament is seeking to limit its own competence in a way that the courts may seek to uphold in future',[286] but even without hypothesising about the judiciary's interpretation of the legislation, especially given their hesitation since *Jackson*[287] to challenge Parliament's view of its own sovereignty, it is at the very least clear that these provisions have political—and constitutional—significance. The permanence provisions

[282] Elliott (n 273) 40.
[283] Section 63A reads: '(1) The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom's constitutional arrangements. (2) The purpose of this section is, with due regard to the other provisions of this Act, to signify the commitment of the Parliament and Government of the United Kingdom to the Scottish Parliament and the Scottish Government. (3) In view of that commitment it is declared that the Scottish Parliament and the Scottish Government are not to be abolished.'
[284] Wales Act 2017 s 1.
[285] Thanks to Stephen Tierney for this point: Tierney (n 24) 114.
[286] House of Lords Constitution Committee, *Scotland Bill Report* (HL 2015-16, 59) para 36.
[287] *R (Jackson) v Attorney General* (n 272).

clearly appear 'to be moving the United Kingdom in a federal direction, attempting to crystallise by way of statute, if not written Constitution, the status and powers of the devolved institutions in a way that has hitherto not been the case'.[288] Whether these limitations have legal resonance is therefore a narrow misrepresentation that conceals the more significant point:

> If … the UK Parliament wanted to diminish the powers of the devolved legislatures, or to enact legislation overriding laws passed by the devolved legislatures, or even to abolish those legislatures, nothing in *law* prevents it from doing so. However, the binary analysis yielded by this sort of exclusively legal analysis must be supplemented by considering the matter in broader constitutional terms. When such a perspective is adopted, it becomes clear that the devolution schemes both acknowledge and conjure into life a constitutional principle—that of devolved autonomy—whose fundamentality is increasingly difficult to dispute. This demands, among other things, that the authority of devolved institutions be respected, and implies the general impropriety of UK legislation impinging upon self-government within the devolved nations.[289]

If they are to have legal effect then this claim is solidified, amounting to an exceptional step towards recognition. It is *possible* to argue that such political promises are without teeth if such provisions were to have no legal effect, but they do in themselves demonstrate a substantial commitment to the devolved institutions. What they require, remains however, the political will to support devolved autonomy. Statements such as the permanence provisions might *encourage* this mentality, but they cannot (especially if they are of dubious legal effect) protect devolution in its absence. It is at the very least unclear what exists in law that would be able to protect devolution against a Westminster minded to disregard it. This trend, of political mechanisms to protect devolution which are of themselves positive, but remain contingent on attitudes of cooperation, is also evident in the nature of intergovernmental relations.

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[288] House of Lords Constitution Committee, *Proposals for the Devolution of Further Powers to Scotland* (n 263) para 77.
[289] Elliott (n 273) 42–3. For a comparative example (from Canada) of how this might work in legal terms, see ibid 45.

3. Intergovernmental Relations and Joint Ministerial Committees

One of the most significant demonstrations of hierarchical element of devolution is in intergovernmental relations.[290] Here the impact of dependence on political sensibilities and pleasantries, the lack of formal (or legal) mechanisms—arguably both the result of devolution's *ad hoc* implementation—and the immense dominance of Westminster and Whitehall when these informalities can be manipulated have all made for a system that is not nearly as effective as it could be, even if the creation of the systems themselves is a positive step. A consistent criticism of devolution is that there are no avenues for 'the expression of legitimate political and territorial differences, negotiation, dialogue and dispute resolution.'[291] However, avenues *have* from time to time existed, but have simply been very ineffective. As O'Neill suggests, '[d]evolution has undoubtedly unsettled territorial relations. Implicit in this favourable allocation was an incentive for these regions to remain committed to the union state. Devolution has undermined that bond, weakening loyalties on both sides'[292] and there is therefore a real need for intergovernmental relationships to develop to counteract these forces. The most notable opportunity for this has come in the form of the Joint Ministerial Committees (JMCs), which are set out in Memorandums of Understanding, themselves informal political agreements with no legal significance.[293] These can be convened on a number of issues, or as forum for meetings between the heads of each institution. The JMCs have come in and out of use periodically and have proven particularly ineffectual when the different institutions have been governed by the same Party. This was the case when Labour had control over the devolved institutions in Britain and at Westminster and

[290] See generally Nicola McEwen, 'Still Better Together? Purpose and Power in Intergovernmental Councils in the UK' (2017) 27 Regional and Federal Studies 667.
[291] Justice Committee of the House of Commons, *Devolution: A Decade On* (HC 2008-9, 529) para 105.
[292] O'Neill (n 142) 85. The recognition of the importance of the union has been distilled throughout devolution, though the instruments for making this work have been few: 'There are many matters which can be more effectively and beneficially handled on a United Kingdom basis. By preserving the integrity of the United Kingdom, the Union secures for its people participation in an economic unit which benefits business and provides access to wider markets and investment and increases prosperity for all. Scotland also benefits from strong and effective defence and foreign policies and a sense of belonging to a United Kingdom.': Scottish Office, *Scotland's Parliament* (Cm 3658, 1997).
[293] These were founded by HM Government, *Memorandum of Understanding* (Cm 4806, July 2000). See also Richard Rawlings, 'Concordats of the Constitution' 116 Law Quarterly Review 257.

preferred to handle disputes internally, rather than through the official forums of the JMC, even though these have mostly been informal themselves. However, when the different institutions have been led by different parties, the JMCs have provided an effective way for managing disputes, cooperating and developing policies. The EU proved to be an avenue of particular utility for JMCs, with the JMC (Europe) being convened consistently. Brexit has also proven an opportunity for JMC collaboration, being an avenue for policy-exchange, even where the administrations have had fundamental disagreement.[294]

However, the effectiveness of the JMCs has been undermined by inconsistent sittings, a lack of transparency or binding weight to their decisions and, because of the asymmetric nature of the settlement, it has proved difficult even for JMCs to coordinate multilateral agreements, being better suited to individual bilateral relations between Westminster and each devolved institution.[295] As a result, 'in the eyes of the devolved administrations at least the way the JMC system works at present is not satisfactory';[296] indeed the problems with the JMCs are largely illustrative of the broader problems with the UK's intergovernmental arrangements namely because of Westminster's pooling of legal sovereignty and the informality of intergovernmental relationships. The temperamentality of the JMCs, their lack of legal oversight or any more fundamental constitutional entrenchment is not disconnected to Westminster's perception of the subordinate

[294] Institute for Government (n 167) 69: 'After an initial flurry of activity, these quickly ceased to meet, suggesting that there was little interest in developing common approaches in policy areas that were now the responsibility of the devolved institutions After 2008, a new all-purpose JMC (Domestic) was established, although that too met infrequently and ceased operation in 2014. A separate 'Finance Ministers Quadrilateral' forum also meets occasionally. The only ministerial committee that has met regularly through the whole two decades of devolution since 1999 is the JMC (Europe)… In October 2016, a new JMC (EU Negotiations) was established, with a remit to "seek to agree a UK approach to, and objectives for, Article 50 negotiations" before starting the withdrawal process. However, after the governments failed to agree on how to proceed with Brexit, this new body ceased to meet between February and October 2017. This marked a low point in relations between the governments. In March of that year, the Prime Minister Theresa May invoked Article 50 without having developed a common 'UK approach' to Brexit. This prompted the Scottish Government to make a renewed push for an independence referendum – only to be rebuffed by the Prime Minister.' House of Commons Public Administration and Constitutional Affairs Committee, *Devolution and Exiting the EU: Reconciling Differences and Building Strong Relationships* (HC 2017-19, 1485).

[295] Jim Gallagher, 'Intergovernmental Relations in the UK: Co-Operation, Competition and Constitutional Change' (2012) 14 British Journal of Politics and International Relations 198.

[296] House of Lords Constitution Committee, *Inter-Governmental Relations in the United Kingdom* (HL 2014-15, 146) para 50.

nature of the institutions themselves. Though, as will be seen, the judicial position embodies a more textured, nuanced approach which sees the devolved institutions as technically subordinate to Westminster, but not unimportant; the position in political disputes is very different, with Westminster's supremacy apparently being at the expense of any significance afforded to the devolved institutions. This, in turn, is leading to the breakdown of already lacklustre institutional collaboration, and the increasing denial of the significance of the devolved legislatures is made more problematic by their heightening role in the constitution. For instance:

> Since 2016, UK and devolved ministers have disagreed on various aspects of Brexit and its impact on devolution arrangements. To resolve these differences, they have created new forums involving representatives from the different administrations. But these forums have operated in a sporadic fashion, often at the whim of UK ministers, to the frustration of the devolved administrations.[297]

The role of politics in intergovernmental dialogue is not restricted to the JMCs. For instance, there is still a dialogue between the territorial Departments of State, but this does not detract from the absence of any effective, formal intergovernmental arrangements that are immune from Westminster's manipulation. The problem is exacerbated with political parties themselves playing a considerable role in the nature and effectiveness of the UK's government structures. With an SNP Government in Holyrood and a Conservative Government in Westminster, the JMCs have become even more important given their differences on policy, but the Conservative Party's unitary, centralising perspective is clearly at odds with the SNPs nationalist one:

> One very notable aspect of Conservative thinking about the Union is the dominance of a 'unitarist' understanding of the Union. For many Conservatives uniformity across the whole of the UK, underpinned by Westminster parliamentary sovereignty, is seen as essential to

[297] Institute for Government (n 167) 69.

> ensuring that the Union remains together. Divergence between the UK's component parts is for many viewed with suspicion.'[298]

This, coupled with the former's domination over the instruments of intergovernmental interaction does not seem to allow for the coexistence of their competing visions of the union—something that will be later demonstrated by the *Continuity Reference*.

The most significant outcome of all this is the persistence of hierarchy: 'the informality of the system [has] left the devolved territories playing a subordinate role'[299] and 'the UK Government has significant control over the outcome of disagreements'[300] with Westminster's approach to subordination being what has led to the informality and impermanence of these structures themselves. It is not necessarily this 'control' that is *per se* problematic: as has already been seen the UK Parliament and Government both retain considerable legal competence, including potentially the ability—ultimately—to remake or abolish devolution itself with few legal consequences; what protects the settlements is the deeper attitude of Westminster to not actually use these powers. It is this attitude that lies at the heart of many of the problems with intergovernmental relations. Withdrawal from the European Union has provided the setting for these conflicts of attitudes and constitutional visions to come to a head, the ultimate outcome of which may not be known for some time. However, this attitude of subordination, informality and unimportance is not a perspective shared by the judiciary, who have created a normative space for the devolved institutions to enjoy an appropriate degree of institutional respect.

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[298] Jack Sheldon and Michael Kenny, 'Unionism and the Conservative Brexit Deal Rebellion' (*The Constitution Unit*, 1 February 2019) <https://constitution-unit.com/2019/02/01/unionism-and-the-conservative-brexit-deal-rebellion/> accessed 9 September 2019.
[299] Tierney (n 24) 118. See also Wilfried Swenden and Nicola McEwen, 'UK Devolution in the Shadow of Hierarchy? Intergovernmental Relations and Party Politics' (2014) 12 Comparative European Politics 488.
[300] Tierney (n 24) 119.

Judicial Approaches: Towards Constitutional Significance

Devolution was, it might seem trite to point out, designed to accommodate regional variations and policy divergence was therefore surely to be expected,[301] yet, as has been noted above, it does not seem that the has ever been any sense of 'coherent planning' and that, instead, devolution appears to be 'decentralisation without direction', [302] with one consequence being the lack of clarity around how policy divergence is to be handled. Not only does this mean the judiciary has had a new and difficult constitutional reality to make sense of, but it has also been one that has changed throughout its life; for instance, Wales has gone from an obviously subordinate institution to one that is more analogous with Scotland and Northern Ireland, although—an additional challenge for the judiciary—each remains unique.

'The amount of devolution-related litigation', Trench pithily observes, 'has been modest'.[303] Although it may be on the increase, this fact alone is claimed by some to be illustrative of the nature of devolution itself as a political rather than legal creature,[304] and it is certainly the case that the UK's territorial constitutional qualms have not reached the heights of federal judicial review, but this is not to say that what litigation there has been is insignificant. Differing and, arguably

[301] Even if, in some instances there has actually been policy convergence; for instance: 'The Scottish Government brought in legislation to ban smoking in enclosed public places from 2006. The UK Parliament and the Welsh and Northern Ireland Assemblies subsequently passed similar legislation… The Labour–Plaid Cymru coalition in Wales introduced a levy on plastic carrier bags in 2011 and the other governments followed suit. The minority Labour Government in Wales introduced a soft opt-out system for organ donation in 2015. Similar legislation will come into effect in England in 2020 The Scottish Government introduced proportional representation for local elections in 2004, which was already in place in Northern Ireland. Scotland also introduced votes for 16- and 17-year-olds in 2015 The Welsh Assembly is now considering legislation to lower the voting age to 16 for Assembly and local elections.': Institute for Government (n 167) 22.

[302] Tierney (n 24) 102; House of Lords Constitution Committee, *The Union and Devolution* (HL 2015-16, 149); Bingham Centre for the Rule of Law, 'A Constitutional Crossroads: Ways Forward for the United Kingdom' (British Institute of International and Comparative Law 2015).

[303] Alan Trench, 'The Courts and Devolution in the UK' (2012) 14 British Journal of Politics and International Relations 303, 303. Though, he continues that 'there has been no intergovernmental litigation whatever to date', which is no longer the case. There has been no litigative challenge to Northern Irish legislation since the successful challenge in *Ulster Transport Authority v James Brown & Sons Ltd* [1953] NI 79.

[304] Trench (n 303) 303: 'its silence tells us a good deal about devolution in the UK'.

changing, legal perspectives on the nature of the devolution settlement(s) are demonstrated in the case law and clear positions have can be gleaned from their analysis. The Bingham Centre for the Rule of Law at the British Institute of International and Comparative Law, for instance, has analysed the litigation that had taken place before May 2015 in pursuit of identifying the positions of judges and courts in litigation:

> The devolution case law reveals three strands of authorities, or three different judicial approaches. First, there are those that interpret devolution, its constitutional innovation and its consequences narrowly (e.g. *Whaley v Watson*; aspects of Lord Mance in *Medical Costs for Asbestos Reference*). Secondly, there are those that go furthest in the opposite direction (eg, the majority in *Robinson*). Thirdly, there are those that strike a balance (*AXA, Imperial Tabacco,* Lord Thomas in the *Medical Costs for Asbestos Reference*). In our view, it would be preferable for the courts' devolution case law to be clearly and consistently based on this third approach.[305]

However, the case law has more to offer than merely demonstrating judicial comprehension of 'devolution, its constitutional innovation and its consequences'.[306] It also offers insights about the relationships and differences between the various institutions, their own constitutional significance and even ideas about the nature of the union and the role of the courts within it. It is best, however, not to think of devolution litigation as a distinct, insulated corner of the constitutional system, but as intricately entwined with these political realities. Indeed, this has shown itself in cases where litigation has been used pre-emptively, such as in the *Medical Costs for Asbestos Reference.*[307] This case was brought because, despite the Counsel General thinking it was within competence, he thought

[305] Bingham Centre for the Rule of Law (n 302) 66.
[306] ibid.
[307] *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, [2015] 2 WLR 481. A thorough case analysis is available in Frankie McCarthy, 'Human Rights, Property and the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill in the Supreme Court' (2015) 19 Edinburgh Law Review 373.

that its vires might be challenged by insurance companies and so challenged it before they had a chance to.[308]

The asymmetry of the devolution Acts and the insistence within them of the normative subordination of the institutions to the Westminster Parliament have been key actors in the litigation, being particularly dominant informers of the early 'minimalist' case law. In *Whaley v Watson*[309] this was coupled with difficulties posed by the political conditions that underlined the matters of the case. The Lord Ordinary held that the matter, which concerned the application of Article 6 of the Scotland Act 1998 (Transitory and Transitional Provisions) (Members' Interests) Order 1999, was for the Parliament itself to decide. It was held there that a member's entitlement to present a Bill was not, therefore, a question for the court. However, colouring the differing opinion of the Lord President in the Inner House was 'the fundamental character of the Parliament as a body which—however important its role—has been created by statute and derives its powers from statute.'[310] This claim, that the Parliament was a 'statutory body',[311] informed the court's ability to intervene (or lack thereof):

> [counsel's argument] seemed to rest upon some broad view that since the Scottish Parliament was a Parliament, rather than for example a local authority, the jurisdiction of the courts must be seen as excluded, as an unacceptable intrusion upon the legislative function which belonged to Parliament alone… [I]nsofar as a Parliament and its powers have been defined, and thus limited, by law, it is in my opinion self-evident that the courts have jurisdiction in relation to these legal definitions and limits, just as they would have for any other body created by law. *If anything, the need for such a jurisdiction is in my opinion all the greater where a body has wide powers, as the Scottish Parliament has: the greater the powers, the greater the need to ensure that they are not exceeded.*[312]

[308] This pre-emptive, poltico-legal dimension to the caselaw has been repeated and will be considered later in *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A Reference by the Attorney General and the Advocate General for Scotland* [2018] UKSC 64, [2019] 2 WLR 1.
[309] *Whaley v Watson* (n 162).
[310] ibid 348 (Lord Rodger).
[311] ibid (Lord Rodger).
[312] ibid 357 (Lord Prosser) (emphasis Added).

This demonstrates how the perception of the fundamental character of the institutions can be used to either permit or forbid judicial interference, depending on the interpretation. But the fundamental character of the Parliament does not need to be denied in order to protect the court's jurisdiction; admitting that the Parliament is more than a statutory body does not necessarily lead to a claim that whatever it does is within its competence. The Scottish Parliament remains *both* a Parliament*, and* a body with limited powers. This might seem paradoxical in orthodox English constitutional circles that prefer one or the other, but it remains the case.

This is not, however, something that the courts were quick to recognise, preferring instead to lurch to the opposite extreme. In *Robinson*[313] the constitutional nature of the settlement was embraced, with Lords Bingham and Hoffmann taking a broad approach, the former suggesting that the Northern Ireland Act 1998 is 'in effect a constitution' to be interpreted 'generously and purposively'.[314] Lord Hutton's words, by contrast, echoed those of Lord Prosser in *Whaley*: 'the Northern Ireland Assembly is a body created by a Westminster statute and it has no powers other than those given to it by statute'.[315] This case does seem to stand as something of a unique incident, confined to its facts and not followed in the Supreme Court since[316] and, as is often emphasised, Northern Ireland is a unique settlement to resolve a unique set of challenges. The case of *AXA*[317] then is perhaps a more easily transposed decision. This case concerned the applicability of Acts of the Scottish Parliament to common law judicial review.[318] In holding that common law judicial

313 *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32.
314 ibid [11] (Lord Bingham).
315 ibid [54] (Lord Hutton).
316 Bingham Centre for the Rule of Law (n 302) 60.
317 *AXA General Insurance Limited v The Lord Advocate* [2011] UKSC 46, [2012] 1 AC 868.
318 The Bingham Institute explains the issues thus: '[S]ection 29 of the Scotland Act 1998 limits the legislative competence of the Scottish Parliament: but is section 29 an exhaustive list of the grounds on which an ASP [(Act of the Scottish Parliament)] may be challenged, or could a petitioner also argue that an Act of the Scottish Parliament is unreasonable or irrational? The Supreme Court ruled than an ASP could not be challenged as if it were the decision of an ordinary public body… but that if an ASP was violative of the rule of law, the courts would step in to rule it

review could not be deployed against Acts of the Scottish Parliament, Lord Hope suggested that the Parliament was 'self-standing' and that its Acts enjoyed 'the highest legal authority' where they were within competence,[319] something that has been described as placing 'Holyrood legislation and Westminster statutes on the same constitutional plane'.[320] Though he cited no authority, Lord Hope's dicta do make sense: that the competences themselves are limited does not mean that the status of that legislation *within* competence should be reduced. It might mean that the status of the institution itself is subordinate—it is clearly not a supreme Parliament with unlimited, 'unreviewable' legislative powers—but it is a body with *a realm* of powers that are beyond some kinds of review. Lord Reed simply suggested that since the Scottish Parliament was not obliged to point to reasons for a particular decision, and that nor are there 'any specific matters to which it is to have regard',[321] these forms of review were inapplicable, observing that in these areas, its electorate was to be what held the Parliament to account, not the court.[322]

Lord Reed also looked to separation of powers and the respective role of legislatures and courts within the constitution, suggesting that,

> '[l]aw-making by a democratically elected legislature is the paradigm of a political activity… In my opinion it would not be constitutionally appropriate for the courts to review such decisions on the ground of irrationality. Such review would fail to recognise that courts and legislatures each have their own particular role to play in our constitution, and that each must be careful to respect the sphere of action of the other.'[323]

unlawful (even if it was otherwise within competence under section 29).': Bingham Centre for the Rule of Law (n 302) 60–61.

[319] *AXA General Insurance Limited v The Lord Advocate* (n 317) [46] (Lord Hope).

[320] Bingham Centre for the Rule of Law (n 302) 61.

[321] *AXA General Insurance Limited v The Lord Advocate* (n 317) [146] (Lord Reed).

[322] Bingham Centre for the Rule of Law (n 302) 61.

[323] *AXA General Insurance Limited v The Lord Advocate* (n 317) [148] (Lord Reed).

However even in these dicta, nestled in the language of deference, the emphasis is clearly on the Scottish Parliament's credentials as a 'legislature' rather than a 'local authority'. It seems that these 'fundamental character' questions are difficult to avoid, even if they pin more on deference to democratic credentials than on the ideas of a constitutionally significant national representative. The limits placed on the legislature when it is operating within its competences seem to mirror those limits on the Westminster Parliament recognised in *Simms*[324] by Lord Hoffmann, namely that the Westminster 'Parliament cannot itself override fundamental rights or the rule of law by general or ambiguous words, but also that it cannot confer on another body, by general or ambiguous words, the power to do so.'[325] However, the Scottish Parliament in *AXA* was being held account in the courts to the European Convention (ECHR) in a form of review that has very different legal implications than those applicable to Westminster.[326] Indeed, if legislation of the Scottish Parliament is incompatible with Convention rights, it is outside of competence—it is not law.[327] This distinction led to much discussion in the case about whether Acts of the Scottish Parliament were primary or secondary legislation and, in pursuit of a third path, Lord Hope held that 'we are in uncharted territory', the issue being more of principle than of precedent.[328] Again, Lord Hope placed the emphasis on the Parliament's *democratic* credentials which warranted a degree of judicial hesitation, thus:

> For the Supreme Court, the Scottish Parliament is plainly not an ordinary public body "like any other", but a legislature, democratically elected, with plenary powers, which produces legislation that the courts may review on common law grounds only in the most exceptional

[324] *R v Secretary of State for the Home Department, ex p Simms* [1999] UKHL 33, [2000] 2 AC 115.
[325] *AXA General Insurance Limited v The Lord Advocate* (n 317) [152] (Lord Reed); I am grateful to the Bingham Centre for highlighting this similarity: Bingham Centre for the Rule of Law (n 302) 61.
[326] Review of Westminster legislation under the Human Rights Act 1998 can only result in the legislation being read compatibly with the ECHR under section 3, or a 'declaration of incompatibility' under section 4. Despite some academic commentary to the contrary, the Act is very clear that this does not amount to a challenge to the validity of the legislation found to be incompatible: 'A declaration under this section ("a declaration of incompatibility") does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given': Human Rights Act 1998 s 4(6)(a).
[327] Scotland Act s 29(d).
[328] *AXA General Insurance Limited v The Lord Advocate* (n 317) [205] (Lord Hope).

> circumstances… this is precisely how the Scottish Parliament – and indeed all the UK's devolved legislatures – should be understood.'[329]

But this does highlight further problems: Firstly, just because the Scottish Parliament is seen by the judiciary as a democratic *legislature,* or even a constitutionally significant one, does not mean it is in political practice; as was emphasised above, the law is only one part of a vast and complex picture. Secondly, and pertinent for the asymmetry of the devolution arrangements, equating 'all the UK's devolved legislatures' when they exist in quite different legal, political and historical contexts needs justification, especially when this expresses itself (as it has done) in the differences between the legal powers each legislature possesses.

As has been noted, devolution did not at its inception create one uniform settlement for the UK. Instead each territory received its own unique arrangement in light of its own context. This seemed to decentralise the very process of decentralisation, allowing the degree of regional responsiveness permitted to be, itself, regionally responsive. This might appear to be a rejection of the fundamentality of the changes that were being made, suggesting perhaps that it amounted to piecemeal redistribution of authority rather than wholesale constitutional change. In turn this has meant that the task of making sense of the very nature of the devolution arrangements as independent arrangements for each territory, while simultaneously being something more significant for the United Kingdom as a whole, has led to confirmation of a 'middle way' in judicial thinking. Under this view, each of the devolved legislatures *is* constitutionally significant, but within the bounds of their (unique) foundational legislation. For example, in the Inner House, Lords Reed and Brodie in *Imperial Tobacco* were quick to point out, in contrast to Lords Bingham and Hoffman in *Robinson,* that the Scotland Act is 'not a constitution'.[330] In the Supreme Court, Lord Hope sought to bring clarity to the issue: rather than embarking on an overly-expansive, or

[329] Bingham Centre for the Rule of Law (n 302) 62.
[330] *Imperial Tobacco Ltd v The Lord Advocate* [2012] CSIH 9 [71] (Lord Reed), [181] (Lord Brodie).

overly-reductionist reading based on the constitutional significance (or otherwise) of the settlement, it was His Lordship's view that each case should be handled using the terms of the devolution statute in question, and that these should be interpreted 'in the same way as any other rules that are found in a UK statute'.[331] It should be noted that one way in which the 'constitutional' status of the devolution legislation has been overtly recognised, however, is in the dicta of Laws LJ in *Thoburn* where the Scotland Act was directly referred to as a 'constitutional statute'.[332] But this only sounded in terms of its repeal, a fact that has since been affirmed by Lord Hope in *H v Lord Advocate:* 'because of the fundamental constitutional nature of the settlement that was achieved by the Scotland Act . This in itself must be held to render it incapable of being altered otherwise than by an express enactment.'[333] Despite this, the idea that the legislation's 'fundamental constitutional nature' might in some way affect its *interpretation* has been overtly rejected by Lord Hope in *Imperial Tobacco:* 'the description of the Act as a constitutional statute cannot be taken, in itself, to be a guide to its interpretation.'[334]

Demonstrative of the differences between the legal arrangements, in Wales the circumstances surrounding the case law have been different, being more intergovernmental than the public/private litigation prevalent in Scotland.[335] Despite this, and despite the differing nature of that legislature compared to its Scottish counterpart, 'the principles governing the interpretation of ASPs set out in *Imperial Tobacco* apply equally to the interpretation [of] Bills passed by the Welsh

[331] *Imperial Tobacco Ltd v The Lord Advocate* (n 177) [14] (Lord Hope).
[332] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) [62] (Laws LJ): 'We should recognise a hierarchy of Acts of Parliament: as it were "ordinary" statutes and "constitutional" statutes. The two categories must be distinguished on a principled basis. In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights. (a) and (b) are of necessity closely related: it is difficult to think of an instance of (a) that is not also an instance of (b). The special status of constitutional statutes follows the special status of constitutional rights. Examples are the Magna Carta, the Bill of Rights 1689, the Act of Union, the Reform Acts which distributed and enlarged the franchise, the HRA, the Scotland Act 1998 and the Government of Wales Act 1998.'
[333] *H v Lord Advocate* [2012] UKSC 24, [2012] 3 WLR 151 [30] (Lord Hope).
[334] *Imperial Tobacco Ltd v The Lord Advocate* (n 177) [15] (Lord Hope).
[335] Bingham Centre for the Rule of Law (n 302) 63.

Assembly.'[336] Arguably, however, Wales has produced the most 'federal' litigative problems of all of the legislatures. Rather than questions primarily about Convention violation and cases that depend on the comprehension of the status of the legislature, in Wales legislation has come under scrutiny for coming under categories of legislation that are *both* within and beyond competence depending, as a federation does, on the judiciary to demark the boundaries. The question in this instance becomes not about how broadly to interpret the competences against convention rights or *in vacuo,* but against a list of forbidden areas which also need to be interpreted. This is where the reserved or conferred powers models become of tangible significance, and the key case in question is the *Agricultural Wages Reference.*[337] When one is alert to the fact that agriculture was devolved and remuneration for employment was reserved, the interpretive issue at play becomes clear. The Attorney General argued that a Bill which made provision for agricultural wages was outwith competence, whereas the Counsel General argued that since it concerned agriculture it was within competence.[338] Under the Government of Wales Act 2006, if a Bill relates to a subject under Schedule 7, such as agriculture, it is within competence. Therefore, the Supreme Court, which thought the Bill could be interpreted in either direction, ruled it was within competence. It might seem *prima facie* that a conferred powers model where the legislation lists the powers devolved, rather than those reserved, is more restrictive because it assumes that powers are, by default reserved to Westminster. An analogy can easily be located in federal jurisdictions, where the federal level has its powers 'enumerated', meaning the 'residual' competence remains with the States, suggesting they lead in the hierarchy of authority. This is something of a controversial point among scholars who might prefer to suggest that there is no 'hierarchy',[339] but it is easy to see how an interpretive presumption that powers exist unless they are reserved might lead, ultimately, to a broader conferral than a finite list of devolved powers. However, despite this forgivable

[336] ibid; *Re Local Government Byelaws (Wales) Bill 2012* [2012] UKSC 53, [2013] 1 AC 792 [79]-[81] (Lord Neuberger).
[337] *Re Agricultural Sector (Wales) Bill* [2014] UKSC 43, [2014] 1 WLR 2622.
[338] Bingham Centre for the Rule of Law (n 302) 63.
[339] For instance, see Daniel J Elazar, 'Contrasting Unitary and Federal Systems' (1997) 18 International Political Science Review 237.

assumption, the *Agricultural Wages Reference* suggests the opposite. That the Bill 'related' to a reserved matter was acceptable, since it also, more importantly 'related' to a devolved matter. The Silk Commission's (adopted) recommendation of a shift to the 'reserved' powers model therefore has retrospective implications for the *Agricultural Wages Reference.* Since the court did not find the Attorney General's suggestion that the Bill related to a reserved matter to be misplaced, under the reserved powers model this would be enough to find the Bill to be outside of competence.[340] This seems to invert the logic of enumerated and reserved powers, but it does not refute that *in general* more power is usually conferred under the reserved model.[341] It also, more significantly, indicates a desire on the courts' part to interpret the powers of the devolved legislatures as broadly as possible.

The more recent decision of the *Medical Costs for Asbestos Reference* has been noted above for the fact that it was a pre-emptive legal challenge in light of foreseeable private litigation, but for present purposes the interpretation of competences is the key element of the case.[342] 'Organisation and funding' of the NHS in Wales is listed in Schedule 7 of the Government of Wales Act 2006—the then-key devolution legislation conferring powers to the Welsh Assembly.[343] Lord Thomas in the minority noted that funding meant the raising of funds, rather than merely the allocation of funds and that, therefore, the Assembly possessed 'competence to enact legislation that makes provision for charging for services by way of the treatment and long-term care of those with asbestos-related

[340] Bingham Centre for the Rule of Law (n 302) 64.
[341] '[N]o matter what the original intent, language used to seek to delimit the differences between reserved and devolved powers… is always open to judicial interpretation, with courts able to construe it more or less generously depending on the needs of the times.': Adam Tomkins, 'Shared Rule: What the UK Could Learn from Federalism' in Robert Schütze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 79.
[342] Another core element of the case was whether the Bill was outwith competence because it was incompatible with the ECHR. Lord Thomas and Lady Hale held that one section was 'drafted with unnecessary breadth that made it incompatible with [Article 1 of the 1st Protocol].' Lords Mance and Neuberger found that two sections of the Bill were incompatible with the same provision and that the Bill in general was outwith competence: Bingham Centre for the Rule of Law (n 302) 64.
[343] Section 108 of the Act made provision that the Assembly had competence when a Bill related to one or more of the subjects in Schedule 7.

diseases provided that the moneys so raised are used exclusively for the Welsh NHS'.[344] The degree of deference that was to be given to the legislature was emphasised only in terms of the rights abrogation: whether the legislation pursued a legitimate aim was 'in every respect pre-eminently a political judgement… on which it is for the legislative branch of the State to reach a judgement';[345] whether the interference was proportional was also a question that could be answered only by giving 'great weight' to the views of the legislature.[346] Further, His Lordship also suggested that each legislature 'must be entitled to form its own judgement about public interest and social justice in matters of social and economic policy within a field where, under the structure of devolution, it has sole primary legislative competence.'[347] This not only distinguishes the legislatures from local authorities,[348] but also went some way to indicating the nature of the relationships between the legislatures. 'Sole primary legislative competence' suggests very clearly a dual federal model where each legislature has its own 'exclusive sphere'.[349] It is at least clear that Lord Thomas did not think it was the court's, nor any other body's place to second-guess the primary legislation of the Welsh Assembly.

Lord Mance in the majority, however, took a different view on both the rights and competence issues. His Lordship's test for the legislative term 'relates to' was that it be 'more than a loose or consequential connection'.[350] There is difficulty in importing this test, however, from Lord Walker's dictum in the Scottish case of *Martin v Most*[351]since, as has been explained, Scotland's settlement at that time depended on a different logic of conferral. This demonstrates the problems, at least historically, with seeing the settlement as one coherent system, or that 'the essential *nature*

[344] *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* (n 307) [95] (Lord Thomas).
[345] ibid [108] (Lord Thomas).
[346] ibid [118] (Lord Thomas).
[347] ibid [122] (Lord Thomas).
[348] ibid [123] (Lord Thomas); Bingham Centre for the Rule of Law (n 302) 64–65.
[349] See KC Wheare, *Federal Government* (3rd edn, OUP 1956). The alternative interpretation which, it is suggested would be an inaccurate reading, would be to see the competence as legally 'shared' between spheres.
[350] *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* (n 307) [25] (Lord Mance).
[351] *Martin v Most* [2010] UKSC 10, 2010 SC (UKSC) 40.

of the legislatures that the devolution statutes have created in each case is the same'.[352] Lord Neuberger for instance has regarded them as 'different statutes', and that judges must be 'wary of assuming that they have precisely the same effect, as context is so crucially important when interpreting any expression'.[353] There is (or at least was) clearly some disagreement about how to understand the fundamental questions of competence allocation. The point has been made thus:

> The effect of interpreting "relates to" as indicating "more than a loose or consequential connection in Scotland is that the competence of the Scottish Parliament is treated generously: an ASP must have more than a loose connection with a reserved matter before it may be held on that ground to be out with competence. However, the effect of interpreting "relates to" in this way in Wales is the opposite and diminishes the legislative competence of the Assembly: an Act of the Assembly risks being held ultra vires unless the Assembly can show that it has more than a loose or consequential connection with a subject listed in Schedule 7.[354]

The familiar challenge of exactly what normative status the Welsh Assembly possesses is clearly an undercurrent here, shaped by the logic of conferral, as is the Court's understanding of its own role. Though Lord Thomas was keen for the Court to give 'great weight' to the judgement of the Assembly,[355] deferring to it as though it were the Westminster Parliament was too much for Lord Mance who was less persuaded. Further, Lord Mance stated that 'it is the Court's function, under [the Government of Wales Act], to evaluate the relevant considerations and to form its own judgement',[356] and that there is 'perhaps… a relevant distinction between cases concerning primary legislation by the United Kingdom Parliament and other legislative and executive decisions.'[357] The majority therefore put Westminster on a pedestal and saw the other legislative and administrative

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[352] *Re Local Government Byelaws (Wales) Bill 2012* (n 336) [81] (Lord Hope).
[353] ibid [50] (Lord Neuberger).
[354] Bingham Centre for the Rule of Law (n 302) 65: Interestingly, and again thanks must be given to the Bingham Institute for this insight, 'Lord Mance made no mention of, and did not cite, section 154(2) of the Government of Wales Act… [T]his provides that a provision of an Act of the Assembly "is to be read as narrowly as is required for it to be within competence… if such a reading is possible.'"
[355] *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* (n 307) [114] (Lord Thomas).
[356] ibid [67] (Lord Mance).
[357] ibid [56] (Lord Mance).

organs in the UK as more analogous in their subordination, and deserving of a different degree of deference.[358] There is clearly some confusion (or at least disagreement) within judicial circles as to how much deference these institutions are to be accorded, the kind of normative status they possess and how the judiciary should police the boundaries between them. Now the settlement for Wales is not only more in keeping with the arrangements in the other corners of the union, creating an element of uniformity and consistency that devolution arguably attempted to avoid at its inception, but it also possesses powers and institutional characteristics that are a far cry from its beginnings as a small, weakly empowered afterthought that resulted from a meagre showing of popular support. The courts' approach to each legislature since 'has been to adopt a generous—and pragmatic—approach to the legislative competence of the devolved legislature'.[359]

The inconsistency of the case law can, it is suggested, be forgiven: the settlements themselves have not only posed new, complex and fundamental questions for the courts to solve, but have also had within them inconsistencies and, crucially, asymmetries which the courts have needed to make sense of amongst a divisive political backdrop, all while the arrangements themselves continue to change. However, it is at the very least clear that the courts have begun to recognise the increasingly constitutional status of the devolution settlements and, indeed, are forming a coherent view of the position and significant status of devolution. This recognition does not suggest that the devolved legislatures are all the same, or that they all solve the same problems in each of the territories, but it does suggest that territorial constitutionalism is beginning to be seen as a common solution to different problems. The differences in these problems shows itself in the different powers devolved and even the different names of the institutions, but they are not different enough to justify the claim that devolution is not a single coherent issue in the UK. Further, the trend of

[358] Bingham Centre for the Rule of Law (n 302) 66.
[359] Christopher Himsworth and Christine O'Neill, *Scotland's Constitution: Law and Practice* (Bloomsbury Professional 2015) 466.

recognition seems to have settled on a far more constitutional status for the legislatures than might have been expected in 1998 making rejection of their significance untenable.[360] Now, the arrangements have converged to the extent that there is a 'relevant commonality in the devolution settlements in Northern Ireland, Scotland and Wales.'[361] They share similarities in structure, process and purpose. As a result, the judicial position, noting that 'there cannot always be hard and fast lines between devolved and reserved matters',[362] accepts that the devolved legislatures are not like local authorities but that they are bound by some principles (such as the rule of law) that are not codified in their statutes. The four elements of the test were drawn together in *Christian Institute* and unified for each of the settlements, it can be explained thus:[363]

> First, 'relates to' indicates more than a loose or consequential connection…Secondly…it is necessary to look at more than what be discerned from an objective consideration of the effect of [a provision's] terms…Thirdly…if one of its purposes does [relate to a reserved matter], then unless that can be regarded as consequential and of no real significance in the overall scheme of things, it will be outside competence. Finally, this is not the same as the 'pith and substance' test and these cases should be dealt with according to the terms of the devolution statutes in question and not otherwise.[364]

The status and operation of the devolved legislatures and their relationship with Westminster is not, however, a solely legal question. The interaction between law and politics remains hugely important in the devolution settlement; its dependence on politics ensures crises are avoided and

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[360] For instance, the petition 'Hold a referendum to scrap the Welsh Assembly' currently has 15 signatures: 'Hold a Referendum to Scrap the Welsh Assembly' <https://petition.parliament.uk/petitions/262868> accessed 29 September 2019.

[361] *R (Miller) v Secretary of State for Exiting the European Union* (n 4) [128]; Lord Reed, 'Scotland's Devolved Settlement and the Role of the Courts' (The Inaugural Dover House Lecture, London, 27 February 2019) 5: 'As matters now stand, all three settlements share similar structures. Each involves the establishment of a democratically elected legislature. Each confers on the legislature the power to "make laws to be known as Acts". Each sets limits to that legislative power by reference to particular subjects and, more generally and regardless of subject-matter, to compliance with EU law and Convention rights. Accordingly, all are now based on a reserved powers model: that is to say, the legislature is given a general power to make laws, subject to specified limits and to compliance with EU law and Convention rights.'

[362] Lady Hale (n 190) 9.

[363] *Christian Institute v Lord Advocate* [2016] UKSC 51, 2016 SC (UKSC) 29.

[364] Lady Hale (n 190) 8–12 supported with applicable case law.

stability ensured, yet it also enables the system to maintain flexibility and indeterminacy, with the potential for the constitution to be rewritten overnight looming large in the minds of the 'subordinate' legislatures. These political factors, as Trench notes, not only mean that the devolution arrangements can be easily amended, but also that much of the 'work' of the territorial constitution can happen behind the scenes: 'The key issue becomes the political one of whether the parties will agree, rather than the legal one of whether they are able to agree or to implement their agreement.'[365] This means that litigation itself is often avoided, perhaps somewhat to blame for its sparseness to date. In some ways this is positive: as has been noted, decentralisation's added layer of 'red tape' and the legalisation assumed by some to be inherent in federalism is avoided if the debates around the allocation of competence can remain a political rather than legal issue. However, the collision of an only recently settled legal position with a political appetite for informality and subordination has had dangerous results.

Cracks Emerge: Withdrawal from the European Union

So far, a dissonance has been revealed. In the courts, the unique constitutional significance of devolution has been understood. The judiciary have given the devolved institutions normative status below Westminster, but above local authorities; partly on the grounds of their innate significance as representatives of different parts of the union, and partly on democratic grounds. This has shown itself in the deference the courts show to their decisions, the expansive interpretation of their powers and their willingness to state in strong terms their view of the importance of the institutions. In the political realm, despite some attempts—such as the permanence provisions and the Sewel convention—to enshrine some institutional respect, Westminster and Whitehall's approach has never been to conceive of devolution as a fundamental shift in the constitution, preferring to see it as 'business as usual'. Although the centre has shown

[365] Trench (n 303) 309.

a willingness to defer to the devolved institutions in order to shape the settlements, and legislative consent has often been an effective mechanism for cooperation, both of these instances have depended on political sensibilities. When these political sensibilities are not of institutional respect but of disregard and subordination, intergovernmental cooperation has suffered. This has shown itself in the lack of formally instituted intergovernmental arrangements where the entire system has operated at London's whim, leading to a hierarchy that excludes the devolved institutions from areas of importance to them. The *ad hoc* implementation of devolution may bear some responsibility for this, and for doing little to combat the perspective that prefers to disregard rather than bolster the devolution arrangements; yet, the courts have demonstrated that this incrementality need be no barrier to constitutional significance. However, a recent case-study will demonstrate the interplay between politics and law, that even judicial recognition of significance is not enough to protect the territorial constitution from a Westminster, backed by its place in the 'hierarchy', bent on asserting its unitary constitutional vision. The chief example of this in action has been the UK's withdrawal from the EU; it is demonstrated by two key sagas of litigation and illustrates the fractious persistence of unitary thinking in England.

Before the 2016 EU referendum Nicola Sturgeon, Scotland's First Minister, had argued that there should be a territorial veto on the referendum result such that the UK, as a consensual union, would need to vote in all of its constituent 'parts' to leave the EU for it to take place.[366] David Cameron, then Prime Minister, rejected the proposal, arguing instead that 'we are one United Kingdom'.[367] In the event, the UK as a whole voted 51.9% to leave the EU but only England and Wales voted as territories in favour of that outcome, with Scotland and Northern Ireland preferring 'remain'. This referendum tested conceptions of the union: on the one hand the UK's

366 HC Deb 16 June 2015, vol 597, cols 192–193.
367 Reuters, 'Cameron Rejects Giving Scotland Veto in EU Referendum' (30 October 2014) <https://www.euractiv.com/section/uk-europe/news/cameron-rejects-giving-scotland-veto-in-eu-referendum/> accessed 29 September 2019.

will could be expressed through the voice of one 'people', on the other, it could be expressed as the voice of four distinct 'peoples'. Not only did Holyrood and Westminster's views of the union differ with one another, but membership of and departure from the European Union also has different implications in each of the territories. As a result, the litigation challenging the government's ability to use the royal prerogative to activate Article 50 of the Treaty on European Union (the provision actualising the UK's departure) was joined by a separate challenge on territorial consent. The primary contention of the challenge was that notification of withdrawal under Article 50 could not take place without the consent of the devolved territories, but it was unsuccessful since the Sewel convention remains merely a political rule, unenforceable in the courts:

> The Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures. But the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law.[368]

This is, of course, the precedent that was set in the Privy Council decision of *Madzimbamuto*[369] but the enshrinement of the convention in statute did little to change things, even nested as it is amongst the permanence provisions:

> [T]he UK Parliament is not seeking to convert the Sewel Convention into a rule which can be interpreted, let alone enforced, by the courts; rather, it is recognising the convention for what it is, namely a political convention, and is effectively declaring that it is a permanent feature of the relevant devolution settlement. That follows from the nature of the content, and is acknowledged by the words ("it is recognised" and "will not normally"), of the relevant subsection. We would have expected UK Parliament to have used other words if it were seeking to convert a convention into a legal rule justiciable by the courts.[370]

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[368] *R (Miller) v Secretary of State for Exiting the European Union* (n 4) [151].
[369] *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 (PC).
[370] *R (Miller) v Secretary of State for Exiting the European Union* (n 4) [148].

However, although the Court's view of the legal implications was predictable, it might not have been expected to take such a deferential stance towards the convention (and its codification)'s *constitutional* significance. For instance, in the famous *Re Constitutional Amendment* case[371] in Canada, a convention's legal insignificance did not deter the Court from suggesting disapplication of it would be unconstitutional, eventually inviting the Government to adhere to it. Courts need not, this case suggests, be merely a voice of *legality* and nothing more.[372] However, there is utility in the conclusions the Court reached. Arguably, in a constitution shaped largely by political rules and practices, the moving of questions like territorial consent away from legal fora (and protecting judicial independence in the process) means that political debate is not replaced by litigation. Alternatively, the flagrant disregard of the interests of the territories is enabled by a settlement that, in instances such as this, demonstrates its subservience to Westminster. Either way the reliance on these political mechanisms, and the dominance of Westminster throughout devolution is clearly problematic for those territories whose views can so easily be circumvented.

Even when the issues at hand remain firmly within the realm of the courts as matters of law, Westminster remains able to reshape the arrangements to its advantage; as was importantly the case in the *European Withdrawal Bill Reference* (*Continuity Reference*).[373] Set against the backdrop of Scotland's majority 'remain' vote and the SNP's own position on the matter, it is not a great stretch to appreciate that the Scottish Parliament desired to pass its own withdrawal legislation: the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill; and refused consent to Westminster's own European Union (Withdrawal) Act 2018. The UK Government swiftly challenged the Scottish Continuity Bill on three grounds: First, that it was incompatible with EU

[371] *Re Resolution to amend the Constitution* [1981] 1 SCR 753.
[372] Consider the non-legal effects of s 4 HRA as well as Elliott (n 184); Elliott (n 273).
[373] *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A Reference by the Attorney General and the Advocate General for Scotland* (n 308).

law; second, that it related to the reserved matter of foreign affairs and third that it modified protected enactments listed in Schedule 4. It was the Supreme Court's view that the Scottish Continuity Bill did not relate to international relations (even including those with the EU), but that it did, specifically in Section 17, 'affect the power of the Parliament of the United Kingdom to make laws for Scotland', meaning it was outwith competence. However, it was the UK Government's response to the passing of the Scottish Bill that most demonstrates Westminster's ability to manipulate the devolution settlement. When the UK Government passed its own Act in 2018, it included an amendment to Schedule 4 of the Scotland Act 1998 such that it *itself* became a protected enactment, immune from modification. Because of this, at the time the Scottish Bill would be enacted, it, in making modifications to the UK's Act, would be outside of competence. Here the UK Parliament was able to manipulate the core devolution legislation so that Holyrood's activity was without doubt *ultra vires*. This is neither an example of positive cooperation, nor is it in keeping with the institutional respect devolution clearly warrants; instead it demonstrates the dangers of a flexible arrangement in the hands of a powerful institution with a unitary mindset. Historically, relations between the two institutions have not been so abrasive,[374] yet clearly '[t]he UK and devolved governments do not agree on the rules governing their relationship',[375] and this is problematic when one has the formal power to rewrite the rules.

Devolution has posed plenty of opportunities for cooperation. It has also seen governments, at least sporadically, take many of those opportunities. The central problem remains Westminster's perspective of the devolved institutions and its preparedness to flex its sovereign muscles—legally entitled as it is to do so—to subordinate or circumvent the territories on matters that concern them. Despite Professor Elliott's claim that to do so would arguably be unconstitutional, the

[374] Lady Hale (n 190) 8: 'There is a long history of the UK Parliament legislating separately for Scotland, so there are established channels of communication between London and Edinburgh enabling things to be sorted out at official level. Following devolution, it had become customary for Scottish Bills to be notified in advance to the Advocate General. The Continuity Bill was the first where this had not been done.'
[375] Institute for Government (n 167) 6.

courts—as their treatment of the Sewel convention suggests—are in truth unlikely to find any remedy, though this is not to say it is without political consequences. Certainly, Dicey's fear that Parliament's ability to legislate for a devolved territory would be 'not only impaired but destroyed'[376] was misplaced in practice, but unfortunately this has been demonstrated through an exercise that suggests the UK Government may be failing to recognise the constitutional significance of devolution. Whereas the perspectives of the regions have been altered by devolution, the centre's has remained unchanged and it, in this instance at least, operated as if devolution does not exist or, possibly worse, as if it does not matter. When devolution has worked at its best, it has provided a means to ensure peace and allow governments to work together. At times this has been effective, with Westminster being cooperative on issues from legislative conferral to the Welsh Assembly, to Scottish independence and mechanisms do exist to encourage multi-lateral involvement in shared issues. The Sewel convention, for instance, protects the legislative freedom of the devolved institutions without requiring an apparently impossible restriction on Westminster's legal competence. Yet there is still a debate over what the constitution requires, and what devolution's place within it is. Douglas-Scott indicates, for example, that '[f]rom the perspective of the UK Government, the British constitution is unitary in nature'.[377] This perspective, she suggests, 'views the UK as a unified, centralised state, with an omnicompetent Parliament.'[378] She goes on to consider an alternative view of the UK constitution which

> identifies other traditions and interpretations as key to an understanding of the British constitution, and views the UK as a union state rather than a unitary state. It interprets the UK as a union founded on treaties (such as the Treaty of Union 1706) and reliant on ongoing consent, as well as on constitutional practice which involves much (ie constitutional conventions) that is not strictly speaking law.[379]

[376] Boyce (n 148) 287. Dicey was, of course, writing about Ireland at that time.
[377] Sionaidh Douglas-Scott, 'Brexit, Article 50 and the Contested British Constitution' 79 Modern Law Review 1019, 1035.
[378] ibid.
[379] ibid 1036.

This more textured, pluralist account of the constitution is persuasive. It has historical reinforcement and is an encouraging way of making sense of the valuable role played by the devolved institutions and the nations they represent, especially since it is more recognising of the impact of devolution on the constitution itself.[380]

However, arguably this account only becomes useful when the central government at Westminster views the constitution as a shared endeavour. Douglas-Scott suggests that viewing Brexit as an expression of parliamentary sovereignty is unjustified because it is on the decline as a core principle of the constitution,[381] yet this is far from the conventional view, at least in the case law.[382] Far more persuasive is Professor Elliott's claim that, rather than parliamentary sovereignty being on the decline, it is instead the instances when Parliament might deploy its sovereignty that are diminishing. The argument here is that a more textured understanding is on the rise of what constitutes valid action, not in legal terms, but in constitutional terms:

> 'Parliament might or might not be sovereign, but that is largely beside the point—for the constitutional system demands and expects that Parliament will desist from exercising the full width of the extravagant powers which it would possess if it were sovereign.'[383]

It is not that Parliament is no longer legally competent in certain areas—this is difficult to justify—but that it might be less willing to use the full-extent of its competences after taking account of the broader constitutional picture. This account is a far more accurate picture of constitutional practice itself and is helpful in prescribing the kinds of institutional relationships that might be

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[380] 'This alternative interpretation of the British Constitution also recognises that the UK has been transformed, or even revolutionised, by external developments and memberships (such as the EU and Council of Europe) and recalibrated internally by devolution arrangements since 1998 (but also by the Human Rights Act, and a desire for a more principled constitutional development than parliamentary sovereignty allows)': ibid 1036–7.
[381] ibid 1037.
[382] See *R (Miller) v Secretary of State for Exiting the European Union* (n 4); *R (Miller) v The Prime Minister* [2019] UKSC 41, [2019] 9 WLUK 256.
[383] Elliott (n 273) 65.

possible in the shadow of parliamentary sovereignty, rather than incorrectly asserting it no longer operates practicably. However, even with this contention accepted, it remains important to consider the perspectives of the territories and their views of their relationship with Westminster. It might be simply that there are plural views of the constitution from different angles and that these can peacefully coexist, but, as recent history suggests, these views are often in conflict.[384] Perhaps it could be suggested that Westminster, with its own view of the constitution, should be tolerant towards those institutions that have different views. Yet this discussion highlights the paradox at the core of the UK's territorial constitution: Devolution is the acceptance that government is best when it is closest to citizens, but the operation of the centre is increasingly to disregard the views of those closest because they are 'inferior' institutions. It is increasingly necessary for central government to accept that superiority does not beckon from legal possibility, but also from political plausibility: Parliament might well be sovereign, but often the territorial institutions' word should be the last. This is especially significant because of the lack of institutions of shared rule: the constitution remains—for better or worse—solely Westminster's domain and any failure on its part to take account of different visions may have significant ramifications.[385] As has been demonstrated above, there *are* mechanisms for cooperation and interaction, but they must be enhanced and protected; if devolution is to work effectively the disregard that the *Continuity Reference* illustrated should be avoided. There are idiosyncrasies to devolution as well as some outright flaws in its design, but these are only problematic when the attitude to exploit them is allowed to prosper. O'Neill makes the point thus: 'Outcomes will depend on the capacity of elites at every level to construct procedures, and adopt habits that make cooperation rather than conflict the prevailing standard of inter-governmental relations. There is a new political culture to be learned by all sides.'[386]

[384] Douglas-Scott (n 377).
[385] The constitution is a reserved matter in each of the devolution statutes.
[386] O'Neill (n 142) 80.

CONCLUSION: TOWARDS A 'RELEVANT COMMONALITY'

This chapter has explored the UK's territorial constitution beyond 1998. It outlined the changes that have taken place (and those that have not), why they took place and the 'state of play' as it stands today. It then went on to interrogate how it operated in practice, considering mechanisms for interaction, cooperation and the persistence of hierarchy before considering judicial approaches and, finally, what happens when the two collide. The argument throughout has been that devolution, despite its incremental and piecemeal development, represents a fundamental change in the territorial constitution. This is something recognised by the courts who have grappled with the settlements to accommodate a normative space for the institutions as subordinate to Westminster but by no means insignificant. The unique 'Britishness' of the settlement—that is to say its dependence on political stability, ideas of a largely flexible constitutionalism, and the dominance of short-sighted pragmatism over long-term existential re-evaluation of constitutional norms or requirements—have not themselves posed anything more than stumbling blocks for the successes of devolution; in some ways, such as the political guarantee of legislative consent, it has even enabled easy and successful cooperation. It may have been the case at its inception that the *ad hoc* implementation of devolution was never intended to be a constitutional 'moment' for the UK but it is quickly becoming one; the territorial constitution has changed and evolved to the extent that the constitutionally fundamental nature of devolution is becoming increasingly difficult to reject.

England and the 'Centre' are both proving slow to realise this change, being the least affected by devolution and the most willing to harken to unitary policies when it is convenient, as the *Continuity Reference* demonstrates. Not only is this out of step with the contemporary constitution, it is the

result of misguided assumptions about the stability and permanence of the union.[387] Westminster needs to see its role in the UK as part—albeit a hugely important part—of a constitution which now, irreversibly, hears the views of many, some of which differ from its own. The responsibility of governing is clearly more shared than ever before, and this should be embraced, though it is most obviously rejected at Westminster where parliamentary sovereignty retains its most adoring fandom. Although it was seen that parliamentary sovereignty is not inherently incompatible with decentralisation, an attitude towards the constitution that continues to believe 'Parliament can make or unmake any law whatever'[388] is increasingly problematic. The settlement, and judicial understandings of it, both continue to push towards symmetry, significance, and elements that commentators would often regard as 'federal' characteristics. Indeed, as Burgess rightly indicates, devolution means that 'the federal elements which have always existed in the UK state structure will be reinforced'.[389] The picture is little different regarding institutional interaction. Although the influence of politics on devolution in practice is problematic—particularly with the implementation of any effective intergovernmental arrangements—it is not beyond accommodation: the usual operation of the Sewel convention is demonstrative of how the political constitution can make decentralisation work. Although the UK's withdrawal from the European Union demonstrates the cracks in this political approach to decentralisation, the real problems only arise when, as in that case, those cracks are exploited. The central issue for devolution then is the mentality that warrants this exploitation—a mentality that prefers unitary (parliamentary) sovereignty to a divided sovereignty, or that prefers hierarchy to cooperation and one that is, for the most part, centred on Westminster.

[387] 'To some extent complacency within the pro-union camp was understandable… but it surely also reflected a fundamental assumption that unravelling the Union was almost unthinkable.': Dickson (n 201) 253.
[388] Dicey, *Introduction to the Study of the Law of the Constitution* (n 27) 39–40.
[389] Burgess, 'Constitutional Change in the United Kingdom: New Model or Mere Respray' (n 241) 725–6.

Devolution contains many opportunities for cooperation, and where attitudes have encouraged it, these opportunities have often been grasped effectively, but there is still more to be done, especially as Brexit looms.[390] Disagreements are, of course, unavoidable, but because of the lack of attention to the union itself, what it is for and how it should operate in the round it is proving difficult for the UK's various legislatures to make sense of their place in their constitution.[391] 'Yet,' as O'Neill indicates, 'the onus is not entirely on Westminster, regional legislatures also have responsibility, too, for facilitating smooth inter-governmental relations, ensuring that legislation does not incur central government's wrath.'[392] This is very much a collaborative enterprise, and it should be seen by all participants as exactly that; the continued existence of the systems themselves pins very firmly on the attitudes of its participants.[393] Exactly what kind of 'attitude' might recognise, or even endorse, cooperation in this way? O'Neill suggests a possible answer:

> 'The need is for, on the one hand, satisfying demands for meaningful self-government and, on the other, sustaining an abiding sense of a shared endeavour. *The equivalent is what is widely understood elsewhere as a 'federalist culture'—those habits of mutual tolerance and cooperation between levels of government indispensable to stable power-sharing arrangements.* Goodwill is a necessary but by no means a sufficient resource for carrying this off.'[394]

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[390] Institute for Government (n 167) 70: 'In October 2017, the JMC (EU Negotiations) was reconvened and, for the first time, agreement was reached on a substantive Brexit issue – the contested question of what should happen to powers repatriated from the EU. The devolved governments and the UK Government reached a compromise: the overall effect of Brexit would be an expansion of devolved policy autonomy, but new 'common frameworks' would be required in some areas to limit policy divergence within the UK… But while meetings between the UK and devolved governments are taking place more regularly than was previously the case, the key test is whether such interactions help to bring the governments to agreement both on the Brexit legislation discussed above and on the scope and content of new common frameworks to replace EU law in devolved areas. The evidence suggests that there is a long way to go to reach this point.'

[391] See, for instance, ibid 6:'The overarching problem is that there has been too little consideration of the future of the UK as a whole. Instead, there have been separate devolution processes in each part of the country. This approach has its advantages. The UK constitution has shown an impressive ability to adapt to pressures in each nation as they have arisen. But the downside is the absence of guiding principles, which has led to disagreement about the nature of the post-devolution constitution. The 2016 referendum and its aftermath have made it more urgent that these big questions be considered by the governments, by political parties and potentially through a deliberative exercise involving citizens from across the UK.'

[392] O'Neill (n 142) 82.

[393] ibid 79:'Any constitutional arrangement where there is power-sharing between discrete levels of governance depends both on constant vigilance by the central authorities and mutual goodwill to sustain the bargain.'

[394] ibid 83–4 (emphasis added).

What exactly 'federalist culture', or federalism in general, might be able to offer the UK's territorial constitution, is explored in chapter 3.

CHAPTER 3

FEDERALISM, COOPERATION AND THE PURSUIT OF SHARED-RULE

'I did not invent it, or dig it up. I found it in common use, and I have endeavoured to get at its meaning, and to some extent to work out its consequences... The term "federal" is a loose designation, and is not to be subjected to fine academic tests.' [395]

INTRODUCTION

It was seen in the first chapter that assumptions about the stability—and even 'unitarianism'—of the UK constitution are not completely immune from challenge, being further from historical reality than might first be thought. Constitutional traditions of adaptability and incremental development do find historical support, but none of this, it was seen, need be out of step with federalism. The second chapter demonstrated that, although devolution is progress and amounts to a fundamental change in the structure of the UK, it does not benefit from the 'federal' mindset present in other multi-layered constitutions, though it does offer mechanisms (such as the Sewel convention) through which this might develop. These kinds of opportunities for cooperation enjoy only a sedentary and inferior position in the discourse and in light of the Westminster Parliament's grip on the constitution it is necessary for its views to evolve in line with the needs of the people it represents. Much of the scholarly work on devolution compares or contrasts it to federalism[396] and this work requires an exploration of what federalism is, and how the UK's internal structures relate to it as a concept. Federalism is, of course, distinct from ideas such as the separation of

[395] FS Oliver, *What Federalism Is Not* (John Murray 1914) vii–viii.
[396] For extra-judicial commentary on the two, which sees them as sharing crucial values, see Sandra Day O'Connor, 'Altered States: Federalism and Devolution at the "Real" Turn of the Millennium' (2001) 60 Cambridge Law Journal 493.

powers in that it is a theory for understanding the territorial structures of states, but precisely what it requires—or demands—is hotly disputed. It is also an idea that has undergone a great deal of evolution in its relatively short life with its evolution being set amongst the changing national and international contexts that it seeks to make sense of. This chapter's suggestion is that the context the UK now provides makes federalism not only relevant but overtly useful. It will be seen that recognition of pluralism at its core, and the pursuit of shared-rule so fundamental to it, allow it to provide concepts that can help advance the progress of devolution, and minimise its flaws, encouraging institutions to cooperate in the work of government. It has already been suggested that federalism should be detached from a mere state-form, and this chapter looks at those elements of federalism that, it is suggested, provide most utility for the UK. First, the concept of shared rule is explored. It will be seen that, once it is accepted that there should be multiple layers of government, they can be encouraged to work in a positive, collaborative way. Secondly how federalism is compatible with multi-layered constitutionalism will be considered, to demonstrate that its insights are useful in light of the realities of contemporary government, and in order to enable the aims of constitutionalism to be properly obtained.

As was noted at the outset, federalism has, for some time, been something of a 'dirty' word in political and legal discourse in the UK, being overtly rejected at numerous junctures.[397] The UK constitution has evolved largely in (sometimes conscious) contradiction to federalist ideals, yet the UK-fashioned alternative—piecemeal, demand-led decentralisation—has led to an uncomfortable middle-ground where asymmetry, uncertainty and hierarchy prevail. Some, as a result of this discomfort, see 'federation' as a plausible and welcome destination for the UK.[398] However, as has been seen, federalism does not necessitate a particular state-form. Rather, it is a kind of

[397] A federal solution would be 'a strange and artificial system': *Report of the Royal Commission on the Constitution 1969 – 1973* (n 152) 152–4.
[398] Parliamentary committees have often considered federalism to be a viable destination for the union: House of Lords Constitution Committee, *Inter-Governmental Relations in the United Kingdom* (n 296); House of Commons Political and Constitutional Reform Committee (n 223).

constitutional thinking, flexible in its requirements and beneficial because it welcomes active cooperation rather than rejection of institutional exchange. Federalism also warrants intrusions and interactions, it prefers shared, rather than solely self-rule, and provides for ways of institutionalising it. It suggests that there need be no definite hierarchy of institutions, and therefore—crucially to the UK—that all their voices are constitutionally important. It further proposes that conflict, coercion, and political tension are better managed when channelled by state architecture than by being simply left in the political domain. To federalists, conflict is no less ubiquitous, but is capable of being kept respectful and principled, rather than one party using its (considerable) powers at the expense of its partners. Federalism is not, as it has sometimes been perceived to be, simply a touchstone for deciding what the UK *is*—these debates often end with some claim that it is somehow unhelpfully *sui generis*—but rather, it is a way of thinking about power dynamics and the structures of governance such that the broader aims of constitutionalism can be pursued. Federal principles and ideas have evolved to make sense of the context within which they sit, and have a very real relationship with other norms, standards and changes in the constitutional landscape. In a constitution revolutionised by devolution, its contribution on this front is surely welcome.

THE LESSON OF SHARED RULE

Debates over sovereignty in the UK are usually those concerning Westminster's parliamentary sovereignty and what it might have come to mean. This has already been explored to an extent regarding devolution and suffice it to say here that, although parliamentary sovereignty is not in and of itself incompatible with federalism, a sovereignty-unitarist outlook which sees Westminster at the pinnacle of a hierarchy and disregards the devolved institutions does not allow fruitful institutional interaction or sharing of governance, and may even prove dangerous for the union.

The structure of devolution it was also seen, is quite disintegrative: It allocates competences away from a centre that has seldom changed to keep pace and to justify its continued existence. It has been seen that a federal 'mentality' might have utility here to encourage the different legislatures to collaborate in the activity of government, but, although the territories now have powers of 'self-rule', as Professor Tierney puts it, there is a 'lack of any formalisation of the shared rule dimension of the UK territorial Constitution, and a general lack of any encompassing vision of the union as a system with a federal mentality or spirit' whereby this dimension might develop.[399] The UK does have *some* institutions that exhibit what might accurately be called shared rule, but these are exceptions to a general trend. Arguably Northern Ireland is the most comprehensive example of cooperative, federal style arrangement in the UK. Containing provisions for engaging with self-government while balancing the integrity of the union,[400] it overtly operates a system of shared rule across competences and between institutions.[401] Northern Ireland also operates an interesting system where if it is successful, it gains more competences, and even those it does not have are flexible[402] as well as, of course, its reliance on cross-community support. Northern Ireland depicts a complex picture of the potential of inter-dependence between devolved and central legislatures but is also likely to be most fragile in the face of a disinterested or insensitive central government. It is here where the centripetal force of undivided sovereignty has been clear as a force for division in communities, sounding most strongly when direct rule has been implemented. There are other examples too, such as the fact that international treaty obligations are shared between the many different legislatures,[403] and the application of legislative consent motions and conventions.

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399 Tierney (n 24) 103.

400 Consider, for instance: 'Social security is a devolved matter in Northern Ireland, unlike in Scotland and Wales, but there is a statutory provision requiring the Secretary of State for Northern Ireland and the Northern Ireland Minister having responsibility for social security to 'from time to time consult one another with a view to securing that, to the extent agreed between them, the legislation to which this section applies provides single systems of social security, child support and pensions for the United Kingdom': Dickson (n 201) 265.

401 Henderson (n 179) 154.

402 Lady Hale (n 190) 2: '[The Northern Ireland] Act does not say that the Northern Ireland Assembly cannot legislate for reserved matters. It can do so, but only with the prior consent of the Secretary of State for Northern Ireland. It can also legislate, with consent, for excepted matters if this is ancillary to provisions dealing with a reserved or transferred matter (s 8)'.

403 ibid 1–2.

However, the crucial element of shared rule, especially as it is exhibited in obviously federal constitutions, is the sharing of competences and the existence of legislative 'overlaps', both of which are largely absent from the UK's decentralisation experience which usually prefers a 'dual' system of competence allocation:

> 'the guiding approach to devolution has been to draw a clear division between what is devolved and what is 'reserved' to Westminster. Few functions are formally shared between central and devolved governments. As a result, the UK Government did not create systems or processes for joint working with the devolved administrations.'[404]

This is not unlike the earliest federal experiences, which preferred a similar 'dual' model of power allocation. Madison expressed the separation, and the initial primacy of the several States in the following way: 'The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite.'[405] However, as times changed, so too did the interpretation of the federal enumerated powers. In the post-war years, the advance in civil rights and the growth of the economy meant that the federal balance began to be reset.[406] Despite the US Supreme Court, in cases such as *Lopez*[407] ruling that the congressional power under the Commerce Clause had been exceeded when it made it an offence to possess a firearm at or near a school,[408] demonstrating the persistence of the 'dual federal' approach, more significant for present purposes are those cases that demonstrate cooperative federalism. Dual federalism, Tomkins suggests, 'is a thin and, experience would show, weak form of federalism ... Of course, delimiting the powers of central government and regional government is a necessary component of federal and quasi-federal orders but, on its own, it is far

[404] Institute for Government (n 167) 59.
[405] James Madison, 'No. 45' in Terence Ball (ed), Alexander Hamilton, James Madison and John Jay, *The Federalist* (CUP 2003).
[406] Tomkins (n 341) 79.
[407] *United States v Lopez* 514 US 549 (1995).
[408] A similar example can be found in *United States v Morrison* 529 US 598 (2000); where the effect of the legislation was found to be too remote and indirect to be within the Commerce Clause.

from sufficient.'[409] Indeed, not only is dual federalism an inadequate picture of federalism, it also does not do justice to its real purposes. For instance, to Elazar it is 'self rule plus shared rule'[410] that defines federalism and to Tierney '[t]hese two components are needed to give the state balance, coherence and the mutual or multiple interdependence upon which the very idea of union rests.'[411] Federalism warrants, by virtue of its acceptance of multiple levels of authority, active cooperation between legislatures and governments to add this element of shared rule. This is something that modern federal jurisprudence, especially in the US, has come to recognise.

There are two elements of US constitutional law that are significant here. Firstly, the anti-commandeering rule and the way Congress can use its broad spending powers and, secondly, there is the concept of 'pre-emption'. As Tomkins notes, 'Congress' power to spend is far wider than its power to legislate… [it] may spend money even in areas over which it has no legislative competence'.[412] Congress may even, as the case of *South Dakota v Dole*[413]demonstrates, attach conditions to its funding. In that case, it withheld some highways funding from States with a minimum drinking age of less than 21. The attachment of conditions has long been accepted,[414] and is treated with more judicial deference than legislative powers, but these conditions must nonetheless be 'reasonably related to the purpose of the expenditure'.[415] The Court found that this test had been met, although Justice O'Connor found that drinking age was not sufficiently connected to highways funding. This power, clearly, is not unlimited. In *New York v United States*[416] Justice O'Conner held, speaking for the Court, that Congress may not 'commandeer' the States. This meant 'directly compelling them to enact and enforce a federal regulatory programme.'[417]

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409 Tomkins (n 341) 81.
410 Daniel J Elazar, *Exploring Federalism* (University of Alabama Press 1987) 12.
411 Tierney (n 24) 108.
412 Tomkins (n 341) 81.
413 *South Dakota v Dole* 483 US 293 (1987).
414 Since the case of *United States v Butler* 291 US 1 (1936).
415 *South Dakota v Dole* (n 413) 213 (O'Connor J); *Massachusetts v United States* US 435 444 (1978), 461.
416 *New York v United States* 505 US 144 (1992).
417 ibid 176; *Hodel v Virginia Surface Mining & Reclamation Association Incorporated* 452 US 264 (1981), 288.

'While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require States to govern according to Congress' instructions.'[418] It is clearly a fine line between incentivising and requiring compliance, and where this line stands may be up for debate. Justice O'Conner suggested that this regime, where legislation 'anticipates a partnership between the State and the federal government, animated by a shared objective',[419] epitomised 'co-operative federalism'; significantly, the crucial element in demarking this line is whether or not the State has any choice as to whether to cooperate or not.[420] This partnership exists primarily in the field of funding and is a dynamic virtually unheard of in the UK's block-grant system.

The second element depends more than non-commandeering on the supremacy of federal law. Pre-emption is the name given to the displacing or setting aside of State law where it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'[421] It is also possible for a State's competence to be displaced in a field more generally if 'Congress, acting within its proper authority, has determined it must be regulated by federal law exclusively.'[422] In the case of *Arizona v United States,*[423] when the State enacted supplementary migration laws—an area that, of course, greatly involves both levels of government—it was held that Arizona's provisions had been pre-empted by pre-existing federal law on alien registration. The same was the case for aliens seeking work; 'Congress [had] made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorised employment'[424] and that Arizonan law which was at odds with this had been pre-empted. Equally, a proposed increase in arrest powers

[418] *New York v United States* (n 416) 162; Tomkins (n 341) 82.
[419] *New York v United States* (n 416) 167; *Arkansas v Oklahoma* 503 US 91 (1992), 101.
[420] Tomkins (n 341) 83. Equally, in *Printz v United States* 521 US 898 (1997) it was held that State officers could not be commandeered to implement federal regimes.
[421] *Hines v Davidowitz* 312 US 52 (1941), 67; Tomkins (n 341) 85.
[422] Tomkins (n 341) 85.
[423] *Arizona v United States* 567 US 387 (2012).
[424] ibid slip opinion 13.

had been pre-empted in the same way. Tomkins suggests this case, and others concerning pre-emption, are unhelpful for shared rule since they deter rather than encourage both levels of government from engaging in the same areas. Yet even if the legacy of dual federalism remains present, the broader context of concurrent jurisdiction and of non-commandeering represents 'a sharing of regulatory authority between the federal government and the states';[425] this is a system very similar to the EU's directive system, which leaves 'the choice of form and methods' open to Member States.[426]

The Canadian experience of federalism is the most explicit about the room the judiciary is comfortable with granting for joint regulation of the same competence areas, in fact 'courts should allow both levels of government to jointly regulate areas that fall within their jurisdiction'.[427] Here, the threshold is much higher: 'It will hold legislation to be unconstitutional not where it merely *affects* the jurisdiction of the other layer of government but only where it *impairs* that jurisdiction.'[428] This is clearly a very positive, encouraging approach to cooperative federalism, in fact it may be the case that modern federalism '*demands* cooperation between the federal government and the Provinces'.[429] This approach reaches such a level that it has been suggested in court that 'the principle of co-operative federalism prevents Canada and the Provinces from acting or legislating in a way that would hinder co-operation between both orders of government.'[430] It can therefore be claimed that cooperative federalism is a way of encouraging both layers of authority to engage in a policy area. One may be granted scope and choice in its implementation, or it may be used as

[425] Philip Weiser, 'Towards a Constitutional Architecture for Co-Operative Federalism' (2001) 79 North Carolina Law Review 644, 655.
[426] Treaty on the Functioning of the European Union 2007 Art 288.
[427] *Attorney General (Canada) v PHS Community Services Society* [2011] 3 SCR 134 [63].
[428] Tomkins (n 341) 93. A key example can be found in *Quebec v COPA* [2010] 2 SCR 536 where territorial legislation was restricted so it no longer impaired the federal jurisdiction.
[429] Tomkins (n 341) 94, referencing the securities regulation (emphasis added); *Securities Act Reference* [2011] 3 SCR 837 [7]: 'Federalism demands that a balance be struck'.
[430] *Quebec (Attorney General) v Canada (Attorney General)* [2015] 1 SCC 693 [15].

a 'pawn' of the other to ensure its own policies are implemented.[431] Importantly, cooperative federalism is not a one-way street; it is not the tool of the higher level of authority to manipulate the lower, rather it is a tool that both layers can use to ensure policy goals are met and, if necessary, to challenge one another. Territories are in fact able to be 'uncooperative' and challenge the 'higher' authority's policy ambitions. As the anti-commandeering litigation has suggested, it is this choice that distinguishes cooperation from coercion, but it is also a tool that can be used by territories to reject, challenge or at least test public opinion against particular federal strategies. This has been the case for various aspects of immigration law, college tuition fees and fractious terrorism policies and is as much a tool of cooperative federalism as active or passive collaboration is.[432] It can even be strategically deployed such that, despite apparent pre-emption of an area, the anti-commandeering rule can be used to negate any federal attempts at regulation: 'the anti-commandeering cases have established that States have no obligation to implement or enforce federal law unless they voluntarily agree to do so'.[433] This means that the federal government is powerless to enforce regulation that depends on States for their enforcement, even though it disapproves of the State's approach.

Despite the principle of cooperative federalism on some readings (though not all) being incapable of 'impos[ing] a positive obligation to facilitate co-operation where the constitutional division of powers authorises unilateral action',[434] normative weight can in fact be attached to the concept.

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[431] Both of these are mechanisms familiar in the European Union where subsidiarity allows for a degree territorial discretion and diversity, and directives leave a Member State's options open for how it sees fit to implement policy. They are also present in the margin of appreciation at Strasbourg.

[432] See Tomkins (n 341) 88–90; Jessica Bulman-Pozen and Heather Gerken, 'Unco-Operative Federalism' (2009) 118 Yale Law Journal 1256; Cristina Rodriguez, 'The Significance of the Local Immigration Regulation' (2008) 106 Michigan Law Review 567, 581; Matthew Waxman, 'National Security in the Age of Terror' (2012) 64 Stanford Law Review 289, 306; Ernest Young, 'Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror' (2004) 69 Brooklyn Law Review 1277.

[433] Ernest Young, 'Modern-Day Nullification: Marijuana and the Persistence of Federalism in an Age of Overlapping Regulatory Jurisdiction' (2015) 65 Case Western Law Review 769, 776.

[434] *Quebec (Attorney General) v Canada (Attorney General)* (n 430) para 20. Tomkins suggests that co-operative federalism *does* encourage this facilitation.

Importantly—and to the likely pleasure of those of a political constitutionalist persuasion—this is taking place on the political as well as legal fora. This idea is that of 'mutual respect'. Each sphere of government should, it suggests, take account of the interests of the other:

> It ought to be the case in Canada and the UK alike that, in sharing power, governments may not act unilaterally without taking into account the impact of their actions on the other level of government. To adopt this as a legal principle in the UK would be a welcome addition to our public law.[435]

This might be implicit in the non-commandeering rule, and in the Canadian experience of cooperative federalism more generally,[436] but it is most explicit, especially as a political principle, in the experience of South Africa. In the South African Constitution, all the spheres of government (local, provincial and national) must, among other things,

> 'respect the constitutional status, institutions, powers and functions of government in the other spheres; [and] exercise their powers and perform their functions in a manner that does not encroach on the… integrity of government in another sphere; and co-operate with one another in mutual trust and good faith.'[437]

This is a provision not intended to spark litigation but is rather 'designed to facilitate political solutions'.[438] When the Constitutional Court has (rarely) interpreted this section, it has noted that the spheres are 'distinctive, inter-dependent and inter-related'.[439] Even if this made little material difference to the conclusion of the case, it does represent an example of enshrining even political cooperative mechanisms in constitutional principle.[440]

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[435] Tomkins (n 341) 96.
[436] For instance, *Quebec (Attorney General) v Canada (Attorney General)* (n 430) para 15: 'the principle of co-operative federalism prevents Canada and the Provinces from acting or legislating in a way that would hinder co-operation between both orders of government.'
[437] Constitution of South Africa Article 41.
[438] Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (CUP 2013).
[439] *Premier of Western Cape v President of South Africa* (Case CCT 26/98) [50].
[440] Tomkins (n 341) 98.

The fact that the UK does not yet possess fully developed cooperative federal institutional structures is something of a weakness in its current constitutional arrangements. Cooperative federalism may provide a way to strengthen those shared-rule elements of the constitution that currently exist and push for more where none are present. The way devolution operates in the UK, especially with its rejection of legal limits on Westminster's 'sovereign' authority, does not, as some have suggested, equate to a rejection of federalism;[441] through the lens of cooperative federalism, it is possible for the two to be reconciled. As Professor Elliott indicates, and as noted above, '[o]ne of the hallmarks of devolution is that the national legislature, far from *transferring* legislative competence, merely *shares* such competence with devolved institutions.'[442] This sharing of competence is, it must be accepted, a far cry from the dual federalism envisaged by Wheare, but it is not entirely incompatible with cooperative federalism as far as the constitutional realities of devolution extend (when one is mindful of the political—and possibly constitutional—limits on Westminster, as well as its ability to legislate for the devolved territories, especially with consent). Although, of course, as a point of or pure law the institutions and their laws can all be reversed and abolished by Westminster,[443] in terms of constitutional reality, this is not possible[444] and viewing this relationship as purely subordinate does not do justice to its complexities where '[t]he better view … is that Parliament's legislative freedom is restrained—even if it not unambiguously restricted—by values that are genuinely constitutional in nature.'[445] Legislative cooperation is already a reality in some areas, namely in those of taxation and welfare; the Scotland Act 2016 has

[441] 'Parliamentary sovereignty is flatly incompatible with *any conventional understanding* of the federal model…': Elliott (n 273) 40 (emphasis added); Dicey, *Introduction to the Study of the Law of the Constitution* (n 25) 148: 'to vest legislative sovereignty would be inconsistent with the aim of federalism, namely, the permanent division between the spheres of the national government and of the several states.'
[442] Elliott (n 273) 40.
[443] See for instance, *Thoburn v Sunderland City Council* (n 332) [59] (Laws LJ): 'Being sovereign, [Parliament] cannot abandon its sovereignty'. Dicey also claimed this was the one thing a sovereign Parliament could not do, see Dicey, *Introduction to the Study of the Law of the Constitution* (n 25).
[444] '… Westminster may 'make or unmake any law whatsoever'… as a matter of high legal theory but, perfectly plainly, there are all sorts of political constraints on the United Kingdom Parliament. Among them are those created by, or arising as a result of, devolution.': Tomkins (n 341) 73.
[445] Elliott (n 184) 55–56; Elliott (n 273) 64.

made provision for these areas of competence to be distributed among both of Scotland's legislatures, and, in some cases, shared between them. These provisions 'will require co-operation between UK and Scottish Governments across a range of new areas'[446] with the effect that '[t]he hitherto fairly straightforward demarcation between reserved powers and those devolved to the Scottish Parliament will become considerably less clear.'[447] As Tomkins suggests, progress towards 'shared rule' is welcome: 'thinking about cooperation between governments may be a more productive way forward than focussing only on the 'sovereignty' or autonomy of different levels of government'.[448]

MAKING SENSE OF A MULTI-LAYERED CONSTITUTION

Cooperative federalism in other jurisdictions is primarily animated by a single factor: it is the result of reality.[449] It has been recognised in Canada that a dual model, where each sphere of government is insulated or 'watertight' is simply unrealistic—and, significantly, this is recognised in the nature of the legislation and jurisprudence on competence delineation. For instance, 'the pith and substance doctrine is founded on the recognition that it is in practice impossible for a legislature to exercise its jurisdiction over a matter effectively without incidentally affecting matters within the jurisdiction of another level of government'.[450] The fact that legislation often has qualities or effects that sound on both levels is a reality that the UK has wrestled with, but that cooperative federalism can easily make sense of: 'some matters are by their very nature impossible to categorise

[446] House of Lords Constitution Committee, *Scotland Bill Report* (n 286) para 17.
[447] ibid 19; Tomkins (n 341) 77.
[448] Tomkins (n 341) 91.
[449] See Daniel J Elazar, 'From Statism to Federalism: A Paradigm Shift' (1995) 25 Publius: The Journal of Federalism 5.
[450] *Canadian Western Bank v Alberta* [2007] 2 SCR 3 [29]. It is important to note that this test is the same one applied by the Judicial Committee of the Privy Council to competence allocation in those territories under its jurisdiction.

under a single head of power',[451] and therefore beyond the dual federal model's remit. Further, as the New Deal and the shift in American federalism at least illustrates, there is real advantage to this legislative and executive 'overlap'—policies not achievable by one sphere alone may be achieved by both acting in concert; it is the inevitability of this reality that requires the flexibility of the theory.[452]

Cooperative federalism is not merely about accepting this reality, it is about encouraging it; in fact 'co-operative federalism reflects the realities of an increasingly complex society that requires the enactment of co-ordinated federal and provincial legislative schemes to better deal with the local needs of unity and diversity'.[453] Indeed it also possesses a strong normative gravity towards institutional collaboration, not only because the jurisprudence will accept it and there is therefore room to use it to achieve policy goals, but also by providing a normative framework through which it can operate most effectively. This is increasingly important as constitutional structures become ever-more interconnected. O'Neill suggests that '[t]he classic Westphalian state system is under stress across the Continent and beyond. These trends reflect a global phenomenon, a structural shift in governance in response to unparalleled changes in the international political economy'[454] and if this is so, federal experiences demonstrate that the realities of contemporary government make cooperative federalism a hugely useful tool for modern constitutional thought, both as a scholarly pursuit, and in the minds of the lawyers and politicians who make the constitution tick. The idiosyncrasies of devolution do little to detract from its utility, but rather make it all the more important:

> 'British devolution does not conform to the neat separation of powers usually found in formal federalism. Rather than ceding outright authority, central government accommodates

[451] ibid 30.
[452] ibid 42; Tomkins (n 341) 93.
[453] *Quebec (Attorney General) v Canada (Attorney General)* (n 430) paras 148–54.
[454] O'Neill (n 142) 93.

> territorial interests, agreeing to share its competencies in a restricted list of legislative and administrative matters. Boundary disputes are certain to arise in these areas of concurrent or overlapping power. Again, there is nothing untoward in this, though a culture of common sense inter-governmental cooperation is indispensable if these conflicts of interpretation are to be contained, let alone resolved.'[455]

The recognition of plurality is a challenge facing many constitutional systems; indeed '[t]he rise of powerful internal nationalisms within the territory of ancient states is a worldwide phenomenon. It raises some fundamental questions about the identity of nations'.[456] Further, the challenge faced by the UK, 'of how to unite different regions and people with different histories and identities[,] is one common to many modern governments'.[457] With disintegrative unitary conceptions of sovereignty preferring secession to union, it is clear that constitutional theory needs to quickly catch up with the realities of contemporary government. The absence of adequate theories or their rejection in pursuit of political ambition is clearly to the detriment of both scholarly understanding of constitutions, and their operation.

Shared rule and the avoidance of hierarchy are crucial elements of this[458] and multi-layered constitutionalism has its own innate advantages. For instance, it creates an opportunity for policy experimentation: Devolution has frequently led the way in endorsing constitutional ideas that might otherwise be less obvious in the UK: each settlement has an obvious separation of powers, enables judicial protection of the rule of law through strike-down powers, EU and ECHR norms are protected; as well as power-sharing, proportional representation and super-majorities[459] all being present in the settlements. Multi-layered constitutionalism also amounts to a recognition of

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[455] ibid 79.
[456] Lord Sumption (n 90) 2.
[457] Institute for Government (n 167) 2.
[458] In the US for instance hierarchy is avoided and arguably substituted by a horizontal understanding of intergovernmental relations. See Nicolaidis and Howse (n 42).
[459] The Scotland Act 1998 was amended to require legislation on protected matters (such as the franchise and the number of constituencies) to be passed by two thirds majority of the number of seats in the Parliament; see Lady Hale (n 190) 3.

the interrelationship between governance structures within and without the State. This was apparent in the UK as early as the Irish question and, as it was with Irish Home Rule, questions of the UK's internal constitutional dynamics are intricately (and delicately) entangled with questions of its external ones:

> [T]he subject of British federalism should also be seen in its broader imperial and international context, putting the Irish crisis beyond its conventional dimension of a limited "domestic affair." After all, it was the political development of Canada and the other self-governing Dominions which stimulated the imagination of British constitutional reformers… [along] with constant references to the contemporary experience of Switzerland, Germany, and Austria-Hungary. And the United States remained the ideal model for a federal "Greater Britain" at the centre of global politics, reuniting different nations into a solid political and military union.[460]

This is not something that has changed and it reflects an understanding of the interconnectedness of modern government; for instance, it is interesting that Tony Blair suggests 'the arguments of the Brexiteers are very similar to the arguments of the Scottish nationalists ultimately. It's just a misunderstanding of what nationhood really entails in the 21st century.'[461] The mixing of power structures and the sharing of competences is therefore an increasingly significant reality, made increasingly problematic by Brexit.[462] Brexit might be seen as a rejection of this approach to modern constitutionalism, but it retains its importance in at least some parts of the Union, and it marks an increased interest in assessing (or reassessing) the layers of constitutional structures:

> 'in this era of globalized economics and increased international interdependence the prevailing mood within other parts of the United Kingdom seems to have been that a supra-national identity, one which stresses cooperation and harmony between the countries in the Union, is

[460] Pelizza (n 16) 12.
[461] Institute for Government, Interview with Blair (n 146) 10.
[462] Institute for Government (n 167) 71: 'Analysis published by the UK Government in April 2019 shows there are 160 areas of EU law that intersect with devolution in at least one of the three devolved nations, meaning that powers in this area are devolved but currently constrained by EU law.'

> an even more inspirational model. In the United States, a classic federal state within which substantial power is vested in 50 state governments, it is collaboration between those states which gives the country as a whole its resilience and the people of the various states their national pride.'[463]

The fundamental claim of multi-layered constitutionalism is that it is far more desirable to embrace this interconnected 'marble-cake' reality than to reject it. Cooperative federalism then becomes a useful tool to ensure this works and maintains its legitimacy. Once the 'layer-cake', dual federalist idea is abandoned, with it the 'zero-sum metaphor for institutional relationships'[464] can also be lost. This means that the conception of growth of some competences at the cost of other institutions,[465] a flawed way to make sense of institutional relationships, can be replaced with an understanding that better reflects the interconnecting network of sovereignties and the necessary conflicts and collaboration that are fundamental to multilevel governance, with its own positive ramifications.[466] That '[t]he expanding competence of the European Union is, according to some, realised at the expense of 'the role that is left for national parliaments'"[467] is partly the result of this 'dualist' conception of both sovereignty and competence allocation. If government is seen as an overlapping, shared enterprise suspicion over increased institutional interaction in policy areas can be reduced, and the need for disintegrational territorialism can be minimised. Instead, the *real* benefit of multilevel governance—the increase of institutional exchange and interaction—can be realised. It is also possible to suggest that the problems evidenced with viewing federalism merely as a threshold of function allocation are the fruit of the dualist/layer-cake model:

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[463] Dickson (n 201) 253.
[464] Jon Pierre and B Guy Peters, *Governance, Politics and the State* (Palgrave Macmillan 2000) 133.
[465] Tom Entwistle and others, 'The Multi-Level Governance of Wales: Layer Cake or Marble Cake' (2014) 16 British Journal of Politics and International Relations 310, 313–315; Annette Elisabeth Töller, 'Measuring and Comparing the Europeanization of National Legislation: A Research Note' (2010) 48 Journal of Common Market Studies 417, 420.
[466] Relevant, of course, in light of Brexit; See Sionaidh Douglas-Scott, 'Britain and the European Union: Federalism and Differentiation' in Robert Schütze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 184.
[467] Entwistle and others (n 465) 313; Töller (n 465) 420.

> …the clear attribution of functions to different levels of government [as opposed to a 'mixed' analogy] seems to have an irresistible allure to anyone charged with codifying or understanding constitutional arrangements whether or not they satisfy what are taken to be the defining criteria of federalism.[468]

In this sense, the 'clear attribution of functions' may *itself* be seen as 'the defining criteria of federalism', leading at least in part to the linguistic and migratory problems faced by the concept.[469] Page suggests that the layer-cake is a better descriptive analogy of multilevel governance,[470] but the work undertaken in the US and EU alone surely suggests this is not the case,[471] yet it continues to be an attractive model, with some regarding cooperative federalism 'faux-federalism'.[472] Perhaps then, it has normative power not possessed by the cooperative model of federalism, perhaps the lack of clearly defined boundaries, the imprecision of its competence allocation and its ability to catch any institutional arrangement that features 'overlaps' makes it normatively vacuous. Yet it remains, as experience shows, the most effective (or possibly only) way of making sense of multi-layered constitutions, being both reflective of their reality, and pursuant of their advantages. Tomkins reiterates the benefits of a perspective that encourages shared rule:

> That we should think of devolution and federalism in terms of spending powers as well as law-making competences. That shared rule can empower governments both through cooperation and non-cooperation. That principles of mutual respect and recognition can be given judicial expression and do not have to be mere platitudes. And that shared rule can be pushed yet further to embrace formal ideas of federal loyalty.[473]

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468 Entwistle and others (n 465) 312; Andreas Auer, 'The Constitutional Scheme of Federalism' (2005) 12 Journal of European Public Policy 419; Thomas Christin, Simon Hug and Tobias Schulz, 'Federalism in the European Union: The View from below (If There Is Such a Thing)' (2005) 12 Journal of European Public Policy 488.
469 Entwistle and others (n 465) 312.
470 To Page, it is preferable to understand multilevel governance in terms of the 'separate authority federal model in which there are separate spheres of authority and activity', rather than the 'eradication of the boundaries between international and domestic policy making': Edward Page, 'The Impact of European Legislation on British Policy Making: A Research Note' (1998) 76 Public Administration 803, 808; Entwistle and others (n 465) 313.
471 See, for instance, Schütze (n 20); Nicolaidis and Howse (n 42); Edward Corwin, 'The Passing of Dual Federalism' (1950) 36 Virginia Law Review 1.
472 *Arlington v FCC* 569 US 290 (2013) (Slip Opinion, p 14) (Scalia J).
473 Tomkins (n 341) 98–99.

It has been seen that the preference for a hierarchical, exclusive and dismissive approach has far more disadvantages for intergovernmental relationships, particularly in the shadow of parliamentary sovereignty which, it has been suggested, is far more a warrant for engagement of other institutions than suspicion from them. Uncertainty does have its own problems, but this may be a necessary expense in pursuit of improved institutional interaction. Further, it can operate as a fountainhead for other principles. The question 'who has this power?', can become the question 'who *should use* the power', the answer to which will be more useful. In answering it, recourse will need to be had to other principles—subsidiarity, the rule of law and democracy among other core principles of constitutionalism—but this conversation is not possible if the institutions are excluded at the point of competence allocation. Federalism is often conflated with legalisation,[474] yet the cooperative model clearly pushes competence and governance back into the political sphere. This model of federalism suggests that the normative-constitutional problem of who should *wield* a certain power may not be resolved by recourse to legal principle alone, since the law may simply place it in the hands of many institutions. Which institution is best placed to use that power is therefore the produce of political debate, something that has been embraced in South Africa. The result of this kind of federalism is that, rather than talking about whether to devolve,[475] the question becomes which institution(s) are best placed to handle tasks, and how they should coordinate their responses to challenges that transcend those obvious boundaries; the advantage of federalism being its encouragement of multiple institutional perspectives, which it then goes on to legitimise.

[474] See above discussion of Dicey's understanding of the concept, where it is suggested that his fault is the conflation of the coincidence of a supreme codified constitution (and therefore legal constitutionalism) over federalism *itself* demanding supremacy of law.
[475] Livingstone (n 61) 81.

The problems that federalism seeks to solve are clearly deeply imbedded in the devolution settlement. At its core, federalism is a way of framing constitutional questions, of accepting plurality, both in terms of peoples and of perspectives, and also as a means of balancing autonomy and integrity: finding unity in diversity. Federalism need not be ruled out because of the blocks in the way of the UK's claims to federation, federalism clearly has more to offer than mere classification. The UK, certainly, is more 'constitutional' than ever before in its history: the protection of rights, constitutional statutes, decentralisation and ever-growing judicial review jurisdiction are all beginning to qualify the Westminster Parliament's claim as the salient voice on constitutional matters. Clearly the UK's constitution is not only more 'constitutional', but also more 'federal':

> [F]ederalisation is in a state of becoming, but the very flexibility in the term suggests that a federal Britain may well emerge without a full blown written Constitution, without a fully formalised symmetry of powers involving a model of regional government for England in any way comparable to Scottish devolution, and also with only a modest tampering with Parliament's supremacy or its institutional architecture. In fact, from certain angles it probably will continue to look not very federal at all.[476]

It is clear that many other institutions have valid—and often different—views on the constitution. Some, for instance the courts, are often informed by their institutional characteristics as arbiters of disputes and protectors of minorities, insulated from the magnetism of political expediency; while others, such as the devolved legislatures, are mandated by their representation of forgotten peoples who seek a voice in a larger union or separation from it. This must also be seen in the shadow of the UK's own constitutional history as, though it is often forgotten, a young, unstable union that has had to battle with conflicting constitutional visions since it was first conceived. The devolution settlement has enshrined these differing perspectives and it is no longer tenable for Westminster to ignore them—they are not going anywhere. Federal thinking might, it is suggested,

[476] Tierney (n 24) 121.

be a way for the UK to balance these views, to seek compromise between autonomy and integrity, and properly share its government.

CONCLUSION: WHAT CAN FEDERALISM DO FOR US?

When federalism is properly understood it is clear that communities and institutional forms themselves can exhibit certain federal qualities, many of which the UK is already home to: Northern Ireland, the Sewel convention, constitutional restraints on parliamentary sovereignty such as the principle of devolved autonomy, and the very devolved institutions themselves (as well as the process through which they have come about and developed) are all examples of federal elements in the UK constitution. In one way or another these institutions recognise discrete political communities and encourage (to some extent) dialogue and cooperation between them. Devolution does, however, have problems: the politicisation and infrequency of formal intergovernmental arrangements, the lack of English home rule, the absence of cooperative capital allocation systems, and, most significantly, the absence of a desire in England to break from the homogenous, unitary conception of the UK. When the UK's federal qualities are appreciated, these challenges can be (and some suggest, would inevitably be) overcome.[477] Once it is accepted that the UK is in a club of systems that have 'federal' problems, these can be understood with reference to other systems that experience similar ones to see, for instance, how South Africa constitutionalises a 'federal loyalty', or how Canada understands the impossibility of 'watertight legislative compartments', and these insights offer solutions for the UK. The UK can review the flaws in its territorial constitution and find federal solutions to them, the most significant of which is arguably the idea of cooperative federalism. This concept, it has been seen, is the result of the

[477] See Livingstone's claim above about the reciprocal relationship between federal sensibility and federal architecture: Livingstone (n 61).

realities of territorial government, but it also encourages the shared rule that literature on devolution broadly accepts is the most regrettable absence from UK constitutional thought.

None of this is, as chapter 1 explained, at odds with the UK's history. Rather than being understood as an homogenous unitary state, the UK *should* be recognised as perpetually wrestling with distinct communities and their desire for self-rule, something that unitary thinking has never been able to come to terms with. Whether the UK is a federation or not is, bluntly, irrelevant; the most important question is how its federal characteristics can be understood and its government made more effective. A mindset that endorses these qualities is essential, and, in light of the fundamental nature of the changes that have resulted from devolution (whether they were desired at implementation or not), a mindset that rejects them is clearly out of step with reality. The problems with the UK's territorial governance can be solved by federal thinking, a thinking that, in turn, can make sense of a world that is, hesitantly, increasingly interconnected and multi-layered, or at least in the process of reimagining constitutional structures. Only when this is accepted, can we begin to 'recognise just how federal the devolved arrangements are, and continue to become.'[478]

[478] Tierney (n 24) 106; Andrew Gamble, 'The Constitutional Revolution in the United Kingdom' (2006) 36 Publius: The Journal of Federalism 19; Matthew Flinders, 'Constitutional Anomie: Patterns of Democracy and 'The Governance of Britain' (2010) 44 Government and Opposition 383; Stephen Tierney, 'Federalism in a Unitary State: A Paradox Too Far?' (2009) 19 Regional and Federal Studies 237.

CONCLUDING THOUGHTS

'UNCHARTED TERRITORY'?

'Differences, however, of words must not conceal from us essential similarity of things' [479]

If one thing is gleaned from this thesis, it should be that the territorial constitution *matters*. The UK's past, present and, in all likelihood, its future are all shaped by the way the UK as a state is understood, and how authority and power is distributed within it. It is essential to the study of constitutionalism to remain cognisant of the importance of architecture in shaping intergovernmental relations, constitutional theory and the legitimacy of law-making institutions. It is far too easy to remain ignorant of these factors, to suggest that constitutions can be studied as documents without context, immune from their history and that the only principles that matter are those that operate at the highest orders of constitutionalism, such as the rule of law and the separation of powers. It is, as the UK's experience clearly demonstrates, crucially important to remain aware of those structures that exist within the state and be prepared to make sense of their symbiotic relationship with other constitutional principles. In so doing, it is important that theories are not neglected now purely because they have been before, and that sight is not lost of how much structures change and how, though for instance devolution may once have been quite different from federalism, this claim can no longer be sustained. And indeed federalism itself has far more to offer than simple identification.

The essential claim of this thesis can be put in quite simple terms: The UK's rejection of federalism is no longer, if it ever was, justified. Federalism, when properly understood, does not prescribe a state-form that is extraneous to the UK's past, nor does it have certain inflexible institutional

[479] Dicey, *Introduction to the Study of the Law of the Constitution* (n 25) 150.

requirements that are unobtainable. Instead, it provides for a way of thinking about the roles played by the institutions in the constitution and warranting positive interactions between them. As chapter 1 discovered, the UK has historically rejected federalism as an inappropriate theory; with the UK's home-grown constitutional theories being far too focussed on ideas of monolithic, indivisible sovereignty to have room for a theory that overtly divides sovereignty, power and authority between political communities. This rejection has sometimes been justified: the theory for a long time lacked a clear, agreed meaning, it was analogised with legalisation, limited legislative authority and a particular history (namely that of a pact or *fœdus*). It is true that it has been marred by poor ideological clarity and imprecision, but surely it is true that '[t]he human understanding more easily invents new things than new words, and we are hence constrained to employ many improper and inadequate expressions.'[480] Opponents might suggest that federalism may not be the best way to think about the constitution, but its accommodation of diversity makes it more suited to the UK—and the 'cracks' in the devolution arrangement make it more important—now than ever before.

The UK's own constitutional history has not been the homogenising mission its rejection of federalism would suggest. Instead, as the first chapter also outlined, it has been shaped by union and disunion as much as any 'federation'. However, the dominance of English constitutional traditions meant that the prospect of an existential moment—which first arose in the form of Irish Home Rule—had to be avoided. In the first chapter it was also seen that, '[t]his Anglo-centric outlook, betraying a self-regarding account of history, and of governance as centralised authority, set the standard for succeeding generations.'[481] This held true both in terms of the English dominance of the union, and its dominance of its constitutional theory: the preferences for incrementalism over existentialism, the sovereignty of parliament and the subordination of

[480] Tocqueville (n 43) 162–4.
[481] O'Neill (n 142) 69.

territory are all very 'English' ideas, themselves shaping the way the union formed and the way it functioned even into the 21st Century. And yet the second chapter suggested that this existential moment is exactly what devolution has amounted to, however much it also was intended to avoid it. Devolution has not been a perfect system, it is asymmetrical, often improvised and '[c]ontinues to be extended with no vision of the state as a union of peoples',[482] with only limited institutions for institutional respect and mutual collaboration. Yet both devolution and federalism have morphed into something more mature and more similar. Devolution has become more symmetrical, principled and constitutionally significant, and, even though a hierarchical and dual model of power allocation persists, there *are* mechanisms that allow for cooperation and shared government. It has now become an arguably permanent part of the UK's constitution and Westminster would do well to treat it as such, and those weaknesses that it does have—such as in the temperamentality of intergovernmental relations—can often be seen as the result of the absence of a cooperative mindset in the centre. Federalism, in turn, has also matured, becoming more about normative claims of divided legislative power and shared government, and more accepting of the peculiarities of different systems.

Rather than prescribing a particular state-form, federalism provides access to a useful mentality, of considerable benefit to the UK. It was seen that progress on decentralisation has been, largely, good(, long overdue) and, even with its idiosyncrasies, asymmetries and political dependence, devolution has proved an effective tool to achieve self rule. It even possesses the ability to obtain shared rule because of functional overlaps and political mechanisms to protect cooperation, but it is here that the 'federal mentality' is able to step in. It was seen that the biggest hindrance for devolution was a mindset that was happy to subordinate or dismiss devolution as insignificant. Even though this is a view no longer shared by the judiciary, they have not been capable of quelling

[482] Tierney (n 24) 102; House of Commons Political and Constitutional Reform Committee (n 223) 46.

it. The federal mindset is the antidote to this, encouraging the significance of different power structures and even prescribing for their interaction by harnessing those functional overlaps, spending powers and using 'federal loyalty' to bind together the aspects of the modern union that devolution has apparently driven apart.

This was the purpose of the final chapter which suggested that, not only are there benefits to be obtained in the form of shared rule now resoundingly encouraged by federalism, 'cooperative federalism' is also a far better way of allowing the UK to come to terms with its own reality. A sovereignty-oriented approach, one which can only recognise Westminster as the site of truly legitimate law-making authority, cannot hope to make sense of the contemporary constitution in its full richness, and cannot prescribe for any pathways that might help resolve the current difficulties facing devolution. It is ideas of sovereignty, particularly that it is 'indivisible', that diminish the application of shared rule, of cooperative government and of recognition from the centre of the constitutional status of the devolved institutions which is, clearly, overdue. Pluralism and unitarist sovereignty conceptions are not compatible, but whereas the former is the reality in the *UK*, the latter is only the case in *England*. In fact history shows that '[t]he unitarism of the unitary state has really been English not British.'[483] It is certainly the case that, historically, politics and convention have 'moderated the strict legal position',[484] but this does not mean the federal principle is out of place in the UK, far from it. It might mean that the more legalist interpretations of federalism are not well-suited, but this misses 'the presence of the federal principle in the British constitution',[485] crucially that 'the "federal idea" of "reconcil[ing] national unity with the right of local self-government" was, as Clement said, part of British imperial constitutional law long before

[483] Burgess, 'Constitutional Change in the United Kingdom: New Model or Mere Respray' (n 241) 733.
[484] Peter Oliver, 'Parliamentary Sovereignty, Federalism and the Commonwealth' in Robert Schütze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 51.
[485] ibid 57; Mark Walters, 'The British Legal Tradition in Canadian Constitutional Law' in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers (eds), *The Oxford Handbook of the Canadian Constitution* (OUP 2017) ch 3.

American federalism was established.'[486] It is this reconciliation that might be possible now under the guise of federal thinking, which is in fact necessitated by devolution's dependence on political 'trust' over legal protections. Crucial to this reconciliation is acceptance of the legitimacy of both layers of authority and, importantly for those aware of federalism's recent developments, that they may *both* legitimately govern over the same area.

However, the benefits of this new, uncharted territory, reach out even beyond the state's borders as 'rising regional tensions within the United Kingdom, tied with the difficult relation of the country with the European Union, still underline the importance of federalist thought for the British constitutional system'.[487] It is certainly true that the British relationship with federalism has always been to think of it as an external as much as an internal concept and, if it is true that '[a]lthough devolution is not federalism, there is no doubt that it is likely to accentuate the spirit of federalism in the UK',[488] then this spirit may not have come too late. But, if Westminster continues to reject the fundamentality of devolution, or fails embrace a mentality that stays its hand and respects the other institutions, it may be that federalism becomes the UK's great 'what if'?

The crucial challenge facing the modern statist system of government is two-fold. Firstly, how can it make sense of the clearly ubiquitous reality of multi-layered government. Secondly, how can states balance the competing needs of autonomy and integrity. Competing centrifugal and centripetal forces have shaped the histories and politics of states; there is no harm in engaging with the effect they might have on constitutionalism. For the UK, it seems that it is accurate to say, as

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[486] Oliver (n 484) 57.
[487] Pelizza (n 16) 3; Muhammed Fazal, *A Federal Constitution for the United Kingdom: An Alternative to Devolution* (Darthmouth 1996); John Redwood, *The Death of Britain?: The UK's Constitutional Crisis* (Macmillan 1999); Alan Trench, *Devolution and Power in the United Kingdom* (Manchester University Press 2007).
[488]Burgess, 'Constitutional Change in the United Kingdom: New Model or Mere Respray' (n 241) 725.

Bogdanor does, that 'devolution introduces, for the first time, the federal spirit into the British constitution',[489] but this may not be enough. 'Introducing' that spirit is a long way from cementing it, and yet this is exactly what must happen, indeed, '[p]olitical authority in a democracy is sustained… by a public philosophy; and a country's constitutional arrangement are bound to be deeply affected by this public philosophy'.[490] If this political philosophy is not sufficiently developed—sufficiently 'federal'—the surely noble project of devolution may be little more than a missed opportunity. The constitution's 'internal and uneasy tension between its *unitary* and *union* state identities'[491] has not been resolved by devolution, indeed some might suggest it has only been exposed by it; but devolution does invite the (federal) kinds of thinking that UK constitution clearly needs. It has thrust questions of legitimacy, of power structures, and of the very nature of the state to the fore; their chosen resolution may make or break the United Kingdom.

[489] Vernon Bogdanor, 'Our New Constitution' (2002) 120 Law Quarterly Review 242, 251.
[490] ibid 261.
[491] Christopher McCorkindale, 'Scotland and Brexit: The State of the Union and the Union State' (2016) 27 King's Law Journal 354, 354.

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