

THE REFORMED UNION

THE UK AS A FEDERATION

by David Melding



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To
Peter and Isabel Buckingham



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A Note on the Nation

As the UK is a multi-national state, references to national governments in this text mean the governments of Scotland, Wales, and Northern Ireland (England is yet to join the party). Occasionally I also use the term substate governments to refer to the UKs national tier.

18 September 2014 – Forethought

The people of Scotland will determine their own constitutional future and that of the whole British people on 18 September 2014. This constitutes a fiduciary duty of the highest order. While there is little doubt that Scotland could sustain the weight and cost of a state apparatus, Wales and Northern Ireland would have little choice but to remain in a reduced and perhaps dysfunctional Union with England. Even finding a plausible name for that state formerly known as the United Kingdom of Great Britain and Northern Ireland might prove difficult (some have mischievously suggested 'Little Britain', others 'Great England'). More ominously, the peace process in Northern Ireland would be further tested by any fundamental reconfiguration of the UK.

It is surprising that the referendum on Scottish independence, so far at least, has been portrayed as a question of simple and contained national self-determination. Britain's tolerance of secession is exceptional in the international community, but it is yet to be balanced by an adequate sense of fiduciary duty. This imperative to consider Scottish independence in an international context also involves the whole British people. Unionists must make any counter offer to Scottish independence clear, at least in its essentials, and do so well before the commencement of the official referendum campaign.

The Scottish referendum will be the most critical decision on state formation since the Supreme Court of Canada's judgement in August 1998 on the permissibility of a Québec secession. The Court ruled that Québec could not secede simply as a result of a referendum vote in favour of independence. It further held that the right to

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national self-determination in international law only permitted secession for a people suffering oppressive subjugation. Nevertheless, the Court did rule that a referendum in favour of independence would generate an obligation for the rest of Canada to negotiate with Quebec. There was, to summarise, neither an absolute right to secede nor an

absolute denial of such a right. As Peter H. Russell has written:

“In going where no high court in a constitutional democracy has gone before – namely to the legal rules governing secession – it was also a landmark decision for worldwide constitutionalism”.¹

Should the people of Scotland vote for independence it would set a dramatic precedent. It would promulgate the principle that nations and states are ideally coterminous and multi-national states are something of a compromise because the potential for national flourishing within them is limited. That indeed would be a ‘landmark decision for worldwide constitutionalism’. The international community is now starting to make its voice heard on the issue of secession. It is likely that the Spanish government speaks for several EU states when it asserts that Catalan independence “would require a large majority in the Spanish parliament, new elections and further approval in a referendum held throughout the country”.² In the USA some key opinion formers are anxious about the implications of Scottish independence. As an editorial in the Washington Post put it:

“An independent Scotland would significantly weaken the foremost military and diplomatic ally of the US, while creating another European mini-state unable to contribute meaningfully to global security”.³

The former prime minister of Canada, Jean Chrétien, has challenged the very validity of referendums to determine such vast constitutional questions, “I lose my country because somebody loses their glasses on the day and doesn’t vote? I have a problem with that”. He made these comments on a recent visit to the Scottish Office in London⁴.

*If a multi-national state cannot endure in Britain,
where can it prosper?*

These misgivings and anxieties should not surprise us. The demise of the UK would strike a far heavier blow against the concept of multi-national states than the dissolution of the Soviet Union or Yugoslavia. Britain is the world’s oldest liberal democracy and has set the benchmark for much constitutional practice in the English-speaking world and indeed beyond. If a multi-national state cannot endure in Britain, where can it prosper? Some political philosophers believe that there is a strong ethical argument against unfettered national self-determination within liberal multi-national states. Nationalists in such states should seek to fulfil legitimate nation-building goals within the multi-

national union. The federalist thinker Wayne Norman argues that there are compelling

“...reasons for seeking out federal solutions to the problems of multi-national states. The world surely has little to gain from being divided into 600 states (with 600 tetchy armies and who knows how many ethnic and religious militias), and still less from going through the ‘liberating’ process (Yugoslav-style) of fighting to become 600 states.”⁵

Even if we consider these thoughts over anxious, they should remind us that the referendum on 18 September 2014 will be no ordinary political moment. Although no guns will blaze, its impact on unionism and the coherence of multi-national states could be greater than any event since the American Civil War. The different visions Scottish Nationalists and British Unionists have for political life after the referendum must be shaped in the long shadow of this fiduciary duty.

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The passing of the old Union

On the 5 May 2011 the Union received an electoral shock greater than any it had experienced since 1918 when republican Sinn Fein defeated the more polite Irish Nationalist Party. Sinn Fein's victory soon ended the forced Union of 1801; the SNP's triumph at the polls threatens the more willing Union of 1707. Ireland was always a restless partner, but should Scotland reassert her political independence, the Union would be null and void. The consequences for Wales, Northern Ireland, and of course England, would be profound. Those unionists who casually assume that an independence referendum cannot be won should remember that prior to 2011 few thought the SNP capable of winning a majority in the Scottish Parliament. So far the debate about the future of the Union has focused almost entirely on Scotland. This has a certain historical elegance because it was in Scotland that unionism as we know it was forged in the early 1700s. Yet it is the constitutional future of Scotland and Britain that will be decided in 2014 when the Scots cast their ballots for or against independence.

It is always salutary to recall that the UK unlike Britain is not an ancient entity, barely being three score years and ten older than the USA. There has always been something dynamic and incomplete about the Union. This has allowed the UK to adapt to some profound challenges such as the loss of Ireland and the end of the Empire, but there is also the latent danger that the Union may one day dissolve. For a while in the late 1960s it seemed that a new Union was imminent, but the cause lacked depth. When it came to fruition in the late 1990s Labour's devolution scheme was meant to be limited, definitive and above all safe. Despite the expansive talk of a New Britain, it stopped well short of being a settlement and the basis of a new Union. In this respect the UK between 1999 and 2011 resembled the USA in its transitory period between the Articles of Confederation and the Constitutional Convention.

Those unionists who casually assume that an independence referendum cannot be won should remember that prior to 2011 few thought the SNP capable of winning a majority in the Scottish Parliament.

Devolution quickly turned out to be anything but safe and predictable. More than anything else, Labour did not anticipate the new political dynamic that devolution would release. Most observers also expected Labour's dominance of Scottish and Welsh politics to continue. (Today, some diehard Tories console themselves with the silly notion that if Scotland leaves the Union, England will be forever Conservative.) Rather than view this dynamism as a sign of political vitality, some unionists now lamely predict that the demise of the Union is inevitable because devolution cannot be contained – it is a political explosion that can only end in independence. Such pessimism is no more coherent than the unionist complacency of a generation ago. What's more likely to fuel support for Scottish independence is the failure of unionism to reform and become a more exhilarating ideology.

Time is short for unionists

Constitutional questions can generate a momentum of their own and what were once fanciful abstractions can be transformed into practical propositions with disarming speed. Independence is no longer a fringe obsession but the policy of the Scottish government – and who would have thought that possible in 1999? Of course the character of Celtic independence has changed significantly since the 1960s; indeed it would be more coherent to call it neo-independence today. To many Scots this neo-independence seems more cosmopolitan and less isolated than the separatism implicit in the Eurosceptic attitudes within much of unionism. It is surely a pity that unionist ideology has not adapted itself with any such alacrity and finds itself stuck with a rather 19th Century vocabulary. One would have thought that if the UK is worth defending it would be easy to defend. But a new unionist idiom remains elusive.

This is critical because only a reformed unionist ideology can hope to respond to the momentous constitutional events of our times. Reliance on what one critic calls 'banal unionism' may have worked in a quieter age, but it will not do so now. The UK is not alone in facing such challenges – they affect nearly all multi-national states, and indeed this is why the debate on the future of Britain has such global significance.

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If the UK dissolves, would any liberal multi-national state view the future with equanimity?

Those who advocate a reformed Union must exercise a confident political dexterity. During the Irish crisis of a century ago, the most creative unionist proposals came far too late in the day and under visible duress. By the time a consensus was forged in Britain, Ireland had moved irrevocably down the road to independence. What is needed today is a British policy to save the Union, not a Conservative or Labour one.

Throughout Britain right up until the 1980s, both the Conservatives and Labour had a political reach that facilitated the operation of a unitary state with a distinctly multi-national character. The Conservative Party was most strongly identified with traditional unionism, although the Labour and Liberal parties also espoused a clear belief in the Union. Political parties are key to the operation and success of democratic systems and this is particularly so in potentially fissiparous states. It was the case that Labour had particular strength in Scotland and Wales (and periodically weakness in England) but this reflected a broad socio-economic pattern rather than deep national preferences. In the last quarter of the 20th Century this unifying pattern changed abruptly as the Conservative Party declined and then collapsed in Scotland, and struggled in Wales. The Conservative Party is consequently less a party of the Union and more an English party favouring Union. The failure of indigenous Conservatism in Scotland, and to a lesser extent in Wales, continues to threaten the viability of that very same Union. We have reached a situation where such a statement is almost insipid in its unexceptionalism. Yet it is surely astonishing that a Conservative Prime Minister dare not be seen as too conspicuous in the campaign to save the Union.

The peculiar acceptance of secession

One of the most remarkable aspects of the constitutional debate in the UK is the widespread acceptance of Celtic independence as a legitimate option. The basic legitimacy of secession is highly disputed in Canada and Spain, and the Americans fought a Civil War on the question. Indeed it is fair to generalise that most multi-national states seek to restrict or deny the principle of national self-determination. But the UK does not.

Historians are prone to explain the UK's tolerance of secession by referring to the Irish Crisis, when the alternative was seen to be civil war. Some also emphasise that the Act of Union 1707 was a treaty between two states and treaties are not necessarily irrevocable. But there is a better, if more mundane explanation of British tolerance of secession. Until the 1960s there was little chance of Scottish or Welsh independence ever being viewed as a serious likelihood. Even the nationalist parties concentrated on autonomy rather than independence as their key motivating principle. It was also the age of the centralised, welfare state, while in intellectual discourse there was much talk of the crisis of federalism.

More profoundly, at a time when supranational organisations like the EU were much weaker, political philosophers tended to condemn as illiberal the very concept that states and nations should be coterminous. Unionist ideology was correspondingly unreflective. As Colin Kidd has written:

“Between the mid-eighteenth century and the emergence of the Scottish question in the 1970s, there was no credible, sustained or widely supported Scottish critique of the Anglo-Scottish Union, and as such no call for an articulate ideology of Anglo-Scottish unionism”.¹

Against this background, acceptance of secession was almost blurted out by unionists without thought of its ramifications. In its examination of the case for separatism, the Kilbrandon Report on the Constitution made no mention of the impermissibility of secession. Instead, it focused on the general political and

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economic arguments for independence. It noted, in a manner that accepted the basic notion of national self-determination within the UK, that the “vast majority of people simply do not want it to happen. We believe that the national aspirations of the Scottish and Welsh peoples and their desire for better government are more likely to be satisfied within the UK than outside it”².

Even before the advent of devolution the UK was an odd and lumpy unitary state. While the core political institutions were shared, all sorts of national anomalies were permitted. Welsh became a liturgical language after the Acts of Union; Scotland retained its own Church and legal system after 1707; and Ireland had its own executive even after the Act of Union 1800. While the welfare state acted as a centralising force (and provided the basis for a strong British civic identity) the old heterodox pattern was apparent throughout the 20th Century with the strengthening of the Scottish Office, the creation of the Welsh Office, and in Northern Ireland’s Home Rule parliament. While Scotland and Wales were not autonomous regions they existed in a state of what was sometimes called administrative devolution. The problem for unionists was that while these constitutional anomalies did not challenge the efficacy of statewide institutions, they hinted at the possibility of a more profound re-configuration of the UK.

The old Union rejected federalism

Broadly speaking, unionists have viewed devolution as an alternative to federalism rather than one of its variations. The great devolutionists of British politics – Gladstone and Blair – were both passionate anti-federalists. While the British state has always contained paradox, Blair left the constitution deeply convoluted and less integrated. Had Gladstone's prescriptions reached the statute book, he would have done likewise. Both were surely right in believing that the Union as they found it could only be maintained if it became less centralised. While devolution has never been offered as a coherent system and therefore always lacks the character of a definite settlement (largely because England has been entirely excluded) it has had certain pragmatic attractions.

The great conceptual attraction of devolution is that it supposedly leaves parliamentary sovereignty unaffected. Even today, unionist dogma maintains that Parliament could still legislate for Scotland and Wales in devolved matters without the consent of the Scottish Parliament or Welsh Assembly. It is confidently asserted that, because sovereignty has not been divided as it is in federal systems, devolution does not dilute the power of Parliament. No doubt this view would have much merit if devolution had been applied to administrative regions rather than to the Celtic nations of the UK.

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While current unionist ideology is obdurate in theory on the matter of parliamentary sovereignty, this is offset in practice by the Sewel convention that Parliament will not legislate for Scotland in devolved matters without the consent of the Scottish Parliament. This sensible convention has been extended to Wales. Yet the muddle remains. Unionism seems to hold that Parliament is absolutely sovereign, but so too are the Home Nations on the ultimate of constitutional questions: secession. If devolution was meant to stop short of divided sovereignty it seems to have failed conspicuously. Perhaps it is the very pragmatism of devolution that prevents its adherents thinking from first principles. This rarely matters in most political activity, but it can have dire consequences in constitutional questions.

That devolution and federalism are close constitutional cousins was demonstrated in the Government of Scotland Act 1998, which itself had clear antecedence in the Government of Ireland Act 1920. The Scottish Parliament has legislative competence

over all matters not explicitly reserved to Westminster. This is a strongly federal principle because it accepts the proposition that the Scottish Parliament has the authority to legislate unless positively excluded from doing so. By way of contrast, the Government of Wales Act 2006 follows the opposite principle and allows the Assembly to legislate over prescribed fields only.

The failure of devolution as a settlement

Such confusion on the locus of sovereignty would hardly matter if devolution had done the trick and – from its progenitors’ point of view – contained nationalism. Nothing of the sort has happened, probably because few see devolution in practice as a clear and stable settlement. As Ron Davies famously observed “devolution is a process not an event”. Devolution has shown itself to be a particularly dynamic process and nationalists have used it to advance demands for greater autonomy. The Scottish Government’s encroachment into defence policy – especially its rejection of nuclear deterrence – is a pungent and dangerous example of this tendency. Without a firm constitutional settlement, where the powers of the UK state are set out and enshrined, Unionism is destined to fail.

What has made British devolution so dynamic is its national character. As a constitutional process, rather than a clear constitutional event, this has highlighted national cleavages and created incentives for devolved governments to seek greater authority at the expense of Westminster. At first devolution did operate fairly smoothly because there were Labour or Labour-led governments at Westminster, Edinburgh, and Cardiff. This reduced the temptation for devolved governments to blame London for the dissonances of political life. It should be said that bickering, encroachment, and burden shifting between the levels of government is an ever present danger in federal states too; but they are contained by institutional design. The durability of devolution is likely to be fully tested now that there is a Conservative-led coalition at Westminster, a SNP government in Edinburgh, and a Labour government in Cardiff. Such a scenario was far from the minds of devolution’s architects in the late 1990s.

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Many of the challenges posed by devolution would have been more successfully accommodated if the sense of British national identity was stronger. Just as Scotland

and Wales are nations with some of the attributes of statehood, the UK is a state that has required a national dimension. British national identity was probably at its apogee during and just after the Second World War. It also amalgamated itself with a sense of civic identity that grew out of the welfare state and the deep-rooted demand of citizens for universal services and benefits to protect them from the vicissitudes of life. Much of the Labour Party's unionism was based on the concept of equal and universal services for British citizens. Until the 1970s, the strength of British identity largely subdued the potential of nationalism in the political but not cultural arena. British identity has weakened along with the memory of the Second World War and its deeply unifying affects, and is now being pulled back by the gravitational forces of Celtic and English nationalism. Moreover, since the 1970s, and especially after the end of the Cold War, the UK has been squeezed by demands for national autonomy on the one hand, and international cooperation and the consequent pooling of sovereignty on the other. Some unionists, in their more depressed moments, fear that the people of Scotland are beginning to forget what the Union is for!

The UK is not alone in facing fundamental constitutional change

We often forget that the challenges facing the Union are not peculiar to the UK. There is a strong international trend in democratic states to decentralise administrative mechanisms and for multi-national states to embrace some degree of federalism. In existing federal states there has been a tendency for what one Canadian thinker has called the 'small worlds' dimension of political life to become more prominent. The crisis of federalism, which so preoccupied political scientists in the decades following the Second World War, has given way to demands for greater local control over political decision making. There is a sense that while central government – massively strengthened in the age of welfare – is not exactly ill-intentioned, it cannot be entirely trusted. Faith in big government solutions can no longer be assumed, and this trend has been aggravated by the international financial crisis. 'Small worlds' on the other hand, offer the prospect of limiting political power, increasing accountability, and improving the quality of information in a very complex world.

Britain is not alone, either, in facing something of an identity crisis. States such as Spain, Belgium and Canada face similar existential challenges. Belgium has given voice to its rather divergent national identities but has struggled to maintain a sense of majesty in the Belgian state. In Spain and Canada the notion of a union of nations is still highly disputed, and any sense of multi-national identity is correspondingly weaker. Most British citizens also affirm a national identity that is either English, Scottish, Welsh, or Irish (the principal exception is the BME community). What is less clear is whether these identities are

accompanied by a sense of dual nationality where a common British identity is also held as national and not merely civic. Unionism surely needs to speak the language of bilingual nationalism. The UK is unlikely to survive as an exclusively civic entity, especially if the national identities of the Home Nations continue to intensify.

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While Britain's 'theory of mind' as a state survived the Second World War, it was almost alone in Europe in doing so. Nazi invasion or its threat demonstrated that European states could not fulfil their first and central function, which is to defend citizens. This failure had been intimated many times in the modern era. However, the sheer ferocity of Nazi brutality against the most basic of human values meant that Europe would have to be made anew. If anything, the process was rather slow, largely because of the Cold War, with European integration starting in the 1950s but stalling by the mid 1970s, before really advancing after the introduction of the single market. Yet even in the days of stagnation, the European concept of sovereignty was being transformed, just as it had been so profoundly rethought by Hobbes after the English Civil War.

The birth of parliamentary federalism in the British Dominions

From Hobbes in the 17th Century until Dicey during the Irish Crisis, the British theory of political sovereignty was essentially absolutist. As Dicey put it, using a very unBritish example "The sovereignty of Parliament is like the sovereignty of the Czar. It is like all sovereignty at bottom, nothing else but unlimited power"³.

This pattern of thought was broken, however, when a system of parliamentary federalism was devised in London for Canada and then Australia. Here the shibboleth of parliamentary sovereignty was overcome, albeit for geographical reasons in large and distant dominions, and the halfway house of devolution avoided. It was a magical and highly innovative development of the Westminster model. At last the magic circle of parliamentary sovereignty appeared to be squared by dividing sovereignty into portions, which remained absolute within their sphere of government.

The Victorians sought to explain away the apparent paradox of parliamentary federalism by arguing that Canada and Australia were political associations that temporarily lacked

the ability to form unitary parliamentary states but were likely to move towards fuller union in time. Furthermore, from the start central government in Canada and Australia was expected to be dominant, and this further weakened the federal principle – and was thought likely to quicken union. Despite such expectations, both Canada and Australia developed a strong federal culture in the early decades of their constitutional history, and even the arrival of the welfare state did not lead to unitary government. British political practice when decolonising the non-white parts of the Empire again favoured a federal model. This sometimes failed, but when it did so it led not to fuller union in a unitary state, but to fragmentation and the proliferation of smaller states (notably in the former West Indian and Central African federations).

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Experience in Canada and Australia emboldened many Edwardian reformers to promote some form of federalism as a means to modernise the British constitution. While this never materialised, and once southern Ireland left the Union few bothered to advocate federalism, it led to the emergence of nationalist movements in Wales and Scotland that advocated some form of federation for the UK. Autonomy, not independence, was the battle cry of Celtic nationalism in its political infancy.

The Union is now fragile

A number of factors, then, have made the Union fragile and in need of reform. The most important of these is the multi-national nature of the UK. Scotland was until 1707 an independent state and there is a sense that ‘once a state always a potential state’. It is not uncommon to hear Scottish nationalists refer to the Act of Union as a treaty and one that could be revoked. Wales was subjugated before a modern theory of the state was formed and her political institutions remained weak even before Conquest in 1282. The Acts of Union (1536 and 1543) can be seen as the consolidation of an existing if somewhat irregular union forced on Wales in the later medieval period. While Scotland and Wales entered the Union through very different doors, they both secured by design and happenstance their most important national attributes: Church and law in Scotland, the language in Wales. By the late 19th Century this model of the Union was still surprisingly serviceable, but the 20th Century brought a much more political world into being. The old formula of common political institutions but distinctive cultural and

religious practices, was losing its vitality.

There is little evidence that devolution has been more suited to British political experience than parliamentary federalism.

While parliamentary sovereignty brought great power to the British constitution after the Civil War, and until the middle of the 19th Century accommodated reform with alacrity, it became something of an intellectual incubus during the protracted Irish Crisis. It at first prevented and then delayed the proper consideration of federal solutions to the UK's constitutional problems. Although many unionists came to favour federalism as a means to retain Ireland in the Union, they did so too late and too feebly. Gladstone developed the concept of devolution – then called Home Rule – as an alternative to federalism and the Blair government did likewise in the 1990s. Of course Gladstone did not have to cope with the consequences of devolution, while Blair and his acolytes had to live with their creation. There is little evidence that devolution has been more suited to British political experience than parliamentary federalism.

The scope of the state changed profoundly in the 20th Century. Welfarism was first proposed as a serious political goal by the Liberal government elected in 1906. Initially its scope was very limited but it grew during the First World War. In the wake of the Great Depression and the Second World War the promotion of social wellbeing (a hugely ambitious, almost utopian, goal) vastly extended the role of the state in all western democracies. In the UK this tended to subdue the multi-national character of the Union as citizens focused on statewide and uniform rights and entitlements. For instance, the once active commitment to Home Rule found in the Labour Party, quickly evaporated as a British civic identity became prominent.

Since the reawakening of Celtic nationalism in the late 1960s, some of the most poignant functions of the state have been elevated to the international sphere. Britain was often in the vanguard of this process, notably in the construction of the UN's economic and monetary mechanisms, and in NATO. British influence was also prominent in the development of international law. All these developments required the concept of state sovereignty to be radically adapted. Eventually, Britain also joined the most significant supra-national experiment of the age, the Common Market - later the European Union. One unanticipated consequence was that intellectual antipathy towards nationalism weakened as it became possible to advance a form of neo-nationalism that subscribed to international political structures.

Yet it would be quite wrong to conclude that these profound historical forces have overwhelmed either the resources of the UK or the capacity of British political experience to generate reform. What is clear, and must be understood by all unionists, is that courage and imagination is now required to adapt the Westminster model of government. A British federation would synthesise the liberal demands of nationalism with those of the Union. The materials are at hand in British political experience, but if not used creatively the Union will surely fail. There is nothing new in this, as the Edwardian unionist FS Oliver wrote in 1906, "For it is the business of the British people today, as it has been for four centuries past, not to follow precedents, but to make them."⁴ The present is not an ordinary time.

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The Union's one foundation: Parliamentary sovereignty

The world's first modern political institution

The manner in which Parliament established itself as the premier political institution in Britain has been a source of great fascination to political theorists. While the Whig theory of history – that Parliament's progress to hegemony was inextricable – has lost its grip on the British imagination, it is still tempting to view British parliamentary history as the product of some intelligent design. Perhaps a little perversely, the Tory metaphor of organic growth is more suited to modern thinking as it caters for happenstance. But it is surely no easy task to view events as abrupt as the Civil War, the Glorious Revolution, the Great Reform Act, and even universal suffrage, as fitting into a process of gentle, organic change. Much of British political history has been brutal and bloody, although ultimately constitutional processes won out. The actual milestones were many and varied on this curious journey, but from the 15th Century Parliament started to steadily acquire the constitutional accoutrements of a modern political institution – arguably the first in the world to do so.

The revolt of Owain Glyn Dŵr provides a valuable insight into the vitality of English political institutions in the late medieval period. Wales had no indigenous tradition of holding parliamentary assemblies and, as R.R. Davies observed, only “on two occasions had representatives from Wales sat in an English Parliament, in 1322 and 1327”.¹ Glyn Dŵr's revolt stimulated some impressively advanced political thought

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which resulted in a putative state of considerable sophistication. One of its essentials was a parliament with members drawn from every commote in Wales. The model

for Glyn Dŵr and his chief advisors was, of course, the English Parliament – already becoming one of the most influential (and increasingly non-regal) political institutions in Europe.

The political arena in late medieval England was a very crowded space indeed, with overlapping jurisdictions and a concept of sovereignty that was thoroughly diffuse. Whatever their pretensions, few kings came close to establishing the Crown as the overwhelming source of sovereignty – perhaps only Edward I succeeded, with bitter consequences for Wales. In the early 15th Century the English Parliament achieved two key breakthroughs, which placed new limits on royal power. The Commons won precedence over the Lords on the question of taxation, and in 1414 Henry V accepted that he could not amend a Commons' Bill (merely approve or reject it). It would take 250 years for the ramifications of these constitutional innovations to be fully worked out, but it is difficult to overestimate the significance of these events. According to the historian Norman Davies, it was "the very first whisper of a limited monarchy".²

Power over the purse became the most potent of Parliament's powers and set the parameters for the future battles between the executive and legislative arms of government. These battles were still heavily loaded in favour of the king, but money rather than majesty would be the driving force of constitutional development in Britain. And behind money was power and sovereignty. It led Britain to house the authority of the state in institutions rather than personal and autocratic structures. Two monarchs in particular had a vision for Britain that would have left her with a more continental political tradition. Henry VIII, a renaissance prince of terrible genius, was Britain's most complete autocrat, although Charles I would later seek to emulate his absolutist methods. Wales was formally annexed into Henry's realm as part of a programme to quash seigniorial authority and end the sovereignty of the Church. Parliament played its subservient part in this programme as Henry sought to convince himself that these ruptures in fact re-established ancient practices.

Sovereignty now became an absolute concept and one embodied in the king. However, the cost to the Crown would prove vast as the most reliable and compliant source of revenue was lost along with the monasteries Henry dissolved. There was a windfall, of course, as the Church's property was plundered, but much of it went to a gentry destined to become the most reluctant of taxpayers and the most fierce of parliamentarians. It took another 100 years and a brutal civil war to complete a process that set England apart from all other great European powers. Even so, it is Henry VIII who inadvertently ensured that the English state would not sustain an autocratic theory of government. This outcome he would certainly have loathed.

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Charles I both lacked Henry's force of character and his astute advisors. What the two had in common, however, was a view of kingship in which Parliament was not a partner but a functionary. This is why the defeated Charles could not accept the compromise offered by Parliament in 1646. Had he done so, the constitutional pact agreed between William of Orange and Parliament 43 years later could have been achieved to the great advantage of the House of Stuart. The Civil War destroyed royal absolutism and created essentially constitutional concepts of government. However, this abrupt ideological shift threatened the very notion of sovereign power. As Thomas Hobbes wrote in one of the most important passages of modern political thought:

"If the essential rights of sovereignty ... be taken away, the commonwealth is thereby dissolved and every man returns into the condition and calamity of a war with every other man, which is the greatest evil that can happen in this life, it is the office of the sovereign to maintain those rights entire, and consequently against his duty, first, to transfer to another or to lay from himself any of them."³

An answer was quickly found to steady the ship of state. If the king could not be the source of sovereignty, then Parliament would have to be that body. The Earl of Shaftesbury declared in 1689, "The Parliament of England is that supreme and absolute power, which gives life and motion to the English Government".⁴ John Locke stated the case with radical brilliance, "the legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others".⁵ Here are the seeds that brought forth universal suffrage, but no one would have thought so at the time. Constitutional change expands the political imagination.

The king is dead but not the executive

With the Glorious Revolution a republican monarchy was established, although one with considerable prerogatives for the Crown. Republican because Parliament could not only depose kings but enthrone new ones (William of Orange had no orthodox claim to the throne). To the power of the purse had been added the right to hire and

fire the chief magistrate. So strong was this theory from its very conception, that the problem of the Scottish succession dominated the early part of Queen Anne's reign.

The phrase 'as dead as Queen Anne' would enter common speech, only dying out in the middle of the 20th Century. What Anne's death threatened was a Stuart restoration in Scotland (and possibly England). The Union of 1707 was the price the English were prepared to pay to prevent this calamity. Having established a republican monarchy, the English ruling class were not going to risk an autocratic Stuart as a neighbour even in a state as weak as Scotland. At last the ground was laid for the Hanoverians who reigned in a splendour that compensated for their evaporating executive prerogatives.

Parliament won its battle with the Crown and became the source of absolute sovereignty within the British state. Polite formulations – the very definition of Parliament as constituting Sovereign, Lords and Commons – ensured that the dignity of the Crown was preserved somewhat. But throughout the 18th Century the people realised the greater truth: the Hanoverians were no Tudors. And the story did

Charles I could never dominate Parliament, but Britain's prime ministers have largely succeeded with alacrity.

not end there. The much reduced Crown could only survive with the assistance of prime ministers. Prime ministers soon became the state's chief magistrate, although one that could be dismissed by the Crown. Even this prerogative, however, would die with William IV. Sir Robert Walpole demonstrated not the victory of Parliament, but that of the executive over the legislature. Charles I could never dominate Parliament, but Britain's prime ministers have largely succeeded with alacrity. To this day the doors of the Commons are slammed in the monarch's face, but in the same chamber the Prime Minister sits supreme. The king was thrown out but the Prime Minister let in and executive power increased rather than diminished. This is the essence of our constitution – the hybrid that is Parliament: half government, half legislature.

The great influence of Parliament

While in the routine course of political life Parliament struggles to fully scrutinise and modify the actions of government, on a symbolic level Parliament wields an influence that on occasions can bring governments down. Inevitably the potency of Parliament's

political influence waxes and wanes in response to how poignantly it can capture the national mood. Sometimes, more rarely, Parliament can persuade the nation to acquiesce in decisions that bring profound and unsettling change. Parliament had a very good 19th Century although its proceedings were often dull and jejune; and as Dickens observed in the 1830s, frequently very distant from the struggles of the common people. Nevertheless, Parliament retained enough prestige even at its lowest moments to encourage most radicals to agitate for reform not

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revolution. In 1848, the year of revolution, Britain was spared the chaos which spread across continental Europe. Instead the Chartists marched for universal suffrage and annual parliaments. It was as an expansive political arena that Parliament worked, not in the closed and labyrinthian world of government. Like Wagner's music, Parliament's minutes were magnificent, but in the long dark hours of government its melody could wane.

The vitality of the British parliamentary tradition, forged in the 18th and 19th Centuries, is seen in how successfully it has been exported. Known as the Westminster model, it became dominant and remained so throughout the British Empire and Commonwealth. Of all the European colonial powers, Britain was the most successful in establishing constitutional institutions that adapted with considerable alacrity in many diverse cultures. Perhaps this was predictable in countries like Canada and Australia, but surely less so in India, the Caribbean and Africa. It did not always work, but the wonder is that it often did. Influence indeed.

Parliamentary sovereignty

Those who hold to the simple belief that Parliament is the sole sovereign authority and should remain so have little sympathy for federalism. The paradox for such traditionalists is that the practical implications of sovereignty have tended to weaken the power of the legislature vis-à-vis the executive. Not only does parliamentary sovereignty require the government to sit in Parliament, it has to dominate most of its business. Parliament has found it difficult to create internal procedures or external institutions that restrain government because this implies the limitation of parliamentary sovereignty. Consequently, Parliament has become a relatively weak

legislature that sometimes struggles to be more than the agent of government. Yet there are times when Parliament exercises its absolute authority in lightning strikes that can destroy entire governments or individual ministers. In recent times the resignation speech of Sir Geoffrey Howe fatally wounded Mrs Thatcher; and in spring 1940 Parliament overshadowed and then swiftly replaced a discredited prime minister at a time of supreme national crisis. Such utterly decisive moments are harder to engender in less flexible and more rule-based constitutions.

Unlimited sovereignty when in the hands of a monarch or president would soon lead to tyranny. Paradoxically, parliamentary sovereignty has not had such disastrous constitutional consequences despite the periodic warnings by great parliamentarians like Lord Hailsham that Britain was in danger of becoming an elected dictatorship. It is also clear that parliamentary sovereignty has allowed the British constitution to adapt with speed and dexterity. As Hailsham remarked:

“There is no doubt that this legislative omnipotence usually dressed up in the complimentary phrase ‘the sovereignty of Parliament’, has been extremely useful in the past and has afforded an extremely valuable element of flexibility in time of need”.⁶

To explain how absolute sovereignty became in Britain a constitutional concept we have to go back again to Thomas Hobbes, its principal progenitor. In Hobbes’ scheme, the abuse of power amounts to irrational political behaviour because the purpose of sovereign power is “the procuration of the safety of the people”.⁷ Furthermore, the “obligation of subjects to the sovereign is understood to last as long and no longer than the power lasts by which he is able to protect them”.⁸ To act outside these natural limits is to abrogate the contract by which sovereign power is established. This apart, the sovereign – which for Hobbes was best a monarch but could also be an assembly – can lawfully do and undo anything necessary for the safety of the people. It is therefore a Hobbesian principle that no Act of Parliament

Parliamentary sovereignty ... must now be vested in Britain’s parliaments rather than solely in Westminster.

can fetter the sovereignty of a future Parliament to repeal legislation. Hobbes also emphasised that in much of human activity the law is silent, in “cases where the sovereign has prescribed no rule, there the subject has the liberty to do or forbear

according to his own discretion".⁹ This concept allowed individual liberty to flourish in Britain alongside a theory of absolute sovereignty.

Parliamentary sovereignty is a useful concept and is likely to remain a central principle in any successful but reformed Union. Yet it must now be vested in Britain's *parliaments* rather than solely in Westminster. Furthermore, it must not close off innovative options for constitutional development – for example, the pooling of sovereignty in treaties and international organisations. Otherwise Parliament risks becoming an archaic institution unsuited to the demands of 21st Century political life.

Most of those who have advocated absolute parliamentary sovereignty have readily acknowledged its sometimes fictitious character when pushed to impracticable extremes. Today, could Westminster really dissolve the Scottish Parliament and Welsh Assembly? In theory this could perhaps happen, but hardly in practice. To take another example, it surely comes as a relief to citizens to live in a state that acknowledges the force of international law. To believe in parliamentary sovereignty, then, is not to deny the realities of the external world, rather it is to provide a mechanism by which political experience is understood and appropriate responses discerned. As Edmund Burke observed of liberty, it must "be limited in order to be possessed".¹⁰

To move beyond the natural boundaries of sovereignty, as Hobbes warned, is to ask for trouble. Burke realised this when urging Parliament to be generous to the American colonists. He was about a century ahead of his time when he made one of the greatest parliamentary speeches of the 18th Century, emphasising the need to draw on the genius of the British constitution. Burke's Speech on Conciliation with America should be read today by all Unionists. This is just one of its many sparkling passages:

"The Americans will have no interest contrary to the grandeur and glory of England, when they are not oppressed by the weight of it; and they will rather be inclined to respect the acts of a superintending legislature, when they see them the acts of that power which is itself the security, not the rival of their secondary importance."¹¹

Better to allow the American legislatures a degree of independence than force compliance from afar with all the hostility such obduracy entails.

Burke was ignored, and the first Empire lost. This fundamental error was repeated during the Irish Crisis when Dicey encapsulated unflinching unionism by declaring

that, “Home Rule is the half-way house to Separation”.¹² Now some may dismiss this example as archaic, but 110 years after Dicey, John Major repeated the same fallacy:

“Scotland mattered to me. From the moment I became Prime Minister I could see the danger of it sliding away to independence through the half-way house of devolution”.¹³

Here we see the danger of using parliamentary sovereignty as a block to new and innovative constitutional thought. Interestingly, John Major has developed his own thought considerably and now warns that, “The present quasi-federalist settlement with Scotland is unsustainable” and asks, “Why not devolve all responsibilities except foreign policy, defence and management of the economy?”¹⁴ Such a settlement would seem fully federal. Should the Union be reformed on more coherent federal lines, then Westminster’s sovereignty would be formally divided with Britain’s other parliaments (and those that might one day emerge). To divide sovereignty in such a

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manner is the first principle of federalism; this does not dilute sovereignty but separates it into different spheres. Over such essential functions of the state as defence, foreign affairs, macro-economic policy and much of social security, Westminster’s sovereignty would be unimpaired and indeed protected against encroachment.

If we recall the Irish Crisis for a moment, we see what can really go wrong with intractable unionist thinking inspired by an absolute faith in sovereignty and its indivisibility. Until the passing of the Parliament Act 1911 unionists enthusiastically upheld the concept of absolute parliamentary sovereignty because they held a power of veto in the House of Lords. This ended with the 1911 Act and the way was opened (rather too late) for Irish Home Rule. The Conservative leader Andrew Bonar Law jettisoned his belief in constitutional government overnight:

“In our opposition [to Home Rule] we shall not be guided by the considerations or bound by the restraints which would influence us in an ordinary constitutional struggle ... I repeat here that there are things stronger than parliamentary majorities”.¹⁵

So much for parliamentary sovereignty! Bonar Law's statement was a flat repudiation of traditional constitutional practice and a call for extra-parliamentary action. That most unparliamentary device, the referendum, came into play and replaced the House of Lords as the unionists' constitutional watchdog. Unsurprisingly perhaps, once Ireland left the Union in 1921, hard-line unionists rediscovered their faith in unfettered parliamentary sovereignty.

Federalism and the parliamentary tradition

In any analysis of federalism for a British audience the first point to establish is whether or not it is foreign to British political experience. Federalism emerged as a practicable theory of government during the 18th Century. In Scotland the anti-unionist Andrew Fletcher of Saltoun urged a federative solution that would have preserved the Scottish Parliament in 1707. After gaining independence, the Americans eventually solved their constitutional conundrums with the most strongly federal model yet imagined, although it drew extensively on British political experience too. What had been denied the Scots was in large part granted to Ireland's protestant oligarchs in the 1780s – an Irish parliament with legislative authority over domestic matters, although executive power was entirely reserved to London. While this small federal experiment dimly reflected the much brighter American version, it was in any event soon extinguished.

While British politicians did not apply federal principles at home, in the second half of the 19th Century federalism became the preferred way to lead the Dominions to fuller political life and responsible government.

While British politicians did not apply federal principles at home, in the second half of the 19th Century federalism became the preferred way to lead the Dominions to fuller political life and responsible government. Parliamentary federalism, an audacious variation of the Westminster model, defined the Canadian (1867), Australian (1900) and a little more ambiguously the South African (1910) constitutions. These developments themselves led some British politicians to urge an Imperial federation as the basis for a supra-national state. The vision of Edwardian imperialists was ambitious and innovative. George Wyndham predicted "the birth of an Organic Empire State".¹⁶ Leo Amery's federal ambition would have put today's Euro-federalists

to shame:

“We mean that all its [the Empire’s] members should remain citizens of a single world state with a duty and a loyalty towards that state, nonetheless the real and intense because of the co-existence with it of a duty and a loyalty towards the particular nation or community within the Empire to which they belong.”¹⁷

If some form of federal solution had been found in time to address the Irish Crisis, it is distinctly possible that today we would be living in a Federal Union of Great Britain and Ireland. After the Easter Rebellion many unionists belatedly adopted federalism as the best way to prevent the Union’s impending implosion. The end of the Union of Great Britain and Ireland came quickly once that tempestuous Eastertide was passed in 1916 and Sinn Fein swept the Irish Parliamentary Party (which was for Home Rule) into oblivion. Even the Speaker’s Conference of 1920, which urged the eventual federation of the four Home Nations, could not check Ireland’s progress to independence. What caused this fatal dithering was the fear that federalism would work as a magic spell and make parliamentary sovereignty disappear. John Kendle has stated the case well:

“The root objection was to the division of sovereignty entailed in a true federal state. To those nurtured on the sanctity of parliamentary sovereignty the concept of separate but co-ordinate sovereignties was mystifying; even frightening”.¹⁸

The wider lesson here is that federalism was an awkward construct until the 18th Century, yet thereafter it was often built with the materials found in British political experience. Without this experience of developing constitutional and responsible government in the British Dominions, it is difficult to see how federalism could have become so pervasive in the 20th Century. As the political theorist William Riker observed, “there is something in the British political tradition that is especially conducive to the federal form”.¹⁹ There is indeed.

Union in diversity

At independence, both Canada and Australia were seen as vigorous British nations but also as states not capable of sustaining unitary structures of government. So parliamentary federalism was viewed as a practical alternative in which union could be preserved in political diversity. In a useful definition for British advocates of

federalism, Jonathan Rodden has distinguished between federations that constitute a “coming together” and those that are a “holding together”. The United States is the

“There is something in the British political tradition that is especially conducive to the federal form”.

classic example of a “coming together” federation where greater unity is achieved through a federal compact. More recently, theorists have started to look at the possibility that multi-national states may turn to the federal bargain as a means of “holding together”. In either instance, “the original federal bargain is an agreement about the composition and powers of the central government and the ‘rules of the game’ that will structure future interactions between the central government and the units”.²⁰ Rodden’s ideas are only partly compatible with those of William Riker who saw federalism as a bold measure forced on participants to meet an external threat. Although Riker moderated his criticism of federalism in his later years, he had little sympathy for the view that federalism was a way to advance wider goals such as the protection of liberty within the federation. Indeed, he considered federalism an incubus when it came to tackling the race issue in America. For Riker,

“...the politicians who accept the [federal] bargain, giving up some independence for the sake of union, are willing to do so because of some external military-diplomatic threat or opportunity”.²¹

If we synthesise these definitions somewhat and apply them boldly to Britain’s predicament, we come to two important conclusions. First, a federation which seeks to hold an existing state together is a coherent proposition, although success in practice depends on the many variables generated by the trials and tribulations of political experience. Secondly, federalism is a bargain to secure the existence of a particular state, be it to repel the internal threat of secession or the external threat of coercion by a foreign power or powers. Federalism is weaker conceptually when justified on the grounds of leading to better government. Federal states, just like unitary ones, are more or less efficient, corrupt, free and so forth according to a wide range of cultural and political variables. Federalism is a pragmatic response, and as such a matter of statecraft rather than an idealistic prescription for a more virtuous political association.

Some theorists have argued that the federal bargain has only ever succeeded when

it is a 'coming together' rather than a 'holding together' contract. Obviously it is only if "holding together" federations are practicable that federalism offers any hope for British unionists. Dicey stated bluntly that federalism was a poor bargain and only ever justified as the price necessary for a measure of unity when the alternative would be no unity at all. Alexander Hamilton held precisely this view and advocated it with great force in his contributions to the *Federalist Papers*. It is one of history's marvellous oddities that the greatest federalist thinker did not much like federalism

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but accepted it as the pragmatic response necessary to forge an American nation. If applied to the UK, Dicey argued, federalism would merely mark the start of the Union's disintegration. Dicey's rejection of federalism dominated British political thought for much of the 20th Century. In 1973 the Kilbrandon Report declared with exquisite condescension:

"The UK has for centuries been governed in a spirit of unity and co-operation, and even if this unity is now being questioned it would hardly be satisfactory to adopt a legalistic system intended for a much earlier stage of constitutional development".²²

We inhabit a constitutional environment very different from that of either Dicey or Kilbrandon. Dicey believed that Home Rule (what we call devolution) would not be a settlement because it threatened to undermine parliamentary sovereignty. In this respect he was right, but not in his conclusion that the Union should be either accepted unreformed or rejected and annulled. Devolution has made Britain a quasi-federal state and one that requires further reform if it is to endure. It needs a constitutional settlement, and it is difficult to see how such reform can be successful without the fuller application of federal ideals. Chapters three and four of this work will sketch out how such federal ideals may be turned into practical prescriptions for a reformed Union. But first some thought must be given to what general principles inform successful federations and would need to be replicated in Britain.

In a seminal work, *The Robust Federation*, Jenna Bednar states:

“Unlike its unitary cousins, a federation suffers from structural deficiencies that challenge its robustness: the very features that make a federal structure appealing for a heterogeneous society – decentralisation and regional semi-independence – also build in new opportunities for transgressions...”²³

Bednar argues that robust federations require three properties:

“...compliance, to dissuade transgressions; resilience, an immunity to design flaws and external shocks; and adaptation, an ability to adjust the rules to meet changing needs”.²⁴

The current constitutional position in Britain was not designed to be federal but has turned out to be so in practice. It is therefore necessary to briefly apply Bednar’s criteria to an examination of our present arrangements.

In regard to compliance, the British constitution has major problems, and these are most conspicuous in Scotland where the Scottish government has started to encroach into areas that in most federal states would be reserved to the central government. These are seen in calls for full fiscal autonomy, rejection of nuclear deterrence or at least Scotland’s part in it, and a claim that the Scottish Parliament should control most of welfare policy. If granted to the Scottish government, such powers would start to turn Britain into a loose confederation, not a federal state.

The resilience of current constitutional arrangements also appears to be weak. Devolution has not provided a settlement free of profound design flaws. One glaring example will suffice for illustration: England was entirely left out of the devolution reforms and this has created that most awkward of constitutional conundrums, the

Devolution has usually been viewed as an alternative to federalism, but it is now surely apparent that it is one of its more volatile variations.

“West Lothian Question” whereby Scottish and Welsh MPs can vote on English domestic policy but English MPs have no equivalent voice in Scottish or Welsh affairs. Three of the UK’s Home Nations have a well-defined and institutional political personality, but the largest – England! – does not. The McKay Commission, which reported in March 2013, proposed a form of English legislative process embedded at Westminster to address this flaw.

On the third principle of a robust federation, adaptation, Britain is in much better shape. There has been a willingness to review and adapt constitutional arrangements in the devolution era. This has been most evident in Wales, although in a less than coherent or systematic manner. The Welsh Assembly, for example, started as a body corporate, then internalised a separation of powers between the legislative and executive arms of government, and eventually acquired primary law-making powers. This within twelve years and two pieces of fundamental constitutional law (the Government of Wales Acts 1998 and 2006). Many households don't replace their cars as quickly!

A new Act of Union

Only the most sanguine would conclude that Britain's current constitutional arrangements are likely to endure without substantial reform. Devolution has usually been viewed as an alternative to federalism, but it is now surely apparent that it is one of its more volatile variations. It is certainly no safe constitutional haven. This should not surprise us. Even in Wales, but far more in Scotland, devolution created a powerful government. The devolved governments in Scotland and Wales are based on national units – adding greatly to their strength and legitimacy. And there has been no clear settlement with broadly accepted “rules of the game” between the UK Parliament and the devolved institutions. Independence for Scotland is now the official goal of the Scottish government (and who would have thought that likely in 1999?).

We end where we started. Parliaments are potent institutions. The British parliamentary tradition is probably the most influential in the world; without much hyperbole Westminster can indeed be considered the mother of parliaments. With the exception of Stormont – which was an anomaly not a precedent – British political experience between 1800 and 1999 was unitary. It did not have to accommodate a system of co-ordinate parliaments with the challenges such an arrangement inevitably generates. Nevertheless, from another angle it would be just as coherent to welcome the great vitality that both the Scottish Parliament and Welsh Assembly have displayed. It should surprise no one that in Scotland and Wales the electorate now focus most of their political hopes and aspirations on their own parliamentary institutions.

Like the Americans before 1776, the Scottish and Welsh don't want less of the British parliamentary tradition but more.

The constitutional conundrums we face today as we grope for a robust settlement would be much greater if devolution had failed to establish such strong national institutions. Like the Americans before 1776, the Scottish and Welsh don't want less of the British parliamentary tradition but more. However, if these aspirations are frustrated then I fear that the Union will collapse. A simple declaration is needed – perhaps codified in the first clause of a new Act of Union – that Britain is a federation with each of its parliaments indissoluble and sovereign over their apportioned jurisdiction. Truly this would allow the British parliamentary tradition to work its magic and inspire the political imagination for generations to come. Burke would be proud of us, and perhaps Owain Glyn Dŵr would be too!

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Towards a new Union: the political fabric of a UK Federation

Federalism could complement the UK's parliamentary tradition

Even when at its most unitary, the British constitution was profoundly heterogeneous, essentially a combination of traditions and practices that coalesced in what we may term the Union *compromise*. We now move on to consider whether this Union can be rejuvenated by a federal *bargain*. But first a word of warning is needed. As we move from the abstract to the concrete, an imaginative leap is required. The mind must be open to new political configurations. Creating a new Union is more important than defending the old; and a glimpse of this new vision may help secure a No vote in Scotland. The essence of the British parliamentary tradition could find new life in a federation based on the Home Nations. This would be the best outcome for us, currently British citizens, and for those presently citizens of other liberal multi-national states around the world. For Britain is not Belgium, and the disintegration of the UK would certainly generate a powerful precedent. We have a duty to take an expansive attitude when addressing our constitutional challenges.

In an examination of what federal British political institutions might look like, I am not presenting an unanswerable case for a British Federation. Rather I seek to demonstrate that a British Federation is feasible, if there is the political will to create such a Union. Similarly, I hope to be spared the forensic criticism that often follows prescriptions for constitutional reform. I already know that federal institutions

*The essence of the British parliamentary tradition
could find new life in a federation based on the Home Nations.*

would have their own anomalies and imperfections. No constitution can hope to be

free of some significant dissonance. What a robust constitution can provide, however, is the necessary harmony for a secure political culture where cooperation not conflict reverberates. Whatever its faults, for three hundred years the Union of 1707 provided such a culture (at least in Britain if not Ireland). Now I want to suggest a federal development of that tradition. Federalism will fall at the first hurdle if it is viewed as a repudiation of British political experience.

Federalism, then, can only hope to work in Britain if it builds on our existing parliamentary tradition. Happily the precedents are encouraging. Even the USA in the 1780s used the base metal of British political experience to create the first modern federal constitution, and parliamentary federalism was directly forged out of the iron ore of the British constitution during the 1860s. The British North America Act was the final product of this industry and it provided the Canadians with a parliamentary and federal constitution that has endured and even survived its own nationalist challenge in Quebec.

Westminster and its relationships with the other parliaments in a UK Federation

The life of a British Federation would probably begin with a new Act of Union passed by Westminster but with the express consent of the Scottish Parliament and Welsh and Northern Ireland assemblies (and it would be a good opportunity to rename the assemblies parliaments). Let us put to one side for the moment whether an English parliament would be created at this stage or merely an entrenched English legislative process within Westminster.

Westminster would no longer be, in abstract constitutional theory, an absolutely sovereign body. However its sovereignty over statewide matters would be real and entrenched. These matters would include large scale economic policy, welfare, defence and foreign affairs. Although the process of limiting the nature of Westminster's sovereignty in this way may seem a radical departure, it has already occurred in practice. In accepting that the people of Scotland have a right to secede from the British state, Westminster has acknowledged that here, on the most supreme of constitutional questions, it is the Scottish people who are sovereign. To put it mildly, it is difficult to argue that some of this sovereignty is not now exercised by the Scottish Parliament on behalf of the Scottish people. Westminster could not abolish the Scottish Parliament without sparking a constitutional crisis which would shatter the Union. It is now dysfunctional as well as archaic to maintain absolute parliamentary sovereignty as the essential principle of the British constitution.

Some have sought to argue that Westminster would still have the ability to dominate national institutions via its control of domestic English affairs. And even should an English parliament be established, this would merely change the location of such dominance not its character. Yet it is difficult to see the federal ideal traduced by

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such shaky reasoning. The federal arrangement would entrench the existence of the Scottish Parliament and Welsh Assembly – they could not be abolished and would assume sovereign authority over their domestic affairs. Any attempt to encroach on such defined rights would merely make secession more likely, particularly in Scotland. And even before such ultimate remedies were to be considered, attempts at encroachment would face the sizeable barrier of judicial review in the Supreme Court.

The political power of England in a British Federation – whatever form English institutions take – needs to be considered carefully. It matters little for the purposes of illustration whether there is an English parliament immediately or not: for even an English legislative process within Westminster would surely exert considerable influence if not force. But the level of government most likely to suffer in any malfunctioning of English institutions is not the national level but that of the state. England could not dominate Scottish and Welsh institutions, but it might dominate British institutions.

One advantage of giving time for English political institutions to develop under a new Act of Union, is that the English question would be mitigated. The most likely interim arrangement – one which could even become permanent – is for an English legislative process to operate within Westminster. English laws would become more distinct (a process that is inevitable even under present arrangements) and on English Bills, only MPs representing English constituencies could vote. Of course this is the central recommendation of the McKay Commission. The most dangerous anomaly this would create is the possibility of a UK government not having a majority to pass England only legislation. This could result in a bifurcated executive (that is in effect an English government and a UK government both located in Westminster). It would indeed be dangerous. There is a fairly simple solution. A UK government in such a situation could form a coalition so that it did have a majority in England. We may have already entered an era where coalition governments will be the norm. A more structured solution would be to use PR for Westminster elections, but this is a fanciful expectation at the moment. Yet it is appropriate to mark such possibilities because unionists must surely confront the question ‘what price Union?’ fully. The present generation is slowly getting used to the idea of some PR in the political system – eg devolved institutions and the London Assembly, and possibly for elections to a reformed House of Lords. A future generation might find PR much less irksome even for the House of Commons.

Parliaments in a UK Federation would all be sovereign over their allocated jurisdictions and a balance would naturally emerge if a new Act of Union had settled and strong popular support. Disputes, when of a magnitude to be formal, would be a matter for the Supreme Court. There would likely as not be few of these as is evidenced by the practice under devolution where disputes have been rare – much rarer than anticipated in 1999. In the USA, the Supreme Court barely deals with a

Parliaments in a UK Federation would all be sovereign over their allocated jurisdictions and a balance would naturally emerge if a new Act of Union had settled and strong popular support.

couple of cases a year where a state is in a jurisdictional dispute with the federal government. Actually, the co-operation between Westminster and the national institutions has been mostly productive and uncontentious. This has been facilitated by the practical device of the Sewel convention whereby Westminster can legislate on behalf of either the Scottish Parliament or Welsh Assembly, but only with their express consent. It is also common practice in parliamentary federal states such as Canada and Australia for such mechanisms to operate. Where there is a culture for this type of practical co-operation to prevail, it does so with some alacrity. Federalism works because it is a bargain.

A parliament for England?

It is likely that the English voice in a UK Federation would be a lot clearer if there were an English parliament. But how would the voice of the UK government – speaking for the whole federation – respond? Much would rest on the respect an English parliament and its government accorded to the federal *bargain*. If the people of England retained a strong attachment to British political institutions and identity, then the respect for the federal bargain would probably be very high. Should English support for the federal bargain be weak, then the Union would falter. One need only look at Belgium to see what happens when the authority of a state is fundamentally weakened. A UK on such sufferance would be a meagre entity. Much would depend on where the most able English politicians focused their political ambitions. If few chose to serve in the UK parliament, then calls for English independence would probably grow. In a federation of the Home Nations where each nation has a share of sovereignty, it must be permissible for the English people to secede from the Union. Such a right cannot be reserved for Scotland alone. While this may appear startling, it is surely the position we have reached by accepting the right of the Scottish people to determine their national destiny.

While it is unlikely that the people of England are going to call for federalism *within* England any time soon, the possibility needs to be briefly considered. The Edwardians, or at least those in the Liberal Party, were partial to such a solution. It would certainly reduce, perhaps to insignificance, the problem of the size of England in a UK Federation if England were to be divided into a dozen or so units. While unlikely, it has the advantage of offering a better federal fit than a single English parliament. Of course the immediate creation of an English parliament in a new Act of Union would preclude federalism within England. This is another reason why unionists should ensure that sufficient time is given for English political institutions to develop. The recent mayoral referendums indicate a very limited appetite for decentralisation within England. Nonetheless a key moment would come if the London Assembly ever seeks substantially greater powers. Other cities and regions (indeed City-Regions) might quickly follow London's example and be seen as incipient federal units.

The House of Lords as a Federal Chamber

That House of Lords reform has been imminent since 1911 should cause all contemporary reformers to despair. It has been difficult to design an alternative to an unelected institution that works effectively as a limited revising chamber. However, in a UK Federation the obvious reform would be for the House of Lords to become the federal chamber. Bicameralism is a feature of many successful federations and the House of Lords could gain a powerful function as the chamber in which the long-term health and vitality of the Union is principally advanced and protected.

In a federation it would be important for each Home Nation to be represented on a basis that enhances the principle of Union. This could be best achieved by guaranteeing a minimum and disproportionate level of membership for each Home Nation. For instance, in a House of Lords of 250 members each nation could be

The House of Lords could gain a powerful function as the chamber in which the long-term health and vitality of the Union is principally advanced and protected.

allocated a minimum of 30 members. Another possibility would be to guarantee the smaller nations say twice their population entitlement of members in the House of Lords. This would build on pre-devolution precedent in the House of Commons where Scotland and Wales had enhanced membership. Whatever mechanism is used it should provide a means to check and balance the potentially overwhelming power of England in a federation.

As the chamber expressly entrusted with the health of the Union, the House of Lords would give voice to each Home Nation in influencing and scrutinizing state matters such as defence, foreign affairs, and the operation of the British constitution. This would be a powerful response to nationalist criticism that present arrangements smother the voices of Scotland and Wales in international affairs, for example. It would not, of course, give the Home Nations their own voice solo – that could only come with full independence – but it would amplify their voice in forming British foreign and defence policy. The House of Lords should gain an absolute veto on constitutional changes that seek to alter the federal bargain. To borrow from Balfour, the House of Lords would really be the watchdog of the constitution.

Assuming that members of a federal House of Lords are elected, the chamber's disproportionate principle would also ensure that it did not compete directly with the House of Commons as the chamber that reflects the popular will with greatest authority.

Intergovernmental relations in a UK Federation

The problem of encroachment between the national governments and Whitehall has been relatively rare though not absent in the devolved era. An obvious and contentious example of encroachment has been the question of which government has the right to call an independence referendum in Scotland. Although settled in favour of the UK government, the principle is still disputed by the SNP. The SNP has also tried to encroach on defence issues, particularly relating to the nuclear

In a federal bargain the structures of intergovernmental co-operation would be more formal and focussed on meetings of the various premiers.

submarine base at Faslane. The Welsh government is in dispute about the reform of the Barnett formula to fund public services in Wales. A final example of friction is how the UK is represented at the EU when the Council of Ministers deals with questions at least partly devolved in the UK, such as agricultural or environmental policy. The last two examples are better termed work in progress as the UK government is committed to replacing the Barnett formula, and there is a convention for Welsh and Scottish ministers to be involved in Council of Ministers' discussions relating to devolved affairs.

It is fair to say that relations between governments in the UK have broadly been business-like and productive. In a federal bargain the structures of intergovernmental co-operation would be more formal and focused on meetings of the various premiers –

in the UK the First Ministers and PM, or their respective ministerial colleagues. The Joint Ministerial Committee in the UK is the prototype that would no doubt be built upon in a UK Federation. Disputes would of course occur, and when both persistent and serious they would be adjudicated by the Supreme Court if not resolved on a bilateral basis.

It is likely that a UK Federation would replace the Scotland and Wales Offices with a department of state for the Union. The territorial departments of state were very much a creature of the former unitary constitution and represented its major concession to national policy differentiation. It would be appropriate, perhaps, for the Secretary of State for the Union to be drawn from the House of Lords as the upper chamber would have the principal responsibility for the wellbeing of the Union. Ministers of State could handle the specific national portfolios, concentrating on effective co-operation and liaison between the national and federal governments.

The great benefit of the federal bargain is that the general competences of the different governments would be set out, which would help to reduce troublesome grey areas of ambiguity. Encroachment would be discouraged and where attempted by one or other level of government it would be more conspicuous and therefore easier for the Supreme Court to adjudicate should that level of formality be required. The problems of encroachment and jurisdictional ambiguity are ever present in federations, and when properly resolved by robust constitutional structures they can be productive.

All constitutions travel through time and have to reconcile fundamental principles with contemporary and mutable demands. Changing circumstances may require a function of government exercised at the federal level to pass to the national, and vice versa. New demands place altogether new functions on government and the

A federation that persistently reduces the powers of the central government is one becoming a confederation.

appropriate level of executive agency must be agreed if it is absent from the original federal bargain. What always marks federations as essentially healthy, is that these currents flow in both directions between the federal and national level. A federation that persistently reduces the powers of the central government is one becoming a confederation. Alternatively, a federation that is persistently drawing power away from the substate level is one becoming a unitary state.

Federal states are often seen as a collection of governments operating in a treaty-style relationship. While the basic rules are fixed – that is the fundamental treaty, which in a UK Federation would be the new Act of Union – there is a constant process of amendment, interpretation, and negotiation. Given the success of inter governmental

co-operation in the devolved UK, federal mechanisms should strengthen the culture of co-operation that has operated.

Political parties in a UK Federation

In a federation statewide parties face a dilemma. They must be coherent enough to provide leadership at the state level, but also flexible enough to respond to national aspirations. Both the Conservative and Labour parties evolved structures that reflected the demands of a unitary state. In Scotland this led to the effective demise of the Conservatives in the late 1980s and early 1990s. The Party was seen as not only English, but also anti-Scottish. Thus even before the arrival of devolution, the Conservative Party had lost its status as a major party in Scotland. This is an extreme example of what happens when a party concentrates on its statewide operation and overlooks national considerations. One of the biggest threats to the Union has been caused by this collapse of the Conservative Party as a UK force, principally because much of centre-right opinion in Scotland has transferred its allegiance to the SNP. Although the Labour Party has fared better in Scotland, it too has suffered from a lack of vitality at the national level. Too many able Labour politicians chose Westminster as the focus for their ambitions, and this sent a powerful signal to the people of Scotland that the Party viewed the Scottish Parliament as second rate. In time this reduced Labour's appeal in Scottish parliamentary elections even in areas once considered the Party's heartland, although the Party retains its edge at Westminster elections. The failure of the Conservative and Labour parties to function optimally in Scotland is a consequence of organisational and cultural attitudes that fail to adequately meet the national demand for differentiation.

Most federations do not contain nationalist parties of the potency of the SNP or Plaid, and this increases the need for the unionist parties to meet more fully nationalist aspirations while defending the integrity of the Union.

A word needs to be said about the exclusively nationalist parties – the SNP and Plaid Cymru. In a federation of national units, nationalist parties have added potential. They can argue that while the federal bargain is inadequate they will do their best with it until more fundamental change is achieved. As the SNP and Plaid Cymru do not operate outside Scotland and Wales, they can claim that their exclusiveness gives them a distinct mandate to speak for Scotland and Wales. While the nationalist message is weaker at the state level where it cannot hope to have the influence exercised by pan UK parties, this lack of reach can itself be turned around to claim that Westminster is habitually unfair to the national aspirations of Scotland and Wales. Most federations do not contain nationalist parties of the potency of the SNP or Plaid, and this increases the need for the

unionist parties to meet more fully nationalist aspirations while defending the integrity of the Union. Tellingly, neither the SNP nor Plaid have advanced federal solutions to Britain's constitutional challenges, and this may be because they fear the potential robustness of the federal bargain. Federalism is not viewed in nationalist thought as a step towards independence, in the way devolution often is, because it is an event not a process. Yet the power of federal mechanisms is perhaps hinted at in the SNPs current strategy to emphasise that *confederal* British institutions and conventions would begin to operate after independence. Talk of a social Union, a dual monarchy, a joint currency and even shared armed forces points to nationalist recognition of the need for a non-state British political association. It is this implicit *confederal* bargain that must be repudiated by unionists with the explicit *federal* alternative which preserves the UK but recognises much more fully the multi-national nature of the British political association.

The unionist parties have much work to do if they hope to present themselves as properly indigenous entities in Scotland and Wales. After the commencement of devolution the need for such a development was overwhelming but largely unachieved. Now the massive strategic consequences of this failure are apparent. The Union cannot be rejuvenated from London alone, and probably not from London principally. It is in Scotland – and to a lesser extent Wales – that the new Union must be created and the case for full independence repudiated. Even a PM as sensitive as David Cameron has only limited traction in Scotland.

To some extent the Liberal Democrats have a structure and culture that accommodates federalism, indeed they identify themselves as a federal party. The Conservative and Labour parties, on the other hand, remain in essentials unitary. This is now organisationally and culturally dysfunctional. The Welsh Conservative Party proudly proclaims that its leader is David Cameron, although this curious subordination has been dropped by Scottish Conservatives. Organisational change is highly desirable but only a necessary and not a sufficient reform. In becoming federal organisations, the Conservative and Labour parties would create optimum conditions for the development of a federal culture. Nevertheless, the example of the structure of the Scottish Conservative Party demonstrates that such reform is not in itself enough to secure change. The Scottish Conservative Party is an autonomous body with considerable operational independence. However, its culture has remained unitary, even ultra-unionist. Alternatively, the Welsh Conservative Party has largely retained an outmoded unitary structure but become more culturally adapted to the demands of national politics. This cultural sensitivity bore fruit in the 2011 National Assembly elections which saw the Welsh Conservatives replace Plaid Cymru as Labour's main opposition. The Conservative and Labour parties cannot hope to function optimally in Scotland and Wales without both a federal structure and a federal culture. However, it is a federal culture which is most important.

While any stable Union requires the Conservative and Labour parties to adopt federal practices, this must not diminish their role as British parties. Healthy federations require strong parties to operate at the state level and to ensure that the federal bargain is respected in practice. Political institutions in a UK Federation will be weak unless the major parties operate with authority at the state level. A concentration of power within party structures in favour of the nations would be as dysfunctional as current structures that concentrate power in London. It is a balance

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that must be both struck and constantly maintained by adaptation, good will and a desire to maintain the Union. This harmony could be achieved by federal parties, or by structures that are more akin to robust alliances. In the latter case, there would be independent English, Scottish, and Welsh Conservative parties that would also be in alliance with a UK Conservative Party. Whatever structure is favoured, it is the culture that it encourages which is crucial. The Scottish and Welsh electorates are not going to be fooled by supposedly federal parties that never exhibit policy differentiation between the national and state levels. If habitual, intra-party friction would erode the federation; but its complete absence would signify a unitary culture masquerading as a federal organisation. It would not work.

The judiciary in a UK Federation

It is apposite to briefly consider the judicial branch of a UK Federation when considering political institutions because the practice of judicial review would be important to the operation of political institutions under a new Act of Union. However, it is worth reflecting first on current judicial structures and how they have responded to devolution. One of the most distinctive features of the Act of Union 1707 was that it maintained a separate Scottish legal system. Before 1999 Scotland was unusual in possessing a judicature without its own distinct legislature. This was the most federal feature of Britain's unitary constitution. And it was probably this inheritance of Scottish judicial distinctiveness that prevented devolution ever establishing itself as an alternative to federalism. From the start the Scottish Parliament not only looked like a federal institution, but actually a particularly powerful federal institution. Even in Wales, where the legal personality was very weak, the gradual creation of a genuine legislature has required judicial structures to adapt quickly and become more distinct. This in turn has led to the current examination of the case for a Welsh legal jurisdiction. British political experience has developed under the axiom of the rule of law administered by

an independent judiciary. Legislatures need to be mirrored by robust legal structures and it is difficult for a state possessing several legislatures to have a single judicial system. Even before the advent of devolution, the British state did not attempt to operate as a unified judicature and this fact should give us confidence to expect a federal Britain to operate effectively on the judicial level.

The most important legal institution in a federal UK would be the Supreme Court. At the moment the Supreme Court of the UK operates as the final court of appeal for England and Wales, and as the final legal arbitrator of jurisdictional disputes between the executives and legislatures of Scotland, Wales and the UK. The latter function would become more salient in a federal UK and would be an organic development of current practice. As previously remarked, disputes between the

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devolved institutions and the UK government have been few and far between. And in federal states like the USA, disputes on jurisdiction are surprisingly rare. Nevertheless, when cases occur they are profound and have extensive ramifications. The US Supreme Court was called upon to determine the constitutionality of President Obama's health reforms which created a federal compulsion for citizens to possess health insurance. In the 1960s federal civil rights legislation was made possible by the Supreme Court's judgement in *Brown v Board of Education* (1954) which held that racial segregation in schools violated the 14th amendment of the US Constitution.

The Supreme Court of the UK would have to demonstrate its ability to undertake judicial review in contentious cases. A Supreme Court has to demonstrate that it can be an impartial arbitrator between national and state interests. A legal culture that always seemed to favour the central state would undermine the Supreme Court's authority in Scotland and Wales. Similarly, a culture that favoured the nations against the state would risk inhibiting the effective operation of UK institutions. Federal states constantly have to deal with this tension and strike a balance that is in the public interest and upholds the rule of law. Judicial review inevitably has, then, a political dimension and it is incumbent on an independent judiciary to act with tact and judgement within the federal bargain. The judiciary would seek to uphold and interpret the federal bargain, although its essentials would remain the reserve of the legislatures in some process of constitutional amendment.

A written constitution would greatly assist the operation of federal institutions in a reformed Union. It is something of a misnomer to describe the current British constitution as unwritten. A more accurate description would be *uncodified* because much of British constitutional practice is found in a constellation of statutes. These are not fundamental, however, because they can be amended by a routine legislative process. The fundamental law of a UK Federation would be the new Act of Union which would need an extraordinary legislative process for amendment. Even a comprehensive written constitution, which may well be required in the longer term, should not seek to anticipate the minutiae of political happenstance.

The best written constitutions are succinct and concentrate on the essential framework of a political association. In federal systems, written constitutions set the parameters for a treaty style relationship between the governments and legislatures of a federation. The judiciary assist this process by review and interpretation via justified inference. This is clearly the case, for example, in the USA where the

The fundamental law of a UK Federation would be the new Act of Union which would need an extraordinary legislative process for amendment.

relationship between the states and the federal authority has undergone considerable change over time as the demands placed on the Republic have been transformed from those of an 18th Century society to a modern and sophisticated state. In a federal Britain, the Supreme Court would be required to play a conspicuous role in the development of a federal jurisprudence and its role is likely to be greater the thinner the initial codification of constitutional law. That said, the new Act of Union would initially not need to go beyond the division of sovereignty between the Home Nations and the UK Federation.

The monarchy in a UK Federation

The monarchy is Britain's most multi-national institution. In 1707 the dual monarchy of England and Scotland was amalgamated to form the monarchy of Great Britain. Regal recognition of Wales and Northern Ireland did not soar to such heights, but monarchists in Wales take pride in the title 'Prince of Wales' being held by a male heir to the Crown. This is a rich heritage which still reflects the medieval alacrity to cope with overlapping identities and diverse traditions. A federation of the Home Nations would breathe new life into the British monarchy and its central purpose as the symbol of a successful Union.

Regal institutions could accommodate federalism with little difficulty. Should the people

of Scotland so wish, the dual monarchy could be restored; and in Wales the monarch, and not the heir, could hold the title 'Prince of Wales'. The Privy Council could have distinct Scottish and Welsh divisions. Wales at last could gain a royal residence (Cardiff Castle would be highly suitable) and the Court could also meet formally in Wales. Another welcome development would be the creation of honours lists for Scotland and Wales, and in Wales the establishment of a Welsh order of chivalry.

The relationship between the Crown and the Home Nations in a federal UK could be much more direct than that presently between the Crown and the Dominions. Practice is already established in some important respects with the Queen opening the Scottish Parliament and Welsh Assembly after each election. The relationship between the Queen and her Scottish and Welsh First Ministers is a little more distant than that between the monarch and the PM. However, more regular audiences could easily become custom and practice when the Queen visits Scotland and Wales and when the First Ministers visit London.

These are examples of how fully the federal principle could be extended to the monarchy. However, the Britishness of the monarchy would also need to be strengthened because the Crown is the ultimate symbol of the UK. The coronation ceremony could be adapted to reflect and celebrate both the British and multi-national nature of the monarchy. The monarch could have a formal role in the Joint Ministerial Committee, perhaps by hosting an annual meeting of the First Ministers and Prime Minister.

The symbolic role played by the monarchy in the present Union is recognised by Alex Salmond. His overtures to the Royal Family have been skilful and reflect his awareness of the power of regal symbols. In emphasising that the Queen would continue to be the head of state in an independent Scotland, Salmond is no doubt seeking to reassure the people of Scotland that nationalism does not entail the

*Britain without the monarchy would be as unthinkable
as Rome without the Pope.*

abandonment of ancient traditions. Indeed, he has reminded Scots that the Union of the Crowns is older than the political Union that created the British Parliament in 1707. He can also point to the practice in the Dominions of the Commonwealth where the Queen is head of state. Whether Australia, Canada and New Zealand will continue this practice after the reign of Queen Elizabeth is unclear, as they no longer identify themselves strongly as British nations within the Commonwealth. It is nevertheless plausible for Scottish nationalists to argue that, in the person of the Queen and her successors, Scotland could identify itself as one of the British states within Britain. Consequently an

independent Scotland could not only retain a sense of Britishness but also encourage Britishness itself to become a more expansive social concept rather than one focused on a particular state structure.

The monarchy is likely to survive and develop as a constitutional symbol whatever happens in 2014. It is the most secure of British political institutions because it is so flexible. In a confederal arrangement, the Queen and her successors are set to retain the throne of Scotland. Wales would probably opt for a similar arrangement despite the republicanism that shapes Plaid Cymru's ideology - the spirit of Saunders Lewis would prevail! A federal arrangement would surely be strengthened by a similar process of regal devolution. There are few institutions that could confidently expect to flourish in a confederal, federal, or indeed unitary constitution. However constituted - confederation or federal state - Britain without the monarchy would be as unthinkable as Rome without the Pope.

Small worlds in a global economy: fiscal federalism and the art of economic decentralisation

In this chapter we will briefly consider the economic arguments for and against Scottish independence and, at greater length, examine the processes of fiscal federalism. The economic dimension of independence has always held an important place in the polemical literature and it is necessary to consider the weight that ought to be given to this aspect of the debate. As the underlying thesis of this work is that a federal solution is feasible for the UK, the processes of fiscal federalism must be considered. There is a vast and numbingly technical body of literature on fiscal federalism, much of it produced in the last 20 years or so. Thankfully, we need not be drawn into the econometric minutiae of fiscal federalism but can focus instead on the question of what sort of economic decentralisation is likely to sustain the economic union underpinning a federal UK.

Can Scotland afford independence today and could Wales afford it tomorrow?

Scotland's wealth has increased relative to the rest of the UK since the 1970s. However, most accept that Scotland is still a net beneficiary as a consequence of membership of the UK. The Calman Commission estimated Scotland's net fiscal balance to be -£10.25 billion but this figure fell to -£2.65 billion if North Sea oil revenue was allocated to Scotland.¹ In an intervention that sparked much controversy in Scotland, the *Economist* magazine estimated that there was a rough balance in Scotland's net fiscal contribution if North Sea oil was part of the calculation.² Most federal states consider ownership of natural resources to rest with the central state (Canada is a notable exception) because such windfalls can distort regional economies massively and even destabilise the whole economic union. To counter arguments advanced for substate ownership of natural resources (that is, ownership by regions or, in the case of the UK, nations) some

Most federal states consider ownership of natural resources to rest with the central state.

economists have argued that over time the benefits of a broader economic union justify the ownership of natural resources by the state. Canada offers an example of what can happen when this principle is not accepted. Alberta has enjoyed a massive oil and gas boom and this has also more generally increased the economic power of western Canada. Efforts to assuage separatist sentiment in Quebec have often found fierce resistance in western Canada as the traditional benefits of the economic union have been questioned. The disproportionate power of the poorer Atlantic provinces has also caused increasing resentment in western Canada. The Italian economist Vito Tanzi has noted this trend for more prosperous regions to question the economic balance of power in states, a phenomenon that may extend to richer regions pushing “to become independent so as to no longer contribute to the public expenses of poorer regions”.³ The former president of Catalonia, Jordi Pujol, recently claimed that Catalonia is in a ‘solidarity trap’ with 9% of GDP being transferred to Spain’s poorer regions. He concluded:

“I have no arguments left against independence because Spain ... is making our country unviable and we can’t accept this situation any longer”.⁴

On a crude income and expenditure basis there is little to suggest that an independent Scotland would face insurmountable economic difficulties, although this is not to say that independence is the economically optimum position (that judgement is not attempted here). Prudence requires a more expansive question to be answered: would an independent Scotland, over the long term, adequately manage the financial shocks and challenges that are inevitable in economic cycles? Again the judgement to be made here is not what economic entity is optimum, but whether the Scottish economy under the supervision of a Scottish government could

The forces of globalisation and the emergence of supranational governance have ... made small territory ‘independence’ more feasible.

adequately navigate economic storms? And again it is difficult to argue that it could not. An independent Scotland might end up richer or poorer than it would otherwise have been within the UK, depending on the quality of decision making. It is unlikely that

an independent Scottish government would lack the institutional and fiscal capacity to endure recessionary episodes, buttressed no doubt by international structures such as the EU.

Vito Tanzi has argued that the forces of globalisation and the emergence of supranational governance have reduced the traditional macro-economic role of the state and made small territory 'independence' more feasible:

"Globalisation and the creation of a de facto global governance make it easier for small territorial entities to operate as new independent countries and as full members of the international community".⁵

Tanzi is a particularly interesting thinker because he approaches these questions from the centre right and he believes that the economic role of the state will change profoundly in the 21st Century. Indeed, he warns nationalists not to be too complacent as they witness this trend because the ultimate winner may be not nations and regions but cities. After all, cities have been a political and economic force for millennia, while the modern state is a very modern concept.

Nevertheless, the international economic crisis has placed a severe test on supra-national economic governance. The EU in particular is being confronted by the reality that for many economies the optimum monetary area remains the state. This has been reflected in nationalist thought in Scotland where rather comically the SNP's faith in the Euro as an independent Scotland's currency has been replaced by a preference for Sterling. There is precedence for this, of course, as the Irish Punt was tied to Stirling for 50 years after independence. The bailout of Scottish banks by the Treasury also confirmed some of the obvious benefits Scotland currently enjoys within the British state. The Royal Bank of Scotland's balance sheet was, according to the *Economist*, 13 times Scottish GDP.⁶ All this said – and they are substantial factors requiring serious attention – the wider point seems to hold that globalisation will in the long run generate greater supra-national governance which in turn makes small territory 'independence' feasible. It seems that an independent Scotland would secure most of its economic insurance from the EU which strikes some hard line nationalists as little more than swapping one insurer (Britain) for another (the EU). But there again nationalism is not the only ideology that has had to change radically to survive.

Tanzi's observation that small territory 'independence' is likely to be more feasible in the 21st Century takes us on neatly to the feasibility of Welsh 'independence'. The immediate economic impact on Wales resulting from independence would be extremely adverse. The

leading commentator on devolution, Alan Trench, has calculated that the scale of Wales' fiscal deficit is £8.2 billion – or one third of total identifiable spending in Wales.⁷ Wales enjoyed her natural resources windfall – coal – a century ago and its tax revenues flowed into the Treasury. Today the past and vast premiums Wales made to Britain's economic development more than justify the 'insurance' transfers that flow into Wales from the Exchequer. An independent Wales might negotiate some exit settlement (perhaps a lower share of the national debt than would otherwise be appropriate) and there would be the prospect of some transfers from the EU. Nevertheless, the initial economic cost of independence would be high. Tough economic prospects did not deter the Irish, of course, and the social and cultural attractions of independence proved decisive to many putative states in central and eastern Europe after the fall of the Berlin Wall. Ultimately national resilience can overcome the economic deterrent against independence. That said, the minimum cost an independent Wales would face is a significantly poorer economy for a generation.

Two seminal Welsh thinkers have adopted a more expansive and ambitious approach to the question of Welsh independence. In the 1970s Leopold Kohr published the influential polemic *Is Wales Viable?* Kohr's thought is too often dismissed as eccentric and with little now to contribute to the mainstream economic debate. But parts of *Is Wales Viable?* remain highly relevant. In his heroic harangues against

Ultimately national resilience can overcome the economic deterrent against independence.

'bigness' Kohr sought to put the individual citizen at the heart of the economic system. There is something vital in what Kohr called 'the strength of the small' which 'does not need statistics but meaning, not formulae but principles' and above all vision.⁸ Anyone who doubts that nationalism can be a profoundly humane and liberal concept should read Kohr's great little book. Equally attractive in tone has been the recent work of Adam Price. Like Kohr, he takes the whole debate into the longer term and urges greater vision. True, Price tends to simply ignore short term factors and the immediate costs of independence, and rather boldly asserts that had independence been declared back in 1989 Wales might now have caught and even surpassed the UK and joined the 'ranks of the smart, the successful, and the small'. A little less trenchantly, he observes that a 'free Wales might do better or worse depending on its choice of policies and the strengths of its institutions'.⁹ Price echoes Kohr in believing that small economies are successful because they are more open to international trade and innovation, and enjoy greater social coherence which

makes them easier to govern efficiently.

Tanzi adds some force to these arguments, although his centre-right perspective would not be altogether welcome in nationalist circles. The central problem and unintended consequence of transfer payments to poorer regions, Tanzi argues, is that they increase the relative size of the public sector and reduce general productivity. In losing such transfer payments, an independent Wales would have to cut the size of the public sector significantly and make public services both more efficient and better targeted on those who need them most. Greater economic competitiveness would then generate more vigorous growth. Tanzi believes that this process is underway in European states as a result of globalisation and the disappearance of the taxpayer. He predicts the emergence of a post universal-welfare model where some 30 per cent of national wealth is consumed by the public sector.¹⁰ Hence the need for fiscal federalism – and indeed its growing popularity – in industrialised states across the world as it is believed that local decision making is inherently more efficient, accountable and competitive.

We can conclude this section with a simple observation: independence is economically feasible in Scotland and may become feasible in Wales in the longer term. Wales could pursue independence sooner, but at a considerable economic cost for at least a generation. These parameters set, it is time to look at fiscal federalism as an alternative to independence.

Fiscal federalism: A global trend

In western countries faith in the efficacy of central government programmes peaked in the 1960s. President Johnson's war on poverty and Harold Wilson's Department of Economic Affairs were notable examples of the latter day 'New Deal' state in action. The 1970s was a tough decade for economic optimists and by the late 1980s it was clear that the political and economic parameters set in 1945 had largely dissolved. Globalisation expanded the opportunities for trade but also brought serious competition to heavy industry and manufacturing in North America and Europe. As tax bases became less assured, the reach of central government began to

In western countries faith in the efficacy of central government programmes peaked in the 1960s.

look overextended. Fiscal federalism and the broader concept of the decentralisation of

public services seemed an answer to the challenges of globalisation. Robin Boadway and Anwar Shah, in their ground-breaking *Fiscal Federalism: Principles and Practice of Multiorder Governance* term this process 'glocalization' where the need for greater competitiveness and innovation in the economic sphere is leading to demands for higher public sector performance and a general shift away from 'a bureaucratic to a participatory mode of operation, from a command-and-control model to one of accountability for results'.¹¹ Although Boadway and Shah identify a strong trend away from unitary constitutional structures to federal and confederal ones, they emphasise also that,

“...globalization by no means implies a demise of the nation-state; rather, globalization implies a reorientation of the nation-state to deal with the more complex governance structures of an interconnected world”.¹²

This strong and confident analysis is perhaps only partly borne out empirically. The EU struggles with the concept of subsidiarity and the localism agenda in the UK still lacks a vivid projection. Yet it remains the case that more decentralised governance has become the norm in many parts of the world – devolution in the UK being just one striking example.

What is less clear than the fact of decentralisation is whether it has led to the range of positive outcomes confidently predicted by its exponents. If a stable federation seeks to combine the advantages of 'bigness' and 'littleness' in political governance, then a similar objective can be attributed to fiscal federalism. The traditional advantage of larger states – the 'bigness' premium if you like – is that the goal of macro-economic stability is more readily achieved. The peril present in fiscal federalism is that macro-economic instability may result if the system lacks rigour, and if substate governments tax, spend and borrow imprudently. The ultimate danger is the creation of a significant moral hazard where substate governments borrow recklessly and then seek a bailout from the central government.

Proponents of fiscal federalism have argued that decentralisation leads to more efficient and accountable public services, and this stimulates growth. There is indeed some evidence that fiscal federalism leads to lower consumption by government thereby creating more room for the private sector. Further examples of the 'littleness' premium, the advocates of fiscal federalism claim, are greater accountability and higher standards as public services in different jurisdictions are compared. These processes are greatly assisted by the information revolution which makes both decentralisation viable and subsequent accountability and comparison possible. This is a mere morsel of the debate, but perhaps it is enough to allow us to conclude that the range of outcomes within

fiscal federalism are wide and the perils created by poorly executed decentralisation considerable. Unsurprisingly, a robust design is crucial as is the ability for any system to adapt to meet unpredicted circumstances.

The peril present in fiscal federalism is that macro-economic instability may result if ... substate governments tax, spend and borrow imprudently.

In the ideal federation, fiscal federalism would facilitate both equitable and efficient economic decision-making. The gap between centrally allocated revenue and locally raised revenue would not be too great. Also, the wealth of the various substates would not be too divergent and therefore unlikely to cause wide variation in the capacity to fund public services. When substate governments have highly divergent wealth creating potential, distortions are likely to occur in the internal economic union. Richer areas tend to attract more taxpayers as the cost of providing public services is lower than in poorer areas. To compensate for this unequal distribution of the tax base, the central government may allocate an equalisation grant to poorer areas. In fact, equalisation grants are a very common feature of fiscal federalism. Many economists have emphasised the need to make local public service delivery accountable via a significant level of responsibility for revenue raising to fund such services. This is unlikely to pertain unless the substate funds in the order of 30-40 per cent of the public services for which it is responsible. As Alan Trench has tersely observed, 'A devolved government needs to be more than just an elected spending agency, if it is to be properly accountable'.¹³

The devolution of taxes is the most challenging aspect of creating a robust system of fiscal federalism. Taxes which are highly mobile are not well suited for decentralisation. Corporation tax and taxes on capital fall into this mobile category. Highly skilled workers are increasingly more mobile as well, making income taxes more susceptible to mobility factors than in the past. Indeed, globalisation has tended to drive down taxes on labour and capital even when the tax base is retained by central governments. This effect has been termed the disappearance of the taxpayer. The best example of an immobile tax is tax on property. Sales taxes and many excise taxes and general duties also tend to be fairly immobile. Perhaps problematically, natural resources are absolutely immobile in distribution and are technically easy to tax locally. Even this brief discussion is enough to illustrate the challenge involved in decentralising tax raising responsibilities, despite the fact that the technical and administrative difficulties of doing so have been reduced considerably by the information revolution.

There is a tendency for jurisdictions to compete against each other for mobile economic resources. In making the provision of public services more efficient, this competition is productive. However, the balance is a fine one and beggar-thy-neighbour tax policies result in a race to the bottom where tax rates are set too low to generate an optimum level of public goods and services. It is little wonder that most formerly centralised states have found it easier to decentralise spending powers rather than taxing powers. This has been particularly true in the UK, although the Scotland Act 2012 seeks to change the position in Scotland by aligning spending and taxing powers more closely.

Fiscal federalism in the UK

The UK already has some of the attributes of fiscal federalism. In 1999 the devolved governments acquired wide-ranging responsibilities for the delivery of public services. Scotland was also given a limited tax-making power to vary the basic rate of income tax by up to 3p, a power that has never been used. However, the block grant from central government has continued to fund an overwhelming proportion of

Most formerly centralised states have found it easier to decentralise spending powers rather than taxing powers.

devolved public spending. This reliance on central government finance is probably the greatest in any western democracy. What makes matters worse is that the block grant is funded by the so-called Barnett formula which is not needs based. Introduced as an interim measure in 1979 before a wider financial settlement could be agreed for the then planned devolution of power to Scotland and Wales, it allocated additional expenditure on a population basis on top of the existing baseline. As the Holtham Commission into the funding mechanism for devolution dryly observed, the baseline presumably 'had evolved from some previous view of needs'. No-one, least of all Joel Barnett who introduced the formula, thought it would last for more than a year or so. As Holtham further observed:

"No-one argued that it was appropriate for all regions of the UK to have the same level of expenditure per head but insofar as this effect of the formula was intended, it was supposed that the formula would be superseded long before that point was reached".¹⁴

There is significant co-morbidity, then, at the heart of devolved finance in the UK: the block grant is dominant and the formula is not needs based. The Calman Commission

in Scotland and the Holtham and Silk Commissions in Wales have grappled with these seemingly intractable challenges in an attempt to make fiscal federalism in the UK less fragile.

The Calman Commission reported in 2009 and many of its recommendations were implemented in the Scotland Act 2012. Calman offered a classic solution to the problem of accountability. Targeting income tax, it recommended a tax-on-base power for the Scottish government. The basic rate of income tax would be reduced to 10p in Scotland and this would be accompanied by a reduction in the block grant. The Scottish government would then set its own rate to put on the base, Calman recommended. Such tax-on-base systems are in use in many federal states, and it

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has the advantage of being readily understood and administratively uncomplicated. Income tax is also a highly visible tax which has advantages for accountability as the electorate compare the taxes they pay with the quality of services they receive. While income tax is a major tax and access to it constitutes a robust form of decentralisation, critics accused Calman of half-measures, especially in respect of the narrow tax base it left the Scottish government and the restrained approach it took to borrowing powers. However, in focusing on the accountability question, Calman united the unionist parties in Scotland and the Commission's proposals found their way into the Labour, Conservative and Liberal Democrat manifestoes for the 2010 UK general election.

The Holtham Commission was asked by the Welsh government to “look at the pros and cons of the present formula-based approach to the distribution of public expenditure” and to “identify possible alternative funding mechanisms including tax raising powers and greater powers to borrow”.¹⁵ This was a slightly different approach to the question of fiscal decentralisation and reflected the Welsh government's priority to secure a reform of the Barnett formula. Holtham did produce some interesting ideas on tax making and took a more imaginative approach than that of Calman. Instead of advocating a simple tax-on-base system for income tax in Wales, Holtham recommended a comprehensive power to vary all rates of income tax, not just the basic rate. This would allow for tax competition, especially at the higher rates – as Holtham astutely pointed out. Under Calman's proposals about 30 per cent of Scottish receipts would be funded by taxes set in Scotland – reducing

the current reliance on the block grant. In Wales the block grant would still loom large should Holtham's approach be followed. It is actually more coherent to view Holtham's prescription as tax breaks to attract income tax payers to Wales and therefore reduce the relative costs of providing public services and increase the size of the private sector, rather than as an attempt to significantly increase the Welsh government's accountability for its spending. Holtham was fully aware of the controversy of this proposal, as the report noted:

“...there would be very understandable reluctance to give Welsh Ministers the power to set tax policy in a way that caused significant harm to the UK tax base. We believe that an acceptable compromise would be to enable Welsh Ministers to set the basic and higher rates separately, but that the extent to which rates could vary from the UK rate should be constrained.”¹⁶

The radical nature of this proposal was largely overlooked but it deserves reappraisal as it would introduce tax competition to the UK and could lead to greater wealth creation in Wales. Too much tax competition weakens tax bases, but Holtham was right to introduce this potential game changer to the fiscal debate. Holtham's work had a clear impact on the Commission on Devolution in Wales which recommended in its report *Empowerment and Responsibility* that “The Welsh Government should be able to vary the basic, higher and additional rates of tax independently” (Recommendation 16).

Barnett has loomed large and terrible in all these discussions. It hangs like a mathematical problem to which everyone intuitively knows the answer but no one can write out the solution. Barnett survives for what accountants sometimes call ‘historical reasons’ – that is they have no robust rationale but are somehow established practice. The Holtham Commission quoted public spending per head as £7,500 in England, £8,600 in Wales, £9,200 in Scotland and £9,800 in Northern Ireland.¹⁷ Wales is treated substantially less generously by the Barnett formula than

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either Scotland or Northern Ireland despite the fact that Welsh Gross Value Added per head is the lowest of *all* regions and nations in the UK. Furthermore, Welsh funding is steadily converging on the English figure. Holtham calculated that the funding gap now stands at some £400 million annually.¹⁸ A needs based formula is clearly justified on

equity grounds and it would make the block grant something of a basic equalisation grant. Until this conundrum is solved achieving a robust form of fiscal federalism in the UK will be difficult. Of course, the Treasury could just compensate Wales without reducing the level of the Scottish block grant, but this would come at the expense of public spending in England.

The use of grant funding in federal states

It is appropriate, then, to take a closer look at the use of grants in fiscal federalism. The use of some intergovernmental grant giving is inevitable in federal systems, and even the USA which attempts no equalisation between states uses grants extensively to fund programmes that have federal as well as state objectives. Many federations rely on the use of extensive block grants from central government to fund substate programmes. Most federations fund 60-70 per cent of substate expenditures this way. Indeed, federations that are well below this rate are very rare (it is more common for the central government's grant to be even higher than 70 per cent). As we have observed, in the UK the devolved governments are highly reliant on central government grants. This reduces the level of accountability for spending decisions and increases the need for intergovernmental bargaining and conferences, processes common in federations all over the world. The latter has established itself via bilateral meetings and in the Joint Ministerial Committee (JMC) but these processes have only been partly successful and they do little to make government spending in the UK more transparent. Interestingly and appropriately, the Calman Commission devoted a chapter of its report to such mechanisms and how they might be strengthened.

Perhaps the main danger caused by such an opaque system is that of burden shifting, a proclivity all too common in decentralised systems of government. Burden shifting can work in both directions, for example when the Welsh government blames the Treasury for the poor performance of some public services in Wales, caused it is claimed by underfunding; and when the UK government transfers the responsibility for certain public services or policies to devolved administrations without the necessary levels of spending. In the recent debate on the electrification of the Great Western mainline it was suggested by some in Whitehall that the costs of electrification between Cardiff and Swansea might be met by the Welsh government. Had this point been forced – quite properly it was not – it would have been a classic example of burden shifting. Burden shifting is a messy part of the democratic process and significantly undermines public accountability. Should burden shifting become a common feature of UK politics it would do much harm to the Union.

A system that devolves extensive tax raising powers obviously reduces the need for

a large block grant from central government, but it does not remove the need for an equalisation process. One of the lethal aspects of full fiscal autonomy for Scotland would arise if it occurred without equalisation transfers. In effect, Scotland would be declaring its intention never to be a net contributor to the UK and therefore unwilling to help the poorer nations and regions of the UK. This would undermine the feasibility of the economic union. Full fiscal autonomy for Scotland could prove particularly troublesome for Wales should nationalist sentiment grow in England and demand that Wales, like Scotland, stand much more on its own feet. That said, equalisation grants do not guarantee higher economic growth in the recipient regions or nations. Some economists believe that such grants are counterproductive as they deter governments from measures to increase indigenous wealth and a higher tax yield. There is some evidence to suggest that unitary states – where highly equitable public finance systems often operate – have no better a record than federal states in reducing the wealth gap between rich and poor regions. What is clear, however, is that equalisation grants allow governments in a federation to provide a range of similar public services to citizens for about the same cost per taxpayer. This does not automatically improve decision-making, but it at least allows it to proceed without added duress.

One of the lethal aspects of full fiscal autonomy for Scotland would arise if it occurred without equalisation transfers.

An alternative approach to equalisation grants is a system where fraternal grants are transferred between members of a federation. Substate governments establish a common fund for equalisation into which wealthier regions contribute and poorer ones draw. Theoretically there is much to recommend this approach as it is more transparent and the costs and benefits of an economic union are clearer to its members. It is also likely to generate more effective decision-making because burden-shifting (such as blaming central government for its parsimony) is more difficult at least on the part of substate governments. However, there are few examples in practice of fraternal grants operating and most federations adopt paternal programmes where the central government funds fiscal equalisation. Nevertheless Boadway and Shah argue that fraternal “programmes foster national unity, as poorer jurisdictions clearly see the contributions made for their well-being by residents of other jurisdictions”. Yet they offer no evidence for this hopeful assertion. They are on firmer ground when stressing:

“Paternal programs lack the discipline of fraternal programs, because unless enshrined in the constitution (as in Canada), they are guided

largely by national politics and the budgetary situation of the federal and state... governments".¹⁹

Block grants tend to be unconditional in federal states and for good reason. The whole concept of fiscal federalism is undermined if central government places heavy restrictions on how block grants can be spent. Unconditional block grants allow a modicum of accountability as citizens hold their devolved governments to account to some extent for local decision-making. Conditional grants can serve a useful purpose for particular programmes that have joint benefits for substate and state governments. Large infrastructure projects and some education and health programmes are suitable for conditional grants when central government wants to encourage a particular approach to public policy.

It is very difficult to see the UK surviving for long if it ceases to be a transfer union.

Finally, it ought to be recalled how important equalisation grants are to the concept of a transfer union where economic risks, over the long term, are shared. It is very difficult to see the UK surviving for long if it ceases to be a transfer union. While the long term objective of a federal UK must be to reduce the level of inequality between the member nations, and this would eventually reduce the need for transfers, the concept of Britain as an economic union is as vital as the social and political union which is more frequently referred to in current debate.

Taxes suitable for decentralisation

We have briefly discussed the basic theory that the less mobile a tax base the more suitable it is to devolve. Stated bluntly, taxes on capital and corporations are not ideal candidates for decentralisation; taxes on property, retail sales and many excise duties are suitable. Income and payroll taxes offer some potential for decentralisation, but care needs to be taken with such broadly based taxes to create a stable system. The interaction between taxes and grants also needs to be considered in this section because block grants tend to equalise when calculated on a needs basis, although in the opinion of many economists they reduce accountability and are consequently less efficient.

The sharing of both tax-bases and revenues can be found in many federations. The 2012 Scotland Act has introduced the concept of sharing the income tax base and it now

stands as the most likely means to a general and symmetric form of fiscal federalism in the UK, assuming Wales and Northern Ireland want to take on such revenue raising responsibilities. The current block grant could be reformed to more conspicuously serve the dual functions of revenue sharing (that is incorporating a share of UK taxes like VAT and corporation tax) and equalisation. In the UK's case there are few alternatives to sharing the income tax base, and income tax is therefore the most plausible candidate for revenue raising responsibilities. Some, usually older, federations use sales taxes for own-source revenue in substate jurisdictions, but VAT has long superseded such taxes in the UK and its rate is subject to EU harmonisation. Furthermore, sales taxes in Britain would be undermined by cross border shopping.

Although extensive use of the income tax base seems inevitable in any comprehensive system of fiscal federalism in the UK, its use presents several challenges. While broadly based, income tax fluctuates in the economic cycle and is therefore subject to some instability as a revenue source – in turn, this makes borrowing powers necessary. As a major source of taxation, income tax has macro-economic functions which must be borne in mind when allocating the base between the central and devolved governments. Income tax together with spending on public services constitutes the main mechanism for the redistribution of income in an economic union. We have already noted that the devolution of public services (principally education and health) has been extensive, and when powers over income tax are added the devolved administrations could – through policies to increase competitiveness – take decisions which are regressive at the margin. The potency of these spending and tax raising powers creates implications for the economic union and the expectations citizens have for universal and broadly equal public services. Already considerable resentment has been felt in England at the decision of the Scottish government to fund free social care.

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When used creatively, the extensive powers involved in robust fiscal federalism can stimulate wealth creation and even a fairer distribution of wealth, but whatever outcome follows, the importance of economic decision-making at the devolved level is inevitably enhanced. While Britain is inching towards quite a strong version of fiscal decentralisation, there are examples of federations with very little devolved tax-raising – such are the difficulties caused to economic management. It is a curious truth that revenue raising at

the substate level is more problematic than at the municipal level. Municipal taxes rarely have macro-economic or redistributive implications.

The block grant in the UK

Given that the range of taxes which could be devolved in the UK is limited, it is unlikely that even Scotland could ever be expected to raise more than 30 per cent or so of the revenue needed to fund devolved services. This is at the lower end of the spectrum thought necessary to sustain adequate accountability, and clearly block grant funding will continue to be of central importance to devolved politics. At the moment the UK government sets the block grant using the Barnett formula. Unsurprisingly this has led the Welsh government to claim that it is being unfairly treated and that its dispute with central government is heavily loaded in the Treasury's favour. This aspect of UK revenue allocation is certainly highly centralised, although it is not unprecedented among fiscally devolved states. Some states use constitutional mechanisms to fix the level of grant, which allows substate governments some protection and predictability, while others use quasi-independent institution to determine the formula. The latter mechanism offers a measure of flexibility over constitutionally set formulas while removing central government from an area where it has an obvious conflict of interest. The UK might be well advised to establish a quasi-independent agency of this kind, especially as disputes between the national and UK governments could be highly corrosive given the added dimension of national sentiment. The House of Lords Select Committee on the Barnett Formula recommended the adoption of a needs based grants system allocated by "a new independent expert body perhaps called the UK Funding Commission".²⁰

Costs of decentralisation

The rather unconvincing argument that decentralised tax systems add inordinately to administrative costs need not detain us for long. Firstly, fiscally decentralised states operate all over the world and do not appear impoverished, indeed some are richer than the UK. Secondly, the modern state with its administrative reach and intricate tax systems has few alibis when it comes to technical arguments against decentralisation. Finally, if the cost of preserving the Union is a form of fiscal federalism then it is surely a price worth paying. It would be more productive to design a particularly robust system of fiscal federalism rather than question the principle itself.

Borrowing: the biggest threat to the Union

It is because the sharing of the income tax base is probably unavoidable in a federal UK

that special consideration must be given to borrowing powers. Although income tax is an important and broad based tax, it is subject to fluctuations in its yield during the economic cycle. Were devolved administrations to use income tax varying powers extensively, then they would need borrowing powers to flatten out the fluctuations in the yield. To date the power to vary income tax has not been used in Scotland; but the Scotland Act will now force the Scottish government to adopt a more active policy by means of a tax-on-base power. It is more than likely that the powers contained in the Scotland Act will stand as a symmetric model for the other devolved administrations to follow. Whatever one may think of its merits, a tax-on-base income tax power is a very strong form of fiscal federalism.

It is because the sharing of the income tax base is probably unavoidable in a federal UK that special consideration must be given to borrowing powers.

As the American political scientist Jonathan Rodden has observed, federalism can lead to substantial debt accumulation and significant failures in macro-economic management. When substate governments are viewed as truly sovereign entities there is little danger of acute debt accumulation because creditors, voters, and the markets will monitor borrowing carefully. However, despite the theory of divided sovereignty, federal substate governments are rarely seen as financially autonomous. Own source tax revenues rarely generate half of the funding required for the expenditures made by substate governments (indeed often substantially less than half). Instead substate governments are reliant on grants and shared revenues from central government. In practice creditors develop bailout expectations and therefore lend more freely to substate governments on the assumption that central government will ultimately prevent any debt default.

Rodden has described what he calls a bailout game where substate governments are reluctant to adjust their fiscal policies and instead hold out for a bailout.²¹ One state that has faced difficulties of this kind is the Federal Republic of Germany. While the reputation of the German government for fiscal rectitude is very strong in the international markets, this rigour has not always been present among the Länder. The problem is aggravated, of course, by the German government's horror of debt default and this has inadvertently provided a guarantee to investors lending to impecunious Länder. The problem is clearly not cultural in Germany's case, rather it stems from a poorly designed form of fiscal federalism where the federal government has no effective control on borrowing by Länder. Eventually the Länder concerned won a Constitutional Court judgement in 1992 that the

primary problem was the inadequacy of the federal government's grant, a decision that did little to reduce bailout expectations.

It is imperative that the UK avoids the design flaws found in many instances of fiscal federalism. Given the fact that Scotland (and even less so Wales and Northern Ireland) is not likely to raise more than 30 per cent of its own revenue to fund devolved public services, the heavy reliance on central government grants will continue. One way around this problem would be to permit full fiscal autonomy, at first in Scotland. Scotland would retain all tax receipts but accept full responsibility for funding its services as well as making a transfer to Whitehall for UK wide public goods. Should this be granted, then it is plausible to argue that the Scottish government would be viewed as sovereign by the international markets. However, full fiscal autonomy could undermine the transfer union that lies at the heart of the British compact, creating even profounder difficulties for the Union. The acid test would be whether the Scottish government is prepared in principle to make transfer payments to enable the UK government to equalise the fiscal capacities of the Home Nations. But as long as a block grant mechanism provides two thirds or more of devolved funding, borrowing powers for Scotland – and by extension Wales and Northern Ireland – must be limited and carefully regulated by Whitehall. Otherwise debt accumulation in the expectation of eventual bailout might occur in Scotland, Wales and Northern Ireland. What is worse, the added dimension of nationalist sentiment – often absent in other federations – would make the danger even more acute. Tax decentralisation, if carefully managed, is unlikely to divide the Union; but poorly constructed borrowing powers could destroy it.

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Restricting borrowing powers by substate governments to permit only capital expenditures does not offer a guarantee against bailout expectations. It is difficult in practice to hold a strict binary divide between revenue and capital spending. The expectation of an income stream for capital projects can alter governmental decision-making when planning public services and the revenue needed to deliver them. The Calman and Holtham Commissions were quite cautious when it came to advancing the case for borrowing powers. Holtham did argue that the,

“Devolution of limited borrowing powers for capital purposes would enable

planning horizons to be extended, and would enable larger projects to be entertained than current constraints easily permit".²²

Controls should still be imposed by HM Treasury. As Holtham emphasised:

"We conclude that borrowing by the Welsh Government should take place via the National Loans Fund or the Public Works Loans Board".²³

Access to international markets was not recommended, and for good reason. Calman's approach was broadly similar in extending borrowing powers but without access to international markets.

Above all else, it is the impending taxing and borrowing powers of the devolved administrations which is set to transform Britain into a federation. Up to now, even though the devolution of public services has been remarkably extensive, the tax powers devolved have been minimal. In all states fiscal power often supersedes constitutional and legal constraints and radically shapes political behaviour. With greater fiscal responsibilities, the devolved administrations will become more accountable to their electorates but also more demanding of the UK government in the allocation of resources. According to the president of the Forum of Federations, George Anderson, "power has gone where the money is. It is natural that fiscal issues are so often at the heart of political debates in federations".²⁴

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As well as making public policy decisions more accountable, fiscal federalism places great weight on the strength, flexibility and effectiveness of intergovernmental relations within federations. There is little prospect of a federal Union working smoothly without strong intergovernmental mechanisms. While most attention has been given to devolving taxation powers, understandably as these are of particular interest to the electorate, the role of borrowing within federations should not be overlooked. Debt crises inevitably place severe strain on intergovernmental mechanisms, whether these operate between sovereign states or within federations. It was a debt crisis that brought the 13 American colonies into a federation in 1789; and today it is a debt crisis that may weaken or even destroy the European Union. Particular care, then, needs to be given to the nature of borrowing powers in a federal Britain because badly designed powers

could wreck the Union.

Macro-economic management

We have observed that the decentralisation of public spending is easier to achieve than devolving tax powers. Furthermore public service delivery plays an important role in the redistribution of income and so has macro-economic implications. The UK has been a highly decentralised state in terms of public spending since 1999 (at least in Scotland, Wales and Northern Ireland). Taxation powers would raise further macro-economic considerations. This is also an appropriate time to consider the position of England which has been silent so far in this chapter. While even robust fiscal federalism in respect of Scotland, Wales and Northern Ireland would raise only limited macro stabilisation questions, such powers devolved in some manner to England with 85 per cent of the population would cause the British government potentially grave problems in the effective management of the economy.

First a word on the role of the modern democratic state in macro-stabilisation. Since the 1930s the provision of economic security has been viewed as second in importance only to the physical defence of the state itself. It has led to an age of economic intervention by governments and generally high levels of public spending much of which is also directly delivered by the state in monopoly provision. The efficacy of this welfare model has come under attack from the forces of globalisation which have created more equitable terms of trade for less developed states (particularly those in Asia and South America). Not only has the Bretton Woods model of international economic governance, which prevailed from 1945 until the 1970s, been superseded in the wake of this demand for greater global equity in decision-making, but international organisations such as the EU have become major players in macro-economic decision-making.

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Boadway and Shah argue that globalisation when combined with fiscal decentralisation, has created a new phenomenon 'glocalisation' where traditional state power appears significantly reduced. Other economists, such as Vito Tanzi, have stated that the traditional macro-economic stabilisation role of the state has been constrained by international organisations and by the general forces of globalisation which make high levels of taxing

and spending by governments difficult to sustain. While few states even before the industrial revolution attempted autarky – the desire to appear sovereign on economic matters lingers as a powerful psychological force in the minds of many politicians. The independence debate in Scotland has focused on economic sovereignty and in particular whether Scotland would have its own currency or adopt the Euro or retain Sterling. A generation ago such debates seemed to be firmly resolved in favour of the Union and its ability to deliver at least a level of macro-economic stabilisation. Today there is a tendency in some circles – not just nationalist ones – to respond that the UK is not sovereign in the economic sphere either.

It is clearly the case that the macro-economic role of the state is changing substantially. This is allowing nationalists in the UK to argue that economic decision-making is becoming ever more international. However, it is far from clear that the state has ceased to be the most effective vehicle for macro-economic stabilisation even if this role is being radically recast. The EU is grappling with the existential realisation that the state, at least in much of Europe, remains the optimum currency area. Denial of this fact, critics argue, is driving up unemployment and rapidly transferring resources from unemployed citizens to those in work – a process that discriminates against young people in particular – as economic growth is not only slowed but actually reversed.

The evidence suggests that macro-economic stabilisation remains an important function for states, although its accomplishment is made more complex by globalisation. While the macro-economic influence exerted by substate governments and international organisations is growing, states are still the main player and, tellingly, the focus of attention for citizens seeking to keep politicians accountable for macro-economic decision-making. A federal Britain that undermined the ability of Whitehall to perform macro-economic stabilisation functions would be a weak and probably unsustainable entity.

A federal Britain that undermined the ability of Whitehall to perform macro-economic stabilisation functions would be a weak and probably unsustainable entity.

As hinted at above the main constraint on the macro-economic functions of central government in a federal Britain would come from an English government should one ever be established. An English government with extensive taxing, spending, and borrowing powers could usurp the macro-economic role of the British government by dictating

policy even in monetary affairs. Instead of exercising a powerful directional role, the British government would be reduced to a co-ordinative function with little power in economic affairs. Under this scenario the English and Scottish governments would enjoy extensive fiscal autonomy. While this may not preclude productive and deep economic union, it could end the concept of a transfer union to the detriment of Wales and Northern Ireland. Monetary policy would become the major test for the feasibility of economic co-existence between England and Scotland. While the two economies are deeply integrated and likely to remain so, this would not prevent the possibility of a major rift on monetary policy, for example the choice of currency. The only way to avoid these acute dangers is either to imbed English legislative processes within British institutions or to steadily encourage the federalisation of England (and indeed it would be possible to combine these approaches). The authority of the British government in economic decision-making could then be preserved.

A number of influential economists have argued that federal states are generally better equipped to pursue optimum fiscal and monetary policies. Federalism is a dynamic process in which the federal compact has to be constantly adapted in a sort of on-going 'treaty' relationship. This encourages the design of clear and effective intergovernmental processes. Boadway and Shah argue that federal states have significantly better performance than centralised states in the following areas: central bank independence; the quality of fiscal policies and institutions; prudent use of tax revenue; and public-sector management.²⁵ A federal Britain might hope to emerge as a more resilient economic entity if the necessary care is taken in its institutional design. Nevertheless, the comparative success of federal states in fiscal matters is not uncontested.

A unionist approach to economic decentralisation

Full fiscal autonomy for Scotland is sometimes advocated by nervous unionists as a magic answer to the feared implosion of the Union. It is more frequently advanced by the SNP controlled Scottish government as an alternative option should independence be declined (to use a gentle word). There is growing evidence that the Scottish electorate is anxious about the economic implications of independence, while full fiscal autonomy within the UK appears to be attracting considerable support. Alex Salmond has also been keen to reassure the Scottish electorate that some form of economic union with Britain would continue even after independence. This would be secured both directly via bilateral agreements with the British government, and indirectly via Scotland's membership of the EU. There is little doubt that the expectation of some economic union continuing within the British Isles is reasonable, but it tends also to weaken the romantic appeal of independence, particularly if Sterling is retained as the Scottish currency.

It is probable that the question of full fiscal autonomy will receive extensive attention in the run up to the official referendum campaign whether or not it appears on the ballot. So there is merit in considering the coherence of full fiscal autonomy as a foundational principle for a federal Britain. What economists call the principle of derivation does shape fiscal policy in many federations where tax yields are retained to a large extent by substate governments. Substate governments can then transfer resources to the central government to fund public goods like defence, major infrastructure, and policies associated with economic stabilisation. The latter usually involves transfers to fund equalisation grants so that all constituent units within the federation can fund public goods and services to a similar standard. Some advocates of fiscal federalism praise the principle of derivation because it makes clear the costs and benefits of the federal state.

There is growing evidence that the Scottish electorate is anxious about the economic implications of independence, while full fiscal autonomy within the UK appears to be attracting considerable support.

However, few federal states have attempted to take the principle of derivation to the point of full fiscal autonomy where this means that no significant funds are remitted back by substate governments to the central government for the purpose of economic stabilisation. This is because such a policy undermines the concept of solidarity which is crucial to hold federations together. Full fiscal autonomy, if exercised by all the constituent units, would make a transfer union practically impossible. Furthermore, full fiscal autonomy would make Scotland semi-independent within the UK and this would create a highly volatile situation for the Union – and it would be a less desirable alternative to an honourable declaration of independence. As Paul Hallwood and Ronald MacDonald have argued:

“If all the economic functions of government are devolved it is in essence a de facto sovereign or independent government”.²⁶ And they further maintain that the “failure of the full fiscal autonomy model properly to address the equity issue is one important reason why we do not in practice observe the full fiscal autonomy model in any nation state”.²⁷

The dangers of full fiscal autonomy are aggravated further by the question of North Sea oil revenues. Ownership of off shore resources by substate governments within a federation is exceptionally rare. Some federal states do permit on shore natural

resources to be owned by substate governments, but even this is a minority practice. Conceding ownership of North Sea oil to Scotland would dramatically undermine the concept of a British economic union which over time seeks to manage and dampen the economic shocks and structural changes that are likely to face the Home Nations. No doubt if North Sea oil ownership is conceded to the Scottish government in a desperate ploy to keep some form of Union going after 2014, it may buy only temporary respite. Nationalist rhetoric would soon shift to the demand for compensation to cover 'lost' revenue in the past.

Even since the advent of devolution, Britain has remained a highly centralised state in terms of taxation. While this does need to change, jumping to the opposite extreme of full fiscal autonomy is not the answer. A federal UK needs a form of fiscal federalism which is capable of symmetric application across the Union. Full fiscal autonomy is favoured by the SNP as a good second best to independence, but it could not be applied symmetrically to the other Home Nations without gravely weakening the integrity of the UK. The Home Nations would become quasi-independent governments in a confederal arrangement where Scotland would be financially secure, England financially secure and immensely powerful, and Wales and Northern Ireland neither financially secure nor politically influential.

Full fiscal autonomy is favoured by the SNP as a good second best to independence, but it could not be applied symmetrically to the other Home Nations without gravely weakening the integrity of the UK.

The form of fiscal federalism embodied by the Scotland Act offers a better foundation for a potentially symmetric fiscal system across the UK. However, as things stand the powers may not be used very actively if the Scottish government simply chooses to mirror UK tax rates, as was practice previously with the 3p varying power. Here is the main weakness of the Scotland Act. Calman's recommendations were designed to force the Scottish government's hand because "it is a shortcoming of a system of territorial finance if a sub-national government's budget is unaffected by 'doing nothing' and avoiding making any tax decisions".²⁸ In reducing the block grant by the equivalent of 10p in the rate of income tax, the Scotland Act will force the Scottish government to make a tax decision and thereby expose the Scottish budget to fluctuations in income tax receipts. But, should the Scottish government follow its previously passive policy it is likely to blame the UK government for operating a system that reduces Scottish

revenues during economic recessions when income tax yields fall. Presumably the justification for not using the taxation powers actively would be that they are too narrow to be effective. The SNP might attempt to portray Scotland as a victim in a tax system designed to placate middle England.

A delicate balance needs to be struck if a federal UK is to have a robust political economy. What must be remembered is that Britain would be a federation of nations, and nationalist sentiment would always be a potential factor in the relations between the various governments. A system that leaves Scotland, Wales and Northern Ireland highly reliant on grants from the Treasury risks both a lack of accountability and an abundance of asperity between the orders of government during times of fiscal stress. These would not be conditions conducive to the promotion of Britishness and a sense of shared ownership of the state. The Union would quickly degrade. The other extreme, full fiscal autonomy, would be an even more lethal approach for those keen to strengthen Britishness.

While these challenges may appear a little daunting, and they are made more complicated and potent by the UK's multi-national make up, they are in fact often present in federations. It is by no means impossible to reconcile the principles of common solidarity in an economic union with a healthy measure of national or regional empowerment in fiscal affairs. What is at the heart of a healthy fiscal federation is the acceptance by all parties that the state's role needs to be active enough to ensure basic equity and efficiency across the federation. It is now time to spell out what that could mean in a federal UK.

The fiscal structure of a UK Federation

As in most federations, fiscal federalism in the UK should retain sizeable grant funding from the Treasury to the national governments. Most of this would be unconditional but it could be complemented by some conditional grant giving to fund programmes that bring both national and Union wide benefits. However, conditional grants should be used sparingly and their use would require more tact than in most federations given the national character of a UK Federation. Treasury grants are likely to account for at least two thirds of total devolved expenditure, but in principle this share should be reduced if and when possible. In general, it can be stated that substate governments with a relatively high level of own-source revenue tend to be more autonomous. Such a situation would seem to suit the UK because there is a strong preference for national autonomy in Scotland and Wales. Practically speaking this ideal situation might take a long time to achieve.

A smaller block grant would not preclude an equalisation process to ensure that there is reasonably equal revenue capacity across the Union. Given the scale of such transfers

is likely to remain high for the foreseeable future, coupled with the national dimension in British politics, the grant settlements should be determined by an independent Grants Commission. This would be appointed by the UK government but subject to the approval of the House of Lords as the chamber of Parliament charged with maintaining the wellbeing of the Union. The Commission's criteria would include factors such as need, derivation, and equalisation. Grant levels would be set for several years – subject to adjustment for inflation or major economic shocks – to allow for stability in fiscal planning and to avoid the friction generated by an annual allocation process.

A smaller block grant would not preclude an equalisation process to ensure that there is reasonably equal revenue capacity across the Union.

Income tax would be the main source of revenue for the devolved administrations. Powers over income tax should be wide-ranging – including the ability to vary differently the higher and lower rates – and be a tax on base model. Corporation tax should not be devolved, but as an alternative payroll taxes could be considered for transfer to the nations. Income tax and payroll taxes have the advantage of encouraging governments to promote economic enterprise. However, care is needed to discourage beggar-thy-neighbour tax competition which ends in a race to the bottom and dysfunctionally low taxation rates.

Borrowing powers would be sufficient to allow national governments to manage fluctuations in revenue and to permit a fuller capital programme. However, access to international markets by national governments would be prohibited. Instead a UK agency – perhaps the Grants Commission – would be the source of lending for large and long-term capital programmes.

The importance of intergovernmental relations in a federal UK needs to be clearly understood. While the Joint Ministerial Committee, established by a Memorandum of Understanding in 2001, is a useful framework, it requires substantial reinforcement. Under Tony Blair's premiership, the plenary meeting of the JMC – attended by the PM and First Ministers – fell into abeyance. Plenary meetings have been more frequent since the coalition government came to power, but do not have to be called at set intervals leaving the system an informal one. A useful start would be to give the JMC a statutory footing and a permanent secretariat charged with preparing data, studies and reports. At the heart of the strengthened JMC should be an authoritative Finance Minister's Committee to discuss the parameters for resource allocation in the Union and macroeconomic issues of common concern. A reformed House of Lords could periodically receive a 'state of the

Union' report from the JMC.

This is an apposite note on which to end. The political economy of a federal UK would require a culture of intergovernmental co-operation. Mutual respect would need to be at the heart of the system, a respect based firmly on the expectations of the people - or perhaps we should say peoples - of the Union.

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Unionism and nationalism: a meeting point in federalism

This chapter is not about the respective strengths and weaknesses of unionism and nationalism when weighed in the balance so that a simple choice can be made between the two. Instead it examines the compatibility of the two concepts and asks whether they can combine to provide a strong narrative for a federal UK. Such an ambitious objective might at first sight appear fanciful. Yet one thing these theories of identity certainly have in common is a desire to shape the horizontal plane of politics on which socio-economic ideologies strike vertically. Consequently, there are left and right wing unionists and nationalists. There are intimations in both unionism and nationalism that suggest the possibility of compromise and unexpected coalition. Both Unionism and Nationalism are crucial forces in Britain because much Britishness lingers in Celtic nationalism while unionism requires a heavy dose of national sentiment to lift it above a mere civic identity. Celtic nationalism has regularly sought to embrace aspects of Britishness as can be readily seen today in the SNP's belief that a social union would replace the constitutional union after Scottish independence. And unionism has never merely been a constitutional concept but rather one that has sought to accommodate, even sublimate, nationalism, in order to produce a sense of dual identity.

Celtic nationalism has regularly sought to embrace aspects of Britishness.

However, a hint of cultural paramountcy is present in unionism. Unionists face a big constitutional moment because a Union based on the superiority of British national identity cannot survive. Nevertheless, one that represents a partnership, where Britishness is the common but not dominant identity might prosper. More: *it ought to prosper*. In retaining its integrity as a multi-national state, the UK would demonstrate that the constructive forces within identity politics may be accommodated by wider political associations. We would not face a world made fractious by the principle that states and

nations must be necessarily co-terminous. And if Britain finally accommodates the quest for European unity, it would also demonstrate that states may participate in supranational political associations without losing the inner essence of identity that gives life to the concept of sovereignty.

The origins of Union

Unionism has drawn deeply on the historical, cultural and social wells found all over the island of Britain. Bismark was being dismissive when he referred to Italy as merely a geographic expression, but the political force exerted by Britain's geography has always been adamantine. The island was too big to be insular but too small to be continental. This fine balance between outward and inward forces made Britain a natural location for the exchange and application of ideas. These forces were aggravated in the industrial revolution, creating the most coherent internal market in the world. Britain became the world's first truly modern state and it set the pattern for political development across the rapidly expanding English speaking world. By 1900 Australia, Canada, England, New Zealand, Scotland and Wales all considered themselves to be British nations enjoying a vital double dimension to their national identity. Even those rebellious nations America and Ireland acknowledged their debt to British political experience. While the cadet branch of the British constitutional tree became dominant in the 1940s, in a real sense America inherited the global authority won by the British state in the second half of the 18th Century.

The emergence of unionism as a constitutional concept was first glimpsed in the Union of England and Wales.

The emergence of unionism as a constitutional concept was first glimpsed in the Union of England and Wales. This proto-unionism was the consequence of the failure of the English realm to simply absorb and assimilate Wales. Social assimilation proved to be beyond the capacity of the early modern state – a fact of life recognised by the Elizabethan compromise which accorded Welsh the status of a language of Reformed religion. In accepting English political institutions the Welsh elite achieved a sort of political advancement which, in the absence of existing Welsh institutions, caused little discomfort. While Wales was too small and too poor to impress Britishness deeply on English political consciousness, it left a tiny precedent that was eagerly taken up by James I when urging a deeper union between England and Scotland:

“And hath not the union of Wales to England added a greater strength thereto? Which though it was a great Principality, was nothing comparable in greatness and power to the ancient and famous Kingdom of Scotland ... Hath not God first united these two Kingdoms both in language, religion, and similitude of manners?”¹

Here James was cajoling the Parliament of England and Wales to think about Scotland and the promise of a greater, over-arching Britishness beyond the Union of the Crowns. Greater Union, something which James termed more ‘perfect’ in a striking anticipation of modern political thought, did indeed come a century later. While it contained the contradictions that spring from ambivalent motivation, the Act of Union 1707 is rightly seen as the treaty that gave coherence to unionism because it created British institutions and ended the, de facto, exclusively English character of the state that inhibited the Union of England and Wales.

The most important thing to observe about the Act of Union 1707 is that it was not inevitable. Scotland could have maintained its independence as there was little threat of annexation as long as a Stuart was not restored to the Scottish throne after the death of Queen Anne. A federal union was also possible and strongly advocated by Andrew Fletcher, a distinguished member of the last independent Scottish parliament. Instead a Union with British institutions was agreed upon, but one that left Scottish religion and law quite independent. Thereafter, with a brief aberration in (pre-union) Ireland between 1782-1800, federal solutions to the problems of a multi-national British state were avoided. This would have profound implications for unionism in the late 19th and early 20th Centuries. Nevertheless, constitutional uniformity did not characterise the Union state beyond the core institutions of government. Even that is not quite the whole story, for the Irish Act of Union 1800 did leave intact an Irish executive, albeit one entirely without the attributes of autonomy. This curious anomaly did not doom the Irish union as much as the failure to accompany it with Catholic emancipation which never allowed the Irish to see British institutions as symbols of political partnership.

A nationalist response to the nascent Union, in a sense that we would readily understand it, did not occur in 1536 as it would in Scotland 170 years later, in 1706-7. Welsh élites were eager to acquire the political privileges that formal union with England offered. On the eve of their union, Scottish élites already participated in their own political institutions, albeit those of a rather sickly Scottish state. The Scots surrendered their parliament but preserved whole other national and frankly more vital institutions. Parliamentarianism – where Parliament is seen as the symbol of and the greatest authority in the state – had not progressed in Scotland to anything near the degree it had in England. Constitutional

development was weaker still in Wales before Union, although a valiant attempt had been made by Owain Glyn Dŵr during his great rebellion to generate viable national institutions. In a sense, then, the Union diverted nationalist forces in Wales into British nation-building, but accommodated them in Scotland excepting Crown and Parliament. In the 18th Century, London was the centre of Welsh political and cultural life while Edinburgh enjoyed an intellectual renaissance which did much to re-shape British institutions, and had a seminal influence on economic thought.

Given the strongly multi-national nature of the Union state it might appear surprising that neither Wales nor Scotland joined Ireland in the European renaissance of nationalism in the 19th Century. This phenomenon has been widely studied and further analysis is beyond the scope of this chapter, but the most plausible explanation seems to lie in the growth of Britain as a global state and Empire in the period. National sentiment was largely subdued or sublimated as the Welsh and Scots invested in the more expansive concept of Empire, a concept that briefly embraced an imperial mission of astonishing proportions and which appeared British rather than English.

Given the strongly multi-national nature of the Union state it might appear surprising that neither Wales nor Scotland joined Ireland in the European renaissance of nationalism in the 19th Century.

It is difficult, however, to view Empire as a simple alternative to national development. The imperial age did not last very long (barely the 60 years from 1858 to 1918) while the concept of Britannia had purchase in Wales and Scotland since early medieval times, if not earlier. It was probably less the end of an Empire mission and rather more the positive example of indigenous democratic development in the British nations of the Empire that stimulated a modern apprehension of nationalism in Wales and Scotland. Ireland too stood as an example of national self-determination as did the cluster of post-1918 states in central and eastern Europe. Embryonic Nationalist parties were formed in Wales and Scotland in the 1920s, although the cultural focus of these movements illustrated their minority political appeal. Some have argued that the inevitability of the Union's demise was delayed by the deeply unifying affects of the Second World War and the Cold War that followed it. But one must surely suspect that a state that can navigate such crises is capable of further adaptability in response to growing national sentiment in Scotland and Wales.

Much of the Union's success has been based on its acceptance of paradox. A state that maintained two established churches and also none (in Wales) perhaps unsurprisingly embarked on asymmetric devolution in the 1990s and a generation earlier acceded to the Treaty of Rome. However, the constitutional ramifications of both devolution and membership of the EU have proved extensive, intricate and transformative. Like invasive ivy they now threaten the structure of the Union state while removal would probably spell imminent collapse. Yet that said, ivy when carefully managed becomes an adornment that brings added strength to the most venerable of structures. Perhaps the Union has not been sucked dry of its political vitality as some seem prone to think.

The Home Nations and the Union State

What, we should now ask, made the Union such a strong compact? The principal embodiment of the Union was - and remains - Parliament. When Scotland joined with England to create the British state Westminster had already established itself as the sovereign authority in England and Wales. Parliamentarianism developed briskly in the 18th Century into a secular Trinity: Crown (in reality the executive), Lords (tradition, law and property) and the Commons (the general will, although constrained until the arrival of democracy) combined in one powerful institution.

Faith in parliamentary government became the first article of the Westminster catechism and readily found expression throughout the English-speaking world, America excepted.

This allowed Britain to absorb the radically transformative forces of the industrial revolution and so end the 19th Century as an essentially democratic state. Most European states struggled mightily to achieve a similarly coherent constitutionalism and were far more susceptible to the forces of revolution. Faith in parliamentary government became the first article of the Westminster catechism and readily found expression throughout the English-speaking world, America excepted. As they left the Empire, states from Ireland to India adopted parliamentary institutions and have preserved them. The Commonwealth is still very British indeed in the conduct of political life.

Westminster signified something slightly different to the Home Nations. To the English it was in some enduringly mystical way still England's Parliament; to the Welsh and Scots it was, less ethereally, Britain's Parliament; while to most of the Irish it was an Imperial

Parliament that needed to be balanced with Home Rule. The old Union was ultimately not flexible enough to accommodate Irish nation building, a failure not experienced in Wales or Scotland at that time. In every election from 1886, Ireland returned an overwhelming majority of Home Rule MPs, but both of Gladstone's attempts to meet this demand for autonomy were dashed on the jagged rocks of ultra-unionism. The age of ultra-unionism that dominated British domestic politics for much of the early 20th Century was a sorry and self-defeating one. Britain was driven to the edge of civil war by ultra-unionists who rejected the third Home Rule Bill (introduced by Asquith, whose administration after 1910 was dependent on the support of Irish Nationalist MPs). A greater conflict, World War One, prevented Britain's slide towards anti-Parliamentarianism. However, by 1918 Irish opinion had moved strongly in favour of outright independence. Union then required a level of coercion that could not be sustained by a democratic state.

The Union suffered its first diminution with the Anglo Irish Treaty of 1921. The last but rather forlorn strategy of unionists had been to urge federation on Britain to retain Ireland in the Union. Federal reform of the British constitution – known as Home Rule all round – might have worked a generation earlier and had been suggested, but it never became a serious proposition between 1918-1921 because the Irish by then wanted more, the Welsh and Scottish rather less, and the English practically nothing at all.

The interplay of rapid industrialisation, urbanisation, and the acceptance of British parliamentary institutions explains much of the Welsh and Scottish indifference to Home Rule.

The interplay of rapid industrialisation, urbanisation, and the acceptance of British parliamentary institutions explains much of the Welsh and Scottish indifference to Home Rule. It is surely no coincidence that industrialisation was largely absent from Ireland apart from the Protestant dominated and unionist north. For the Welsh and Scottish, Britain was a state with a global mission to spread democracy, prosperity and civilisation. Socialism also proved a strongly British force as it emphasised the place of the working class as the essential motor of a state not nationality. The Labour Party did briefly flirt with Home Rule, but it soon became a solidly unionist party with particularly strong support in the industrial areas of Wales and Scotland. Public ownership of the higher reaches of the economy and the provision of universal services to mitigate the afflictions of want and illness became its principal goals. This produced a sense of civic identity that stressed the importance of what a state collectively *did* rather than how it was precisely formulated. Some socialists went even further and condemned the very

notion of ethnic politics, a view that many believed was confirmed by the experiences of the First and Second World Wars. Ireland did not seem to offer socialists in Wales and Scotland an alternative vision; rather it was viewed as a pre-industrial society dominated by conservative values and traditional organisations like the Roman Catholic Church. Post-war Britain was a tough political environment for Celtic nationalists.

Aneurin Bevan's career stands as a testament to the strength of Parliament as a unifying ideal. It is no exaggeration to say that faith in Parliament and in its efficacy as an instrument of democratic socialism prevented the at heart Marxist Bevan from ever joining the communist fold. When confronting the BMA's die-in-the-ditch opposition to the establishment of the NHS in 1948, Bevan warned:

"It must be clear to everybody that if there is one thing we must assert, it is the sovereignty of Parliament over any section of the community. We have not yet made BMA House into another revising chamber. We have never accepted the position that this House can be dictated to by any section of the community."²

Parliamentary sovereignty was the democratic equivalent of the dictatorship of the proletariat! That Parliament could be such an object of reverence across the political spectrum in mid-20th Century Britain effortlessly symbolised the political strength of the Union. It was a strength that permitted a good dose of national exceptionalism too: the Scottish Office was re-established in 1885; both Scotland and Wales were substantially over represented in the House of Commons; a Minister for Wales was created in 1951 and advanced to Secretary of State in 1964; and Scottish and Welsh Grand Committees allowed for some debates to be conducted on a national basis. Much national diversity could be accommodated beneath the umbrella of Parliamentary sovereignty. Nevertheless, it would take a great leap of imagination to accommodate the idea of subordinate parliaments in the 1990s.

While the Union's constitutional character was more sharply defined after the departure of Ireland in 1921, its social dimension was also forging a genuine British nationalism.

While the Union's constitutional character was more sharply defined after the departure of Ireland in 1921, its social dimension was also forging a genuine British nationalism. Even today, Scottish nationalism at full flood seeks to accommodate the idea of a social

union as something that would be valuable and necessary after political independence. This is not surprising given the depth and vitality of Britain as a social – and by small extension, national – entity. Capital and labour flowed through Britain’s highly integrated internal market, and in their wake social interaction started to generate new nation-making forces. Wales drew in thousands of agricultural labourers from the West Country and the Marches; many learned Welsh and adopted a Welsh identity that still allowed much of their former Englishness to flourish under the label ‘British’. London, the world’s first mega-city, was British rather than English. The capital city of the English speaking world, it contained a multitude of sub cultures allowing Welsh speaking chapels, London Scottish institutions, and the like to flourish. Britishness became an identity that embraced both the Home Nations and the Dominions. It was a common not a sole identity, rather akin to the sense of Europeaness that pervades today in many European nations. Britain was unusual in being a multi-national state underpinned by genuine multi-nationalism. Perhaps only Switzerland achieved similar political alchemy.

A sense of mild incoherence inevitably attended and arguably still attends this multi-nationalism. In sport, some games were organised on a Home Nations basis (football and rugby) others on a British basis (athletics). Cricket was unique in fielding a British team called England. The National Debt has been managed by the Bank of England (founded before Union) while the state’s prized cultural artefacts first went on public display in the British Museum (founded after Union). These phenomena are more than mere oddities. Constitutional and national identities remain mixed so profoundly that both the Home Nations individually and Britain collectively have political and social attributes. Scotland is partly a state embedded in a deep treaty of union. Britain is mostly a state but has clear national attributes such as language and a literary and cultural tradition that is often impossible to reduce to English, Scottish or Welsh components. Most of these attributes would undoubtedly survive the dissolution of the state. No wonder some people consider the BBC to be the most British of institutions as it broadcasts the images and voices of the UK’s *five* nations. Devolution has added a stronger political dimension to this complexity, but did not create it. Unsurprisingly, when it comes to national identity, the British are enthusiastic bigamists.

Table 1: Moreno National Identity Measures (%) in England, 1997-2012

	1997	1999	2000	2001	2003	2007	2009	2011	2012
English not British	7	17	18	17	17	19	17	—	15
More English than British	17	14	14	13	19	14	16	—	20
Equally English & British	45	37	34	42	31	31	33	—	39
More British than English	14	11	14	9	13	14	10	—	10
British not English	9	14	12	11	10	12	13	—	7

Source: 1997: British Election Study; 1999-2009 British Social Attitudes; IPPR 2013

Table 2: Moreno National Identity Measures (%) in Scotland, 1997-2011

	1997	1999	2000	2001	2003	2007	2009	2011	2012
Scottish not British	23	32	37	36	31	27	27	29	—
More Scottish than British	38	35	31	30	34	30	31	33	—
Equally Scottish & British	27	22	21	24	22	28	26	23	—
More British than Scottish	4	3	3	3	4	5	4	5	—
British not Scottish	4	4	4	3	4	6	4	5	—

Source: 1997: Scottish Election Study; 1999-2011: Scottish Social Attitudes

Table 3: Moreno National Identity Measures (%) in Wales, 1997-2012

	1997	1999	2000	2001	2003	2007	2009	2011	2012
Welsh, not British	17	17	—	24	21	24	—	17	21
More Welsh than British	26	19	—	23	27	20	—	19	17
Equally Welsh & British	34	37	—	28	29	32	—	30	35
More British than Welsh	10	8	—	11	8	9	—	8	8
British, not Welsh	12	14	—	11	9	9	—	20	17

Source: 1997: Welsh Referendum Study 1997; 1999: Welsh Assembly Election Study; 2001-2007 Wales Life and Times Surveys; 2011 (2) Welsh Election Study 2011 (Post-wave); 2012: Silk Commission Survey

These figures actually demonstrate that devolution has had relatively little impact on dual identities in Britain's Home Nations. Exclusive identities (those identifying as either British or English, Scottish or Welsh *but not both*) are not increasing rapidly: in 1999 the figures were 31 per cent in England, 36 per cent in Scotland and 31 per cent in Wales. By 2011-

2012 (taking the latest figures in each Home Nation) they were 22 per cent in England, 34 per cent in Scotland and 38 per cent in Wales. Only in Wales did exclusive identity increase, while exclusivity actually decreased in England and Scotland.

Perhaps more surprising still is the lack of growth in exclusively or predominantly English, Scottish or Welsh identity over the same period. It increased moderately in England, from 31 per cent to 35 per cent, declined in Scotland from 67 to 62 per cent, and increased a little in Wales from 36 to 38 per cent.

There is more variation in Britishness over the period (again measured as exclusive or predominant identity). It fell in England from 25 to 17 per cent, increased a bit in Scotland from 7 to 10 per cent, and rose slightly in Wales also, from 22 to 25 per cent. Most significantly, those identifying as equally British and English, Scottish or Welsh is stable. In England it has risen slightly, from 37 to 39 per cent, risen fractionally in Scotland from 22 to 23 per cent, and fallen a bit in Wales, from 37 to 35 per cent.

It should be stressed that these figures do fluctuate and the choice of years for comparison can effect the analysis (for example, if 1997 is taken as the base year, those identifying as equally British and English has declined from 45 to 39 per cent in 2012). However, unionists should not be terrified by this data as it demonstrates the mutability of all identity options rather than the remorseless progress to exclusive identities with Britishness giving way to a strong preference for an exclusive English, Scottish or Welsh identity.

Secession and unionism

An unusual feature of modern British unionism is its acceptance of secession, the very thing that is at the heart of nationalism. Today multi-national states like Spain and Belgium are following with some trepidation the debate on Scottish independence. In Spain the constitutional acceptability of secession is highly disputed. The American Civil War was largely fought to resolve the extent of states' rights and whether the founding fathers accepted or rejected the principle of secession. *Unionism* was in fact coined in America during the Civil War, and its implacable opposition to secession spread to Britain and fuelled the antipathy of many Victorian and Edwardian unionists to Home Rule.

The current consensus that secession is permissible, if regrettable from a unionist standpoint, has been forged from three distinct elements of British political experience. First, the Irish crisis stands as a warning against ultra-unionism. Secondly, secession was accepted in the middle decades of the 20th Century when unionism was, according to

Colin Kidd, a banal but overwhelmingly popular concept. Quite simply, secession was viewed as a fanciful prospect that could be conceded in the abstract. Thirdly, as the Celtic nations increasingly emphasised the multi-national nature of Britain, the ultimate right of the Home Nations to secede from the Union became conceptually difficult to deny while imagining the Union as a partnership. The Home Nations are amongst Europe's oldest nations and enjoy a cultural and now political status that is in no way provincial.

The Home Nations are amongst Europe's oldest nations and enjoy a cultural and now political status that is in no way provincial.

The Irish crisis need not detain us for long, but a few observations are necessary.³ From the start Ireland's was a forced and unsatisfactory union. The greatest problem was the denial of religious rights, an impediment that to his credit Pitt the Younger fully recognised. Nor did the Irish union get to grips with the arrival of democracy in the second half of the 19th Century. Once the Irish electorate habitually returned Irish Nationalist MPs, Home Rule was essential, yet repeatedly denied by unionists. Although Irish nationalism provoked a popular unionist backlash in the rest of the UK, it was principally a failure of British statecraft that forced Ireland out of the Union. Ultimately the denial of Ireland's desire for a significant measure of self-determination could only be sustained by coercion once Balfour's stratagem to kill Home Rule with kindness failed. Such coercion was wisely abandoned after the First World War as soon as the reputational damage it was causing to Britain was recognised. It says much about the strength of the Union in the rest of the UK that the Irish crisis did not leave the state profoundly weakened. If anything, the unionist consensus in Britain was deepened and the briefly fashionable expedient of Home Rule all round quickly forgotten. The Union went on to survive the Great Depression and its traumatic effects, and gathered yet more strength and coherence during and after the Second World War. These events were about as severe and exacting as any likely to face a state.

Describing mid-20th Century unionism as banal should in no way be taken as damning with faint praise. Unionism was so culturally embedded in Britain that it required little explicit theorising. It echoed also the traditional state of affairs in Scotland and Wales. As Colin Kidd has written:

"The Union occupied a position of such unchallenged dominance in Scottish life between about 1750 and 1970 that there was no need to make a vigorous case on its behalf".⁴

Kidd's analysis of Scottish unionism is profound and his 2008 work *Union and Unionisms: Political Thought in Scotland 1500-2000* is probably the most important study of unionism yet written. He observes that when unionism was banal it was taken for granted. While banal unionism has now lost its potency, he warns that:

"Analytical unionism is but a step away from deconstructive unionism. This is because the events and key documents of 1706-7 do not easily fit into the conventional English understanding of the British state and its constitution, but seems in fact to contradict them. Thus the attempts of analytic unionists to understand the Union risk subverting the shibboleths of British statehood".⁵

The creation of a reformed Union requires not a reinterpretation of the events of 1707 but a transformation of the Union here-and-now to achieve a settlement fit for the 21st Century.

If we accept this analysis it may be difficult to reconcile old time unionism with the UK's revived sense of multi-nationalism. Yet the creation of a reformed Union requires not a reinterpretation of the events of 1707 but a transformation of the Union *here-and-now* to achieve a settlement fit for the 21st Century. What is undeniable here is that one of the axioms of mid-20th Century unionism was an almost dismissive acceptance of secession based on the sure and certain knowledge that the Home Nations fully consented to the Union. The great constitutional scholar, Sir Ernest Barker, wrote in 1927 that:

"A Scotsman, for example, has his own national fund; but he is also a partner in the broader fund of British nationality. He has the two homes of the Scottish and the British nation. If he is satisfied with his double domicile, no question arises. If he should ever resolve to prefer a single home, and to stay there, he will have his way".⁶

While Kidd is right that the English have tended to see the Union as leaving the fundamental political character of England unaffected, their acceptance of secession has acknowledged the multi-national character of Britain.

If the sovereignty of the British Parliament is limited on the question of secession, then the multi-national nature of Britain is spelt out in capital constitutional letters. The only way to avoid this conclusion would be to hold that the whole of the UK must consent to an act of

secession by one of its constituent parts (the foundation principle of American Unionism). The Victorian constitutional theorist A.V. Dicey reluctantly abandoned the concept of absolute parliamentary sovereignty when unionists lost their parliamentary majority in 1910, and he made the plebiscite – on a UK wide basis – the watchdog of the constitution. Clearly, when parliamentary sovereignty is suspended in favour of popular sovereignty on supreme constitutional matters, the question ‘which people’ becomes vital.

In the matter of Britain – that adamant political material – the Home Nations are too venerable and the British state too recent to assert the view that it is the *British people* who are first amongst equals. Otherwise Britishness would be seen as a dominant and not just a common identity. The Union would not be conditional or by necessity consensual. Unionism tried to advance this view during the Irish crisis, but it failed totally and drove Ireland out of the Union. Since at least the 1970s when the first devolution referendums were held in Wales and Scotland, the ultimate authority on supreme constitutional matters has been held to be the peoples of the Home Nations separately. In the 1990s John Major’s government stated the reality of the UK’s multi-national character when it acknowledged that:

“It should be a mark of Scotland’s self confidence in her own status as a nation that she shares her sovereignty with the other parts of the United Kingdom. But the willingness to share that sovereignty must never be taken for granted”.⁷

This is pungent not banal unionism. Of course, this striking development in unionist thought did not go unopposed by some advocates of the old Union who kept faith in Dicey’s absolutes. One distinguished group, writing under the imprimatur of the Conservative Political Centre, maintained that:

“The Union established one constitutional entity – one constitutional people – which has contained national differences and allowed for their distinctive cultural and religious institutions. To be British is to devote an allegiance to the Crown and constitution rather than a national identity. As such, it does not denote the suppression of other identities but rather the expansion of identity, allowing the individual the opportunity to be part both of a national entity and a wider, liberating constitutional entity.”⁸

Dicey’s beguiling point that sovereignty must rest in one place has been revived by John Law. He argues boldly that even federalism cannot divide sovereignty:

“Sovereignty refers to the *final* and *absolute* source of political authority underlying a society, which – being final and absolute – can only be thought to lie in *one* place ... what can be distributed, by contrast, *are the powers flowing from sovereignty* (whilst sovereignty itself remains the undivided well-spring of those powers)”⁹

These views cannot be lightly dismissed because they have a strong internal logic which holds that constitutional change must be endorsed by the British electorate as a whole even if the change only effects a part of the Union. In a recent letter to the *Financial Times*, the Spanish ambassador, Federico Trillo-Figueroa, echoed this orthodox unionism when he maintained that constitutional change in Catalonia would require ‘approval in a referendum held throughout the country’.¹⁰ To orthodox unionists, Britishness is best termed supra-national in character. It provides a common civic identity to sit alongside the particular affiliation a citizen has to one of the Home Nations. Welshness, Scottishness and Englishness becomes Britishness when considered in the wider political dimension. It follows from this orthodox unionism that constitutional sovereignty must lie collectively with the British state and not the individual nations of the Union.

Since at least the 1970s when the first devolution referendums were held in Wales and Scotland, the ultimate authority on supreme constitutional matters has been held to be the peoples of the Home Nations separately.

The power of traditional unionist thought cannot be denied. It remains the received view in the USA, Canada and Spain. But in Britain it was set aside in the middle decades of the 20th Century when the threat of secession was thought if not extinct, then deeply dormant. Only the inherent strength of Britain’s ancient Nations could have activated the concept and made Britain so peculiar on the question of secession. For example, the Canadian Supreme Court has ruled that Quebec does not have a unilateral right to secede. Canadian unionism does not concede that the ultimate constitutional authority in Quebec rests with the people of Quebec. There is instead a belief – originally and most clearly advanced by the Quebec unionist and Canadian PM Pierre Trudeau – that the Canadian state has a direct constitutional relationship with each citizen of Canada, and this relationship is superior to any national rights. To be Canadian is to share in a unified citizenship. In rejecting so totally such constitutional concepts, both British unionism and Celtic nationalism have a fiduciary duty to the international community to consider the precedent the UK would set if one of the Home Nations were to secede and effectively dissolve the Union. Denial of such a fiduciary duty would undermine the character of Britain’s theories of identity – unionism and nationalism – as liberal patterns of thought.

We should not be insular, therefore, when considering secession but continental, even global.

Unionism and the quest for European unity

The apogee of banal and instinctive unionism occurred at the very time when the classic concept of statehood was shattered in Europe. During World War Two most European states simply failed to uphold the first principle of statehood: defence of the realm. Those states that did avoid occupation had to accommodate German foreign policy, making them vassal states. Only the Soviet Union emerged from the war with its 'theory of mind' as a state intact, having achieved the unique distinction of liberating itself from extensive Nazi occupation. The Cold War which followed the world's bloodiest conflict did little to restore European self-confidence. This enervation of the state structure in Europe was offset somewhat by the establishment of NATO which at least provided a robust mechanism for collective security. But even here the reality of American and (initially) British leadership could not be denied, and nor could the nuclear umbrella that many found morally repugnant. Yet out of the ashes of total war came a desire for European unity. Moves to form an economic union in western Europe received little encouragement from British politicians, although some, like Churchill, considered a united Europe a good thing for the Europeans, if not the British. The British government was not represented at the Messina conference which prepared the way for the Treaty of Rome in 1957.

Both British unionism and Celtic nationalism have a fiduciary duty to the international community to consider the precedent the UK would set if one of the Home Nations were to secede.

Unionism has gone through several stages in its response to European unification. Its initial and total rejection of British membership of any European union was encapsulated by the Labour leader Hugh Gaitskell who, in 1962, said of proposed membership 'it means the end of a thousand years of history'.¹¹ This implacable opposition amongst leading unionists was followed by weary attempts at accommodation which eventually saw Britain enter the European Economic Community in 1973. The European 'project' had by then entered a period of stagnation which made it easier for British politicians to present membership as no more than the limited pooling of sovereignty on some economic matters. Legally speaking this was nonsense as the constitutional principle implicit in EEC membership was radical and inimical to traditional unionism of the Dicean model. As Lord Bridge stated in 1991,

“...if the supremacy ... of community law over the national law of member states was not always inherent in the EEC treaty it was certainly well established in the jurisprudence of the Court of Justice long before the UK joined the Community”.¹²

To be fair, Labour saw the point more clearly, or at least the point caused them more internal division at the time. A referendum to retrospectively approve Common Market membership was held in 1975 and won with a two-thirds majority. This was the first ever UK wide plebiscite and it further reduced parliamentary sovereignty despite the fiction that the referendum was merely advisory.

Mrs Thatcher seems to have been entirely oblivious to the political and cultural implications of a Single Market.

During the decade 1975-1985 unionism was split between those keen to accommodate European membership (mostly Conservatives) and those reluctant or hostile (mostly Labour). However, the divide in unionism was not a simple left-right one and there were many Conservative Euro-sceptics and many Labour Euro-enthusiasts in this period. It takes an act of imagination now to appreciate how contained and even inert the Common Market appeared in the 1970s and much of the 1980s. This made the European ideal a lot safer for unionists seeking a greater external role for Britain, with Empire gone and the Commonwealth turning out to be rather insipid in projecting British interests. Mrs Thatcher, never a fan of the Commonwealth, saw membership of the European Economic Community as strengthening Britain's ability to deal at the top table of global politics. The first two Thatcher administrations (1979-87) were comfortable enough with the nature of the EEC – focused as it was on economic co-operation – to start an audacious plan for a Single Market. The idea would transform the EEC into a genuine European Union, although Mrs Thatcher seems to have been entirely oblivious to the political and cultural implications of a Single Market.

Between the Single Market's agreement and its implementation, the Berlin wall collapsed and rent asunder the iron curtain dividing Europe. Many unionists saw attractive options for Europe in this 'new world order'. A vision of European union was advanced that would consist of a Single Market stretching from the Atlantic to the Urals. Such a vast economic market would require regulation but not intrusive political integration. Enlargement became the creed of both Conservative and Labour governments from 1989. Another idea that had been brewing since the 1970s now arrived on the European scene with great

potency. The Exchange Rate Mechanism offered the prospect of a common monetary policy amongst its members, thereby giving added force to the Single Market. This idea was attractive to many economically liberal minded members of the third Thatcher administration. Reluctantly Mrs Thatcher succumbed to pressure, and Britain joined the ERM in 1990.

It was an event that would have profound implications for unionism and sweep aside the heady optimism contained in notions of a looser but enlarged Europe focused on a Single Market. Within 23 weeks of its unexpected re-election, John Major's government had to buckle to market pressure and withdraw from the ERM on 16 September 1992. Although its stay of execution lasted four and a half years, Major's government was instantly doomed. Unionism also turned decisively Euro-sceptic, as did the public mood. Yet the political and social ramifications of a coherent Single Market are surely analogous to those experienced in the 18th Century when Britain became a single economic entity sustained by the most powerful single market until then created. Somewhat ironically, many of the EU's younger citizens – especially those from the East – flocked to its most reluctant member to enjoy the economic opportunities of their European citizenship. Although Britain has always coped well with paradox, it is to say the least a little odd to be both the most cosmopolitan and most sceptical member of the EU.

European unionism bears more than a little comparison to British unionism for its self-belief and faith in multi-national structures.

The ERM was the precursor of the Euro. Agreed at the Maastricht Summit in 1992, the Euro fulfilled the founding fathers' vision that economic union would lead to political integration. The Major government emerged with credit from the Summit in gaining for Britain the right to wait and see if the Euro worked before deciding whether or not to join. This was hardly the stuff of beastly Euro-imperialism on the part of European leaders. However, the determination to forge a closer union in Europe was consistently underestimated by British politicians. For the French, Germans and Italians in particular, the terrible monster in the attic was memory of the war. This is why the Euro crisis has not undermined the basic belief most European politicians have in the European 'project' and may never do so. A monetary crisis created both the Anglo-Scottish and American unions; it might yet create a politically and fiscally integrated European union, at least at the core. European unionism bears more than a little comparison to British unionism for its self-belief and faith in multi-national structures. It also asks British unionists a very tricky question: *if the Home Nations can prosper in a British Union why can't Britain in turn prosper*

in a European one? British unionism, which started off as an expansive ideology, risks becoming a very insular one in its response to the quest for European unity.

Nationalism embraces European unionism

European Unionism has exerted a strong pull on Celtic nationalism. Both Plaid Cymru and the SNP were steadfast in their opposition to European integration until the mid-1980s. To nationalists favouring pure independence, surrendering sovereignty to a European entity resembled the hated subservience to the British state. These attitudes, sincere as they undoubtedly were, came at the cost of pushing the Nationalists to the fringes of politics. Nationalism struggled to gain acceptance in liberal intellectual circles where it was often dismissed as separatist and reactionary.

In the second half of the 1980s the concept of full national status in Europe started to gain currency. The Welsh New Left thinker, Raymond Williams, coined the phrase ‘Welsh Europeans’ and used it as a signpost to a neo-nationalism where the European ideal could marry with Britain’s ancient national entities. Nationalism did appear more viable within supra-national structures such as the EU. All of a sudden the charge of separatism lost its sting and this helped both the SNP and Plaid Cymru make striking breakthroughs in the first round of elections to the devolved institutions in 1999. On balance, the European dimension of British politics has opened up new and productive possibilities for the Nationalist parties. It has required, however, an acceptance of dual or multiple identity which would have spooked many nationalists of an earlier generation. This has left nationalists with their own tricky question: *if it is possible to be Welsh and European, why is it not possible to be Welsh and British too?* Put another way, if Welsh nation-building can sit happily beside the quest for European unity, why cannot it also accommodate membership of the UK? The SNP has reconciled these potentially contradictory attitudes to a greater extent than Plaid Cymru. Although the SNP has called for the dissolution of the British state, it has also stressed the need for what amounts to a British confederation (although critics consider this response tactical rather than strategic).

If unionism stands still it will surely perish in the face of political change that is as fundamental as any since the Reformation when the very idea of the modern state was conceived.

Unionism and nationalism in a changing world

The search for a coherent and reformed unionism is daunting. In unpicking the casual

certainties of banal unionism, the whole viability of the Union state might unravel. Yet if unionism stands still it will surely perish in the face of political change that is as fundamental as any since the Reformation when the very idea of the modern state was conceived. At its own birth, the 1707 Union claimed to be a partnership and not what we might now call a hostile takeover. To remain coherent partnerships must accept the possibility of dissolution or renewal – or they are not partnerships. There is then an idea here that the Union is not in its essentials fixed or final. And furthermore, any use of coercion to maintain the Union would be self-defeating. As Colin Kidd has so lucidly put it:

“Much of the history of unionist political thought depends, it transpires, on the Scots awareness that Union was not the same thing as absorption, and that unionism was at bottom a type of anti-imperialism”.¹³

Since its foundation the Union has regularly been put to the test existentially. It failed to compromise with the Americans in 1776 and ‘lost’ the first Empire, and then subjected the Irish to a forced Union that denied basic political and religious rights, and ended with Ireland’s eventual exit. More positively, the Union developed the British nations of the Empire into independent dominions, and disengaged from Empire with relative success leaving many Commonwealth states with viable parliamentary institutions. And most recently, the Union has accommodated devolution with equanimity. While the existential test inherent in Britain’s membership of the EU is profound, it should be considered alongside earlier constitutional innovations. Today a reformed unionism is required that not only adapts to change but also helps shape the political spaces in which the Union must operate, especially at the European level.

The greatest post-war challenge that faced nationalism in Britain, and indeed across Europe, was how to absorb the liberal values contained in ideas for supra-national governance. While progress towards greater European unity offered nationalists a plausible defence against the acidic charge of separatism, it also added greater rigour to the examination of nationalism once it had entered the political mainstream. No longer ignored as the zany pursuit of a few alienated political souls, nationalism had to respond to the measures taken by multi-national states to accommodate the liberal goals of nation-building by their constituent nations. While nationalist parties in Britain have made substantial progress, it is difficult to see nationalism retaining its liberal credentials if there is any automatic demand for secession as the only means to facilitate authentic nation-building.

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Attitudes towards secession are key on both sides of the current Unionist - Nationalist divide now present in several European states. Unlike Spain, Britain has accepted the principle of secession as the ultimate guarantee of a truly multi-national and consensual Union. But the Spanish have a point too; what would happen if most of the nations of the world demanded statehood? How many states would there be in the world? Six hundred? Six thousand?¹⁴ One way to moderate the principle of secession would be to make it difficult but permissible. Here secession would not be viewed as an ordinary political procedure which permits of easy application. Secession would become a last resort when all practicable options to accommodate nation-building have been exhausted. This theory of secession would allow unionists to hold that unions must be consensual and not forced, while nationalists would retain the hard won liberal credentials secured since the Second World War by accepting the primacy of nation-building over state formation. Both unionism and nationalism would, by taking these paths, exercise a constitutional fiduciary duty to the international community.

The approaching Scottish referendum on independence is likely to meet the test that secession should not be an ordinary political procedure. The Scottish and UK governments have agreed the parameters for the referendum and there is to be a long interval – perhaps too long – before the question is put to the Scottish people. The question itself will be a straightforward Yes or No which will focus on the issue of independence. And the referendum will fulfil a long-standing SNP pledge to hold a vote on independence – and one covered by its clear mandate, won in the 2011 election. Furthermore, the wider implications for the UK or any successor state are set to form a central part of the debate, in which all UK citizens are entitled to a voice if not a vote.

The referendum will also be a test both for the reformed versions of unionism and nationalism. Each side seems aware of the fiduciary duty that falls on them at a supreme constitutional moment. The SNP has already stressed its commitment to EU membership (although this may have to be applied for by an independent Scotland) and its desire to see some form of British confederation continuing after independence. If the world were to follow Scotland's example, the SNP will surely claim, we are unlikely to see hundreds of additional autarkic states, each undermining the potential for international co-operation and supra-national governance. It is questionable, nevertheless, that mere membership of the EU can completely discharge the fiduciary duty Scottish Nationalists have to the

international community. This is because expectations of supra-national governance in many, indeed most, parts of the world are remote. The dissolution of Britain could set a very different example to nationalists in India or China than that to nationalists in Catalonia or Flanders.

Reform does come at a cost. If the nationalism of the 21st Century is not about diamond hard independence but rather international co-operation and the pooling of sovereignty, what is wrong with the theory of the multi-national state? How does the European Union safeguard Scottish national identity but the British Union compromise it? It is difficult to argue in hard and clear tones for an independence that is soft and nuanced. Unionism faces its own challenge here too. Offering a vision of a new Union that facilitates nation-building sits uneasily with a Euro-scepticism that loathes supra-national governance. Many responses are possible - the type of European Union that is being created is key - but some answer will surely be demanded of unionists who claim they have a multi-national and expansive approach to statecraft. Just as the decision to be taken by the Scots on independence will profoundly affect generations to come throughout Britain, so will that taken in the likely referendum on British membership of the EU. Supreme constitutional decisions determine the long view and should not be heavily influenced by the passions and frustrations of the moment. Constitutions are not fashion accessories.

*Britain may be stumbling towards common ground
that could accommodate the most constructive elements
of unionist and nationalist thought.*

A meeting point in federalism?

Britain may be stumbling towards common ground that could accommodate the most constructive elements of unionist and nationalist thought. That common ground might be a federation that would allow the UK to meet the political aspirations of the Home Nations or, should that attempt ultimately fail, allow for the UK to evolve into a looser confederation. It would be a productive compromise allowing for the development of the British state and the two most vital forces that now seek to shape it. Speaking of compromise is appropriate because federalism is best understood as a treaty relationship in which the interests of the different spheres of government are constantly being modified and negotiated. It creates a lot of space for constitutional development and allows states to adapt to challenges that cannot be easily anticipated. However, it also sets the rules of the game, something alarmingly absent in devolution.

At first glance, federalism appears a difficult option for unionists. There is always a

danger that unionism will over compensate in its desire for unity and become insular in outlook rather than expansive and open to change. This danger is also clearly present in the quest for European unity. Today, some strands of unionism are dominated by a Euro-sceptic vision that yearns for a more classically independent British state. Here the need for international co-operation is still acknowledged but believed to be achievable by bilateral agreements between states. But it is doubtful that the traditional character of Britain can be easily preserved in such a confined context. Britain was the first global state with an expansive mission first in Empire and then in Europe and the various international organisations that were set up after the Second World War (many of which Britain was instrumental in founding). Narrow Euro-scepticism is now one of the principal threats to the emergence of a reformed unionism. Such Euro-scepticism threatens to fuse with a rather brittle English nationalism that resents outside interference and finds more inspiration in contemporary Switzerland than in the historic achievements that created the English-speaking world. This 'stay at home' Britain looks a meagre version of the state that defeated the Nazi menace and established many of the pillars of democratic government and free trade. Britain would surely not survive by becoming the last place in the British Empire.

The dilemma facing Celtic nationalism is something of a reversal of that confronting unionism. While Welsh and Scottish Nationalists have largely accommodated the concept of European unity, opinion within the EU is turning against secession (although it was to a degree accepted in the 1990s when eastern Europe emerged out of the shadow of communism). Nationalists in Britain, Belgium and Catalonia face a stern examination from those who see the greater use of federal mechanisms as a way to sustain the constitutional integrity of multi-national states. The EU could expand alarmingly in terms of constituent members if secession becomes an increasingly ordinary political process. When the EEC was formed in the 1950s most political observers would have thought an independent Scotland as likely as an independent Bavaria or Burgundy. Yugoslavia stands as a grim warning of what can happen when multi-national states dissolve suddenly, although the Czechoslovakian experience amounted to a 'velvet' divorce that perhaps indicates a more likely pattern should secession become commonplace in Europe.

What a federal Britain would look like institutionally has been dealt with earlier in Chapter 3. It is worth concluding, however, with a brief account of the ideological common ground that exists between unionism and nationalism. The shared faith in parliamentary institutions is striking. What is often called the Westminster model of government has been the template for Welsh and Scottish political institutions. Many parliamentary states are federal and there appear few arguments in principle against Britain adopting a federal

constitution (there is a big argument in practice, the dominant size of England, which has also been discussed in Chapter 3).

Many political-cultural values are also shared. Most nationalists in Wales and Scotland agree that some form of British connection would survive independence.

What is often called the Westminster model of government has been the template for Welsh and Scottish political institutions.

The SNP has called for what amounts to a confederation of considerable depth with a single market and currency, a shared head of state, and joint armed forces. Even when this is described as a social union it still looks like a treaty relationship not a million miles away from federalism. Indeed one can take this further and argue that the presence of Britishness is being acknowledged in such proposals. Britishness is ancient unlike the UK and it seems fanciful to expect Scots in an independent Scotland to start relating to the English as fellow Europeans rather than fellow Brits! Dual identities are clearly at play here, otherwise why call for a social union at all? Finally, and most surprisingly, unionism and nationalism in Britain accepts the legitimacy of secession. This embeds the principle that sovereignty ultimately resides with the peoples of the Home Nations separately and not in the people of Britain collectively. If the peoples of the Home Nations are sovereign and want a federal Union, both unionism and nationalism will have to accommodate such a desire if they are to practice liberal and constructive statecraft. The agreement on the conduct of the Scottish referendum signed by David Cameron and Alex Salmond on 15 October 2012 in effect convened Britain's constitutional convention. It remains to be seen whether a politician of the first rank has the imagination to combine the most positive aspects of unionism and nationalism in a Federal Union.

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A Constitutional Convention as a path to a new Union

While independence is considered a permissible option for Scotland, unionists are keen to defend the UK as a successful state that could further adapt to the constructive aspirations of the Home Nations. There is a clear sense here that should the Scots vote No to independence there would still be a need to renew the Union because the status quo is no longer durable. David Cameron has endorsed the Scottish Conservative Party's decision to establish a commission on the future of devolution and this is just one of several major initiatives by unionists to sketch out options for the UK after 2014. The leader of the Scottish Conservative Party has stated that "once Scotland has rejected independence, there needs to be a mechanism for establishing a consensus in Scotland on the shape of further devolution". And she added her support for Douglas Alexander's proposal for a Scottish National Convention.¹ The feasibility of a UK constitutional convention has also been endorsed by the House of Commons' Political and Constitutional Reform Committee.² It is appropriate now to look at the use of constitutional conventions, or analogous processes, in the past 30 years or so in various liberal democracies.

Should the Scots vote No to independence there would still be a need to renew the Union because the status quo is no longer durable.

In succeeding against the odds to forge a union, the assembly of American politicians who met at Philadelphia in 1787 received the supreme accolade Founding Fathers. This constitutional convention became the classic example of statecraft and it continues to inspire reformers to this day. Its power to define a constitutional convention has waned in our faster and more democratic age. However, in briefly considering a number of recent conventions we could do worse than settling on a definition that such events are constitutional moments outside the ordinary political process. This definition allows us to focus on outcomes or aspirations rather than the formal structure of conventions.

Canada

The Meech Lake Accord, agreed by Canada's leading politicians in 1987, sought to recognise the "distinctive nature of Quebec society as the principal although not exclusive centre of French-speaking Canadians".³ The Accord fell apart under the weight of criticisms from opponents, like Pierre Trudeau, who feared that it would render the Canadian state 'totally impotent'. Civic society, especially those organisations located on the left of Canada's political spectrum, feared that the Accord conceded too much to nationalist sensibilities at the expense of a citizen's rights under the Canadian constitution. Although the Accord was driven by Canada's federal and provincial leaders, it also submitted what was essentially a behind closed doors and a take it or leave it agreement to an open legislative process without a clear timetable. Opponents of the Accord mobilised public opinion effectively in the ratification process and one thing above all was apparent in the wreckage of the Meech Lake Accord: the political monopoly of Canada's political leaders on major constitutional matters had come to an abrupt end.

Canada's political leaders attempted to learn the lessons of this failure when negotiating the Charlottetown Accord in the early 1990s. The process was more open and the final agreement - initially popular - was submitted to a referendum. However, the proposals were defeated in Canada's first and to date only state wide vote on a 'mega-constitutional agreement' with 55 per cent voting against. As Russell observes, the "Charlottetown Accord was defeated because, outside Québec, it was perceived as giving Québec too much, while inside Québec it was perceived as not giving Québec enough".⁴

With hindsight it is apparent that Canada's attempts to secure major constitutional change were compromised because they were too élite driven.

With hindsight it is apparent that Canada's attempts to secure major constitutional change were compromised because they were too élite driven and failed to convince civic society and the electorate of the need for fundamental constitutional change. As Russell succinctly puts it, "Citizens are not likely to be in a mood to compromise their principles or interests in a major constitutional re-ordering unless they believe that dire consequences will flow from their refusal to do so".⁵ Although neither Accord was the result of a formal constitutional convention process, but rather agreements negotiated between Canada's federal and provincial governments, they were analogous to the elite or oligarchic approach to the conduct of constitutional conventions.

Iceland

Sweeping constitutional change is often precipitated by a crisis which exposes flaws in the existing constitution. This is true in the case of Iceland. The 'Pots and Pans Revolution' sparked by the financial crash of 2008 demanded that the systemic causes of the crash, which were traced back to the 1944 constitution, be rectified. Iceland's Constitutional Convention is unique in the way it has been 'crowd-sourced'. First, a National Assembly of 1,000 individuals, chosen at random but proportionally representing Iceland's demographic composition, was convened for a day. It produced a list of concerns, which the Constitutional Assembly was legally required to consider. Second, parliament appointed seven professionals from different fields to a Constitutional Committee, which published a 700-page report with recommendations for a new constitution. Finally, the Constitutional Assembly was elected using the single transferable vote (STV) method that allowed voters to choose 25 representatives from a pool of 523 candidates.

The Constitutional Assembly drafted the Constitutional Bill in a three-stage process. Articles were posted on a website, inviting the public to comment. They were then revised and published online once more. Finally, the Assembly voted on each article to accept it or not into the final document. Throughout the process, the Assembly had access to advice from a wide variety of experts, but special interest groups were excluded from having contact with the Assembly beyond that afforded any other citizen. Iceland's citizens participated enthusiastically in the drafting process. Three hundred and twenty three proposals were put to the Assembly, and the website received over 3,600 comments. In seeking to restrict the influence of interest groups, Iceland's approach was in sharp contrast to that of Canada.

On 20 October 2012, six proposals contained in the draft constitution were put to a referendum. All were supported, most with majorities in excess of 66 per cent.

Iceland has set some of the key standards that modern constitutional conventions will have to meet if they are to be seen as authoritative and distinct from the ordinary political process.

However, the referendum was non-binding, and it remains to be seen if the new constitution will be enacted, especially with the election of a new government in April 2013. In its innovative use of a variety of consultative methods including wide use of the internet, Iceland has set some of the key standards that modern constitutional conventions will have to meet if they are to be seen as authoritative and distinct from the

ordinary political process.

Ireland

Ireland established a Constitutional Convention in 2012 and it is currently in session. It has similarities to the Icelandic model. The Convention is comprised of 66 randomly selected citizens intended to be representative of Irish society, 33 parliamentarians nominated by their parties (and including members of the Northern Ireland Assembly), and an independent chairman. The Irish parliament has posed the primary questions that the Convention must seek to answer, although the Convention is not limited to the consideration of these issues only. The Convention has a strict 12-month timetable in which to complete its work. The Convention's proposals will be put to a referendum.

Australia

A ten-day Convention was convened in Canberra in 1998 to determine whether Australia should become a republic. Of the 152 delegates, half were appointed by the government and half were directly elected. The Convention was highly fractious but supported a republican constitution. However the proposed model was soundly defeated when put to the electorate in a referendum. In the end, the people of Australia seemed to want a republic but could not agree on how to appoint a president.

While the Convention itself was of a very short duration, the process leading up to its establishment was protracted. In 1993 the Prime Minister, Paul Keating, established the Republic Advisory Committee which reported that "A republic is achievable without threatening Australia's cherished democratic traditions". Keating's government declared in 1995 that Australia should become a republic by 2001. Australia is still a monarchy.

Scotland

The Scottish Constitutional Convention was established in 1989 by two opposition parties (Labour and the Lib Dems) and a wide range of civic groups. From the beginning the Convention fractured public opinion because neither the Conservative Party nor the SNP took part. After publishing a set of proposals in favour of political devolution in 1990 the Convention ran out of steam. The 1992 general election also checked the process for reform somewhat as John Major led the Scottish Conservatives to a modest revival on a traditional unionist ticket. In 1993 the Convention established a ten-person Scottish Constitutional Commission to inject a sense of momentum into the process. The final proposals for reform - a case for the principle of devolution rather than a detailed practical

plan – were published in 1995.

Protracted, élite driven, and lacking a political consensus, the Convention left the constitutional heavy lifting to the Labour Party which won an overwhelming mandate for reform in the 1997 general election. While it would be wrong to describe the Convention's influence as peripheral, especially in its early stages, it was only one of several factors that hurried Scotland along the road to major constitutional reform.

The European Union

The Convention on the Future of Europe was established in 2001 by the European Council. Chaired by the former French president, Valéry Giscard d'Estaing, it clearly drew deep inspiration from Philadelphia. Unapologetically élitist, the Convention was made up of members drawn from national parliaments, the European Parliament, the EU Commission and representatives of member states' governments. The Convention met once or twice a month in plenary in the European Parliament, Brussels between early 2002 and July 2003.

*With vast aspirations but little consensus, the **European Convention** descended to the comic on occasions.*

With vast aspirations but little consensus, the Convention descended to the comic on occasions. Vituperative arguments about the absence of God from the proposed constitution to the failure to agree a name for the deeper union weakened the whole process. After the rejection of the Convention's proposals in referendums held in France and the Netherlands, everything was put on pause for a period of reflection to allow wider consultation with the citizens of Europe. Some of the failed Convention's proposals were taken up in the Lisbon Treaty in 2007.

APPROACHES TO CONSTITUTIONAL CONVENTIONS

As we can see, several approaches have been used to regulate the conduct of constitutional conventions or similar processes since the late 18th Century. Let us now attempt a rough categorisation and draw some lessons for those seeking to establish a robust convention process.

Élite Driven or Oligarchic

The classic example of this form of convention is also the most famous: the US Constitutional Convention which met in Philadelphia between May-September 1787. The Convention produced proposals for a federal constitution which were submitted to the 13 states for ratification. In March 1789 the US constitution took effect with the meeting of the first Congress. The process was highly contested and the eventual adoption of the constitution required also a Bill of Rights to placate those who feared that too much power would pass to the central government. It is often now overlooked, but there was a widespread fear in the 1780s that a federal constitution would create a government so powerful that both the rights of states and citizens might be threatened. The federal constitution was championed by those who wanted strong, if limited, central government. The campaign conducted by Alexander Hamilton, James Madison and John Jay – and encapsulated in *The Federalist Papers* – is perhaps the most successful conducted in defence of a new constitution.

The 1787 Convention has often been seen as the paradigm of wise statecraft. However, graceful and effortless it most certainly was not. Without the campaigning skills of Hamilton, Madison, Jay and others it would not have survived the ratification process where the nascent but significant forces of public opinion took their forensic affect.

While elite driven processes can produce decisive outcomes, they can be brittle because the electorate may feel alienated..

Today the classic US model is still in regular use where political élites (usually governments; sometimes parliaments) submit a constitutional deal for ratification by a referendum or other democratic process. Canada and the EU have broadly followed this model when seeking to secure constitutional change. While elite driven processes can produce decisive outcomes, they can be brittle because the electorate may feel alienated and reluctant to endorse ‘take it or leave it’ deals in a referendum when, for the first time, they have a meaningful say in the process. Political élites eager to secure constitutional change should never forget that without the magical campaign encapsulated by the *Federalist Papers*, the deal struck in Philadelphia probably would not have stuck.

Participative

Here the political élites respond to an open or ‘crowd-sourced’ process. Iceland is a good example of this model and its use seems suited to circumstances of national crisis when

the former constitutional structures are thought to have failed and a radically different constitutional settlement is required. Although a very high level of public participation is encouraged, mechanisms are used to focus discussion on key points and principles. A random but demographically representative ballot may be held to convene a constitutional convention. The convention may draw on elite and technical expertise. Use of IT enables wide public participation and discussion.

At some point the political élites examine the proposals that emerge from this participative process. This might extend to a full legislative process in parliament or the government responding to a convention's proposals with amended ones of its own. The final proposals are usually submitted to a referendum.

It is possible that this model will be seen as the most viable one for negotiating constitutional change in the Internet age. The Web is to the 21st Century what the coffee house was to the Eighteenth. However, it requires a high level of engagement that is perhaps only likely in circumstances of national crisis, or when a fundamental renewal of the existing political association is thought necessary.

Standard

The function, if not the form, of a convention may exist in the standard political process. Political parties develop policies for constitutional reform and consult on them with a wide range of organisations and individuals. Mechanisms varying from face-to-face discussions to focus groups and opinion polls are frequently used. A political party, especially one either in government or with a strong prospect of taking office, may conduct inter-party discussions to develop a broader demand for constitutional change. Proposals may be widely consulted on by a government seeking to start a 'national conversation'. The legislative process may also be used to fine tune proposals for reform (something that James Callaghan's government did on its devolution proposals in the late 1970s; but totally avoided by Tony Blair's government in 1997) before final endorsement in a referendum. The UK's adoption of devolution to Scotland and Wales followed this standard approach.

*The Web is to the 21st Century what the coffee house
was to the Eighteenth.*

A standard process to secure constitutional change is best used for adaptive or second order reforms. The Labour Party's devolution proposals in the 1990s were presented

as such. Parliamentary sovereignty was reasserted throughout the campaign and the devolution proposals themselves were not comprehensive as England was left out of the scheme entirely. There are dangers in this approach, especially when the reforms in practice carry far greater weight in constitutional conduct than anticipated. Rather than constituting a new settlement, a process is instead initiated that may quickly necessitate further reform. The history of devolution in the UK seems to demonstrate this phenomenon.

Hybrid

Constitutional change can be secured by a process that is élite led but with a high level of consultation. This enables wider participation by civic society and the electorate. Typically the government will submit options (perhaps a draft constitutional bill) for extensive consultation. At the conclusion of the consultation stage, the government might amend its proposals and submit them to either general scrutiny (such as a constitutional convention) or a parliamentary process. Finally, ratification may require the electorate's endorsement in a referendum.

In the UK the device of a Royal Commission is occasionally used to address seemingly intractable challenges. Such was the case with devolution in the early 1970s. The Kilbrandon Commission sat for four years and issued a report of bewildering complexity in 1973. Another, more parliamentary, device is the Speaker's Conference. One was convened in 1919 to find a solution to the Irish crisis. While it produced two coherent options for reform it was a generation too late to save the United Kingdom of Great Britain and Ireland. It is conceivable that a suitably modernised Speaker's Conference might serve as a more flexible model to discuss constitutional questions than the cumbersome device of a Royal Commission. In fact it could be a Speakers' Conference, convened by the Speaker and Presiding Officers of the devolved institutions.

THE PATH TO A SUCCESSFUL CONVENTION

Let us now examine the key components required to make a constitutional convention successful. Not all of the following components will be present with full force in any particular convention, but the absence of more than one of them is likely to compromise the process.

Urgency

The electorate must believe that a constitutional issue of the highest order is at stake

and, without its resolution, the very existence of the state might be threatened. A constitutional convention – just like a referendum on secession – is not part of the ordinary political process.

A constitutional convention – just like a referendum on secession – is not part of the ordinary political process.

The US Constitutional Convention met this criterion because the founding fathers recognised the vulnerability of the republic to external attack. Only a strong, if limited, central government could hope to defend the 13 states from European interference. Iceland's economic crisis created the existential anxiety needed to question basic constitutional principles. Australia's Constitutional Convention saw its proposals for a republic rejected because the matter was just not thought to be of primary importance and the referendum debate degenerated to the level of petty politics and trivia. No one thought the outcome would affect the viability of Australia as a state.

Clarity

Unless they produce clear outcomes (such as a new constitution) conventions are not likely to command serious attention from élites or the wider electorate. They must aim to arrive at a decisive and readily understood settlement of important constitutional questions. Ambiguity and obfuscation are the enemies of coherent constitutional debate (unless they are used simply to avoid the catastrophe of outright conflict). There is more than a hint of this failure in the EU's attempts to secure reform. The Kilbrandon Commission's failure to produce a clear report compromised the attempts of the Labour Government (1974-9) to introduce devolution to Scotland and Wales.

Focus

Successful conventions need to be limited in duration and work to a strict timetable. An open-ended process undercuts any sense of urgency and is unlikely to produce clear outcomes. Successful conventions are of course part of a process leading to constitutional change. Usually some form of consultation or national 'conversation' precedes conventions and legislative scrutiny and/or a referendum follows.

Successful conventions need to be limited in duration and work to a strict timetable.

However, the convention is a key event that must produce decisive proposals to enable fundamental constitutional decision making. The Scottish Convention (1989-95) simply lasted too long and at times drifted into the realms of a supporters club for devolution rather than a catalyst for decisive change. Some mitigation may be sought on the grounds that the Scottish Convention was not a state commissioned process, but its ambitions were such to warrant a harsher judgement.

Participation

Élite domination is much less acceptable in the Internet age. Furthermore, if elites drive the process for constitutional change it is difficult to distinguish this from the ordinary political process. To be seen as extraordinary political events, constitutional conventions must engage wider society and the electorate. This does not remove the need to shape a national conversation and set parameters (without which decision making is very difficult). But a high level of interaction is required if the electorate and civil society are not to be alienated from the process (as happened to a considerable extent in Canada in the 1980s and 1990s). The constitutional convention held in Iceland sought to maximise public participation, and it is interesting to note that the convention underway in Ireland is seeking to emulate this pattern.

The biggest danger caused by élite driven processes is that they tend to produce 'take it or leave it' outcomes even when the electorate favours a via media. We have seen an element of this proclivity in Scotland where elites have often portrayed the constitutional choice as a simple one between independence or the status quo, whereas the electorate appears to favour something along the lines of 'devo-plus'.

Deal-making

Without an underlying desire among élites to compromise and 'make-a-deal' any outcome from a constitutional convention is likely to be tarnished. Political actors must be induced to move away from established and polar extremes and onto the middle ground favoured by the electorate. Just as a disengaged electorate might reject an apparently coherent deal made by political élites (Canada again) so can political actors frustrate the popular demand for compromise and deal making. The Northern Ireland peace process faced many points of crisis when political leaders seemed on the edge of returning to entrenched and sectarian positions. The Good Friday breakthrough came when political leaders made their historic and courageous decision to make a deal and justify it to their respective communities. South Africa escaped from the grip of apartheid when a deal was struck by the ANC to afford the functionaries of apartheid

the most magnanimous treatment in a democratic South Africa. Politicians who in bad faith agree to a convention process in an attempt to smother a constitutional issue fail the most basic test of statecraft.

Sovereignty of the People

The Canadian writer Peter H. Russell has said that ‘mega-constitutional’ politics only works when the electorate wants to act as a ‘sovereign people’. Not only must they view the state as being under a real threat, but they must also want to assert themselves as the ‘sovereign people’ and either renew or dissolve the state. The difficulty in Canada was two-fold. Many did not feel that the state was threatened enough to justify the explicit recognition of Québec’s national rights. Better to call the bluff of Québec’s separatists than compromise on a Canadian citizen’s universal rights. Secondly, what became known as ‘the rest of Canada’ started to see itself as the essence of civic Canada against the forces of separatism which commanded considerable support in Québec. No syntheses emerged from this standoff to forge a new sense of Canadians as a sovereign people.

Will the English electorate... accept the need for parliamentary federalism to retain Scotland in the Union?

There is some danger that the UK will experience similar difficulties on this question to those experienced in Canada in the 1980s and 1990s. Will the English electorate respond to the call to act as part of the sovereign people of the UK and accept the need for parliamentary federalism to retain Scotland in the Union? Or might the English view the UK as greater England with Celtic ornaments that could ultimately be discarded? Unionists cannot hope to succeed by merely cajoling the English into acquiescence. Only the confident vision of a New Union is likely to inspire. A vision that does not traduce Britain’s parliamentary tradition, but gives it additional space in which to flourish.

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18 September 2014 – Afterword

We live in an age that is diffident about affirmative moments whether in the political or private sphere. There is a crisis of belief; existential uncertainty about basic identities abounds. However, the referendum on Scottish independence will inevitably be such an affirmative moment and while its ramifications will spread most extensively through the generations in Scotland, they will be far reaching also in England, Wales and Northern Ireland. But as or even more important, in opening up again the question of secession in liberal multi-national states, the referendum's ramifications will spread worldwide. This is why the referendum must be considered in its fullest dimension and recognised in its conduct as a fiduciary duty on the Scottish people in particular but also on the British people in general. Let us now briefly consider the alternative outcomes and their likely consequences.

A YES Vote

It would be incumbent on the Scottish and UK governments to conduct the necessary negotiations to secure separation with the maximum of goodwill and co-operation. Matters relating to defence and the sharing of the National Debt are likely to be the most difficult to resolve. However, the most productive development would be an agreement to form a confederation of sorts. A confederal Britain may share a common currency, a head of state, and a defence agreement. It could conceivably even extend to a transfer union. Alex Salmond has already advocated a social union which seems confederal in its essentials, and unionists should take care not to dismiss this concept in an attempt to up the anti or play a constitutional double or quits with the Scottish electorate. Here the fiduciary duty incumbent on nationalists and unionists seems clear. Nationalists should temper independence with confederal arrangements so that the risks involved in secession are minimised. This would surely reassure much of the international community (although by no means all of it). Unionists must acknowledge that a sense of Britishness would continue in a Confederation.

*Alex Salmond has already advocated a social union
which seems confederal in its essentials...*

A premium should be placed on reasonable compromise and measures to move away from polar extremes. Any YES vote is likely to be narrowly won, again increasing the need to preserve many of the attributes of the former Union only on a confederal basis. While a confederation would be very much a second best outcome for unionists, its value should not be dismissed in the heat of the referendum battle. It is even possible to conceive of hitherto impossible developments such as the Republic of Ireland joining a suitably constructed confederation.

Northern Ireland and Wales would face immediate existential challenges if the Scottish people vote to secede. The whole peace process in Northern Ireland would need reappraisal in the light of Scotland's secession from the Union. Constitutional options would range from a new union between England, Wales and Northern Ireland (presumably on some federal basis) to preserve the nearest thing to a status quo; patently awkward options like a Northern Ireland state or condominium (with some form of involvement from the EU, Britain and the Republic of Ireland?) to perhaps an Irish union (presumably on some federal basis). Sketching out these options is itself an unsettling experience – but some response would be necessary to Scottish secession and need to be robust and expeditious.

Again one must conclude when considering the impact of a YES vote on Northern Ireland in particular, but also on Wales, that a heavy fiduciary duty falls on the Scottish and British people. A confederation may be the best option in such circumstances.

A NO vote has to be decisive if the question of Scottish secession is to be resolved for a generation or more.

A NO Vote

While it is probably the case that any YES majority, however small, would be seen as irreversible, a NO vote has to be decisive if the question of Scottish secession is to be resolved for a generation or more. To maximise the NO vote unionists need to tap the middle ground of Scottish opinion which seems to prefer more devolution to independence. The path to a new Union with enhanced Scottish autonomy on domestic affairs needs to be clearly marked out before the referendum campaign, and then advocated sincerely throughout the campaign itself. This approach would also have the advantage of being more positive in tone than simply urging outright rejection of independence. It is more important to promote a new Union rather than obdurately defend the old. Such a settlement, developing rather than simply

preserving the UK and its devolved institutions, would also send an optimistic signal to other multi-national states facing demands for greater national autonomy within their borders. In my view, any coherent settlement to develop the UK post 2014 needs to use more explicit federal mechanisms.

There is a danger that those with long memories will recollect what happened in Scotland after the 1979 referendum. The Conservative Party – on the cusp of government – had stressed that a NO vote would not close the devolution question. In fact it did, for the Thatcher and Major administrations. Any hint of similar equivocation now is only likely to increase the YES vote in Scotland as voters in the middle ground who favour more autonomy but not independence send the unionist parties a ‘signal’ in the referendum. One way to resolve this and offer an adequate assurance of a new settlement would be, of course, to announce the establishment of a Constitutional Convention if the Scottish people vote ‘NO’. Whatever is done, the Scottish people must be reassured that the parties of the Union are sincere in wanting further development and reform. Otherwise, in sending the unionists a ‘signal’, the Scots may inadvertently vote for secession! This would surely be the worst of all outcomes.

Another factor needs to be considered here. It is unlikely that a decisive NO vote could be achieved without such an assurance. A narrow NO vote would hardly be worth the gamble as some significant concessions would have to follow (the alternative would be on going constitutional turmoil). Furthermore, a tight result without any new settlement to follow would likely as not increase the SNPs chances of victory in the Scottish general election in 2016. And so the question of secession would rumble on.

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