

# Preservative or Transformative?

## Theorising the UK Constitution using Comparative Method

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**Abstract:** The complexities of the United Kingdom's decision to withdraw from the European Union whilst simultaneously honouring its prior commitments to its de-centralised, autonomous, and constituent nations have put constitutional questions back on the map. The dominant approach analyses these questions premised on the 'preservative' view of the constitution. This view prioritises the stability and continuity of the institutions in Westminster (Parliament) and Whitehall (central executive). However, the preservative view of the constitution is theoretically and practically deficient as it cannot give an account of the multi-polar and de-centralised developments of the past 20 years. Another interpretation regards the legal and political changes to the constitution as 'transformative'. This view accentuates the fragility of the UK constitution due to a plurality of constitutional rules and the ongoing processes of devolution of powers within multilevel systems of government. This article discusses that evolution of the UK constitution through the prism of comparative constitutional law and its appropriate methodology. The preservative model of the constitution favours a universalist method, whereas the transformative model requires a contextualist method. I argue that the experience of supranational (European Union) and infranational (devolution) power-

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sharing has fundamentally altered the United Kingdom's central constitutional concepts. To stabilise its fragmentary forces, the UK needs to adopt concepts that reflect the state as divided, the constitution as transitional, sovereignty as an attribute of the state rather than Parliament, and democracy as conflicted. Nothing less than the future of the United Kingdom as a state is at stake.

**Keywords:** Comparative constitutional law; constitutional theory; methodology; United Kingdom; legal culture; federalism; Brexit

**Category:** Comparative/Transnational Legal Theory

Comparative constitutional law searches for an external reference point. A comparatist may wish to pursue a variety of aims, e.g. to develop a better understanding of one or more legal systems, to understand better her own legal system, to identify 'best practices', or to find a solution to a particular problem. But that undertaking will often be executed with reference to another legal system.<sup>2</sup> In that regard, the criteria for case selection represent one of the most difficult aspects of comparative methodology.<sup>3</sup> This is especially so for the UK: with what other system could a *sui generis* order such as the UK be compared? It would certainly be possible to provide a highly generalised account of the UK constitution that took 'full account of the breadth of world constitutional experience, thus maximising the possibilities of what

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<sup>2</sup> M. Claes and M. de Visser, 'Reflections on Comparative Method in European Constitutional Law' in M. Adams and J. Bomhoff (eds.), *Practice and theory in comparative law* (Cambridge: Cambridge University Press, 2012) 145; V.C. Jackson, 'Comparative Constitutional Law: Methodologies', in M. Rosenfeld and A. Sajó, *The Comparative Handbook of Comparative Constitutional Law* 69-70; 'Methodological Challenges in Comparative Constitutional Law' (2010) 28 *Penn State International Law Review* 319-326.

<sup>3</sup> R. Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53(1) *The American Journal of Comparative Law* 125-155.

might be considered to be a global constitutional gene pool'.<sup>4</sup> Alternatively, the former British colonies of Africa and Asia could form a discrete comparator group. Their adoption of the Westminster model of government and their continuation of the common law tradition have arguably preserved the unity of 'fundamental constitutional common law principles',<sup>5</sup> and resulted in a 'new Commonwealth model of constitutionalism'.<sup>6</sup>

Both approaches have weaknesses. The 'universalist' method assumes that constitutionalism by definition embraces fundamental principles, such as federalism, separation of powers, rights protection.<sup>7</sup> This method accounts for the US-centric bias in comparative constitutional studies that feeds off structurally similar cases.<sup>8</sup> The alternative comparison of the UK with other common law countries based on shared fundamental principles might sidestep important differences between various members of the Commonwealth. Moreover, it would certainly ignore the idiosyncratic constitutional experience of the UK, which over the past 20 years has, in substance if not in form, transitioned away from the Westminster model of government. The current state of the UK constitution resembles a patchwork that, on the one hand, clings to the continuity of the Westminster model and the common law tradition and, on the other hand, resembles an 'adventure playground for constitutional innovators'.<sup>9</sup> If method is a necessary feature of comparative constitutional law,<sup>10</sup> then this development creates a challenge for anyone looking for an accurate

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<sup>4</sup> Cheryl Saunders, 'Towards a Global Constitutional Gene Pool' (2009) 4 *National Taiwan University Law Review* 1-38, 1.

<sup>5</sup> H-R. Zhou, 'A contextual defense of "comparative constitutional common law"' (2014) 12(4) *International Journal of Constitutional Law* 1034-1053, 1038.

<sup>6</sup> S Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge; Cambridge University Press, 2013).

<sup>7</sup> M. Tushnet, 'Some reflections on method in comparative constitutional law' in S. Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006) 69.

<sup>8</sup> V. Jackson and M. Tushnet, *Comparative Constitutional Law*, 3rd edn (New York: Foundation Press, 2014); and N. Dorsen, M. Rosenfeld, A. Sajo, S. Baer and S. Mancini, *Comparative Constitutionalism: Cases and Materials* (St. Paul: West Academic Publishing, 2016).

<sup>9</sup> P. Arthur, 'The Long War and its Aftermath, 1969-2007', in A. Jackson (ed.) *The Oxford Handbook of Modern Irish History* (Oxford: Oxford University Press, 2014) 748.

<sup>10</sup> For a sceptical discussion see S. Glanert, 'Method?' in P.G. Monateri (ed.), *Methods of Comparative Law* (Cheltenham: Edward Elgar, 2012).

comparative method for the purposes of theorising the UK constitution. There is, of course, ‘no exclusive method, and there is much to be said about the virtues, and defects, of different methods’,<sup>11</sup> which ‘produce different forms of knowledge’.<sup>12</sup> But the concern with method does raise the intriguing question as to which comparative method would lend itself to the purpose of theorising the contemporary UK constitution.

Comparative methodology craves clarity. Clarity requires stable criteria. Stability venerates strictly defined binary opposites, such as centralism vs federalism; presidentialism vs parliamentarism, strong-form and weak-form judicial review. The twin concepts of commonality and diversity, which arguably form ‘part of the definition of comparative law’,<sup>13</sup> translate into two broad conceptions of the UK constitution. One conception that I will call the ‘preservative’ constitutional model is premised on the ‘commonalities’ of the Westminster model that respect the UK constitution. This assumes stability, which makes for effective comparison at the global level. As Cheryl Saunders notes,

‘For a truly global discipline of comparative constitutional law, the methodology for comparison must apply effectively, and be recognised as having effective application, to constitutional arrangements in all parts of the world.’<sup>14</sup>

The other conception, which I will call the ‘transformative’ constitutional model, focuses on the ‘diversity’, and therefore on the inherent instability, of the constitutional structures of the constituent parts of the UK. The plurality of constitutional rules, the ongoing processes of devolution of powers within multilevel systems of government, and the implications for the traditional concept of sovereignty do not make for ‘effective application’ for comparative purposes. Instead, they call for a culturally sensitive or ‘contextual’ approach

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<sup>11</sup> H. P. Glenn, *Legal Traditions of the World*, 4<sup>th</sup> ed. (Oxford: Oxford University Press, 2010) 7.

<sup>12</sup> G. Samuel, *An Introduction to Comparative Law Theory and Method* (Oxford: Hart Publishing, 2014) 28.

<sup>13</sup> G. Danneman, ‘Comparative Law: Study of Similarities or Differences?’ in M. Reimann and R. Zimmermann, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 384.

<sup>14</sup> Saunders, ‘Towards a Global Constitutional Gene Pool’.

that insists on an appreciation of constitutional ideas ‘in the full institutional and doctrinal context within which they are placed’.<sup>15</sup> Contextualism poses a challenge for comparatists who seek to capture new constellations that defy traditional legal categories. In this article, I will take up that challenge and discuss the evolution of the UK constitution in the form of a ‘methodological road map’<sup>16</sup> that charts the UK constitution’s Hobbesian-unitary foundations as well as its contemporary fragmented devolved autonomy. I conclude by saying that nothing less than the future of the UK as a state will depend on which constitutional model is selected.

## What constitution?

Parliament’s authority over the constitution was seen as ‘transcendent and uncontrollable’ when the Federalist Papers were written.<sup>17</sup> That perception still persists today. Compared to the USA, the UK stands out for its ‘proud tradition of legal unitarianism’.<sup>18</sup> Martin Shapiro claims without a shadow of doubt that ‘no matter what the past and future arrangement for the various Celtic lands, the UK is a land of parliamentary, not divided, government’.<sup>19</sup> In the context of individual rights protection, Ronald Dworkin notes that deference to the majority’s view, and the resulting majoritarian conception of democracy, ‘have been more or less unexamined fixtures of British political morality for over a century’.<sup>20</sup> On the basis of stark theoretical opposites, the UK constitution appears to outside observers as ancient, immutable, permanent, and ‘thoroughly preservative’.<sup>21</sup>

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<sup>15</sup> Tushnet, ‘Some reflections on method in comparative constitutional law’ 68.

<sup>16</sup> G. Samuel, *An Introduction to Comparative Law Theory and Method* (Oxford: Hart Publishing, 2014) 173.

<sup>17</sup> Federalist Papers No. 53, A. Hamilton, J. Jay & J. Madison, *The Federalist*, 4th ed. (Cambridge, MA: The Belknap Press of Harvard University Press, 1974).

<sup>18</sup> Frank Michelman, ‘Constitutions and the Public-Private Divide’ in M. Rosenfeld and A. Sajó, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012), 315.

<sup>19</sup> M. Shapiro, ‘The Success of Judicial Review and Democracy’, in M. Shapiro and A. Stone Sweet, *On Law, Politics and Judicialization*, (Oxford: Oxford University Press, 2002) 156.

<sup>20</sup> R. Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Cambridge, Mass.: Harvard University Press, 1996) 16.

<sup>21</sup> Cass R. Sunstein, *Designing Democracy: What Constitutions Do* (Oxford: Oxford University Press, 2001) 67.

The search for stable concepts and rigorous models is not solely the preserve of comparative scholars. There is ample domestic evidence that supports the dominant view of the preservative constitution. Structures, laws, institutions, and conventions have proven to be as resilient (if not more so) in protecting the political order from accidental change and from arbitrary power as the entrenched norms in written constitutions elsewhere. A snapshot of current arrangements, which also maximises the possibilities of comparison within a ‘global constitutional gene pool’, looks something like this. Ultimate legislative authority resides in the sovereign Parliament in Westminster. A party can only govern if it commands majority support (either by itself or through more or less formal arrangements with other parties) in the House of Commons. The UK is a constitutional monarchy and parliamentary democracy, whose Parliament is elected in free and fair elections by universal adult franchise. An independent judiciary ensures that all public bodies (with the exception of Parliament) comply with the law and uphold fundamental civil and political rights. Membership of external bodies, such as the Council of Europe or the European Union, is subject to ongoing legislative consent by Parliament, which can be withdrawn by a simple majority vote in Parliament at any time. The same is true for the decentralisation of executive and legislative powers to Scotland, Wales, and Northern Ireland. The devolution arrangement and the institutions were created by Parliament and can theoretically be curtailed or abolished at any time.<sup>22</sup>

In their study of enduring (written) constitutions of independent nation-states, Zachary Elkins, Tom Ginsburg and James Melton<sup>23</sup> demonstrate a connection between the longevity of a constitution and social and political goods, such as individual rights, democracy, wealth, and stability. States with enduring constitutions tend to be richer and more democratic. The UK should, in theory, fit the bill. According to IMF estimates, the UK is the fifth largest economy

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<sup>22</sup> See e.g. s.28(7) Scotland Act 1998, as interpreted by *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64 [41].

<sup>23</sup> Z. Elkins et al, ‘The Endurance of National Constitutions’ (Cambridge: Cambridge University Press, 2009).

by nominal GDP in the world, and the ninth largest using the concept of purchasing power parity. It is listed as a ‘full democracy’ in the Economist Intelligence Unit’s Democracy Index<sup>24</sup> and as ‘free’ (aggregate score: 94/100) by Freedom House.<sup>25</sup> In 2016, Global Democracy Ranking placed the quality of democracy in the UK at fourteenth in the world.<sup>26</sup> Less impressively, in 2018 Reporters Without Borders, which campaigns for journalistic freedoms, ranked the UK 40th out of 180 countries on its annual World Press Freedom Index –<sup>27</sup> still ‘fairly good’ comparatively, but ‘unacceptable for a country that plays an important international standard-setting role when it comes to human rights and fundamental freedoms’.<sup>28</sup>

Yet for all the highly vaunted stability of its legal and political system the UK does not feature on Elkins’ list of most enduring constitutions.<sup>29</sup> On the one hand, the absence of a written constitution appears to turn the UK into a disenfranchised member of the international community. The UK organises governmental relations through an amalgam of formal rules and informal conventions, and it uses a blend of legal and political tools to regulate the relationship between the government and the people. A constitution of sorts does exist but it is a mess. It makes for a poor comparative case study in the Elkins et al mould. Rational observers, both domestic and foreign, call for its codification.<sup>30</sup> On the other hand, the lives of (comparative and domestic) constitutional lawyers would not be made any easier by a written document. Even if a constitution were enacted, the central challenges would still lie in identifying and analysing general structural issues, such as the nexus between law and politics, or the

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<sup>24</sup> The annual Democracy Index looks at governments around the world and tracks elections, politics, culture and civil rights. 167 countries are scored on a scale of 0 to 10 based on 60 indicators, with the UK consistently scoring higher than 8.

<sup>25</sup> <https://freedomhouse.org/report/freedom-world/2018/united-kingdom> [accessed July 2018].

<sup>26</sup> <http://democracyranking.org/wordpress/rank/democracy-ranking-2016/> [accessed July 2018].

<sup>27</sup> <https://rsf.org/en/united-kingdom> [accessed July 2018].

<sup>28</sup> Rebecca Vincent, Reporters Without Borders’ UK bureau director, cited in ‘UK among the worst in western Europe for press freedom’, *The Guardian*, 25 April 2018.

<sup>29</sup> For the explanation see Elkins et al, *The Endurance of National Constitutions* 49.

<sup>30</sup> A. Blick, *Beyond Magna Carta: A Constitution for the United Kingdom* (Oxford: Hart Publishing, 2015); B. Ackerman, ‘Why Britain Needs a Written Constitution—and Can’t Wait for Parliament to Write One’, *Political Quarterly* (forthcoming).

interaction between doctrinal constitutional law and normative conceptions of constitutionalism, especially in the areas of human rights and constitutional review by courts,<sup>31</sup> in addition to the fraught and fluctuating relationship between the centre and the regions on which this article will focus.

Beyond the general issues neatly caught in a snapshot of the UK constitution, there are specific constellations and constraints that generate an alternative narrative. Comparative law fails if it ignores context.<sup>32</sup> In addition to the practicalities of time, expertise, language barriers, and certain socio-legal sensibilities that apply to any kind of comparative study, a distinctive methodological challenge in comparative constitutional law arises out of ‘the complexity and path dependence of the historical context and the interdependence of constitutional provisions’.<sup>33</sup> Jackson illustrates this point with a specific example, namely comparisons of federal systems. Federal arrangements are invariably historically contingent and arise out of specific deals struck by the rulers of its day.<sup>34</sup> Indeed, the UK has been described as ‘a federal state with a Constitution regulating the relationship between the federal centre and the component parts’.<sup>35</sup> However, this is a provocative statement that aligns the UK’s carefully-tailored arrangements with the globally-recognisable form of federalism. More commonly the UK’s own brand of decentralisation is referred to as ‘devolution’, which poses even greater challenges for the methodology of constitutional theory.

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<sup>31</sup> M. Tushnet, ‘Comparative Constitutional Law’, in M. Reimann and R. Zimmermann, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006), 1228.

<sup>32</sup> W. Ewald, ‘Comparative Jurisprudence (1): What was it like to try a rat?’ (1995) 143 *Pennsylvania Law Review* 1889.

<sup>33</sup> Jackson, ‘Comparative Constitutional Law: Methodologies’ 71.

<sup>34</sup> V.C. Jackson, *Constitutional Engagement in a Transnational Era* (Oxford: Oxford University Press, 2010), Ch.8.

<sup>35</sup> Lady Hale, ‘The Supreme Court in the UK Constitution’ (Legal Wales Lecture, 12 October 2012); see also House of Lords: Select Committee on the Constitution, 6<sup>th</sup> Report, 2015-2016, *Scotland Bill*, HL 29, 2015, para.41, which alludes to the ‘self-rule’ of the Scottish Parliament; and House of Lords: Select Committee on the Constitution, 10<sup>th</sup> Report, 2015, *Proposals for the devolution of further powers to Scotland*, Summary of Conclusions and Recommendations, para.14: the draft clauses of the Scotland Bill ‘appear to be moving the United Kingdom in a federal direction’.



Devolution has served different constitutional and political purposes since it was inaugurated in 1998. Its official purpose was to strengthen the Union. In Scotland and Wales this meant decentralising executive and (initially only in Scotland) legislative powers.<sup>36</sup> According to this balancing act, Westminster authorised the unidirectional transfer of powers to Scotland and Wales without, however, relinquishing its own central powers of oversight, control, and indeed general law-making including on devolved matters. Design features were built-in to forestall the respective nationalist political parties in Scotland and Wales, and in Northern Ireland devolution formed part of the peace process to end the violent thirty-year conflict (1968-1998) over its constitutional status.

Various factors have motivated devolution, ranging from a short-term political calculus to longer-term institutional changes. Viewed together with other innovations, e.g. House of Lords Reform Act 1999, the Human Rights Act 1998, and the Freedom of Information Act 2000, the lasting impact of these changes on the Westminster model of government has not always been appreciated by those in power. The changes made the constitution ‘more multipolar in its sources of authority and less institutionally concentrated’,<sup>37</sup> but they also retained the basic structure and ongoing narrative. Devolution was still ‘expressed in terms of sovereignty, with all its attendant paraphernalia of referendums, reserved powers, and parliamentary hierarchy’.<sup>38</sup> It recognised one centre from which legislative and executive power flowed to subordinate bodies. Devolution merely grafted ‘new politics’ onto the ‘old constitution’.<sup>39</sup> A decade later, Barry Winetrobe could still assert that ‘the impact of devolution

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<sup>36</sup> Scotland Act 1998 and Government of Wales Act 1998.

<sup>37</sup> Walker, *The Unsettled Constitution*, 536.

<sup>38</sup> J. Morison, “‘A Sort of Farewell’: Sovereignty, Transition, and Devolution’, in *Sovereignty and the Law: Domestic, European, and International Perspectives* (Oxford: Oxford University Press, 2013) 142.

<sup>39</sup> B. Winetrobe, ‘Scottish Devolution: Developing Practice in Multi-Layer Governance’, in J. Jowell and D. Oliver, *The Changing Constitution* 6<sup>th</sup> edn (Oxford: Oxford University Press, 2007) 209; S. Tierney, ‘Giving with One Hand Scottish Devolution within a Unitary State’, in S. Choudhry (ed.) *Constitutional Design for Divided Societies* (Oxford University Press 2008) 451.

on Westminster has not been dramatic'.<sup>40</sup> The practice of periodic updates without an overall strategy is, as Richard Kay wryly observes, 'a funny way to make a constitution'.<sup>41</sup>

The myth of the UK as unitary and monolithic state is now being severely tested. The core of the centralised constitution is being complemented, or challenged, by decentralisation and autonomy on the geographic periphery. This development has consequences that will be further explored in this article. Constitutional actors elevate the solid value of legality to abstract theory, and downgrade the high-minded value of constitutionality to the crudeness of politics. The familiarity of the preservative constitution clashes with transformative innovations, e.g. devolution. To give a quick example: repeal of UK-wide legislation, such as the Human Rights Act 1998, remains 'relatively simple to achieve' in theory;<sup>42</sup> a simple majority in the House of Commons, backed by the deployment of the Parliament Acts 1911 and 1949 if needed,<sup>43</sup> would suffice. However, this re-statement of constitutional canon no longer holds water: repeal of the HRA would breach the Good Friday/Belfast Agreement in Northern Ireland<sup>44</sup> and, therefore, constitute a violation of both domestic and international law.<sup>45</sup> What is the point of an outdated and simplistic theory that bears no relation to the current and complex constitutional reality? The Good/Friday/Belfast Agreement comprises a multi-party agreement between the political parties in Northern Ireland, which is supported by the British-Irish Agreement, and a bilateral Treaty between Ireland and the UK that was appended to it. Both parts of the Agreement were endorsed by a majority of voters in a referendum held

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<sup>40</sup> B. Winetrobe, 'Scottish Devolution' 218.

<sup>41</sup> R.S. Kay, 'Changing the United Kingdom Constitution: The Blind Sovereign', in R. Rawlings et al, *Sovereignty and the Law: Domestic, European, and International Perspectives* (Oxford: Oxford University Press, 2013) 103.

<sup>42</sup> G. Phillipson and A.L. Young, 'Would Use of the Prerogative to Denounce the ECHR "frustrate" the Human Rights Act? Lessons from *Miller*' [2017] *Public Law* 150-175, 151.

<sup>43</sup> This legislation allows the House of Commons to enact certain legislation without the approval of the House of Lords.

<sup>44</sup> *The Agreement: Agreement Reached in the Multi-party Negotiations*, 'Rights, Safeguards and Equality of Opportunity' (para 2).

<sup>45</sup> See generally A. O'Donoghue and B.T.C. Warwick 'Constitutionally Questioned: UK debates, international law, and Northern Ireland' (2015) 66 (1) *Northern Ireland Legal Quarterly* 93-104, 98-101.

in both the Republic of Ireland and in Northern Ireland on the same day in 1998. It is implemented in UK law by the Northern Ireland Act 1998 and the Northern Ireland Assembly Act 1998, and in Irish law through an amendment to the Constitution. It is this corpus of interconnected domestic and international legal documents that forms the Northern Irish Constitution.<sup>46</sup> Referring to the documents as ‘constitution’ is not merely symbolic, but important for a material change to the UK constitution as a whole. Searches for ‘the right answer’ are, therefore, not only elusive, they are also distorted by the dominant narrative of the preservative constitution.

Devolution complicates matters beyond the doctrinal level also. Often referred to as a ‘settlement’, the term ignores the evolutionary nature of devolution.<sup>47</sup> Twenty years after its inception, the objective is no longer to take the wind out of the sails of nationalist parties in Scotland and Wales. The Scottish Independence referendum in 2014 and the UK government’s response to the ‘No’ vote substantially changed not only the devolution legislation but also Scotland and Wales’ status within the UK.<sup>48</sup> The Scotland Act 2016 and the Wales Act 2017 confirm in their opening provisions that the respective legislatures and governments are a ‘permanent part’ of the UK constitution and are ‘not to be abolished’ except on the basis of a referendum held in that country. What importance attaches to the permanence of a institution in a constitutional order that does not, and cannot, entrench anything? It depends on one’s perspective. To outsiders, the three Celtic nations remain barred from participating in the centralised constitution-making power.<sup>49</sup> To most English observers, the amendments ‘lack any

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<sup>46</sup> McCrudden, ‘Northern Ireland and the British Constitution since the Belfast Agreement’, in J. Jowell & D. Oliver (eds.) 6<sup>th</sup> edn *The Changing Constitution* (Oxford: Oxford University Press, 2007) 232-233.

<sup>47</sup> See also N. Walker, ‘Our Constitutional Unsettling’ [2014] *Public Law* 529-548.

<sup>48</sup> A. McHarg et al, *The Scottish Independence Referendum: Constitutional and Political Implications* (Oxford: Oxford University Press, 2016).

<sup>49</sup> L.R. Basta Fleiner and J.F. Gaudreault-DesBiens, ‘Federalism and Autonomy’ in M. Tushnet et al, *Routledge Handbook of Constitutional Law* (Abingdon: Routledge, 2013) 148.

legal effect whatever’<sup>50</sup> and are ‘impossible to enforce’.<sup>51</sup> From a Scottish perspective, however, the changes ‘will have active legal effects’.<sup>52</sup> Kenneth Campbell QC compares the devolution legislation to the Statute of Westminster 1931, by which Parliament agreed not to legislate for the self-governing dominions of the British Empire without their consent.<sup>53</sup>

‘...the Statute of Westminster model carries with it a strong degree of protection for the legislative autonomy of the Scottish Parliament, and, mutatis mutandis, a high price for UK legislation in areas of devolved competence in the face of rejection by the Scottish Parliament.’<sup>54</sup>

The requirement of consent has for a long time been part of constitutional politics in Northern Ireland. Section 1(2) of the Northern Ireland Act 1949 confirmed that Northern Ireland would remain in the UK unless and until the Parliament of Northern Ireland voted otherwise. Section 1(1) of the Northern Ireland Act 1998 replaced the consent of the Parliament of Northern Ireland with ‘the consent of a majority of the people of Northern Ireland’ voting in a border poll. Schedule 1 of the 1998 Act imposes a duty on law on the UK government, under certain conditions, to enter into negotiations on a united Ireland. As the supervisory Parliament, Westminster must ensure that this consent be manifest before Irish reunification. ‘The principle of consent is not simply a *political* principle in the Northern Ireland governmental context, but also a *constitutional* principle of the first order’.<sup>55</sup>

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<sup>50</sup> M. Elliott, ‘The Draft Scotland Bill and the sovereignty of the UK Parliament’, *www.publiclawforeveryone.com*, 22 January 2015. See also R. Ekins, ‘Legislative Freedom in the United Kingdom’ (2017) 133 *Law Quarterly Review* 582-605, 583-4.

<sup>51</sup> M. Gordon, ‘The Permanence of Devolution: Parliamentary Sovereignty and Referendum Requirements’, *Scottish Constitutional Futures Forums*, 30 September 2015.

<sup>52</sup> K. Campbell QC, ‘The “Scotland clauses” and parliamentary supremacy’ (2015) 3 *Judicial Review* 2015 259-273, 272.

<sup>53</sup> S.4 Statute of Westminster 1931. The dominions at the time were Canada, Australia, New Zealand, the Union of South Africa, Ireland and Newfoundland.

<sup>54</sup> K. Campbell QC, ‘The “Scotland clauses” and parliamentary supremacy’ (2015) 3 *Judicial Review* 2015 259-273, 272.

<sup>55</sup> C. McCrudden and D. Halberstam, ‘Miller and Northern Ireland: A Critical Constitutional Response’ (2018) *The UK Supreme Court Yearbook* Vol. 8., p.309.

What does the future hold in store for Northern Ireland? Polling in June 2018 found that two-thirds of Leave voters in the UK would rather leave the customs union ('hard Brexit') than avoid a hard border in Northern Ireland, and that six out of ten people surveyed 'would not mind either way' if Northern Ireland voted to leave the UK.<sup>56</sup> In October 2018, the "YouGov/Future of England Study" from the Universities of Cardiff and Edinburgh found that 79% of English Conservative voters would accept Scottish independence, and 75% the collapse of the Good Friday Agreement, as the price of EU withdrawal. In Northern Ireland, 87% of Leave voters were willing to sacrifice the peace process in order to secure EU withdrawal.<sup>57</sup> This suggests that the momentum might lie with preserving an essentially English constitution rather than with pre-empting territorial loss, for instance through a federal solution. This article does not at any point make the normative argument for the UK surviving as a state. But it does presuppose that the object of reference of UK constitutional law would be the state as it is currently constituted.

In Scotland, the demand for popular sovereignty can be traced back at least to the Claim of Right Act of 1689, to *MacCormick v Lord Advocate*,<sup>58</sup> and to the Scottish Constitutional Convention of 1989 (a loose coalition made up of political parties, trade unions, churches, and civil society in Scotland, but including neither the Conservatives nor the Scottish National Party), which acknowledged 'the sovereign right of the Scottish people to determine the form of government best suited to their needs'.<sup>59</sup> In 1994, the then leader of the UK Labour Party, John Smith, referred to the possibility of a Scottish Parliament as 'the settled will of the Scottish

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<sup>56</sup> Lord Ashcroft Polls, 'Brexit, the Border and the Union', 19 June 2018.

<sup>57</sup> Full results available here: <https://www.centreonconstitutionalchange.ac.uk/news/press-release-may%E2%80%99s-%E2%80%98precious-union%E2%80%99-has-little-support-brexit-britain> [accessed January 2019]

<sup>58</sup> (1953) SC 396, 411, per Lord Cooper: '[T]he principle of the unlimited sovereignty of Parliament is a distinctly English principle which has no counterpart in Scottish constitutional law'.

<sup>59</sup> Scottish Constitutional Convention, *Scotland's Parliament, Scotland's Right* (November 1995).

people’.<sup>60</sup> Pre-legislative referendums were held in Scotland, Wales, and Northern Ireland in 1997/8, and the UK government gave further effect to this right in the Edinburgh Agreement of October 2012 on the terms for the Scottish independence referendum. The circumstance of the 2014 referendum itself should not be underplayed. Referendums can ‘unsettle the traditional balance between constituent power and constitutional form in the contemporary polity, substituting the people directly for the representational role traditionally played by the democratic constitution’.<sup>61</sup> The 2014 referendum arguably acknowledged the ability of Scotland to leave the voluntary union of the UK. As noted, the Scotland Act 2016 further enshrines Scotland’s right to self-determination, and a similar provision is now found in s.1(3) of the Wales Act 2017, which rolls out the principle of consent from the Northern Ireland context.<sup>62</sup> For some, the provisions contain political and symbolic affirmations of institutional permanence without any legal or constitutional limitations on Parliament.<sup>63</sup> But for others, they confirm a ‘continuing claim to a historically attested sovereignty of the people’ in Scotland and elsewhere.<sup>64</sup>

At least the House of Lords Select Committee on the Constitution acknowledges that bestowing symbolic permanence and popular consent with one hand, and rendering them technically meaningless with the other, creates ‘the potential for misunderstanding or conflict over the legal status of the Scottish Parliament’.<sup>65</sup> The principle of consent creates space for a counter-narrative with three themes. First, it rivals the dominant view of Westminster-

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<sup>60</sup> Cited in D. Torrance, ‘“The Settled Will”? Devolution in Scotland 1998-2018’, House of Commons Library, Briefing Paper, No. 09441, 19 November 2018.

<sup>61</sup> S. Tierney, ‘Constitutional Referendums: A Theoretical Enquiry’, (2009) 72(3) *Modern Law Review* 360-383, 361.

<sup>62</sup> Belfast Agreement Article 1(ii).

<sup>63</sup> R. Ekins, ‘Legislative Freedom in the United Kingdom’ (2017) 133 *Law Quarterly Review* 582-605, 583; HL Select Committee on the Constitution, ‘Proposals for the Devolution of Further Powers to Scotland’, HL Paper 145, 24 March 2015, para. 64.

<sup>64</sup> N. MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999) 60.

<sup>65</sup> HL Select Committee on the Constitution, ‘Proposals for the Devolution of Further Powers to Scotland’, HL Paper 145, 24 March 2015, para. 64.

dependency with a proposition that devolution reflects ‘an autochthonous movement which continues to develop’.<sup>66</sup> A second outcome is that the UK Parliament *might* be ‘legally disabled’ from abolishing the legislatures and governments in Scotland and Wales.<sup>67</sup> The third consequence relates to the formal legality and democratic legitimacy of Westminster legislation: ‘...the introduction of devolution suggests that democratic concerns are not exhausted by ensuring adherence to the legislation enacted by the UK Parliament’.<sup>68</sup>

In this section I have tried to show that the preservative chronicle of the constitution no longer tells the full story. Devolution, to use just one example, complicates matters – to what degree will be discussed in the next section. If the devolution legislation was ‘quasi-autochthonous’<sup>69</sup> in 1998, when ‘the most controversial area of legislative competence [in Scotland] is the power to vary the base rate of tax by three pence in the pound’,<sup>70</sup> by 2017 the legislation had become ‘constitutional’,<sup>71</sup> with some even daring to ask whether Scotland could block the UK’s withdrawal from the EU.<sup>72</sup> No volume on public law is now complete without a chapter on the ‘multidimensional’<sup>73</sup> or ‘territorial constitution’.<sup>74</sup> Noreen Burrows noted as long ago as 2000 that

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<sup>66</sup> B. Hadfield, ‘Devolution: A National Conversation?’ in J. Jowell and D. Oliver (eds), *The Changing Constitution* (Oxford: OUP, 3rd ed, 2011) 233.

<sup>67</sup> M. Elliott, ‘Parliamentary Sovereignty’, in J. Jowell, D. Oliver, and C. O’Cinneide, *The Changing Constitution* 8<sup>th</sup> ed (Oxford: Oxford University Press, 2015), 41.

<sup>68</sup> Elliott, ‘Parliamentary Sovereignty’ 43.

<sup>69</sup> B. Hadfield, ‘The United Kingdom as a Territorial State’ in V. Bogdanor, ‘The British Constitution in the Twentieth Century’ (Oxford: Oxford University Press, 2004) 626.

<sup>70</sup> I. Ward, *The English Constitution: Myths and Realities* (Oxford: Hart, 2004) 146.

<sup>71</sup> R. Rawlings, ‘The Strange Reconstitution of Wales’ [2018] *Public Law* 62-83, 65; see also *Robinson v Secretary of State for Northern Ireland* [2002] NI 390, [2002] UKHL 32, per Lord Bingham [11]; Lord Hoffman [25].

<sup>72</sup> *Institute For Government*, ‘Brexit and the Sewel (legislative consent) Convention’ 17 May 2018; M. Elliott, ‘Can Scotland block Brexit?’ [www.publiclawforeveryone.com](http://www.publiclawforeveryone.com) 26 June 2016.

<sup>73</sup> M. Elliott, ‘Legislative Supremacy in a Multidimensional Constitution’, in M. Elliott and D. Feldman (eds), *The Cambridge Companion to Public Law* (Cambridge: Cambridge University Press, 2015).

<sup>74</sup> P. Leyland, ‘Referendums, Popular Sovereignty, and the Territorial Constitution’ in R. Rawlings et al, *Sovereignty and the Law: Domestic, European, and International Perspectives* (Oxford: Oxford University Press, 2013).

‘...these written texts are now the constituent acts of a *union kingdom* in which the identity and existence of the other, smaller and non-English parts of the United Kingdom is acknowledged.’<sup>75</sup>

The multi-dimensional and territorial dimension is not encapsulated by A.V. Dicey’s exposition of absolute institutional sovereignty. UK constitutional law interlocks with international law, EU law, and the European Convention on Human Rights, which complicates the tasks of theorising and comparing the constitution. Any such attempt must also embrace the irresolvable tension created by formal-legal assumptions and constitutional realities. Are devolution and democracy (in the sense of popular sovereignty) legally irrelevant from Parliament’s perspective? Do they represent ‘fundamental constitutional values [that] can and do both shape the *meaning* of statute law and serve to determine its *constitutionality*’?<sup>76</sup> Do they pose *legal* limitations on Parliament’s legislative authority? These questions will be explored in the next section.

## What method?

In this section, I will discuss four ways in which the UK constitution can be mapped. The first two mapping strategies are consistent with the preservative constitution. They subordinate devolution to the overriding principle of parliamentary sovereignty, and assert that the UK has witnessed only partial decentralisation of power. According to these models, devolution has neither resulted in fundamental constitutional change, nor has it altered the hierarchical structure of the institutions. The exercise of decentralised power takes place in a constitutional blind spot a world away from Westminster/Whitehall in which the devolved institutions are neither equal nor superior.<sup>77</sup>

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<sup>75</sup> N. Burrows, *Devolution* (London: Sweet and Maxwell, 2000) 2-3 (original emphasis).

<sup>76</sup> Elliott, ‘Parliamentary Sovereignty’ 46.

<sup>77</sup> Elliott, ‘Parliamentary Sovereignty’ 42.



The first mapping strategy is simultaneously the clearest and the most misleading. It is premised on the universal principles of the Westminster model of government, which accords ‘no special sanctity’ to constitutional law.<sup>78</sup> Michael Gordon, in a monograph on the UK constitution, discusses devolution on five pages and regards it as a ‘non-critical challenge’ to Westminster. He acknowledges the constitutional impact of devolution and the Human Rights Act 1998, but asserts as a *fact* ‘that each can be reconciled with the doctrine of parliamentary sovereignty’.<sup>79</sup> In his exposition, Gordon repeatedly asserts the formal position that devolution does not rival parliamentary sovereignty.<sup>80</sup> Gavin Phillipson’s premise is similarly legalistic. He distinguishes ‘the legal reality of the unlimited sovereignty of the Westminster Parliament’ from ‘the political imperative to grant Scotland a real and strong measure of devolution’.<sup>81</sup> Mark Elliott regards devolution as a ‘significant constitutional value’ that ‘exists other than as a hard-legal restraint upon the authority of the UK Parliament’.<sup>82</sup> These positions are technically accurate and based on clear statutory support. The ‘threat’ of a referendum on Irish reunification or of a second referendum on Scottish independence, the permanence of the devolved institutions, and the premise of popular sovereignty notwithstanding, Westminster continues to assert ultimate authority within the United Kingdom under s.28(7) of the Scotland Act, s.107(5) Government of Wales Act 2006, and s.5(6) Northern Ireland Act 1998.

The first mapping strategy, although technically sound, is ultimately incoherent and unsustainable. By conceptually separating parliamentary sovereignty from the constitution, it creates an unbridgeable gulf between theory and practice. A few recent illustrations serve to

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<sup>78</sup> F.W. Maitland, *The Constitutional History of England* (Cambridge: Cambridge University Press, 1908) 536.

<sup>79</sup> M. Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics, and Democracy* (Oxford: Hart 2005), 113.

<sup>80</sup> Gordon, *Parliamentary Sovereignty in the UK Constitution* pp.114-120.

<sup>81</sup> G. Phillipson, ‘Brexit, Prerogative and the Courts: Why Did Political Constitutionalists Support the Government Side in Miller?’ (2017) *University of Queensland Law Journal* 311-331, 324.

<sup>82</sup> M. Elliott, ‘Legislative Supremacy in a Multidimensional Constitution’ 84.

show that the preservative predilection persists in legislative and executive developments, as well as in judicial interpretation, but at the cost of bracketing out devolution.

The UK government's attempts to control the passage of the Wales Bill have been expertly documented by Professor Rick Rawlings. After twenty years of devolution to Wales, and following on the heels of recommendations by the independent Commission on Devolution in Wales (Silk Commission), one might have expected the next stage of devolution to have been worked out on the basis of experience and principle. Instead, the UK government's approach was riddled with beginner's mistakes. Rawlings describes the draft Bill, and especially the proposed Schedule that contained 34 pages of general and specific reservations, as 'long-winded, jumbled, and inherently backward-looking'. The scope of the Bill ranged 'from the constitutionally vital to the wholly ungenerous and eccentric, via the questionable and arcane'.<sup>83</sup> Instead of rolling out devolution to the next stage, it sought to enshrine 'reservation creep'<sup>84</sup> and a raft of veto powers for the UK government. In the end, and the supreme authority of the Westminster Parliament notwithstanding, the draft Bill met with universal rejection in Wales and had to be scrapped.

At the second attempt, the Wales Bill 2016 removed or diluted the more egregious features of the first draft. 'The legislative text as a whole is less clunky, but it is still clunky'.<sup>85</sup> But Rawlings' point about the Bill is a broader one that reflects on the sclerotic operation of the UK constitution. The Wales Bill was of major constitutional importance, yet scrutiny in the House of Commons was muted. Whitehall and Westminster treated the devolved government 'as lobbyist not participant in the formal making of devolved legislation'.<sup>86</sup> The failure to approach devolution from first principles was also evident in the House of Lords, which

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<sup>83</sup> Rawlings, 'The Strange Re-Constitution of Wales' 69.

<sup>84</sup> Wales Governance Centre and The Constitution Unit, 'Challenge and Opportunity: The Draft Wales Bill 2015', February 2016, Ch.7.

<sup>85</sup> Rawlings, 'The Strange Reconstitution of Wales' 73.

<sup>86</sup> Rawlings, 'The Strange Reconstitution of Wales' 75.

regarded the Bill as making technical alterations rather than promoting alignment between devolved legislative and executive competence on the basis of the Scottish model. The list of perceived failures and insensitivities at the centre goes on. Rawlings' analysis makes the point that the UK government and Parliament are not only tone-deaf when it comes to devolved autonomy, but ultimately also unsuccessful in their ham-fisted attempts to assert the waning power of the preservative constitution.

'If the Wales Act 2017 is the best that Whitehall and Westminster can do with some 20 years' experience of devolution legislation, then all the more reason to fear for the integrity of the UK'.<sup>87</sup>

The same argument can be levelled against the first draft of the EU (Withdrawal) Bill. The Bill had diverse objectives, such as repealing the European Communities Act 1972 and enabling the withdrawal of the UK from the European Union following the referendum in June 2016. For present purposes its significance lies in the manner in which it exposes the UK government's attitudes towards the devolved institutions. The beginnings were auspicious. The government's White Paper in the spring of 2017 promised to enhance the decision-making powers of the devolved administrations after exit day.<sup>88</sup> In her letter to Donald Tusk triggering Article 50, the Prime Minister noted her expectation 'that the outcome of [the negotiation] process will be a significant increase in the decision-making power of each devolved administration'.<sup>89</sup>

However, the notorious Clause 11 of the EU (Withdrawal) Bill instantly formed the centre of a constitutional storm. It sought unilaterally to amend the Scotland Act 1998, the

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<sup>87</sup> Rawlings, 'The Strange Reconstitution of Wales' 82.

<sup>88</sup> Policy Paper, 'The United Kingdom's exit from and new partnership with the European Union White Paper', Cm 9417, 02 February 2017, at 1.3, 1.5, 3.5.

<sup>89</sup> Prime Minister's letter to Donald Tusk triggering Article 50, 29 March 2017; see also The Lord Privy Seal (Baroness Evans of Bowes Park), opening the debate for the government: House of Lords Hansard, European Union (Withdrawal) Bill, Second Reading, 30 January 2018 Volume 788, Col.1374; see also the UKSC in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61 [130].

Government of Wales Act 2006 and the Northern Ireland Act 1998 by preventing devolved parliaments from altering retained EU law even in areas that are devolved. As EU powers are returned to Westminster, the UK government sought to replace EU regulatory frameworks with UK-wide frameworks. These areas primarily involve agriculture and fisheries, economic development, public procurement and transport, and environmental protection, as well as aspects of justice and home affairs for Scotland and Northern Ireland. The Bill, therefore, pitted ‘the important single market of the United Kingdom’<sup>90</sup> against the principles of the existing devolution settlement.<sup>91</sup> This would have been unproblematic where UK-wide frameworks had already been developed with the consent of the devolved parliaments, but ‘constitutionally insensitive’<sup>92</sup> where consent had not been granted. In a joint statement that marries political rhetoric with constitutional insight, the First Ministers of Scotland and Wales jointly denounced the Bill as ‘a naked power-grab’ and as ‘an attack on the founding principles of devolution’.<sup>93</sup>

In the end, as before with the draft Wales Bill, the UK government eventually gave up and caved in. After months of negotiations between the UK government and the devolved administrations, the European Union (Withdrawal) Act 2018 reversed its approach. Instead of protecting all retained EU law from modification by devolved institutions, s.12(2), (4), and (6) empower UK Ministers to specify in regulations (i.e. by secondary legislation) those parts of retained EU law that the UK government wishes to protect from alteration by devolved legislatures pending a new common framework to regulate the single market of the UK. In other words, s.12 temporarily freezes devolved legislative and executive competence in certain areas pending negotiations over future common policy approaches. Furthermore, the 2018 Act subjects secondary legislation to a sunset clause: s.12(7) and (9) provides that the ministerial

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<sup>90</sup> PM Theresa May, House of Commons Hansard, Volume 620, col.294, 25 January 2017.

<sup>91</sup> First Minister Nicola Sturgeon, ‘Scotland After Brexit’, David Hume Institute, 16 January 2018.

<sup>92</sup> House of Commons Public Administration and Constitutional Affairs Committee, *Devolution and Exiting the EU and Class 11 of the European Union (Withdrawal) Bill: Issues for Consideration* (First Report, Session 2017-19, HC 484), para.41.

<sup>93</sup> <https://news.gov.scot/news/eu-withdrawal-bill> (13 August 2017).

power expires two years after exit day (if not repealed earlier), and that the regulations made using that power will expire five years after coming into force.

Section 12 treads a fine line between sovereignty and constitutionality. Is the constitutionally proper method for devolved legislatures to be consulted before retained EU law is amended in accordance with regulations made by UK ministers? Or does sovereignty permit the UK Parliament unilaterally to limit devolved powers? The ease with which ordinary technical procedures and legitimate questions of competence transform into jurisdictional clashes and accusations of foul play must be of concern to a constitutional model that claims continuity and stability, but is fast running out of road. It would appear in practice that UK ministers may limit the powers of the devolved legislatures over retained EU law without their consent. But this conclusion conjures up a theory of parliamentary sovereignty that miraculously morphs into the executive power of UK ministers to limit the autonomy of the Scottish Parliament. Rawlings lambasts this approach, which was also employed for the Wales Bill: ‘however nicely dressed up, this is formal recentralisation of power and exercise of constitutional hierarchy in spades’.<sup>94</sup>

The third and final illustration of the incoherence of the preservative model relates to the priority given to the uniform constitution over fundamental conventions, such as the Sewel Convention, which provides that Parliament will ‘normally’ only legislate for the devolved regions with the consent of the respective devolved legislature.<sup>95</sup> The Smith Commission, established to shore up devolution after the Scottish Independence referendum in 2014, recommended that that ‘the Sewel Convention will be put on a statutory footing’.<sup>96</sup> The

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<sup>94</sup> R. Rawlings, ‘Brexit and the Territorial Constitution: Devolution, Reregulation and Inter-governmental Relations’ (London: The Constitution Society, 2017), p.26.

<sup>95</sup> Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee, October 2013.

<sup>96</sup> Smith Commission. Report of the Smith Commission for further devolution of powers to the Scottish Parliament, para. 22.

legislation for Scotland and Wales was duly amended,<sup>97</sup> although the Convention continues to exist in its uncodified form in Northern Ireland. Its elevation to statute notwithstanding, the status of the Sewel Convention was destabilised by the UK Supreme Court's decision in *Miller*.<sup>98</sup> The submissions on behalf of the UK government during the *Miller* litigation were premised on the 'legal irrelevance' of the Sewel Convention, and on the claim that 'the Westminster Parliament is sovereign and may legislate at any time on any matter'.<sup>99</sup> The UKSC arguably endorsed this reasoning when it unanimously referred to the Convention as 'a statement of political intent [that did] not create legal obligations,' and did not fall within the remit of the judiciary.<sup>100</sup>

Following amendments to the Withdrawal Bill and reassurances in an intergovernmental agreement,<sup>101</sup> the Welsh Assembly gave legislative consent. But in May 2018, the Scottish Parliament voted 93 to 30 to withhold legislative consent for the Withdrawal Bill. The Scottish Government did not agree to the UK government's amendments on the competences of the Scottish Parliament and the Scottish Government. This was only the second time since 1999 that the Scottish Parliament refused to grant consent to Westminster legislation. (After the first time, regarding the Welfare Reform Bill 2011, the UK government amended the Bill, whereupon the Scottish Parliament did grant consent). While consent is not a legal requirement, it must be remembered that the Sewel Convention is an intergovernmentally-agreed, legislatively-endorsed, and judicially-affirmed constitutional practice that plays 'an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures'.<sup>102</sup>

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<sup>97</sup> S. 28(8) Scotland Act 1998, as amended by s.2(2) Scotland Act 2016; s.2 Wales Act 2017.

<sup>98</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61.

<sup>99</sup> Appellant's Written Case on the Devolution Issues, para. 24, 31.

<sup>100</sup> *Miller* [139; 149; 151].

<sup>101</sup> *Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks*, Cabinet Office, 25 April 2018.

<sup>102</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61 at para 151.

To bridge the gap, the Scottish Government introduced into the Scottish Parliament the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, i.e. its own version of the European Union (Withdrawal) Act 2018. There was, indeed, a considerable degree of overlap between the two measures, for instance as regards the power of Scottish Ministers to address deficiencies in devolved retained EU law, so far as that would be within the legislative competence of the Scottish Parliament. However, there were also some notable differences, for example with respect to the Charter of Fundamental Rights and the status of judgements by the Court of Justice of the EU. More poignantly, s.17 of the Continuity Bill directly challenged Westminster's continuing claim to sovereignty by confidently providing that regulations by UK ministers which modify or affect retained devolved EU law 'is of no effect unless the consent of the Scottish Ministers was obtained before it was made, confirmed or approved'.

In December 2018 the UK Supreme Court gave judgment in relation to the Scottish Continuity Bill.<sup>103</sup> On the first and central question, whether the Scottish Parliament had acted within the legal powers conferred by the Scotland Act 1998 when it enacted the Continuity Bill, the UKSC found in favour of the Scottish Parliament. The Bill 'simply regulates the legal consequences in Scotland of the cessation of EU law as a source of domestic law relating to devolved matters, which will result from the withdrawal from the EU already authorised by the UK Parliament'.<sup>104</sup> In other words, the Bill dealt with the legal implications in Scotland of the UK's conduct of international relations, but did not relate to international relations itself, which is a reserved matter under schedule 5 of the Scotland Act 1998.

However, the UKSC then considered the individual provisions, and struck out the crucial ones. Section 17, for instance, was deemed to be outside the legislative competence of the Parliament as it contravened the Scotland Act 1998. The UKSC's ruling confirms the power of

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<sup>103</sup> *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64.

<sup>104</sup> [2018] UKSC 64 [33].

the UK Parliament power to authorise ministers to make subordinate legislation, and nullifies the effect of s.17, which would have been to make the legal effect of such subordinate legislation conditional upon the consent of the Scottish Ministers.

Underlying the ruling in this case, as in *Miller*, is a centrist view of sovereignty. The court notes how, even after two decades of devolution, ‘the UK Parliament remains sovereign, and its legislative power in relation to Scotland is undiminished’.<sup>105</sup> Such a retreat to doctrinal formalism is a reminder both of the weakness of the preservative model, which relies on Diceyan assertions of parliamentary sovereignty in the devolution legislation, and of the dependency of the devolution settlement on the goodwill of Westminster. If Westminster wishes to seek consent from devolved bodies only as a matter of ‘practice not convention, as Lord Keen, the senior legal adviser to the UK government on Scottish law, suggested,<sup>106</sup> then a traditional black-letter stance will not protect the preservative constitution. Instead, it will inevitably lead to future conflicts over the territorial constitution.

The second mapping strategy offers more nuance but ultimately also draws its coherence from the preservative constitution and the doctrine of parliamentary sovereignty. The key advance proffered by Mark Elliott lies in the distinction between legality and constitutionality.<sup>107</sup> The argument based on formal legality, according to which the unidirectional decentralisation of power since 1998 has left Westminster’s ultimate legislative authority intact, is supplemented by an argument based on constitutionality, which acknowledges the existence of a new ‘constitutional principle – devolved autonomy – whose fundamentality is increasingly difficult to dispute’.<sup>108</sup> The constitutional principle of autonomy consists of two obligations, one legal and one conventional. First, Scottish, Welsh and Northern

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<sup>105</sup> [2018] UKSC 64 [41]; see also [53]; [58]; [61].

<sup>106</sup> Noted by A. Paun, ‘Is the UK-Scotland Supreme Court case the start of a new phase of constitutional conflict?’ *The Constitution Unit blog*, 07 August 2018.

<sup>107</sup> Elliott, ‘Parliamentary Sovereignty’.

<sup>108</sup> Elliott, ‘Parliamentary Sovereignty’ 42-3.



Irish ministers and parliamentarians must as a matter of enforceable law respect EU law, the ECHR, and ‘reserved’ (or in Northern Ireland ‘excepted’) matters when they act and legislate.<sup>109</sup> Second, Westminster will not, as a matter of constitutional propriety, legislate on ‘devolved matters’ without first securing the assent of the devolved legislature.<sup>110</sup>

It is the second proposition, which is backed only by non-legally enforceable convention that is the Achilles’ heel of the principle of constitutionality. Closer examination shows that the constraint on Parliament not to intervene unilaterally in devolved affairs is more than merely political. The tailored devolution arrangements combine ‘the high politics of constitutional accommodation’, i.e. power-sharing agreements, with other, smaller, but no less ‘constitutional’ issues, which in the context of Northern Ireland range from housing and education, to policing, flags and marches.<sup>111</sup> Save for truly exceptional circumstances, unilateral intervention is an ‘affront’ to ‘fundamental constitutional principles’.<sup>112</sup> Lord Hope speaks of ‘the bonds that hold the UK together’, and fears that they ‘would be stretched almost to breaking point if the [EU (Withdrawal) Bill] were to proceed to enactment without [the devolved legislatures’] consent’.<sup>113</sup>

The second mapping strategy results in a stand-off between legality and constitutionality. If the Westminster Parliament remains omni-competent in theory, then the status of devolution is precarious and contingent upon self-restraint from the centre. However, if the status of devolved autonomy is recognised as fundamental and constitutional, then that might imply a substantive limitation on Parliament not to legislate within the sphere of

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<sup>109</sup> S.29(2) Scotland Act 1998 and similar provisions for Wales and Northern Ireland.

<sup>110</sup> The concept of ‘devolved matters’ is itself problematic and does not reflect the logic of devolution in Scotland. Devolved competences were deliberately not defined. The reverse is correct: devolved legislative competence was limited by reserved matters: see A. Tickell, ‘Does Westminster need Holyrood’s consent to repeal the Human Rights Act 1998?’ (2015) 33 *Scots Law Times* 160-164, 161.

<sup>111</sup> Morison, “‘A Sort of Farewell’” 133.

<sup>112</sup> Elliott, ‘Parliamentary Sovereignty’ 44.

<sup>113</sup> HL Hansard, European Union (Withdrawal) Bill, 30 January 2018, vol.788, col.1385.

devolved competence, and certainly not without the consent of the respective devolved legislature. Ultimately, like the first mapping strategy, the stand-off is resolved in favour of legality. The second mapping strategy still errs on the side of the preservative constitution.

And so to the third and fourth mapping strategies that reflect the transformative rather than preservative constitution. They strive to recognise permanent and irreversible changes to the UK constitution. The third strategy, which I will refer to as the *constitutional method*, would make the bold claim that devolution has altered the rule of recognition. I acknowledge that few scholars are directly arguing this currently, and the UK Supreme Court rejected a similar strand of thought in *Miller* with respect to the European Communities Act 1972.<sup>114</sup> But the constitutional method is nonetheless theoretically plausible. It consists of two planks. The first plank recognises the power of the referendum, which features in the contexts of Europe and devolution. The second plank argues that the devolution legislation now imposes a substantive limitation on the powers of Parliament not to legislate contrary to the constitutional principle of devolved autonomy, and especially the second proposition that is protected by the Sewel Convention. As Tickell points out, neither the UK nor the Scottish government enjoys a monopoly over the interpretation of that Convention. ‘We are in the debatable lands of constitutional morality rather than strict law, and both pugilists retain considerable room for manoeuvre’.<sup>115</sup>

Vernon Bogdanor does argue that the use of referendums has altered the rule of recognition. He first advanced this argument in the context of the European Union Act 2011,<sup>116</sup>

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<sup>114</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61 [60], per Lord Neuberger et al: ‘...we would not accept that the so-called fundamental rule of recognition (ie the fundamental rule by reference to which all other rules are validated) underlying UK laws has been varied by the 1972 Act or would be varied by its repeal’.

<sup>115</sup> A. Tickell, ‘Does Westminster need Holyrood’s consent to repeal the Human Rights Act 1998?’ (2015) 33 *Scots Law Times* 160-164, 163.

<sup>116</sup> V. Bogdanor, ‘Imprisoned by a Doctrine: The Modern Defence of Parliamentary Sovereignty’ (2012) 32(1) *Oxford Journal of Legal Studies* 179–195, 189-190.

and again in the context of the 2016 referendum. The referendum is de facto ‘a third chamber of Parliament’, and it is ‘the people’ that now effectively constrain Parliament.<sup>117</sup> In the context of devolution, Parliament has committed itself to respecting the status quo unless and until a plebiscite in Scotland, Wales, or Northern Ireland forces constitutional change. Shifting Bogdanor’s analysis to devolution, one might conclude that the referendum requirement in the devolution legislation represents a substantive limitation on legislative power. Baroness Hale hinted at this transformation in *Jackson*:

‘If the sovereign Parliament can redefine itself downwards, to remove or modify the requirement for the consent of the Upper House, it may very well be that it can also redefine itself upwards, to require a particular Parliamentary majority or a popular referendum for particular types of measure’.<sup>118</sup>

By requiring the assent of an external body (the electorate), the referendum requirement amounts to a ‘partial renunciation’ that ‘deprives the legislature of its sovereign power to legislate on certain constitutional matters’.<sup>119</sup> It has become, Bogdanor concludes, ‘the people’s veto’.<sup>120</sup>

I do not wish to endorse the *constitutional method* here – not because I think the argument is confused or wrong, but because I want to break away from Westminster-centric accounts of the constitution. The UK is divided by competing visions of the state, by disagreement over its constitution, not to mention the competing commitments of national identity. The significance of the Scotland Act 2016 and the Wales Act 2017 lies in their capacity to ‘redefine the United Kingdom’s constitution in a plurinational direction’.<sup>121</sup> There

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<sup>117</sup> V. Bogdanor, *Beyond Brexit: Towards a British Constitution*, (London: I.B. Tauris, 2019) 110.

<sup>118</sup> *Jackson v Attorney General* [2005] UKHL 56; [2006] A.C. 262 at [163].

<sup>119</sup> Bogdanor, ‘Imprisoned by a Doctrine’, 190.

<sup>120</sup> Bogdanor, *Beyond Brexit*, 112.

<sup>121</sup> Tierney, ‘Scottish Devolution Within a Unitary State’, 439.

are two possible outcomes if the UK government recentralises power along the lines of the first two mapping strategies. If recentralisation is widely accepted, Westminster/Whitehall will have successfully re-absorbed Scotland, Wales, and Northern Ireland within the Westminster model of government and the preservative constitution. If recentralisation is widely resisted, the UK government's attempts will be regarded as 'unconstitutional' by the devolved governments. In other words, the reason the first two mapping strategies are not only incoherent, but also unsustainable, is that they may lead to a border poll in Northern Ireland and a second referendum on Scottish Independence, the mere holding of which would threaten the integrity of the UK constitution. The value of the fourth mapping strategy, which I refer to as the *comparative method* and discuss in the next section, lies in transcending the binary stand-off between legality and constitutionality, and opting for a transformative constitutional paradigm that embraces, rather than exacerbates, the conflicting strands within the UK. Although the approach represents a clear break with constitutional theories of parliamentary sovereignty, it strives for continuity by developing existing constitutional practices.

### The comparative method and the transformative constitution

The fourth mapping strategy draws on comparative method, which is contextual, and a constitutional model that is transformative. Isolating doctrines, institutions or constitutional arrangements from the context within which they exist, as the 'universalist' and 'functionalist' methods do, symptomizes a flawed methodology.<sup>122</sup> The value of 'contextualism' lies in its recognition of constitutional law as 'deeply embedded in the institutional, doctrinal, social, and cultural contexts of each nation'.<sup>123</sup> Contextualism demands close and careful scrutiny of the constitutional and institutional structure of each legal system, which in turn creates significant

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<sup>122</sup> Tushnet, 'Some reflections on method in comparative constitutional law' 74.

<sup>123</sup> Tushnet, 'Some reflections on method in comparative constitutional law' 76.

obstacles for orthodox projects in comparative constitutional law that are based on stable concepts and rigorous models.

Like contextualism, Gary Jacobsohn's work focuses on fissures, which he views not as obstacles but as creating opportunities. His central concept of 'disharmony' creates the main impulse for changing constitutional identity.<sup>124</sup> He analyses tensions between commitments and conflicts, e.g. the USA's original commitment to universal natural rights and the conflict with slavery; or more generally a commitment to the constitution (e.g. civic identity, universal values, and eternity clauses) and conflict (e.g. private identity, local values, and mutation). This in turn runs into conflict with the mirror theory of law, i.e. the theory that the constitution should reflect the nation, and the nation should define itself on the basis of the constitution. Tushnet refers to such congruence as 'expressivism'<sup>125</sup> as it explains an ongoing commitment to basic structures, eternity clauses and universal principles. However, as Jacobsohn argues, the more interesting questions deal with constitutional modification (formal) and mutation (informal).

The comparative method constructively draws on contextualism and disharmony. Using the experience of the UK as a case in point, I argue that the historical commitment to the preservative model needs to be counter-balanced by more recent commitments to the transformative model. Concretely, I argue that the experience of power-sharing (devolution, EU law, Council of Europe) has implications for the meaning of the state, constitution, sovereignty, and democracy – in other words, the 'central icons' of the modern state's cultural representation.<sup>126</sup> The UK does not require a monolithic constitutional model that 'preserve[s] an idealized past', but instead a transformative constitutional model that '[points] the way

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<sup>124</sup> G.J. Jacobsohn, *Constitutional Identity* (Cambridge: Mass.: Harvard University Press, 2010) 335.

<sup>125</sup> Tushnet, 'Some reflections on method in comparative constitutional law' 68.

<sup>126</sup> G. Frankenberg, 'Comparative Constitutional Law', in M. Bussani and U. Mattei, *The Cambridge Companion to Comparative Law* (Cambridge: Cambridge University Press, 2012) 171.

toward an ideal future'.<sup>127</sup> Re-theorised as transformative, I argue that the model must reflect the state as divided; the constitution as transitional; sovereignty as an attribute of the state rather than Parliament; and democracy as conflicted.

The first step in this exercise is to recall that the UK does not fit the model of the nation-state (in the mould of Germany, Austria, USA, Australia, Argentina, Brazil) or the 'state-nation' (comparable to Switzerland, Canada, Belgium, Spain, India),<sup>128</sup> but rather forms a 'union state'<sup>129</sup> or 'state of unions'<sup>130</sup> that comprises England, Scotland, Wales, and a part of Ireland. Its citizens have long shared a high degree of positive identification with the union, and they have multiple, overlapping, and complementary identities. Michael Keating notes that 'in the United Kingdom the term "nation" is used indifferently for the whole state, for Britain (England, Scotland, and Wales) and for the component parts individually'.<sup>131</sup> Moreover, citizens enjoy a high level of trust in the UK's institutions, and they manifest a high degree of positive support for democracy among all the diverse groups of citizens in the country. Post-devolution, the UK might be described as a union state Mark II. Devolution has been asymmetric, which has been key to recognising divergent degrees of autonomy in its constituent parts, especially in Northern Ireland. The UK political system also accommodates (i) polity-wide parties and (ii) centric-regional parties, like the Scottish National Party, Plaid Cymru, or the Democratic Unionist Party that derive their voter-base solely from one regional political space. More recently, the UK has a good track-record of political integration of groups

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<sup>127</sup> Sunstein, *Designing Democracy* 67-8.

<sup>128</sup> A. Stepan et al, *Crafting State-Nations: India and other Multinational Democracies* (Baltimore: John Hopkins University Press, 2011) 7-8.

<sup>129</sup> S. Rokkan and D. Unwin, *The Politics of Territorial Identity: Studies in European Regionalism* (London: Sage, 1982) 11; I. McLean and A McMillan, *State of the Union* (Oxford: Oxford: University Press 2005), ch.1.

<sup>130</sup> J. Mitchell, *Devolution in the United Kingdom* (Manchester: Manchester University Press, 2009).

<sup>131</sup> M. Keating, *Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era* (Oxford: Oxford University Press, 2001) 26 and generally Ch.3.

without cultural assimilation. Education and self-government in Welsh are an obvious example.<sup>132</sup>

If the union state Mark II is the correct political form, it goes without saying that the interpretation of the 2016 referendum as a UK-wide decision to leave is problematic. It effectively views the numerical majority provided by the 53.4% of voters in England who voted Leave, as determinative. It ignores the differing territorial results in Scotland and Northern Ireland, which voted for the UK to remain in the EU, and in so doing violates the principle of formal co-equality among the four constituent parts of the UK. One solution might have been to apply a double majority provision, i.e. that the referendum should only have been carried if a majority of voters in all four regions respectively had given their backing. That argument was made, and lost, in Parliament.<sup>133</sup> However, the real significance of the 2016 referendum relates to the constitutional voice of the devolved institutions in decision-making and especially with respect to the nature of the EU withdrawal process. As McHarg and Mitchell rightly point out, ‘these are questions which would arise irrespective of whether there were divergent territorial majorities.’<sup>134</sup>

The second step is to produce a new imaginary of the constitution as transitional. On the one hand, the constitution accepts, converts, and institutionalises the changes made since 2016. On the other hand, it allows for compromises and inconsistencies that stem from the balancing act of reconciling self-rule and shared rule in a union state. Contested issues need to be juridicalised, suspended, or deferred. Internalising transformative constitutionalism is not an end in itself – it is a necessary response to the fact of plurality and diversity. The UK already

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<sup>132</sup> See the introductory text to the Welsh Language Act 1993, which establishes that ‘in the course of public business and the administration of justice, so far as is reasonably practicable, the Welsh and English languages are to be treated on the basis of equality.’

<sup>133</sup> A. McHarg and J. Mitchell, ‘Brexit and Scotland’, (2017) 19(3) *The British Journal of Politics and International Relations* 512-526, 518-520.

<sup>134</sup> McHarg and Mitchell, ‘Brexit and Scotland’ p.518.

has form on this matter. The legislation relating to devolution, or the European Communities Act 1972 or the Human Rights Act 1998 for that matter, already include provisions that aim to provide constitutional change while maintaining an image of preserving the constitutional status quo. Going back further, the Constitution of the Irish Free State 1922 also contained ambivalent and contradictory clauses. Irish Republicans successfully demanded that the Constitution express the doctrine of popular sovereignty, which it did in Article 2: ‘All powers of government and all authority, legislative, executive, and judicial, in Ireland are derived from the people of Ireland’. However, the UK insisted on provisions that would guarantee Irish loyalty to the Crown. The Irish Parliament (Oireachtas) consisted of the King and the Chamber of Deputies and the Senate (Article 12); and members of the Oireachtas had to swear an oath of allegiance to the monarch (Article 17).

There is a parallel between the Irish situation in 1922 and devolution today. The Irish Constitution was ‘both supreme and subordinate’.<sup>135</sup> Similarly, devolution is both permanent and precarious. But there is also a warning: the UK stopped legislating for the Free State with the passage of the Statute of Westminster 1931, which brought international recognition of the independent Irish state, and by the time the Constitution of Ireland was enacted in 1937 all references to the British Monarch were gone.<sup>136</sup> While Westminster may still lay a formal claim to sovereignty in the Northern Ireland Act 1998, the Scotland Act 2016, and the Wales Act 2017, the question is whether it can still unilaterally determine their constitutional status without the consent of its people. The answer, increasingly, appears to be No.<sup>137</sup>

‘In the Good Friday Agreement the governments of the UK and Ireland have agreed to vision their own geography, nation and identity in a contingent manner, in effect,

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<sup>135</sup> A.F. Saunders, ‘The Irish Constitution’ (1924) 18(2) *American Political Science Review* 340-345.

<sup>136</sup> H. Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge: Cambridge University Press, 2011) Ch.5.

<sup>137</sup> I. McLean and A. McMillan, *State of the Union* (Oxford: Oxford: University Press 2005) 241; Bogdanor, *New British Constitution* 112, 116.



making it solely dependent on the democratic desires of the inhabitants who live in Northern Ireland'.<sup>138</sup>

Admittedly, the UK may not be able to accommodate the diverse claims for constitutional recognition and self-rule in Scotland, Wales, and Northern Ireland. But, as McHarg and Mitchell conclude tantalisingly, it also does not 'have the political strength to resist them indefinitely'.<sup>139</sup>

The third requirement is for sovereignty to be de-institutionalised, juridicalised and elevated to the level of the state. This is a conceptual premise that runs through most of Western political philosophy from Jean Bodin and Thomas Hobbes to Hans Kelsen and Jürgen Habermas. Martin Loughlin refreshingly employs that understanding for the UK.

'Sovereignty is the name given to the supreme will of the state. In a juristic sense, the state is treated as a volitional entity (a juristic person), and sovereignty expresses its condition of legal omnipotence'.<sup>140</sup>

Located in the institution of Parliament, Diceyan sovereignty asks questions exemplified in our first two mapping strategies that lead directly into a binary cul-de-sac. Does the UK have a centralised or decentralised constitution? Could devolution be repealed by Parliament? Can the UK government legislate without the consent of the Scottish and Welsh legislatures? Diceyan sovereignty can only treat devolution as a foundational challenge: either the UK Parliament is absolutely sovereign and the devolved assemblies and administrations are 'constitutional phantoms';<sup>141</sup> or the devolved institutions are autonomous and the UK Parliament's authority

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<sup>138</sup> C. Campbell, F. Ní Aoláin, C. Harvey, 'The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland' (2003) 66 MLR 317, 332.

<sup>139</sup> McHarg and Mitchell, 'Brexit and Scotland' p.525.

<sup>140</sup> M. Loughlin, 'Constitutional Pluralism: An Oxymoron', in (2014) 3(1) *Global Constitutionalism* 9-30, 12.

<sup>141</sup> D. Marquand, 'England, Ireland, Scotland, Wales - time for all to jump in to the debate', [www.opendemocracy.net](http://www.opendemocracy.net), 22 June 2018.

has been substantively curtailed. For Loughlin, the answer is juridical: the state, not Parliament, is sovereign. For Neil MacCormick the answer is pluralist:

‘Where there is a plurality of institutional normative orders, each with a functioning constitution (at least in the sense of a body of higher-order norms establishing and conditioning relevant governmental powers), it is possible that each acknowledge the legitimacy of every other within its own sphere, while none asserts or acknowledges constitutional superiority over another.’<sup>142</sup>

For John Morison, the challenge is epistemological: how do political and sociological understandings of individual vs state, or national vs regional, inform and constitute the rise and reproduction of statehood?<sup>143</sup> If that is the right question, Diceyan sovereignty clearly operates on the wrong premise. The more we focus on Whitehall and Westminster, the less we understand about the actual operation of UK-wide governance structures, the complexities of which orthodox constitutional theory does not even begin to grasp. Loughlin’s juridical, MacCormick’s pluralist, and Morison’s ‘non-sovereign’ approach allow for a re-theorisation of the UK constitution by breaking with the UK’s historical obsession with institutionalised sovereignty.

Finally, Fionnuala Ní Aoláin and Colm Campbell identify two types of democracy. The first is an ideal-type liberal democracy, which is broadly peaceful and can point to popular consent with respect to the laws and institutions of the state.<sup>144</sup> The second is a ‘conflicted democracy’, which is characterised by deep-seated division within the polity, e.g. on ethnic, racial, religious, class, or ideological grounds, that has already caused or threatens political

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<sup>142</sup> MacCormick, *Questioning Sovereignty*, 104.

<sup>143</sup> Morison, “‘A Sort of Farewell’” 142.

<sup>144</sup> F. Ní Aoláin and C. Campbell, ‘The Paradox of Transition in Conflicted Democracies’, (2005) 27(1) *Human Rights Quarterly* 172-213, 183-4; 189.

violence.<sup>145</sup> A third category needs to be added for the situation of the UK. As noted in the description of the UK as a union state, agreement exists at the formal juridical level: all the national political actors agree on the idea of the union. But the socio-political reality in which politics and constitution are constructed is contested, and political actors are unable to give a coherent account on the institutional form that best articulates the form of constitutionalism most appropriate to the union. Centralisation and assimilation (the constitutional default that remained descriptively accurate until 1997) are today unworkable for political and increasingly constitutional reasons. The radical alternative, self-determination in the form of Irish reunification and Scottish independence, is undesirable in principle from the vantage point of any unionist UK government as well as politically perilous. As Keating notes, ‘in Northern Ireland, either absolute solution, assimilation into the United Kingdom or unification with the Republic of Ireland, would increase polarization’.<sup>146</sup> The social, political, and constitutional situation in Northern Ireland, Scotland, and even in Wales,<sup>147</sup> has arguably produced ‘a normative shift in the principles under-lying and legitimating the exercise of state power’.<sup>148</sup> Normative shifts are a defining feature of an unstable or transitioning regime, from which even established democracies are not immune.<sup>149</sup>

Out of the triangulation of the two unattractive options, assimilation and self-determination, arises the third political form of autonomy. Autonomy creates a viable compromise by harnessing or creating the institutional conditions for civic trust and civil recognition, which are the necessary conditions of reconciled and democratic polities.<sup>150</sup> Autonomy must be embedded within the broader context of constitutional design, and it must

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<sup>145</sup> Ní Aoláin and Campbell, ‘The Paradox of Transition in Conflicted Democracies’, 176.

<sup>146</sup> Keating, *Plurinational Democracy* 166.

<sup>147</sup> ‘Plaid Cymru “would hold Wales independence referendum”’, BBC News online, 24 March 2018.

<sup>148</sup> R.G. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000), 213.

<sup>149</sup> S. Winter, ‘Towards a Unified Theory of Transitional Justice’ (2013) 7 *International Journal of Transitional Justice* 224-244, 225.

<sup>150</sup> Pablo de Greiff, ‘A Normative Conception of Transitional Justice,’ (2010) 50(3) *Politorbis* 17–29.

respect the legally entrenched power to regional self-administration as well as the oversight, integrity, and success of the legal order of the overall state.<sup>151</sup> It recognises the overall state not as unitary, but as divided. And it associates democracy not with the popular sovereignty of ‘the people’, but conceives it as an aspirational concept that seeks to reconcile the conflicts that account for it as ‘conflicted’.

The UK is today, at least partially, engaged in a transitional politics that resembles Teitel’s ‘normative shift’. The role of Northern Ireland is instructive in this regard: either Northern Ireland is conceived ahistorically and *pars pro toto* as an integral part (‘as British as Finchley’, as PM Margaret Thatcher is supposed to have said), or it is treated as *sui generis* for which the Northern Ireland Act 1998 provides a local solution with no immediate ramifications for UK constitutional law. The claim that the changes since 1998 have been gradual, cumulative, contested, and are not yet complete does not rebut the ‘normative shift’ – in fact, it strengthens it. Incrementalism is central to transitional constitutions.<sup>152</sup> Unlike existing theories of the UK constitution (preservative, monolithic, enduring), transformative constitutionalism could accept historically entrenched provisions and treat other features as provisional. ‘Constitutionality’ returns as a concept, but this time it is contextual and contingent rather than foundational and preservative.<sup>153</sup>

## Conclusion

The UK constitution is at crossroads. The first two mapping strategies retain all the distinctive features of the preservative constitution. From a Diceyan perspective, or the Schmittian vantage point of the exception, the formal retention of parliamentary supremacy overrides all other decentralised constitutional developments. The quotidian vantage point, however, stresses the

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<sup>151</sup> M. Weller and S. Wolff, *Autonomy, Self-governance and Conflict Resolution: Innovative Approaches to Institutional Design in Divided Societies* (Abingdon: Routledge, 2005) at 3.

<sup>152</sup> Lerner, *Making Constitutions in Deeply Divided Societies*.

<sup>153</sup> Teitel 196

transformation of the UK constitution. The third strategy opts for a radical move (changing the rule of recognition) that seems unnecessary, accidental, and premature. The fourth strategy recognises not just regional autonomy at the periphery, but also modifications at the centre. In the context of Colombia, Carlos Bernal-Pulido refers to this as the ‘transitional dilemma’: ‘either the transition is successful but the constitution is not permanent any more, or the constitution maintains its permanent character but renders the transition impossible.’<sup>154</sup> If the UK constitution is permanent and preservative, then the devolution efforts since 1998 have at best only been successful diplomatically. If, however, they have occurred within, and brought about changes to, a transitional constitution, then a new constitutional model is needed to classify and categorise those changes. I argue in this article that a transformative constitutional model is more suitable for the UK than a return to the Westminster model or its replacement by a federal model.

What are the constitutional choices for the UK? The answer is brutal: transform or be doomed. ‘Taking back control’, as the campaigners to leave the EU promised, and returning to the status quo ante are no longer possibilities. Federalism might be the more clear-cut solution, but it will require not just formal-juridical but also concrete agreement on the final ‘settlement’ of powers, competences, and jurisdiction. There is no evidence that the constituent parts of the UK could agree to such a settlement. In the absence of political will for full scale reform, the fourth mapping strategy offers a better understanding of constitutional reality in the UK: it reconceives sovereignty for the state, converts institutional changes into the transitional constitution, recognises democracy as conflicted, and accommodates popular sovereignty in the regions. Without reform at the centre, the biggest constitutional changes will continue to manifest themselves in the constitutional laboratories of the UK: Scotland, Wales, Northern

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<sup>154</sup> Carlos Bernal-Pulido, ‘Transitional justice within the framework of a permanent constitution: the case study of the legal framework for peace in Colombia’ (2014) 3(4) *Cambridge Journal of International and Comparative Law* 1136-1163.

Ireland, as well as cities and county-regions.<sup>155</sup> Without transformation, the threat to the sovereignty of UK stems not from an external reference point, such as the ‘tidal wave’ of European law,<sup>156</sup> but from sectional strife and constitutional collapse.

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<sup>155</sup> Cities and Local Government Devolution Act 2016.

<sup>156</sup> Lord Denning, *Introduction to the European Court of Justice: Judges or Policy Makers?* (London: Bruges Group, 1990).