

ALTERED STATES: FEDERALISM AND DEVOLUTION AT THE “REAL” TURN OF THE MILLENNIUM

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It is my great honour and pleasure to deliver the inaugural Sir David Williams Lecture. Sir David is among the most distinguished members of the legal academy not only in this country, but around the world. His teaching career began at the University of Nottingham, after which he taught at the University that, I am told, is known affectionately in these parts as “the other place.” Sir David then joined the Law Faculty at Cambridge, later serving as the Rouse Ball Professor of English Law and President of Wolfson College. Sir David has been a path-breaker in the fields of constitutional and administrative law. His books, “Not in the Public Interest: The Problem of Security in Democracy”, and “Keeping the Peace: The Police and Public Order”, are landmarks in his fields and, I suspect, will be for a long time to come.

Sir David’s impact, however, is not confined to the life of the mind, but extends also to the world of public affairs. While enhancing our understanding of democracy, he has demonstrated a passionate concern for the quality of life in this democracy through his public service. He has served on the Royal Commission on Environmental Pollution, the Council of Tribunals, the Clean Air Council, and a number of other bodies whose work is significant. Sir David has also excelled as a leader of this University. Not only did he serve as Vice Chancellor of Cambridge, he did such a good job that his term was extended from two to seven years.

It is a privilege to be able to celebrate Sir David’s achievements and his indelible mark on learning and the law. It is an even greater privilege to partake of the very first time that Sir David will be honoured through this Lecture Series. The Book of Proverbs tells us that “a good name is rather to be chosen than great riches”.¹ If that truth applies also to an event, I am certain that the Sir David Williams Lecture Series will live long and will prosper.

* Associate Justice, Supreme Court of the United States. This speech was delivered as the inaugural Sir David Williams Lecture at the University of Cambridge Centre for Public Law on 15 May 2001. I would like to thank my law clerk, Stanley Panikowski, for his assistance in preparing this speech.

¹ Proverbs 22:1.

I am also proud to say that Sir David and I have a few things in common. Each of us studied law in the great State of California: Sir David received an LL.M. from the University of California at Berkeley, and I received my J.D. from neighbouring Stanford. I have also had the pleasure of participating with Sir David in the Anglo-American Legal Exchange. He and I share a keen interest in Transatlantic dialogue between the legal communities of our two countries, which can enrich each other in so many ways. Perhaps most coincidentally, Sir David and I share the same year of birth.

Speaking of notable years, we are currently in the midst of one. As most people celebrated the putative eve of the new millennium on 31 December 1999, a few sticklers for detail defiantly refused to recognise an event that would not technically occur for another full year. They studiously observed that the first year of any decade, century, or millennium could begin only in a year ending in "1." If any of you happened to be among those steadfast guardians of epochal purity, I ask for no confession. All I ask is that, as one who gladly celebrated the "counterfeit" turn of the millennium, I not be estopped from claiming the privilege of speaking with you now during the "real" first year of the new millennium.

Imagine the following scene at the turn of the next century (whenever you think that precise event will occur): Four businesspeople from around the globe share a table in an airport café before dispersing to their respective homelands to celebrate New Year's Eve. The conversation soon turns to predictions of how each of their countries will fare in the century to come. An American venture capitalist, a Japanese entrepreneur, and a Brazilian executive offer their partly sunny forecasts in turn. The Englishman is the last to weigh in. When asked his thoughts on the future of the United Kingdom, he replies, "I think it's quite a fine idea. Perhaps somebody ought to try it again one of these days."

The possibility that, a hundred years hence, the United Kingdom will exist only in theory may well be exaggerated. To some, however, the only exaggeration may be the notion that it will take that long. It is much too early to tell the long-term effects of recent constitutional changes in the United Kingdom. What is clear is that these changes are momentous.

Scholars have chronicled the twin late twentieth century developments that have resulted in a United Kingdom that is being "pulled in both directions."² On the one hand, devolution has

² See, e.g., Michael H. Lee, "Revolution, Evolution, Devolution: Confusion?" (2000) 23 *Suffolk Transnat'l L. Rev.* 465; Michael Burgess, "Constitutional Change in the United Kingdom: New Model or Mere Respray?" (1999) 40 *S. Tex. L. Rev.* 715; Robert Hazell, "Westminster: Squeezed From Above and Below", in Robert Hazell (ed.), *Constitutional Futures: A History of the Next Ten Years* (1999).

effected an unprecedented delegation of power to elected bodies in Scotland and Wales. New devolved institutions are also in place in Northern Ireland. There have been calls for greater devolution of power to regions within England, reinforcement of the constitutional status of local governments, and even whispers for the creation of an English Parliament. At the same time, UK membership in the European Union is exerting upward force on powers traditionally exercised by Parliament alone. Punctuating the complexity of these changes is the fact that the upward pressure of European integration may increase the downward pressure of devolution through the principle of subsidiarity and the enforcement of EU law. One of the many important uncertainties in the midst of this flux is the role that courts will play in interpreting and enforcing these new arrangements.

If the changes underway in the United Kingdom are to be measured (so far) in metres, then the magnitude of recent events concerning the balance of power among the different levels of government in the United States is more in the way of centimetres. And rather than encountering new frontiers, the latest movement of the dial in the United States has mostly been toward the restoration of a balance that obtained not too long ago. Nonetheless, federalism in America has been the subject of an increasingly vigorous debate in recent years. At the heart of this controversy has been the role of courts in interpreting and enforcing the structural guarantees of our Constitution. One American scholar, in speaking of federalism, has observed that “perhaps no other concept, save judicial review, has stirred more controversy”.³ If this is so, then it should surprise no one that the combination of the two excites great passions in my country.

These preliminary observations on the states (no pun intended) of affairs in our two countries bring me to the thesis of today’s lecture. Each of our countries is deeply engaged in a debate concerning the proper allocation of power among various levels of government at the dawn of this new millennium. In each case, however, the diffusion of power proceeds from a different premise. In the United States, power originally resided with the people or in the States and was ceded upward to a national government of limited authority. In the United Kingdom, power is being devolved from the sovereign Parliament of a unitary state to national assemblies, and possibly to other regional actors. These different premises have produced different historical trajectories and different contemporary challenges. Yet federalism and

³ Kermit L. Hall, “Introduction”, in Kermit L. Hall (ed.) *Federalism: A Nation of States* (1987), p. xi.

devolution in our respective countries also reflect many of the same values and thus present many of the same opportunities. Each of our countries, accordingly, has something to learn from the other.

DEVOLUTION IN THE UNITED KINGDOM

The roots of the present devolution in the United Kingdom lie first in the making of the United Kingdom itself.⁴ The United Kingdom's "coming to be" was clearly the product of an evolution, not a revolution. While the contours of an English state had taken shape by the middle of the tenth century, England's precise date of birth is unknown.⁵ (If only the rest of us could shroud our ages in such obscurity!) Wales, Scotland, and Northern Ireland became part of today's United Kingdom through events that unfolded over many centuries.⁶

The familiar principle of parliamentary sovereignty has long animated the governance of this unitary state. Dicey famously summarised the doctrine in this way: "The principle of parliamentary sovereignty means neither more nor less than this, namely, that Parliament . . . has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."⁷ While institutions facilitating local control of varying forms and degrees have also been part of this multinational Kingdom,⁸ rule has been unmistakably from the centre.

Calls for greater self-government by the nations comprising the United Kingdom are by no means an innovation of the late twentieth century. For example, the question of Irish Home Rule that gripped the United Kingdom during the late nineteenth and early twentieth centuries naturally stirred sentiment for greater autonomy elsewhere.⁹ In 1973, the Royal Commission on the Constitution issued the Kilbrandon Report, which recommended the establishment of elected assemblies in Scotland and Wales.¹⁰ A quarter-century after the publication of the Kilbrandon report, Acts

⁴ See, e.g., Vernon Bogdanor, *Devolution in the United Kingdom* (1999), p. 3; Burgess, note 2 above, at pp. 716–719.

⁵ Bogdanor, note 4 above, at p. 5.

⁶ See generally *ibid.* at pp. 3–18.

⁷ A.V. Dicey, *Law of the Constitution* (E.C.S. Wade ed., 10th ed. 1959), pp. 39–40.

⁸ See generally Martin Loughlin, "Restructuring of Central-Local Government Relations", in Jeffrey Jowell & Dawn Oliver (eds.), *The Changing Constitution*, 4th ed., (2000), pp. 137–164.

⁹ See Bogdanor, note 4 above, at pp. 44–45.

¹⁰ Hefin Rees, "Awakening the Welsh Dragon: Will the Creation of the National Assembly for Wales Make A Significant Difference to the Constitutional Arrangements Between England and Wales?" (2000) 23 *Suffolk Transnat'l L. Rev.* 459, 462–463.

of Parliament authorised elected national assemblies in Scotland, Wales, and Northern Ireland.¹¹

One of the most salient features of the present devolution is that different institutions have been ordained and different powers devolved in each territory. For example, the Scottish Parliament is a true legislative body with an extensive list of devolved powers.¹² It can pass primary legislation within its areas of competence, has some power to vary taxes, and has its own representative office in Brussels.¹³ In contrast to the devolution model proposed in the 1970s, the powers reserved to the Westminster Parliament are enumerated.¹⁴ Like Scotland, Northern Ireland is experiencing both legislative and executive devolution, but with wrinkles like power-sharing because of its situation as a divided society.¹⁵ The order of the day in Wales, on the other hand, is simply executive devolution.¹⁶ The Welsh Assembly has the power to make secondary, but not primary, legislation.¹⁷ Its areas of competence are more limited than those of the Scottish Parliament.¹⁸ The Welsh Assembly operates chiefly through a cabinet, and is much more dependent on Westminster and Whitehall than the other assemblies.¹⁹

In all cases, the assemblies are subordinate to the Westminster Parliament, which retains supremacy throughout the entire United Kingdom.²⁰ Many scholars have pointed out that devolution thus rests on two seemingly conflicting principles: parliamentary sovereignty and domestic self-government.²¹ But parliamentary sovereignty is not, in theory, incompatible with the exercise of some local control. The theoretical reconciliation of these principles lies in the idea that the authority exercised at levels below the central government ultimately derives from and depends on the will of Parliament.

The recent changes are consistent with this constitutional theory, but the fit between the theory and the new constitutional reality is a far different question. Devolution is technically a revocable

¹¹ See Scotland Act 1998; Government of Wales Act 1998; Northern Ireland Act 1998.

¹² Burgess, note above 2, at pp. 722–723.

¹³ *Ibid.* at p. 723; Geoffrey Clark, “Scottish Devolution and the European Union” [1999] *Pub. Law* 505, 519–522.

¹⁴ Bogdanor, note 4 above, at p. 204.

¹⁵ *Ibid.* at pp. 105–109; Winston Roddick, “Devolution—The United Kingdom and the New Wales” (2000) 23 *Suffolk Transnat'l L. Rev.*, 477, 482–483; Burgess, note 2 above, at pp. 726–728.

¹⁶ Vernon Bogdanor, “Devolution and the British Constitution”, in David Butler *et al.* (eds.), *The Law, Politics, and the Constitution* (1999), pp. 71–72.

¹⁷ Roddick, note 15 above, at p. 482.

¹⁸ Burgess, note 2 above, at p. 724.

¹⁹ *Ibid.* at pp. 724–725.

²⁰ Bogdanor, note 4 above, at p. 3.

²¹ See, *e.g.*, Bogdanor, note 16 above, at p. 55; Hazell, note 2 above, at p. 111.

licence, not a conveyance in fee simple.²² But what is legally permissible may be politically impossible. Many scholars have asserted that it is unlikely that Westminster would recall devolved powers without the consent of the national assembly at issue.²³ Indeed, such an attempt might well be considered “unconstitutional” in the British sense.

We all know what parliamentary sovereignty meant to Dicey. But what will Westminster’s sovereignty now mean in Edinburgh? What will it mean in Cardiff, in Belfast? If devolution extends to the English regions, will it also have a new meaning in Yorkshire? Will parliamentary sovereignty still cloak the United Kingdom? If so, will it be a coat of many colours? Or will it simply be like the Emperor’s new clothes?

Given my line of work, one of the issues surrounding devolution that I find to be especially compelling is the role of courts. The source, status, and character of judicial review in the United Kingdom differ in many ways from the features of judicial review in the United States. Parliamentary sovereignty and the absence of out-and-out constitutional adjudication stand on one side of the Atlantic, while Article III and *Marbury v. Madison*²⁴ reside on the opposite shore. In practice, of course, the gap has narrowed in recent decades due to developments in the judicial role in the United Kingdom. Recent constitutional changes in the United Kingdom raise the questions what effect the courts will have on devolution and, just as important, what effect devolution will have on the role of courts.

The devolution Acts expressly assign the UK courts a role in determining the limits of devolution and the powers of the devolved institutions.²⁵ At a broad level, this role is a familiar one for UK courts. The question whether a devolved body has acted within the limits of its devolved powers dovetails nicely with the type of *ultra vires* review to which UK courts are accustomed.²⁶ Likewise, at least in the cases of Scotland and Northern Ireland, the judicial review of actions by the UK executive to ensure that they are within the powers that Parliament has reserved to Westminster does not require new wineskins. As Lord Falconer put it, “These sorts

²² See Abimbola A. Olowofoyeku, “Devolution: Conceptual and Implementational Problems” (2000) 29 *Anglo-Am. L. Rev.* 133, 161–162.

²³ See, e.g., Bogdanor, note 16 above, at p. 61; Ian Leigh, *Law, Politics, and Local Democracy* (2000), pp. 27–28; Dawn Oliver & Gavin Drewry, “The law and Parliament”, in Dawn Oliver & Gavin Drewry (eds.) *The Law and Parliament* (1998) p. 2; but see Olowofoyeku, note 22 above, at p. 162.

²⁴ 1 Cranch 137 (1803).

²⁵ Lord Falconer of Thoroton Q.C., “The Role of the Courts in the Devolution and Human Rights Arrangements” (1999) 21 *Liverpool L. Rev.* 1, 1.

²⁶ See *ibid.* at pp. 10, 14.

of cases are ones where the court will be adjudicating in a way in which they are very experienced—deciding as a matter of law what the competence of a particular body is.”²⁷

But while the exercise may be familiar, the precise subject matter may present some uncharted territory. Devolution will involve the courts more in the business of drawing vertical institutional boundaries. It remains to be seen how extensive this role will be, and what patterns will emerge from the exercise of this adjudicative authority. For example, in the case of Scotland, will the courts construe more broadly the devolved powers or the reserved powers? In Wales, will the courts be swift or slow to find that executive action exceeds the limits of Westminster’s primary legislation? And how will the courts approach national assembly action in areas that intermingle both devolved and reserved powers?

Just as Parliament will retain in theory the power to alter or rescind the devolution arrangements at any time, it can overrule any judicial resolution of a devolution issue that is not to its liking.²⁸ Indeed, the very role of the courts in devolution will remain subject to change at parliamentary will. In other words, wherever the courts draw vertical institutional boundaries, Westminster will still hold the supreme legislative rubber.

But there is bound to be a gap between constitutional theory and constitutional practice. The manner in which UK courts have construed primary legislation to vindicate fundamental constitutional rights has received much attention in recent decades.²⁹ While technically abiding within the confines of statutory construction, these decisions sometimes have the flavour of full-fledged constitutional review. Now that Parliament has delegated substantial powers to the national assemblies, it will be interesting to see whether the courts treat these powers in essence as permanently transferred or simply on indefinite loan.

FEDERALISM IN THE UNITED STATES

I will now travel across the ocean and back in time to trace the outlines of federalism in the United States. The character of American federalism is also deeply rooted in the way our nation was forged. The Framers engaged in extensive debate concerning the appropriate allocation of power between the States and the national government. If the Constitutional Convention had taken

²⁷ *Ibid.* at p. 14.

²⁸ *Ibid.* at p. 7.

²⁹ See, e.g., *ibid.* at p. 9; Paul Craig, “Constitutionalism, Regulation and Review”, in *Constitutional Futures*, above note 2, at p. 83; Jeffrey Jowell, “Of Vires and Vacuums” [1999] *Pub. Law* 448, 457–458.

place over a Wimbledon fortnight, there is little doubt that questions of federalism would have held Centre Court. The Framers were gripped by competing concerns. On the one hand, the Framers “were suspicious of every form of all-powerful central authority”,³⁰ which they viewed as inimical to individual liberty. On the other hand, the Articles of Confederation had proven to be too weak a tonic for the achievement of national goals because the central government was entirely dependent on the cooperation of State legislatures.

State sovereignty was at the heart of the dilemma. While the Framers were committed to the preservation of state sovereignty, it could not be the insuperable obstacle to coordinated action that it had proven to be under the confederation. The Framers were thus confronted with the challenge of navigating between the Scylla of excessively concentrated power and the Charybdis of disunity.

The Framers hammered out a series of compromises, some of which guaranteed an institutional role for the States in the composition of the central government itself. For example, as a result of the Connecticut Compromise, each State was afforded equal representation in the Senate.³¹

But the Framers did not think it would be enough simply to place State hands on the central tiller. The Framers instead provided that the central government would be one of limited, enumerated powers, with the States retaining those powers that they did not delegate. At the same time, the Constitution forbade the States from exercising certain powers that would rest in the central government alone.³² These principles are the primary fulcrum on which the ultimate balance between state authority and national power rests. The limitation of the central government’s authority is inherent in our constitutional design. The Tenth Amendment, ratified in 1791, reinforces this design by stating that famous “truism”³³: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” The Framers thus established dual spheres of sovereignty, allowing the central government to act directly upon individuals in some fields of activity while preserving the sovereignty of States acting within their own territorial boundaries.

Today’s central government certainly does not resemble the limited enterprise that the Framers of our Constitution envisioned.

³⁰ Justice John Harlan, “Thoughts at a Dedication: Keeping the Judicial Function in Balance” (1963) 49 A.B.A.J. 943, 944.

³¹ US Const., art. I, § 3, cl. 1.

³² US Const., art. I, § 10.

³³ *United States v. Darby*, 312 US 100, 124 (1941).

While some of the expansion is a result of formal constitutional amendments, the country's response to technological and social change accounts for the lion's share of the growth of central power. The Framers could not have foreseen our world of technological sophistication and mass communication. They could not have known the Internet, the 747, or biotech corn any more than they could have envisioned cable television, cloning, or the splitting of the atom. Chiefly through Congress's exercise of its powers under the Commerce and Spending Clauses,³⁴ aided by broad judicial interpretations, the sphere of federal activity has greatly expanded.

The ability to adapt to new circumstances within the same constitutional framework is indeed testimony to the wisdom of our forebears. But while the Framers prudently designed a flexible system, they did not adopt principles without limits. Nor did they neglect to design institutions that would enforce those limits. *Marbury v. Madison* confirmed not only the power of judicial review generally, but specifically the competence of courts to enforce the constitutionally enshrined balance of power among the different organs of government.³⁵

Yet these first principles have come under increasing attack. Some have encouraged the judiciary to effectively abdicate its role as an "institutional border patrol" under the appealing label of "the political safeguards of federalism".³⁶ Under this view, enforcement of the federal-state balance should be left to the political process, in which the Framers have already guaranteed a role for the States.

In my view, both the "political" and the "judicial" safeguards of federalism reinforce the federal-state balance.³⁷ There is ample room for political accommodation within the parameters of our system. Just as the States do not regulate conduct within their borders to the fullest permissible extent, Congress does not always legislate to the limits of its constitutional authority. But the courts are nonetheless obligated to remedy the transgression of constitutional borders in the cases and controversies before them. In discharging this function, the courts should strive to emulate a prudent umpire, who allows the contestants to play hard between the lines but takes swift and sure action when those lines are crossed. While

³⁴ US Const., art. I, § 8, cl. 3; US Const., art. I, § 8, cl. 1.

³⁵ 1 Cranch 137 (1803).

³⁶ See, e.g., Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (1980); Herbert Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government" (1954) 54 Colum. L. Rev. 543.

³⁷ Cf. *Garcia v. San Antonio Metro. Transit Auth.*, 469 US 528, 580-589 (1985) (O'Connor, J., dissenting); see also John C. Yoo, "Judicial Review and Federalism" (1998) 22 Harv. J.L. & Pub. Pol'y 197.

reasonable minds may differ as to where those lines are, line-drawing is the essence of law.³⁸ The difficulty of the task is no cause to shrink from it. As my colleague Justice Kennedy has said, “[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far.”³⁹

Recent debates in the political arena in the United States over such issues as welfare reform, energy policy, and the future of health care testify to the ample latitude that the national and state governments have to negotiate their respective spheres of action. It is just as much the role of the courts not to intervene in the legitimate machinations of the political process. But when a particular action, whether a result of political compromise or unilateral political will, violates the Constitution, judicial intervention is warranted.

COMPARING DEVOLUTION IN THE UNITED KINGDOM WITH FEDERALISM IN AMERICA

This abbreviated discussion reveals several substantial differences between devolution in the United Kingdom and federalism in the United States. These and other differences have been of interest to students and scholars of comparative law. Federalism represents a true division of power, whereas devolution is simply a delegation. While each of our countries is a Union, there are two spheres of sovereignty in America, but a single realm in the United Kingdom. Our countries’ names reflect this difference: both begin with “United,” but the second word is plural in one, singular in the other. In the United States, the power of actors away from the centre is a postulate. In the United Kingdom, it is a wholly dependent proposition.

These facts, of course, represent much more than conceptual footnotes to history. Rather, they influence the constitutional and political realities of the vertical allocation of power in each country. For example, residual state sovereignty in America means that, even in an era where the exercise of national power is often the instinctive norm rather than the deliberate exception, the federal government is limited in the extent to which it can commandeer, override, or displace the States.⁴⁰ And despite the exponential

³⁸ Cf. *Irwin v. Gavit*, 268 US 161, 168 (1925) (“Neither are we troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law.”).

³⁹ *United States v. Lopez*, 514 US 549, 578 (1995) (Kennedy, J., concurring).

⁴⁰ See, e.g., *Printz v. United States*, 521 US 898 (1997); *Lopez*, 514 US 549; *New York v. United States*, 505 US 144 (1992).

increase in the pages of the United States Code since the New Deal, the fact remains that the vast bulk of our law is state law. In the United Kingdom, what Parliament hath devolved, it can taketh away. And even if the political realities would make it very difficult for Parliament to roll back significantly the present devolutionary arrangements, the prospect of rescission is a part of the constitutional and political backdrop against which the new devolved institutions operate.

The territorial units that comprise the lower level of government are defined on a different basis in each country. In the United Kingdom, each of the units to which substantial power has been devolved has a distinct national identity. In the United States, though each State has its own ethnic mix and cultural flavours, the lines are strictly geographical. The multinational, as opposed to merely multiethnic, composition of the United Kingdom may create centrifugal pressures to a degree not present in the United States. Indeed, some see devolution as a halfway house on the road to full independence. For example, a Scottish National Party spokesperson recently said: "Rather than killing nationalism stone cold dead, we see devolution as a stepping stone toward independence."⁴¹ Others, however, view devolution as a "safety valve" for the release of nationalist pressures to preserve the integrity of the Union. For example, the UK Foreign Secretary said recently: "[B]y recognising the United Kingdom's diversity, devolution has guaranteed its future."⁴² While it may be a paradox to say that one can fasten a Union by loosening the political ties that bind it, it is a paradox in which many place great faith.

Further, devolution in the United Kingdom is asymmetrical, while federalism in America is almost perfectly symmetrical. Asymmetry in the United Kingdom is enabled by the fact that power is flowing from the top down, and results from the interplay of historical forces and present demand.

In the United States, asymmetry is practically unheard of (and is likely even "unthought of"). In large part, symmetry of powers among States results from the fact that state powers are not enumerated and the only cession of power is upward. While there may be asymmetry of influence in national affairs, each State regulates within its own borders on equal terms. And even though roughly 170 years separated the ratification of the Constitution by the first State, Delaware, and the entry into the Union of the

⁴¹ Jason Beattie, "Devolution Helps the UK, says Cook" *Scotsman*, 20 April 2001, at p. 11; see also Bogdanor, note 4 above, at p. 296.

⁴² Beattie, note 44 above; See also Robert Hazell & Brendan O'Leary, "A Rolling Programme of Devolution: Slippery Slope or Safeguard of the Union", in *Constitutional Futures*, note 2 above, at pp. 45–46; Bogdanor, note 4 above, at pp. 297–298.

fiftieth State, Hawaii, each State has entered on an equal footing with the others.

While many extol the virtues of asymmetrical devolution as the most logical response to the disparate situations of nations within the United Kingdom, others believe that asymmetry makes the present arrangements unsatisfactory and inherently unstable.⁴³ It remains to be seen whether asymmetry remains the rule or a pattern of convergence emerges. For example, will Wales look at the Scottish Parliament and want the same legislative and tax-varying powers for its own assembly?⁴⁴ And if the Welsh keep up with the Scots, will the Smiths then want to stay a step ahead of the Joneses?

Another important dimension of the asymmetry question is the status of England and the English regions. Many of the concerns driving devolution, such as a perception of excessive centralisation and remoteness from the decisions that affect everyday lives,⁴⁵ apply to England as well. As a result, there have been calls for greater devolution of power to regions within England.⁴⁶

The role of courts in policing the borders between the different levels of government is a matter of longer standing and greater certainty in the United States than it is in the United Kingdom. The political and judicial safeguards of federalism exist alongside each other in the United States. In the United Kingdom, by contrast, judicial protections are ultimately subject to political will, and Parliament has the final word. Recent UK experience attests, of course, that neither Article III nor *Marbury v. Madison* is a prerequisite for the emergence of some meaningful judicial review. Conversely, neither guarantees freedom from controversy when courts perform their vested role. But the lack of independent moorings constrains the ability of courts to be institutional referees, especially when those institutional boundaries are drawn and redrawn through the ordinary legislative process. The devolution Acts provide a textual basis for limited judicial review, but they do not authorise full-fledged constitutional adjudication. It remains to be seen whether the courts here exercise their interpretive powers in a manner that bolsters and entrenches devolution. It also remains to be seen whether the adjudication of devolution issues in turn bolsters and entrenches an independent role for the courts in the constitutional structure.

⁴³ Compare, e.g., Hazell & O'Leary, note 42 above, with Olowofoyeku, note 23 above.

⁴⁴ "Why We Must Keep Our Aim", *S. Wales Evening Post*, 30 October 2000, at p. 8.

⁴⁵ See, e.g., Roddick, note 14 above, at pp. 479–480; Leigh, note 23 above, at pp. 23, 27.

⁴⁶ See generally Leigh, note 24 above; See also Kevin Brown, "Shaping the Group Dynamics of the Assemblies: Regions Minister Says that English Devolution is Inevitable", *Financial Times*, 9 April 2001, at p. 5.

Our two countries also inherit different challenges from the last century's developments concerning the vertical allocation of power in each country. The United States is confronted with the task of preserving its constitutional structure as each generation grows accustomed to a higher baseline of central government activity. The United Kingdom, on the other hand, is engaged in the process of forging new constitutional arrangements. As Sir David has noted, the questions do not end with devolution.⁴⁷ In 1997, the present government's "comprehensive programme of constitutional reform" emphasised devolution, an elected Mayor for London, incorporation of the European Convention on Human Rights, freedom of information, and a referendum on the voting system for the House of Commons.⁴⁸ In March 1999, Sir David noted that the following matters should be added to the list: "possible changes in the role of the monarchy, the evolving position of the United Kingdom in Europe, the peace settlement in Northern Ireland and a new institutional link with the Republic of Ireland, reform of the House of Lords, major constitutional challenges for the courts of law, a readjustment in the work of local authorities, and . . . a shift in the balance of power between Whitehall and Westminster".⁴⁹ Some of these changes are already a reality, in whole or in part.⁵⁰ And not only are many of these changes significant in themselves, but the interplay and integration of these changes will pose major challenges as well.⁵¹

Finally, while the United States must manage centripetal forces that threaten to erode the rightful role of the States, the United Kingdom must deal with centrifugal forces that make its unitary status, long an axiom of British constitutional law, an uncertainty. A number of scholars have already noted that, especially in light of devolution, it is more accurate to refer to the United Kingdom as a "union" state rather than a "unitary" state. Now there are suggestions that the United Kingdom might even proceed toward what Blackstone deemed a "solecism in politics"—the coexistence of coordinate sovereignties in a federal system.⁵² Some even say that devolution is a road with no logical stopping point short of independence.⁵³

⁴⁷ Sir David Williams, "Constitutional Issues Facing the United Kingdom" (1999) 30 *Law Libr.* 13.

⁴⁸ *Ibid.* at p. 13.

⁴⁹ *Ibid.*

⁵⁰ See generally *Constitutional Futures*, note 3 above.

⁵¹ See Robert Hazell & Richard Cornes, "Introduction", in *Constitutional Futures*, note 2 above, at pp. 4–5.

⁵² Hall, note 3 above, at p. ix (quoting Blackstone); Olowofoyeku, note 22 above, at pp. 165–166; Alan J. Ward, "Devolution: Labour's Strange Constitutional 'Design' ", in *The Changing Constitution*, note 8 above, at p. 135.

⁵³ See note 41 above.

THE EUROPEAN UNION

The picture that I have painted would be incomplete if I failed to mention an important third layer of institutions. While the effect of membership in supranational organisations on national sovereignty crops up from time to time in the United States, the question has nothing like the ubiquity and immediacy that it has in the United Kingdom. The European Union, as it is presently constituted, is a challenge for the traditional taxonomy of governmental structures. The consensus is that it is neither a confederation nor a federal system, but rather “a construction *sui generis* somewhere between the two”.⁵⁴ In comparison to American experience, the centralised institutions of the European Union are not so weak as the Articles of Confederation but not so potent as the national government created by our Constitution. As a Union, the European Union is more like the United States than the United Kingdom in that the constituent sovereign states cede power upward to a government of their creation. But like devolution in the United Kingdom, it is yet unclear what type of creature will evolve from the process. Just two weeks ago, the newspapers reported a German proposal that would strengthen the European Parliament and invest the European Union with more of a federal structure.⁵⁵ The assent to such a proposal would be far from uniform at this point.

One of the many factors that will likely influence the structural path of the European Union is the practical meaning accorded to the principle of subsidiarity. “Subsidiarity” is perhaps one of the most elusive, but also one of the most crucial, words in contemporary European political discourse.⁵⁶ In 1992, Jacques Delors offered a prize to anyone who could define the term.⁵⁷ (I don’t know if it has been claimed yet.) The essence of subsidiarity is that the non-exclusive functions of the European Union should, where possible, be performed by or within the Member States.⁵⁸

The principle of subsidiarity serves many of the same values as other structural principles that enable the exercise of power at lower levels of government.⁵⁹ The European Union’s adoption of the principle of subsidiarity also shares common tactical roots with

⁵⁴ Reimer von Borries & Malte Hauschild, “Implementing the Subsidiarity Principle” (1999) 5 *Colum. J. Eur. L.* 369, 370.

⁵⁵ Edmund L. Andrews, “Germans Offer Plan to Remake European Union”, *N.Y. Times*, 1 May 2001, at A1.

⁵⁶ See, e.g., Paul Craig & Gráinne de Búrca, *EU Law: Text, Cases, and Materials*, 2nd ed., (1998), p. 124; A.G. Toth, “A Legal Analysis of Subsidiarity”, in David O’Keeffe & Patrick M. Twomey (eds.) *Legal Issues of the Maastricht Treaty* (1994) 37.

⁵⁷ *Ibid.* at p. 129.

⁵⁸ See A.G. Toth, “Is Subsidiarity Justiciable?” (1994) 19 *Eur. L. Rev.* 268, 268–270.

⁵⁹ See, e.g., W. Gary Vause, “The Subsidiarity Principle in European Union Law—American Federalism Compared” (1995) 27 *Case W. Res. L. Rev.* 61.

federalism and devolution in our respective countries. The federalist structure of the United States Constitution was designed in part to gain the States' acceptance of a stronger central government by assuring meaningful residual state sovereignty.⁶⁰ Devolution in the United Kingdom is often considered a measure to ensure the continuity of the Union by allowing greater self-government within the limits of Union.⁶¹ Likewise, "subsidiarity" has been referred to as "the word that saves Maastricht"⁶² and "member state morphine for the painful loss of sovereignty".⁶³ The principle represents an accommodation designed to ensure acceptance of the European Union among national governments and the citizens of each state by preventing an over-centralisation of power at the EU level.⁶⁴ The success of the European Union may well turn on whether subsidiarity strikes a sturdy, acceptable balance or is merely a drug that wears off.

Just as with devolution, the European Union will in theory diminish UK sovereignty in only that measure which Parliament chooses. But also like devolution, the reality may not be so cut-and-dried. As British judges and scholars have noted, Parliament chose to relinquish some of its sovereignty and subject the United Kingdom to European law when it passed the European Communities Act of 1972. The ramifications of this decision continue to unfold today. While there is political opposition to the United Kingdom's further integration into the European Union, so too are there political obstacles to pulling back even as the jurisdiction and power of the European Union grow beyond what Parliament may have envisioned in 1972. The efficacy of the principle of subsidiarity in ensuring that substantial authority will be exercised at the state level may play a big role in determining the acceptance of EU prerogatives among UK institutions and citizens.

Much attention has been devoted to the role that EU courts will play in the New Europe.⁶⁵ As the *Factortame* case demonstrates, the impact of the European Union on domestic courts may be even more significant.⁶⁶ The United Kingdom's 1998 incorporation of the

⁶⁰ See generally William T. Hutchinson, "Unite to Divide; Divide to Unite: The Shaping of American Federalism" [1959] *Miss. Valley Hist. Rev.* 3, reprinted in *Federalism: A Nation of States*, note 4 above.

⁶¹ See, e.g., Hazell & O'Leary, note 42 above; Bogdanor, note 4 above, at pp. 294–298.

⁶² Deborah Z. Cass, "The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community" (1992) 29 *Common Mkt. L. Rev.* 1107.

⁶³ Allison S. Russell, "Subsidiarity in European Union Law: Member State Morphine for the Painful Loss of Sovereignty" (1998) 11 *Int'l L. Practicum* 67.

⁶⁴ von Borries & Hauschild, note 54 above, at p. 369.

⁶⁵ See, e.g., Toth, above note 58; Frank Vibert, "British Constitutional Reform and Europe", in *Constitutional Futures*, note 2 above, at pp. 60–61; Paul Craig, "Britain in the European Union", in *The Changing Constitution*, note 8 above, at p. 86.

⁶⁶ See, e.g., Craig, note 65 above, at pp. 72–79; A.W. Bradley, "The Sovereignty of Parliament—Form or Substance?", in *The Changing Constitution*, note 8 above, at pp. 43–46; Bogdanor, note 16 above, at p. 63.

European Convention on Human Rights enables the courts to declare Acts of Parliament to be incompatible with EU rights.⁶⁷ While the Human Rights Act does not empower the courts to invalidate or disapply primary legislation, a declaration of incompatibility, combined with political pressure and the “fast track” procedure for parliamentary reconciliation, may have the same effect in practice.⁶⁸ The European Union provides not only a new source of rights, but also a new impetus for domestic courts to assert a greater role in enforcing pre-existing rights. These dynamics will require institutions within the United Kingdom to adjust and find new accommodations with each other.

CONCLUSION: THE VALUES OF DEVOLUTION AND FEDERALISM

Centralised institutions undoubtedly have a crucial place in today’s complex, interconnected world. The slogan “global solutions” is not just the fancy of Madison Avenue. But this does not mean that we should reach unthinkingly for the highest shelf when we search for the cures to some of our deepest societal ills. The intricacies of modern society, perhaps now more than ever, also demand local decision-making that is flexible, responsive, and personal. As salutary as national and supranational bodies can be, we must not let their potential obscure the simple truth that government often governs best when it governs close to the people.

As a Supreme Court Justice, it is my duty to enforce the structural guarantees of our Constitution regardless of the utility of adhering to the Framers’ design in one instance or another. As our Court said in *New York v. United States*: “Our task would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution.”⁶⁹ Nonetheless, as a citizen of the United States, I recognise that it is a happy incident of our republic that vibrant state and local institutions are in fact of great value to our nation. Devolution in the United Kingdom, though cut from a different mould from our federalism, reflects many of the same values, and therefore many of the same opportunities. I would like to end by reflecting on some of these common values and shared opportunities.

⁶⁷ Falconer, note 25 above, at pp. 5–6; See generally Stephen Grosz *et al.*, *Human Rights, The 1998 Act and the European Convention* (2000).

⁶⁸ See note 67 above; Lord Lester of Herne Hill, “Human Rights and the British Constitution”, in *The Changing Constitution*, note 8 above, at pp. 99–110.

⁶⁹ 505 US, at p. 157.

Democracy and accountability. The exercise of power at lower levels of government promotes democracy and accountability. Individuals have a greater say in the decisions that affect their lives. The decisions are more likely to reflect the local preferences. And an individual's voice and vote are generally more effective in bridging the inevitable gaps between policy preferences and policy outcomes. These concerns are arguably the principal driving forces behind devolution in the United Kingdom.⁷⁰ As the post-war expansion of central government functions increased the distance between individuals and the government, the "democratic deficit", which is inescapable to some extent in any republic, became more and more acute.⁷¹ This problem especially affected those areas where the election results hardly aligned with the composition of Westminster and Whitehall.⁷² And as Parliament delegated more functions to the executive branch while keeping them at the national level, accountability diminished and government seemed even more remote from the people.

Devolution aims to reverse these trends. From a process perspective, it seeks to enable meaningful self-government by reposing power closer to the citizens. From a substantive standpoint, it is hoped that devolution will lead to a better "fit" between local preferences and policy results. Of course, the exercise of power at lower levels of government does not in itself guarantee democratic, accountable governance. There are many other variables, such as real electoral choices, civic engagement, and openness in government. But hopefully the lower locus of power will fertilise the soil so that these elements will flourish as well.

Comparative efficiency and laboratories for experimentation. Devolution and federalism also hold the promise of more efficient, responsive, and creative government. Comparative efficiency probably comes in second to democracy and accountability as a recurring theme in discussions of devolution's driving forces.⁷³ In areas where centralised government may prove cumbersome, smaller units of government can deliver services with greater effectiveness and flexibility. And as Justice Brandeis famously observed of the American federalist system, each State "may, if its citizens choose, serve as a laboratory" in order to "try novel social and economic experiments without risk to the rest of the country".⁷⁴

⁷⁰ See, e.g., Roddick, note 14 above, at pp. 479–481; Olowofoyeku, note 22 above, at pp. 135–136.

⁷¹ See note 70 above.

⁷² See Bogdanor, note 4 above, at pp. 193–196.

⁷³ See, e.g., Roddick, note 14 above, at pp. 479–480; Burgess, note 2 above, at pp. 719–721.

⁷⁴ *New State Ice Co. v. Liebmann*, 285 US 262, 311 (1932) (Brandeis, J., dissenting).

Individual liberty. The Framers of the American Constitution viewed the diffusion of power among different levels of government as a bulwark of individual liberty. The Framers embraced federalism not just to preserve state sovereignty as an end in itself, but, by doing so, to preserve individual liberty.⁷⁵

This idea does not figure nearly so prominently in the devolution debate. Individual liberty is perhaps the area where our respective countries have employed the most divergent institutional means to achieve similar successes. Yet in a world where eternal vigilance is the price of liberty, there are always opportunities to shape our institutions in ways that produce government even more solicitous of each person's natural right of liberty.

Sense of community and shared purpose. Finally, devolution and federalism promote a stronger sense of community and shared purpose. When meaningful decisions are made through democratic processes at levels close to us as citizens, we have a greater sense of responsibility for those decisions. We are challenged to be not just spectators on the sidelines of democracy, but active stewards of the heritage and promise of our regions, our cities, our towns, our neighbourhoods. We learn the healthy habits of democracy and citizenship not by watching, but by doing. The common enterprise of self-government can lift us beyond our self-interests and sources of division in order to see and strive for the good of all.

These values, of course, are not unqualified and are not without trade-offs.⁷⁶ Further, while there may be widespread agreement on the importance of the values of devolution, opinions vary on the success of devolution so far in achieving these goals. These returns, of course, are very early, and the saying that "devolution is a process, not an event", has become almost a mantra. The future shape and success of devolution quite appropriately depend on both territory-specific variables and system-wide factors. Perhaps more than anything, the future of devolution depends on the response and initiative of the people themselves, whose welfare is the supreme end of democracy.

Whatever path devolution takes in the United Kingdom, the experiment is assuredly rich with possibility. While great uncertainty may make the experiment seem more like a gamble, risk is opportunity's constant companion. Democracies throughout the world, whether budding or in full bloom, should take heart and take note as one of the world's greatest democracies challenges itself to realise more fully the vast promise of democratic governance. I wish it all the best in this timeless endeavour.

⁷⁵ Cf. The Federalist No. 28 (Alexander Hamilton).

⁷⁶ See generally A.E. Dick Howard, "The Values of Federalism" (1993) 1 New Eur. L. Rev. 143.