

# Scotland has voted 'No'. What next for the UK constitution?

 [blogs.lse.ac.uk/politicsandpolicy/scotland-has-voted-no-what-next-for-the-uk-constitution/](http://blogs.lse.ac.uk/politicsandpolicy/scotland-has-voted-no-what-next-for-the-uk-constitution/)

9/22/2014

*The UK constitution does not currently conform to any particular, identifiable model. Nor would it do were the constitutional reforms currently being proposed by the Government and various other parties come to pass. For example it would not be characterisable either as a federal system or as a unitary state. Rather, the constitution would remain messy and incomparable. But these characteristics are not necessarily negative ones, writes [Mark Elliott](#).*



After a very long — and at times electrifying — campaign, a modest but decisive majority of those who participated in the referendum on Scottish independence have voted 'No'. In one sense, this is the end of the process — even if, bearing in mind the main UK parties' still-to-be-fulfilled promises about further [devolution](#), it is only the beginning of the end. In another sense, however, it might turn out to be only the end of the beginning.

Had Scotland voted 'Yes', this would have represented a constitutional shock of seismic proportions, and would quite conceivably have resulted in major constitutional changes in the remainder of the UK. It is less certain that such changes will follow the 'No' vote. Nevertheless, it is likely that the 'No' vote will leave at least some sort of — and potentially a very significant — constitutional legacy thanks to the conferral upon the Scottish Parliament of the [additional powers promised by the main UK parties](#) during the final weeks of the independence campaign.

It is not, however, obvious that the changes provoked by the referendum will — or should — be confined to the beefing up of the existing devolution system. As the debate moves on from the falsely binary form — independence or Union? — it took during the campaign, a more searching and granular debate can and will succeed it. ("Falsely" binary because, as I have [argued before](#), both independence and Union are highly catholic concepts that bear a range of meanings and are capable of shading into one another.) That debate will concern not the apparently extreme options that were on offer to the people of Scotland, but the constitutional smorgasbord of possibilities that arise when we consider what kind of Union should exist, as we move forward, between England, Northern Ireland, Scotland and Wales.

## Federalism?

The obvious counterpoint to the present system is a federal one. Some — including [Lady Hale JSC](#) — have gone so far as to argue that the UK is already a federal system. This is incorrect as a matter of technical constitutional law, since the principal hallmarks of a federal system are absent from the UK. The system of devolution is asymmetrical, with different parts of the UK having different types and amounts of power (and, in England's case, none); the relationship between the central government and each of the four home nations is different; and the legal power vested in devolved institutions is insecure in the sense that it flows from UK legislation that remains within the legal control of the Westminster Parliament, as distinct from being enshrined in a written constitution that is immune from unilateral amendment by a single institution.

However, recognising that the UK does not conform to the technical paradigm of the federal model gets us only so far — not least because, like independence and Union, federalism is a concept whose elasticity tells against over-emphasis of technicality. Demonstrating an admirable grasp of such matters, former Prime Minister Gordon Brown, in [an article in the \*New Statesman\* in June 2014](#), points out that the UK's constitutional architecture increasingly tends towards, even though it does not fully conform to, a federal model. For example: in theory, the present system depends upon the Westminster Parliament's ongoing acquiescence in the autonomy of devolved institutions, because, in theory, Westminster could unilaterally override legislation enacted by — or even unilaterally change, diminish or abolish the powers of — such institutions. However, the theoretical position described by the doctrine of the sovereignty of the Westminster Parliament is radically transformed when viewed through the prism of political

reality. From this perspective, the true measure of constitutional security enjoyed by devolved institutions in the UK is comparable to that which is enjoyed by their counterparts operating elsewhere under federal arrangements.

Yet for all that the current arrangements may disclose traces of federalism, they also remain clearly distinguishable from that model. Its adoption would entail major constitutional innovation, bearing in mind that the vast majority of the country — i.e. England — is currently exempt entirely from the devolution scheme. A genuinely federal model would involve the creation of exclusively English institutions sitting — alongside their equivalents in the other three home nations — under the umbrella of pan-UK federal institutions. This would represent an enormous constitutional change; and while the scale of that change is not in itself a good reason for rejecting it, such a fundamental alteration to the constitutional fabric ought not to be undertaken lightly.

Whether a federal system in the UK would be appropriate must be considered holistically. It would be blinkered to advocate its adoption merely because it would be in the perceived interests of one or some — as opposed to all — parts of the country. By definition, a federal model would be all-encompassing, and would change the basis of the relationship between all four home nations, as well as the relationship between those nations and central institutions of the UK state. But in spite — or perhaps because — of such radical implications, talk of federalism is on the rise as we emerge, blinking, from the Scottish independence debate.

This is likely so for two reasons. From the perspective of the devolved nations, federalism offers a degree of lock-in to the decentralisation of power which outstrips that which can be supplied by mere devolution. And although, as noted above, the constitutional security enjoyed by devolved institutions is considerable under the current system, a federal model would (among other things) supply greater and more-formal guarantees concerning both the balance of power and (just as importantly) the process by which any further alterations to that balance would fall be negotiated and secured. Meanwhile, from the perspective of England, federalism offers the prospect of a form of “home rule” that would address concerns about the increasingly anomalous lopsidedness of the existing constitutional architecture. Viewed in this way, a shift to a federal model might facilitate the containment of English nationalist tendencies, which are certain to be awakened in the aftermath of the Scottish independence debate.

## England

The position of England cannot be considered in isolation — any change to its position would necessarily have implications for the situation of the other home nations — but it is increasingly obvious that it must be confronted head-on. England has long remained (as Richard Rawlings pithily puts it) “the spectre at the [devolution] feast” because its sheer political, numerical and economic weight has generally been judged to exempt it from the case in favour of devolution. A very large part of that case has always been that Scotland, Wales and Northern Ireland should be afforded an opportunity to move out of the shadow cast by England by virtue of its size, thereby allowing those parts of the country to live out their distinct political, cultural and economic identities. (There are, it goes without saying, other layers of complexity that apply in the particular case of Northern Ireland.)

On this view, to propose the extension of the devolution settlement to England would be nonsensical: it hardly needs to step away from its own shadow. However, the position is surely more complex than this. Even if the initial impetus for devolution is understood in the way sketched above, it does not follow that — now that there is devolution elsewhere — devolution remains inapposite in England. It is one thing to argue that the arguments forming the initial impetus for devolution had particular purchase in relation to the three smaller home nations; it is another thing to argue that the inapplicability of those arguments to England ought permanently to exclude it from any recognition within the devolution settlement. What, then, might be the positive arguments in favour of revisiting England’s position? Two are particularly pertinent.

The first argument concerns fairness; it is an old one, but it is no less compelling for that. The so-called [West Lothian problem](#) — which concerns the capacity of Westminster MPs representing non-English constituencies to legislate on matters affecting only England — is an increasingly pressing one. At its heart lies a basic unfairness stemming from an absence of reciprocity: while English MPs have renounced involvement in whole swathes of

devolved matters, MPs representing constituencies located in devolved nations remain capable of influencing, sometimes decisively, the passage of legislation affecting only England.

Moreover, the electoral-college function served by the Westminster Parliament — its political composition determines which party or parties form the UK Government — means that the West Lothian problem is capable of distorting the political make-up of what is, for many purposes, the English government. Indeed, in 2010, the Conservative Party could comfortably have formed a single-party majority government had only English constituencies been taken into account.

It was always only matter of time before this issue is transformed from one that concerns constitutional anoraks into one that impinges significantly upon popular consciousness and stokes resentment. And that time has very likely now arrived. As the competence of devolved institutions expands — resulting in commensurate diminishment of Westminster's involvement in matters affecting the devolved nations — so the anomalistic nature of the involvement of MPs from outside England in purely English affairs becomes more glaring. Indeed, it is highly unlikely that promises of further powers for Edinburgh will be politically deliverable unless accompanied by a resolution of the West Lothian problem.

The second argument concerns identity. One of the purposes of devolution is to acknowledge and to give institutional life to differential national identities within the UK. Do existing arrangements adequately accommodate this need as it pertains to England? One response to this question is (as mentioned above) to argue that English national identity receives adequate expression thanks to the size of England coupled with its (ambivalent) representation within the pan-UK Parliament and Government. However, whether this is so depends, at least in part, on how well UK institutions are able to perform their secondary function as English institutions (a question that takes us back, at least in part, to the West Lothian problem). A further issue, however, is whether the focus of this debate should be an undifferentiated English identity or multiple English identities

— and this, in turn, invites questions about the extent to which we should be concerned with England's place in the Union, and the extent to which we should instead be concerned with the place of English regions within England. A complex set of issues — encompassing not only devolution to but also devolution within England — therefore arises.

Big-bang constitutionalism — or a typically British response?

Where, then, does this leave us? A dramatic response would be a form of “big-bang constitutionalism” involving a fundamental rethink about how the constitution works, how the four home nations relate to one another, how they relate to the UK tier of government, and where and how more-local levels of government should fit in.

The upshot might be a genuinely federal model involving the creation of an English Parliament and an English Government invested with powers similar to those wielded in Edinburgh, coupled with confining the Westminster Parliament and the UK Government to matters that need to be dealt with on a pan-UK basis. The adoption of such a system would necessarily entail the enactment of a written constitution enjoying a hierarchically superior legal status, so as to render the balance of power between the different tiers of authority constitutionally secure and impervious to unilateral disturbance — the absence of such characteristics being incompatible with a federal model. But while a “federal” system is [increasingly in the contemplation](#) of those arguing the case for Scotland to remain a UK with a reimagined constitution, it is not at all clear that the language of federalism is being used in a technical sense as opposed to being a rhetorical flourish. It is also widely argued that a truly, technically federal system in the UK would be highly problematic given that one of the four sub-federal units, i.e. England, would be so large and dominant, accounting for around 85% of the population. As Professor Vernon Bogdanor [recently pointed out in \*The Times\* \(£\)](#):

there is no federal system in the world in which one unit represents more than 80 per cent of the population. The nearest equivalent is Canada, where 35 per cent of the population live in Ontario. Federations in which the largest

unit dominated, such as the USSR, Czechoslovakia and Yugoslavia, have not been successful.

A second possibility would be to roll out devolution to England, too. This would stop short of a federal model, since the new English (like the existing devolved) institutions would be creatures of the Westminster Parliament, lacking the constitutional security inherent in federalism. Such a system would also remain distinguishable from federalism because the devolved institutions in each part of the country would continue to wield different types and amounts of authority. As such, a system encompassing devolution in England would — by definition — not amount to full-blooded adoption of a federal system.

It would, however, represent a major constitutional change — and, as such, it would run up against much the same problem as the one cited by Bogdanor above: namely, England would acquire a distinctive institutional machinery that would (on the argument adopted by Bogdanor and others) risk destabilising the Union thanks to England's relative size. We should not, however, adopt this argument unthinkingly, given the position at which we have arrived today. In its present condition, the Union is hardly in a particularly stable condition. It is therefore at least worth balancing any risk of destabilisation against the possibility that creating English institutions might in fact exert a stabilising influence, by enabling English nationalist impulses — which, as surely as night follows day, will be ignited by perceptions that Scotland is being accorded preferential treatment through the devolution of additional powers — to be accommodated within the Union.

A third possibility — and by far the most likely one, bearing in mind [the Prime Minister's statement of Friday morning](#) — is an incremental, as distinct from a big-bang, approach. Such an approach would be of a piece with the incrementalist, pragmatic tradition that is arguably the defining characteristic of British constitutionalism. This tradition treats constitutional reform as an ongoing process — one that addresses challenges as they arise, rather than undertaking holistic reimaginings of the system. If this tradition prevails, then a Scottish “no” vote — and the associated conferral upon Scotland of additional powers — will likely trigger a series of consequences.

First, the possibility of conferring further powers upon devolved institutions elsewhere in the UK will arise. If Scotland is given additional powers in the aftermath of the “no” vote, it is inevitable that Northern Ireland and Wales will agitate for equivalent treatment.

Second, the West Lothian problem will be confronted, whether in [the way proposed by the McKay Commission](#) or otherwise, whilst stopping short of the more-radical option of creating wholly distinct (either federal or devolved) English institutions. Of course, as those who have wrestled with the West Lothian problem well know, there are no easy answers to it. Even curtailing the capacity of non-English MPs to influence English law is not a magic bullet, not least because this creates a further problem known as the “shifting majority”, the difficulty being that an administration formed from a party with a pan-UK majority would be unable to secure its English legislative programme if it were to lack a majority of English MPs. Indeed, the shifting-majority problem is a good illustration of the problems invited by piecemeal, as opposed to holistic, constitutional reform: pull at one loose thread, and a wider unravelling may follow.

Once — as, at some point, there inevitably will be — a UK government that commands a majority in the House of Commons thanks only to the ballast accorded by MPs from outside England, this problem will become all too apparent. It will strike at the heart of the Westminster model, according to which the government of the day commands — and must command — a majority in the House. In contrast, once the West Lothian Question is resolved, the possibility arises of a UK government being incapable of securing a majority in the House of Commons on the vast majority of the — English — legislative business transacted there. While, therefore, the notion of “English votes for English laws” may sound as modest as it is sensible, it opens up a new can of worms that may be hard to contain. In particular, if the resolution of the West Lothian Question results in a de facto English Parliament within the Westminster Parliament, it will be hard to resist some degree of reform on the executive plane. The logic of an (effectively) English Parliament may, in other words, dictate the establishment of (in some form) an English government. A real possibility, therefore, is that tackling the West Lothian Question will — unintentionally — turn out to be the mere precursor to more far-reaching institutional reform, the logical endpoint of which is something

more closely akin to English devolution of full federalism.

Third, even if reticence around pan-England institutions closes off discussion about devolution to England, it is likely that greater attention will be given to devolution within England: that is, devolution not to all-England institutions but to regional English institutions. Indeed, [Nick Clegg](#) and [Ed Miliband](#) have already said as much. Such proposals fell spectacularly flat when proposed in north-east England a decade ago, but that is not to say that different proposals would also fail. However, whether devolution within (rather than to) England is a fitting response to the challenges arising from the Scottish referendum is another question. The answer to it turns on (among other things) the prevailing sense (or senses) of belonging that operate in England: do those living in England identify with — and wish to be represented by — institutions that reflect an undifferentiated notion of Englishness, or would they identify more readily with institutions standing for particular sub-strands of English identity?

Fourth, the constitutional position of devolved institutions in Scotland, Wales and Northern Ireland will become increasingly entrenched — not by dint of legal security wrought through the adoption of a technically federal model and the disavowal of Westminster's sovereignty which that would entail — but thanks to the ongoing solidification of constitutional conventions that render unilateral interference by London in devolved affairs every bit as inconceivable as central incursions into local matters within a federal system.

These incremental steps would not amount to wholesale constitutional reform, but they form part of a narrative that it has been possible to discern for some time: of a system that is moving irrevocably away from the centralist model that was once said to characterise the UK constitution, and towards a system that, while not federal in the classical sense, is manifestly not unitary in nature.

Just as it does not now, so the UK constitution would not, were these things to come to pass, conform to any particular, identifiable model. It would not, for instance, be neatly characterisable as a federal system; nor could it be described as a unitary state. Rather, the constitution would remain — as it has been for centuries — messy and incomparable. But these characteristics are not necessarily negative ones. Untidiness is a price that is arguably worth paying for a system that exhibits a degree of flexibility, albeit that the practically irreversible dispersal of power that devolution is accomplishing inserts brakes upon that flexibility which are novel in this country. Nor is uniqueness necessarily something to be disparaged. That the UK constitution compares to no other should not inevitably be taken to mean that there is something defective about it. Rather, it is testament to the uniqueness of our epic constitutional story. The 'No' vote in Scotland means that — at least for the foreseeable future — that story will endure. Nevertheless, it is hard to deny that — in ways that are, in the immediate aftermath of the referendum, difficult to forecast with absolute certainty — the 'No' vote will be shown by history to have marked a profound turning-point in that story.

*Note: This article gives the views of the author, and not the position of the British Politics and Policy blog, nor of the London School of Economics. Please read our [comments policy](#) before posting. Featured image credit: [Berit Watkin](#) CC BY 2.0*

## About the Author

[Mark Elliott](#) is a Reader in Public Law at the University of Cambridge. This post was first published on his blog, [Public Law for Everyone](#). Mark can be found on Twitter as [@DrMarkElliott](#).

