Shared Rule: What Scotland needs to learn from federalism

Shared Rule: What Scotland needs to learn from federalism

Professor Adam Tomkins

Adam Tomkins has held the John Millar Chair in Public Law at the University of Glasgow since 2003. He has written widely about constitutional law and politics for nearly 25 years. He was a member of the all-party Smith Commission in 2014. He is the Conservative candidate in Glasgow Anniesland in the 2016 Scottish parliamentary election and tops the list for the Scottish Conservatives in the Glasgow region.

April 2016

Reform Scotland is a charity registered in Scotland (No SCO39624) and is also a company limited by guarantee (No SC336414) with its Registered Office at 7-9 North St David Street, Edinburgh, EH2 1AW

About Reform Scotland

Reform Scotland, a charity registered in Scotland, is a public policy institute which works to promote increased economic prosperity and more effective public services based on the principles of limited government, diversity and personal responsibility.

Reform Scotland is independent of political parties and any other organisations. It is funded by donations from private individuals, charitable trusts and corporate organisations. Its Director is Geoff Mawdsley and Alison Payne is the Research Director. Both work closely with the Advisory Board, chaired by Alan McFarlane, which meets regularly to review the research and policy programme.

About The Melting Pot

The Melting Pot is our guest blog page, where Scotland's thinkers, talkers and writers can indulge in some blue sky thinking. The posts do not represent Reform Scotland's policies.

Reform Scotland's Advisory Board

- Alan McFarlane (Chairman)
- Keir Bloomer
- Professor Jane Bower
- Derek Brownlee
- Isobel d'Inverno
- Sinclair Dunlop
- John Glen
- Alex Hammond-Chambers
- Tom Harris
- Professor Sir Donald MacKay
- Siobhan Mathers
- Paul McLennan
- Steve Thomson

Contents

i. Foreword

Since it was set up in 2008, Reform Scotland has contributed to the constitutional debate by looking at how the devolution settlement, and particularly the relationship between Westminster and Holyrood, could be improved. Initially, our work focused on what we identified as the fundamental weakness of the devolved settlement - the lack of fiscal powers devolved to the Scottish Parliament and our suggested way to address this was to give Holyrood the ability to raise far more of its own spending. This led to a series of reports examining this issue, culminating in Reform Scotland's proposal for Devolution Plus which called for Holyrood to be given control over the vast bulk of non-pensioner welfare spending in Scotland and sufficient tax and borrowing powers to enable it to raise what it spends.

Following the No vote in the referendum on Scottish independence, Reform Scotland set up the independent Campaign for Scottish Home Rule since it had become evident that there was a desire amongst people in Scotland to see meaningful Home Rule within the United Kingdom. This group included people from across the political spectrum as well as from outwith party politics who came together to set out the clear underlying principles that should underpin a sustainable Home Rule settlement. These were:

- A presumption in favour of devolving responsibility to Holyrood, with a review of Schedule 5 of the Scotland Act 1998 and the burden of proof for a power remaining at Westminster resting with the UK Government should it wish to retain that power.
- Ensuring that both Holyrood and Westminster have control over the tax and borrowing powers required to make each of them responsible for raising the money that they spend.
- Mutual respect between the two parliaments with a means found to ensure the permanence of the Scottish Parliament.

These principles formed the basis of the group's submission to the Smith Commission. As far as Reform Scotland is concerned, the Smith Commission recommendations and the resulting Scotland Act 2016 do not represent the end of the devolution road. However, as Professor Tomkins points out in this report, 'Whether or not this process (of transferring powers away from the centre to new legislatures and new governments in Edinburgh and Cardiff) has gone far enough, it is unrealistic to expect it to go very much further in the current Westminster cycle once the Scotland Act 2016 is in force.'

With this in mind, Reform Scotland is keen to widen the debate and to look at other ways in which the relationship between Westminster and Holyrood might

be improved. In particular, we are keen to look at federal structures and asked Professor Tomkins in his report to examine federal systems in other countries to see what lessons we might learn from them in relation to the concept of shared rule.

Professor Tomkins's report represents the views of the author and not those of Reform Scotland. As such, it is in keeping with the shorter pieces done by a variety of authors for our blog, the Melting Pot, and we intend to publish similar longer reports by individuals on other issues in the future.

Reform Scotland is delighted to publish this report because it is an important contribution to the debate from a respected authority on constitutional law. It is part of our contribution to fostering further discussion of our constitutional future.

Geoff Mawdsley
Director, Reform Scotland

1. Introduction

The United Kingdom is not about to become a federal country. A fully federal UK would require us to adopt a new written constitution, setting out the powers each of the UK's component nations would possess, and listing those remaining with the centre. A constitutional court would adjudicate on disputes arising as to whether a particular matter was for London, Edinburgh, Cardiff or Belfast. A reformed Upper House of Parliament would likely be constituted so that it represented each of the UK's component nations, as the US Senate represents the States or as the Bundesrat represents the German Länder. But no such written constitution is in prospect, even if some elements of further constitutional reform might be enacted in the next few years.

Equally unrealistic, however, is the notion that the United Kingdom Parliament remains sovereign in the full Diceyan sense—i.e., that Westminster may "make or unmake any law whatsoever".[1] This may remain true as a matter of high legal theory but, perfectly plainly, there are all sorts of political constraints on the United Kingdom Parliament, not all of which can be blamed on the European Union. Among them are those created by, or arising as a result of, devolution. Unless it first seeks and obtains Holyrood's consent to do so, the United Kingdom Parliament may not legislate for Scotland on matters that are devolved to Edinburgh, for example. If the UK is not a fully federal state, then neither does the unitary model of "one Parliament to rule us all" hold any longer.

We are somewhere in between these models and, moreover, our direction of travel is clear. We are moving ever further away from Dicey's orthodoxy towards something resembling federalism. Even if the pace of travel slows in the years ahead, it is difficult to see that there will be any reversal or retreat. Devolution is here to stay and, whether one looks to Scotland, to Wales or to the city regions of northern England, it seems set not merely to stay, but to deepen and grow.

This paper is not a call for a federal Britain. Several such papers have been written already, and more will no doubt follow.[2] Rather, this paper seeks to illuminate something of the territorial constitution that we have now, and that will develop further over the course of the current parliamentary cycle, as the next round of devolved powers in Scotland and Wales unfold and come into force. But neither is this paper simply an account of devolved powers: this is not a manifesto of what the Scottish Parliament or Welsh Assembly should do in its

[1] A.V. Dicey, *The Law of the Constitution* (1885).

[2] See, among other examples: David Melding, *The Reformed Union: the UK as a Federation* (2013), David Torrance, *Britain Rebooted: Scotland in a Federal Union* (2014), Society of Conservative Lawyers, *Our Quasi-Federal Kingdom* (2014); IEA, *Federal Britain: The Case for Decentralisation* (2015).

next term. Its purpose, instead, is to attempt to recast the way we see devolved power and, in particular, how we understand its relation to reserved power.

Thus far in the short history of devolution in Britain, we have done as if a power is *either* devolved *or* reserved. If it's devolved, it is for the Scottish Ministers to exercise, accountable as they are to the Scottish Parliament in Holyrood. And if it's reserved, it is for Ministers of the Crown to exercise, accountable to the United Kingdom Parliament in Westminster. On this understanding there is no meeting point, no middle ground, no power that is partly devolved and partly reserved, no power that is shared. Even if this limited understanding of devolution has been sufficient to make sense of devolution as it has operated since 1999, it will soon prove inadequate. The Smith Commission Agreement and the legislation it has spawned—the Scotland Act 2016—require us to see devolution in a more sophisticated way than the simple binary divide of devolved/reserved allows. There will, of course, continue to be both devolved and reserved powers. But, in addition to these, a new category of power will also come to the fore—shared powers. This may be new for the United Kingdom, but it is routine in federal countries.

How will it work in the United Kingdom? What sort of institutional architecture is needed to operate shared powers? What sort of legal framework should underpin a regime of shared rule? What can Britain learn from federal experience overseas about the strengths and limitations, the opportunities and drawbacks of shared powers? These are the questions addressed in this report.

Since Tony Blair's first government, through the Coalition of 2010-15 and on into David Cameron's Conservative administration, the problems of Britain's territorial government have been addressed principally through the means of devolution: of transferring powers away from the centre to new legislatures and new governments in Edinburgh and Cardiff. Whether or not this process has gone far enough, it is unrealistic to expect it to go very much further in the current Westminster cycle, once the Scotland Act 2016 is in force.

But this does not mean to say that the territorial puzzle is thereby solved. The devolution of power has been a necessary reform to Britain's government but, of itself, it is far from sufficient. What the United Kingdom needs to do now is to reconceive of the way its four governments interact (in London, Edinburgh, Cardiff and Belfast) and, in particular, how they share power. This is not about more devolution: it's about how much more than mere devolution alone, important though that has been, is needed to reinvigorate and secure Britain's territorial governance.

2. Shared Rule

2.1 Why shared rule matters

First, we need to understand why the Smith Commission Agreement and the Scotland Act 2016 mean that we should start taking shared rule seriously. When devolution first came to Scotland under the Scotland Act 1998, the decision as to what to devolve and what to reserve to Westminster was based largely on what the old Scottish Office had done in the era before devolution. The health service in Scotland had never been run by Whitehall's Department of Health (who ran the health service in England). Likewise, Scotland's schools had never fallen within the remit of the Department for Education. Rather, both health and education in Scotland were overseen by the Scottish Office, as was the justice system in Scotland. Crudely, if a matter was the responsibility of the Scottish Office before 1999 the presumption was that it would be devolved to the new Scottish Parliament, but if a matter was overseen for Scotland by another department of state in Whitehall, the presumption was that it would remain reserved. Thus, social security, almost all taxation, defence and foreign affairs all remained reserved. This was no arbitrary division imposed by the Blair Government: it was what the Scottish Constitutional Convention had understood by "home rule", and it is what the long campaign for Scottish devolution had always been about.

Developing devolution in this way, however, has had unfortunate unintended consequences. Whilst the Scottish Office—now called the Scotland Office—has been hollowed out to the point where there is almost nothing of it left, numerous government departments have been able to carry on much as they were before, unaffected by (and thereby ignorant of) devolution. As a rule, Whitehall's knowledge and understanding of devolution is woeful and the Scotland and Wales Offices are so small that they can lack the weight to have the influence they deserve in ensuring that the UK government machine reflects the modern, devolved state rather than Dicey's nineteenth-century unitary one. The United Kingdom Government needs a single, powerful Department for the Constitution—or for the Union—rolling together the current Cabinet Office, Scotland Office, Wales Office and Northern Ireland Office, and taking over the constitutional functions carried out in England by the Department of Communities and Local Government, too.

Devolution on the 1998 model was only modestly changed by the Scotland Act 2012, which implemented a number of the recommendations made by the Calman Commission. This model delivered home rule—or "self-rule"—for Scotland, but it did so by dividing powers into two types—devolved and reserved—and making a different government responsible for each type. Daniel

Elazar, an American political scientist who devoted much of his career to the study of federalism, wrote in his book *Exploring Federalism* that federalism is "self-rule plus shared rule".[3] This has become a widely cited definition in discussions in Scotland about devolution and federalism. If the first iteration of Scottish devolution has delivered the "self-rule" part of Elazar's equation, the "shared rule" element is yet to be accounted for.

2.2 The Smith Commission

The Smith Commission met in the immediate aftermath of the 2014 independence referendum. Its task was to find common ground among the five parties represented in the Scottish Parliament—those who had campaigned in favour of independence as well as those who had campaigned in favour of the Union—as to how devolution should be enhanced beyond the 1998 model.[4] Clearly, Smith had to move substantially beyond the devolution of tasks that had formerly been undertaken by the Scottish Office. Of the domestic functions of government[5] two became the prime candidates for fresh devolution: welfare and taxation. An important constraint on the Smith Commission, however, was that a majority of those voting in the independence referendum had elected to preserve Scotland's status within a United Kingdom that, as the rhetoric of the Better Together campaign had repeatedly put it, "pools and shares risks and resources". The full devolution of either taxation powers or welfare powers would cut against this and, it was felt, would risk undermining the 18 September No vote. Yet, at the same time, too great a resistance to the devolution of tax or welfare powers would result in an agreement that would not satisfy those—quite possibly a very large majority of Scots—who wanted to see much greater devolution than the 1998 model had delivered. A compromise was reached, both on tax and welfare. In other words, once the Smith Commission's recommendations come fully into force in the Scotland Act 2016, both tax and welfare in Scotland will become the shared responsibilities of both the United Kingdom Government and the Scottish Ministers.

In outline, the deal on taxation results in the following split: taxes on land and local government taxation are generally devolved;[6] taxes on wealth[7] and profits[8]

[3] Daniel Elazar, *Exploring Federalism* (1987), p. 12.
[4] Argument is ongoing as to whether Smith went far enough—or, indeed, whether it went too far—in devolving further powers to Holyrood. These arguments are not rehearsed here. Our purpose is simply to seek to understand Smith in the context of shared rule, not to appraise the judgements the Commission reached.
[5] There was no prospect that the Smith Commission would recommend the devolution of the external or international functions of government, such as defence, immigration and foreign affairs.
[6] Stamp Duty (Land and Buildings Transaction Tax), Non Domestic Rates and Council Tax were already devolved in Scotland before Smith. Smith added Air Passenger Duty to the list of fully devolved taxes in Scotland.
[7] Eg Capital Gains Tax and Inheritance Tax.
[8] Eg Corporation Tax.

are generally reserved; and taxes on income are shared. Whilst the details vary from country to country, this basic division reflects the practice of federal jurisdictions such as the USA, Canada and Australia.[9] For our purposes it is the last category that is most interesting. Smith agreed that national insurance contributions would remain reserved to Westminster and that income tax would be divided as follows: Westminster should determine the definition of "income" for the purposes of the Taxes Acts, should continue to control income tax on savings and dividends, and should continue to set the personal allowance (i.e. the point at which earnings become liable to income tax); beyond that the Scottish Ministers should be responsible for determining all the rates and bands of income tax in Scotland on earned income.

The welfare deal likewise sees a basic three-way split. First, it was decided that the state pension should remain the responsibility of the UK Parliament across the whole of the United Kingdom. Working-age benefits actually do two quite different things. First, they assist those on very low incomes; secondly, they assist those with additional needs. Most of the first category are being rolled up into a single benefit—Universal Credit. It was agreed that this should remain under the overall responsibility of the United Kingdom Government, but that Scottish Ministers should have the power to adjust certain aspects of the way Universal Credit operates in Scotland. Most of the benefits in the "additional needs" category, by contrast, are to be devolved under Smith (Carer's Allowance, Attendance Allowance, Disability Living Allowance, Personal Independence Payments, and Cold Weather and Winter Fuel Payments). The only major benefit in this category that remains reserved to Westminster is Child Benefit. As with taxation, then, so too with welfare we see a mix of powers for London, powers for Edinburgh, and powers to be shared between them.

The most sensitive and important of the shared powers will arise in relation to Universal Credit. Whilst this remains "a reserved benefit administered and delivered by the Department for Work and Pensions",[10] the Scottish Ministers will have administrative powers to alter both the frequency of Universal Credit payments and the ways in which the payments are made, and the Scottish Parliament will have the power to vary the housing cost elements of Universal Credit (including varying the under-occupancy charge, otherwise known as the bedroom tax).

[9] Perhaps the principal difference is that VAT cannot be devolved in the UK, as EU law requires each Member State to set only one rate of VAT. Sales taxes are commonly devolved in federal countries. Smith agreed that a share of VAT receipts in Scotland should be assigned to the Scottish Ministers.

[10] Smith Commission Agreement, para. 43; Scotland Act 2016, ss 29, 30.

The importance of shared rule as regards Universal Credit arises partly as a result of these features, and partly because of the relationship between welfare and work. The United Kingdom has a single labour market, and full, unimpeded mobility within that market is a defining feature of the Union between Scotland and the rest of the United Kingdom. One of the key objectives of Universal Credit is to assist in moving people off welfare and into work. Universal Credit payments will be tapered to minimise marginal tax rates at the bottom end of the labour market, seeking to remove wherever possible fiscal disincentives that have hitherto lain in the path from welfare to employment. Given that the Scottish Parliament will be able to vary a substantive element of Universal Credit (namely, its housing element), whatever policy it elects to implement as regards this could have knock-on consequences for the UK's labour market as a whole. If, for example, the housing element of Universal Credit were to be made more generous in Scotland than elsewhere in the United Kingdom, this could have the effect of disincentivising some people from moving off Universal Credit and into the workplace. That would have consequences both for Scottish revenues and for those of the United Kingdom as a whole. This is likely to be compounded by the fact that the Smith Commission agreed to devolve to the Scottish Parliament significant powers over support for the long-term unemployed. The DWP's Work Programme, for example, is to be devolved in full.[11]

In addition to all this, the Scottish Parliament will have two further powers with regard to welfare: it will have the power to top-up any benefit and it will have the power to create new benefits in any area of devolved responsibility.[12] It is clear, therefore, that while the majority of working-age benefits will continue to be determined by UK Ministers across a pan-UK basis, their responsibilities as regards social security will to some extent be shared in Scotland with Scottish Ministers.

That the Smith Commission and the Scotland Act 2016 have introduced into the British constitutional landscape a new category of shared powers has been recognised both by Ministers and by parliamentary committees that scrutinised the Scotland Bill during its passage through Parliament. Giving evidence to the Scottish Parliament's Devolution (Further Powers) Committee in June 2015, Secretary of State for Scotland David Mundell talked, for example, of "the environment that Smith envisaged, *which involves having shared responsibilities and which must be based on a different type of relationship*" between governments within the United Kingdom. Likewise, in its report on the Scotland Bill the House of Lords Constitution Committee noted that it is "a feature" of the legislation that its provisions "will require co-operation between

[11] Smith Commission Agreement, para. 57; Scotland Act 2016, s. 31.
[12] Smith Commission Agreement, para. 54; Scotland Act 2016, ss 24, 28.

UK and Scottish Governments across a range of new areas".[13] In the Committee's analysis, such co-operation will take a variety of forms, from the existence of concurrent powers, to duties of consultation, requirements to obtain consent, information-sharing and the management of cross-border bodies. Of these, it is the new arrival of concurrent powers that is the most important. "The hitherto fairly straightforward demarcation between reserved powers and those devolved to the Scottish Parliament," the Committee said, "will become considerably less clear".[14] The Committee noted that, among other matters, this would make the United Kingdom's inter-governmental relations "both more complex and more important".[15] It is to this topic that we turn in the next chapter.

But the advent of shared rule means much more than that we should take another look at the UK's inter-governmental machinery, vital though that task is. It means that we have to understand afresh what devolution and its place in the Union state is. Plainly, it can no longer be taken to mean simply that when a power is devolved to Holyrood, Westminster can switch off and pass the responsibility north to Scotland. Powers over income tax, over Universal Credit, over employment and—critically—over the inter-relationship between tax, welfare and work will have to be exercised in tandem, not in isolation. The rejection of independence means that Scotland does not have full self-rule over tax, welfare or work. But the new Union, reshaped by Smith and by the Scotland Act 2016, means that these policy areas are no longer the exclusive preserve of Westminster and Whitehall, either. From now on, they are shared. And we need to understand what that means and what the implications of this are likely to be.

2.3 The structure of the argument

This may all be new for the United Kingdom but, as we shall see in the following chapters, there is ample overseas experience from which the UK can usefully learn. Of course there is no off-the-shelf package that the UK can simply copy and paste. Every country is different and no other country has the same imbalance as the UK (where England has 85% of the population and where Scotland, with less than 9% of the population, has about one third of the UK's landmass). That there are only four home nations in the United Kingdom (and that there is devolution in only three of them) contrasts sharply with the fifty States of the USA, the ten Provinces and three territories of Canada, the sixteen Länder of Germany, and the twenty-six Cantons of Switzerland.

[13] House of Lords Constitution Committee, *6th report of 2015-16*, para. 17.
[14] Ibid, para. 18.
[15] Ibid, para. 19.

Whatever we can learn from overseas experience will have to be tailored carefully to fit the unique needs of the United Kingdom.

What follows, in the next three chapters, is an account first of the UK's inter-governmental machinery, its current limitations, and how it can and should be reformed. This is followed by an examination of the way in which multi-level government operates in a number of federal countries, where there is long experience both of self-rule and of shared rule (and of the relationship between them).

Chapter 4 focuses on the United States of America and Chapter 5 moves to the Commonwealth, examining Canada, South Africa and Australia. In both these chapters the focus is on constitutional law, and the analysis relies on the leading case law of the US Supreme Court, of the Supreme Court of Canada, and of the South African Constitutional Court to illustrate how federalism works in these countries. The jurisprudence is richest in the United States, where there is also an unrivalled body of academic research into and commentary on federalism. Several schools of federalism scholarship have emerged and these are surveyed, along with the case law, to draw insights into the strengths and limitations of shared rule as it is practised in the US and in the Commonwealth.

It is a core recommendation of this paper that the United Kingdom needs to put its arrangements for shared rule on a statutory footing. Shared rule needs a formal underpinning and the introduction and passing of such a law will force both government and Parliament to think through the implications of devolution for them more carefully than has been apparent hitherto. Shared rule should be understood as generating legal entitlements and obligations: this is why an understanding of case law, as well as of political institutions, is essential if we are fully to grasp the constitutional implications of shared rule. Last year the Bingham Centre for the Rule of Law recommended that the United Kingdom needs a new Charter (or Act) of Union.[16] Whether or not this one day comes about—and there appears to be no immediate prospect of it doing so, despite the idea having been taken up by committees in both Houses of Parliament[17]—a new law setting out the United Kingdom's arrangements as regards shared rule would be a valuable first step, and something this report argues would be in the interests of UK and Scottish Ministers alike.

Chapter 6 presents the report's conclusions and recommendations. This report is not offered as the last word on shared rule in the United Kingdom, but in the

[16] Bingham Centre for the Rule of Law, *A Constitutional Crossroads: Ways Forward for the United Kingdom* (2015).

[17] The House of Commons Public Administration and Constitutional Affairs Committee and the House of Lords Constitution Committee.

hope that it will trigger thought, debate and discussion about where Scotland and the United Kingdom should go from here.

3. An Institutional Architecture of Shared Rule

3.1 Inter-governmental machinery

It is difficult to find anyone who has a good word to say about the United Kingdom's inter-governmental machinery. In the last decade it has been criticised by the House of Commons Justice Committee,[18] the House of Commons Welsh Affairs Committee,[19] the House of Commons Scottish Affairs Committee,[20] the House of Lords Constitution Committee,[21] the Calman Commission,[22] the Silk Commission,[23] the Smith Commission,[24] the Scottish Parliament Devolution (Further Powers) Committee,[25] the Institute for Government[26] and the Bingham Centre for the Rule of Law.[27]

Four core criticisms, echoed by numerous of the above committees, commissions and think tanks, are that:

- the UK's inter-governmental machinery is lacking in formality
- it is dominated by the UK Government
- it lacks an independent and robust process for dispute resolution, and
- it lacks transparency.

All four concerns stem from the same source: that when devolution was established in the late 1990s, no real thought was given to the problem. It was as if relations between different governments within the United Kingdom could be managed just as relations between different departments of the same government had been. Just as the original set of powers for the Scottish Parliament was based on the old job description of the Scottish Office (as we saw in the last chapter), so too was the approach to inter-governmental relations based on the old pattern of relations between the Scottish Office and other departments of the UK Government. Hence the lack of formality, the domination of the centre, the absence of independent dispute resolution and the lack of transparency: all four are features of inter-departmental relations in Whitehall. That the advent of devolution could be managed as if it were an act

[18] House of Commons Justice Committee, *5th report of 2008-09*, HC 529.
[19] House of Commons Welsh Affairs Committee, *11th report of 2009-10*, HC 246.
[20] House of Commons Scottish Affairs Committee, *4th report of 2009-10*, HC 256.
[21] House of Lords Constitution Committee, *11th report of 2014-15*, HL Paper 146.
[22] Commission on Scottish Devolution (2009).
[23] Commission on Devolution in Wales (2014).
[24] Smith Commission Agreement (2014).
[25] Scottish Parliament Devolution (Further Powers) Committee, *8th report, 2015*, SP Paper 809.
[26] Institute for Government, *Governing in an Ever Looser Union* (2015)
[27] Bingham Centre for the Rule of Law, *A Constitutional Crossroads: Ways Forward for the United Kingdom* (2015).

of continuity rather than of change was augmented by the fact that, at the time, the same political party was in power in London, in Edinburgh and in Cardiff, albeit that in Edinburgh the Labour party had to share power in coalition with the Liberal Democrats. As soon as this ceased to be the case (in 2007) the cracks started to show.

The UK's inter-governmental relations are based on a Memorandum of Understanding (MoU), first drawn up in 1999 and reissued numerous times since, most recently in October 2013.[28] (At the time of writing it is once again under review.) It is a purely political agreement, not intended to bind the parties legally. It is drawn up by officials and agreed by Ministers. There is no prior consultation with parliaments or assemblies about its content; neither is there any public consultation. It is a document of good intentions. It says that the governments "are committed to the principle of good communication with each other" and that all four governments "want to work together, where appropriate, on matters of mutual interest".[29] There are paragraphs on the exchange of information between governments, on confidentiality, and on international and EU relations. The MoU establishes a modest machinery so that the United Kingdom's four governments can meet from time to time. At the top of this machinery sits the Joint Ministerial Committee (JMC), but the MoU specifies that "most contact" between the governments should be carried out on a bilateral—and informal—basis, with departments dealing with one another as the need arises.

Provision is made about JMC meetings and the JMC secretariat, which is led by staff from the UK Government's Cabinet Office. Plenary meetings of the JMC occur annually in London; more frequent meetings take place in specific fields, notably as regards the UK's representation at EU Council meetings.[30] Plenary meetings are chaired by the Prime Minister and attended by the First Ministers of Scotland, Wales and Northern Ireland. Of more practical importance are the Joint Exchequer Committee, which manages the devolution of tax powers, and the Joint Ministerial Working Group on Welfare, which will manage the devolution of welfare powers.

Provision is made in the MoU about the resolution of disputes arising between governments. Such disputes are to be resolved informally where possible, by

[28] Available online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf (last visited 7 March 2016).

[29] Ibid, paras. 4 and 8.

[30] This has been a contested matter in Scotland, with Scottish Ministers unhappy about UK Ministers representing what they consider to be discretely Scottish interests as regards fishing, for example. Appended to the MoU are a series of Concordats on the co-ordination of EU policy issues: see, in particular, Concordat B4.

officials where possible and by Ministers where necessary. Where Ministers cannot agree the matter may be referred to the JMC. The last word, in reality, will rest with the UK Government. No provision is made for any external or independent dispute-resolution procedure.

3.2 Fixing the machinery

From even this brief overview of the United Kingdom's inter-governmental machinery it is readily apparent why it has been so sharply criticised. None of the machinery is underpinned by law; London dominates; the whole process is opaque as well as ad hoc and informal; and there are no established means by which parliaments can work together to hold officials or ministers to account for what they do—or fail to do—inter-governmentally.

The solutions to these problems are, for the most part, equally obvious, and they have been pointed out by several of the committees and commissions that have joined the chorus of disapproval outlined above. The United Kingdom's inter-governmental relations and machinery are too important to be left to the vagaries of political ad hockery: they should be underpinned by statute. The Joint Ministerial Committee should meet in plenary session in each of the United Kingdom's capitals in turn, and not always in London. Provision should be made for an independent dispute-resolution procedure. Agendas should be published in advance and ministers called to account by their parliament or assembly before or after joint ministerial meetings, as the parliament or assembly in question sees fit. Provision should be made for parliaments and assemblies to meet jointly to scrutinise the operation of the United Kingdom's inter-governmental machinery. There is no reason, for example, why the House of Commons Treasury Committee and the Scottish Parliament Finance Committee should not meet jointly to scrutinise the work of the Joint Exchequer Committee in the management of fiscal devolution. These reforms are necessary to secure the "more productive, robust, visible and transparent relationship" between the UK and Scottish Governments that Lord Smith wrote of in his foreword to the Smith Commission Agreement in 2014.

These reforms are necessary but, on their own, they will not be sufficient to meet the challenges of shared rule. Shared rule requires an effective institutional architecture not only of exchanging information and resolving disputes, but of policy-making itself. Without a means of developing policy jointly shared rule will inevitably be limited. This does not have to happen across the board: indeed, it should not. Scottish Ministers have no role in developing United Kingdom defence policy any more than United Kingdom Ministers have a role in developing Scottish schools policy. But in those areas where responsibility for policy is shared, there needs to be an institutional means—a forum—in

which it can be at least discussed jointly, if not determined jointly. And, of course, there needs to be an accompanying parliamentary means of scrutinising such joint ministerial (or joint official) deliberation. This will be a departure for the United Kingdom—we have not done this before—but it should not be regarded as optional if we want the full effects of the sharing of power to take root.

This is all very well as a matter of sound public policy, but what's in it for Ministers? Why should the UK and Scottish Governments agree to share power in this way? Happily, there is a great deal in it for both UK and Scottish Ministers. For Unionists in London the sharing of power is a great way of embedding the Scottish Government more deeply in the fabric of the devolved British state. It would implicate Scottish Ministers in the making of British policy. And it would show that the public interest lies in the more effective inter-dependence of governments, not in independence. For Nationalists in Edinburgh, the sharing of power is a great way of showing that Scotland can lead in innovative policy development. Fresh ideas can be brought to the table but, at the same time, Scottish Ministers and their officials can learn from the wealth of experience locked into the Treasury and the Department of Work and Pensions. Setting up new revenue streams and welfare benefits from scratch is an expensive, time-consuming and risky business. Sharing with London may enable more policy innovation (and more effective tailoring to distinct Scottish needs or interests) without taking on unnecessary extra risk.

3.3 Accountability

Where power is shared, accountability must be shared to mirror that. Power-sharing cannot be permitted to become a means of avoiding responsibility, finger-pointing, or governments blaming each other for their policy failures. It is of cardinal importance to Britain's parliamentary democracy that Ministers are accountable to Parliament (whether Westminster, Holyrood or Cardiff Bay). Where Ministers are acting co-operatively, Parliaments may also have to co-operate in holding them to account. The National Assembly for Wales and the House of Commons Welsh Affairs Committee have co-operated before in holding joint sessions, but this has not been a feature in Scotland. It needs to be. Effective accountability of joint ministerial working will require a transformation in the way governments (of all political colours, in London and in Edinburgh) interact with parliaments. Inter-governmental deliberations in the United Kingdom tend to be conducted in private, behind closed doors, with minimal transparency. There may be a joint communiqué released at the end of a meeting—perhaps even a press conference—but there is generally no opportunity for parliaments to make any input *before* governments meet. The model is reminiscent of international diplomacy (or of meetings between

ministers of different departments in the same government). This model is manifestly inapt if we are to have fiscal, welfare or employment policy developed in a shared setting in the United Kingdom in an open, democratic or accountable manner.[31]

The fiscal framework negotiations of 2015-16 are a case-study in what not to do. This is a criticism not of the outcome of those negotiations, but of their process. The negotiations took place in private, with no systematic parliamentary notice as to when meetings would take place, who would attend, or what would be discussed. Yet, when it became apparent that agreement on one particular issue was proving difficult,[32] there were leaks to the media, resulting in lurid headlines about Ministers seeking to write billions out of the Scottish budget, and the like. Neither Holyrood nor Westminster were kept properly informed, meaning that neither parliament could hold Ministers effectively to account for what was being discussed—never mind decided.

Yet the outcome—the agreement published in February 2016[33]—underscores the ongoing importance of shared rule. It provides, for example, that "the Joint Exchequer Committee will agree on a suitable point for the devolution of the Aggregates Levy"[34] and that the implementation dates for the devolution of welfare powers legislated for in the Scotland Act 2016 "will be agreed by the Joint Ministerial Working Group on Welfare", with the Joint Exchequer Committee overseeing transfers of funding.[35] Similarly, "the full details of the VAT assignment methodology will be jointly developed and agreed by both HMRC and Scottish Government officials".[36] The fiscal framework will be reviewed in 2021 and, again, the Joint Exchequer Committee "will agree the arrangements for undertaking the review".[37]

---

[31] See, to similar effect, the report of the Scottish Parliament Devolution (Further Powers) Committee, *Parliamentary Scrutiny of Inter-governmental Relations*, 8th report, 2015, SP Paper 809. In March 2016 a Written Agreement on Parliamentary Oversight of Inter-governmental Relations was published. Under this agreement the Scottish Government has undertaken to provide the Scottish Parliament with advance notice of inter-governmental meetings, enabling Holyrood committees to express a view (and to take evidence) before the meeting takes place. There is also a commitment for the Scottish Government to report annually to the Scottish Parliament on inter-governmental relations. These are welcome, if rather tentative, steps in the right direction, but it is regrettable that the Written Agreement omits any reference to the importance of joint parliamentary scrutiny.

[32] Namely, the mechanism by which reductions in the block grant should be calculated or indexed.

[33] Agreement between the Scottish Government and the United Kingdom Government on the Scottish Government's Fiscal Framework, available online at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/503481/fiscal_framework_agreement_25_feb_16_2.pdf.

[34] Ibid, para. 27. The Aggregates Levy is a tax, to be devolved in Scotland to the Scottish Parliament once legal challenges to it in the European courts have been resolved.

[35] Ibid, para. 29.

[36] Ibid, para. 41.

[37] Ibid, para. 111.

3.4 Reform at the centre

It was noted above that Whitehall underwent minimal internal reform in the wake of devolution's arrival in 1998-99, save that the Scotland and Wales Offices became so small that they struggle to command the clout they deserve. We need a single, powerful department at the heart of government with responsibility for our constitutional arrangements—a substantially beefed-up Cabinet Office incorporating the Scotland, Wales and Northern Ireland Offices. Co-ordinating the UK Government's participation in shared rule would be a core role for that department.

It is sometimes said by those who have studied shared rule that one of its aspects is that the nations and regions of the country should be represented as such in the Upper House of Parliament. In rather different ways, this happens in the USA, Australia, Canada and Germany, for example. The US House of Representatives represents voters on a per capita basis (so there are, for example, 53 Congressmen from California, 19 from Illinois and two from Rhode Island) whereas the Senate represents each State equally, regardless of that State's population (each State elects two Senators). Australia follows this model. In Canada the Upper House is appointed, not elected, and—in theory at least—the Senate represents the Provinces and regions of Canada whilst the House of Commons represents the people directly, but the representation of the Provinces in the Canadian Senate is not systematic, with the result that some are relatively over-represented and others under-represented. Germany is different again, where the Bundesrat represents the *governments* of the Länder. It is more like a council of ministers than a legislature.

Reform of the House of Lords is not essential in order to secure effective shared rule in the United Kingdom. However, it is notable that attempts to reform the House of Lords have foundered when they have focused on that House's (unelected) *composition*. Focusing instead of the *function* of the Upper House might prove to be a more fruitful way of thinking about Lords reform. If it were a starting point that the House of Lords should in some way represent the nations and regions of the United Kingdom (as the Labour Party suggested in its manifesto for the 2015 general election), that might lead to a more coherent reform agenda than simply seeking to change the composition of the Upper House without considering its functions.

Even if Lords reform is not an essential component of effective shared rule, it is certainly possible that it could help. Exactly how a reformed Upper House should reflect and represent the nations and regions of the United Kingdom has not been worked through, however. It is an issue on which much more work remains to be done.

4. A Constitutional Law of Shared Rule: Learning from the United States

4.1 Federalism in the United States

Federalism as we understand it today was invented by the Founding Fathers in eighteenth-century America. They inherited an older idea and converted it in two ways. The older idea was confederation and it applied to relations between states.[38] Countries had formed alliances, groups or leagues since ancient times—the Achæan League and the Lycian Confederacy, for example—and in early-modern Europe the experiment was repeated in such forms as the Hanseatic League and the United Provinces of the Netherlands. The Articles of Confederation, under which the thirteen American colonies had formed a loose association since 1781 was based on this idea.

The United States Constitution took this idea of confederation, tightened it so that a much greater degree of sovereignty would be pooled at the centre, and applied it not to the relations between countries but to relations within a single country. Thus was the single American nation born by the "more perfect Union" of the thirteen colonies—now States. The Federalists knew that they would face resistance in several of the States, nine of which needed to ratify the new Constitution before it could take effect, so they launched a remarkable campaign to persuade the States that it was in their interests, as well as in the interests of the newborn American nation as a whole, to embrace this change. The crowning glory of this campaign is *The Federalist*, a series of 85 papers published between October 1787 and May 1788 written principally by James Madison and Alexander Hamilton to persuade the State of New York to ratify. *The Federalist* is one of the great works of constitutional theory published in the English language, as well as an unrivalled practical guide to the US Constitution.

American federalism is based on the fundamental principle that the federal government has only those powers that are ascribed to it in the Constitution. In the words of the Tenth Amendment, "the powers not delegated to the United States by the Constitution ... are reserved to the States respectively". *Federalist* Nos 41-44 take the reader through the various powers the Constitution confers on the federal government, arguing why each one needs to be exercised at that level and not reserved to the States. *Federalist* No 45 then examines how the relationship between the federal government and the States will work. Madison notes how the balance between them is not designed to be equal, but is intended

[38] The European Union is a confederation. Even under the failed Constitutional Treaty of 2005 this would have remained the case. That Treaty would not have turned the EU into a federal entity.

to benefit the States at the expense of the national government. Federal government is dependent on the States in ways that are not reciprocated, Madison notes (the President, for example, is elected by a College comprising delegates from each State, whereas the federal government has no similar role in electing State governments). The States will retain a greater degree of popular support than will the federal government. They will have more power to disrupt federal activity than the federal government will have to interfere with State activities, Madison claims (we shall return to this point below). And, despite the fact that the Constitution clearly empowers the centre to a far greater degree than had the Articles of Confederation,[39] it remains the case even under the Constitution, Madison argued, that the powers vested in the States outweigh those conferred on the federal government. Madison's conclusion was famously expressed: "The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite".[40]

The intervening two centuries of American government have not been kind to this appraisal. In modern-day America Madison was wrong on both counts. The national government has grown so much that it would be completely unrecognisable to the Founders, and the States have withered by comparison. It has been remarked that, if the United Kingdom is moving from Dicey's unitary constitution towards something resembling a quasi-federal model, the United States has moved in the opposite direction. This has been particularly the case since the 1930s, and President Franklin D. Roosevelt's New Deal "reconstruction" of the American economy after the Great Depression. It was in this period that a truly national economy developed in the United States, with Congress legislating on nationwide labour standards and employment conditions in order to try to reboot the economy after the disaster of 1929. At first resisted on States' rights grounds by the US Supreme Court, after threats of Court packing, there was a decisive change in the direction of the Court's jurisprudence, as the constitutional constraints on Congressional power came to be understood much more loosely, and the constitutional protections formerly afforded to State sovereignty diminished.

There is an important lesson here for Scotland and the United Kingdom. No matter what the original intent, language used to seek to delimit the differences between reserved and devolved powers (or, in the American case, between federal and State powers) is always open to judicial interpretation, with Courts able to construe it more or less generously depending on the needs of the times. Take the famous Commerce Clause of the US Constitution, for example. This provides that "Congress shall have Power ... to regulate Commerce with foreign

[39] Under the Articles of Confederation, Congress had no powers over taxation, for example.
[40] James Madison, *Federalist No 45* (1787).

Nations, and among the several States ...".[41] Perfectly plainly, this means that Congress has the power to legislate on *international* trade ("Commerce with foreign Nations") and on trade *between* the various States of the USA ("among the several States") but not to legislate on trade *within* States. Under the Tenth Amendment, the power to regulate *intra-State* trade is reserved to the States themselves. This was the constitutional hurdle at which Roosevelt's New Deal legislation fell—at least, to start with. But, in a series of landmark decisions between 1937 and 1942 the Supreme Court changed course, and significantly relaxed its interpretation of the Commerce Clause. The Clause itself has never been amended, but its meaning has changed considerably so as to accommodate within the US constitutional order a far greater degree of national economic regulation than the Founders could ever have contemplated.

The post-war period saw an acceleration of this trend. Defence of States' rights became associated with support for Jim Crow segregation as it was the federal government and the Supreme Court—and not the States—that transformed America in fields such as civil rights and abortion, as well as in national economic terms. It was not until President Ronald Reagan arrived at the White House in 1980 that any official encouragement was given to the idea that the pendulum may have swung too far. Reagan's first two appointees to the Court—Justices Sandra Day O'Connor and Antonin Scalia—began, with Chief Justice Rehnquist, the task of resetting the federalist balance.[42]

4.2 Enumerated powers

Part of this was about seeking to revive what had become known as the "dormant" Commerce Clause. The breakthrough finally came in a case called *United States v Lopez*, in 1995.[43] Federal legislation made it an offence to possess a firearm at or near a school. By a five-to-four majority the Supreme Court struck the legislation down as exceeding Congressional power under the Commerce Clause. This was the first time in 65 years that the Court had invalidated a provision of federal legislation on this ground. A second example followed in 2000, when the same five-to-four majority struck down certain provisions of the Violence Against Women Act.[44] Congress had enacted that legislation on the basis that violent crimes against women could have a number of adverse effects on interstate commerce. The Court ruled, however, that these effects were too remote and indirect to bring the legislation within the scope of the Commerce Clause.

[41] US Constitution, Article I, section 8, clause 3.
[42] Rehnquist had been appointed to the Court in 1972; Reagan elevated him to Chief Justice in 1986 when Warren Burger retired.
[43] *United States v Lopez* 514 US 549 (1995).
[44] *United States v Morrison* 529 US 598 (2000).

Whilst interesting in their own right, and whilst they are central to the contemporary law of federalism in the United States, these cases do not tell us anything very much about shared rule. All systems of multi-level government must have ways of distinguishing those powers exercisable at the centre from those exercisable by states, provinces or regions. European Union law has such a system. So do Canada and Australia. And so too does the United Kingdom. In all of these places the limits of legislative competence are a matter of law for the courts to rule on, in the event of any dispute. The Scottish Parliament may not legislate on the powers the Scotland Act 1998 reserves to the United Kingdom. The Welsh Assembly may legislate only within the powers that are conferred upon it by the Government of Wales Act 2006. Courts in the United Kingdom can and do enforce these limits.[45] There is little difference between what the UK courts do in such cases and what the US Supreme Court was doing in *Lopez*. The judicial enforcement of the limits of legislative competence is a key part of federal constitutional law, but it has little to do with shared rule.

Cases such as *Lopez* rely on an understanding of federalism known as "dual sovereignty". This is familiar to us in Scotland. Some powers are for this government (Scotland, or the US States); others powers are for that government (the United Kingdom, or the US federal government). On this understanding, powers are for one government or another: they are not shared. The job of a constitution is to delimit the powers, identifying which powers are for which level of government. And the constitutional job of the courts is to rule on disputes, determining whether (for example) gun control falls within or outwith the regulation of "commerce … among the several States"—or whether, to take a Scottish example, legislation limiting tobacco sales is related to the devolved subject-matter of public health or to the reserved subject-matters of consumer protection and product safety.[46]

Cases such as *Lopez*, strategies of federalism such as enumerated powers, and the model of dual sovereignty may tell us quite a lot about how much "self-rule" is afforded to the States or provinces or regions that make up a country, but they are only one element of the federal picture. They are generally the place to start but, on their own, they do not take us very far. A court that was able to enforce or protect federalism only by ensuring that constitutional lists of enumerated powers were adhered to would not be a court with many tools in its box. It is a thin and, experience would show, weak form of federalism that relies only or

[45] For an account of the key UK Supreme Court cases, see Bingham Centre for the Rule of Law, *A Constitutional Crossroads: Ways For the United Kingdom* (2015), pp 59-66.

[46] See *Imperial Tobacco v Lord Advocate* [2012] UKSC 61, in which the UK Supreme Court ruled that the Tobacco and Primary Medical Services (Scotland) Act 2010 was within the legislative competence of the Scottish Parliament.

even mainly on this strategy. Of course, delimiting the powers of central government and regional government is a necessary component of federal and quasi-federal orders but, on its own, it is far from sufficient.

This was recognised in the United States more than half a century ago. For our purposes, two sets of cases can be used to illustrate what, in addition to a jurisprudence of enumerated powers, is needed to append an understanding of shared rule to the basic building-blocks of self-rule. These cases concern the spending power and the doctrine of pre-emption.

4.3 The spending power and the anti-commandeering rule

For our purposes, much more interesting than the revival of the Commerce Clause is the second main prong of the Reagan appointees' approach to federalism: to curb the reach of Congress' spending power. The US Constitution authorises Congress to "provide for the ... general welfare of the United States". Congress has the power to tax and, under this clause, it also has the power to spend. Congress' power to spend is far wider than its power to legislate. It may legislate only in relation to the powers conferred upon it by the Constitution, but it may spend to provide for the *general* welfare. Congress may spend money even in areas over which it has no legislative competence.

The case of *South Dakota v Dole* illustrates both the breadth of Congress' spending power, and its direct relevance to shared rule.[47] In South Dakota the minimum drinking age for alcoholic drinks was 19 years. Congress directed the federal government to withhold a percentage of federal highway funds allocated to States where the State in question had a minimum drinking age of less than 21 years. South Dakota challenged this as being, among other matters, in excess of Congress' spending power. The State's challenge was unsuccessful. It has long been accepted that, under its spending power, Congress may attach conditions to the receipt of federal funds (including conditions designed to further broad policy objectives preferred by the federal government). The Supreme Court ruled as long ago as 1936 that such conditions were not limited by and did not have to match Congress' enumerated legislative powers.[48] That is to say, Congress could seek to achieve through conditional funding what it could not require by positive legislation.

This does not mean that there are no constitutional limits to the conditions that Congress may attach when allocating federal funding to the States but, "in considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress", the

[47] *South Dakota v Dole* 483 US 203 (1987).
[48] *United States v Butler* 297 US 1 (1936).

Supreme Court ruled. Conditions attached to federal funding must be unambiguous, so that States may exercise their choices knowingly. And conditions must be "reasonably related to the purpose of the expenditure". In *South Dakota v Dole* the Court ruled that these requirements were amply met. "The condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel", the Court ruled. Justice O'Connor dissented. She agreed with the Court's elaboration of the basic principles, but found that in this instance the condition attached to the funding (that the State should raise its minimum drinking age from 19 to 21) was not sufficiently related to the purpose of that funding (the construction of interstate highways).

In the 1990s the Court sharpened the limits to Congress' spending power, just as it gave fresh bite to the Commerce Clause. In *New York v United States* the State of New York challenged certain provisions of federal legislation that incentivised States to encourage them to comply with Congressional policy about the disposal of low-level radioactive waste.[49] The Court ruled that a number of the incentives fell within Congress' spending power but that one of them went too far: namely, a requirement that a State unable to provide for the disposal of the waste had to take possession of the waste and had thereby to assume associated liabilities in relation to that waste (the "take title" provision). Justice O'Connor gave the Opinion of the Court. She saw the case as being about the extent to which Congress could direct the States to regulate in a particular field or in a particular way. She ruled that Congress may not "commandeer" the States by "directly compelling them to enact and enforce a federal regulatory program". She added: "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions".

As is evident from the earlier case of *South Dakota v Dole*, this does not mean that Congress lacks the ability to encourage States to regulate in a particular way; nor does it mean that Congress may not offer incentives to seek to influence a State's policy choices. But "outright coercion", as Justice O'Connor put it, is forbidden. Justice O'Connor referred to the Clean Water Act as an example of what she said had been termed "co-operative federalism". Legislation such as the Clean Water Act "anticipates a partnership between the State and the federal government, animated by a shared objective". Such a scheme is perfectly compatible with the Constitution, but when co-operation becomes coercion—or commandeering—a line is crossed into territory the Court will rule to be unconstitutional. This is because "States are not mere

[49] *New York v United States* 505 US 144 (1992).

political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the federal government". States must be free to choose whether to co-operate with federal programmes (such as in the area of environmental protection). The "take title" provision, by requiring States to take possession of certain radioactive waste, crossed the line from co-operation to coercion and was, for that reason, unlawful. We shall return to co-operative federalism later in this chapter.

The anti-commandeering rule in *New York v United States* was taken further in *Printz v United States*, a decision of the US Supreme Court in 1997 in which the Opinion of the Court was written by Justice Scalia.[50] *Printz* concerned federal legislation that required State officers to carry out background checks on prospective purchasers of handguns. Unlike in *New York* there was no question in *Printz* that the federal legislation required a State to adopt any particular *policy*. State officers were simply required to assist in the *administration* of federal gun controls. None the less, in another five-to-four decision the Supreme Court read across from *New York* to hold that, just as Congress could not commandeer a State's legislative processes, neither could a State officer be pressed into federal service: "the federal government", Justice Scalia wrote, "may not compel the State to implement, by legislation or by executive action, federal regulatory programs".

The same point arose in the more recent court challenges to President Obama's Affordable Care Act—informally known as Obamacare. One of the key elements of Obamacare is what Chief Justice Roberts described as a "dramatic increase" in State obligations under Medicaid.[51] Medicaid is a federal programme that requires States to cover certain medical needs of particular groups of people (pregnant women, children, poorer families, the blind, the elderly and the disabled). The Affordable Care Act significantly extended the categories of people covered by Medicaid. Some 90% of this increased coverage would be paid for by federal funds. However, if States did not extend Medicaid's coverage, not only would they be denied the additional federal funding, but Congress threatened to withdraw *all* Medicaid funding from such States. (To put this in context, Medicaid spending accounts for more than 20% of the average State's total budget, with federal funding covering between 50% and 83% of those costs.) Thus, between 10% and 18% of the average State's *total* budget was at risk if States did not comply with the Affordable Care Act's extension of Medicaid.

Clearly, this raises the same issue as was determined in Congress' favour in *South Dakota v Dole*: namely, are the conditions attached to federal funding so

[50] *Printz v United States* 521 US 898 (1997).
[51] *NFIB v Sebelius* 567 US __ (2012).

coercive that they pass the point at which "pressure turns into compulsion"? A seven-to-two majority of the Court distinguished *South Dakota v Dole*. In that case the federal funds at stake constituted less than 0.5% of South Dakota's budget. By contrast, Chief Justice Roberts ruled that "the financial 'inducement' Congress has chosen [in the Affordable Care Act] is much more than relatively mild encouragement—it is a gun to the head". The Court did not invalidate those aspects of Obamacare concerned with Medicaid expansion. Congress remained free to attach lawful conditions to its increased Medicaid funding, but it was prohibited from threatening to withhold the entirety of a State's Medicaid funds if that State sought to resist to expand its Medicaid coverage.

These cases illustrate an element of multi-level government that remains almost entirely unexplored in Scotland and the United Kingdom. Hitherto, we have understood devolution in terms of devolved and reserved legislative and executive *powers*; we have not yet come to understand it in terms of *money*. In part this is because the fiscal relationship between the UK and Scottish Governments is not one in which conditional funding features. The block grant is transferred from HM Treasury to the Scottish Ministers with no strings attached. When this is explained to American (or Canadian) colleagues, their reaction is astonishment: how could the United Kingdom Government have set up powerful devolved institutions without seeking to influence them through conditional funding? It is an aspect of devolution that has never received the attention it merits.

Despite the unconditional nature of the UK's block grant funding, there are two valuable lessons to learn from the American spending power and anti-commandeering case law. The first is to recall that, as well as having legislative powers over reserved matters, UK institutions also retain spending powers in Scotland. There is nothing to stop the UK spending money in Scotland, even where the UK Parliament would not be able to legislate (without Holyrood's consent). As in the USA, so too in the United Kingdom: there is no reason to think that spending powers and law-making powers have to match and mirror each other. The second lesson is that, even if the block grant is transferred free of conditions, other Scottish public expenditure emanating from the Treasury can and does come with conditionalities attached. The lead examples are the City Deals signed with Glasgow and the Clyde Valley in 2014 and with Aberdeen and Aberdeenshire in 2016. In Glasgow's case, the UK Government has undertaken to invest £500 million in the Glasgow city region over the coming years for the purpose of assisting the city region with boosting its local economy, raising productivity and creating jobs. That financial commitment was matched by the Scottish Government, making Glasgow's city deal the richest in the United Kingdom (at the time it was signed), and marking another example, it is to be noted, of shared rule. Glasgow City Council, its

neighbouring local authorities, the Scottish Government and the United Kingdom Government are jointly responsible for co-operating in the delivery of the city deal. Westminster could not legislate on local authority law in Scotland without Holyrood's consent, as the matter is devolved; but this rule does not inhibit UK Ministers from dealing directly with local authorities in Scotland, using their spending powers rather than their law-making powers. There is ample opportunity here for UK Ministers to seek directly to influence the shape of public policy in Scotland, even in areas that are devolved. Thinking about shared rule through the prism of spending, rather than of powers, lends a quite different complexion to it.

4.4 Pre-emption

The US Constitution provides that federal law is "the supreme law of the land".[52] Thus, in the event of a clash between State law and federal law, the latter prevails over the former (as long as it is otherwise compatible with the Constitution). Further, where State law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress", the Courts will set the State law aside. This is known as pre-emption. States are also precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by federal law exclusively. The intent to displace State law can be inferred from a framework of regulation "so pervasive that Congress has left no room for the States to supplement it". This is known as "field pre-emption".[53]

The 2012 case of *Arizona v United States* concerned the validity of various provisions of immigration law that Arizona had enacted. The authority of the federal government over matters of immigration and naturalisation is well settled in the United States. As the Court expressed it in *Arizona*, "federal governance of immigration and alien status is extensive and complex. Congress has specified categories of aliens who may not be admitted ... Unlawful entry and unlawful re-entry into the United States are federal offences ... Once here, aliens are required to register with the federal government and to carry proof of status on their person ..." and so on. But, as the Court also noted, the "pervasiveness of federal regulation does not diminish the importance of immigration policy to the States". Hundreds of thousands of deportable aliens are apprehended in Arizona every year (Arizona has a long land border with Mexico). It has been estimated that unauthorised aliens comprise as much as 6% of the State's population. In 2010 Arizona enacted a controversial law that sought to supplement federal immigration law in a number of ways. Several

[52] US Constitution, Article VI, cl. 2.
[53] See *Arizona v United States* 567 US __ (2012).

provisions of the Arizona statute were challenged by the US Government on grounds of pre-emption.
The first was a provision that made it a State offence for an alien wilfully to fail to complete or carry an alien registration document. This was already a federal offence. The federal offence could be punished by fine, imprisonment or a term of probation. Under the Arizona law the only punishments available in respect of the offence were a fine or imprisonment. Arizona argued that its law should be upheld because it had the same aim as federal law and used the same standards, but the Supreme Court ruled that the provision was pre-empted by federal law. The Court held that Arizona's law created a framework of sanctions that conflicted with Congress' plan and, moreover, that "the federal government has occupied the field of alien registration".

The second provision the United States challenged made it a State offence for an unauthorised alien knowingly to apply for work. Federal law makes it an offence for employers knowingly to hire, recruit or continue to employ unauthorised workers. While federal law may impose some civil sanctions on unauthorised aliens who seek work in the United States, it does not criminalise them—rather, it imposes criminal sanctions on the employer side. The Court held that "Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorised employment" and that the Arizona law was an obstacle to the regulatory system Congress had chosen. It was therefore pre-empted.

A further provision of the Arizona law successfully challenged by the United States in this case concerned powers of arrest. Again, the State sought to increase the powers of arrest already provided for by federal law. And, again, the Court ruled these extensions to be pre-empted.

Three Justices dissented from these rulings. Among them was Justice Scalia, who saw the case as going to the very core of State sovereignty. The power of States to exclude requires that Congress has unequivocally expressed its intention to abrogate, he ruled: "implicit field pre-emption will not do". Seen in this light, the Arizona law should be upheld unless it conflicted with federal law (which it did not, in Justice Scalia's judgment). Arizona, he ruled, "is entitled to have its own immigration policy—including a more rigorous enforcement policy—so long as that does not conflict with federal law". Arizona was seeking to act not to contradict or reverse any provision of federal immigration law, but solely to enforce federal immigration law more effectively.

In contrast to the case law on the spending power, the doctrine of pre-emption is decidedly unhelpful from a shared rule point of view. *Arizona v United States* is a good example of the sort of direction that UK case law on devolution should

not take (and is extremely unlikely to take). The structure of powers over tax, welfare and employment in the Smith Commission Agreement and in the Scotland Act 2016 is based on a very different approach to shared rule from that preferred in the US doctrine of pre-emption. The power of the Scottish Parliament to top-up welfare benefits, for example, could not operate at all were the United Kingdom courts to hold that Westminster had so comprehensively legislated in the field of social security as to pre-empt Holyrood from adding to or reinforcing that law. Whatever the rights and wrongs of Arizona's uncompromising stance on immigration—and no comment is made on that here—from a shared rule point of view, the judgment of the US Supreme Court in *Arizona v United States* is to be regretted. A shared rule perspective would suggest that States should be encouraged to act, not prohibited from acting, to supplement federal law in areas where they share responsibility with the federal government.

4.5 From dual sovereignty to co-operative federalism

The spending power cases and the *Arizona* case on pre-emption are all, in their different ways, about the possibilities and the limits of shared rule. To what extent may Congress use federal funds to encourage States to behave in a particular way? To what extent may Congress rely on the States to implement federal policy? And to what extent may States seek to enhance—or, indeed, to resist—federal rule-making? These are all questions of shared rule or, as the academic literature in the United States would have it, of "co-operative federalism".

As we saw above, the old model of federalism was that a federal country has two layers of government, each with its own set of powers: if Congress has "sovereignty" over foreign relations and national security, the States have "sovereignty" over everything not enumerated in the Constitution as one of Congress' legislative powers. (Likewise in Scotland and the UK: if Westminster controls immigration law and the state pension, Holyrood controls the health service in Scotland and the Scottish education system.) Commentators in the United States have long since recognised that this older model of federalism, which was referred to above as the "dual sovereignty" model, fails to describe the reality of modern American government. In so many areas of public policy, both law-making and administration are shared between the States and the federal government, rather than owned exclusively by one or the other. Lawyers call this "concurrent jurisdiction". In the United States it is very much the norm, not the exception. Think of the broad array of contexts the cases we have considered represent: environmental law (*New York v US*), criminal law (*Lopez* and *Printz*), health care (the Obamacare case) and immigration (*Arizona*). Each

of these areas, like so many more, are examples of concurrent jurisdiction, co-operative federalism, or shared rule.
That is to say, there is "a sharing of regulatory authority between the federal government and the states that allows states to regulate within a framework delineated by federal law".[54] This is a style of government that developed in the US from the late 1960s. If, under Roosevelt's New Deal programme, national bureaucracies tended to regulate directly, since the late 1960s the trend has been much more for federal government to seek to regulate through the agency of the States. Environmental regulation is often regarded as the place where this started in the US. The Clean Air Act, for example, provided for certain "uniform federal standards, but left the States with considerable flexibility in addressing the statute's objectives".[55] In the UK context this is completely familiar, not because of devolution but because of the European Union. The description just given of the Clean Air Act in the United States is precisely what an EU directive does. Brussels sets the standards with which—for example—Member States' data protection legislation must comply, but leaves to each Member State "the choice of form and methods" by which those standards are implemented into national law.

The federal Environmental Protection Agency (EPA) works closely with States in administering legislation such as the Clean Air Act and the Clean Water Act. The EPA will *negotiate* with State counterparts in prioritising and implementing enforcement actions. Indeed, federal legislation now requires the EPA to follow States' lists of priority pollution clean-up projects, rather than imposing its own priorities on States. Decisions as to which treatment facilities are built where and when are the result of negotiations between the EPA and the relevant State.[56] Such practices of negotiation make for what has been described as "an iterative process of joint decision-making" encompassing "political haggling", collaborative policy-making and a variety of "signalling processes".[57]

Practices such as this—shared rule in action—are not limited to the environmental field. One academic who has researched this matter reports that "collaborative state-federal programmes have been especially popular to combat gang violence".[58] The Project Safe Neighbourhoods programme, for example, partnered regional US Attorney's offices with corresponding State Attorney General's offices, the FBI, State and local police, and State probation and parole officers "to co-ordinate the deterrence, investigation, and prosecution of gun

[54] Philip J. Weiser, 'Towards a Constitutional Architecture for Co-operative Federalism' (2001) 79 *North Carolina Law Review* 664, at 665.
[55] Weiser, ibid, at 670.
[56] See Erin Ryan, 'Negotiating Federalism' (2011) 52 *Boston College Law Review* 1, p. 33.
[57] Ibid, p. 5.
[58] Ibid, p. 32.

violence in metropolitan areas". Another example comes from energy policy. State actors were instrumental in the making of the federal Energy Independence and Security Act in 2007 which, among other matters, authorised the transfer of federal funds to States to encourage the use of clean energy. "Thanks to State leadership in the design of the programme, federal grants ... offer funds to State ... and municipal governments in exchange for their development and implementation of community-based projects to improve energy efficiency, reduce energy use, and reduce carbon emissions".[59]

4.6 Co-operation and unco-operation

If co-operative federalism were only about the assistance that States can give in the implementation of federal policy it would not be a very attractive model to those who consider federalism to be a check on—rather than a mere means of—national law-making. But if States can choose to co-operate with federal policy-makers, they may also be able to choose not to. Further, they may be able to seek to resist federal policy—to be unco-operative, rather than co-operative. To this end, a new school of "unco-operative federalism" has recently emerged in American legal thinking.[60] Three brief examples will illustrate the argument: on immigration, national security and drugs control. We saw above that Arizona's attempts to strengthen immigration law enforcement were met with stiff resistance in the US Supreme Court. A number of States (and, indeed, a number of municipalities within States) have sought to go the other way, and to resist the enforcement of aspects of federal immigration law.

Federal immigration law makes it designedly difficult for illegal migrants to integrate into American society. But most of the institutions that migrants need in order to integrate are controlled not by the federal government but by States or by localities within States—schools, civic associations, the workplace, public health and safety institutions, and the like.[61] Cristina Rodriguez has documented how municipalities across America have, for example, established Day Labour Centres at which (typically) immigrant men can register to seek employment, thus "regularising and even formalising a labour market that operates in the shadow of federal law".[62] Additionally, local "sanctuary laws"—more accurately, resolutions or executive orders—may limit the authority and ability of State and local officers to co-operate with federal officials in the enforcement of federal laws. Going yet further, by 2007 at least ten States had passed laws permitting unauthorised students to pay in-state tuition at public colleges,

[59] Ibid, p. 39.
[60] Jessica Pulman-Rozen and Heather K. Gerken 'Unco-operative Federalism' (2009) 118 *Yale Law Journal* 1256.
[61] See Cristina M. Rodriguez, 'The Significance of the Local in Immigration Regulation' (2008) 106 *Michigan Law Review* 567, p. 581.
[62] Ibid, p. 598.

despite this being contrary to federal law.[63] Congress can legislate to outlaw all of these practices. The United States can take legal action to have the federal courts declare them unlawful. But all this takes time and, in the meantime, States can seek to use public opinion to support their efforts either to go beyond, or to undermine, federal immigration law.

In the US there are about ten State or local law-enforcement officers for every federal one. One estimate has it that there are as many as 17,000 State and local law-enforcement agencies, comprising about 700,000 officers. The FBI, by contrast, has 12,000 agents.[64] In the immediate aftermath of 9/11 Congress passed the Patriot Act and the Bush Administration established a new federal Department of Homeland Security. Much as these measures increased the reach of the federal government's counter-terrorism operations, great reliance continued to be made on co-operation with local and State law enforcement. But when the Justice Department requested assistance from local police agencies in locating and questioning men holding visas from countries where al Qaeda operated, many declined to participate in the questioning, not wanting to jeopardise carefully developed relationships with immigrant communities.[65] If States' rights and support for federalism had long been the preferred terrain of the political right in America, post 9/11 law enforcement saw the tables turned, as more liberal States (and, indeed, cities) sought refuge in "unco-operative federalism" as means of resisting what they considered to be the illiberal and authoritarian reaction of the Bush Administration.[66]

Our final example is similar. In November 2012 two States—Colorado and Washington—legalised recreational marijuana use despite the fact that this is in contravention of federal law and policy. Federal law classifies marijuana as a Schedule 1 drug under the Controlled Substances Act; its manufacture, distribution and possession are thereby prohibited categorically.[67] Ernie Young's analysis of the Colorado and Washington position is compelling:

> "if State non co-operation undermines federal enforcement ... then one might think federal authorities would have a strong argument that State marijuana laws are pre-empted. After all, surely they 'stand as an obstacle to the accomplishment and execution of the full purposes and objects of Congress'. But the anti-commandeering cases have established that States have no obligation to implement or enforce federal law unless they

[63] Ibid, p. 605.
[64] Matthew C. Waxman, 'National Security Federalism in the Age of Terror' (2012) 64 *Stanford Law Review* 289, p. 306.
[65] Waxman, ibid, p. 316.
[66] See Ernest A. Young, 'Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror' (2004) 69 *Brooklyn Law Review* 1277.
[67] Ernest A. Young, 'Modern-Day Nullification: Marijuana and the Persistence of Federalism in an Age of Overlapping Regulatory Jurisdiction' (2015) 65 *Case Western Reserve Law Review* 769, p. 774.

> voluntarily agree to do so. It follows that States have no obligation to criminalise conduct simply because federal law does ...".[68]

Given that some 99% of arrests in the US for marijuana are made by State officials,[69] even if the federal government were to take legal action to have the Colorado and Washington laws declared unconstitutional on pre-emption grounds, the anti-commandeering doctrine suggests that there is little either the President or the US Congress can do to require State officials to enforce federal law.

4.7 Conclusions

As Ernie Young says in his essay on Colorado and Washington's marijuana laws, "the scholarly literature on federalism [in the United States] is only just beginning to explore the full implications of co-operative federalism for inter-governmental relations and the constitutional balance of power". Even now, it is a model of federalism which finds much more support in American law schools than it does in the US Supreme Court. Justice Scalia's dissent in *Arizona v United States* was firmly based on what he considered to be the "sovereign" power of the States to exclude—this is the language of dual sovereignty, not of co-operative federalism (or self-rule, rather than shared). In a Supreme Court case decided in 2013 Justice Scalia went so far as to condemn co-operative federalism as "faux-federalism".[70] The academic commentary on federalism in America is some way ahead of the Court's case law, it seems.

And even in America—where the scholarship on federalism is richer and fuller than anywhere else in the world—academics and commentators are only at the beginning of their thinking about how States and the federal government should interact within schemes of co-operative federalism. This should give us some comfort in Scotland and in the UK. If in the coming years we find our novel terrain of inter-governmental relations and shared rule challenging to navigate and to understand, we will not be alone!

What this survey of American case law and commentary on federalism tells us is the following:

- focusing on enumerated powers—on the division between reserved and devolved power—is a limited and ultimately not very useful way of thinking about multi-level governance

[68] Ibid, p. 776.
[69] See Jessica Bulman-Pozen, 'Unbundling Federalism: Colorado's Legalisation of Marijuana and Federalism's Many Forms' (2014) 85 *University of Colorado Law Review* 1067, p. 1083.
[70] *Arlington v FCC* 569 US __ (2013) (Slip Opinion, p. 14.)

- at least as much thought should be given to spending powers, and to the ways in which (in our case) the United Kingdom could seek to influence and shape public policy in Scotland—even in devolved areas—by means of public expenditure rather than law-making
- thinking about co-operation between governments may be a more productive way forward than focusing only on the "sovereignty" or autonomy of different levels of government
- where governments have the chance to co-operate, however, they may also have opportunities to leverage power by being unco-operative; whether this should be encouraged or constrained by a constitutional architecture of shared rule may be open to question. US case law on this point is under-developed but, as we shall see in the next Chapter, there are valuable insights to be gained on this front by considering experience in Canada and South Africa.

5. A Constitutional Law of Shared Rule: Learning from the Commonwealth

5.1 Canada

Federalism is as important an animating principle of the Canadian constitution as it is in the United States but, as we shall see, it has taken a different shape from its southern neighbour. The Canadian constitution is nearly a century younger than the American, with the constitutional text dating from 1867 rather than 1787. And, unlike the USA but like the United Kingdom, Canada has had to deal with a powerful secessionist movement, with two secession referendums having been held in Quebec, in 1980 and 1995.

The starting point is sections 91 and 92 of the Constitution Act 1867. Section 92 lists the "exclusive powers of the provincial legislatures". Section 91 provides that the Canadian Parliament has legislative competence over "the peace, order and good governance" of Canada, subject to the exclusive competences of the provincial legislatures. And, "for greater certainty", section 91 then lists a number of powers that fall within the rubric of "peace, order and good governance".

Until the middle of the twentieth century judicial decisions approached sections 91 and 92 as if each provided a list of mutually exclusive competences. They were "watertight compartments", the judges said. Except they never really were. The main test that the Canadian courts use to determine whether a matter is properly for the Provinces or for the federal government is the "pith and substance" doctrine. If the pith and substance of the impugned legislation can be related to a matter that falls within the jurisdiction of the legislature that enacted it, the courts will declare it *intra vires*. To assess this, courts will look both at the purpose of the legislation and at its legal effects. The courts are concerned to identify the dominant purpose and effects of the legislation: as long as they are within the powers of the legislature in question, the law will be upheld as constitutionally valid even if it has secondary objectives or incidental effects that would be beyond the powers of that legislature. Recognition that legislation may have secondary or incidental effects on areas beyond a parliament's competence shows that we are not talking about "watertight compartments". As the Supreme Court of Canada put it in one of its leading cases on federalism, "the 'pith and substance' doctrine is founded on the recognition that it is in practice impossible for a legislature to exercise its jurisdiction over a matter effectively without incidentally affecting matters within the jurisdiction of another level of government. For example … it would be impossible for Parliament [in Ottawa] to make effective laws in relation to copyright without

affecting property and civil rights [which under section 92 are for the Provinces] …".[71]

The Supreme Court went on to note in the same case that "some matters are by their very nature impossible to categorise under a single head of power: they may have both provincial and federal aspects". Thus, "the fact that a matter may for one purpose and in one aspect fall within federal jurisdiction does not mean that it cannot, for another purpose and in another aspect, fall within provincial competence".[72] An example is dangerous driving: Ottawa may make laws in relation to the public order aspect, and provincial legislatures in relation to its property and civil rights aspect. This "double aspect" doctrine ensures that the policies of elected legislators of both levels of government are respected.

This is a modern approach to federalism, much championed by Chief Justice Brian Dickson, who was Chief Justice of Canada from 1984-1990. It emphasises what the Court has described as "the legitimate interplay between federal and provincial powers".[73] As Dickson CJ wrote, Canadian constitutional law allows for "a fair amount of interplay and indeed overlap between federal and provincial powers".[74] Overlapping powers are "inevitable", the Court has said, and this requires a "flexible federalism".[75]

The Supreme Court of Canada, unlike its US counterpart, regularly uses the language of "co-operative federalism" to describe its approach. In a 2011 case, for example, the Court wrote that "in the spirit of co-operative federalism, courts should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest … Where possible, courts should allow both levels of government to jointly regulate areas that fall within their jurisdiction …".[76] This is a live-and-let-live approach to multi-level government; it is quite starkly at odds with the old dual sovereignty model on which American federalism was formerly said to be based. Under the Canadian approach, co-operation is *expected*. Government in silos is discouraged as policy fields are understood to engage the legitimate attention of both federal and provincial authorities.

Accordingly, the Supreme Court tries uphold legislation against federalism-based challenges where it can. It will hold legislation to be unconstitutional not where it merely affects the jurisdiction of the other layer of government but

[71] *Canadian Western Bank v Alberta* [2007] 2 SCR 3, para. 29.
[72] Ibid, para. 30.
[73] Ibid, para. 36.
[74] *OPSEU v Ontario* [1987] 2 SCR 2, p. 17.
[75] *Canadian Western Bank*, para. 42.
[76] *Attorney General (Canada) v PHS Community Services Society* [2011] 3 SCR 134, para. 63.

only where it impairs that jurisdiction. *Impairment* is a higher standard than *affects*: it suggests that the courts should intervene to quash provincial legislation, for example, only when it "seriously or significantly trammels … federal power".[77] The 2010 case of *Quebec v COPA* illustrates this nicely. The case concerned an aerodrome that was built by two private citizens on land zoned by Quebec as agricultural. Quebec wanted the aerodrome to be dismantled, but this was disputed on the basis that it is the federal government, and not the Provinces, that has jurisdiction over air travel. As the Supreme Court put it, "the question posed in this appeal is which level of government has the final say on where airfields and aerodromes may be located".[78] The Court answered the question by ruling that, whilst the Quebec law limiting the non-agricultural uses that may be made of designated agricultural land was valid, applying that law in a manner that impaired federal jurisdiction over aeronautics was invalid. Thus, Quebec's legislation was upheld, but the scope of its application was limited to the extent necessary to protect federal jurisdiction.[79]

That this is a two-way street, and not an approach that will always allow federal interests to restrict provincial concerns, is illustrated by another decision from 2011, the *Securities Act Reference*.[80] The Canadian Parliament enacted the Securities Act and the Supreme Court was asked whether the legislation fell within federal law-making powers. The Act sought comprehensively to regulate the securities market in Canada. The Court ruled that aspects of the Act over-reached what it called "genuine national concerns". The case is reminiscent of US cases, considered in the previous chapter, on the Commerce Clause. Here, Canada sought to rely on the provision in section 91 of the Constitution Act 1867 that Ottawa has power over the regulation of trade and commerce. Supreme Court case law has established that, to fall within this head of legislative power, "legislation must engage the national interest in a manner that is qualitatively different from provincial concerns". In order to establish whether this test is met or not, courts will ask, for example, whether the law in question is part of a general regulatory scheme, whether the law is concerned with trade as a whole or with a particular industry, whether the law is such that the Provinces acting alone could not have enacted it, etc. Aspects of the Securities Act failed these tests, in the Court's judgment: "while the economic importance and pervasive character of the securities market may, in principle, support federal intervention ... they do not justify a wholesale takeover of the regulation of the securities industry". Investor protection, ensuring the fairness

[77] *Quebec v COPA* [2010] 2 SCR 536, para. 45.
[78] *Quebec v COPA* [2010] 2 SCR 536, para. 1.
[79] Two Justices dissented on the ground that Quebec's requirement that the aerodrome be dismantled did not interfere with the core of Canada's jurisdiction over aeronautics and ought therefore to be upheld as a lawful exercise of provincial authority over land-use.
[80] *Securities Act Reference* [2011] 3 SCR 837.

of capital markets, and other such matters included within the scope of the Act "have long been considered local concerns subject to provincial legislative competence over property and civil rights", the Court ruled.[81]

The Court noted that a more co-operative alternative was available: "a co-operative approach that permits a scheme recognising the essentially provincial nature of securities regulation while allowing Parliament to deal with genuinely national concerns remains available and is supported by Canadian constitutional principles", the Court said. The problem with the over-reach of the Securities Act was that it "effectively eviscerate[d]" provincial powers to regulate in the field. "Federalism," said the Court, "demands that a balance be struck".[82] In other words, federalism, in this field, demands co-operation between the federal government and the Provinces.

5.1.1 Co-operative federalism and its limits

This is a striking judicial dictum: federalism "demands" balance. It suggests that, where there are opportunities for shared rule, those opportunities should be taken and, indeed, that where they are not taken this may be unlawful. Unfortunately, however, in its subsequent case law the Supreme Court of Canada has not always carried this dictum through. An opportunity arose in 2015 for it to do so but the Court, by the narrowest of margins, squandered it. This was a case that had the makings of a new and potentially very significant jurisprudence of shared rule, or of co-operative federalism, but, despite a very strong dissent from four Justices, the Court turned in another direction. The case—*Attorney General (Quebec) v Attorney General (Canada)*[83]—concerned the decision of the federal government to relax aspects of its gun control laws. A federal firearms registry had been in existence for some years; in 2012 the legislation governing it was amended to remove the requirement that long guns be registered (and to decriminalise possession of an unregistered long gun). Quebec wished to maintain a registry for long guns and asked the federal registry for its data pertaining to the registration of long guns in Quebec. The federal registry refused to share the data with Quebec.

Quebec argued that the courts should recognise that "the principle of co-operative federalism prevents Canada and the Provinces from acting or legislating in a way that would hinder co-operation between both orders of government".[84] This a five-to-four majority of the Supreme Court refused to do. "Quebec's position has no foundation in our constitutional law", the majority

[81] Ibid, para. 6.
[82] Ibid, para. 7.
[83] 2015 SCC 14.
[84] Ibid, para. 15.

ruled.[85] Co-operative federalism has its limits, the majority opined, and "it cannot be seen as imposing limits on the otherwise valid exercise of legislative competence". In particular, the principle of co-operative federalism cannot be relied upon to "impose a positive obligation to facilitate co-operation where the constitutional division of powers authorises unilateral action".[86]

The four dissenting Justices, whose judgment is much more impressive than the cursory reasoning offered by the majority, upheld the constitutionality of the federal legislation relaxing federal gun controls: there was nothing unlawful about Ottawa deciding to exclude long guns from its registration requirements under the Firearms Act. But the decision that all data pertaining to long guns should be destroyed (and not shared with Provinces that wished to maintain controls over long guns) was not necessary to the achievement of Ottawa's legislative purposes and should, for that reason, have been declared invalid. Importantly, the dissenting Justices would have ruled that there was no legal basis upon which Quebec could *require* the federal government to transfer data pertaining to long guns—this was for the governments to figure out, not for the courts to rule on.[87] This is what the dissenting Justices had to say about co-operative federalism:

> "co-operative federalism reflects the realities of an increasingly complex society that requires the enactment of co-ordinated federal and provincial legislative schemes to better deal with the local needs of unity and diversity ... The federal-provincial partnership with regard to firearms control is consistent with the spirit of co-operative federalism. This partnership has enabled the federal and provincial governments to work together, rather than in isolation, to achieve both federal (criminal law) and provincial (public safety and administration of justice) purposes ... In our opinion, our courts must protect such schemes both when they are implemented and when they are dismantled ... Thus, Parliament or a provincial legislature cannot adopt legislation to terminate such a partnership without taking into account the reasonably foreseeable consequences of the decision for the other partner ... In other words, a co-operative scheme from which both the federal and provincial governments benefit cannot be dismantled unilaterally by one of the parties without taking the impact of such a decision on its partner's heads of power into account".[88]

[85] Ibid, para. 16.
[86] Ibid, para. 20.
[87] Ibid, paras 51-2.
[88] Ibid, paras 148-54.

This is a verdict which, from the point of view of shared rule, has much to commend it. It has echoes of the "respect agenda" that informs the Memorandum of Understanding on inter-governmental relations in the United Kingdom. Indeed, the dissenting Justices quoted from the judgment of the Supreme Court in the *Securities Act Reference*, in which the Court had said that "the backbone of these [co-operative] schemes is the respect that each level of government has for each other's own sphere of jurisdiction".[89] In the United Kingdom that respect agenda is a matter of political agreement between governments, rather than of strict constitutional law. The Supreme Court of Canada had the chance to turn it into a matter of constitutional law in *Attorney General (Quebec) v Attorney General (Canada)*. That the opportunity was seized by only a minority of the Court is regrettable. None the less, the dissenting judgment in that case offers a number of signposts as to what a constitutional law of shared rule should look like.

It ought to be the case in Canada and the UK alike that, in sharing power, governments may not act unilaterally without taking into account the impact of their actions on the other level of government. To adopt this as a legal principle in the United Kingdom would be a welcome addition to our public law. In chapters 2 and 3 we concluded that the UK should place its institutional architecture of shared rule on a new statutory footing. A principle of mutual respect—that in sharing power one government may not act unilaterally without taking into account the impact of their actions on the other level of government—should be incorporated into this law.

5.2 South Africa

The South African constitution dates from 1996 and was written, of course, as South Africa emerged from the era of apartheid. In many ways it is an exercise in nation-building. It is designed to assist in the consolidation of the country's transition to democracy. The inclusion within its Bill of Rights of judicially-enforceable social and economic rights is a well-known component of this. In a country more ravaged than most by the evils of inequality the jurisprudence of the South African Constitutional Court on rights to housing and to the health-care has been of cardinal importance.[90] Less well known, at least internationally, is what the South African constitution says about federalism and shared rule. The South African constitution establishes three "spheres" of government: local, provincial and national. Section 41 of the constitution, "principles of co-operative government and inter-governmental relations", provides that all spheres of government must "preserve the peace, national unity and indivisibility of the Republic; ... be loyal to the Constitution, the Republic

[89] *Securities Act Reference*, above n. 80, para. 133.
[90] Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (2013).

and its people; respect the constitutional status, institutions, powers and functions of government in the other spheres; ... exercise their powers and perform their functions in a manner that does not encroach on the ... integrity of government in another sphere; and co-operate with one another in mutual trust and good faith".

This is perhaps the fullest articulation of the principle of co-operative federalism in any of the world's English-language constitutions. But it is more than that. Section 41 clearly incorporates principles of co-operative federalism, but it goes further, extending to a constitutional principle of federal loyalty. This is an idea which has more to do with German traditions of federalism than with American or Canadian traditions. In Germany, however, federal loyalty—*Bundestreue*—is concerned principally with fiscal federalism: that is to say, with the way in which public money is transferred from wealthier Länder to poorer ones. In South Africa, by contrast, the constitutional principle of federal loyalty is more general: there is nothing in section 41 to suggest that it pertains only to fiscal matters.

Section 41 and the principle of federal loyalty have not featured prominently in the case law of the South African Constitutional Court in the twenty years since the constitution came into force. In part this is because the principles enshrined in section 41 are intended to be protected politically. Section 41(3) provides that governments "must make every reasonable effort to settle" any dispute politically before turning to the courts. If a court is not satisfied that this has been the case, the court may decline to rule on the matter, referring it back to the political process (section 41(4)). A leading commentary on the constitutional law of South Africa states that the Constitutional Court's case law on section 41 "can appear a bit soft" and is "highly qualified", reflecting the fact that section 41 is "designed to facilitate political solutions". The Court has "shied away" from using section 41 to impose judicial solutions, the commentary says.[91]

The most significant case on section 41 was decided only a few years after the Constitution came into force: *Premier of Western Cape v President of South Africa*.[92] The Province of the Western Cape challenged aspects of an Act of the national legislature which was aimed at the structural transformation of the public service. The legislation required various institutions of provincial government to be structured in a certain way, and the Western Cape argued that this infringed the constitutional autonomy of the Provinces. The Constitutional Court sought to understand the legislation in the light of the principles of co-operative federalism and federal loyalty set out in section 41. It noted that the

[91] S. Woolman, T. Roux and B. Bekink, *Constitutional Law of South Africa* (2008), Ch. 14.3.
[92] Case CCT 26/98, *Premier of Western Cape v President of South Africa*.

three spheres of government in South Africa are "distinctive, inter-dependent and inter-related" and it observed that "the inter-dependence and inter-relatedness flow from the founding provision that South Africa is one sovereign, democratic state". The Court noted that the Constitution sets out which powers are to be exercised by which sphere of government, and that these constitutional provisions vest "concurrent legislative competences" in various of the spheres.[93] Both national and provincial legislatures have competences in respect of the structuring of local government and for overseeing its functioning, for example. Co-operation, the Court said, is "of particular importance in the field of concurrent law-making".[94]

This is all well and good, but it does not seem to have made any material difference to the way the Court decided the case. The Court's comments on section 41 are scene-setting, giving the context within which South African federalism is to be construed, rather than laying down actual rules of construction. When it came to *determining* which provisions of the legislation on the restructuring of the public service were within the national parliament's competence and which were not, the Court relied principally not on section 41 but on what the Constitution says about the executive power that is allocated to the Provinces (section 125 of the Constitution). Indeed, the Court stated that "the circumstances in which [section 41] can be invoked to defeat the exercise of a lawful power are not entirely clear".[95] In the event, most of the provisions of the national legislation in question were found to be compatible with the Constitution; only one provision was found to be unconstitutional.

Despite the fact that the South African Constitutional Court has not made very much of section 41, the values enshrined in that provision nonetheless point to a further way in which constitutional law can articulate and protect principles of shared rule. A legally enforceable principle of constitutional fidelity could be used to help structure practices of shared rule, not least as regards the fair resolution of disputes that arise between governments.

5.3 Australia

The history of federalism in Australia has numerous echoes of its development in the United States. As in America, so too in Australia, federation was an act of nation-building among previously established colonies (or States). Over the course of the twentieth century, Australian government, like government in the US, grew more powerful at the centre and weaker at State level. Australia is, of course, much smaller in terms of population and, in contrast to the fifty States of

[93] Ibid, para. 50.
[94] Ibid, para. 55.
[95] Ibid, para. 58.

the USA, Australia has just the six, plus two territories.[96] That aside, the principal difference between the US and Australian constitutions is that, unlike the former, the latter seeks to marry federalism to responsible government.

American democracy is presidential rather than parliamentary—Governors of the States and the President of the United States are elected directly. They may or may not come from the same political parties as are for the time being in the majority in the State legislatures or the US Congress. Australia, by contrast, uses the Westminster system of parliamentary democracy, in which the government, rather than being directly elected, emerges from parliamentary majority or coalition. Governments in Australia (as in the United Kingdom) are responsible in constitutional theory not to the electorate directly but to the voters' representatives in parliament. The tension between federalism and parliamentary—or responsible—government has been an abiding feature of the Australian constitutional experience. It is unresolved to this day. How can a powerful Senate, where the States are represented effectively, be rendered compatible with a system of responsible government under which the executive depends on the confidence of the House of Representatives? The tension was graphically illustrated in 1975, when the Governor-General dismissed the Prime Minister of the day, despite the fact that the Prime Minister retained the confidence of the House of Representatives, because the government was unable to obtain supply from the Senate.[97]

There is widespread dissatisfaction in Australia with the operation of federalism. Australians' commitment to federalism is weaker than in Canada or the United States, to the extent that there are occasional calls for it to be abandoned or, at the least, radically reconceived. To many, the large Australian cities are more important as sites of political power than the nineteenth-century States, with Melbourne and Sydney commanding greater loyalty and affection than Victoria or New South Wales. In contrast with Canada, there is a significant imbalance in favour of the Commonwealth Government (in Canberra) when it comes to fiscal matters. Some 82% of tax revenues in Australia accrue to the Commonwealth Government (with 18% accruing to the States), whereas in Canada the federal government is responsible for only about 45% of taxation. Concerns about productivity and economic competitiveness have led to a rapid acceleration in Australia of political agreements between the Commonwealth Government and the States to co-operate in a range of matters. The use of conditional grants from Canberra to the States has proliferated; they are used widely in fields such as healthcare, education, housing and economic policy. Much of this activity is undertaken through the Council of Australian

[96] The States are New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia; the territories are the Northern Territory and the Australian Capital Territory.

[97] See Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (2011), p. 225.

Governments (COAG), a body established formally in 1992 that now sits at the apex of a bewildering 40 different ministerial councils.[98]

COAG and the ministerial council system "cuts across the lines of accountability that responsible government assumes. It also obscures the decision-making process to a degree that makes it difficult to pinpoint the causes of underperformance".[99] This has become a major problem in Australian government. Successive waves of reform have sought to tackle the problem but success has been limited. There is at least now an online Compendium of Ministerial Councils that contains information about the composition, role and decision-making of each council but, as Cheryl Saunders has argued, much more remains to be done.[100]

The latest effort at reform was launched in 2014, with the publication of the Commonwealth Government's *Reform of the Federation* White Paper.[101] The goals of this project are: to reduce the "waste, duplication and second guessing" between different levels of government; to achieve a "more efficient and effective" federation and, in so doing, to improve national productivity; to make interacting with government simpler for citizens; and to ensure that the Australian federation has a clearer allocation of roles and responsibilities. The White Paper's analysis of the current state of Australian federalism is far from complimentary: "Commonwealth expansion has led not only to inefficient overlap and duplication—with associated cost—and blame-shifting—but loss of accountability to voters, and has also impinged on States' sovereignty".[102] The core concern is accountability: "our national governance is less than what it should be because it is not clear to voters who is responsible for what", the White Paper states.[103] Health, education and housing are three of the key policy areas identified where roles and responsibilities need to be more clearly allocated.

This echoes concerns that were outlined above in Chapter 3, that accountability must mirror power. If the question "who does what" becomes muddled through over-complexity, then lines of accountability inevitably become obscure. Australia is, in this respect, a warning that co-operative government can have drawbacks as well as virtues. It is a reminder of the central importance of ensuring that systems of accountability are open, transparent, and robust.

[98] Saunders, ibid, p. 250.
[99] Ibid.
[100] Ibid, p. 251.
[101] Available at https://federation.dpmc.gov.au/.
[102] Ibid, p. 2.
[103] Ibid, p. 18.

6. Summary of Conclusions and Recommendations

The devolution of power has been a necessary reform to Britain's government but, of itself, it is far from sufficient. What the United Kingdom needs to do now is to reconceive of the way its four governments share power. This is not about more devolution: it's about how much more than mere devolution alone, important though that has been, is needed to reinvigorate and secure Britain's territorial governance.

The United Kingdom Government needs a single, powerful Department for the Constitution—or for the Union—rolling together the current Cabinet Office, Scotland Office, Wales Office and Northern Ireland Office, and taking over the constitutional functions carried out in England by the Department of Communities and Local Government. Co-ordinating the UK Government's participation in shared rule would be a core role for that department.

The advent of shared rule means much more than that we should take another look at the UK's inter-governmental machinery, vital though that task is. It means that we have to understand afresh what devolution and its place in the Union state is. In Scotland, for example, powers over income tax, over Universal Credit, over employment and—critically—over the inter-relationship between tax, welfare and work will have to be exercised in tandem, not in isolation. The new Union, reshaped by the Smith Commission Agreement and by the Scotland Act 2016, means that these policy areas are no longer the exclusive preserve of Westminster and Whitehall alone. From now on, they are shared.

It is a core recommendation of this report that the United Kingdom needs to put its arrangements for shared rule on a statutory footing. Shared rule needs a formal underpinning.

It is difficult to find anyone who has a good word to say about the United Kingdom's inter-governmental machinery. Four core criticisms are that:

- the UK's inter-governmental machinery is lacking in formality
- it is dominated by the UK Government
- it lacks an independent and robust process for dispute resolution, and
- it lacks transparency.

The United Kingdom's inter-governmental relations and machinery are too important to be left to the vagaries of political ad hockery: they should be underpinned by statute. The Joint Ministerial Committee should meet in plenary

session in each of the United Kingdom's capitals in turn, and not always in London. Provision should be made for an independent dispute-resolution procedure. Agendas should be published in advance and ministers called to account by their parliament or assembly before or after joint ministerial meetings, as the parliament or assembly in question sees fit. Provision should be made for parliaments and assemblies to meet jointly to scrutinise the operation of the United Kingdom's inter-governmental machinery.

These reforms are necessary but, on their own, they will not be sufficient to meet the challenges of shared rule. Shared rule requires an effective institutional architecture not only of exchanging information and resolving disputes, but of policy-making itself. In those areas where responsibility for policy is shared, there needs to be an institutional means—a forum—in which it can be at least discussed jointly, if not determined jointly. Additionally, there need to be accompanying parliamentary means of scrutinising such joint ministerial (or joint official) deliberation.

Focusing on enumerated powers—on the division between reserved and devolved power—is a limited and ultimately not very useful way of thinking about multi-level governance.

At least as much thought should be given to spending powers, and to the ways in which the United Kingdom could seek to influence and shape public policy in Scotland—even in devolved areas—by means of public expenditure rather than law-making. US cases on Congressional spending powers are instructive in this regard. The City Deal programme represents one way in which UK Ministers can seek to influence the shape of public policy in Scotland, even in areas that are devolved.

Thinking about co-operation between governments may be a more productive way forward than focusing only on the "sovereignty" or autonomy of different levels of government. Canadian approaches to federalism may be more useful than US approaches in this regard.

Building on the foundations of Canadian co-operative federalism, however, the United Kingdom should go further and enshrine in law a principle that in sharing power, governments may not act unilaterally without taking into account the impact of their actions on the other level of government. This would have the effect of placing the "respect agenda" onto a statutory footing.

In addition, consideration should be given to emulating the South African example of writing into our law a principle of federal loyalty, that all

governments in the United Kingdom should be loyal to the UK constitution, and should co-operate with one another in mutual trust and good faith.

Reform Scotland is committed to informing and influencing the public policy debate in Scotland.

The Melting Pot is Reform Scotland's guest blog, where Scotland's thinkers, talkers and writers can indulge in some blue sky thinking. The views expressed do not necessarily represent those of Reform Scotland.

www.reformscotland.com/category/melting-pot