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Beyond The Unitary Conception Of The United Kingdom Constitution

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Through numerous editions our constitutional law textbooks provide a familiar thumbnail sketch of the British constitution. [1] Tested against certain basic classificatory criteria, the British constitution is revealed as unwritten, flexible, monarchical, parliamentary and unitary in character. At a slightly lower level of abstraction, the British constitution is viewed as having other distinguishing historical and institutional features, including an emphasis upon continuity of development, conventions in lieu of higher law, the absence of a constitutional court, the residual protection of civil liberties, a majority voting system and a bicameral legislature with an unelected upper chamber.

It is a peculiar feature of our constitutional self-understanding that we tend to make either too much or too little of the coincidence of these central features. It is perhaps even more peculiar that these opposite attitudes are connected to one and the same defining trait of our constitutional tradition, namely its unwritten – or non-documentary[2] character. This unwritten character, it has

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[1] See e.g., S. de Smith and R. Brazier, Constitutional and Administrative Law (8th ed., Penguin, London, 1998), Chap. 1; A.W. Bradley and K.D. Ewing, Constitutional and Administrative Law (12th ed., Longman, London, 1997), Chap. 1; E. Barendt, An Introduction to Constitutional Law, (Oxford University Press, 1998), Chap. 1.

[2] C. R. Munro, Studies in Constitutional Law, (2nd ed., Butterworths, London, 1999), p. 3.

been argued, is closely bound up with a deep-rooted constitutional sensibility of "pragmatic empiricism"[3] a conservative, practical, problem-oriented and factually-grounded approach to constitutional statecraft.

On the one hand, this underscores a distinctively modest and atomistic attitude towards our constitutional arrangements and their reform. Within this approach, which is the inarticulate major premise of much constitutional scholarship and practice, constitutional problems are defined discretely and solutions are found incrementally. There is no overall telos, no text as the product of or to serve as the inspiration for a grand constitutional vision. The textbook characterisation of the main features of the constitution, then, is merely a descriptive device – a modest pedagogic tool, rather than an interpretation of the deep legal structure of the polity. The constitutional legacy, to adopt a metaphor from European constitutionalism, is viewed as one "of bits and pieces"[4] with no strong cohering idea or ideas to confer privileged status on any particular bit or piece, to join the various fragments together, or to command, suggest or exclude particular solutions to particular problems.

On the other hand, the very same unwritten characteristic and the accompanying attitude of pragmatism are perceived and portrayed by some, not as the explanation for the lack of a holistic constitutional identity, but as the defining feature of such an identity. On this alternative view, the character of the constitution as evolved rather than scripted is the sign of the presence of an underlying coherence, not of its absence. Like the society from which it emerges, a constitution is seen as a natural, organic product of slow historical growth. Its authority and integrity rest upon its traditional roots, on the sanctity of immemorial tradition – or, more

[3] C. McCrudden, "Northern Ireland and the British Constitution," in J. Jowell and D. Oliver (eds), The Changing Constitution, (3rd ed., Oxford University Press, 1994) 323, at p. 326.
[4] D. Curtin, "The Constitutional Structure of the Union; A Europe of Bits and Pieces" (1993) 30 C.M.L.R. 17.

prosaically, on having stood the test of time – rather than upon the pretensions of comprehensive planning and a set blueprint. This more holistic approach has a distinct philosophical pedigree,[5] but it also has an important ideological dimension and manifestation – the first refuge of the politician seeking to defend the distinctive constitutional heritage against the forces of reform.

Both approaches miss something important in their understanding of constitutional dynamics and of the appropriateness and strategies of constitutional reform. The atomistic approach does not take the interconnectedness of the constitutional tradition seriously enough. The absence of an entrenched constitutional framework is seen to provide carte blanche for constitutional reform in whatever direction, at whichever pace and on whatever scale is deemed expedient. It is assumed that as our constitutional law has evolved in an incremental, piecemeal fashion, an equally incremental approach to its reform will not be at variance with its underlying structure; that the separately conceived parts are capable of separate revision.[6] On this view, there are no structural implications, no perverse consequences for the broader constitutional "power map"[7] to be concerned with when adjusting or transforming any local feature.

But this atomistic approach confuses intentions with effects. There may be no rational teleology underpinning our unwritten constitution, yet this has not prevented its various doctrines and institutions from becoming tightly intertwined over the long course of history. To say this is

[5] See in particular Martin Loughlin's discussion of the normativist tradition of public law thought in the U.K. particularly its conservative dimension inspired by the political theory of Michael Oakeshott; Public Law and Political Theory, (Oxford University Press, 1992), Chap. 5.

[6] N. Walker, "Constitutional Reform in a Cold Climate: Reflections on the White Paper and Referendum on Scotland's Parliament", in A. Tomkins (ed.) Devolution and the British Constitution, (Key Haven, London, 1998) 61, at pp. 80-81.

[7] I. D. Duchacek, Power Maps, Comparative Politics of Constitutions (Santa Barbara, Cal., and Oxford, 1973).

not to credit the evolutionary process with some mystical guiding intelligence or to romanticise our received constitution as a repository of timeless wisdom, but merely to acknowledge certain basic insights which overlap a broad range of historical sociologies. Weber, for example spoke of the "elective affinity" of social phenomena which co-exist over long historical periods.[8] Similar understandings underpin concepts as different as the "decisionless decisions" of Bachrach and Baratz's theory of political power[9] and the "self-referentiality" which lies at the heart of modern systems theory.[10] In all cases what is acknowledged is that ideas and institutions, often of quite diverse origins, can become closely mutually adjusted and accommodated over a period of time, so that one aspect of the gradually interwoven structure or system can no longer sensibly be assessed discretely or its reform contemplated in isolation.

The holistic approach, on the other hand, may err in the opposite direction. Here coherence tends to be viewed as very deep, even impenetrable. The problem then is that the constitutional tradition becomes untouchable, in either sense of the word. Either it is treated as an object of reverence, not to be tampered with for fear that the entire richly-textured, multi-layered structure begins to unravel, or, if viewed unfavourably, it is treated as beyond redemption, as incapable of meaningful reform, and so fit only to be discarded and replaced.

In the era of New Labour, with a constitutional reform agenda unarguably more far-reaching than followed by

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[8] M. Weber, The Protestant Ethic and the Spirit of Capitalism (Basic Books, New York, 1958).
[9] P. Bachrach and M. S. Baratz, "Two Faces of Power" in R. Bell et al. (eds.) Political Power: A Reader in Theory and Research (Free Press, New York, 1969) 94.
[10] See e.g. G. Teubner, Law as an Autopoietic System (Blackwell, Oxford, 1993); N. Luhmann, The Differentiation of Society (Columbia University Press, New York, 1975); E. A. Christodoulidis, Law and Reflexive Politics (Kluwer, Dordrecht, 1998).

any other government of the twentieth century,[11] these observations have a particular resonance. Many of the main features of the British constitution listed above are subject to review or reform. As is well-known, the reform programme includes – on the point of implementation – the introduction of a fundamental rights culture through the domestic recognition of the European Convention of Human Rights,[12] and – in the pipeline – the restructuring of the second chamber, electoral reform and freedom of information.[13] And standing out from these themes, as both the trigger for the wider reform agenda and its most diligently pursued item, has been "the rolling programme" of devolution, already delivered at the executive level to Wales and at legislative and executive levels to Scotland and Northern Ireland, and a longer-term and as yet imprecise possibility for the English regions.[14] In the politics of the reform process, the range of different strategic attitudes and dispositions discussed above may be observed.

Dissent has been heard or caution advised by holists of both conservative and radical bent.[15] For its part, New

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[11] Indeed, according to one commentator, any government since Oliver Cromwell: J. Morison, "The Case Against Constitutional Reform" (1998) 25 J. Law & Soc. 510.

[12] Human Rights Act 1998.

[13] For an overview of the programme see: R. Hazell, "Reinventing the Constitution: Can the State Survive?" [1999] P.L. 84; R. Hazell (ed.) Constitutional Futures: A History of the Next Ten Years (Oxford University Press, 1999); R. Blackburn and R. Plant (eds.), Constitutional Reform: The Labour Government's Constitutional Reform Agenda (Longman, London, 1999).

[14] See e.g. R. Brazier, "The Constitution of the United Kingdom" (1999) 58 C.L.J. 96; R. Hazell and B. O'Leary, "A Rolling Programme of Devolution: Slippery Slope or Safeguard of the Union?" in R. Hazell (ed.) bp. cit., n. 13; C. Munro, op. cit., n. 2, Chap. 2; H. Elcock and M. Keating (eds.), Remaking the Union: Devolution and British Politics in the 1990s (Frank Cass, London, 1998); V. Bogdanor, Devolution in the United Kingdom, (Oxford University Press, 1999); M. O'Neill, "Great Britain: From Dicey to Devolution" (2000) 53 Parl. Aff. 69.

[15] On the pre-election warnings against constitutional reform of John Major – whose successor William Hague's public pronouncements continue to endorse conservative holism – see A. Barnett, This Time:

Labour has sometimes appeared to take an unduly atomistic approach, although as the programme has gained momentum they have seemed more ready to countenance the bigger picture, more adept at "joined-up" constitutional thinking.[16]

In this article I do not propose to track the reform strategies preferred or pursued by various parties and interests. Nor do I propose to pursue the more obvious interconnections between different parts of the reform agenda. Clearly, for example, at the level of micro-strategy there are countless links between the devolution programme on the one hand and the fate of the upper house, the shape of the new voting system, and the implementation of the new rights and freedom of information agendas on the other, in the sense that the operating procedures, impact and inter-institutional relations of the devolved bodies cannot be fully fleshed out and assessed until these other reforms are also in place and bedded down.[17]

Instead, I am concerned with a deeper and more challenging question of constitutional identity and integrity – of structural wholeness and interconnectedness. I am concerned with the meaning and with the resilience of a feature of the British constitution, namely its unitary quality, which, from a holistic perspective, is viewed as of central significance in shaping the character of the constitution as a whole and in setting limits on what norms it might promote and what goals it might achieve. The unitary conception is unavoidably central to any strongly holistic perspective because it is parasitic upon the doctrine of parliamentary sovereignty, which, in

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Our Constitutional Revolution, (Vintage, London, 1997), Chap. 1. The Liberal Democrats, on the other hand, from a radically holistic standpoint, have tended to be critical of New Labour's reform agenda as insufficiently comprehensive and systematic; see N. Walker, op. cit., n. 6, pp. 75-87.

[16] R. Hazell, op. cit., n. 13, "Reinventing the Constitution".

[17] ibid.

formal terms at least, is the "top rule"[18] of the constitution. That is to say, the unitary idea of a constitutional order with a single, unrivalled agency or institutional complex of ultimate legal competence in the sphere of government is a necessary structural inference from a fundamental "rule of recognition"[19] which places that single agency or institutional complex, the Queen in Parliament, in a position of unimpeachable authority.[20] As well as being central to any sense of constitutional coherence and integrity, the fate of the unitary notion is highly topical, since it is also the fundamental of our constitution most directly addressed and challenged by the devolution programme which, as noted above, is at the heart of the reform agenda.

An inquiry into the unitary conception, therefore, provides the best and most ambitious test of constitutional holism. It allows us to explore how far we are permitted to go beyond an atomism which sees only an undifferentiated constitutional flatland in which the unitary theme has no special prominence or coherent links with other ideas and institutions, and towards a holism which sees the unitary conception as an integral part of a whole which is greater than the sum of its parts, none of which can be meaningfully reformed except through a transformation of the whole, including the unitary conception itself.

The answers arrived at suggest only a modest role for the unitary conception as a cohering idea, and thus only a

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[18] H. W. R. Wade, "The Basis of Legal Sovereignty" [1955] C.L.J. 172 at 187-89.

[19] H. L. A. Hart, The Concept of Law (2nd ed., Oxford University Press, 1994), Chaps. 6 and 10.

[20] The converse does not, however, hold. That is to say, it is possible to have a unitary constitutional order without a top rule which vests power in a single agency or institutional complex. Instead, as Wheare points out, the top rule might dictate the supremacy of a written constitution, which in turn might allocate ultimate legislative and governmental power to a single agency or institutional complex. (K. C. Wheare, Modern Constitutions (2nd ed., Oxford University Press, 1966), pp. 19-24.

modest sense of holism, of structural interconnectedness. It is argued, first, that the unitary conception of the constitution is actually a very flexible notion, capable of embracing a wide range of different constitutional structures and visions.[21] Secondly, however, although within a particular field there are certain fundamental limits set by the unitary conception, beyond which it is difficult to proceed short of the kind of structural transformation of the constitution of the kind anticipated – whether in hope or trepidation – from a holistic perspective, even these fundamental limits are less constraining than is often assumed. Thirdly, in any event this structural overhaul is unlikely to take place, in large part because of the development of multi-dimensionality within the sphere of public law. Where once there prevailed a monist conception of public law, of state constitutions as the single and largely unrivalled sources of public legal authority within the world order, in the post-Westphalian order the state is increasingly in competition with other authoritative sites. This more pluralist environment militates against the transformation and transcendence of the unitary conception of the state in a double sense; in strategic terms it makes such a transformation more difficult to deliver, but also in normative terms it makes such a goal less directly significant and less immediately relevant to the fate of communities. The unitary conception of political community can now be transcended, not by transcending the unitary conception of the constitutional state, but by transcending the constitutional state itself. Or, in other terms, the new pluralism of legal orders to some extent compensates for the limits of pluralism within a particular

[21] Indeed, although Wheare's discussion of the subject has been influential in the modern acceptance of the centrality of the unitary theme to an analysis of the U.K. constitution, he himself was at pains to emphasise its flexibility: "The class of unitary Constitutions is so wide and varied, the degree and method of decentralisation in practice in unitary Constitutions is so diverse, that a good deal more must be known about a Constitution described as 'unitary' before we can feel that we know what it is like" (op. cit. n. 20 at p. 21).

legal order. And so, finally, the answer to the question posed in the title of the article is no and yes: No, in the sense that the legal limits to the unitary conception of the constitution remain securely in place notwithstanding the force of devolved government and other manifestations of plural authority. Yes, in the sense that the unitary conception of the constitution has always been a less eloquent and influential statement of the overall character of the constitution than has been assumed or credited by many, and in any case it is becoming a more and more partial understanding of the pattern of public authority as it affects the United Kingdom, its various parts, and the wider global environment and spheres of authority with which they connect.

The flexibility of the unitary conception

In order to account for the flexibility of the unitary constitutional conception of the British state the following steps are required. In the first place, it is argued, there are two separate discourses associated with the unitary conception of the British state, one narrowly legal/constitutional and the other more broadly political. Secondly, the unitary state, as defined in legal terms, can accommodate much of what is excluded by a unitary political discourse but embraced by political pluralism.

Let us begin by distinguishing the legal conception and the political conception of unitary order. Partly, and most obviously, this is about different types of power associated with the two discourses. The legal conception concerns the type of order and of authority that may be generated through the specialised form of "institutional normative order"[22] associated with law. The political conception of unitary order, on the other hand, concerns de facto political power in all its forms and manifestations and the type of order that may be produced through the

[22] N. MacCormick, Questioning Sovereignty: Law, State and Nation in the European Commonwealth (Oxford University Press, 1999) Chap. 1.

operation of that power in its various forms and manifestations.

Associated with these different power claims, however, the legal and political conceptions of unitary order may also be distinguished in terms of their overall discursive field. Each discourse involves counterposing unitary order to a different conceptual opposite, and so the legal and political conceptions of unitary order may be distinguished by reference to their particular relationships to these different conceptual opposites. Within legal discourse, the unitary constitutional state is opposed to the state in which ultimate legal authority is not vested in any single institutional centre, a category typically limited in the relevant literature to the federal constitutional state.[23] While it is arguable that this limitation may be unnecessarily restrictive, [24] the federal state is certainly by

[23] See e.g. De Smith and Brazier, op. cit., n. 1 at p. 12; Barendt, op. cit., n. 1 at p. 10; Wheare, op. cit., n. 20 at pp. 19-24.

[24] Strictly speaking, since the relevant literature sets up unitary and federal as conceptual opposites with mutually dependent meanings, logic precludes the search for non-unitary forms of order other than federal. However, if we are interested in constitutional forms which challenge unitary order in a manner or on a scale similar to federalism, then a broader picture begins to emerge. For example, an entrenched and justiciable charter of rights may pose a challenge to and impose limits upon the ultimate authority of any single complex of legislative and executive power, as in Ireland. Equally, a "diarchical" constitutional arrangement in which primary law-making powers are divided between the legislative and the executive, as in France, involves a challenge to unitary order, more broadly defined. (De Smith and Brazier, op. cit., n. 1. pp. 12-13.) Even strong versions of the separation of powers doctrine, as in the United States, pose a challenge to unitary order, although in this case legislative competence is not directly challenged but balanced by the other organs and functions of government. Of course, if this broader, multi-faceted, notion of non-unitary order is developed, the U.K. constitution still falls within the unitary definition. Indeed, the top rule of parliamentary sovereignty necessarily rules out rights entrenchment, diarchical division of legislative authority or rigid separation of powers just as it rules out federalism, since all such arrangements presuppose rules of institutional design which are not within the control of Parliament. However, for the sake of argument, even if this more inclusive definition of unitary legal order is conceded, it does not weaken my case for the inherent flexibility of the unitary form. Rather, it simply

far the most significant manifestation of a legally non-unitary state, and is thus the primary focus of our concerns. Although the precise legal definition of federalism is elusive,[25] in basic terms, legal authority under a federal constitutional order is distributed in separate parcels between central (federal) legislatures and governments on the one hand and provincial (state) authorities on the other, and in such a manner that neither sphere of authority is (entirely) free to trespass upon, override or remove the competence of the other. As noted above, the unitary legal state, in contrast, has a single centre of authority from which all other authority flows, in the British case the Queen in Parliament. Within political discourse, on the other hand, the opposites of unitary conceptions of the political order, are pluralist conceptions. Pluralism is a broad umbrella covering both any explanatory thesis which accounts for the political order in terms of a diversity of authorities and influences and any normative thesis which advocates a diffusion of power between different groups, mechanisms or sites of authority.[26] The unitary conception of political authority, on the other hand, like its legal counterpart, identifies and/or advocates one dominant centre of political power.

The referential field of the political opposition between unitary and pluralist conceptions of order is clearly far more expansive than the referential field of the legal opposition between unitary and federalist approaches. Granted, the political opposition embraces within its

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shifts the emphasis to the second limb of my argument, developed in the text below, concerning the compatibility of a wide variety of visions and designs of pluralism, politically defined, with unitary legal arrangements.

[25] See e.g. Brazier, op. cit., n. 14 at pp. 125-126; Barendt, op. cit., n. 1, Chap. 3.

[26] For an explicit opposition between unitary and pluralist political theory, see P. P. Craig, Public Law and Democracy in the United Kingdom and the United States of America (Oxford University Press, 1990) Chaps. 1-6.; on the varieties of pluralism, see also D. Miller and M. Walzer (eds.), Pluralism, Justice and Equality, (Oxford University Press, 1995); R. Bellamy, Liberalism and Pluralism: Towards a Politics of Compromise (Routledge, London, 1999).

terms the aspirations associated with the politics of regional or national identity, predicated upon a territorially based cultural pluralism, or multiculturalism. In turn, these aspirations map onto the territorially-based institutional pluralism that we associate with federalism. Indeed, this link can arguably be seen in the intellectual foundations of the United States Constitution – the first federal constitution – where Thomas Madison in The Federalist Papers develops certain pluralist lines of thought to argue for the comprehensive framework of checks and balances, including the federal division of power, that we associate with the foundation settlement.[27]

But this association with federalism and territorial identity politics, although important and one to which we return when considering the legal sense of the unitary state, by no means exhausts the scope of the unitary/pluralist opposition within wider political discourse. Paul Craig, for instance, in his analysis of the public law implications of pluralism in the United Kingdom and the United States, identifies a rich variety of different socio-political constellations and normative projects or dispositions within and between the two political orders which might count as species of the genus pluralism.[28] In the United States, perspectives as divergent as Dahl's conception of countervailing group power [29] and Buchanan's public choice theory[30] register on the pluralist scale. The family of pluralisms in the United Kingdom is just as extended, and again a basic distinction seems to lie between, on the one hand, those pluralisms which look to civil society and the framework of government itself for their diverse centres of authority, and on the other, those pluralisms

[27] Craig, op. cit. n. 26, pp. 57-58.
[28] ibid. Chaps. 3-6.
[29] R. Dahl, A Preface to Democratic Theory, (University of Chicago Press, 1958).
[30] J. M. Buchanan and G. Tullock, The Calculus of Consent; Logical Foundations of Constitutional Democracy (MIT Press, Ann Arbor, 1962).

which look to the operation of the market-place as an alternative form of ordering and interest representation.[31]

It should come as no surprise that pluralism within a wider political discourse is such a broad church. After all, the variables that pluralism is concerned with, namely the accommodation of a diversity of values and institutional forms within a polity, often operate at a point fairly removed from the foundations of any particular substantive political theory. Thus, as with the tradition of Fabianism, guild socialism and, more recently, "associative democracy",[32] institutionalised respect for a diversity and balance of interests and values may be predicated upon a basically redistributive and socialist ethic. Similarly, as already noted, pluralism may be consistent with a strong free market-orientation. In particular, much of the theory and practice of the New Right in the 1980s is about the reassertion of a kind of pluralism, as a backlash against and direct challenge to the perceived corporatist hegemony of the postwar years, with its emphasis upon the incorporation of hierarchical and noncompetitive forms of interest representation into the framework of government.[33] Indeed, many of the new institutional forms and themes which we associate with the development of public law and public administration over the last 20 years are linked to this new market-based pluralism. The "hollowing out"[34] of the state through the transfer of functions outwards to private and other non-state agencies and the "new public management" which seeks to introduce private management techniques, disciplines and incentive structures are the twin poles of a strategy which aims both to transfer decision-making and functional authority from public bureaucracy to private enterprise and to reshape public bureaucracy in a manner which involves greater responsiveness to the consumer and greater internal competition over access to resources,

[31] See Craig, op. cit., n. 26, Chap. 5.
[32] P. Hirst, Associative Democracy, (Polity, Cambridge, 1994).
[33] See Craig, op. cit., n. 26, at pp. 153-57.
[34] See Craig, op. cit., n. 26, at pp. 153-57.

the development of policy and the provisions of services. Privatisation, contracting-out, the development of Next Steps Agencies, the proliferation of ombudsmen, the introduction of internal markets and new forms of public audit: these are all points on that new policy continuum.[35]

In other words, pluralism should be thought of not as a doctrine, but as Marquand suggests, as "a disposition, a mentality, an approach" consistent with a number of different doctrines, and, "like most approaches to politics ... a matter of feeling as well as of belief".[36] It follows that at the other side of the divide, unitary theories within political discourse, too, are internally diverse, cut across different substantive doctrines, and are as much a matter of disposition and feeling as of belief. Craig, for instance, rightly points to Dicey's important contribution to the unitary theory of the state.[37]

Dicey developed a theory of unitary, self-correcting democracy within which the dominant political authority of Parliament was justified through a bottom-up conception of representative democracy, the central legislative institution being liable to electoral correction if it passed questionable laws. Dicey combined this somewhat naive commitment to Parliament as the paradigm of representative democracy with a conservative political outlook, with a fear of class legislation and a distaste for state welfarist intervention.[38] A unitary conception of the political order is also compatible with some conceptions of modern conservative thought. Those who are less apt to see the

[35] See e.g. I. Harden, The Contracting State, (Open University Press, Milton Keynes, 1992); T. Daintith, "The Techniques of Government" in Jowell and Oliver, op. cit., n. 3, 209; D. Oliver, Common Values and the Public-Private Divide, (Butterworths, London, 1999), Chaps. 1-2; P. Birkinshaw, Grievances, Remedies and the State, (2nd ed., Sweet & Maxwell, London, 1994).
[36] D. Marquand, "Pluralism v. Populism" [1999] 42 Prospect 27 at 29.
[37] Craig, op. cit., n. 20, Chap. 2. See A. V. Dicey, An Introduction to the Study of the Law of the Constitution, (10th ed., Macmillan, London, 1959).
[38] See e.g. Loughlin, op. cit., n. 5, Chap. 7.

pluralist strain in the Thatcherite New Right programme, who in particular are more inclined to view the dynamic released by the renewed prominence of market allocation as against state distribution in terms of a pattern of deepening economic inequality rather than as a pluralist challenge to the state monolith, have preferred to label the type of statecraft it represents as authoritarian individualism,[39] or even authoritarian populism.[40] On this view a strong unitary state is required to preserve order in the face of social unrest and indiscipline and to guarantee liberty and property against individual jealousy and collectivist encroachment. At the other side of the ideological divide, however, those who have championed and who continue to champion a relatively unitary conception of the political order also include democratic collectivists, [41] committed to an inclusive and egalitarian socialist or social democratic vision.[42]

Clearly, therefore, the distinction within political discourse between unitary and pluralist conceptions of the state is porous, elusive and uneven. The relationship between the two is graduated rather than dichotomous, more-or-less rather than either-or. It is controversial – a matter of contested interpretation where some perspectives are situated on the continuum. And neither unitary nor pluralist discourses track the course of any substantive political doctrines. Instead, they both cut across the major doctrines.

This helps to explain why the unitary conception of the state within legal discourse can be so accommodating towards such a diversity of political discourses. The unitary legal conception, based upon the doctrine of

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[39] D. Marquand, The New Reckoning: Capitalism, States and Citizens, (Polity, Cambridge, 1997), Chap. 10.
[40] S. Hall and M. Jacques (eds.), The Politics of Thatcherism (Lawrence & Wishart, London, 1983).
[41] Marquand, op. cit., n. 37.
[42] See, e.g. K. D. Ewing "Human Rights, Social Democracy and Constitutional Reform", in C. Gearty and A. Tomkins (eds.) Understanding Human Rights (Mansell, London, 1996) 40.

Parliamentary sovereignty, is formal rather than substantive, and so does not presuppose any particular set of reasons why Parliament should be said to be sovereign.[43] A wide range of political discourses can sustain and be sustained by the doctrine of parliamentary sovereignty. In particular, many members of the palpably ecumenical church of political pluralism, their only common credential that they preach some degree of diversity of institutions and authorities – political, civic or economic – are not incompatible with a legal doctrine whose only imperative is the vesting of indivisible authority in a particular agency in the final analysis. Moreover, this is no recent development. It is not a case of new models of political pluralism wearing the old-fashioned, but basically ill-fitting clothes of parliamentary sovereignty. Constitutionalist political discourse in Britain has always been a "palimpsest of sometimes discordant myths, understandings and expectations, reflecting the changing values of succeeding generations".[44] One enduring faultline has been the collision between unitary and pluralist political theories, vying for ascendancy in providing the better interpretation, the more attractive ideological foundations of our constitution. Thus, as we have seen, one canonical figure in our constitutional heritage, Dicey, articulated a unitary conception of our constitution. Another equally canonical but even earlier figure, Blackstone, set out a very different justificatory theory which focused on the contemporary eighteenth century notion of the balanced constitution and which contained clear pluralist elements. Parliamentary sovereignty, on this view, far from being a denial of pluralism, instead supplied a pluralist institutional bulwark against the absolutist ambitions of the executive monarch.[45]

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[43] See P. P. Craig, "Sovereignty of the United Kingdom Parliament after Factortame" [1991] Y.E.L. 221 at 234.
[44] Marquand, op. cit. n. 36, at p. 27.
[45] See Craig, op. cit., n. 43, at pp. 234-237.

Arguably, therefore, there is only the loosest of coupling between a unitary political discourse and the unitary legal theory of the state. First and foremost, there is a lack of correspondence in the strong sense of a unitary approach providing the necessary and exclusive grounding in political theory for the unitary legal conception. But secondly, even once the lack of strict correspondence is conceded, it is not even empirically true that the best historical justifications for the unitary legal order have been always or preponderantly unitary political justifications. Such a state of affairs would have left a highly skewed legacy of constitutional doctrine inspired and sustained by a unitary orthodoxy. But in some of the most revealing discursive battlefields of our constitution that has not been the case. For example, in recent years, the unitarian position that judicial review of administrative action is best justified by reference to interpretation of the will of the sovereign Parliament and the linked doctrine of ultra vires has been strongly resisted by those who would seek deeper justifications in our constitutional heritage for holding the executive branch to account.[46] Equally, against the prevailing orthodoxy, a renewed common law constitutionalism has recently sought to ground the protection of human rights in something more substantial and less fickle than the intention of the legislature.[47] The point is not that one

[46] See e.g. P. P. Craig, "Competing Models of Judicial Review" [1999] P.L. 448; and "Ultra Vires and the Foundations of Judicial Review" (1998) 57 C.L.J. 63; J. Jowell, "Of Vires and Vacuums: The Constitutional Context of Judicial Review" [1999] P.L. 448; C. Forsyth, "Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, The Sovereignty of Parliament and Judicial Review" (1996) 55 C.L.J. 122; M. Elliot, "The Demise of Parliamentary Sovereignty? The Implications for Justifying Judicial Review" (1999) 115 L.Q.R. 119, and "The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law" (1999) 58 C.L.J. 129; D. Oliver, "Is the Ultra Vires Rule the Basis of Judicial Review?" [1987] P.L. 543.

[47] For a balanced assessment of the emergence of this new jurisprudence in and beyond the courts, see M. Hunt, Using Human Rights Law in English Courts (Hart, Oxford, 1997).

side or the other in debates such as these is demonstrably correct; rather, that the discursive sources and resources are sufficiently rich, wide-ranging and evenly balanced to allow the issues to be hotly and enduringly debated.

Accommodating territorial diversity

If many pluralist visions can be reconciled with the formal institutional constraints of parliamentary sovereignty, this is not true of federalism. Yet it is important to note that federalism is incompatible with a unitary legal conception of the state on technical grounds rather than substantive grounds. It is simply not possible to generate the type of entrenched institutional pluralism necessary for federalism on the basis of the formal concept of the indivisible sovereignty of Parliament. That legal incompatibility does not, however, mean that federalism has been a repugnant idea within the political discourse of constitutionalism which has provided the long-term cultural accompaniment to the legally unitary British state. The venerable authority of the idea of indivisible sovereignty notwithstanding, federalism has often been mooted as a solution to the problems of the constitutional integrity of the United Kingdom. Federal union rather than incorporating union, indeed, was the preferred option of the Scottish negotiators prior to the Treaty of Union of 1707, although the lack of a historical prototype and the weakness of the Scottish leadership ultimately precluded such a solution.[48] Federalism also figured prominently as a candidate solution to the problem of accommodating Irish demands for autonomy in the nineteenth century, advocated at different times by both Home Rule and Unionist interests.[49] Moreover, British

[48] See e.g. MacCormick, op. cit., n. 22, p. 55-60; A. A. Olowofoyeku, "Decentralising the UK: The Federal Argument" (1999) 3 Edin. L. R. 57 at 66; J. Kendle, Federal Britain: A History (Routledge, London, 1997), Chap. 1.

[49] Principally by Isaac Butt on the Home Rule side in the 1870s and by Joseph Chamberlain on the Unionist side in 1886. See Olowofoyeku, op. cit., n. 48, at p. 66.

politicians, civil servants, academics and interest groups have been active in promoting federalist ideas in contexts other than the internal structure of the United Kingdom, including the integrity of the British empire, the organisation of the international order, the internal structure of decolonised states, and, more recently, Britain's relationship to Europe.[50]

None of this gainsays the fact that the legal sovereignty of Parliament continues to constitute a fundamental impediment to the institutional design of federalism. However, matching the endurance of an active political discourse concerning federalism is the resilience of the type of substantive political debate about identity, recognition and mutual accommodation of diverse communities which typically underpins federalism. [51] These arguments, and the cultural pluralism they embody, are in principle no more abhorrent to parliamentary sovereignty than the other types of pluralisms we have considered. This is an important point, since it underpins the argument to follow that the exclusion of federalism from a unitary framework implies nothing about the acceptability of other methods of accommodating territorial diversity.

Pursuing this line of thought, we can formulate two propositions which seek to demonstrate that, even in the context of the present escalation of demands for constitutional recognition of regional and national identity within the United Kingdom, the unitary conception of the constitution remains a flexible instrument to accommodate diversity. As with our earlier

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[50] See generally, Kendle, op. cit., n. 48.

[51] The development of cultural identity politics, often couched in terms of claims for constitutional recognition, is of course a world-wide phenomenon-- one which has attracted a voluminous literature. See e.g. W. Kymlicka, Multicultural Citizenship (Oxford University Press, 1995); D. Miller, On Nationality, (Oxford University Press, 1995); J. Tully, Strange Multiplicity: Constitutionalism in an Age of Diversity, (Cambridge University Press, 1995).

discussion of other types of pluralism, axiomatic to the argument is the distinction between legal and political discourses on the nature and implications of the unitary constitution.

In the first place, if federalism is viewed within a broader political discourse it appears as a graduated state of affairs rather than, as in the legal discourse, one which is basically[52] conceived in either/or terms. Viewed as a graduated affair, there are many positions which contain federalist elements, sometimes labelled "quasi-federal".[53] Yet viewed in legal terms, these quasi-federal positions, not being federal in the classical sense, are perfectly compatible with the unitary constitution. That is to say, although within political discourse we can recognise a range of positions which are proximate to (bear a family resemblance to) classical federalism, they are not, in legal terms, contaminated by that proximity.

Consider the new devolved assemblies designed for Scotland and Northern Ireland,[54] clearly the most ambitiously conceived in this or any previous constitutional reform initiative. In a purely legal sense, and bracketing for the moment the matter of the lop-sidedness of the arrangements across the United Kingdom, there nevertheless remains clear water between these schemes and a legal definition of federalism. Unlike a properly federal arrangement, there is no attempt to entrench the status of either devolved body against the

[52] The development of cultural identity politics, often couched in terms of claims for constitutional recognition, is of course a world-wide phenomenon-- one which has attracted a voluminous literature. See e.g. W. Kymlicka, Multicultural Citizenship (Oxford University Press, 1995); D. Miller, On Nationality, (Oxford University Press, 1995); J. Tully, Strange Multiplicity: Constitutionalism in an Age of Diversity, (Cambridge University Press, 1995).

[53] See e.g. Bogdanor, op. cit., n. 14, Chap. 8; Hazell, op. cit., n. 13, "Reinventing the Constitution", at p. 92; Wheare, op. cit. n. 20, at p. 20.

[54] For a comparative analysis, see B. Hadfield, "The Nature of Devolution in Scotland and Northern Ireland: Key Issues of Responsibility and Control" (1999) 3 Edin. L. R. 3.

abolitionist instincts of a future Westminster Parliament, although in Northern Ireland there is an attempt to entrench – at least politically if not legally – the answer to the wider question of statehood by reference to a referendum procedure.[55] Equally, there is no attempt to prevent the Westminster Parliament encroaching on the devolved sphere of authority in either case; on the contrary, the sovereign authority of Westminster to legislate even in transferred matters is explicitly preserved.[56] Nor is there any attempt to establish a new constitutional court as federal umpire, charged with policing the jurisdictional boundaries of the settlement on all sides. Instead, we have a very old court – the Judicial Committee of the Privy Council – monitoring the compliance of the devolved but not the central body.[57]

Despite this, in political terms, these new settlements are significantly closer to the federalist end of the continuum than their predecessors in the Northern Ireland Act 1920 and the abortive Scotland Act 1978. In both new settlements the transferred powers are defined residually rather than enumerated [58] or subject to a general limitation,[59] a device which enhances the flexibility of the local jurisdiction and which is used in many federal arrangements. Again unlike their predecessors, neither settlement allows the centre any general power of veto over local legislation,[60] which limitation on central power

[55] Northern Ireland Act 1998, s.1 and Sched. 1.
[56] ibid. s.5(6); Scotland Act 1998, s.28(7).
[57] Northern Ireland Act 1998, ss.11, 79 and Sched. 10; Scotland Act 1998, ss.33, 98 and Sched.6.
[58] As they were under the Scotland Act 1978, s.63 and Sched. 10; see now Scotland Act 1998, ss.28-29.
[59] As they were under the "peace, order and good government" provision of the Government of Ireland Act 1920, s.4(1); see now Northern Ireland Act 1998, ss.5-6.
[60] Although the specific powers of veto of the devolved legislature and executive retained by central Government are greater under the Northern Irish scheme than the Scottish scheme; compare Northern Ireland Act 1998, ss.10, 14 and 25, with Scotland Act 1998, ss.35-58. Nevertheless, according to one set of commentators, even the provisions of the Scotland Act remain sufficiently wide to allow their

is an additional feature of federal balance. In another echo of federal arrangements, the Scottish settlement, though not the Irish, allows a modest tax-varying power to the devolved executive and Parliament.[61] Finally, and returning to the question of entrenchment, it is noteworthy that the absence of legally watertight entrenchment of either settlement is not defended as a political insurance policy for the centre, as a longstop power of unilateral rejection of the devolved arrangements. Clearly, that remains legally possible, but in both settlements the framer's intent[62] was to link the new institutions to the consent or otherwise of the constituencies affected, a provision made explicit in the more complex transnational circumstances of the Belfast Agreement and the Northern Ireland Act, [63] and expressed as a background assumption in the context of the Scotland Act.[64] The key point is that the British state has come closer than ever before to conceding that its retention of legislative omnicompetence in the context of a devolution process is a matter of legal form rather than political substance; in other words, while ritual deference continues to be paid to the legal theory of the unitary state, the developing culture of negotiation and balanced settlement reflects a rather different political understanding.

A second proposition which underpins the accommodating nature of the unitary legal conception relates to its narrow concern with the federal alternative.

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critics "to evoke ... the spectre of the Secretary of State as Governor General"; C. M. G. Himsworth and C. R. Munro, Scotland Act 1998, Current Law Statutes, 46/35.

[61] Scotland Act 1998, ss.73-80.

[62] Which, of course, does not necessarily bind a future Parliament of the U.K.

[63] Northern Ireland Act 1998, s.1.

[64] For the development of the idea of consent in the context of the debate about entrenchment within the Scottish Constitutional Convention and in the early days of the New Labour administration, see J. McFadden and W. Bain (eds.) "Strategies for the Future: A Lasting Parliament for Scotland?" in T. St J. Bates (ed.) Devolution to Scotland: The Legal Aspects (T. & T. Clark, Edinburgh, 1997).

The unitary legal conception does not recognise forms of institutional accommodation of territorial difference which may be just as pronounced as federalism, if not more so, but which cannot be adequately captured within a strict unitary/federal opposition; and in so failing to recognise these different forms the unitary legal conception refrains from ruling them out. In particular, the unitary conception does not adequately capture the linked ideas of the "union state"[65] and of "asymmetrical government"[66] which have been used to make sense of the internal structure of the United Kingdom. The union state is one, such as the United Kingdom, Canada or Spain, in which parts of the territory have been incorporated by agreement, which agreement allows variation in governmental arrangements as they affect the incorporated territory or territories. The union treaties with Scotland and Ireland in 1707 and 1800 are clear examples of these foundation agreements, albeit the former contained far more guarantees of enduring institutional distinctiveness than the latter. The constitutional character of the union state, however, cannot simply be read off from its foundation parchments. Instead, they provide points of departure for the continuous renegotiation of variation in the light of changing social, economic and political circumstances. The union state, therefore, provides a key historical pathway towards a more general model of asymmetrical government, in which a heterogeneity of governance arrangements between regions becomes a normal and persistent feature of a state. Clearly, the present rolling programme of devolution, with quite distinctive blueprints and timetables of reforms for different parts of the territory, fits the model of enduring and dynamic asymmetry. Seen in that light, indeed, the current muddied waters over the future of regional government in

[65] S. Rokkan and D. Urwin, "Introduction: Centres and Peripheries in Western Europe" in S. Rokkan and D, Urwin (eds.) The Politics of Territorial Identity: Studies in European Regionalism (Sage, London, 1982), p. 11.
[66] M. Keating, "What's Wrong with Asymmetrical Government?" in Elcock and Keating (eds.) op. cit. n. 14, 195.

England – whether regional chambers, regional assemblies or city mayors – represent the unfolding of a new but essentially unremarkable chapter in a long and familiar constitutional narrative.[67]

In certain respects, then, particularly in its eschewal of the idea of a uniform and symmetrical division of powers, the union model may be even more accommodating of diversity – of pluralism – than the federal model. But the point is precisely not to attempt to place the union/asymmetrical model on the same scale as unitary and federal models. That is to make a category mistake. The unitary/federal opposition within a specialist legal discourse recognises nothing beyond that dichotomy. Ideas of the union state and asymmetrical government are more appropriate to a broader political discourse, where positions are more graduated and less one-dimensional. Thus the union state is not an alternative to the unitary or federal state, but merely the product of a different way of categorising and measuring institutional homogeneity or diversity within states. So union states can, in a narrower legal sense, be either unitary states, as in the United Kingdom, or federal states, as in Canada. Their character is not adequately captured by either legal category, and so, as in the domestic example, they may both be compatible with the formal terms of the unitary state but institutionalise elements of diversity more profound than found in many federal states.

The unitary state and beyond

In this final section I intend to depart from the internal perspective and look at the character and durability of the unitary state from an external perspective. At the end of a century in which states, as the primary political actors on the international stage since the Treaty of Westphalia of

[67] Hazell, op. cit., n. 13, pp. 90-92. See also Regional Development Agencies Act 1998; Greater London Authority Referendum Act 1998; Greater London Authority Act 1999.

1648, gathered and exercised unprecedented levels of power, there is a burgeoning literature on the emergence of new forms of power and authority beyond the state and which challenge the long-standing political hegemony of the state.

This literature, which some attempt to unite around the portmanteau theme of "globalisation", [68] refers to a complex mix of legal, political, cultural, economic and technological processes, with different disciplines centring different strands. Within public law, [69] the new emphasis is on the development of multiple sites of authority set beyond yet operating alongside the "law-state", [70] whose historical claims to internal and external sovereignty have been articulated through constitutional law and international law respectively. The concern is to make sense of the idea of "constitutionalised" power beyond the state – the site in which constitutional power has traditionally nested and also to examine the relationship between the various overlapping authoritative sites or putatively authoritative sites – national and "postnational" [71] within this new multi-dimensional, or plural, legal space.

In briefly examining the implications of these developments for the unitary conception of the United Kingdom state, I intend to make use of a metaconstitutional framework of analysis I have developed elsewhere. [72] The prefix "meta" is chosen

[68] See, e.g. D. Held, A. McGrew, D. Goldblatt and J. Perraton (eds.), Global Transformations (Polity, Cambridge, 1999).
[69] See esp. N. MacCormick, op. cit., n. 22; J. H. H. Weiler, The Constitution of Europe (Cambridge University Press, 1999).
[70] MacCormick, op. cit., n. 22, p. 9.
[71] D. M. Curtin, Postnational Democracy (Universiteit Utrecht, 1997); J. Shaw, "Postnational Constitutionalism in the European Union" (1999) 6 Journal of European Public Policy 579-597.
[72] "Flexibility within a Metaconstitutional Frame: reflections on the future of legal authority in Europe" in G. de Burca and J. Scott Constitutional Change in the EU; From Uniformity to Flexibility (Hart, Oxford, 2000) 9.; see also N. Walker, "Sovereignty and Differentiated Integration in the European Union" (1998) 4 E.L.J. 355.

because it stands in relation to the activity denoted by the concept prefixed as "a higher science of the same nature but dealing with ulterior problems".[73] Cosmopolitan metaconstitutionalism, from this perspective, refers to a range of authoritative legal discourses which have emerged as part of the post-Westphalian order, which have the same general object of reference as state constitutional law – namely, the framework of public authority – but which, unlike the latter, do not look to the state as their fundamental source of validity. Rather, metaconstitutional discourse always claims a separate and often a higher normative authority than state law, even though this tends in turn to be challenged by the state through its traditional constitutional discourse and representations of sovereignty.[74] Metaconstitutional discourse purports to authorise, instruct, influence, supplement or supplant state law, or any combination of these, and in so doing conceives of its own authority as original and irreducible.

There are a variety of different but interrelated forms of metaconstitutional discourse operating at different levels and occupying different sites, some of which are relevant to the present inquiry.[75] As intimated earlier, my contention is that the existence of such sites makes the perseverance of the unitary state more rather than less likely, on both strategic and normative grounds. We can deal with the strategic grounds by examining the most basic form of metaconstitutionalism, the one least abstracted from the constitutional state.

This first type of metaconstitutionalism seeks to reshape the traditional intraconstitutional law sphere of the structural relations between different groups within the

[73] The Shorter Oxford English Dictionary.
[74] On the centrality of the idea of sovereignty to the representation of a polity qua polity, see H. Lindahl, "The Purposiveness of Law: Two Concepts of Representation in the European Union" (1998) 17 Law and Philosophy 481.
[75] For a fuller development, see Walker, op. cit., n. 72, "Flexibility within a Metaconstitutional Frame", pp. 17-21.

state – whether national, ethnic, territorial, religious, linguistic or functional – in a manner which goes beyond those forms of legal "identity politics",[76] such as claims to mutual respect, to multicultural citizenship or, most relevantly to us, to the distinct political institutions we associate with federalism or other forms of asymmetrical government, which can be accommodated within the existing framework of state authority. Instead, it proceeds to question and challenge the constitutional integrity of the state itself through secessionist or quasi-secessionist claims. For the most part this is necessarily a counterfactual legal discourse. Unlike the forms of metaconstitutionalism considered below it is not anchored within an institutional site or sites which can make a plausible current claim to possess fundamental lawmaking authority. On the other hand, as explored below, this form of metaconstitutionalism may be sustained and supported through its relationship to these other, more state-removed metaconstitutional sites which do possess plausible claims to fundamental legal authority. Yet as long as the integrity and internal distribution of authority of the state which it challenges remain intact, secessionist or quasi-secessionist discourse clearly can be no more than aspirational. That does not mean, however, that it is merely a form of constitutional law-in-waiting. It is metaconstitutional in the sense that while its ultimate purpose may be the creation of a new state, and thus a new constitutional order, the process by which the transformation is sought addresses matters of fundamental political authority through arguments – historical, ethical or pragmatic[77] which refuse to defer to the existing state constitutional order as a definitive and irreducible pattern of authority, and in so doing

[76] See references at n. 51, above.

[77] See, e.g. the rich mix of arguments used on behalf of the secessionist case in the Quebec Secession Reference; Reference by the Governor General of Canada pursuant to s53 of the Supreme Court Act, concerning the secession of Quebec from Canada [1998] 2 S.C.R. 217. See also M. D. Walters, "Nationalism and the Pathology of Legal Systems: Considering the Quebec Secession Reference and its Lessons for the United Kingdom" (1999) 62 M.L.R. 370.

necessarily pose a challenge to the general claim of constitutional law to ultimate authority.

This type of counterfactual metaconstitutionalism may also have an indirect impact upon existing state constitutional law. In the moulding of primary constitutional discourse, political prudence may demand, or dialogic openness may encourage, the taking into account of secessionist or quasi-secessionist discourse, and often with consequences which escape the intentions of those who make the accommodation. The fluid narrative of constitutional reform in the United Kingdom is an apt current example. British constitution-builders act in the knowledge that institutions to which they have recently applied their official constitutional imprimatur, such as devolved assemblies and local referenda, may have a meaning and a role within alternative metaconstitutional discourses. So, for instance, the new Scottish Parliament is in one view the cement of the Union, on another a stepping-stone to independence.[78] The referendum which preceded it is in one view a healthy exercise in local democracy within an increasingly "federalist" constitutional pattern, on another a prefigurative assertion of the popular sovereignty of the Scottish people. Clearly, too, the new institutions created under the Belfast Agreement and the Northern Ireland Act, and the procedures by which these are ratified and legitimated, have different and contested meanings between unionist and nationalist communities.[79]

[78] For a stimulating account of the symbolic constitutional politics of devolution, see T. Nairn, After Britain: New Labour and the Return of Scotland (Granta, London, 2000).

[79] See Agreement reached in the Multi-Party Negotiations, Cm.3883 (HMSO, London, 1998); B. O'Leary, The British-Irish Agreement: Power-Sharing Plus (Constitution Unit, London, 1998); B. Hadfield, "The Belfast Agreement, Sovereignty and the State of the Union" [1998] P.L. 599; D. O'Donnell, "Constitutional Background to and Aspects of the Good Friday Agreement—A Republic of Ireland Perspective" (1999) 50 N.I.L.Q.76.

Strategically, then, this type of metaconstitutionalism provides the context for a kind of constitutional shadow-boxing, a bargaining in the shade of the possibility of a radical constitutional alternative. Critically, what this strategic context also does is militate against a fundamental constitutional resettlement of the existing state of the type required to move beyond the unitary model. Just as the current debate on whether the European Union needs, deserves or is likely to receive a constitutional baptism in the form of its own new model constitution cannot sensibly be joined without acknowledging that for some such a move would credit the European Union with a legitimacy as an independent polity that they are not prepared to concede or contemplate, so too an appreciation of similar sentiments of "constitutional denial"[80] should inform consideration of the prospect of a new constitutional order for the United Kingdom. Thus, as Brazier concludes, it is likely to "be those who champion local rights most strongly who would oppose a federal structure for the United Kingdom the most vigorously".[81] Nationalists pursuing a secessionist or quasi-secessionist strategy are bound to be wary of a process which would so "freeze" and endorse an arrangement to preserve the integrity of the state whose very legitimacy they challenge.

Moving onto the normative considerations for treating multi-dimensionality and a unitary conception of the state in the context of the British Isles as mutually supportive, we should recognise that there are two opposite strands to this, and that together they tend to squeeze out the federal option. On the one hand, multi-dimensionality can be seen as a counterweight to excessively unitarian elements present or latent within the constitutional order, as a way of acknowledging, making concessions to and ultimately containing or absorbing fragmentary pressures and separatist aspirations. On the other hand, the

[80] N. Walker, "European Constitutionalism and European Integration" [1996] P.L. 266 at 278.
[81] R. Brazier, op. cit. n. 14, at p. 127.

existence of other metaconstitutional sites may provide a more supportive and attractive context, and so a significant mobilising force, for movements for constitutional independence, thus by comparison making the middle option of accommodation within a more diversified federal polity less attractive. This can even be seen at work at the first level of metaconstitutional authority. Thus one of the consequences of constitutional shadow-boxing in the Irish context is the acknowledgment in section 1 of the Northern Ireland Act that if a majority in a referendum vote that the North should cease to be part of the United Kingdom and instead form part of a United Ireland, such a wish will be respected and acted upon by the British Government. In other words, it raises "a statutory doubt"[82] about the continuance of the union between Great Britain and Northern Ireland, one that provides a beacon of hope to nationalists.

The normative point becomes clearer if we move to higher metaconstitutional sites. A second type of metaconstitutional discourse seeks to shape and instruct the traditional intra-state constitutional law sphere of the basic rights and duties of the individual vis-a-vis the state. The paradigm case here is "international" human rights law.[83] Mainly through treaty law promulgated at both regional and local level, but backed by peremptory norms of international law (ius cogens) and the general framework of international customary law, this area of law expanded exponentially in the wake of the Second World War. It is a movement which has challenged the premise of untrammelled state sovereignty preventing the traditional framework of international law from addressing individuals as well as states themselves as the subjects, rather than the mere objects, of its legal rules. As well as the development of a substantive state-

[82] ibid. p. 113.
[83] See, e.g. H. J. Steiner and P. Alston, International Human Rights in Context; Law, Politics, Morals (Oxford University Press, 1996).

transcendent human rights jurisprudence,[84] this form of metaconstitutionalism has been increasingly underscored by a constellation of non-state courts and tribunals within which such rights may be vindicated, including most prominently the European Court of Human Rights under the auspices of the Council of Europe.

It is instructive in this regard that both Irish and Scottish devolution settlements presume a central role for the European Convention and its jurisprudence, effectively entrenching its provisions against local repeal or amendment.[85] In the Irish context, this is particularly relevant to the question of the acceptability of the two extremes of the unitary status quo ante or a new all-Ireland state. That is so because the recognition of the ECHR and the introduction of a Human Rights Commission are an integral part of a strategy of "double protection"[86] in which both unionists and nationalists are guaranteed a minimum floor of citizenship rights regardless of who holds the sovereign power in the North.

A third type of metaconstitutional discourse shapes relations between states in ways which supplement and modify the internal constitutional structure of those states. Again, the current metaconstitutional conversation between Britain and Ireland provides a good example.

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[84] This jurisprudence is increasingly influential in the national courts even of those states, such as the U.K. which retain a basically dualist approach to international law, and so remain reluctant to endorse international law as domestic law without domestic legislative instruction. A landmark decision in this regard is R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p. Pinochet Ugarte (Amnesty International intervening (No.3) (1999) 2 W.L.R. 827, in which the House of Lords, drawing upon both domestic law and customary international law, held that a former head of state enjoys no immunity in extradition or criminal proceedings brought in the U.K. in respect of the international crime of torture; see H. Fox, "The Pinochet Case No.3" (1999) 48 I.C.L.Q. 687.

[85] Scotland Act 1998, ss.29(1)d), 57 and Sched. 4, para. 2(f); Northern Ireland Act, ss.6(2)(c), 7(1)(b) and 24(1)(a). See also the establishment of a Northern Ireland Human Rights Commission under ss.68 72.

[86] Hazell and O'Leary, op. cit. n. 14, at p. 30.

The Belfast Agreement provides for a new permanent institutional complex embracing both East-West structures (British-Irish Council and British-Irish Intergovernmental Conference) [87] and a North-South Ministerial Council [88] as a means to endorse and to stabilise an element of power-sharing between the two states. This new additional edifice provides an additional point of constitutional reference, an intermediate site of contestation, interest representation and identity formation to dilute the significance of the sovereign state.

Finally, this type of arrangement shades into a fourth type of metaconstitutional authority, which in addressing relations between states develops an institutional structure with sufficient depth and scope of authority to constitute a non-state polity. Of course, the extent to which an institutional structure constitutes a separate polity is a matter of degree. Clearly the Good Friday structures, for now at least, fall short, but the GATT/WTO structure and the North American Free Trade Association, to take but two examples, are less clear-cut cases, as also are some of the regional international organisations.[89] At the other end of the spectrum, and most relevant to our inquiry, is the supranational legal framework of the European Union. Originally conceived of as a means to regulate certain fundamental economic relations between states and designed with the orthodox tools of international law, the European Union, as is well-known,[90] gradually developed its own claim to sovereign authority within a limited sphere. Indeed, as the European Union has attracted a complexity of institutional structure and a range of legal competences which begin to rival those of the state, it has come to represent a particularly developed form of metaconstitutional law. It provides a crucial additional

[87] Cm.3883, Strand Three.
[88] Cm.3883, Strand Two.
[89] See B. Laffan, Integration and Co-operation in Europe (Routledge, London, 1992).
[90] See, e.g. S. Weatherill and P. Beaumont, EU Law (Penguin, London, 1999), Chap. 12.

dimension in legal identity formation which may significantly modify the implications of membership of any particular state polity. Of course, it is a question of great complexity and controversy whether and to what extent large states, small states and devolved or federalised parts of states may be advantaged by the existence of the supranational theatre of the European Union. In particular, as Scottish devolution settles there is a vigorous debate between nationalists and pro-European unionists as to whether Scotland can have greater influence as a small but autonomous state or as a modest and sometimes unheard voice within a larger state.[91] The point is not to answer that question, but to acknowledge that it produces alternative institutional projections, alternative ways of imagining and modifying the sense of political community provided by the unitary state. For those who make these projections, the unitary state – British, Scottish, Irish, English or Welsh – takes its place as an integral part of the overall picture, but it no longer frames the picture.

Concluding remarks

None of what I have said in this article is intended to eulogise the unitary constitution, or to apologise for the dirigiste political culture and authoritarian political projects which have often flourished beneath its canopy. If I have shown that the unitary constitution of the United Kingdom is a more flexible affair than is often imagined in the context of territorial and other forms of pluralism,

[91] See G. Clark, "Scottish Devolution and the European Union" [1999] P.L. 504; M. Happold, "Independence: In or Out of Europe? An Independent Scotland and the European Union" (2000) 49 I.C.L.Q. 15; C. Jeffery "Sub-National Mobilisation and European Integration: Does it Make any Difference?" (2000) 38 J.Com. Mar. St. 1. In October 1999 a Memorandum of Understanding and Supplementary Agreements between the U.K. Government and the Scottish and Welsh executives were published, covering both general liaison machinery between the various executives and specific areas left unresolved in the devolution legislation, including co-ordination of E.U. policy issues; Cm. 4444.

and that the advent of multi dimensionality has made it simultaneously more difficult to transform but less central to the overall public law framework, these are not reasons for complacency. Rather, the insufficiently acknowledged normative openness of the unitary constitution coupled with its resilience make it all the more important that we attend to the task of developing a more appropriate and fuller normative language for that unitary constitution,[92] and for conceptualising its relationship with other key authoritative sites. Historically, this task has been hindered by the unhelpfully polarised atomistic and holistic preconceptions which we identified at the outset, encouraging as they do either the marginalisation of systematic constitutional debate or its framing in terms of the stark alternatives of wholesale retention or rejection. Against this backdrop, the acknowledgment of the flexibility and durability of the unitary state and of its gradual de-centring within a wider cosmopolitan configuration of public law is not the end of constitutional self-understanding, but a modest if indispensable beginning.

[92] A task already taken up in recent years and in different ways by, inter alios, Craig, op. cit. n. 26; Loughlin, op. cit. n. 5; T. R. S. Allen, Law, Liberty and Justice: The Legal Foundations of British Constitutionalism (Oxford University Press, 1993); R. Brazier "The Non-Legal Constitution: Thoughts on Convention, Practice and Principle" (1992) 43 N.I.L.Q.262; T. C. Daintith, "Political Programmes and the Content of the Constitution", in W. Finnie, N. Walker and C. M. G. Himsworth (eds.) Edinburgh Essays in Public Law (Edinburgh University Press, 1991); J. Morison, op. cit. n. 11.