Chapter Eighteen: Conclusion

In *State and Nation* Professor Michael Keating declares that:

> The UK is not a state, unitary or federal, but a union, and as such does not necessarily need a hard core or sovereignty or purpose.[1]

A Tale of Two Unions does not agree that being a 'union' provides some kind of exemption from establishing a constitution. At the same time, it has not tried to suggest that a future constitution for the UK might simply be a replica of the European Union. It is aware of the fact that a union of 27 different nation-states requires a different structure to that of one multinational state. However, it believes that the institutional structure of the EU provides useful pointers to the future constitution of a multinational state, should the UK be prepared to move in that direction and should it be determined to preserve its own union rather than simply tolerate or even welcome its disintegration. That is what this book hopes for. It is based on my fear that Brexit might prove to be a halfway house towards the final dismantling of the United Kingdom into its constituent parts.

The book began by referring to two narrative arcs. It suggested that the first, which concerned the development of what became the United Kingdom, is not always sufficiently recognised when there is too much focus upon a country going it alone, whether it be England pressing ahead with the break from Rome in the sixteenth century or the UK surviving alone after the fall of France in 1940 until the invasion of the Soviet Union a year later. The second narrative arc, which concerned the development of Europe, highlighted the way in which a continent riven by factions emerged, a continent without fixed borders and without fixed identity, in which Christian fought Christian as well as Muslim and Islam mixed with Christianity in helping to form its character,

1 Keating, *State and Nation*, p. 50.

as they do today. Europe might like to see an expression of respect for diversity in the many different states inside its undefined borders, but small states have been as intolerant towards minorities as large ones in this warlike western peninsula of Asia. If it is appropriate to talk of 'European values,' then it will be more a case of institutions building values than reflecting values that are already there.

What, then, are these institutions that may help to form 'European values?' The next part of the book tried to show why sovereignty-sharing was a vital ingredient in creating an enduring peace on the continent. The system which eventually emerged through the European Union was a means of having effective supranational supervision without creating a superstate. From this perspective it is at least possible to appreciate the problem to which the European Union tried to provide an answer, even if the EU continues to have major failings. When the book turned to consider the contribution of Jean Monnet and the origins of what became the European Union, it made clear what his own failings were.

The road to the European Union began with its forbear the Coal and Steel Community. This was something new in the history of nations. It was the creation of an institution to which nation-states voluntarily ceded the power to make decisions that were binding upon them. For Jean Monnet, the most important influence behind this approach to managing relations between states, it was to be promoted in a manner he had always adopted, by going to the great and the good and persuading them of the value of a particular policy initiative. Precisely because he had been used to working for wartime coalitions or unstable post war governments, Monnet did not sufficiently recognise that a popular mandate is not an optional extra where radical political change is concerned. As for the French foreign minister Schuman who implemented Monnet's ideas, he did so under the constraints of necessity rather than conviction. For all his grandiose words in the *Salon d'Horloge*, he smuggled sovereignty-sharing past the people having first smuggled it past the French cabinet.

That was the context in which this book turned to a consideration of British entry into the European Economic Community (which later became the EU). To those aware of the narrative arc, the proposal for a European Economic Community might have been seen as an opportunity for the UK to pursue its traditional alliance-making in Europe. But to those focused upon the 'highlights', the echoes of its single-handed resistance to German might between 1940 and 1941 overrode its search for alliances and encouraged a confidence in its ability to make its own way in the world, in peacetime as in the early years of wartime.

The war had been followed by the first ever Labour government with a working majority, determined to 'win the peace' after winning the war. Any suggestion of sharing power with others, whether at home or abroad, was anathema.

Over the following thirty years the UK tried to change the Coal and Steel Community and then the European Economic Community from without, seeking to make them more like organisations it was prepared to belong to. When this was no longer possible, it sought to join the EEC and then change it into something 'acceptable' from within. However, accession took two vetoes and fourteen years and at the end of that period the Community was too well-established to be moulded into a different form.

If you genuinely believe that a sovereignty-sharing body is less a close relationship between states than an artifice to create a new and more powerful state out of several smaller ones, then you are bound to perceive it as another behemoth upsetting the balance of power on the continent, as Harold Macmillan perceived it when the Treaty of Rome was signed. You insist that there is no halfway house between the system of nation-states acting independently and the creation of a superstate in which existing countries are turned into little more than regions. Most politicians in the UK, whichever party they belonged to, appeared to take this view. They did not try to articulate what sovereignty-sharing meant. Perhaps few of them really understood what it meant.

Hence the Conservative government which finally took the UK into the European Economic Community presented the EEC as if it wasn't a sovereignty-sharing body. Like its Labour predecessor, it ignored the fact that the veto which could apply to any new legislation did not apply to what had already been agreed. It also ignored the method by which such legislation was implemented, namely European Law which was binding upon member states, and which overrode national law in the areas to which it applied. That system still stood in 1973. Moreover, if the Community resolved to abandon the principles of the Luxembourg Compromise in times to come, then the system of European law was in place to make future decisions binding upon member states too. This is precisely what happened – ironically under Margaret Thatcher's premiership, when the Single European Act was passed in 1986.

It was during her premiership that what was to become the EU began to work as an effective supranational body. Jacques Delors was a powerful Commission President, but at the same time the Parliament received new powers to oversee and in some areas veto Commission proposals (alongside the Council of Ministers). There was a period during the 1990s when the Left in the UK began to appreciate that the European Union was not simply a capitalist club.

Poorer nations like Spain, Greece and Portugal had joined in the 1980s and appeared to benefit. Social legislation had been made a part of European Law and ensured that the single market protected the rights of workers. This, after all, had been precisely what Margaret Thatcher had complained about in her Bruges speech, claiming that the frontiers of socialism, rolled back in Britain, were being reimposed by Brussels. A ruling of the Law Lords (on 3rd March 1994) during John Major's premiership established that procedures over redundancy pay and unfair dismissal were discriminatory and breached European law. The 16-hour-per-week threshold for employment protection legislation had to be abandoned. At the same time, important environmental legislation was being introduced and enforced. It would have been the right time to make clear what the EU system of sovereignty-sharing was and how it could be to the benefit of member-states. Instead, the UK made it a decade of bickering over Maastricht and on the Left strict avoidance of anything perceived as too controversial.

For so-called europhiles, the high point was reached at the turn of the century when the Conservatives failed completely to motivate the country to 'save the pound' by voting for William Hague in the 2001 election, and Labour was rewarded with a second landslide. Thereafter, things started to go wrong. The new century saw old ghosts come rushing back through the EU's mishandling of the eurozone crisis. Daily television pictures of Greeks forced by the Troika to lose their pensions or Cypriots queuing to get money from the bank reinstated the myth of the capitalist club. The immigration debate was made to feed into this perception, with those arriving from Central and Eastern Europe seen on the Left as cheap service fodder for wealthy Western clients looking for someone to install their fridge freezers or look after their children.

The referendum in 2016 produced the narrowest of majorities for withdrawal and did so by excluding significant parts of the population, such as the 16 and 17-year-olds who had just voted in the Scottish referendum, who would be affected all their lives by the vote, and many of the expatriates whose lives would be upended by a 'No' vote over which they had no say. Unlike in the 1970s when the Scots were deemed not to have voted 'Yes' to devolution in sufficient numbers, there was no required minimum turnout or majority for this vote to count. But all of that is beside the point. The candle burned just enough at both ends, and the nationalist Right joined with the anti-capitalist Left just as the Gaullists and the Communists in France had combined half a century earlier to destroy the European Defence Community.

The book then moved from considering the UK's experience of being in a supranational union to its own development as a multinational state. To the

extent that it might be seen in terms of the expansion of England, it was an expansion determined by fear of external enemies. Wales was effectively annexed in 1536, shortly after the English Reformation and at a time when it was known that many people in both England and Wales were opposed to the reforms. The Union with Scotland came out of fears of the power of Louis XIV and the possibility of a 'War of the Stuart Succession' as Scotland supported the Stuart line and England the Hanoverian. The Union with Ireland came once more in the context of the threat from France, this time from Napoleon.

Yet each stage of the expansion was different. In the case of Wales, earlier invasions had effectively removed anything for the English to unite with. The Welsh Act was passed by England alone, without any members from Wales. The Act of 1536 made no use of Offa's Dyke, an eighth-century earth embankment designed to mark off the border with Mercia, much of which is still visible today. A boundary was created to serve the purposes of England, much as boundaries were created by seven European powers in order to create over fifty countries in Africa without regard to the various ethnic groups who were affected. Though Wales was certainly to benefit from the economic expansion that came with the industrial revolution, it was always on terms dictated by England. Railways were built to take the English to the coast rather than to unite the different parts of Wales. The coal mines were flooded with English (and English-speaking) incomers who caused an immigration crisis and had a severe effect on the Welsh language. The Welsh certainly understood how they benefited from that expansion, but they also understood that they were not part of deciding how it should take place. That surely affects the Welsh approach to devolution today. A joint approach to tackling problems that affect both countries is at least as important as deciding which responsibilities can be handed over to the Welsh. But sharing power, as opposed to giving it away, is the aspect of devolution that always gets left out.

In the case of Scotland, it was more a matter of receiving or at least retaining powers that Wales didn't have. Scotland was collaborator as well as victim, the junior partner in a project of imperial expansion. It was an Act of Union between England and Scotland rather than an annexation, allowing Scotland to keep its own legal, educational and religious system. This was de facto devolution from the start and caused problems for anyone who tried to claim that the Westminster parliament was sovereign and could legislate as it wished. How was this compatible with the agreement to give Scotland the right to its own presbyterian church, legal processes and educational system? A reasonable conclusion to draw from this would be that accepting a degree

of sovereignty-sharing can not only help to strengthen a British Union post-Brexit but can help to formalise the Act of Union through which England and Wales first joined with Scotland to form Great Britain.

Ireland, on the other hand, was not a partner in the imperial project but more a colony itself, controlled by what was effectively a viceroy in Dublin Castle. An early example of this approach was the so-called 'plantation of Ulster.' At the start of the seventeenth century Ulster was the most Gaelic, Catholic and traditional province in Ireland. Its nature was radically changed by 'plantations.' It became an equivalent to Massachusetts which was created for a similar reason, to maintain a 'purer' religion than that which was practised in the home country. Looking at how these 'plantations' were perceived, it was similar to the way settlers and indigenous inhabitants were perceived in African colonies. If one tries to imagine how, in 1922, the UK was able to accept the loss of one-third of its territory – more than Germany was forced to lose after its defeat in the First World War – the reason lies in the fact that what became the Irish Free State was viewed more as another colony or dominion demanding independence than as a part of the UK precipitating a civil war.

The mention of colonies is important, because imperial expansion beyond the Isles meant that there was later a question of how the colonies and dominions would relate to the so-called 'mother-country'. They had their reservations about 'Empire Free Trade', which seemed to condemn them to supplying raw materials to Britain on favourable terms while receiving British manufactures in return. However lucrative this might be in the short term, they wanted to industrialise themselves. They also disliked the way in which they had simply been 'summoned to war' in 1914 on the basis of an imperial edict issued by George V. They played a huge part in that war. Australians at Gallipoli and Canadians at Vimy Ridge have long been recognised. Less recognised has been the large number of Indians, their numbers in hundreds of thousands, who lost their lives in the trench warfare of the Western front. As the movement towards self-determination gathered pace after the First World War, it was clear that a new arrangement would be needed and that it would mean full independence for the dominions – after all, this was the principle of self-determination which had ended the Austro-Hungarian Empire in 1918. If Yugoslavia and Czechoslovakia were the consequence of that principle, how could anything other than full independent statehood be granted to Canada, New Zealand, Australia and indeed Ireland? And how long before Egypt and India followed?

Hence the earliest thoughts of Home Rule within the Isles were inseparable from the future of the Empire. Home Rule All Round could represent Home

Rule all Round the UK or Home Rule All Round the Empire, with Westminster retained as an Imperial Parliament. In the end, however, Home Rule All Round proved impossible for either the 'internal' or 'external' empire. It failed to prevent the dissolution of the British Empire. It also failed to prevent the formation of the Irish Free State in 1922. Ironically, Home Rule ended up as Home Rule in One Place Only, Northern Ireland, which resulted in protests and later violence for thirty years in the second half of the century. Unsurprisingly, many concluded that the nation state was the only kid on the block, and further attempts at some form of home rule received little attention between the 1920s and the 1970s. At the time of the Scottish Covenant in the 1940s the Labour government under Clement Attlee was increasingly aware of the fact that nothing short of independence could follow the Empire. British India had just collapsed into different independent nations (more were to follow), with over a million dead. Solutions in terms of increased autonomy, however defined, were easily seen as a useless halfway house between regional status and full independence. The Scottish Covenant was largely ignored at Westminster.

The disillusionment with early attempts at devolution affected the UK's opposition to sovereignty-sharing in the run-up to membership of the EU. The failure of Home Rule encouraged a view that there was no alternative to the so-called Westphalian system. The only option for the future was the jostling pack of independent nation-states, the Hobbesian 'state of nature' transposed to the international realm. There was no possibility of going above the level of the nation-state in order to solve the problems of the nation-state. The 'Monnet system' not only appeared to limit the UK's powers but was in any case seen as unworkable.

It also awoke the demons of an Empire gone by. The pioneer of the so-called 'four nations' approach to the future of the UK was a New Zealander, J.G.A Pocock, whose 'British History: A Plea for a New Subject', was first published in 1975, the year that the UK finally voted to stay in the EEC. Far from seeing the four-nations approach as something worthy of comparison with the six-nation approach of the EEC, the latter was simply condemned as a way of discriminating against Commonwealth producers. The ghost of imperial preference was roused back to life by the impact of the Common Agricultural Policy, which supported farmers through a guaranteed floor price together with a common external tariff to prevent that price floor being undercut by cheap imports. Joining the EEC would be making the UK buy more expensive food from Europe rather than cheaper food from the Commonwealth. It was a letting down of 'kith and kin.'

This background had some impact on the way devolution was presented when it finally happened at the end of the twentieth century, both in the Belfast Agreement of 1998 on the future of Northern Ireland and the successful referenda to support the creation of a Scottish Parliament and a Welsh Assembly. Little was done to connect these agreements to the UK's participation in the European Union. Yet once the various agreements are examined, it is clear that there are many important connections between what this book has called two unions.

It is from Wales that the most developed proposals for constitutional reform of the United Kingdom have come. Because Wales voted narrowly in favour of Brexit and is not dominated by a nationalist party in the way Scotland is, it has been able to concentrate more on how to foster Welsh interests inside the British Union than on how to leave that Union. The heart of the Welsh proposals for effective devolution is an understanding of how the nations of the UK could *jointly* make decisions rather than simply receive a new division of the spoils of government in terms of who does what. The chapter on the history of Wales sought to show how this approach would make sense. Wales has been a beneficiary of the economic expansion that came with the industrial revolution and its aftermath, but on terms dictated by England. Decisions have too often been made *for* Wales, not *with* Wales, as the examination of its railway system, for instance, sought to illustrate.

The Welsh proposals make their position clear where they say:

> Wales is committed to this association, which must be based on the recognition of popular sovereignty in each part of the UK; Parliamentary sovereignty as traditionally understood no longer provides a sound foundation for this evolving constitution.
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> The traditional doctrine of the sovereignty of Parliament no longer provides a firm foundation for the constitution of the UK. It needs to be adjusted to take account of the realities of devolution, just as it was adjusted to take account of the UK's membership of the European Union.[2]

2 See Proposition 1 of the General Principles outlined by the document. The first sentence comes from the statement off the principle and the second sentence comes from the 'Narrative' associated with it. See 'Reforming our Union: shared governance in the UK', published in 2019. https://www.gov.wales/reforming-our-union-shared-governance-in-the-uk-html

The key sentence is the one which affirms that 'the traditional doctrine of the sovereignty of Parliament no longer provides a firm foundation for the constitution of the UK.' The question is whether the UK will be prepared to accept this. The idea of parliamentary sovereignty embedded in the mists of time as the keystone of the UK's development as a democracy is a very powerful one, offering a narrative arc linking the barons forcing John to sign Magna Carta at Runnymede to the execution of the King in the seventeenth century, the 'People's Charter' put forward by the Chartists in the nineteenth century and the campaign of the suffragettes a century ago. The implication is that the development of democracy is inextricably linked to the development of the powers of Parliament, despite the fact that there have been many radical thinkers who have echoed Walwyn in suggesting that Parliament can as much inhibit democratic change as promote it.

There is an element of complacency in this story of progress through the centuries, reminiscent of the arguments some half century ago about the so-called 'Whig interpretation of history.' Even on the Left, the image of the 'workers' parliament' threatened by upper-class peers, foreigners from Brussels and in earlier centuries by the overweening powers of the monarchy makes it easy to talk in terms of the sovereignty of Parliament – or at least of the Commons – as if the two can be identified. It forgets that parliament could be a vehicle of dictatorship as much as democracy, as it proved to be in Germany in 1933. Dictators can ride into power on the basis of a popular mandate, their support coming from no more than a large minority of voters, especially under the electoral system used for Westminster elections which has produced parties with absolute majorities in Parliament on the basis of little more than one-third of the vote and one-fifth of the electorate.

It may be that such a view is overly pessimistic. Yet such a development is not avoided simply by breaking the United Kingdom up, leaving the system of parliamentary sovereignty to apply to England alone. As we have seen, the nationalism of small nations can be just as impatient of minorities as that of large ones, particularly when they find that by downsizing they haven't somehow arrived at a homogeneous core. They may adopt the sort of attitude discussed in terms of David Lammy's radio conversation with a listener who was prepared to allow him to be 'British' but never to penetrate the inner sanctum of Englishness.

The proposals outlined in this book largely follow those of the Welsh *Senedd* first laid out in 2019. Some of the proposals have come from elsewhere too – for instance the recent suggestions of the Labour Party for a reformed second

chamber. Unsurprisingly, criticism of the proposals has come from the Commons Speaker (though himself a Labour MP) Douglas Hoyle, who makes the familiar point that such a reform would threaten the supremacy of the Commons. This is perfectly true – and reiterates the point that the UK cannot be effectively reformed unless it is prepared to give up precisely this supremacy of the Commons. The House of Lords would become a Senate of the nations and English regions, akin to the German *Bundesrat*, but even if that solves the problem of giving it a separate role to that of the Commons and not simply duplicating the work of the lower house, there will still be the problem of arbitrating between the different responsibilities of the two houses. There will have to be a way of dealing with the question of which house should deal with what or whether the upper house would have a veto over a particular law – the sort of issues which come before the German constitutional Court under the bicameral system in Germany. A separation of powers is the only way in which the reformed House of Lords can be managed successfully, without either abolishing it or giving it some menial task like 'tidying up bills', as Douglas Hoyle described its present role. A powerful second chamber alongside the House of Commons requires an arbiter between the two.

Hence, the most difficult aspect is not the reform of the House of Lords, but what must result from a bicameral system. The House of Commons would not have the supremacy in a future UK Union that it currently enjoys. To oversee the manner in which legislation passes between the two houses of Parliament, an independent arbiter will be needed, and the Supreme Court must surely fill this role. It will determine how tasks are divided between the devolved nations and regions on the one hand and central government on the other. It will therefore keep an eye on subsidiarity, another very important principle of both unions, the British and the European, but one which requires a body which can determine what is the lowest level of management compatible with efficiency.

Mention the important role of the judiciary, and such an approach is often presented as 'foreign' to the UK's constitutional arrangements, but it was the system that applied while the UK was a member of the European Union, when UK legislation incompatible with European Law was disapplied. This system often seemed to go under the radar even when the UK was part of the European Union, despite the concerns of many on the Left and the Right with preserving parliamentary sovereignty intact. It is noteworthy that even cases like *Factortame*, where it was clearly demonstrated that Westminster legislation, whatever the arguments about the supremacy of Parliament, would be disapplied if they contravened European Law, aroused relatively little interest. The indis-

pensable role of national courts in determining whether UK legislation was compatible with European Law, and if not disapplying it, received hardly any attention, even among those calling for sovereignty to be 'restored' to Parliament.

Because that role of the courts was underplayed during UK membership of the EU, the idea of a role of the courts in any post-Brexit arrangement is seen as a complete break with tradition. Earlier we looked at the McKay report of 2013 which reported to the Liberal Democrat-Conservative Coalition government on the consequences of devolution for the House of Commons. We quoted it saying that:

> Any federal system requires a delineation of competences, which are usually arbitrated by a supreme court that would be able to overrule the UK parliament, as well as binding the devolved institutions. This would be a radical departure from UK constitutional practice.[3]

McKay was right to determine that there must be a body which is able to determine the 'delineation of competences.' Otherwise, we return to the situation where the Westminster Parliament decided arbitrarily in passing the Internal Market Act that the situation was not 'normal' enough for the agreed form of devolution to apply. It would make no sense for Westminster to be able to determine whether, under a bicameral system, the new upper house had acted in a manner that went beyond its authority. But the use instead of a supreme court would not be 'a radical departure from UK constitutional practice' at all. The authors of the report were simply oblivious to the fact that membership of the EU was just such a radical departure because it involved the willingness to be bound by decisions of the European Court of Justice.

It is not, however, the reform of the House of Lords alone that requires an active judiciary, but the whole process of devolution. This has not been recognised sufficiently because throughout the process of devolution, beginning from the end of the last century, parliamentary sovereignty has been the unspoken anchor which supposedly keeps the giving away of powers under

3 See paragraph 71 of the report, which can be read in full at webarchive.nationalarchives.gov.uk/20130403030652/http:/tmc.independent.gov.uk/wp-content/uploads/2013/03/The-McKay-Commission_Main-Report_25-March-20131.pdf

some sort of control.[4] The limitations of the idea of parliamentary sovereignty have been pushed to one side and devolution has been bolted onto a system of parliamentary sovereignty with which it is fundamentally incompatible. 'Further devolution' or 'devo max' is seen as giving away even more powers to the devolved nations or to the regions. What is neglected is all those matters where the question is not whose responsibility a particular issue is but how it can be managed jointly by the nations working together. This is where a Council of Ministers will be necessary to manage tasks which can neither be devolved nor clearly identified as a responsibility of central government alone. These tasks will need to be shared between central government and the devolved nations and regions. It could even be argued that devolution is in danger of giving too many powers away, creating piecemeal arrangements for what is meant to be universal provision, precisely because the sharing of power, in a manner that might be compared to the way decisions are made inside the European Union, is seen to be anathema.

It is arguably the one part of the UK in which devolution was introduced from the very beginning, namely Northern Ireland, which suggests a way in which it could be made to work. Both the Irish Republic and the UK were prepared to show imagination and flexibility with regard to the constitutional arrangements underpinning the Belfast agreement of 1998, where both sides of the border were given a veto over constitutional changes which altered the status of Northern Ireland. The veto power provided in the Belfast Agreement could be extended to an arrangement incorporating the 'four nations' of the United Kingdom. Had the 'four nations' inside the British Union possessed veto power, the fact that two of them wished to be outside the EU and two of them didn't so wish would have been unable to produce a binding decision in favour of withdrawal. In 2017 the UK Supreme Court unanimously held that the consent of Northern Ireland voters had not been required to leave the European Union. Yet the continuation of Northern Ireland as part of the United Kingdom is a matter in which Northern Ireland *is* effectively allowed a veto on its future. The logic of the Good Friday agreement is that decisions on the future of this 'nation' should be subject to the agreement of both the Irish Republic and Northern Ireland. In other words, both could exercise a veto on the agreement. It would have made sense to apply the power of veto to other decisions

4 See Rose, *Understanding the United Kingdom*, written some forty years ago after the first efforts at devolution in the 1970s had been rejected and the successful proposals of the 1990s had not yet been formulated.

which have had profound implications for Northern Ireland, such as membership of the EU. Veto powers for the devolved bodies could be part of any future constitutional changes. Such powers would be controversial, but they would make more sense than the present movement towards giving more and more powers away while trying to reserve the rest for Westminster with the determination of a dog protecting its bone. The best approach to devolution would be to give less away while being prepared to share more. Certainly if 'sharing' means accepting that a binding decision must be based upon a majority vote (possibly a 'qualified' majority vote requiring an overwhelming vote in favour) or even cannot be made at all because of a veto, it may seem to produce the sort of roadblock that has been encountered for long periods in Northern Ireland. But by encouraging joint working it might be able to advance cooperation between the different nations and regions far more effectively than working out what crumbs – or even slices – from the rich man's table will keep them quiet.

Final thoughts on sovereignty, constitutions – and the chance of reform

It is interesting how far the Republic of Ireland has gone in finding common ground with the UK on a number of issues like the common travel area, while remaining absolutely committed to its own sovereignty – staying out of the Commonwealth, not being tied up in any way with the royal family, pursuing an independent foreign policy and yet remaining perfectly prepared effectively to share sovereignty with the UK in areas where it makes sense. If there is one example which more than any other shows up the nonsense of the UK's belief that by sharing sovereignty in certain areas it was in danger of losing its independence, that example is the Irish Republic. Independence for the Republic was won at the cost of much bitterness and blood; the country was ruthless in asserting that independence, whether by staying out of World War Two or staying out of NATO after it. Yet this determination to maintain its independence and its identity has not ruled out arrangements with the United Kingdom which involve a pooling of sovereignty in certain areas, either when both countries were inside the EU together or when they work out how to maintain their relationship after Brexit.

The example of the Republic of Ireland shows that even nation-states determined to preserve their independence are willing to share sovereignty in particular areas. It is this that the UK has always failed to see, whether in the

early years after the war when it was thinking of whether to apply to join the European Coal and Steel Community and later the European Economic Community, or in the later years when it eventually decided upon withdrawal. Yet ironically it has been willing to practise what it doesn't preach in terms of its relationship with the Republic of Ireland itself, formerly itself part of the United Kingdom. Here it has not tried to raise the drawbridge against the free movement of people and may even be willing to develop a shared commitment to human rights.

The hostility of the English in particular to joint working may have something to do with the narrative arc of the United Kingdom's emergence. As England, Wales, Scotland and Ireland grew into the United Kingdom, the English did not see the process as a means of enriching themselves by association; they were grabbing additional baggage from 'outside' with which to fortify their own house against their enemies. Now they are in danger of battening down the hatches inside their own Kingdom. The other nations in the United Kingdom have a sense of being made from outside because of the influence of England on their making. But in the case of England, the narrative myth with its emphasis upon the island fortress seeing off waves of invaders lays all the emphasis upon being threatened from beyond and thereby loses the sense that it has been *made from beyond* as well. In an odd way the English seem to combine a longing to discover their true identity with a determination to carve an identity out of having none at all.[5] A United Kingdom in which each nation recognised that it had become what it was through the influence of the others would understand that joint working – and even the sharing of sovereignty – was a natural reflection of the way the nations' affairs are interrelated and less like an unwelcome imposition from outside upon the affairs of each nation.

When the European Union decided to establish a constitution some two decades ago, it was presented by the former French President Valéry Giscard d'Estaing, who declared that it was something any schoolchild could understand, despite running to 200 pages. The American Constitution, by way of contrast, can be absorbed in a few minutes and is frequently quoted. Constitutions need to be brief and effective, summarising the salient points. A Constitution for the UK would have to be similarly brief. The constitution which the European Union tried and failed to reach agreement on was anything but.

The Treaty Establishing a Constitution for Europe, which was drafted largely by politicians at both national and European level, was signed in 2004

5 Roberts, R.H. *Religion, Theology and the Human Sciences*, p. 221.

and then rejected in referenda by the Netherlands and France. D'Estaing then sought to have the main parts of the Treaty incorporated in a subsequent Treaty, the Treaty of Lisbon, which contained much the same reforms but with, as he put it, the 'constitutional vocabulary removed.'[6] This was a revealing comment. It suggested that what had particularly generated opposition was not the detailed reforms to the powers of various institutions, but the idea they added up to something called a 'constitution', which was seen as something more appropriate to a nation-state. The British foreign secretary, Jack Straw, tried to defuse this argument by pointing out that golf clubs had constitutions too, but this did little to remove the suspicion that referring to a proposed European 'Constitution' meant envisaging a European super-state.

In the *Nicomachean Ethics* Aristotle describes the constitution (*politeia*) as the formal cause of the city-state (or *polis* – from which we get our term 'politics'). It was a way of ordering the inhabitants of the city-state, a community of a few thousand people. Aristotle compares it to what gives life to an organism, the animating principle or 'soul' of the nation. We come closest to this, perhaps, when we describe someone as having a 'good constitution', which means that they are hardy and resilient. It is this meaning that arguably made the Treaty on a Constitution for Europe unpalatable to many people – not the different institutions and their roles within the European Union, but what having a 'constitution' meant for the idea of Europe not as a collective but as akin to an individual whose 'strong constitution' would refer to their ability to function as a living, breathing whole. They feared that if the EU was trying to devise a 'constitution' it was seeking something that properly belonged to nation-states and therefore must be trying to become a nation-state itself.

The outline proposed here in terms of a supreme court, a bicameral parliamentary system of two houses, a principle of subsidiarity and an active council of ministers which can promote joint working is being applied to a single nation-state, and therefore the idea of developing a written constitution would hardly be controversial. However, though it is not advocating the sort of institutional structure seen in the European Union, it certainly does bear similarities with that structure. It calls for a separation of powers, but that is not only characteristic of the European Union. It is also characteristic of the United States of America, and no one is suggesting that the USA, despite its problems

6 He declared in October 2007 that the aim was to get the provisions of the earlier treaty accepted without having recourse to referenda. See https://euobserver.com/eu-political/25052

a century and a half ago, is currently in danger of ceasing to be a single nation-state.

We have seen that there is a problem of a 'democratic deficit' in the European Union. The top-down approach that is embedded in the structure of the Commission must be changed. Sovereignty-sharing has to be an expression of the popular will rather than simply being an opportunity for a transnational elite to gather in Brussels and enjoy the privileges that go with the job. It is not a question of being able to find a better way of 'selling Europe' to consumers, but of finding more effective ways in which the views of Europeans can make themselves known to those with power in the institutions. Having discussed the pros and cons of 'deliberative mini-publics' and having given some examples of citizens' assemblies, the book has suggested that they should become a permanent part of the EU structure. Endless talk of dialogues, conventions and conferences on the future of Europe must be channelled into a powerful body which is able to overlook whatever the Commission proposes and is able to make proposals itself. The 'movers and shakers' to whom Monnet went in his day to introduce new policies would be unable to move and shake without the consent of the people. The descendants of Monnet's 'Commissariat' need to work hand in hand with the people themselves to propose new legislation.

This must also be the case where a constitution of the UK is concerned. Citizens' assemblies are not focus groups designed to be a testing bed for government to try out new policies. They must be a means by which the people have a chance to propose their own legislation and not just respond to initiatives from the government. This provides a further route through which a reformed House of Lords might acquire a distinctive character. Some of its members could be decided through sortition, in the way jurors are. It would be another way of representing the nations and regions of the UK in all its diversity than that which concentrates on geographical location alone.

All of these are matters open to discussion and doubtless there will be many different proposals for reforming the House of Lords over the months before the next election, as there indeed have been in the past. But the fundamental barrier which has to be overcome remains the issue of parliamentary sovereignty. Unless the House of Commons is prepared to share it, then no meaningful reform of the House of Lords is possible. Nor can there be any meaningful devolution without such a sharing of sovereignty.

It is Michael Keating who above all has been able to understand the way in which rather than 'muddling through' the UK has been lagging behind:

> The devolution reforms at the end of the 20th century were an opportunity to break decisively with the model of the unitary state imposed on a plurinational union, but instead tried to bolt devolution onto that unitary state. Statecraft is once again behind the times.[7]

Devolution cannot, as Keating puts it, be bolted onto a unitary state. The state has to change its form, accept a separation of powers and allow the courts to oversee the workings of a bicameral parliament, including a right to determine whose responsibility a particular issue may be. The courts should also have the right to disapply legislation which is incompatible with an effective Human Rights Act (which could be based on the EU's Charter of Fundamental Rights, a more up-to-date version of the European Convention.) That will mean allowing courts to 'interfere' with decisions of parliament, but it is worth asking why this is perceived to be such a problem. Do politicians want a system where the courts always agree with the decisions of elected representatives? Is Russia a good model for the future of democracy in the UK? Above all, a Council of Ministers should embed joint working among the nations and regions where appropriate. As this book goes to press, a row is brewing over trans rights between Scotland and Westminster. Yet the debate is entirely about who has responsibility for what. Nowhere is there a suggestion of working together to find a solution that might be acceptable to the UK as a whole. It is like the piecemeal reforms to the health service that threaten, for instance, to overthrow Aneurin Bevan's conception of a nationwide service and replace it with one in which prescriptions are free in one part of the UK but not in another. What is needed for the nations and regions is a seat at the top table where they can hammer out solutions together, even if it means agreeing that a proposal from England could be blocked by the others. Whatever was jointly agreed would then become law and would be binding upon all the members of the UK. In other words, it would be similar to the way things work inside the European Union.

By pursuing Brexit Boris Johnson made constitutional change much easier. The sovereignty of the people would be a much better basis for establishing a constitution for the UK than the sovereignty of Parliament. The paradox is that, though himself a Unionist, Johnson has undermined the very principle that would seek to maintain that Union in the traditional manner. Once you begin from a sovereign people rather than a sovereign Parliament, you have to build institutions out of a commitment to liberty, rather than build a commitment to

7 Keating, *State and Nation*, p. 201.

liberty out of institutions. The proposals of the Welsh *Senedd* look like a mature response to this challenge; re-iterating the sovereignty of a Parliament whose authority Johnson effectively undermined does not.

Despite being behind the times, it is still possible that British statecraft could put the pieces in place both for the future of an integrated United Kingdom and for a continued close relationship between not only the UK and the Republic but conceivably between Britain and a United (or Re-united) Ireland. If one could look beyond the presumption of insurmountable barriers between nation-states, one might develop a constitution of the Isles that respected the integrity of four nations and two nation-states. Such ideas are already being discussed in the Republic, where people understand that a united Ireland, if it is possible at all, must make provision for a considerable degree of autonomy North of the border.

At the beginning of 2023 it is difficult to be optimistic, although it is a good sign that constitutional reform is an issue which the Labour Party is prepared to embrace. What is not clear is whether it will embrace to deceive. In the meantime, the UK is marked by a consistent failure to devise a successful constitutional arrangement whereby the people of the two islands could maintain their separate cultures and traditions within a single nation-state. There is still a danger that history will repeat itself with the same British insouciance failing to take measures that might prevent further layers being torn off the onion of UK statehood. Powers repatriated to the UK after Brexit have been seized by Westminster and measures like the Internal Market Bill forced through against the wishes of the devolved authorities. Meanwhile Westminster has flexed its muscles with lots of dinky little deals that are supposed to mark up the presence of the UK in all its constituent parts – a city deal here, a partnership there, what Michael Keating calls 'flying the unionist flag.' Behind such nonchalance is the conviction that it doesn't matter if a little more of the UK is shaved off, the great Westminster tradition will carry on, the 'mother of parliaments' will continue to spread its moral authority wherever it goes and whether it's left-wing heroes like Dennis Skinner glued to his green bench or Tony Benn rummaging around in the cellars of Westminster putting up plaques, or right-wing figures like Enoch Powell celebrating the English alternative to a lost Empire, the parliamentary myth will continue to drive out real constitutional reform. Even the 'reformists' and most of the 'federalists' end up bowing to the great mother whose sovereignty must remain intact. It may be that the Labour Party's proposals will go the same way.

The outcome of this tale of two unions is that where belonging to the European Union is concerned, the United Kingdom may have come and gone, but it has to maintain its own integrity beyond Brexit, not only with the rest of Europe but also with the rest of the Isles. There is a chance over the next five years of realising the principle of 'unity in diversity' in practical terms on two islands which have spent so much of their history in inner conflict as well as facing external aggressors. The United Kingdom has spent countless decades maintaining constitutional absurdities like the House of Lords. It has spent four decades refusing to recognise that it was part of a system of shared sovereignty, and two decades trying to avoid such a system at home. Since 1998 it has been steadily *giving* power to those with whom it always refuses to *share* power. The dynastic conglomerate that is the United Kingdom tries desperately to unite itself around the deaths and coronations of monarchs, not to mention the lifestyle of a dysfunctional royal family. It seems determined to prefer Ruritania to reform. It is time to get real.