

# *Unity and Diversity in the United Kingdom's Territorial Constitution*

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## I. INTRODUCTION

In 2006, I co-edited a book of essays considering aspects of public law in Scotland, both institutional and doctrinal, which diverged from those elsewhere in the United Kingdom (UK).<sup>1</sup> Such differences had persisted throughout the entire period since the Union of 1707, but had been extended and amplified by the asymmetric devolution arrangements introduced in 1999. In the introductory essay to that volume,<sup>2</sup> I sought *inter alia* to classify and evaluate the nature and significance of the differences under discussion. I concluded that, although there were plenty of points of *difference*, it was harder to identify *unequivocal* examples of genuine *distinctiveness*—ie, fundamentally different answers to the basic questions of public law concerning the constitution, distribution, and regulation of governmental power, and the relationship between citizen and state.

Had I cast my eye more widely, particularly to encompass Northern Ireland, with its long history of constitutional exceptionalism<sup>3</sup> and a contemporary model of consociational governance underpinned by international agreement, I might have found more significant territorial diversity in the UK's constitutional arrangements. Moreover, territorial diversity has increased since 2006, and particularly since the 2014 Scottish independence referendum. Further devolution has taken place in Scotland,<sup>4</sup> Wales,<sup>5</sup> and Northern Ireland,<sup>6</sup> each following its own pattern and independent timetable.<sup>7</sup> The changes in Scotland ushered in by the Scotland Act 2016, and to some extent replicated for Wales by the Wales Act 2017, are particularly significant, offering both guarantees of the constitutional status of the devolved institutions and giving them a new constitutional competence over their own composition and structure, as well as extending their policy-making and fiscal autonomy. Indeed, once the 2016 Act is fully implemented, Scotland will be amongst the most autonomous sub-state regions in the world.<sup>8</sup> In England, the introduction of English Votes for English Laws in October 2015 was symbolically important in marking the constitutional recognition of England as a distinct territorial entity, while the 'city devolution' programme authorised by the Cities and Local Government Devolution Act 2016 introduces greater internal diversity to the governance of England.

Further territorial divergence is also possible in the wake of the 2016 referendum on membership of the European Union (EU). Withdrawal from the EU (subject to whatever new arrangements may replace it) will remove an important centripetal force from the UK's current constitutional architecture, which has constrained both devolved and UK institutions. It has

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<sup>1</sup> A McHarg and T Mullen (eds), *Public Law in Scotland* (Edinburgh, Avizandum Publishing Ltd, 2006).

<sup>2</sup> A McHarg, 'Public Law in Scotland: Difference and Distinction' in McHarg and Mullen (eds), *ibid.*, 3.

<sup>3</sup> See, eg, H Calvert, *Constitutional Law in Northern Ireland: A Study in Regional Government* (London and Belfast, Stevens & Sons, 1968); B Hadfield, *The Constitution of Northern Ireland* (Belfast, SLS Legal Publications, 1989).

<sup>4</sup> Scotland Act 2012; Scotland Act 2016.

<sup>5</sup> Government of Wales Act 2006; Wales Act 2014; Wales Act 2017.

<sup>6</sup> Corporation Tax (Northern Ireland) Act 2015; Northern Ireland (Stormont Agreement and Implementation Plan) Act 2016.

<sup>7</sup> On the divergent histories and trajectories of devolution in the UK, see in particular J Mitchell, *Devolution in the UK* (Manchester, Manchester University Press, 2011).

<sup>8</sup> See N McEwen, 'A Constitution in Flux: The Dynamics of Constitutional Change after the Referendum' in A McHarg et al (eds), *The Scottish Independence Referendum: Constitutional and Political Implications* (Oxford, Oxford University Press, 2016) 225, 236–37.

also created demand for further devolution, not only through the ‘repatriation’ of powers currently exercised at EU level, but which would otherwise fall within devolved competence, but also for substantial additional powers to enable the devolved governments to mitigate the effects of Brexit.<sup>9</sup> Moreover, the differing territorial results in that referendum are themselves indicative of important territorial cleavages on fundamental constitutional questions, and have served to reopen debates in Scotland and Northern Ireland (which both produced majorities to remain in the EU) about the constitutional future of these territories. This may yet produce some kind of ‘differential Brexit’ for Scotland and Northern Ireland,<sup>10</sup> although there are severe practical and political obstacles to such proposals. Similar territorial divergence can be found in attitudes to fundamental rights protection. Accordingly, if plans to reform the Human Rights Act ever come to fruition, it seems likely that this will also result in greater diversity of provision in different parts of the UK.

In short, the recent history of the UK’s territorial constitution is one of increasing divergence, and one which, given the failure of the 2014 referendum to settle the question of Scottish independence,<sup>11</sup> and the revival of the border question in Northern Ireland since the EU referendum,<sup>12</sup> appears to be following a disintegrative logic. Accordingly, as territorial diversity has increased, so too has concern about territorial unity. In other words, there is increasing interest in the question of what mechanisms exist to bind the UK state together in the face of territorial divergence.

Early signs of such concerns can be detected in the initial debate over the adoption of a British Bill of Rights—an idea originally promoted by Gordon Brown as a positive means of reinforcing British identity by articulating a common set of ‘British values’ as a counterweight to devolution,<sup>13</sup> though it has subsequently acquired a more negative, anti-European character. Similar considerations can be found in the debate over the role of the Supreme Court as the guarantor of UK-wide constitutional standards,<sup>14</sup> and in the attempt by the Calman Commission—the progenitor of the Scotland Act 2012—to identify ‘principles of Union’ which would provide a rational basis upon which to divide powers between the UK and devolved levels.<sup>15</sup>

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<sup>9</sup> See Scottish Government, *Scotland’s Place in Europe* (2016) ch 4; Welsh Government, *Securing Wales’ Future: Transition from the European Union to a New Relationship with Europe* (2017) ch 7.

<sup>10</sup> See B O’Leary, ‘The Dalriada Document: Towards a Multi-National Compromise that Respects Diversity in the United Kingdom’ (2016), available at

[www.centreonconstitutionalchange.ac.uk/publications/reports/dalriada-document](http://www.centreonconstitutionalchange.ac.uk/publications/reports/dalriada-document); N Skoutaris, ‘From Britain and Ireland to Cyprus: Accommodating “Divided Islands” in the EU Political and Legal Order’ (2016), available at [www.skoutaris.eu/working-papers](http://www.skoutaris.eu/working-papers); Scottish Government (n 9) ch 3; B Doherty et al, ‘Northern Ireland and “Brexit”: The European Economic Area Option’ (2017), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2933715](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2933715).

<sup>11</sup> Support for independence has remained high since the referendum: the 2016 Scottish Social Attitudes Survey recorded its highest ever level of support for independence (at 46%) and for the first time found that support for independence as the preferred constitutional solution was higher than for devolution – J Curtice, *Scottish Social Attitudes: From Indyref 1 to Indyref 2? The State of Nationalism in Scotland* (Edinburgh, ScotCen Social Research, 2017). The success of the Scottish National Party in the 2015 Westminster and 2016 Holyrood elections, coupled with the differential EU referendum outcome in Scotland, have ensured that the constitutional question remains high on the Scottish political agenda.

<sup>12</sup> See C Gormley-Heenan and A Aughey, ‘Getting Our Country Back or Waking Up in a Different Country: Brexit and Northern Ireland’, *British Journal of Politics and International Relations*, forthcoming. Sinn Féin significantly increased its vote share at the March 2017 Northern Ireland Assembly elections, and has revived its campaign for a border poll on reunification with the Republic of Ireland.

<sup>13</sup> Ministry of Justice, *The Governance of Britain* (Cm 7170, 2007) ch 4.

<sup>14</sup> See A McHarg, ‘Final Appeals in Scots Criminal Cases’, *UK Constitutional Law Association Blog*, 4 October 2011.

<sup>15</sup> Commission on Scottish Devolution, *The Future of Scottish Devolution Within the Union: A First Report* (2008).

Again, though, the constitutional shock provided by the relatively narrow ‘No’ vote in the 2014 independence referendum has served to intensify such concerns, and the EU referendum result has given them additional impetus. A number of organisations and commentators have called for more or less comprehensive constitutional reform to move the UK’s territorial constitution in a more explicitly federal direction;<sup>16</sup> that is, one which pays greater attention to the question of ‘shared rule’, alongside ‘self-rule’ for the UK’s territorial units,<sup>17</sup> a measure by which the UK currently performs poorly compared with other federal or devolved systems.<sup>18</sup> Proposed reforms variously include institutional mechanisms to improve inter-governmental relations, enhance territorial representation in UK-wide decision-making, and reduce territorial asymmetry; the articulation of common values and purposes to guide the allocation and exercise of decision-making functions; and/or the establishment of a shared constitutional framework to empower and constrain both UK and devolved governance. To date, however, such proposals have had little or no practical impact.

The aim of this chapter is to assess the need for greater unity in the territorial constitution. However, rather than examining particular reform proposals in detail, its focus is primarily methodological. In other words, how do we decide what degree of territorial divergence is constitutionally acceptable? The chapter explores this question from four different perspectives—empirical, conceptual, normative, and political. Ultimately, I argue that the problem to be addressed—and hence the case for reform—is an essentially political one: a question of discovering how much diversity the state can bear without undermining the conditions necessary for the maintenance of sufficient political solidarity to sustain its common functions. It follows that the solutions are to be found primarily in mechanisms for political accommodation, which may go beyond the strictly constitutional, rather than in the articulation of legal values or the proliferation of legal constraints. Nevertheless, I also argue that there are formidable political barriers to the achievement of a successful balance between unity and diversity in the UK’s territorial constitution. The chapter concludes by using Brexit as an illustration both of the failure of political accommodation of territorial difference, and of the severe challenges which this presents.

## II. THE EMPIRICAL PERSPECTIVE

Any assessment of the need for greater territorial unity in the UK constitution has to start from a clear understanding of its current diversity. Patently, an empirical approach cannot tell us how much diversity *ought* to be permitted. Nevertheless, since the UK has a long tradition of diverse and asymmetric governance, it can tell us something useful about the nature and degree of diversity that has historically been tolerated, and what has changed—or is perceived to have changed—more recently such as to threaten the integrity of the state. Classifying difference

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<sup>16</sup> See, eg, House of Commons Political and Constitutional Reform Committee, *Do We Need a Constitutional Convention for the United Kingdom?* (4th Report 2012–13, HC 371); G Brown, *My Scotland, Our Britain: A Future Worth Sharing* (London, Simon & Schuster, 2014) ch 7; J Gallagher, *The Day After Judgement: Scotland and the UK after the Referendum* (Glasgow, Policy Scotland, 2014); House of Lords Constitution Committee, *Proposals for the Devolution of Further Powers to Scotland* (10th Report 2014–15, HL 145); House of Lords Constitution Committee, *Inter-governmental Relations in the United Kingdom* (11th Report 2014–15, HL 146); Wales Governance Centre, *The UK’s Changing Union: Towards a New Union* (Cardiff, 2015); Bingham Centre for the Rule of Law, *A Constitutional Crossroads: Ways Forward for the United Kingdom* (London, British Institute of International and Comparative Law, 2015); R Hazell (ed), *Devolution and the Future of the Union* (London, Constitution Unit, 2015); Constitution Reform Group, *Towards a New Act of Union: A Discussion Paper* (2015); Constitution Reform Group, *Act of Union Bill* (2016); J Gallagher, *Britain After Brexit: Toxic Referendums and Territorial Constitutions*, (Glasgow, Policy Scotland, 2016).

<sup>17</sup> See McEwen (n 8) 227–33.

<sup>18</sup> *ibid* 237–40.

can also help us to understand the various ways in which constitutional diversity might be problematic, and might therefore require different countervailing strategies. However, an empirical perspective is also important in reminding us of the limits of territorial unity. To the extent that differences in territorial governance are the product of differing needs and demands in different parts of the state rather than mere accidents<sup>19</sup>—and perhaps even if they are—they carry their own historical legitimacy which is likely to limit the nature and degree of unity that can be achieved. For instance, an approach which advocated the abolition of the devolved legislatures, or even significant curtailment of their current powers, in the name of constitutional unity is likely to be a non-starter.<sup>20</sup>

The territorial differences that are to be found within the UK could potentially be classified in a number of different ways.<sup>21</sup> For present purposes, however, it is useful to distinguish between institutional diversity; diversity in constitutional values; and differences in how the state itself is understood. In each of these areas, although the existence of difference is by no means new, there have been important recent changes either in the nature and extent of territorial difference, or in the perception of its significance.

### **A. Institutional Diversity**

The most obvious form of territorial diversity is institutional. Institutional variations in the governance of different parts of the UK are longstanding, and encompass both the extent to which different territories are able to govern themselves, and the models through which they do so.

In the case of Scotland, institutional differences have existed since (and indeed were guaranteed by) the Union of 1707, and have been present to varying degrees in all three branches of state—legislative, executive and judicial—ever since.<sup>22</sup> Whilst the creation of the Scottish Parliament and Scottish Government in 1999<sup>23</sup> involved a significant extension of distinctively Scottish governmental arrangements, legislative devolution clearly built upon—and drew some of its justification from—the high degree of institutional distinctiveness which already existed.

Like Scotland, Northern Ireland also has its own legal system (albeit less distinct from that of England and Wales) and the longest history of legislative devolution. A Northern Ireland Parliament was established in 1921<sup>24</sup> following the partition of Ireland and the secession of the south, which exercised extensive powers over the province until the resumption of direct rule in 1972.<sup>25</sup> When devolution was re-established in Northern Ireland in 1999,<sup>26</sup> this involved further institutional divergence. Not only were the competences of the Northern Ireland Assembly different to those of the Scottish Parliament, but its structure was also materially different—based upon a principle of cross-community consent unique amongst UK representative bodies.

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<sup>19</sup> See Mitchell (n 7).

<sup>20</sup> Devolution is very popular in both Scotland and Wales: see eg A Henderson et al, 'National Identity or National Interest? Scottish, English and Welsh Attitudes to the Constitutional Debate' (2015) 86 *Political Quarterly* 265, Table 2. The situation in Northern Ireland is more complicated, but it is clear that the resumption of direct rule would be unacceptable to a significant proportion of Northern Irish opinion: see eg A Cowburn, 'British Direct Rule would Place Northern Ireland at "Mercy of Hard Brexit Government"', says SDLP', *The Independent*, 11 January 2017.

<sup>21</sup> For a different approach to classification, see McHarg (n 2) 9–15.

<sup>22</sup> See McHarg, *ibid* 3–4; AC Page, *Constitutional Law of Scotland* (Edinburgh, W Green, 2015) ch 1.

<sup>23</sup> Scotland Act 1998.

<sup>24</sup> Government of Ireland Act 1920.

<sup>25</sup> See references in n 3.

<sup>26</sup> Northern Ireland Act 1998.

Wales historically enjoyed less institutional recognition, although a Secretary of State for Wales was established in 1964, and there were a number of Wales-specific public bodies.<sup>27</sup> The initial model of devolution established in 1999<sup>28</sup> was much weaker than its Scottish and Northern Irish counterparts, with no legislative or taxation powers, and until 2006 no formal distinction between the Welsh Government and Welsh Assembly.<sup>29</sup> In 2011, however, the Welsh Assembly gained primary legislative powers,<sup>30</sup> and the Wales Act 2014 gave it limited tax-raising powers. Both have been further enhanced by the Wales Act 2017, although some important differences between Scots, Welsh and Northern Irish devolution still remain, regarding not only the scope but also the form of devolved competences.

The governance of England is distinct in having no separate representative structures; the UK Parliament and UK Government departments are by default also English institutions in areas devolved to Scotland, Wales and Northern Ireland—something given a degree of formal recognition by the introduction of English Votes for English Laws.<sup>31</sup> There is limited regional devolution within England. A Greater London Assembly with executive powers was established in 1999,<sup>32</sup> but a planned programme of progressive devolution to other English regions<sup>33</sup> was aborted following an unsuccessful referendum in the North East in 2004. Regional devolution has been revived in the form of the City Devolution programme,<sup>34</sup> again on a rolling basis, but this is more accurately regarded as a form of enhanced local government, which builds upon existing institutions rather than adding a new layer of territorial governance.

The devolution programme of the late 1990s was undoubtedly a constitutional development of major importance. While the earlier experience of devolution in Northern Ireland could be regarded as an exceptional response to the peculiar exigencies of that territory, the creation of new representative structures for Scotland, Wales and Northern Ireland—and the subsequent strengthening, deepening, and widening of the principle of devolution—represents a much clearer commitment to constitutional pluralism. This is apparent not merely from the fact that devolution creates new centres of political power, but also from the willingness to tailor the devolved institutions to the particular circumstances of each nation or region.

Both of these features are significant in understanding the impact of increased institutional diversity. New representative institutions (or in England, the lack of them) appear to have strengthened or at least consolidated sub-state political identities, as expressed in felt national identity, stated constitutional preferences, and electoral behaviour.<sup>35</sup> They have also provided a forum, through the exercise of devolved legislative and executive competences, and the process of electoral competition, for the accentuation and proliferation of political, institutional and policy differences. These effects were muted in the early years of devolution by political convergence at UK, Scottish and Welsh levels, and by the preoccupation in Northern Ireland with consolidating the peace process (with the consequent suspension of

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<sup>27</sup> See R Rawlings, *Delineating Wales: Constitutional, Legal and Administrative Aspects of National Devolution* (Cardiff, University of Wales Press, 2003) ch 1; Mitchell (n 7) ch 3.

<sup>28</sup> Government of Wales Act 1998.

<sup>29</sup> Government of Wales Act 2006.

<sup>30</sup> Following a referendum held under Government of Wales Act 2006, s 103.

<sup>31</sup> Introduced via a change to the House of Commons Standing Orders: see HC Deb, vol 600, col 1159, 22 October 2015.

<sup>32</sup> Greater London Authority Act 1999.

<sup>33</sup> Regional Assemblies (Preparations) Act 2003; Office of Deputy Prime Minister, *Draft Regional Assemblies Bill* (Cm 6285, 2004).

<sup>34</sup> Cities and Local Government Devolution Act 2016.

<sup>35</sup> See, eg, J Curtice et al, 'Devolution', in A Park et al (eds), *British Social Attitudes: The 30th Report* (London, NatCen Social Research, 2013) 139; Henderson et al (n 20).

devolution on several occasions),<sup>36</sup> but have become more pronounced as electoral outcomes have diverged.

As devolution has become better established and territorial divergence has increased, so too the territorial dimension of the UK state has become more pronounced. In particular, demands for territorial differences to be respected have spilled over the boundaries of devolved competencies to include formally reserved matters such as EU withdrawal<sup>37</sup> and human rights reform,<sup>38</sup> as well as more mundane policy issues.<sup>39</sup> In turn, this has made the anomalies arising from asymmetric devolution much more visible<sup>40</sup>—demanding a response which further institutionalises territorial difference and which has an inherent decentralising logic. We see this, for example, in the repeated revisions of the Welsh devolution arrangements, in order to ‘catch up’ with the stronger arrangements in Scotland and Northern Ireland. It was also made explicit by David Cameron following the Scottish independence referendum, when he insisted that stronger powers for Scotland had to be balanced by territorial recognition for England in the form of English Votes for English Laws.<sup>41</sup>

## B. Diversity of Values

In my 2006 essay, I concluded that institutional differences, and the detailed and contextual differences flowing from them, were the most significant marker of constitutional distinctiveness in Scotland.<sup>42</sup> There were some arguable differences in relation to constitutional values, such as the commitment accompanying devolution to a more participatory and consensual style of democracy compared with Westminster, and stronger protection for fundamental rights. However, it was questionable how much difference the former actually made in practice, while the latter seemed to be attributable more to the subordinate status of the Scottish Parliament than to a genuine difference in commitment to rights.

Since 2006, value differences between Scotland and the rest of the UK seem to have increased. The reduction in the voting age from 18 to 16, first for the 2014 independence referendum<sup>43</sup> and subsequently for Scottish Parliament and local government elections,<sup>44</sup> reinforces the commitment to a more inclusive democracy and creates an important difference in citizenship rights between Scotland and the rest of the UK. Greater differences have also opened up in relation to fundamental rights protection. The current Scottish Government is opposed to any weakening of current human rights protection, and indeed is committed to the extension of protections to include social and economic rights.<sup>45</sup> More generally, constitutional

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<sup>36</sup> In 2000, 2001 and between 2002 and 2007.

<sup>37</sup> See, eg, the interventions by the Scottish and Welsh Governments in *R (Miller) v Secretary of State for Exiting the European Union* [2017] 2 WLR 583, arguing that their consent to legislation authorising withdrawal from the EU was required under the Sewel Convention because of its impact on devolved competence, as well as their more general arguments for special treatment in the implementation of Brexit: see references in n 9.

<sup>38</sup> Again, the Scottish Government has asserted a right to veto human rights reform via the Sewel Convention: see I Jamieson, ‘The Repeal of the Human Rights Act and the Sewel Convention in Scotland’, *Scottish Constitutional Futures Forum Blog*, 12 June 2015; M Elliott, ‘The Scottish Parliament, the Sewel Convention, and the Repeal of the Human Rights Act: A Postscript’, *Scottish Constitutional Futures Forum Blog*, 28 September 2015.

<sup>39</sup> See, eg, T Mullen and S Craig, ‘The Immigration Bill, Reserved Matters and the Sewel Convention’, *Scottish Constitutional Futures Forum Blog*, 15 April 2016.

<sup>40</sup> See, eg, Henderson et al (n 20) 271.

<sup>41</sup> D Cameron, ‘In Full: Statement on the UK’s Future’, 19 September 2014, available at [www.bbc.co.uk/news/uk-politics-29271765](http://www.bbc.co.uk/news/uk-politics-29271765).

<sup>42</sup> McHarg (n 2) 9–15, 22.

<sup>43</sup> Scottish Independence Referendum (Franchise) Act 2013.

<sup>44</sup> Scottish Elections (Reduction of Voting Age) Act 2015.

<sup>45</sup> See, eg, Scottish Government, *A Plan for Scotland: The Government’s Programme for Scotland 2016–17* (Edinburgh, Scottish Government, 2016) 82.

debate in Scotland has not exhibited the same hostility to human rights protection or anti-Europeanism found elsewhere in the UK—something borne out by the clear majority (62 per cent) in Scotland in the EU referendum to remain in the EU.

In Northern Ireland, as already noted, value differences are even more readily apparent. Democratic practices have long been different. During the 27-year period of direct rule from Westminster, democracy in Northern Ireland was deeply impoverished; thanks to their numbers and Northern Ireland's separate party system, Northern Irish MPs had limited opportunity to influence UK level decision-making, while local government in Northern Ireland was (and still is) weak compared with other parts of the UK. Following the resumption of devolution in 1999, the adoption of a principle of power-sharing between political parties in the Northern Ireland Executive and Northern Ireland Assembly was a deliberate rejection of the majoritarian style of democracy which had in the past produced (or at least was perceived to have produced) systematic discrimination against the Catholic minority.<sup>46</sup> We also find significant historical and contemporary differences in human rights practice, both in terms of the nature of the rights which are recognised and the extent to which they are respected. Historically, both under devolution and direct rule, there have been extensive departures from human rights norms applied elsewhere in the UK.<sup>47</sup> Since the 1998 Good Friday Agreement,<sup>48</sup> by contrast, rights-consciousness has been much greater.<sup>49</sup> The Agreement includes strong guarantees of respect for the European Convention on Human Rights, along with a commitment to an indigenous human rights process,<sup>50</sup> although due to greater social conservatism in Northern Ireland, rights in areas such as abortion and homosexual equality still lag behind the UK norm.

However, the extent to which these constitutional differences have been recognised as such has been muted by two factors. One is—again—the perception of Northern Irish exceptionalism—ie, differences tend to be seen as temporary aberrations explained by the Province's troubled political history. The second is the weakly-constitutionalised nature of the UK in general, which means that value differences, for instance over matters such as abortion or equality rights, have tended to be regarded as political rather than constitutional. As in Scotland, though, the constitutional significance of value differences has become more difficult to ignore, with issues such as human rights reform and EU withdrawal again exposing important territorial differences between Northern Ireland and the rest of the UK. Both sets of reforms are difficult to reconcile with the terms and spirit of the Good Friday Agreement, and risk upsetting the fragile constitutional equilibrium that has been built since 1998.<sup>51</sup>

Significant value differences are harder to detect in Wales, perhaps reflecting its longer history of close integration with England, and weaker form of devolution, as well as less distinct electoral patterns. The EU referendum result in Wales was very similar to that in England,<sup>52</sup> although here it is English attitudes which are distinct in that Euroscepticism has a correlation with (English) nationalism in England that is not found in other parts of the UK.<sup>53</sup>

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<sup>46</sup> See eg Commission Appointed by the Governor of Northern Ireland, *Disturbances in Northern Ireland* (Cameron Report) (Cmd 532, Belfast, HMSO, 1969); Northern Ireland Office, *The Future of Northern Ireland: A Paper for Discussion* (London, HMSO, 1972).

<sup>47</sup> See, eg, B Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (Oxford, Oxford University Press, 2010).

<sup>48</sup> Northern Ireland Office, *The Belfast Agreement* (1998).

<sup>49</sup> On the significance of human rights to the achievement of peace in Northern Ireland, see C Bell, *Peace Agreements and Human Rights* (Oxford, Oxford University Press, 2000).

<sup>50</sup> See Northern Ireland Human Rights Commission, *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland* (Belfast, NIHRC, 2008).

<sup>51</sup> See House of Lords EU Select Committee, *Brexit: UK–Irish Relations* (6th Report 2016–17, HL 76) ch 4.

<sup>52</sup> Wales voted by 52.5% to leave the EU, and England by 53.4%.

<sup>53</sup> See R Wyn Jones et al, *England and its Two Unions: The Anatomy of a Nation and its Discontents* (London, IPPR, 2013).

However, the (Labour-controlled) Welsh Government is also opposed to reform of the Human Rights Act,<sup>54</sup> and the devolution of local government and Welsh Assembly elections by the Wales Act 2017 opens space for further divergence here too.

### C. Differing Theories of the State

The final area of territorial constitutional difference concerns how the UK state itself is understood. Formally, it is a unitary state, with a single source of sovereignty located in the UK Parliament. This unitary conception has come under pressure in recent years, particularly as a result of the UK's membership of the EU. EU membership both added another territorial layer of decision-making, and challenged the sovereignty of the UK Parliament. However, the recent vote in favour of Brexit in England and Wales, premised on the need to restore parliamentary sovereignty, along with broader hostility to other features of a more cosmopolitan constitutional order,<sup>55</sup> such as the role of the European Court of Human Rights as an external check on sovereignty, indicates the continued relevance and popular appeal of the unitary state account as a theory of the territorial constitution.<sup>56</sup>

Nevertheless, the unitary state account has long been internally contested. In Scotland, an alternative, 'union state' account, which regards the continued existence of the state as resting upon the consent of its constituent parts, and sovereignty as belonging to the plural peoples of the UK, rather than to the Westminster Parliament, has considerable contemporary resonance, even if its historical credentials as a distinctive Scottish constitutional tradition are a matter of dispute.<sup>57</sup> This account has received some symbolic<sup>58</sup> and practical recognition—most significantly in the willingness of the UK Government to facilitate the holding of a lawful referendum on independence in 2014.<sup>59</sup> Nevertheless, it cannot be seen unequivocally to have displaced the doctrine of parliamentary sovereignty as the fundamental rule of the constitution. For instance, the acknowledgment in the Scotland Act 2016 of the permanence of the Scottish Parliament and Scottish Government (subject to a referendum vote in Scotland) and the statutory confirmation of the Sewel Convention<sup>60</sup> were accompanied by continued assertions that parliamentary sovereignty was unaffected and ambiguous wording both of which undermine their status as legally-binding or justiciable guarantees. Indeed, the Supreme Court held in the recent *Miller* case<sup>61</sup> that the 2016 Act had made no difference to the legal status of the Sewel convention, and had not rendered it in any way justiciable.

The union state account of the territorial constitution also has resonance in Northern Ireland, where the principle that the Province's continued membership of the UK rests on the consent of its people has been recognised by statute since 1973.<sup>62</sup> In addition, the grounding of Northern Ireland's contemporary governance arrangements in the Good Friday Agreement—an international treaty between the UK and the Republic of Ireland—and the sharing of

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<sup>54</sup> See D Deans, 'Welsh Government will do "Everything it Can" to Block Repeal of the Human Rights Act', *Wales Online*, 18 May 2015.

<sup>55</sup> See A Somek, *The Cosmopolitan Constitution* (Oxford, Oxford University Press, 2014).

<sup>56</sup> cf M Loughlin, 'The End of Avoidance', *London Review of Books*, 28 July 2016.

<sup>57</sup> See C Kidd, 'Sovereignty and the Scottish Constitution Before 1707' (2004) *Juridical Review* 225; S Tierney, 'Scotland and the Union State', in McHarg and Mullen (n 1), 25; I McLean, *What's Wrong with the British Constitution* (Oxford, Oxford University Press, 2010) ch 3.

<sup>58</sup> See, eg, *MacCormick v Lord Advocate* 1953 SC 396; Claim of Right 1988; Scotland Act 2016, s 1.

<sup>59</sup> See HM Government/Scottish Government, *Agreement between the United Kingdom Government and the Scottish Government on a Referendum on Independence for Scotland* (the 'Edinburgh Agreement') (2012).

<sup>60</sup> ie, the rule that the UK Parliament will not normally legislate with respect to devolved matters except with the consent of the relevant devolved legislature.

<sup>61</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] 2 WLR 583.

<sup>62</sup> Northern Ireland Constitution Act 1973, s 1; see now Northern Ireland Act 1998, s 1.

sovereignty across the Irish border on a range of issues is difficult to reconcile with a unitary account of the UK state.<sup>63</sup> Again, though, parliamentary sovereignty has not formally been displaced. For instance, the Supreme Court in the Northern Irish proceedings heard in parallel with *Miller* firmly rejected the attempt to elevate the principle of consent into a general requirement to seek the consent of the people of Northern Ireland for any significant constitutional change.<sup>64</sup>

Even in Wales, where there is no historic legacy of independent statehood, and where devolution did not proceed upon an assertion of a right to national self-determination, the Welsh Government has recently asserted that '[w]hatever its historical origins, the United Kingdom is best seen now as a voluntary association of nations' and that '[t]he allocation of legislative and executive functions between central UK institutions and devolved institutions should be based on the concept of subsidiarity, acknowledging popular sovereignty in each part of the UK'.<sup>65</sup> Thus, the Wales Act 2017 has extended the same constitutional guarantees to Wales as are contained in sections 1 and 2 of the Scotland Act 2016, albeit subject to the same caveats.

As these various qualifications suggest, these alternative understandings of the nature of the territorial constitution have been essentially peripheral. This is true both in a geographic sense—the lived reality for the vast majority of the UK's population resident in England is that of a unitary system of government—and in the sense of being unofficial, 'political' readings of the constitution rather than ones given unambiguous legal expression.

Again, though, in recent years, territorial divergences in how the constitution is theorised have become harder to ignore. On the one hand, the 2014 independence referendum has transformed Scotland's claim to popular sovereignty from a theoretical assertion to a practical reality which threatens to destroy the UK state. Although the right of the Scottish Parliament to call a second independence referendum is not legally secure,<sup>66</sup> the 2014 referendum creates a political precedent which may be difficult to ignore.<sup>67</sup> On the other hand, EU withdrawal and the threat of human rights reform have exposed the fundamental incompatibility between Northern Ireland's transnational constitutional order and the traditional unitary constitution, and the obstacle—albeit again primarily a political one—that its constrained constitution poses to the free exercise of parliamentary sovereignty.

### III. THE CONCEPTUAL PERSPECTIVE

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<sup>63</sup> See C Campbell et al, 'The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland' (2003) 66 *MLR* 317.

<sup>64</sup> *Reference by the Attorney General for Northern Ireland—In the matter of an application by Agnew and others for Judicial Review; Reference by the Court of Appeal (Northern Ireland)—In the matter of an application by Raymond McCord for Judicial Review* [2017] 2 WLR 583, [134]–[135].

<sup>65</sup> Welsh Government, 'Written Evidence', House of Lords Select Committee on the Constitution, *The Union and Devolution—Evidence* (2016) para 6.

<sup>66</sup> For discussion, see G Anderson et al, 'The Independence Referendum, Legality and the Contested Constitution: Widening the Debate', *UK Constitutional Law Association Blog*, 31 January 2012.

<sup>67</sup> On 28 March 2017, the Scottish Parliament voted in support of a motion requesting the enactment of another Order under section 30 of the Scotland Act 1998 to facilitate the holding of a second independence referendum in Autumn 2019 (Motion S5M-04710 (Nicola Sturgeon) SPOR, 28 March 2017 (Session 5)). Although, at the time of writing, the Prime Minister has indicated that she will reject this request, on the basis that the timing is inappropriate, she has not ruled out the possibility of a second referendum altogether. It remains to be seen whether the Scottish Government will choose to proceed with a referendum Bill without the legal comfort of a section 30 Order, or whether some compromise will be reached over its timing. The degree of popular support for a second referendum is likely to be a determining factor in whether or not the Prime Minister is willing to accede to the Scottish Parliament's request.

Having established the nature and extent of territorial diversity within the UK, the question can now be addressed whether this position is sustainable. One way of approaching this issue is through a conceptual lens; that is, asking how much constitutional diversity can be accommodated within a single state order.

Constitutions have classically been associated with states,<sup>68</sup> and this would appear to place limits on the degree to which constitutional arrangements may diverge within a particular state. This ‘monist’<sup>69</sup> account of the relationship between state and constitution does not necessarily require a unitary constitution with a single sovereign; on the contrary, federal constitutional systems<sup>70</sup> are intended to accommodate (in varying degrees) a significant measure of internal pluralism. However, the parameters within which sub-state units may diverge in federal systems are typically set by and contained within a single, overarching constitutional framework, which provides mechanisms for resolving conflicts of authority. Federal constitutions, in other words, provide for the division and sharing of constitutional authority within the territory of a particular state, rather than the creation of distinct and parallel constitutional orders.

Monist accounts of the relationship between state and constitution are challenged by pluralist constitutional theories, which argue that constitutional orders can exist without being associated with states, and that multiple constitutional orders can co-exist within the same territorial space without any relationship of hierarchy between them.<sup>71</sup> Although developed to account for the competing supremacy claims of the EU and its member states, the decoupling of constitution from state also suggests that radical constitutional pluralism may exist *within* as well as beyond the state.<sup>72</sup>

Loughlin objects to pluralist constitutional theories on the basis that they fail adequately to account for the link between constitutions and the exercise of governmental *authority*.<sup>73</sup> In a situation of constitutional pluralism, he argues, there is no means of *authoritatively* resolving conflicts between constitutional orders. Interactions between them can be explained only as a matter of pure power politics, or else it is necessary to invoke some set of higher order principles which can be used to determine when one system ought to defer to another—ie, to revert to a form of constitutional monism. He further objects to the decoupling of constitution from state on the ground that this requires constitutional orders to demonstrate their own, independent authority. For a sub-state unit to assert that it forms a distinct constitutional order within the state would therefore constitute a challenge to the authority of the state itself. It follows that, within any system of territorial governance, there must be a degree of constitutional unity to authoritatively explain and regulate the relationship of the parts to the whole. In fact, sub-state national units do typically seek accommodation within or recognition by the host state constitution for their distinct constitutional aspirations, and the absence of such recognition does indeed pose a threat to the survival of the state.<sup>74</sup>

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<sup>68</sup> See CMG Himsworth, ‘In a State No Longer: The End of Constitutionalism?’ [1996] *PL* 639.

<sup>69</sup> N Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65 *MLR* 317, 337.

<sup>70</sup> These include federations proper, as well as confederations, federacies, models of associated statehood, constitutionally decentralized unions, condominiums, leagues, joint functional authorities and less formal asymmetrical federal arrangements: see, eg, DJ Elazar, *Exploring Federalism* (Tuscaloosa, Alabama, University of Alabama Press, 1987); RL Watts, *Comparing Federal Systems*, 3rd edn (Montreal, McGill-Queen’s Press, 2008).

<sup>71</sup> See, eg, N MacCormick, *Questioning Sovereignty* (Oxford, Oxford University Press, 1999); Walker (n 69); M Avbelj and J Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Oxford, Hart Publishing, 2012).

<sup>72</sup> See S Tierney, ‘Reframing Sovereignty? Sub-State National Societies and Contemporary Challenges to the Nation State’ (2005) 54 *ICLQ* 161; S Tierney, *Constitutional Law and National Pluralism* (Oxford, Oxford University Press, 2006).

<sup>73</sup> M Loughlin, ‘Constitutional Pluralism: An Oxymoron?’ (2014) 3 *Global Constitutionalism* 9.

<sup>74</sup> See Tierney, *Constitutional Law and National Pluralism* (n 72) 100–01; 125–26.

Nevertheless, the need, in the final analysis, to have some means of making sense of the internal diversity of a constitutional order patently does not take us very far in determining *how much* constitutional diversity may be tolerated. Real world constitutions exhibit widely varying degrees of internal pluralism, differing not only in terms of where the lines are drawn between central and sub-state level decision-making and in the amount of variation permitted to sub-state regions in their own constitutional arrangements, but also in the extent of asymmetry they permit.<sup>75</sup> On the face of it, institutional diversity might appear to be less threatening to constitutional unity than value pluralism, which in turn might seem less problematic than divergent theories of the state. But two further conceptual points can be made here. The first is that diversity is not the same as disunity.<sup>76</sup> In practice, it may be possible to maintain a significant diversity of constitutional values without threatening constitutional unity provided that upholding one set of values in one part of the state does not pose any risk, whether actual or symbolic, to the maintenance of a different set of values in another part. What matters, in other words, is not the achievement of homogeneity, but rather the avoidance of conflict. Secondly, it is possible for *interpretive* conflicts to exist, even on matters as fundamental as the theory of the state, without them necessarily having to be authoritatively resolved. All constitutional orders contain gaps and silences, which may have strategic value in the management of what might otherwise be damaging disagreements and tensions.<sup>77</sup> Key aspects of the constitution may thus constitute ‘incompletely theorised agreements’;<sup>78</sup> that is, they may attract mutual commitment from different groups without agreeing on exactly what it is to which they are committed.

Two conclusions may be drawn from this. One is that, irrespective of whether one adopts a monist or pluralist conception of the relationship between constitutions and states, further criteria are needed to determine the degree of divergence that will or should prevail in any particular context. The other is that institutional arrangements may be just as, if not more, important than constitutional values or theories of the state to the achievement of a successful balance between constitutional unity and diversity, as a key determinant of how effectively territorial conflicts can be avoided or managed.

#### IV. THE NORMATIVE PERSPECTIVE

A conceptual approach tells us that there needs to be some means of creating order out of diversity in any pluralistic constitutional system. However, a normative perspective may be more helpful in identifying the precise nature and degree of unity that is required. Normative arguments may be directed at identifying common minimum standards that must be respected throughout the state, and/or issues that must be decided in common, and/or common purposes to guide the allocation and regulation of decision-making competences. Such proposals are a prominent feature of the recent literature on reform of the UK’s territorial constitution.<sup>79</sup> The difficulty, however, is to identify appropriate normative standards.

One approach is to invoke abstract principles of constitutionalism, such as a shared commitment to democracy, the rule of law and protection of fundamental rights.<sup>80</sup> While the blandness of such values makes them relatively uncontroversial, their very abstraction and

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<sup>75</sup> See references in n 67; G Anderson and S Choudhry, *Constitutional Transitions and Territorial Cleavages* (Stockholm, International Institute for Democracy and Electoral Assistance, 2015).

<sup>76</sup> Elazar (n 70) 64.

<sup>77</sup> See M Foley, *The Silence of Constitutions: Gaps, ‘Abeyances’ and Political Temperament in the Maintenance of Government* (London and New York, Routledge, 1989).

<sup>78</sup> CR Sunstein, ‘Incompletely Theorized Agreements’ (1995) 108 *Harvard Law Review* 1733.

<sup>79</sup> See references in n 16.

<sup>80</sup> See eg, Bingham Centre (n 16) xiii; Brown (n 16) 195; Constitution Reform Group (2016) (n 16).

universality makes them unhelpful as a unifying force for the UK constitution. Broad statements of principle necessarily permit of a range of different interpretations in practice. If, on the one hand, their purpose is simply to establish a minimum floor below which no part of the state may fall, it is not clear what they would add to existing constitutional protections (particularly at the devolved level) nor that there is any real problem to be addressed. The accusation that there are *systematic* violations of minimum standards of constitutional propriety in any part of the UK is one that (at least under current constitutional arrangements) would be hard to sustain.

If, on the other hand, such principles are to be applied uniformly, then the questions arise as to *who* is to decide how they are to be interpreted and *why* their interpretation is to be preferred. Why, for instance, should the decision of the UK Parliament as to the level of human rights protection prevail over that of the devolved legislatures, especially if the latter are committed to a higher standard, or a broader range of rights? Similarly, why is the view of the United Kingdom Supreme Court on the Convention compatibility of matters within devolved competence to be preferred where the local courts have taken a different view? These are, of course, not merely hypothetical examples, but issues of concrete political controversy,<sup>81</sup> which raise sensitive issues about the asymmetry of the UK's populations, and hence the vulnerability of the minority nations to being overridden by the English majority or carelessly assimilated to an English norm.

The invocation of a set of more authentically 'British' values or purposes would in principle be a more satisfactory form of constitutional 'glue' to hold the UK together. In practice, however, this proves to be even more problematic. Again, any attempt to identify common standards risks simply exposing rather than the resolving differences. Most obviously, it may expose *territorial* difference. For instance, the idea of a distinctively *British* Bill of Rights quickly ran up against the reality of different legal traditions, as well as different attitudes to rights protection in different parts of the UK.<sup>82</sup> But it also runs the risk of exposing *political* differences more generally. For example, post-independence referendum debates about the appropriateness of devolving welfare and abortion powers to the Scottish Parliament revealed cross-party disagreement about the role of common social rights as a necessary condition of political solidarity across the UK.<sup>83</sup>

A second problem is that the idea of 'principles' or 'purposes' of the Union is profoundly ahistorical. The UK's constitution has never been a teleological one; on the contrary, its defining feature—the principle of parliamentary sovereignty—is one which explicitly eschews the idea of a fixed ideological purpose. In practice, therefore, attempts to define the purposes of Union tend either towards the tautologous—eg, the Constitution Reform Group's draft Act of Union Bill unhelpfully states that '[t]he purpose of the United Kingdom is to provide a strong and effective union between the peoples of the constituent nations and parts'<sup>84</sup>—or else require the imputation of a rationale which is both historically and politically contentious. Gallagher argues, for example, that the Union encompasses principles of political, economic and social integration; hence the development of the territorial constitution must be consistent with the maintenance of the UK's single external face, its fully-integrated economy, and a substantial degree of social solidarity.<sup>85</sup> In reality, though, the rationale for the Union has

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<sup>81</sup> As to the former, the question whether the consent of the devolved legislatures is required for reform or repeal of the Human Rights Act. As to the latter, cf the controversy over the *Cadder* and *Fraser* cases: see McHarg (n 14). See also D Feldman, 'None, One or Several? Perspectives on the UK's Constitution(s)' (2005) 64 *CLJ* 329.

<sup>82</sup> Commission on a Bill of Rights, *A UK Bill of Rights? The Choice before Us* (2012) ch 9.

<sup>83</sup> See eg HM Government, *The Parties' Published Proposals on Further Devolution for Scotland* (Cm 8946, 2014); T Gordon, 'Revealed: The Devolution Powers Shelved at the Last Minute from the Smith Commission Report', *The Herald*, 30 November 2014.

<sup>84</sup> Constitutional Reform Group (2016) (n 16) cl 1.1(1).

<sup>85</sup> Gallagher (2014) (n 16) 10–13, 15.

changed over time; contemporary ideas of a single market or social union would not have made sense at the time the Union was forged. Instead, the initial purpose of the Anglo–Scottish Union was narrowly focused (for the Scots) on ensuring access to markets and (for the English) on securing the Protestant succession to the Crown. These concerns were later superseded by a common commitment to empire, and later still to a high standard of social protection through a common welfare state<sup>86</sup>—a commitment which itself may now be on the wane.<sup>87</sup> In fact, contemporary interpretations of the requirements of economic, social and political union appear to owe as much to the principles of the *European Union*, as they do to any historically authentic British understanding. Moreover, they have a tendency to shift as political circumstances change. Thus, for example, the reforms to the Scottish devolution settlement proposed by the Calman Commission,<sup>88</sup> and implemented by the Scotland Act 2012, were superseded by the post-independence referendum Smith Commission proposals<sup>89</sup> before they had even come fully into effect. Now Brexit has reopened debate about what powers are suitable for devolution<sup>90</sup> before the post-Smith reforms, implemented by the Scotland Act 2016, have themselves come fully into force.

If, as this suggests, the British Union has always been a protean and evolving concept,<sup>91</sup> then any attempt to fix its meaning is arguably misguided, undermining the very flexibility that has ensured its longevity. Paradoxically, therefore, the attempt to identify British values or purposes may itself be regarded as being in an important sense ‘unBritish’. This in fact points to a final problem with normative projects of this nature, namely the naivety of the assumption that an explicit legal statement of common principles will itself have a cohesive effect. The problem of increasing constitutional divergence is not simply that people have not thought carefully enough about what it means to be British, or about the purpose and benefits of the UK state. On the contrary, having to mount an explicit defence of the Union is itself an indication that it is in trouble. As Kidd has argued, the Union was at its strongest when it was simply taken for granted.<sup>92</sup> Thus the demand to (as Gallagher puts it) ‘crystallise’ the Union seems to ignore the basic truth which underpins the traditional British preference for political rather than legal constitutionalism: if the political conditions for solidarity across the constituent nations of the Union are absent, an abstract statement of constitutional principles cannot fill the void. On the contrary, it may make things worse, if particular territories feel that their political and constitutional aspirations are being curtailed in the name of common ‘British’ values to which they do not subscribe. Clearly, given the asymmetry of the UK’s populations, the minority nations are most vulnerable to being overridden by UK-wide standards, but the reverse situation, in which the English majority is constrained by the values of the minority nations, is equally problematic.

## V. THE POLITICAL PERSPECTIVE

As this last point suggests, the problem of increasing diversity in the UK’s territorial constitution is, at root, a political, rather than a normative or conceptual, one. The problem is

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<sup>86</sup> See, eg, L Colley, *Acts of Union and Disunion* (London, Profile Books Ltd, 2014).

<sup>87</sup> T Mullen, ‘The Scottish Independence Referendum 2014’ (2014) 41 *Journal of Law and Society* 627, 637.

<sup>88</sup> Commission on Scottish Devolution, *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century: Final Report* (2009).

<sup>89</sup> The Smith Commission, *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament* (2014).

<sup>90</sup> See references in n 9 and Gallagher (2016) (n 16).

<sup>91</sup> M Keating, ‘Can the Union Be Saved from Unionists?’, *Centre on Constitutional Change Blog*, 18 September 2015.

<sup>92</sup> C Kidd, *Union and Unionisms: Political Thought in Scotland, 1500–2000* (Cambridge, Cambridge University Press, 2008) ch 1.

political in at least two senses. First, constitutional divergence is a symptom rather than the cause of political fragmentation across the UK. Certainly, as noted above, devolution has accentuated the pluralisation of political identities and behaviour, and contributed to a weakening sense of common citizenship. But devolution itself must be understood at least in part as a *response to* political fragmentation, and the decline of a compelling sense of common purpose. The reasons for that are complex,<sup>93</sup> and are themselves territorially divergent,<sup>94</sup> but it would be a mistake to assume that it is solely the result of political change in the devolved nations and regions themselves. Behaviour by successive *UK* governments, particularly the hollowing out of the state through the pursuit of a neo-liberal political agenda,<sup>95</sup> and austerity-driven attacks on the welfare state,<sup>96</sup> have also been significant in undermining markers of common UK citizenship, just as it is the UK government which has undermined common constitutional commitments by jeopardising the UK's EU membership and proposing to dilute human rights protections. In the absence of a common purpose, defence of the Union has taken on a transactional quality; something demonstrated vividly during the Scottish independence referendum campaign when the Unionist side struggled to articulate a positive vision of the UK, instead selling it to Scottish voters essentially as an insurance policy against economic and defence-related risk.<sup>97</sup> It is, however, hard to feel a strong sense of solidarity with an insurance provider, especially if some of its functions are potentially capable of replication by other means.

The problem is also political in the sense that territorial conflict has been exacerbated by the lack of a 'federal spirit' or 'federal mindset' at the centre of the constitution.<sup>98</sup> Again, this is not necessarily new,<sup>99</sup> but it is accentuated by the double asymmetry of devolution—ie, the lack of separate representative institutions for England, along with the failure to reform the central constitutional apparatus to take account of devolution.<sup>100</sup> The crude assumption often seems to be that devolution has 'solved' the problem of territorial difference (or if it has not solved the problem, then the answer is more devolution), and hence that matters reserved to the centre can unproblematically be decided according to a simple UK-wide majority. Such an approach often seems insensitive to the intertwined nature of devolved and reserved competences, and hence to the possibility of creating problematic spill-over effects for the devolved institutions. Nor is it sensitive to the contested nature of the territorial constitution, as regards both the appropriate boundaries between UK and devolved competences and the location of sovereign power.

If the problem of constitutional diversity is essentially political, the implication is that it also requires a political solution—that is, one which promotes political *inclusion* and the avoidance of territorial conflict, rather than which attempts to impose or re-impose uniformity. This in turn suggests a focus on institutional rather than substantive constitutional reform. Most obviously, institutional reform would mean addressing the double asymmetries of devolution:

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<sup>93</sup> In relation to Scotland, see C Kidd and M Petrie, 'The Independence Referendum in Historical and Political Context' in McHarg et al (n 8) 29.

<sup>94</sup> See Mitchell (n 7).

<sup>95</sup> See eg D Marquand, *Decline of the Public: The Hollowing out of Citizenship* (Cambridge, Polity, 2004).

<sup>96</sup> See eg M Simpson, 'The Social Union after the Coalition: Devolution, Divergence and Convergence' (2016) *Journal of Social Policy* 251.

<sup>97</sup> See in particular the UK Government's independence analysis papers, available at [www.gov.uk/government/collections/scotland-analysis](http://www.gov.uk/government/collections/scotland-analysis); and see J Gallagher, 'Making the Case for Union: Exactly Why Are We Better Together?' in McHarg et al (n 8) 127.

<sup>98</sup> See McEwen (n 8) 232–33, 240.

<sup>99</sup> Kidd and Petrie attribute the rising support for devolution in Scotland during the 1980s to Margaret Thatcher's 'unitarist' version of Unionism, and hence her failure to respect Scottish autonomy and difference: (n 93) 38–43.

<sup>100</sup> See, eg, S Tierney, 'Giving with One Hand: Scottish Devolution within a Unitary State' (2007) 5 *International Journal of Constitutional Law* 730; N McEwen and B Petersohn, 'Between Autonomy and Interdependence: The Challenges of Shared Rule after the Scottish Referendum' (2015) 86 *Political Quarterly* 192.

on the one hand, creating meaningful self-government for England, as well as addressing those other asymmetries which particularly cause resentment (such as the funding of devolved government);<sup>101</sup> on the other hand, reform of the central state apparatus to give due recognition to territorial diversity, for instance, by strengthening and codifying institutions for inter-governmental relations,<sup>102</sup> or by reconstituting the House of Lords as a territorial chamber.<sup>103</sup> However, other institutional reforms, such as reform of the House of Commons' electoral system, may also be important in promoting territorial inclusion. The first-past-the-post system arguably exacerbates territorial conflict by artificially amplifying geographical differences. For instance, the fact that the SNP won 56 out of 59 seats at the 2015 General Election on only 50 per cent of the popular vote has had the unhelpful effect of making normal party competition in the Commons chamber look like conflict between Scotland and the rest of the UK.

In addition, since a 'federal mindset' is about attitudes as well as about institutional structures, a political approach to the problem of territorial diversity suggests a need to pay attention to the broader conditions of political solidarity beyond the formal constitution. Political party organisation, media structures and behaviour, pressure group activity, and so on, may also be important in promoting or undermining territorial inclusion. But a focus on political solidarity also suggests that there may be substantive limits to the degree of territorial diversity that the UK constitution can bear. Since the extent of sub-state autonomy varies widely in different constitutions, it is hard to derive limits to territorial diversity *a priori*; what matters for the maintenance of political solidarity will vary from context to context. Nevertheless, if the state ceases to be a site of meaningful common political identity, then its survival as a state must be in doubt.

It also needs to be recognised that there are significant obstacles to the achievement of the kind of institutional reforms just discussed. The need for devolution to England is easy to state, but remains difficult to achieve. The insight of the Kilbrandon Commission<sup>104</sup> that the UK is too deeply asymmetrical in both its population and history for a symmetrical constitutional model to be feasible still holds true. A federation with England as a single territorial unit would face simultaneous problems of English dominance in central decision-making and a severe democratic deficit to the extent that the minority nations could overrule an English majority.<sup>105</sup> Breaking up England into regional units would solve the geographic problem but would create its own legitimacy issues, both insofar as there is no obvious demand for strong regional government in England<sup>106</sup> and regional boundaries are contested,<sup>107</sup> and because to treat the smaller UK nations as constitutionally equivalent to English regions would do violence to the former's sense of their historical uniqueness. Other institutional reforms are equally difficult to achieve; reform of the House of Lords and the House of Commons electoral system each raise a whole range of difficult issues going well beyond their implications for territorial relations. As Walker has noted, the more complex and inter-related the constitutional reform agenda becomes, the more it becomes trapped in a 'paradox of initiative'<sup>108</sup>—ie, 'the

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<sup>101</sup> See Henderson et al (n 20) 271.

<sup>102</sup> See eg McEwen and Petersohn (n 100); Calman Commission (n 88); Smith Commission (n 89).

<sup>103</sup> As proposed by the Labour Party prior to the 2015 General Election: see Labour Party Press Release, 'Labour Announces Plans to Give Regions and Nations Greater Power and a Stronger Voice in Westminster', 31 October 2014, available at [press.labour.org.uk/post/101667859054/labour-announces-plans-to-give-regions-and-nations](http://press.labour.org.uk/post/101667859054/labour-announces-plans-to-give-regions-and-nations).

<sup>104</sup> Royal Commission on the Constitution, *Volume 1: Report* (Cmnd 5460, 1973).

<sup>105</sup> MacCormick (n 71) 195.

<sup>106</sup> As noted above (n 33 and accompanying text), regional devolution was abandoned in 2004 due to lack of popular support, and City Devolution deals have also been rejected in some local authority areas.

<sup>107</sup> See, eg, the recent dispute over the inclusion of Chesterfield within the Sheffield City Region under the Cities and Local Government Devolution Act 2016: *R (Derbyshire CC) v Barnsley, Doncaster, Rotherham and Sheffield Combined Authority* [2016] EWHC 3355 (Admin).

<sup>108</sup> N Walker, 'Our Constitutional Unsettlement' [2014] *PL* 529, 542.

divisions and centrifugal political forces that make “joined up” constitutional reform so pressing also make it very unlikely to happen’.<sup>109</sup> It is, in any event, difficult to detect much appetite for constitutional reform of this nature,<sup>110</sup> and given that dealing with the consequences of Brexit is likely to dominate the political agenda for the foreseeable future, it is hard to imagine that other constitutional reforms will be seen as a high priority any time soon.<sup>111</sup>

## VI. CONCLUSION: BREXIT AND THE TERRITORIAL CONSTITUTION

In fact, given the current polarised state of territorial politics, so greatly exacerbated by Brexit, the break-up of the UK seems a more likely prospect than its significant reform. Brexit is, *par excellence*, an illustration of the lack of a federal spirit at the heart of the territorial constitution, and of the dangers of political fragmentation. The decision to hold a referendum on EU membership was driven not by any constitutional imperative, but rather purely by political ones: it was an attempt to resolve long-standing divisions in the Conservative party over the merits of EU membership, and to respond to the increasing electoral popularity of the UK Independence Party. Notwithstanding that these were predominantly English concerns,<sup>112</sup> and the clear possibility of a territorially-divided result, the Conservative Government’s political incentive was to respond to its electoral base in England, even if that led it in a direction which was difficult to reconcile with its avowed stance as a unionist party. Indeed, the decision to press ahead with the EU referendum in the face of opposition from the Scottish and Welsh Governments and from most of Northern Ireland’s political parties suggests that the UK Government was at best reckless as to its implications for territorial relations.

Both before and after the referendum, a territorially-inclusive approach to the Brexit decision was offered but rejected. First, the Scottish National Party attempted unsuccessfully to amend the European Union Referendum Bill to create a requirement of parallel consent to Brexit; in other words, for ‘Leave’ to win, there would need to be a majority across the UK and in each of its four constituent units. After the vote, the unexpected challenge to the UK Government’s right to initiate the process of withdrawing from the EU under Article 50 of the Treaty on European Union (TEU) under the Royal Prerogative created an opportunity to reassert the parallel consent principle in the form of an argument that, if statutory authorisation were required to trigger Article 50, such legislation would also require the consent of the devolved legislatures under the Sewel Convention. Although the Supreme Court in the *Miller* case did not reach a conclusive view on whether or not the Sewel Convention was engaged,<sup>113</sup> its decision that this was a political rather than legal matter enabled the UK Government simply to continue to assert its prior position that devolved consent was not required, on the basis that the decision to withdraw from the EU was a matter reserved to the UK Government with (in its view) no major impact on the devolution arrangements.<sup>114</sup> Similarly, despite initially committing to the ‘full engagement’ of the devolved governments in establishing the UK’s

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<sup>109</sup> N Walker, ‘The Territorial Constitution and the Future of Scotland’, in McHarg et al (n 8) 247, 270.

<sup>110</sup> For instance, while the Scottish Labour Party has recently committed to the creation of a federal UK, this is not yet UK Labour policy: see eg S Carrell, ‘Labour Expected to Consider Possibility of Federal UK’, *The Guardian*, 24 February 2017.

<sup>111</sup> eg, the UK Government has already confirmed that human rights reform will be postponed until after Brexit: see D Bond, ‘British Bill of Rights Delayed Until After Brexit, Liz Truss Reveals’, *Politics Home*, 23 February 2017.

<sup>112</sup> See Wyn Jones et al (n 53); B Wellings, ‘English Nationalism and Euroscepticism Overlap and Support Each Other in Important Ways’, *British Politics and Policy Blog*, 29 April 2014.

<sup>113</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] 2 WLR 583, [132].

<sup>114</sup> See HM Government, *Supplementary Supreme Court Printed Case of the Secretary of State for Exiting the European Union (Devolution Issues)* (2016); *Explanatory Notes to the European Union (Notification of Withdrawal) Bill* (2017) para 9.

negotiating position on Brexit,<sup>115</sup> this commitment has waned over time in favour of a reassertion of the decisiveness of the UK-wide Brexit vote and of the UK Government's right to determine its meaning.<sup>116</sup> Thus the Scottish and Welsh Governments' preference for a 'soft Brexit', which would enable the UK to remain part of the EU Single Market,<sup>117</sup> has effectively been dismissed by the UK Government,<sup>118</sup> without any sign of serious engagement with their proposals,<sup>119</sup> and the Prime Minister notified the UK's intention to withdraw from the EU under Article 50 TEU on 29 March 2017 without agreeing a common position with them.

On the one hand, the rejection of a territorially inclusive approach is unsurprising. Given the asymmetry in the UK's populations, it would have been constitutionally problematic—as well as politically difficult for both the Conservative Government and the Labour Opposition—for the minority nations to exercise a territorial veto over Brexit or a decisive influence over the form it takes. On the other hand, it leaves a choice between two equally unpalatable alternatives.

The 'constitutionally homogenising' approach that the UK Government currently seems to be favouring leaves little room for territorial influence, and would stand as a dramatic illustration of the democratic vulnerability of the minority nations within the Union, and of a lack of sensitivity to their particular political and constitutional concerns. The suggestion in the UK Government's Brexit White Paper<sup>120</sup> that decisions currently made at EU level will predominantly be repatriated to the UK Government rather than to the devolved governments, even where *prima facie* within devolved competence, would also involve a major rebalancing of power within the territorial constitution in favour of the UK level. Predictably, the constitutionally homogenising approach has led to the reopening of the question of Scottish independence,<sup>121</sup> as well as unhelpfully raising the political temperature within Northern Ireland.

Alternatively, what might be termed a 'radically asymmetrical' approach—involving either the negotiation of bespoke relationships with the EU for Northern Ireland and/or Scotland or conceding significant additional devolved powers—would involve such an extensive degree of territorial variation that it is hard to see how any sense of common citizenship could survive. In particular, if Brexit were to lead to differential relationships with the EU, this would introduce fundamental differences not only in institutional relationships, but also in constitutional values, and in the nature and location of sovereignty, all of which would have such far-reaching practical consequences that Scotland and Northern Ireland would to all intents and purposes become mini-states, only loosely connected to the rest of the UK. For this reason alone, quite apart from any technical or political obstacles that such proposals would face, differential Brexit seems like a degree of constitutional diversity too far.

Ultimately, therefore, it is difficult to conceive of *any* satisfactory solution to the territorial difficulties caused by the EU referendum result which does not, sooner or later, put the survival of the UK at risk. In these circumstances, worrying about the need for greater unity in the territorial constitution has the air of shutting the stable door after the horse has bolted.

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<sup>115</sup> See David Cameron's resignation speech on 24 June 2016.

<sup>116</sup> See, eg, 'Theresa May Urges Scots to Use Local Elections to Reject Independence', *Holyrood Magazine*, 26 February 2017.

<sup>117</sup> See references in n 9.

<sup>118</sup> HM Government, *The United Kingdom's Exit from and New Partnership with the European Union* (Cm 9417, 2017).

<sup>119</sup> See *Holyrood Magazine* (n 116).

<sup>120</sup> HM Government (n 118) para 3.4.

<sup>121</sup> See n 67 above.