



# The Union and the state

## *Contested visions of the UK's future*

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### **IfG–Bennett foreword**

In February 2022, the Institute for Government and the Bennett Institute for Public Policy launched a Review of the UK Constitution, to offer an evidence-based and non-partisan analysis of the strengths and weaknesses of the constitution, and where necessary make recommendations for change.

To address the bold scope of this project, we have complemented our own in-depth research with a breadth of perspectives from some of the UK's foremost constitutional experts. In this series of expert guest papers, we publish the views and proposals of academics and practitioners, who take a range of stances from constitutional conservation through to major reform. While these papers respond to the pressing constitutional questions of the day, they all also look to construct long-term solutions that will inform political decision making as well as public debate.

Given the range of views expressed, we do not necessarily endorse all of the ideas found in these papers, but we can commend the rigour with which the arguments have been constructed and sincerely thank the authors for their thoughtful contributions.

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## Introduction

The UK remains highly unusual among advanced market democracies in that it willingly contemplates its own break-up in its constitutional framework. And the UK's territorial constitution has just survived a decade of extraordinary turbulence. It remains highly vulnerable, and some sort of reckoning – or at least a revival of debate about the UK's contested territorial future – is likely in the 2030s. Whether the UK survives in its current form or, alternatively, what it will look like if it doesn't stay together, will hinge on which of various starkly contrasting visions for its future prevails. That, in turn, will be determined by how effectively various levers of statecraft are used.

This paper is in three parts.

Part 1 analyses the current state of the Union. It argues that although the Union is stronger than it has been for a decade, this is a pause in tensions, not a resolution of them.

Part 2 then analyses the competing visions for the UK's future. Three different versions of unionism compete with separatism. The first is multinational unionism, a model that emphasises maximum devolution to the constituent parts of the UK. The second has become known as 'muscular unionism'. It is the polar opposite of multinational unionism, as it emphasises the primacy of the unitary UK state and British identity. Finally, muddling through is always an option and also the default one, and many inside and outside government advocate a pragmatic set of attempts to make the messy but popular settlement of the late 1990s work better.

Part 3 then looks at what strategies and levers of government can be used to further each of the competing visions. After two decades in which devolution has been substantially extended, and then following the disruptive constitutional change of Brexit, the balance of power between the central state and the devolved capitals is likely to stabilise because there is little left that can easily be devolved, and little enthusiasm anywhere for devolving it. Instead, the debate on the territorial constitution will move on. Partly, this will be a contest of narrative: whether the UK is a unitary state or a union state of constituent parts. But more importantly, it will also be a contest of statecraft. This will involve important choices for London about whether to compete with the devolved administrations, co-operate with them, or leave them largely alone.

The frequently heard canard that 'Whitehall' doesn't 'get' devolution hides the reality that no post-devolution government has made a clear strategic choice between the different models of the Union on offer. As the contest for the future of the Union continues, such a strategic choice probably becomes unavoidable. Furthermore, the contest takes place in what is now in many ways a 'transactional' Union arrangement where different parts of the population express ambivalence about its utility. So the performance of the UK state as a whole, at a time of serious global headwinds, matters profoundly too.

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## Part 1: Stably unstable – the Union in the 2020s

How stable is the UK Union? On the one hand, the UK seems, at the beginning of 2024, less likely to disintegrate territorially than at any time since the vote in favour of leaving the EU in June 2016.

In Scotland, in particular, the Union's prospects have recovered significantly. In 2020, at the height of the coronavirus pandemic, support for Scottish independence was routinely crossing the 50% threshold\* and independence's primary political vehicle – the Scottish National Party (SNP) – seemed unassailable. Brexit, the fact and manner of which the Scottish electorate had never consented to, provided seemingly ideal political conditions for the nationalists. But none of this was enough – just – to deliver an outright majority for the SNP in the Holyrood elections of 2021. Although eight Green MSPs ensured there would be a majority for legislation for a second referendum, the UK government (correctly) judged that public opinion in Scotland would not be outraged by resisting that demand.\*\* The Supreme Court then ruled emphatically that the Scottish parliament's pro-independence majority did not have the power to pass a bill to hold a referendum without Westminster's consent.\*\*\* That judgment was swiftly followed by a series of scandals and the departure of the first minister, Nicola Sturgeon. By the end of 2023, a weakened SNP remained in power in Holyrood, but in no position to continue to push seriously for an independent Scottish state.

In some ways, the position in Northern Ireland is similar. Sinn Féin, a nationalist party, has started consistently to secure a plurality of the popular vote and its vice-president, Michelle O'Neill, is now the first minister at Stormont, but there is no evidence of a majority in favour of Irish unification; no election result, and only one opinion poll, has ever given the secretary of state for Northern Ireland cause to consider their statutory obligations to call a border poll.\*\*\*\*

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\* For polling data from 2016 to the present on the independence question, see What Scotland Thinks, 'How would you vote on a Scottish independence referendum if held now? (asked after the EU referendum)', retrieved 29 January 2024, [www.whatscotlandthinks.org/questions/how-would-you-vote-in-the-in-a-scottish-independence-referendum-if-held-now-ask](http://www.whatscotlandthinks.org/questions/how-would-you-vote-in-the-in-a-scottish-independence-referendum-if-held-now-ask)

\*\* Similarly, for polling data on whether Scottish voters want another independence referendum, and if so when, see What Scotland Thinks, 'The Scottish independence referendum', retrieved 29 January 2024, [www.whatscotlandthinks.org/topics/the-scottish-independence-referendum](http://www.whatscotlandthinks.org/topics/the-scottish-independence-referendum)

\*\*\* For the judgment, see Supreme Court, 'Judgment: reference by the lord advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998', 2022, [www.supremecourt.uk/cases/docs/uksc-2022-0098-judgment.pdf](http://www.supremecourt.uk/cases/docs/uksc-2022-0098-judgment.pdf). In presenting the judgment, Lord Reed, the Supreme Court's (Scottish) president, opened his remarks with: "The Scottish parliament was established by the Westminster parliament." The rest of his remarks, and the whole judgment, were a comprehensive dismissal of any legal right of secession from the UK by Scotland.

\*\*\*\* No similar organisation to What Scotland Thinks exists for Northern Ireland polling. The most comprehensive list remains, unfortunately, Wikipedia users; see Wikipedia, 'Opinion polling on a United Ireland', retrieved 29 January 2024, [https://en.wikipedia.org/wiki/Opinion\\_polling\\_on\\_a\\_United\\_Ireland](https://en.wikipedia.org/wiki/Opinion_polling_on_a_United_Ireland). The methodology used to measure support for the Union versus Irish unity is disputed among various pollsters, which tends to give significant differences (for example, Lucid Talk consistently rates support for unification higher than the Queen's University's surveys). However, only one poll has ever shown a lead for unification.

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Elsewhere in the UK, constitutional politics are calmer. In Wales, pro-independence sentiment is high by historic standards but much too low to pose any threat to the Union.\* English national sentiment – and resentment – over England’s identity found an outlet in the politics of Brexit rather than the politics of the Union, and ‘the English question’ is not a serious threat to the stability of the UK. With the notable exception of the ongoing dispute over the Northern Ireland protocol, Brexit is seen as complete. The Covid pandemic, and the associated controversial expansion of state power, are also behind us. So constitutional politics at Westminster has returned to something approximating normality. The departure of Boris Johnson from Downing Street and the likely – according to opinion polls – departure of the Conservatives from office altogether in 2024 remove some of the factors of ‘grievance’ associated by many experts with support for breaking away from the UK. Crises in the economy and public services have pushed constitutional questions further down the list of voters’ priorities across the UK. Indeed, the next major test of UK-wide opinion – the general election of 2024 – looks set to be the most ‘conventional’ for some time, with little to no focus on existential constitutional issues in political debate. Predictions of the swift death of the Union, commonplace in the half-decade between the Brexit referendum in 2016 and the Scottish parliamentary elections of 2021 – look excitable at the beginning of 2024.

But for all that, it would be wrong to assume the Union is anything more than temporarily safe, particularly with regard to Scotland. Much of the pro-Union commentary at a UK-wide level of the “it’s over for Scottish nationalism” type\*\* seems to mistake the type of commonplace political reversal, such as that experienced by the SNP, with a structural shift in popular support away from independence. Polling suggests this is transparently mistaken: independence retains the support of around 48% of Scots, marginally lower than the peak of 2020 but still marginally higher than the Scottish referendum result of 2014. The 45% vote to leave the UK in 2014 has proved a floor, not a ceiling, for independence. It is an astonishingly high proportion in historical terms; it is also sufficiently high not to take for granted the continued security of the Anglo–Scottish Union simply because of the current serious difficulties facing the SNP.

Indeed, there are multiple reasons to suggest that ‘the Scottish question’ may only be temporarily dormant. Any or all of the following factors could help revive demand for a referendum over time. A Labour victory at the UK general election in 2024 would remove the Conservative ‘bogeyman’ for a period of time. But governments invariably disappoint. The UK normally eventually returns to the norm of Conservative majority governments. The Conservatives could return with a more ‘muscular’ approach to the Union in the 2030s, just as they returned to power in 2010 much more Eurosceptic than they left office in 1997. Even the worst-case political scenario for the SNP – losing power in 2026 in Holyrood – would allow the party not to have to account for the many failings

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\* For tracking of recent Welsh opinion, see Statista, ‘Should Wales be an independent country?’, retrieved 29 January 2024, [www.statista.com/statistics/572299/welsh-attitudes-of-independence-in-wales](https://www.statista.com/statistics/572299/welsh-attitudes-of-independence-in-wales)

\*\* *The Daily Telegraph* has published numerous articles around this narrative; see, for example, Lynn M, ‘Now that independence is dead, we can breathe new life into the economy’, *The Daily Telegraph*, 12 June 2023, [www.telegraph.co.uk/business/2023/06/12/scottish-economy-snp-nicola-sturgeon-pro-business](https://www.telegraph.co.uk/business/2023/06/12/scottish-economy-snp-nicola-sturgeon-pro-business).

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of government in Edinburgh for a period of time. And serious economic headwinds may undermine not just Labour's chances of governing successfully, but also the very arguments about things like pensions and health care that were so important to the Union's survival in 2014.

Even if none of these things happen, two longer term factors will play in favour of reopening the question of independence. Professor Lindsay Paterson's recent masterful analysis of decades of demographic, psephological and polling data<sup>1</sup> notes "the pronounced growth in support [for independence] among people born since the 1970s". His paper convincingly concludes that "long-term trends", which, he notes, have increased support for independence over recent decades, suggest that the level of support for independence, and of opposition to it, is "unlikely to be affected strongly or permanently by the transient fortunes of the SNP".

The other factor is the passage of time itself. Since 2014 there has been a dispute as to whether the description of the plebiscite of that year as "once in a generation" had any standing; by the end of the 2030s, this argument will be irrelevant, as by anyone's definition a generation will have passed.

For different reasons, those seeking Northern Ireland's departure from the UK may also have reason to believe time might be on their side. As the UK economy struggles, the economy of the Republic of Ireland booms, at least in headline terms. Bread-and-butter arguments about paying to see a general practitioner for health care may become less powerful if the NHS in Northern Ireland is seen to be close to collapse.\* And the absence, until recently, of a devolved government at Stormont has spared Sinn Féin of having to take responsibility for difficult and unpopular choices in the administration of public services (though, of course, it may have to manage them as a minority administration in the Republic of Ireland after the next election, which must be held by early 2025).

Most strikingly, public opinion in Northern Ireland has shifted in two key ways. First, while there is nothing approaching a majority for unification, and while disputed polling methodologies lead to different results, support for staying in the UK is consistently lower than its high point of the pre-Brexit period, when support for the Union was coming in at 65% as late as January 2013.\*\*

Second, although there is a clear majority for remaining in the UK, there is no longer a majority in Northern Ireland for being treated simply as just another part of it. Unionism lost its political majority in the assembly in 2017, a loss that now seems permanent. This is a striking and important historical reversal.

In the 1987 general election, unionist parties implacably opposed to the Anglo-Irish Agreement received 55% of the popular vote. Thirty-five years later, the 2022 assembly elections were held in the shadow of the Northern Ireland protocol, a constitutional

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\* A British Medical Association paper in late 2022 claimed: "If 'crisis' sums up the health service in England, Wales and Scotland, then perhaps we need to invent a whole new word for Northern Ireland, where patients can wait five years for an appointment"; see Trueland J, 'From bad to worse: Northern Ireland's care crisis', British Medical Association, 14 November 2022, [www.bma.org.uk/news-and-opinion/from-bad-to-worse-northern-irelands-care-crisis](http://www.bma.org.uk/news-and-opinion/from-bad-to-worse-northern-irelands-care-crisis)

\*\* For details of this Spotlight poll, see Devenport M, 'Opinion poll indicates NI voters would reject Irish unity', BBC News, 5 February 2023, [www.bbc.co.uk/news/uk-northern-ireland-21345997](http://www.bbc.co.uk/news/uk-northern-ireland-21345997)

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change correctly seen by unionists, and the Supreme Court, as of far greater significance than Margaret Thatcher's deal of 1985 to allow a modest consultative role for the Republic of Ireland government.\* Yet the election of that year saw a total of first-preference votes going to parties that supported this 'modified Union' at 55%. In a profound political shift, Northern Ireland is content to be British, but, recognising its unique circumstances, not quite as British as Finchley, to evoke Mrs Thatcher's famous phrase. A clear majority support specific arrangements for Northern Ireland that are not normal in a stable territorial state.

Analysed this way, while the UK Union has clearly stabilised since its post-Brexit referendum wobble, it would seem unwise to bet against either or both a second Scottish independence referendum or a Northern Ireland border poll by, say, 2040. And the UK's constitutional future will continue to be tested in the meantime.

The flexibility of the UK constitution means it is relatively easy to modify the constitutional settlement. The guaranteed right – enshrined in a binding international agreement – for Northern Ireland to secede, along with the precedent of the Scottish independence referendum of 2014, make the UK highly unusual in building its own potential break-up into its constitutional fabric. The resilience of genuinely 'national' as distinct from regional identities of Scottish, Welsh and, more awkwardly, Irish or Northern Irish drives a political conversation that is different even from countries with strong regional identities and strong subnational governments. It gives rise to various competing visions of what the UK Union should look like, if it should continue at all, and it is to those competing visions we now turn.

## **Part 2: Competing models for the territorial UK**

The fundamental fissure in the modern UK's territorial constitution remains the divide between those favouring continuing union and those advocating separation. Within those parameters, however, there is at present a much greater variation of approach within the unionist side than the nationalist one.

The main challenge for separatists remains the failure to build support for secession consistently above 50% in any of the non-English territories, part of which is attributed to a failure to set out a compelling vision of post-separation arrangements. But the overall strategic approach for those wishing to break up the UK is settled: work within the framework of the late 1990s' devolution settlements (stretching them where possible) while seeking to build support and political pressure for independence.

Contrastingly, there is no such consensus on the unionist side at UK-wide level among those seeking to preserve the UK in its current form. Instead, three alternative, competing models have emerged around how Westminster and Whitehall should seek to shape the UK's territorial constitution. Two of the models are strongly ideologically driven and in sharp contrast to each other; the third is more pragmatic and is based

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\* The Supreme Court ruled that Article VI of the Act of Union 1800 had been "modified in part" by the Protocol; see Supreme Court, 'Judgment', 2023, paragraphs 66–8, [www.supremecourt.uk/cases/docs/uksc-2022-0089-0093-judgment.pdf](http://www.supremecourt.uk/cases/docs/uksc-2022-0089-0093-judgment.pdf).

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on continuity with current practice. All are hard to label and exponents of each of the three approaches often, when setting out the detail of their plans, stray into aspects of the other two. But for the purposes of trying to analyse them, the three approaches are termed in this paper: multinational, muscular and muddling through.

### Multinational unionism

Multinational unionism takes the basic units of the UK as its four constituent parts. It rejects the idea of the UK as a 'unitary state', preferring the term the 'union state'. It has perhaps found its clearest expression via the advocacy of Mark Drakeford, first minister of Wales and leader of the consistently most successful pro-Union political movement in any of the devolved nations. Welsh Labour's 2021 manifesto contained a commitment to what it called radical federalism, and a remarkably radical and highly contested description of what the UK is: "We believe the UK is a voluntary association of four nations with sovereignty shared among its four democratic legislatures in Wales, England, Scotland and Northern Ireland."<sup>2</sup>

Multinational unionism is thus a political idea rather than a legal one. Drakeford's notion of the UK as some sort of confederation of nations has been emphatically rejected as a legal construct twice by the Supreme Court in the Scottish referendum case of 2022<sup>\*</sup> and in the first of two cases brought by the pro-EU campaigner, Gina Miller, in 2017.<sup>\*\*</sup> But it is no less politically evocative for all that. It has deep historical roots in the maintenance of separate Scottish (and to a lesser extent Irish, and to a much lesser extent Welsh) institutions after Union, and a political culture, especially in Scotland, which incentivised emphasising the needs of the particular nation within the Union and maintaining a distinct sense of nationhood.<sup>3</sup>

It also draws on the important and more recent late-20th-century UK-wide consensus that, in principle, any constituent part of the UK is allowed to leave if a majority of voters within it so wish. This is an important consensus even if, outside of the 1998 Belfast/Good Friday Agreement for Northern Ireland, it is only informally expressed.<sup>\*\*\*</sup> It marks a radical departure from the period preceding the First World War when even what would now be regarded as modest devolution for Ireland brought the entire UK to the brink of civil war.

This way of thinking, in marked contrast to much British constitutional history over the preceding two centuries, sees the four national units as the primary foundations of government, with the UK as a whole doing only those things that need to be done at national level. It is, in essence, federalism, but that term cannot properly capture this approach to the UK constitution, for three main reasons.

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\* See Supreme Court, 'Judgment', 2022, [www.supremecourt.uk/cases/docs/uksc-2022-0098-judgment.pdf](http://www.supremecourt.uk/cases/docs/uksc-2022-0098-judgment.pdf). See, in particular, the Supreme Court's rejection of arguments advanced by the SNP on self-determination, paragraphs 84–91.

\*\* See Supreme Court, 'Judgment', 2017, [www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf](http://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf). See paragraphs 126–51 for the Supreme Court's rejection of arguments about the rights of devolved legislatures to consent to UK-wide constitutional changes.

\*\*\* Margaret Thatcher wrote in her first volume of memoirs in 1993: "As a nation, they [the Scots] have an undoubted right to national self-determination; thus far they have exercised that right by joining and remaining in the Union. Should they determine on independence no English party or politician would stand in their way"; see Thatcher M, *The Downing Street Years*, HarperCollins, 1993. There has been no serious renunciation of this principle by any leading UK politician since then.

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First, the classic Hamiltonian federal structure of the US is driven by the need to impose some form of strong central state on historically powerful units; in the UK, the central state, via the Westminster sovereignty doctrine, is the source of all authority so this form of federalism aims to weaken existing central power, not strengthen it. Second, applying the sort of symmetrical power-sharing of federal structures as seen in the US, Canada, Australia, Germany and elsewhere tends to be viewed as unworkable in the UK because England accounts for 84% of the population, and England neither wants its own parliament nor wants to be divided up into regions, which would provide a greater balance between the constituent parts of the UK. Third, any properly federal model would have to replace the long-standing doctrine of parliamentary sovereignty to put constraints on the ultimate power of Westminster over the devolved administrations. While there are constraints in custom and practice at present, theoretically there is nothing to stop the outright abolition of any and all devolved powers by Westminster should a House of Commons and House of Lords majority vote for it.

Unsurprisingly, therefore, there is no clear agreement on what 'federalism' in a UK context, or what might better be called 'multinational unionism', might look like. But there are some reasonably clear sketches. The interim report of the Independent Commission on the Constitutional Future of Wales,<sup>4</sup> published in late 2022, outlined two versions of what it called 'federalism' – one which in effect strongly codified and protected the current devolution settlement but broadly kept the balance between the responsibilities of London and the devolved capitals as it is. It would require the revocation of the doctrine of parliamentary sovereignty and the codification of the UK constitution. The second model would do all this and then go further, in effect making each part of the UK fully fiscally autonomous.

Under either model, there would be new arrangements at the centre of the Union to share power beyond the current model of Commons supremacy that gives English voters the overwhelming dominance their population merits (such ideas normally involve reform of the upper chamber, with the constitutional reform proposals of the former prime minister, Gordon Brown, published at the end of 2022, a good example of this, even if the rest of the Brown proposals would not overall take the UK in the direction of a more federal, or multinational, Union).<sup>5</sup>

The difficulty of devising such arrangements for the UK state in such an unbalanced polity is one of the main objections to these proposals. A second objection, often associated with what we shall come to consider as the 'muscular unionists', is how the central state could be expected to foster the shared sense of Britishness needed to sustain the Union if it had so little impact in the day-to-day lives of citizens. A third challenge arises if full fiscal devolution is part of the package: what further powers can actually be allocated to the devolved nations without calling into question either the point of the central state, or the basis of a highly redistributive tax and social security system that tends to benefit Scotland, Wales and Northern Ireland.



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Nonetheless, for all these difficulties, the 'multinational' or 'quasi-federalist' vision of the UK remains a resilient one, traceable from the 'Home Rule all round' ideas of the late 19th century and embraced by many reform-minded people on the centre-left. Some of the support for multinational unionism is framed positively: for example, those looking to extend the existing devolution settlement in Scotland refer to the 1989 Claim of Right, emerging from the Constitutional Convention of the 1980s, citing "the sovereign right of the Scottish people to choose the form of Government best suited to their needs".<sup>6</sup> But for others, it is a grand concession to keep the UK together: indeed, the Welsh Constitutional Commission noted that many of those responding to its consultation exercise who favoured some form of 'federalism' did so because they "saw it necessary to preserve the Union".<sup>7</sup>

### **Muscular unionism**

This 'concessionary' unionism attracts the ire of those at the other end of the spectrum who advocate what has become known as a more 'muscular' approach.\* This involves a much more aggressive reassertion of Britishness and the UK state, explicitly at the expense of sub-British national identities and their associated devolved institutions.<sup>8</sup> Philosophically, therefore, muscular unionism is the opposite of 'multinational' unionism.

The UK government's *UK Internal Market* white paper of July 2020 precedes its discussion of devolution with the bald statement that "the UK is a unitary state".<sup>9</sup> Boris Johnson's remark in his written evidence to the Covid inquiry, that he did not want to have meetings with the heads of the devolved administrations because the UK was not a "mini-EU of four nations... in a federal structure", is a vivid example of the attitude in practice.<sup>10</sup> Legally, Johnson, and the authors of his white paper, were entirely accurate. Politically, as we have seen, this vision of the UK is much more contested.

Despite these occasional examples of muscular unionist rhetoric, successive Conservative-led administrations since 2010 have (mostly) eschewed (most of) the agenda. However, more recently it is gaining notable traction within the Conservative movement and has some policy accomplishments to its name already. The UK Internal Market Act 2020, which followed the aforementioned white paper, and was passed as a result of withdrawal from the EU single market, is the most forceful assertion of Westminster's governing supremacy since the establishment of devolution in the late 1990s.<sup>11</sup>

The intellectual foundations of so-called 'muscular unionism' are worth exploring. Its proponents often, though not exclusively, overlap with the wing of Conservatism that was always hostile to EU membership and eventually secured Brexit, because it is a philosophy based on the supremacy of the nation state. Just as an institution sitting above the nation state, like the EU, should not have the powers to contain it, neither should political institutions below national government level, such as the devolved legislatures, be able to undermine the settled democratic will of the population as a whole.

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\* For an accessible overview of some of the tenets of what has come to be called 'muscular unionism', see Hill H, 'Putting muscle behind the Union', *The Critic*, November 2021, <https://thecritic.co.uk/issues/november-2021/putting-muscle-behind-the-union>

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Above and beyond this nation-state supremacy, muscular unionists lament a genuinely exceptionalist part of the UK state's approach – a willingness to allow its own break-up not seen in many, or arguably any, other economically advanced democracies.\* To this end, they have belatedly woken up to, and feel trapped by, the internally and internationally binding commitments given by the UK state vis-à-vis Northern Ireland: that Northern Ireland can leave the UK if it wishes, and can have power-sharing government in key areas for as long as it remains.

The Belfast/Good Friday Agreement of 1998 is thus a constitutional game-changer, and not in the way muscular unionists like. Although the Conservatives, consigned to opposition just before the signing of that agreement in 1998, were keen to avoid being seen as opponents of an historic peace agreement, many on the British right were deeply uncomfortable with the compromises of sovereignty that it involved. In 2000, before he entered parliament, Michael Gove authored the right's definitive objections to the agreement.\*\* Two decades later, Jacob Rees-Mogg dismissed the core narrative of John Major and Tony Blair's bipartisan policy on Northern Ireland, enshrined in Major's Downing Street Declaration of December 1993 and later in the 1998 agreement, that the British government had "no selfish or strategic interest in Northern Ireland".<sup>12</sup> Such a statement was crucial to the political progress in Northern Ireland in the 1990s but sits very awkwardly with muscular unionism.

Pre-empting such tensions when still in opposition, David Cameron skilfully avoided revoking Conservative support for the 1998 agreement, while at the same time being clear that a government led by him would "never be neutral" on the Union.<sup>13</sup> Professor Mike Kenny, of the Bennett Institute for Public Policy in Cambridge, along with Jack Shelton, has charted how that latest example of deliberate ambiguity on Northern Ireland effectively led to a 'dual' policy in office, often conflicting, of shoring up the agreement's highly unusual institutions on the one hand, while trying to 'normalise' Northern Ireland's position within the UK on the other.<sup>14</sup> Consequently, Northern Ireland has always acted as a profound intellectual and practical constraint on muscular unionism in two ways: the state contemplates its own break-up, and it is accepted that different parts of the UK state need to be governed differently.

But the politics of Scotland have added a more visceral dimension – the Anglo–Scottish Union being much more historically central to ideas of Britishness than the British–Irish one. Muscular unionists therefore see Lord Cameron's concession of a referendum on independence in 2014 as reckless and unnecessary, contrasting it unfavourably with Madrid's resistance of a similar demand from the Catalan parliament in 2017 and lamenting the willingness of the British state to contemplate its dissolution not just in Northern Ireland but in Scotland too.\*\*\* They reject Cameron's defence of the 2014

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\* The closest comparator is Canada, which allowed two separation referendums to be held in Quebec in the late 20th century. Its Clarity Act 2000 provides very onerous criteria for the federal government to recognise any further such plebiscite.

\*\* Some of the original intellectual ballast for this scepticism for the Belfast/Good Friday Agreement comes from Michael Gove's paper; see Gove M, *The Price of Peace*, Centre for Policy Studies, 2000. Gove in government has distanced himself from this position and the government in which he serves has taken a largely orthodox approach to the agreement. However, the argument is now widely featured in debates within the Conservative Party beyond those in government.

\*\*\* This policy is now being modified in Madrid following the post-election negotiations between the Sánchez administration and some of the Catalan nationalists in the Spanish parliament.

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referendum as the apogee of a so-called 'respect' agenda;<sup>\*</sup> asserting instead that he and his government were "outplayed" in the negotiations.<sup>\*\*</sup> Consequently, muscular unionism has defined resistance to a second referendum on Scottish independence and, moreover, setting out the criteria for triggering one, as an article of faith.

Muscular unionism, crucially, also asserts the rights of the UK state in every aspect of public life beyond England as well as the necessity of using these powers as they are essential to the maintenance of the Union. Here, the narrative goes, a post-devolution attitude of 'devolve and forget' has neutered the UK state as a visible presence in the everyday lives of those living in Scotland, Wales and Northern Ireland,<sup>\*\*\*</sup> standing idly by while this withdrawal has been weaponised by successive SNP administrations since 2007.

Once again, the intellectual underpinnings of this approach must be explored. Boris Johnson, when serving as prime minister, is rumoured to have said that devolution has been "a disaster" that has gravely weakened the UK state.<sup>15</sup> Muscular unionists view devolution itself as the cause of separatist leanings. It is also seen as an infringement of the power of the UK state to manage its own business effectively, as well as a mess that has fuelled demand for independence. It has begun to flex its muscles with the first ever use of the blocking power over the exercise of devolved powers (over the Scottish government's gender recognition reforms, although the exercise of this power was phrased in very cautious, non-inflammatory terms with respect to devolved powers) and in the referral of several devolved statutes to the Supreme Court.

Perhaps the highest-profile articulation of this approach was an article in *The Daily Telegraph* by Lord (David) Frost, erstwhile negotiator of Brexit and cheerleader for the Internal Market Act, in which he said that just as devolution had evolved, it could also "evolve back".<sup>16</sup> Lord Frost seized on the particularly egregious ambiguities of the devolution settlement exposed by the Covid pandemic to highlight the case for greater central direction of statecraft. The exponent of these views is as much of interest as their content: Lord Frost represents the robust, pro-sovereignty wing of the Conservative Party that pushed for a harder form of Brexit and is now pushing for a more assertive form of Conservatism across many fronts.

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\* As recently as November 2023, on the day he was appointed as foreign secretary, Cameron defended his decision to allow a referendum on Scottish independence as a cornerstone of a 'respect' agenda in relation to the devolved administrations; see Cameron D, 'Written evidence submitted by the Right Hon David Cameron (IGR0012)', November 2023, <https://committees.parliament.uk/writtenevidence/126231/pdf>

\*\* For a standard critique of this approach, see Eaton G, 'How Salmond outplayed Cameron in the Scottish referendum talks', *The New Statesman*, 8 September 2014, [www.newstatesman.com/politics/2014/09/how-salmond-outplayed-cameron-scottish-referendum-talks](http://www.newstatesman.com/politics/2014/09/how-salmond-outplayed-cameron-scottish-referendum-talks). The author restates his interest as a senior member of the UK government's negotiating team at the time, working for the prime minister, David Cameron.

\*\*\* The secretary of state for Scotland's 2023 Conservative Party conference speech centred on ending what he called "devolve and forget", saying the UK government would no longer "fade into the background" in Scotland; see Hatton B, 'Alister Jack: UK government will no longer "fade into background" in Scotland', *Independent*, 1 October 2023, [www.independent.co.uk/news/uk/alister-jack-government-scotland-manchester-scottish-secretary-b2421953.html](http://www.independent.co.uk/news/uk/alister-jack-government-scotland-manchester-scottish-secretary-b2421953.html). Similarly, the former Welsh secretary, Sir Robert Buckland, told a Bennett Institute for Public Policy and Institute for Government event with the author in September 2023 that there should be no areas of policy in any part of the UK beyond the reach of the UK government; see Bennett Institute for Public Policy and Institute for Government, 'The future of the UK constitution: the IfG and Bennett Institute conference', 19 September 2023, [www.instituteforgovernment.org.uk/event/future-uk-constitution-conference](http://www.instituteforgovernment.org.uk/event/future-uk-constitution-conference)

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In some ways, the muscular unionist philosophy resembles the anti-EU faction of Conservatism in the mid to late 1990s: a group facing electoral defeat, on the fringes of the governing party, but gaining significantly in power and influence and prepared for the long march in opposition to achieve what looked impossible. That is why it is reasonable to predict that the Conservative Party, after a period in opposition, could return to power in the 2030s with a much more hostile and combative approach to devolved power than the one evident in the successive Conservative administrations since 2010. The hugely significant obstacle for this vision of the UK state is, for now at least, popular opinion: devolution remains hugely popular in Scotland;<sup>\*</sup> after initial reticence it has secured losers' consent in Wales;<sup>17</sup> and in Northern Ireland, as we have seen, it remains far more popular than hard-line integrationist unionism.<sup>18</sup> But given the overlap between muscular unionism and anti-Europeanism, its proponents can reasonably point out that anti-European sentiment overturned a huge majority in the 1975 referendum two generations later.

It is therefore most unwise to discount muscular, unitary-state unionism as a viable competitor in the contest for the future of the UK state. In the remaining period of a Conservative administration, however long it may be, there are small, foundational steps that can and are being taken, such as direct deals with local councils on transport, education and infrastructure projects, that impinge directly on devolved competences. As Part 3 of this paper sets out, more aggressive use can be made of the blocking or judicial referral powers of the UK government over Scottish legislation. Symbolic but powerful restrictions on the Scottish government's involvement with the UK's overseas diplomatic network could be imposed rather than just threatened. More aggressive branding of UK government spending could be deployed. And, in time, all of this could be brigaded into a more sustained attempt to contain, reverse and even ultimately abolish devolution.

### **Muddling through**

Sat between the ideological opposites of multinational unionism and muscular unionism are more pragmatic efforts to make the current highly asymmetrical devolution system work better, consistent with the evolutionary nature of the British constitution.

A review by the former Scotland Office minister Lord (Andrew) Dunlop of UK government devolution capability in 2021 is a striking contrast to some of the more muscular ideas emanating from the governing party.<sup>19</sup> None of the Dunlop proposals is constitutionally radical, but they envisage a generous, capable and respectful approach within Whitehall towards the devolved institutions. For example, the review recommended: that civil servants should be tested on devolution issues in the course of promotion assessments; that the secretariat to a revamped intergovernmental mechanism should be independent rather than provided by the UK government; and, in a notable modification of muscular unionism, expenditure by the UK government in devolved areas of responsibility but, crucially, with the agreement of the devolved administrations.

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\* In 1999, when asked "Which institution should have most influence over how Scotland is run?", the Scottish government led the Westminster government by 74 to 13. In 2022, the response to the same question was 75 to 14. See: [www.whatscotlandthinks.org/questions/which-institution-ought-to-have-most-influence-over-how-scotland-is-run-5](http://www.whatscotlandthinks.org/questions/which-institution-ought-to-have-most-influence-over-how-scotland-is-run-5)

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Proposals in Gordon Brown's Commission on the UK's Future report, commissioned by the leader of the opposition, written by the former prime minister and published at the end of 2022,<sup>20</sup> would, if implemented, represent a significantly more radical change to the operation of devolution. That said, at their heart they represent the same pragmatic approach as Dunlop: they are about improving the way other centres of power relate to London rather than fundamentally altering the balance of power between London and the devolved governments.

Some tinkering in the balance of power is envisaged in the Brown proposals. But the most consequential further transfer of power recommended for Scotland is the administration of the Jobcentre network, a worthy but hardly constitutionally transformative move. For Wales, the limited devolution of youth justice and the probation service – rather than the much-demanded full devolution of policing and justice – is recommended. There is nothing in the report that would radically transform the powers of the legislatures in Edinburgh, Cardiff or Belfast.

Where the Brown report is genuinely radical is its innovative suggestions for how relationships between the devolved capitals and London should work. It would introduce a 'solidarity clause' – in effect a duty to co-operate on all the UK's governments, modelled on the EU's own 'sincere co-operation' obligation on its member states.

This would take the UK constitution, built as it is on a single centre of authority at Westminster, into new territory. As Professor Michael Keating has noted, while the UK's constitutional settlement "provides for extensive self-rule; shared rule is almost completely absent".<sup>21</sup> The Brown report takes up this language, using the phrase "shared government" on some 23 occasions. If implemented, there would be a raft of changes to the machinery of government in the UK, with various new mechanisms established to encourage 'joint' decision taking between the different capitals.

However, what is not clear from the Brown review is how, ultimately, disagreements would be resolved. Someone has to take a decision if joint arrangements cannot be agreed. And the Brown commission, unlike, for example, the Welsh government's commission, does not recommend replacing parliamentary sovereignty – meaning, presumably, that whatever joint arrangements are put in place, there are not, in the end, going to be any constraints on Westminster's ultimate power.

Similarly, the Brown review proposes complex new mechanisms to enhance the protections for devolution from being altered by a hostile House of Commons (presumably Conservative) majority. It proposes abolishing the House of Lords in its current form, with its replacement being called the 'assembly of the nations and regions'. Its name reflects the intent to have stronger representation from different parts of the UK but the review leaves open how this is to be achieved, suggesting the matter is put out for consultation.\* It suggests that a set of constitutional laws are given protected status, meaning that the new assembly could reject changes to their powers and only a House of Commons supermajority or specific mandate in a general election

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\* Page 145 of the review simply suggests the assembly "should represent the nations and regions of the UK in a very explicit way".

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could overrule that vote. While the details as to how it would work are left deliberately vague, the intent is clearly to make it harder for Westminster to overrule devolved legislatures about their own powers, while retaining, ultimately, the fundamental principle of parliamentary sovereignty.

If Dunlop is about changing the way Whitehall (the executive branch) works with the devolved administrations, Brown is much broader, with fundamental reforms to the Westminster system (the legislative branch) too. What is striking about both initiatives, along with other efforts to 'muddle through' within the parameters of the 1998 devolution settlement, such as various attempts to improve the civil service's awareness of devolution, is that they focus on rewiring the central state.

In essence, if multinational unionism is about weakening the central state further and muscular unionism is about strengthening it and exercising the many retained powers more vigorously and unilaterally, 'muddling through' unionism generally leaves the balance where it is, but reforms the central state to deal with it better. Professor Michael Keating remarked that "the 1999 devolution settlement introduced radical changes in Government at the territorial periphery but changed almost nothing at the centre".<sup>22</sup> The provisions of the Brown review in particular seek to address this challenge, contesting the aspirations of separatists in quite a different way. To the multinational unionist, this approach will therefore not go far enough to satisfy national aspirations within the UK; to the muscular unionist, it represents a doubling-down on a failed devolution strategy, which will further undermine British cohesion. Its proponents argue that it is pragmatic, deliverable and consistent with the late 1990s' settlement, which, however messy, commands broad support in most parts of the UK.

### **Part 3: Where the contesting models of the Union compete**

These three competing models for the UK's constitutional future provide a useful reference point in thinking through how territorial policy might be managed by whoever is in government at UK level. However, government is a series of decisions and activities, and the direction of travel London takes is likely to be revealed by the approach to three different areas.

The first is the *balance of powers* within the Union: in effect, whether powers are changed by either further devolution or its partial reversal. The second is the *narrative* of the Union: in effect, how the government talks about the country. The third is the *statecraft* of the Union: in effect, how the central state uses its power to influence the UK state of the future. It is argued here that the third one will prove to be the most important determinant of the future character of the UK state.

#### **Balance of powers within the Union**

Since 1999, devolution has been extended in all three devolved jurisdictions. At each stage of the constitutional journey, and notably around the time of the Scottish independence referendum in 2014, 'more powers' has emerged as a political pledge, often enacted.

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That period may now be coming to an end for both practical and political reasons, and is therefore likely to feature much less in the forthcoming period than it did in the previous quarter of a century.

The practical problem – a challenge for both federalists and ‘devolutionists’ – is that there are very few powers left that can be easily devolved without either destroying the fiscal solvency of the devolved administrations or ending the uniform concept of ‘cradle to grave’ support on a UK-wide basis. This is very much evident in the Brown review for Scotland, which, as we have seen, confines itself to limited proposals on employment support and allowing the Scottish government to enter into international agreements. In Northern Ireland, where social security administration is already devolved and whose executive already has extensive international representation, there is no serious debate about further devolution of power (not least given the frequent and sustained absence of an executive).

The political problem is that even where there is scope for further devolution, there is a marked reduction in support within Westminster for it, and this new lack of enthusiasm seems to span the political divide. Multinational unionists, therefore, may have to wait longer for their time to come. On the Conservative side, Prime Minister Sunak emphatically ruled out further devolution of powers to Scotland at the party’s Scottish conference in April.<sup>23</sup> Labour’s hesitation on the devolution of policing and justice in Wales is telling.<sup>24</sup> The likely fiscal shock of the complete devolution of taxation and social security, along with the consequential end of the ‘cradle to grave’ welfare state, is perhaps why the constitutionally ‘cleanest’ prospectus for federalism yet published was from a right-wing think tank; at present there seems to be little to no chance of arrangements that would require Edinburgh, Cardiff and Belfast to be entirely self-financing being enacted.<sup>25</sup> Indeed, there may, in time, be modest pressure for a small reversal of some areas of devolved autonomy to deal with crises, something covered later on in this paper.

But muscular unionism does not yet have anything approaching a coherent plan to, using Lord Frost’s phrase, ‘roll back’ devolution, let alone the political momentum to implement such a contentious course of action. So over the course of the next few years, the constitutional balance between what is done at the centre of the UK state and what power is held in the devolved capitals is likely to remain more stable than it has been for the past 25 years. But the overall constitutional position is not particularly stable. Therefore, in the short to medium term, the competing visions of the future of the UK are likely to move on to the other two areas of contestation: how the UK talks about itself and how the central state uses its powers.

### **Narrative of the Union**

If the structures of union have dominated the constitutional politics of the UK over the past three decades, the narrative of the Union is an under-analysed part of the UK’s contested constitutional debate. But it is fundamental to any understanding of what the UK as a country is and means.

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Over the course of a century, the description of what the UK is varied from routinely talking about 'Britain' as a single unit and *demos*, to 'the UK' being a compilation of multinational states. Despite that, discussions about the most effective way of governing that multinational arrangement are often framed as being about the best way to maintain the Union rather than the most effective or most popular form of governance in different parts of it.

There has been a striking reluctance – with some notable exceptions – to make the case for devolution or quasi-federalism in its own terms. From the moment George Robertson, then shadow secretary of state for Scotland in Tony Blair's Labour opposition, said that devolution would "kill nationalism stone dead", devolution has largely been framed in the language of concession.\*

There have been occasional attempts to promote a narrative of the devolved Union as a positive. Professor Leighton Andrews, of the University of Cardiff and one-time Welsh Labour cabinet minister, cited the opening ceremony of the 2012 Olympics as the "emotional and cultural highlight" of progressive unionism.<sup>26</sup> The early part of the Cameron period saw measures that were strikingly respectful of devolution, including the new prime minister in 2010 paying visits to the first ministers of the devolved administrations at their offices within a week of taking office. Major UK state occasions beyond the Olympics were conspicuously shared out: Wales hosted a Nato summit in 2014; the G8 of 2013 was hosted in County Fermanagh in Northern Ireland,\*\* and the 2022 COP26 summit on climate change was held in Glasgow. This approach, understandably, irritated muscular unionists, who saw it, not without justification, as representing a doomed approach of more and more concessions rather than a serious strategy to promote Britishness.

And it is on the wane. Politically, as one writer remarked, "Nigel Farage... killed the Britain of the 2012 Olympics".<sup>27</sup> Brexit shattered the notion, popular after the implementation of 'the vow' to extend devolution to Scotland via the Smith Commission and the Scotland Act 2016, that the UK was now a near-federal society. The Brexit vote itself, and the final resolution of how to implement it after years of tension, showed that some (in the case of the popular vote) or all (in the case of the 2019 general election, which framed the terms of exit) of the devolved territories could be entirely ignored on issues of paramount importance.<sup>28</sup> The idea of the UK as, in law, a unitary state may have been reinforced by the Supreme Court judgments in the first Miller case and the Scottish independence referendum, but the raw numbers of the Brexit referendum vote of June 2016 did much more to enshrine in the public consciousness that the UK was not a federal state.

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\* As already noted, many of the respondents to the Commission on the Constitutional Future of Wales who favoured a more federal UK did so on the basis that they felt it necessary to protect the Union.

\*\* This was the last G8 before the expulsion of Russia over the annexation of Crimea, so the photographs of Vladimir Putin, Barack Obama and others joking by the shores of Lough Erne marked the passing of a geopolitical era. The UK government press release announcing the location of the 2014 Nato summit as the Celtic Manor resort in Newport, South Wales, strikingly referred to it as being "Wales' turn" to host a big international event on behalf of the UK; see GOV.UK, 'About the NATO Summit Wales 2014', retrieved 30 January 2024, [www.gov.uk/government/topical-events/nato-summit-wales-cymru-2014/about](http://www.gov.uk/government/topical-events/nato-summit-wales-cymru-2014/about)



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At the same time, Conservative-led governments started to row back on the imagery of the devolved UK, notably under Boris Johnson and, briefly, Liz Truss, who famously managed to avoid meeting any devolved leaders during her 49 days in office in the autumn of 2022. Remarkably, during the exact same period, King Charles III, days into his reign, visited the three devolved capitals and, with the exception of the non-sitting Stormont, their legislatures. The new King's schedule, where reportedly he rejected attempts by Downing Street to have the equally new prime minister accompany him, was the most powerful imagery of the UK as a multinational state since the Olympics a decade earlier.

Perhaps this inconsistent approach reflects a struggle within the governing machinery in Whitehall with the politics of identity. Whitehall is set up to develop and implement policies and to spend money and time doing so. It has no idea how to win contests of identity politics. The UK government has remained reluctant to use what power it has to push British identity aggressively, to the frustration of muscular unionists. Suggestions to put Union flags on Covid vaccine vials – reflecting the remarkable success of the UK state in developing and procuring them – were quietly dropped.<sup>29</sup> By contrast, early in the period of the SNP's long tenure in office in Edinburgh, ScotRail was rebranded in the Saltire in a notable extension of distinctive Scottish branding.\*

So the contest over the 'narrative' of the Union remains unresolved. It is a territory that seems to frighten some of the protagonists. The UK government has mostly eschewed aggressive assertions of Britishness, perhaps because it doesn't know how to do it effectively\*\* and because the absence of non-English MPs from prominent positions in the front line of UK-wide government and politics reduces any chance of learning how to do so. It is a much under-analysed part of the UK's constitutional tensions that since the SNP landslide in 2015, for the first time in British democratic history, MPs sitting for Scottish and Welsh constituencies have not held any of the most senior positions on the front bench of either major party at Westminster.

Moreover, devolutionists still talk in the language of concession. The coronavirus pandemic, where the devolved administrations were unprecedentedly prominent in the everyday lives of their citizens, raised the prominence of the UK as a multinational state like no previous period in the quarter-century history of devolution.

For now, the UK remains an odd construct where the raw legal power rests emphatically in one place – Westminster – and particularly post-Brexit. But the national narrative is more contested. Advocates of independence have a clear story. But those who wish to maintain the Union split into those who wish to assert a strident British identity, those who wish to stress a multinational identity to assuage separatist opinion and those who wish to stress the multinational state as a good in its own right. And none of the

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\* The SNP administration took this decision in its first full year in office; see 'All Scotland's trains to get Saltire livery', *The Scotsman*, 31 July 2008, [www.scotsman.com/news/all-scotlands-trains-to-get-saltire-livery-2452538](http://www.scotsman.com/news/all-scotlands-trains-to-get-saltire-livery-2452538).

\*\* For example, the UK government hastily abandoned a plan to erect an eight-storey Union flag on the UK government's offices in Cardiff; see 'Plans for Union Jack flag on UK government building in Cardiff halted', *ITV News*, 24 September 2021, [www.itv.com/news/wales/2021-09-24/plans-for-union-jack-flag-on-uk-government-building-in-cardiff-halted](http://www.itv.com/news/wales/2021-09-24/plans-for-union-jack-flag-on-uk-government-building-in-cardiff-halted)

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competing visions seems either confident in its ability to win, or coherent in its plan to do so. And in the meantime, particularly in Scotland, the number of people describing themselves as 'Scottish only' or 'more Scottish than British' remains concerningly high for unionists, especially the figures for young people.<sup>30</sup>

## Statecraft of the Union

If the balance of powers between London and the devolved capitals remains largely stable, and the ability of the government machinery to direct the national narrative is limited, this means the main focus of the contest between the competing models of the Union will be how the levers of power are exercised. We now turn to an analysis of six areas where this might play out.

### ***Contesting or complementing devolved efforts***

The first area directly connects the contested narrative of the Union with the practicalities of government. It relates to the explicit decision of the UK government to involve itself directly in devolved matters.

Many Conservatives – including the former prime minister, Theresa May,<sup>\*</sup> and long-serving Scotland secretary, Alister Jack – have invoked the phrase 'devolve and forget' as a criticism of the way devolution has operated. Like many political slogans, this is a negative way of saying something that could equally be said positively, much like 'postcode lottery' is the same as 'local choice'. Sir Robert Buckland, a former Wales secretary, invoked the phrase 'devolve and forget' when arguing that there should be no part of UK public life beyond the reach of the national government in London.<sup>\*\*</sup> But the reality is this means tensions with the devolved administrations because Westminster and devolved governments act in the same areas of competence.

And that is now explicitly the Conservative government's intent. Labour's 1997 manifesto, committing to devolution, and the devolution statutes themselves, were clear to emphasise Westminster supremacy. However, in practice, this was simply a statement of ultimate authority – devolved functions were genuinely that and quite deliberately left alone by Westminster. But the post-Brexit Conservatives have sought to reverse this. The UK government has given itself a hugely powerful tool to compete with, contain and, occasionally, even reverse devolved competence, by way of the United Kingdom Internal Market Act 2020. This explicitly allows the UK government to act in devolved areas, including with money – the UK state's most powerful asset. The Internal Market Act, alongside various other amendments to the constitution required by the UK's withdrawal from the EU, laid waste to the unwritten rule that changes to the balance between reserved and devolved matters would be mutually agreed between the central and peripheral legislatures, known as the Sewel convention. The political result of these changes is not just more activity involving the UK government in devolved affairs, but also changes in political discourse. Whether the matter is failing

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<sup>\*</sup> See the coverage of her speech to the Scottish Conservative Party conference in 2017: Dickie M, 'Theresa May takes hard line on SNP demand for special Brexit Deal', *Financial Times*, 3 March 2017, [www.ft.com/content/dca43e96-0007-11e7-96f8-3700c5664d30](http://www.ft.com/content/dca43e96-0007-11e7-96f8-3700c5664d30)

<sup>\*\*</sup> This was part of an Institute for Government event; see Bennett Institute for Public Policy and Institute for Government, 'The future of the UK constitution: the IfG and Bennett Institute conference', 19 September 2023, [www.instituteforgovernment.org.uk/event/future-uk-constitution-conference](http://www.instituteforgovernment.org.uk/event/future-uk-constitution-conference)

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ferry services to the Scottish islands, or – to use an example of devolved government within England – the extension of the ultra-low emissions zone (ULEZ) in London, calls by unitary state unionists for central government to intervene tend to follow.

Even though, as with the politics of identity within the UK, central government tends to be wary of directly taking over the responsibility of devolved bodies, it is increasingly finding ways to contest devolved powers. A pre-Brexit example was the coalition government's approach to so-called 'city deals' between London and the devolved capitals. Two post-Brexit examples are the establishment of freeports in Scotland and the establishment of the Shared Prosperity Fund to replace EU Structural Funds. The latter is particularly constitutionally significant; it is effectively a challenge fund for local authorities and others in Scotland, Wales and Northern Ireland, designed explicitly to incentivise them to bypass Edinburgh, Cardiff and Belfast and deal directly with London on explicitly devolved matters.

How this aspect of devolved tensions will play out in the next parliament and beyond is unclear. A returning Conservative government might be expected incrementally to extend its reach into devolved politics. Whether a Labour administration would try to co-operate rather than compete, or fall back on 'devolve and forget', is not yet obvious. But the Conservatives have left an incoming legal government with the powers to compete with the devolved administrations should it want to.

### ***The boundary between devolved and reserved matters***

A second area of contestation is the extent to which the UK government will seek to enforce the boundary between devolved and reserved matters. Until recently, successive UK governments had mostly resisted the temptation to refer devolved legislation to the Supreme Court to see if it infringed devolved powers, and had refrained entirely from blocking legislation on the grounds that it affected wider UK law. That has begun to change with the referral of several Scottish and Welsh statutes to the Supreme Court\* and, most significantly, the first ever use of Section 35 of the Scotland Act 1998 to block the Holyrood administration's proposed reforms to gender recognition.\*\*<sup>31</sup> Once again, it is unclear how a Labour administration might approach such issues, and to what extent they might arise. But the use of Section 35 to block Scottish legislation, assuming it is upheld by the Supreme Court, establishes a clear playbook for London to rein in devolved activity should it so wish.

### ***Shared responsibility***

A third, and much more complicated, area of statecraft in the context of the Union is the issue of shared responsibilities. It is, as already noted, unlikely that the UK government – whatever its composition – will seek to develop formal or even informal mechanisms for agreeing, let alone consulting, on its approach to sovereign matters like defence or immigration.

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\* A good overview of the UK government's referrals of devolved legislation to the Supreme Court was published by the House of Commons Library in 2022; see Cowie G, 'What happens when a devolved bill is referred to the UK Supreme Court?', House of Commons Library, 4 July 2022, <https://commonslibrary.parliament.uk/what-happens-when-a-devolved-bill-is-referred-to-the-uk-supreme-court>. It is notable how recent most of the referrals are.

\*\* It should be noted that the use of a veto power on Scottish legislation is an explicit feature of the devolution settlement and it is perhaps surprising that it took nearly a quarter of a century for it to be used for the first time.

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Moving towards meaningful 'shared rule' would require a fundamental re-imagining of UK statecraft, as it would involve concessions on matters of fundamental national importance. Immigration provides a useful example: despite the reality of steeply rising immigration, London has struck a policy tone centred around wishing to reduce the inflows of people from abroad, while Edinburgh in particular has stressed that Scotland needs more migrant labour. The governance framework for the UK leaves the entirety of the system in central hands, without any meaningful devolved input. This contrasts with, for example, the period when devolution and the UK's membership of the EU overlapped, when complicated but consensual arrangements were put in place for representing devolved interests in EU-wide matters, particularly in relation to agriculture.\* Recreating this sort of arrangement in a post-Brexit environment within the singular UK state would be novel, but not undoable, and is an underexplored area of co-operation in the UK debate about the future of devolution.

### ***Crisis management***

By way of stark contrast, following the pandemic, crisis management is an aspect of statecraft that might give cause for a re-examination of the balance of powers from the opposite perspective of the UK debate of previous decades. Covid raised genuine questions, perhaps for the first time, as to whether the centre of government had *enough* powers when a serious, UK-wide emergency arose.

The pandemic was a transformative event in the history of devolution, in at least three ways. First, it raised the profile of devolved governments significantly and often favourably in the eyes of their voters, who often viewed the devolved governments' approaches – rightly or wrongly – more favourably than that of the UK government at Westminster.\*\* Second, the planned arrangements for crisis management between central and devolved government, just like the arrangements for central government itself, were tested to destruction, with a constant need for emergency legislation, new mechanisms for co-ordination and other interventions.\*\*\* Multiple serious disputes over the handling of and control over policy occurred between London and the devolved capitals during the crisis. Third, significant anomalies emerged in the settlement: the basic approach of Westminster was to reaffirm the late 1990s' settlement by way of emergency legislation, without having time to think about some of the challenges that might arise.

International travel was the most obvious and contentious aspect of such arrangements. Because of the unprecedented nature of the Covid crisis (no calamity on this scale had occurred in the era of devolution), arrangements that worked perfectly sensibly in normal times led to serious anomalies. There was significant confusion over travel rules for Scots in July 2020<sup>32</sup> and, for a brief period in September of that year, it became

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\* For an overview of these arrangements, see Bulmer S, Birch M, Hogwood P and Scott A, 'UK devolution and the European Union: a tale of cooperative asymmetry?', *Publius*, 2006, vol. 36, no. 1, pp. 75–93, [www.jstor.org/stable/20184943](http://www.jstor.org/stable/20184943)

\*\* See, for example, 'Four in five Scots say Nicola Sturgeon has handled the coronavirus outbreak well', Ipsos, 26 May 2020, [www.ipsos.com/en-uk/four-five-scots-say-nicola-sturgeon-has-handled-coronavirus-outbreak-well](http://www.ipsos.com/en-uk/four-five-scots-say-nicola-sturgeon-has-handled-coronavirus-outbreak-well)

\*\*\* For an overview of devolution and the pandemic, see Martin C, Kan H and Fink M, *Crisis Management in the Age of Long Emergencies: What Covid-19 teaches us about the capacity, capability and coordination mechanisms governments need for cross-cutting crises*, Blavatnik School of Government, 2023, second part of Chapter 3, [www.bsg.ox.ac.uk/sites/default/files/2023-03/BSG-Crisis-preparation-age-long-emergencies.pdf](http://www.bsg.ox.ac.uk/sites/default/files/2023-03/BSG-Crisis-preparation-age-long-emergencies.pdf)

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known that flights from Greece could land at Heathrow but Cardiff had the power to prohibit them from landing in Wales, yet Cardiff did not have the full power to stop those landing in England from Greece crossing the border into Wales. This was much to the surprise of the Welsh government.<sup>33</sup>

Even the arrangements for the post-crisis evaluation of the handling of the pandemic show the strains of the devolution settlement: there is a UK-wide inquiry; a separate one for Scotland; no separate inquiry for Wales and Northern Ireland; and nothing to stop the UK-wide inquiry from examining the actions of the Scottish government.

All this provides a challenge for UK and devolved leaders of any colour. No one credibly asserts that the arrangements for crisis management between the UK government and the devolved administrations worked well during the pandemic. But changing that at the UK end would require a move either from a London administration that would look hostile to devolution, or from a devolved one that might look weak. That being said, there is an arguable case that the Covid crisis showed that those ambiguities in the UK system that do not normally matter are problematic in a crisis, and that when it comes to crisis management the state needs to choose between the sort of decentralised or federalised model of Australia or the US, or the centralised model of, say, France.

### ***The role of the civil service***

Relatedly, there is likely to be a contentious discussion about the role of the civil service and other state resources in constitutional issues. The pandemic acutely highlighted the different accountabilities of civil servants: most potently, the four chief medical officers, as dispassionate professional experts, were incentivised to collaborate on a 'four nation' approach, but when the UK-wide political consensus began to break down, it became clear that their primary accountability was to devolved ministers. This is a stark illustration of a fundamental and ongoing tension at the heart of the UK state.

In the devolved arena it is not even a uniform arrangement. The Northern Ireland Civil Service has been devolved since the partition of Ireland and the establishment of a devolved government in 1921. But outside Northern Ireland, a single civil service remains, supporting the devolved administrations in Edinburgh and Cardiff.

Once an explicitly separatist SNP administration took office in 2007, the UK state took what was, by international standards, a remarkably tolerant view of the role of officialdom. British civil servants supporting the Scottish government were required to support the latter's objectives, according to the Civil Service Code,<sup>\*</sup> and subsequent guidance and parliamentary appearances by civil service chiefs made it clear that this included supporting work to further the dissolution of the UK state.<sup>\*\*</sup>

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\* Clause 1 of the Civil Service Code notes that: "Civil servants working for the Scottish and Welsh Governments, and their agencies, have their own versions of the code"; see Civil Service, 'The Civil Service Code', 2015, retrieved 30 January 2024, [www.gov.uk/government/publications/civil-service-code/the-civil-service-code#fn:1](http://www.gov.uk/government/publications/civil-service-code/the-civil-service-code#fn:1).

\*\* More detail on how this came about was explored in a Public Administration Select Committee report in 2015; see House of Commons Public Administration Select Committee, *Lessons for Civil Service Impartiality from the Scottish Independence Referendum*, HC 111, 2015, <https://publications.parliament.uk/pa/cm201415/cmselect/cmpubadm/111/111.pdf>. Additionally, Suzanne Heywood's biography of her late husband, the then cabinet secretary, Sir Jeremy Heywood, references the role he and the then permanent secretary to the Scottish government, Sir Peter Housden, played in soothing tensions over this issue; see Heywood S, *What Does Jeremy Think?*, HarperCollins, 2021.

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Strikingly, this was a relatively uncontroversial part of the UK's constitutional arrangements in the run-up to the existential referendum of 2014. However, as the 'devolutionary' view of the Union has become challenged, not just from advocates of independence but also from integrationist unionists, the role of the civil service in such matters is increasingly contested. The current cabinet secretary, and a Scotland Office minister, appeared to suggest in July 2023 that officials could, for the first time, face constraints on supporting Scottish ministers on independence matters.<sup>34</sup> Lest that be seen as a Conservative Party issue, Gordon Brown's report on the constitution proposes that all the devolved administrations have a constitutional duty to co-operate, which, depending on how it is interpreted, restricts pro-independence work by officials.<sup>35</sup> That said, the Brown report also proposes that the Scottish (and other devolved) governments be allowed to have distinctive representation abroad, up to and including agreements with sovereign nations on devolved matters, an idea deeply frowned upon by Conservative ministers, who have clamped down on the practice in office.<sup>36</sup> Whatever happens, the rules and conventions on the activities of state servants are likely to be an important indicator of the approach London takes on matters of the territorial constitution.

### ***The rules for secession***

Finally, and arguably most significantly for the future of the UK in the long run, is whether or not Westminster and the devolved administrations agree on any rules for the dissolution of the UK.

The UK's flexible constitution has many eccentricities, but none perhaps more so than the widespread acceptance that it can be broken up, but without, outside of Northern Ireland, any fixed procedures for such a decision (and even in the case of Northern Ireland, there is only the vaguest of references as to what should trigger such an event).\*

The best illustration of this came in the now largely forgotten, but at the time hugely contested, Scottish parliamentary election of 2021: the SNP made a second independence referendum the centrepiece of its campaign, but the UK government, under Boris Johnson, made it clear that no matter the outcome of that election, there would be no further plebiscite on separation.<sup>37</sup>

Some prominent unionists and commentators at the time sought to neutralise this issue by invoking comparisons with the 1997 Scottish devolution referendum – a vote called by the incoming Labour government after years of pressure and an abundance of evidence that it was the 'settled will of the Scottish people' as evidenced by the landslide 'yes' vote.\*\* For some more muscular unionists, this was a response to what

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\* For a brief overview of the conditions for a border poll, see Tonge J, 'Criteria for calling a border poll in Northern Ireland', UCL, 15 January 2020, [www.ucl.ac.uk/constitution-unit/sites/constitution\\_unit/files/jon\\_tonge\\_-\\_16\\_jan\\_20.pdf](http://www.ucl.ac.uk/constitution-unit/sites/constitution_unit/files/jon_tonge_-_16_jan_20.pdf)

\*\* The then Cabinet Office minister with responsibility for the Union, Michael Gove, remarked at the time of the 2021 election in a BBC interview with Andrew Marr that the path to independence remained a lawful referendum, without saying what would trigger one. The constitutional law professor and former Conservative MSP, Adam Tomkins, commented, following the Supreme Court ruling that the Scottish parliament did not have the power to hold a referendum, that Westminster would consent to one if there was overwhelming demand for one. Finally, the secretary of state for Scotland, Alister Jack, said in broadcast interviews that if there was sustained support in opinion polls in the region of 60% for independence, consistently for a year, a referendum should be held. This echoed the language used in 2016 by the then first minister, Nicola Sturgeon. Unlike Sturgeon, however, Jack went on to say that there should be a minimum of 25 years following the 2014 vote.

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they saw as the complacency of the Cameron government in granting a referendum in 2014 in which, although nationalism lost, support for independence grew very significantly during the course of the campaign. There is now a strong view in unionist circles that nationalists should not be allowed to campaign their way to victory, and that an independence referendum should only be conceded in future to affirm a clear, obvious and settled majority view in favour of independence for Scotland.<sup>38</sup>

The political malaise affecting the SNP means that no such decisions are likely to be needed in the next few years. Similarly, support for Irish unity remains sufficiently low that the government in Northern Ireland is under no serious pressure to call a border poll. However, as in Scotland, those circumstances could foreseeably arise in the medium term and, again as in Scotland, there is no real guide as to what could trigger a referendum.

The legal difference between the situation in Northern Ireland and that in Scotland is well known: the UK government has no obligation whatsoever to concede Scotland's right to self-determination but has an explicit duty in domestic and international law to do so in respect of Northern Ireland. In reality, however, the situation is not all that different. As an extensive study by University College London scholars has shown,<sup>39</sup> there are multiple measures a UK government could use to trigger the obligation, but none has been set out, or even widely debated. So there is no constitutional doctrine on what would constitute the necessary evidence that would require the UK government to act on its duty.

In respect of Scotland, some muscular unionists have floated the idea of severely restricting or even removing the right to secede from the UK constitution; while this is mostly a proposal of the political right,\* it was also supported by the senior Blair-era minister Jack Straw just after the 2014 Scottish referendum.<sup>40</sup>

Fundamentally, a crucial element of whether or not the UK continues in its current form will be what, if any, rules there are for those seeking to break away to fulfil their aims. The approach that whatever government takes office in London in the future has towards setting out the criteria for separation is likely to be more important than any further consideration of the division of powers.

Options range from clear criteria to the effective illegalisation of independence; as ever, muddling through with the current ambiguity is likely to be the favoured option. Moreover, it remains an extremely difficult subject to tackle, and when the immediate pressure is off, there is less likelihood of movement. For example, as the experience of the build-up to the 2021 Scottish election showed, it is highly unlikely that a future British prime minister will recognise a future SNP majority in Holyrood, as Cameron did, as "a clear democratic mandate for the Scottish government to hold a referendum on independence".<sup>41</sup> It is unknown whether a future UK government would recognise a pro-unity majority in the Northern Ireland assembly as representing a mandate for a border poll. So politics in the UK looks likely, in the short term, to continue to allow the pursuit

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\* See, for example, Daisley S, 'The case for a new Act of Union', *The Spectator*, 12 August 2020, [www.spectator.co.uk/article/the-case-for-a-new-act-of-union](http://www.spectator.co.uk/article/the-case-for-a-new-act-of-union)

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of its break-up by lawful, democratic politics, but without giving a clear mechanism for separatists to achieve their objectives. For all the reasons set out in this paper, this tactic of deliberate ambiguity might be tested in the 2030s, if not before.

## **Conclusion: the ambivalent, transactional Union**

Taking this all together, these six areas of statecraft – competing in areas of devolved responsibility; policing the boundaries of devolution; exploring (or not) shared government; crisis management; the role of the civil service; and, above all, mechanisms for ending the Union – are far more likely to shape the future of the Union than any adjustment to the balance of competencies between the centre of government and the periphery.

They are also more likely to be more decisive in the future of the UK than any strategy to promote a Union 'narrative'. This is partly because the Union, for better or worse, is now, as Ailsa Henderson and Richard Wynn Jones have shown in a seminal study,<sup>42</sup> sustained more grudgingly than enthusiastically across its constituent parts, including England. Public attitudes to the Union across the UK are ambivalent, and much of the remaining consent for the UK in its present form is largely transactional.

This presents an enormous challenge to a UK government of whatever persuasion the voters return in the upcoming general election. And this paper has set out the limitations of the levers of statecraft in addressing that challenge. For the multinational unionist, only a wholesale – and potentially highly destabilising – overhaul of the British constitution remains on offer; asymmetric devolution has probably gone as far as it can. For the muscular unionist, retaking the powers of the devolved legislatures is fraught with political difficulty, and attempts to promote a singular 'British' identity seem to be failing in whatever way they are tried.

For all that, separatism is not gaining the ground it needs to be irresistible. So the contested areas are likely to be how the powers held by London and the devolved administrations are used. 'Identity' does not seem to be the battleground on which the competing elected administrations can fight, at least at the London end. What matters is how power is exercised, and to what end.

Here, it is easy to lament the lack of 'capability' in Whitehall, and the narrative that UK ministers and civil servants don't 'get' devolution is a compelling one.\* But there is far more to it than that. The government machine has been tasked with impossible objectives such as 'selling' the benefits of the Union. But bureaucracies are not set up to do this; they are set up to develop policies and deliver them. Governments in Western democracies find it hard to 'do' identity, especially in a long-established state like the UK, where aspects of national autonomy for Scotland, Wales and Northern Ireland are baked into the constitutional tradition.\*\*

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\* See, for example, Kenny M, Rycroft P and Sheldon J, *Union at the Crossroads: Can the British state handle the challenge of devolution?* Bennett Institute for Public Policy, University of Cambridge, 2021, [www.bennettinstitute.cam.ac.uk/publications/union-crossroads](http://www.bennettinstitute.cam.ac.uk/publications/union-crossroads)

\*\* For an account of how Winston Churchill opposed Clement Attlee's nationalisation programme on the grounds that, among other things, it would diminish Scotland's "distinctiveness", along with other matters, see Devine TM, *The Scottish Nation*, 3rd edition, Penguin, 2014.



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The real challenge for the Whitehall machine is that no UK government this century has had a clear strategy for the Union, whether it is multinational unionism or the more muscular variety. No government has even had a serious strategy for muddling through – for making devolution work better.

The Whitehall machine needs clear political direction, which has been largely absent. Those seeking Scottish independence and Irish unity have broadly a clear idea of the sort of constitutional end-state they seek. The same cannot be said of recent UK governments. A clear set of constitutional objectives is a prerequisite for any future UK administration, with the commensurate senior attention to delivering them, and a recognition of the limitations of the levers in so doing.

There will inevitably be contests and compromises, but ultimately any UK government will have to answer two strategic questions. First, does it wish the UK state to be more unitary, more devolved, or broadly as it is now? Answering that question is essential to decision taking in government. Second, how hard does it wish to resist separatist sentiment, even if it creeps towards a majority? Again, such a fundamental question profoundly shapes policy.

Finally, as well as answering such stark questions, whoever forms the UK government will also have to find ways of proving the success of the UK as a nation after a difficult period of economic stagnation and constitutional disagreement. None of the strategic and political challenges set out in this paper can be detached from the huge array of economic, social and foreign policy problems facing the UK state in the coming years. If the UK has become a more transactional Union, the onus on the state to prove its worth has only increased.

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