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A Federal Constitution for the United Kingdom? Constitution-Making within a Westminster-Derived Context

When the referendum really comes, the sovereign Parliament must go. But whether for good or for evil, the referendum, in principle at least, seems to be coming.

– C. H. McIlwain, *The High Court of Parliament and Its Supremacy* (1910), xv.

[N]ow we are witnessing something that would have seemed almost impossible a few years ago, a serious discussion taking place in the United Kingdom about the possibility, and the desirability, of the introduction of a federal, or ‘quasi-federal’ system there.

– M. J. C. Vile, ‘Federal theory and the “New Federalism”’ (1977) 12 *Politics* 1.

I

The current debate over Scotland’s potential withdrawal from the United Kingdom has generated a great deal of discussion about the future of the Union, including the possibility of the United Kingdom adopting a written constitution and forming itself into a federation.¹ While debate about such a possibility is certainly not as new as it seems,² and while the

¹ Eg, Iain Macwhirter, ‘The Break-up of the Union Now Appears Inevitable’, *The Guardian* 10 January 2008; Tim Mongomerie, ‘David Cameron Must Make Brave Steps Towards a Federal U.K.’, *The Guardian* 19 February 2012.

² See Michael Burgess, *The British Tradition of Federalism* (London: Leicester University Press, 1995); John Kendle, *Federal Britain: A History* (London: Routledge, 1997).

likelihood of a fully-orbed federal system emerging in the U.K. may still be remote, the sorts of issues to which the formation of a federal constitution would give rise are of real significance for our understanding of the nature of the British polity as it currently exists, and they also give us cause to reflect on the conditions under which other Westminster-derived polities (such as Canada, Australia and New Zealand) came into being, and to compare the legal and political processes involved in each case as a way of enhancing our understanding of them all.

For present purposes, we may start with the working proposition that a federation exists where there is (1) a binding constitution agreed to among constituent states, which (2) provides for representation of the peoples of the regions and localities of the federation within a federal parliament, (3) distributes power among central and regional governments, and (4) cannot itself be altered unilaterally by either the federal or regional parliaments.³ On this definition, there remains a long distance between present arrangements in the U.K. and a fully-orbed federation. Even if the current debate about Scottish independence was to be resolved and if popular and political will consolidated in favour of some kind of federal system, many important questions would still need to be addressed, centred on these four characteristics of an established federation.

The first of these large questions concerns how a binding and legally entrenched constitution could come into being in the U.K., noting that U.K. law still treats the British Parliament as the highest authority in the land and the institution that has the most plausible capacity to initiate, if not consummate, a constitutional change of such magnitude.⁴ A second major question concerns precisely how representation of the constituent regions and localities would be instituted, noting among other things the problem of bifurcating the present Parliament at Westminster into two institutions, a federal legislature for the United Kingdom and a regional legislature for England, alongside the existing legislatures of Scotland, Wales and Northern Ireland. The third question concerns the breadth of power that would need to be devolved to the regional legislatures and whether it is feasible for the current asymmetry in the system of devolution to be replaced by a more symmetrical arrangement. And, fourthly, there is the important question about what procedures would be laid down for the amendment of the constitution in the future, a question that cannot be separated from the first one, about how the constitution is to be established as legally binding upon the

³ On the compactual basis upon which federations are characteristically founded, see Olivier Beaud, 'The Federal Compact of a Federation as a Political Constitution. Reflections on the Constitution of a Federation' (Paper presented at the Political Constitutions conference, London, 7-8 June 2012) and, for more detail, Olivier Beaud, *Théorie de la Fédération* (Paris: Presses Universitaires de France, 2009).

⁴ On parliamentary sovereignty, see Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford: Clarendon Press, 1999).

legislatures. Clearly many significant hurdles would need to be passed before the U.K. could be said to be a federation in this full sense.

The constitutional experience of former British colonies that have formed themselves into federations nonetheless suggests several different ways in which a federal constitution for the U.K. might be designed and instituted. In this article, I want to suggest that there are at least three basic ways of proceeding, exemplified in the diverse means by which federal constitutions were established in the United States, Canada and Australia respectively. There are many interesting parallels between the experiences of these three countries and current developments and possibilities in the U.K.

II

Revolution was the path that the United States famously took, but in that country there continues a very important but still unresolved debate over whether, when the revolutionary claim to autochthony was effectively made, independence was secured *severally* by the individual American States or *jointly* by the States acting together as the Second Continental Congress in 1776.⁵ While some say that the controversy has been an essentially ‘fruitless’⁶ one that has in any case been made irrelevant by the outcome of the Civil War,⁷ the issue goes very significantly to the nature, design and interpretation of the U.S. Constitution, as cases like *US*

⁵ For opposing views see, eg, Raoul Berger, *Federalism: The Founders' Design* (Norman, OK: University of Oklahoma Press, 1987), ch. 2; Samuel H Beer, *To Make a Nation: The Rediscovery of American Federalism* (Cambridge, MA: Belknap Press, 1993), ch. 6. See also the Resolutions proposed by Jefferson Davis in the U.S. Senate, 2 February 1860, in Lynda L. Crist and Mary S. Dix (eds), *The Papers of Jefferson Davis* (Louisiana State University Press, 1989), vol. 6, pp. 273-76, transcribed from the *Congressional Globe*, 36th Congress, 1st Session, pp. 658-59.

⁶ Gordon S Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1969), 355. See, likewise, Jack Rakove, ‘The First Phases of American Federalism’ in Mark Tushnet (ed.), *Comparative Constitutional Federalism: Europe and America* (New York: Greenwood Press, 1990), 2.

⁷ Eg, John W. Burgess, *Political Science and Comparative Constitutional Law* (Boston: Ginn and Co, 1890).

Term Limits v Thornton have demonstrated.⁸ The view that I think is best supported by the evidence is that assertions of independence and of constitutive authority were exercised *both* severally *and* jointly,⁹ but in a way which meant that no State would be bound by either the Articles of Confederation (ratified 1777-81) or the U.S. Constitution (ratified 1787-9) unless it *individually* ratified the proposed arrangement. This was clearly the case for the Articles of Confederation,¹⁰ but it was also the case for the Constitution,¹¹ even though the provision in the Constitution for ratification by only nine States meant repudiating the requirement of unanimity for the amendment of the Articles.¹² This fact of separate ratification by each State was indeed emphasised by James Madison in *Federalist No. 39* when he said that the ‘assent and ratification’ of the proposed Constitution, although in the name of ‘the people of America’, was given by the people ‘not as individuals composing one entire nation, but as composing the distinct and independent States’.¹³ Even Chief Justice John Marshall, who is famous in *McCulloch v Maryland* for asserting that the American Constitution ‘derives its whole authority’ from ‘the people’, admitted that the people when ratifying the Constitution had ‘assembled in their several States’ and recognised that ‘[n]o political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass.’¹⁴

Now, it would be quite extraordinary if a federal constitution were to emerge in Britain on the basis of a claim to revolutionary autochthony by the constituent people, or peoples, of the United Kingdom. But the prospect of a Scottish referendum on independence as the ground upon which a new ‘devo-max’ or ‘devo-plus’¹⁵ settlement might be negotiated,¹⁶ suggests that an analogy to the United States might not be altogether out of place. And here, the making of the U.S. Constitution remains potentially relevant in at least one important respect, for it illustrates how the design of a federal constitution is related to the authority

⁸ *US Term Limits v Thornton* 514 U.S. 779 (1995), discussed in Nicholas Aroney, ‘Formation, Representation and Amendment in Federal Constitutions’ (2006) 54(1) *American Journal of Comparative Law* 277, 290-291.

⁹ Cf Jack P. Greene, *Negotiated Authorities: Essays in Colonial Political and Constitutional History* (Charlottesville: University Press of Virginia, 1994).

¹⁰ Articles of Confederation, Art. XIII.

¹¹ U.S. Constitution, Art. VII.

¹² Richard Kay, ‘The Illegality of the Constitution’ (1987) 4 *Constitutional Commentary* 57.

¹³ Clinton Rossiter (ed), *The Federalist Papers* (New York: New American Library, 1961), 243-246.

¹⁴ *McCulloch v Maryland* 17 US (4 Wheat) 316 (1819), 402-5.

¹⁵ Jeremy Purvis, ‘Devo-Plus Would Work – but Devo-Max Wouldn’t’, *The Scotsman* (Edinburgh), 11 May 2012.

¹⁶ Simon Johnson, ‘Alex Salmond: Devo max instead of independence is “very attractive”’, *The Telegraph*, 2 July 2012.

upon which it is conceived to be based.¹⁷ As Madison pointed out in *Federalist No. 39*, although the U.S. Constitution was thoroughly ‘federal’ in its foundation, the representative institutions, distribution of powers, direct effect of federal law, and means of amendment of the Constitution displayed both ‘federal’ and ‘national’ features. To take the most obvious example, the U.S. Senate was chosen by the legislatures of the States on the basis of equality among the States (it is now directly elected by the voters in each State, but still on the basis of State equality), the House of Representatives was (and still is) elected by voters in a manner that is essentially proportional to each State’s population, and the President was (and is) elected through an electoral college which allocates to each State a number of votes corresponding to its total representation in both houses of Congress.¹⁸ Similarly, the U.S. Constitution can only be amended through the consent of special majorities of the State legislatures or in conventions held in each State.¹⁹ In relation to both ‘representation’ and ‘amendment’, therefore, the federal principle is expressed in the special role and status of the States, while the national principle is expressed in the movement from unanimity among the States towards majority rule at a state and national level. Moreover, throughout, democracy is conceived essentially as *representative* democracy, even at the supreme constitutive moments of ratifying the Constitution (through elected conventions) and making formal amendments to it (through either conventions or the state legislatures).

This much is fairly rudimentary, but it is the logic of the constitutional design that is important, for the prime questions to be addressed in constructing a federal system concern the many different ways in which Madison’s ‘federal’ and ‘national’ principles can be combined. Other federal countries offer models of different combinations of these principles, but a tendency to move from unanimity among the constituent states to majority rule, and from control by the state governments towards popular involvement of some kind, is consistent across all federal systems that come into being on the basis of a negotiated agreement among several constituent states. Some integrative systems go further in these directions than others, and all of them express the principles in specifically different ways, but the underlying principles are the same.²⁰

¹⁷ See M.E. Bradford, *Original Intentions on the Making and Ratification of the United States Constitution* (Athens: University of Georgia Press, 1993), 9-10.

¹⁸ U.S. Constitution, Art. I, ss. 2, 3; Art. II, s.1; Amendments XII, XVII.

¹⁹ U.S. Constitution, Art. V.

²⁰ See Nicholas Aroney, 'Formation, Representation and Amendment in Federal Constitutions' (2006) 54(1) *American Journal of Comparative Law* 277.

III

This brings us to the Canadian and Australian examples. These two federations did not come into being through revolutionary assertions of autochthony. Lawmakers in both instances were careful to ensure complete legal continuity with the then accepted authority of the British Parliament to legislate for the colonies.²¹ But the Canadian and Australian ways of coming together and constructing a federation were in certain respects significantly different. The Canadian federation was designed in a manner that was consciously intended to avoid the apprehended tendencies of the American system to disunity and dissolution, expressed most tragically in the Civil War. Rather than begin with putatively sovereign states bargaining on the basis of a fundamental constitutive equality, the Canadian system was understood to rest, ultimately, on the authority of the sovereign Imperial Parliament at Westminster, which would through the *British North America Act 1867* unite Ontario, Quebec and the Maritime provinces into a suitable form of union, modelled on the British system of parliamentary responsible government. As the most prominent Canadian politician of the time, John A. MacDonald, put it:

The United States began at the wrong end. They declared by their Constitution that each state was a sovereignty in itself, and that all the powers incident to sovereignty belonged to each state, except those which by the Constitution were conferred upon the General Government and Congress. Here we have adopted a different system. We have strengthened the General Government. We have given the general Legislature all the great subjects of legislation. We have conferred upon them not only specifically and in detail all the powers which are incident to sovereignty, but we have expressly declared that all subjects of general interest not distinctly and exclusively conferred upon the local government and local

²¹ Peter C. Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford: Oxford University Press, 2005). Cases relevant to this point include: *Reference re Amendment of the Constitution of Canada (Nos. 1, 2 and 3)* (Patriation Reference) [1981] 1 SCR 753; *Reference re: Secession of Quebec* (Quebec Secession Reference) [1998] 2 SCR 217; *Sue v Hill* (1999) 199 CLR 462; *Attorney-General (WA) v Marquet* (2003) 217 CLR 545; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28.

legislatures, shall be conferred upon the General Government and Legislature.²²

While political representatives of the Canadian colonies did participate in conferences in 1864 and 1866 at which the terms and structure of a proposed union were agreed in the form of a series of published resolutions, the colonies did not participate as equals (the Maritime provinces were treated, constitutionally, as a unit), and they did not presume to dictate to the Parliament the exact language of the statute under which they would be united. Unlike the Americans, the Canadians thus wished to create a relatively unified federation, under which the legislative powers of the general government (the Dominion of Canada) would be plenary and the powers of the Provinces would be limited to certain specified topics – a significant departure from the American model, where the original and plenary powers of the constituent States were the very presupposition of the federal system and the powers of the United States Congress were therefore limited and specified.²³ The Canadian Provinces were thus conceived to be creatures of the *British North America Act* (most of them still don't have 'constitutions' of their own).²⁴ The provincial governments were presided over by Lieutenant Governors and 'represented' by Senators appointed by a Governor-General advised by the government of the Dominion of Canada as a whole.²⁵ Indeed, the very nomenclature was significant: Provinces, not States; Lieutenant Governors, not State Governors, and so on. Moreover, the constitutive dependence of Canada on the Imperial Parliament was preserved in the fact that no local power of constitutional amendment was included in the *British North America Act*.²⁶ The logic of Parliamentary sovereignty thus shaped the Canadian Constitution of 1867 through and through. In its 'foundation', the system was highly unitary, with the exception that the Provinces did negotiate the general nature of the system that would be adopted (but not as equals), and these unitary and unequal foundations shaped the fundamentals of the *British North America Act* in terms of its distribution of powers, representative institutions, and lack of an amending provision.²⁷

Now it is of course very true that constitutional politics in Canada has seen the country shift very dramatically in the direction of much greater autonomy for

²² G P Browne (ed), *Documents on the Confederation of British North America* (Toronto: McClelland & Stewart, 1969), 33.

²³ For the Canadian debates generally, see Janet Ajzenstat et al, *Canada's Founding Debates* (Toronto: University of Toronto Press, 2003).

²⁴ *British North America Act 1867*, Pt. V.

²⁵ *British North America Act 1867*, ss. 58-62.

²⁶ Note the limited power conferred by the *British North America Act 1867*, s. 91(1), now replaced by *Constitution Act 1982* (Can.), Pt. V.

²⁷ For more detail, see Aroney, 'Formation, Representation and Amendment', 332-333.

the Provinces.²⁸ This is due to several factors: most notably, the pressures of linguistic and cultural diversity expressed in Francophone Quebec and calls for secession; the addition of several new Provinces to the federation by way of carefully negotiated agreements between the parties; and the unintended consequence that specifying the legislative powers of the provinces in the BNAA provided the Privy Council and Supreme Court with a textual ground upon which to limit expansionist interpretations of federal power. But in the 1890s, when the Australian colonies were contemplating federation, the Canadian model appeared much too Imperial and centralist for politicians and a voting public that had become accustomed to exercising substantial powers of local self-government and constitutional self-determination (as confirmed by the *Colonial Laws Validity Act 1865* (U.K.)). The Australians wanted to follow the American model, and they did everything they could to reproduce an American-style federation subject only to the dictates of a continuing (but oftentimes grudging) willingness to acknowledge the authority of the British Parliament to legislate for Australia. And it was in this respect that the referendum proved very significant indeed.²⁹

Following the American example, Australian politicians generally resisted British encouragements towards federation until they themselves, as elected representatives of the colonies, thought that it was expedient and right to do so. Accordingly, federation did not proceed in Australia until the governments of each colony supported it. Once this support was secured, at a conference held in 1890,³⁰ *Enabling Acts* were passed in each of the colonial Parliaments which set up a U.S.-style federal convention at which a draft Constitution Bill was to be debated, drafted and submitted to each of the colonial legislatures for their approval. Such a convention, at which each colonial Parliament was necessarily equally represented, was duly held in 1891.³¹ The draft constitution that emerged from the convention was inspired deeply by the American example: the existence, powers and mutual independence of the constituent colony-states was taken as a presupposition of the whole system rather than as a product of it, and it was thought quite improper to make any provision at all for the governing institutions of the States within the federal constitution. It was enough that the State constitutions should ‘continue’ as they had,³² subject only to the conferral of

²⁸ See, eg, the comments in *Reference re Secession of Quebec* [1998] 2 SCR 217, 250.

²⁹ This section draws extensively from Aroney, *Constitution of a Federal Commonwealth* (2009).

³⁰ *Official Record of the Proceedings and Debates of the Australasian Federation Conference* (Melbourne: Government Printer, 1890).

³¹ *Official Report of the National Australasian Convention Debates, Sydney* (Sydney: Acting Government Printer, 1891).

³² Australian Constitution, s. 106. Most of the features discussed in this paragraph were reflected in the constitution that was eventually enacted into law in 1900 and came into force on 1 January 1901.

certain limited powers on the federal institutions of government.³³ Thus, the limited and specific distribution of legislative powers to the federal Parliament presupposed the original and plenary legislative powers of the colonial Parliaments, and these same Parliaments were also equally represented in the federal Senate.³⁴ Moreover, federal executive authority, although formally vested in the Crown, was to be exercised by a Governor-General acting on the advice of a Prime Minister and Cabinet responsible to a Parliament in which the Senate had equal power with the House of Representatives except in relation to financial bills;³⁵ and even here the power of the Senate to refuse to grant financial supply to the government was conceded, making the government potentially responsible to both houses (as famously occurred in 1975, leading to the controversial dismissal of the Whitlam government by Governor-General Kerr).³⁶ And, finally, again influenced by the American example, but also following the particular federating logic of the Australian system, provision was made for the amendment of the constitution by specially elected conventions held in each constituent state.

As it turned out, the Constitution Bill of 1891 did not secure the support of the colonial governments of the day, and federation languished for another four years, until a second convention was proposed in 1895. This convention was duly held in 1897-8 and a second Constitution Bill was drafted, approved and finally enacted into law by the British Parliament in 1900.³⁷ What distinguished this constitution from the earlier draft was a slightly different federating logic. This time it was thought important for the federal convention itself to be directly elected by the voters in each colony, and for the draft Constitution Bill prepared by the convention to be submitted to the colonial legislatures for their comments, subsequently revised at a second sitting of the convention, next submitted to the voters in referendums held in each colony and, only to the extent thus approved, finally sent to Westminster for enactment into law. The principles embodied in this constitutive process dictated in the minds of the Constitution's drafters that while the principles of unanimity and equality among the colony-states must be preserved, the principle of direct, popular, constituent authority should also be expressed throughout the system, particularly in the direct election of the Senate by the voters in each State,³⁸ and in the provision for amendment of the

³³ Australian Constitution, s. 51.

³⁴ Australian Constitution, s. 7.

³⁵ Australian Constitution, ss. 53, 61, 64.

³⁶ L.J.M. Cooray, *Conventions, the Australian Constitution and the Future* (Sydney: Legal Books, 1979).

³⁷ *Official Report of the National Australasian Convention Debates, Adelaide* (Adelaide: Government Printer, 1897); *Official Record of the National Australasian Convention Debates, Sydney* (Sydney: Government Printer, 1897); *Official Report of the National Australasian Convention Debates, Melbourne* (Melbourne: Government Printer, 1898).

³⁸ Australian Constitution, s. 7.

Constitution by a referendum at which a majority of the voters in a majority of States would be needed, in addition to the support of a majority of voters in the nation as a whole.³⁹

In this, and in numerous other more specific ways, the Australian founders gave effect to a particular form of federating logic, similar to the American (and the Swiss) federations, and somewhat different from the Canadian. In particular, through the referendum, the constitutional logic of the Australian federal system appealed to a kind of political sovereignty in the plurality of peoples of the constituent States as a means of asserting as much autochthony as was possible without altogether repudiating the authority of the British Parliament to legislate for Australia. Indeed, one of the powers conferred upon the Australian Parliament, acting (significantly) with the consent of *all* of the State Parliaments concerned, was a ‘catch-all’ or ‘residuary’ capacity to exercise the legislative powers of the British Parliament with respect to Australia.⁴⁰ As Andrew Inglis Clark, one of Australia’s leading constitutional lawyers, said at the time:

[the draftsmen] knew what they were doing. ... They told the Convention what they were doing, and it agreed with them. ... They did not hold anything back. They faced the position that they were going in for absolute legislative independence for Australia as far as it could possibly exist consistent with the power of the Imperial Parliament to legislate for the whole Empire when it chose.⁴¹

In the 1980s, the constitutional ties between the British Parliament and Australia and Canada were decisively brought to an end.⁴² But within Australia at least, opinions about precisely *when* constitutional independence effectively occurred, and *what* it has amounted to, have turned, in part, on views about the referendum – both as the means by which the federal Constitution was first approved by the voters, and as the only regular means by which it can formally and legitimately be amended in the future.⁴³ The statutory confirmation of

³⁹ Australian Constitution, s. 128.

⁴⁰ Australian Constitution, s. 51(xxxviii).

⁴¹ Keven Booker, ‘Section 51(xxxviii) of the Constitution’ (1981) 4(2) *University of New South Wales Law Journal* 91; George Winterton, ‘Section 51(xxxviii) of the Constitution and Amendment of the “Covering Clauses”’ (1982) 5(2) *University of New South Wales Law Journal* 327.

⁴² *Canada Act 1982* (U.K.); *Australia Acts 1986* (U.K. and Australia).

⁴³ Geoffrey Lindell, ‘Why Is Australia’s Constitution Binding? - the Reasons in 1900 and Now, and the Effect of Independence’ (1986) 16 *Federal Law Review* 29; Michael Kirby, ‘Deakin: Popular Sovereignty and the True Foundation of the Australian Constitution’ (1996) 3 *Deakin Law Review* 129; Nicholas Aroney, ‘A Public Choice? Federalism and the Prospects of a Republican Preamble’ (1999) 21 *University of Queensland Law Journal*

Australia's constitutional independence from the U.K. in 1986 was in fact secured in two separate Australia Acts, one enacted by the British Parliament following Australia's request and consent pursuant to the *Statute of Westminster*, the other enacted by the Australian Parliament following the consent of the State legislatures pursuant to s. 51(xxxviii) of the Constitution.⁴⁴ Which of these statutes is the actually effective one, and by what authority the Australian Constitution is now binding, have been questions that have intrigued constitutional lawyers in Australia ever since, and in the ensuing discussions, the existence of the referendum has played a central conceptual and normative role.

IV

It is in the sense just described that the use of referendums in the United Kingdom has the potential to be of very great significance. The referendum, even if only used as an 'indicative' device, has the capacity to be much more than a means by which the popular will is ascertained. Whether it will in fact do so depends, of course, on numerous political and legal factors. The referendums that have accompanied the current devolution arrangements have not led to such a conclusion, of course, but that is a function of the limited nature of devolution itself. The proposition asserted by the Scottish Parliament that it has the power to define and hold a referendum of the Scottish people on the question of independence,⁴⁵ if upheld, has the remarkable potential to be interpreted not simply as an appeal to public opinion, but as an appeal to an alternative basis of 'sovereignty', in much the same way that the referendum has functioned in the Australian debate.⁴⁶ For, as the Australian experience shows, even if independence

205; Simon Evans, 'Why Is the Constitution Binding? Authority, Obligation and the Role of the People' (2004) 25 *Adelaide Law Review* 103. The Canadian debate on this issue has had a significantly different character. See Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (2nd ed, Toronto: University of Toronto Press, 1993).

⁴⁴ See Anne Twomey, *The Australia Acts 1986: Australia's Statutes of Independence* (Sydney: Federation Press, 2010).

⁴⁵ Cf the contrasting views of the Scottish and British Governments: The Scottish Government, *Your Scotland, Your Referendum* (Edinburgh: The Scottish Government, 2012); Secretary of State for Scotland, *Scotland's Constitutional Future: Responses to the Consultation* (London: The Stationery Office, 2012).

⁴⁶ Cf Stephen Tierney, "'We the Peoples': Constituent Power and Constitutionalism in Plurinational States' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism* (Oxford: Oxford University Press, 2008) 229.

(or devo-max, or a federal system) were to be formally established by an Act of the British Parliament, the existence of a referendum initiated by local authority could be interpreted as the basis upon which the whole system rests, permanently limiting, or even displacing, the authority of the Parliament.⁴⁷ To be sure, such a fundamental realignment would only occur if it had fairly general support among the political and legal branches of government, but such things can happen. And the fact that the ultimate grounds of the Australian and Canadian federal systems are still debated shows that these things can take a long time to work themselves out.

Of course, many steps would need to be taken before anything approaching a fully-orbed federation in the contemporary Australian or Canadian senses could be said to have developed in the U.K. And yet, there are several respects in which the current scheme of devolution is not all that far removed from the Canadian system as it existed in the second half of the nineteenth century.⁴⁸ While the details of both systems were to an extent negotiated between the parties, each scheme rested (or still rests) on British parliamentary enactment. The powers of the centre also present themselves in both instances as original and/or plenary, while the powers of the regions are conferred from the 'centre', or from 'above'.⁴⁹ And both systems are asymmetrical in respect of the powers devolved⁵⁰ or in the degree of regional representation in the central legislature.⁵¹ Even the development of the Sewel Convention and various constitutional concordats between Westminster and Holyrood which restrain the exercise of power by the U.K. Parliament⁵² recall the way in which the fundamentals of the Canadian system have evolved through intergovernmental negotiations and constitutional agreements in a way and to extent that simply has not occurred in Australia.⁵³ Moreover, the legal capacity to make 'constitutional' changes to the scheme in both the U.K. and Canada rests (or once upon a time rested) with the British Parliament.

⁴⁷ For an application of this principle to the constitutions of the Australian States, see Nicholas Aroney, 'Popular Ratification of the State Constitutions' in Paul Kildea, Andrew Lynch and George Williams (eds), *Tomorrow's Federation: Reforming Australian Government* (Sydney: Federation Press, 2012) 210.

⁴⁸ Cf Martin Laffin and Alys Thomas, 'The United Kingdom: Federalism in Denial?' (1999) 29(3) *Publius: The Journal of Federalism* 89; Peter Leyland, 'The Multifaceted Constitutional Dynamics of U.K. Devolution' (2011) 9(1) *International Journal of Constitutional Law* 251.

⁴⁹ See Canadian Constitution, ss. 91 and 92.

⁵⁰ On the asymmetry of U.K. devolution, see C. M. G. Himsworth, 'Devolution and Its Jurisdictional Asymmetries' (2007) 70(1) *Modern Law Review* 31; Peter Leyland, 'The Multifaceted Constitutional Dynamics of U.K. Devolution' (2011) 9(1) *International Journal of Constitutional Law* 251.

⁵¹ Canadian Constitution, s. 22.

⁵² Paul Bowers, *The Sewel Convention* (London: The House of Commons Library, 2005).

⁵³ For a comparison, see Thomas O. Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Inquiry* (Peterborough, Ontario: Broadview Press, 2006), ch. 8.

What nonetheless distinguishes the U.K. from mainstream federal systems is the extent of the powers devolved, the way in which those powers are conferred, and the grounds upon which they are conferred. This is because the formal logic of devolution is fundamentally different. Devolution works as a grant from a superior legislature to legally subordinate ones. The *Scotland Act 1998* thus affirms the continuing legal authority of the Parliament at Westminster to legislate for Scotland generally and confers on the Scottish Parliament what are in principle subordinate and limited powers.⁵⁴ However, contrary to expectation, the Act achieves this by an initial conferral of a general legislative power which is in turn subjected to a (long) list of specified reservations.⁵⁵ Such a scheme presents questions of interpretation that are intriguingly different from those presented by either the Canadian or Australian federal systems. In Canada the powers of the Provinces are limited to specific topics in a manner similar to that envisaged for Scotland in 1978,⁵⁶ whereas in Australia, like the United States, the powers of the States are treated as original and plenary and the powers of the federation specified and limited.⁵⁷ This has led to an important difference in interpretative approach between Canada and Australia, based on the way in which the constitutional question of legislative validity is posed to the court.⁵⁸ And, most interestingly, members of the U.K. Supreme Court in *Martin and Miller v. Lord Advocate*, following a line of Privy Council decisions arising out of Canada, seem to have adopted a ‘pith and substance’ approach to characterisation, which requires the court to identify the ‘true nature and character’ of any Scottish law for the purpose of determining whether it ‘relates to’ a matter ‘reserved’ to the United Kingdom Parliament.⁵⁹

This approach to characterisation, influential in Canadian jurisprudence, differs from the approach that has long prevailed in Australia, where on the contrary it has been considered that enactments can have several ‘characters’, depending on which aspects or dimensions of the law are emphasised. For example, a law may impose a tax on superannuation schemes which do not invest

⁵⁴ *Scotland Act 1998*, s 28(7).

⁵⁵ *Scotland Act 1998*, ss. 28(1) and 29(1)-(2), and Sch. 5.

⁵⁶ *Scotland Act 1978*.

⁵⁷ Australian Constitution, s. 51.

⁵⁸ In Canada, it is a question of deciding whether a particular statute of either the federation *or* a particular province falls *either* within the list of federal or provincial powers. In Australia, it is always only a question of whether a federal statute falls within the list of federal powers. Although the Australian approach of distributing legislative competence was meant to accord a certain priority to State power, and while the Canadian approach was meant to give greater priority to federal power, for reasons explained below, two schemes have in practice had the opposite effect.

⁵⁹ *Martin and Miller v. Lord Advocate* [2010] U.K.S.C 10, [11]-[16]; but cf [44].

in government bonds.⁶⁰ Is such a law to be characterised as relating to ‘taxation’, ‘superannuation schemes’ or ‘government bonds’? The answer to this question will have implications for the constitutional validity of the law depending on whether the topics of ‘taxation’, ‘superannuation schemes’ or ‘government bonds’ fall within legislative competence or not. In Canada, where there is a list of specified Provincial competences, supplemented by a list of Dominion competences, it is necessary for the courts to determine whether the subject matter of a particular enactment falls within *either* the Provincial or the Dominion list. If an enactment was thought to have more than one relevant ‘character’, one of which aligned the law with the Provincial list and the other which aligned it with the Dominion list, then an impasse would be reached and it would be impossible for the judicial technique to generate a resolution to the question of validity. It is precisely for this reason that the dual list system in Canada has tended to drive the courts towards arriving at the *one* ‘true nature and character’ of the enactment. In Australia and the United States it is different, for in both these systems it is only necessary to determine whether a federal enactment falls within any one of the competences conferred upon the federal legislature. As there is no list of state competences, there is no question whether a federal enactment also falls within state power. As a consequence, it is not necessary to determine the one ‘true nature and character’ of the law in Australia, and it is possible that a law may have many different characters, *any* one of which might be sufficient to classify it against the list of federal competences.

All of this makes a difference to the balance of power between the federation and the states. In Australia and the United States it means that federal laws are more likely to be characterised in a way that connects them to a requisite competence and therefore finds them to be validly enacted, whereas the Canadian approach means that federal laws can be found invalid, even if they have some aspect that connects them to a topic in the list of federal legislative powers – precisely because it can sometimes be shown that the ‘true nature and character’ of the law actually concerns a topic on the provincial list.

Against this background, what makes the U.K. scheme unique and intriguing is that while there is a single list, this list sets out the matters that are reserved to the United Kingdom Parliament. This means that an enactment of the Scottish Parliament will be invalid if it can be characterised as relating to something on the list of reserved matters. And as there is a single list, there is no logical need for the court to identify the *one* true nature and character of the law; *multiple* characterisation, as occurs in Australia, is conceptually possible. And yet, the leading judgment of Lord Hope in *Martin and Miller v. Lord Advocate* seems to

⁶⁰ The example is taken from *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1.

have settled on the Canadian approach, based on the special requirement in the *Scotland Act* that the character of any Scottish enactment be determined ‘by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances’.⁶¹ The singularity of the ‘purpose’ and the ‘effect’ here seems to have led the Court to adopt the Canadian pith and substance method, even though the *Scotland Act* distributes legislative competence through a single list, unlike Canada. Whether this approach to characterisation will prove sustainable in the U.K. over the long term is an interesting question. Certainly, such an approach has the general tendency to increase the likelihood that a Scottish law will be upheld as constitutional, for it limits the character of the law to only one character, which will only lead to invalidity if the that single character happens to connect it to a reserved matter.

The Scottish Parliament’s asserted power to define and hold a referendum on Scottish independence raises issues of competence along these lines, but the questions that it raises go even deeper than this. The primary question is whether a Scottish enactment authorising the holding of a referendum on independence would ‘relate to’ one of the ‘reserved matters’ set out in Schedule 5 to the *Scotland Act*, namely ‘the Union of the Kingdoms of Scotland and England’.⁶² Noting that this question has to be determined by reference to the purpose and effect of the law, the interesting point at the outset is that such a law would have several different effects, both ‘legal’ and ‘practical’. The immediate effect of the law would be to authorise the holding of the referendum. Now merely holding a referendum, whatever the result, would have strictly no legal effect on the union of the two kingdoms. Even if a majority of Scottish voters were to express a preference for independence, the legal dissolution of the union would require further steps to be taken. And yet, an affirmative referendum result would place considerable, probably irresistible, political pressure upon the U.K. Government and Parliament to accede to the preferences of the Scottish people and institute whatever legal steps would be necessary to dissolve the union. So the question becomes: are these ‘effects’, and the underlying intent of the Scottish Parliament to secure independence through the referendum, enough to conclude that a Scottish law merely authorising the holding of a referendum is to be characterised as a law ‘relating to’ the reserved matter of the union of the two kingdoms? While the stronger legal view may be that this is indeed enough, opinions on this strictly legal question vary.⁶³

⁶¹ *Scotland Act 1998*, s. 29(3).

⁶² *Scotland Act 1998*, Sch. 5, para. 1(b).

⁶³ Compare, eg, Gavin Anderson et al, *The Independence Referendum, Legality and the Contested Constitution: Widening the Debate* (UK Constitutional Law Group, 2012); Adam Tomkins, *The Scottish Parliament and the Independence Referendum* (UK Constitutional Law Group, 2012), both at <http://ukconstitutionallaw.org>. See, also, Select

But it is not just a technical question of legal competence that is a stake. A law which authorises the holding of a referendum on independence is no ordinary law, for referendums are the most obvious and direct way in which the will of ‘the people’ is expressed, and a referendum on independence raises perhaps the most fundamental question that can be asked of a people: do you wish to remain a part of this wider political community called the United Kingdom, or do you wish to withdraw from the union and govern yourselves as an independent political community? As such, a referendum on independence appeals to a ground of authority that, in democratic terms, is even deeper, and more commanding, than the authority of elected governments and legislatures. It is commonplace to call this kind of authority by the name of ‘popular sovereignty’, which *if* successfully asserted and secured through the referendum process, has the extraordinary potential to reconfigure the constitutional foundations of Scotland, England and the United Kingdom in the most fundamental terms possible. A referendum might lead to full independence for Scotland as a sovereign state; or it might lead to a renegotiation of the terms of union through a process which treat Scotland and England as constitutional equals. Either result would lie outside the scope of the powers of the Scottish Parliament under the *Scotland Act* technically conceived, but if the referendum became the effective means through which Scottish autochthony was successfully asserted, the *Scotland Act* would *ex hypothesi* cease to be of any relevance to the matter.

Moreover, if a positive response to the referendum were to be secured, the renegotiation of the terms of union along federal lines would be very possible. And if as a result Scotland and England (if not also Wales and Northern Ireland) were treated as constitutional equals and constituent units of a newly negotiated union, it would have implications not only for the logic of the distribution of power in the U.K., but also for the principle of representation within the legislatures of the union, especially the U.K. Parliament itself, as well as the ‘constitutional’ status of the agreement among the constituent nations that would give rise to the federal system in the first place.

Committee on the Constitution, *Report on Referendum on Scottish Independence* (HL Paper 263) (London: House of Lords, 2012).

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But this is to get well ahead of the facts as they presently exist. There remain many ‘ifs’. At the present time, the first complexity is that as the ‘sovereign’ legislature, the U.K. Parliament possesses not only the power to determine the terms of the devolution settlement as whole, but also to legislate directly on matters concerning any one of the constituent nations of the U.K. The Sewel convention means that the Parliament presently does not legislate for Scotland without the consent of Scottish Parliament, but without a corresponding parliament for England, the same principle simply cannot apply to legislation concerning England, on which question non-English MPs still have full voting rights within the U.K. Parliament. Procedural steps have been taken within the U.K. Parliament to seek to separate the functions of the Parliament concerning each of the constituent nations of the U.K., but progress to date has been gradual and often tentative,⁶⁴ and the so-called ‘English question’ remains an unresolved point of very significant tension caused fundamentally by the dual nature of the Parliament and the asymmetrical structure of the U.K. system (including the simple fact that England accounts for over four-fifths of the U.K. population).⁶⁵ These features of U.K. devolution continue to distinguish it very sharply from mainstream federations, where the ‘central’ legislatures are certainly not ‘sovereign’, and there is an underlying symmetry in the way in which the distribution of legislative competence correlates with the structure of representation in both the ‘state’ and ‘federal’ parliaments.

Significantly, this fusion in the U.K. of two functions within the one institution (‘central’ legislature and ‘sovereign’ legislature) makes the system look more like what Germans are accustomed to calling a *zweigliedrig* or bipartite ‘federal’ system, rather than a *dreigliedrig* or tripartite one, noting that the former conception suggests a centralised federal system, in which the ‘states’ are subordinate to the ‘federal’ level of government, rather than one in which both the ‘states’ and the ‘federation’ are equally subject to the order of the federation as a

⁶⁴ As early as one year into devolution commentators were observing ‘tentative’ steps towards a more ‘federal’ U.K. Parliament through the special parliamentary committees for Scotland, Wales and Northern Ireland and the development of select and standing committees dealing particularly with English affairs: Meg Russell and Robert Hazell, ‘Devolution and Westminster: Tentative Steps Towards a More Federal Parliament’ in Robert Hazell (ed), *The State and the Nations: The First Year of Devolution in the United Kingdom* (Devon: Imprint Academic, 2000) 183.

⁶⁵ Robert Hazell, *The English Question* (London: The Constitution Unit, School of Public Policy, University College London, 2006); Leyland, ‘The Multifaceted Constitutional Dynamics of U.K. Devolution’, 265-267; Oonagh Gay, *The West Lothian Question* (London: House of Commons Library, 2011).

whole, as defined by the founding compact between the states, as embedded in the constitution.⁶⁶ It is not necessary to buy into the metaphysics of German state-theory to see the point. For the U.K. to become more like a federation in the *dreigliedrig* sense, a way to separate the ‘central legislature’ and ‘sovereignty’ functions of the Parliament would have to be found, and the formation of a written British constitution, resting on the authority of the peoples of the U.K., is an obvious way in which this might be achieved.

In drawing attention to all of this – about the four large questions that would have to be addressed if the United Kingdom were to become a federation – I am conscious that this is all a matter of very lively political debate and I do not mean to imply a view about the course that the United Kingdom and each of its constituent nations ought to take on these issues. The issues are complex, some of them seem quite insuperable, and the path ahead remains very unclear. But I do suggest that the American, Canadian and Australian examples (and many other ‘federal’ models besides) can help us think through what U.K. devolution is, what it is not, and what it might become.

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⁶⁶ See Beaud, *Théorie de la Fédération*, ch. 4.