# Discussing Federalism: John Law’s Theory Applied to The United Kingdom and The European Union

Author: Marta Soria Heredia

University of Oxford

Universitat Pompeu Fabra

Abstract: This article will discuss federalism from different perspectives to conclude there is a clear need for an objective commonly agreed-upon analysis to establish the character of a state. In that light, John Law’s theory of federalism will be brought forward. It will be applied to the case of the United Kingdom and the European Union to conclude neither of them can be considered a federalist state. In the case of the latter, disputing Law’s own criteria.

Key Words: Federalism, John Law, United Kingdom, Devolution, European Union, European Court of Justice

Abstract: Este artículo discute el concepto de federalismo desde distintas perspectivas, para resaltar la necesidad de una definición objetiva, clara y común que aplicar al carácter de un estado. En ese sentido, se aplicará la teoría federalista de John Law al caso del Reino Unido y la Unión Europea para concluir que ninguno de ellos puede considerarse un estado federal. En el segundo caso, tal conclusión irá en contra del criterio del propio Law.

Palabras Clave: Federalismo, John Law, Reino Unido, Devolución, Unión Europea, Tribunal de Justicia de la Unión Europea

Abbreviations and initials: IRA (Irish Republican Army), MP (Member of Parliament, United Kingdom), EU (European Union), ECJ (European Court of Justice), TEU (Treaty on European Union), TFEU (Treaty on the Functioning of the European Union)

## Introduction

It is necessarily difficult to define a form of government characteristics of which have changed through the years and that is currently being applied in different regions of the world in crucially different ways.

The lack of a common agree-upon definition creates real mayhem in its analysis, with doctrinal discussion of political theory being mixed with the ascertaining of the facts regarding a specific case. As if legal discussion on matters as the entrenchment of devolved powers in the United Kingdom or the primacy and direct effect of the law of the European Union were not complex enough, we must add the lack of a coherent approach to a key idea as federalism.

The aim of this article will be to, firstly, prove mere comparative approaches offer very limited help in this matter. Secondly, introduce a coherent and comprehensive definition among the wide array of possibilities which can be found. Thirdly, apply that definition to the cases of the United Kingdom and the European Union in the hope that practical examples may help shed light on our more abstract point on methodology. That is, clarity and precision in a disputed definition help further our understanding of a given topic; and do not preclude us to continue the debate on that (disputed) definition in parallel.

## Is the United Kingdom a federal state? Elliott and Thomas as an example of comparative approach

Recent developments have brought about an enormous change on the vertical distribution of power in the United Kingdom, creating new layers and political units and granting them unprecedented levels of authority. Thus, there is a point on asking whether the United Kingdom, with the rapid changes that has been implementing in recent years, has become *de facto* a federal state. I will argue it has not (yet), but the disparity on scholar approaches to the matter bring about unnecessary unclarity.

Elliott and Thomas[[1]](#footnote-0) address the question from a comparative perspective. By comparing the United Kingdom with the United States, the paradigm of federalism, they conclude the United Kingdom is not a federal state and give three main reasons for it.

1. Asymmetry

They argue that devolution has been asymmetrical, so different parts of the United Kingdom have different amount of devolved power whereas in the United States all fifty states have the same amount of power and the same institutions, including legislative and administrative autonomous powers.

It is true that, say Scotland, has undoubtedly been devolved more power than Wales. Scotland and Northern Ireland have been historically recognized as different systems with their own jurisdictions and that has brought about more autonomy than that of Wales, which continues to share legal jurisdiction with England.

Nevertheless, the process of devolution shows a **tendency to uniformity** as more and more powers are devolved. Although Scotland and Northern Ireland continue to gather more powers -as an example, the Scotland Act 2016, which amended the Scotland Act 1998, gave Scotland competence on, among others, taxation and welfare payments[[2]](#footnote-1) making it practically fiscally autonomous- it has been the rapid devolution of powers to Wales that has enhanced uniformity in the legal landscape of the regions. Until the Wales Act 2017 amendment to the Wales Act 2006, Wales had a conferred rather than reserved powers model, meaning it can now legislate in all matters not reserved to the United Kingdom Parliament. Before that, it could only legislate if specifically allowed to do so.

Moreover, it has been argued this lack of uniformity may in most cases have a *raison d’être*.[[3]](#footnote-2) What comes to mind when reading this may probably be the case of Northern Ireland, as its devolution began in response to the terrorism threat posed by IRA and after a civil war and negotiation period finally ended by the Belfast Agreement.[[4]](#footnote-3) Respecting that agreement, or in Scotland’s case, respecting its own widely developed historical legal system, must need different approaches. That same thesis can be defended for Wales, the process of which has been slower for a traditional lack of interest (the conservative party ruling in the late seventies did not want more devolved powers[[5]](#footnote-4)) and has recently gained traction due to an increase of that willingness.[[6]](#footnote-5)

As an example of fundamental difference, Wales does not have competence in criminal law or its own court system on the basis that it has a shared legal jurisdiction with England. That restriction has impact on the law *per se*, but also touches upon the criminal justice system including prison administration or legal education, now very similar in both England and Wales. As Wincott[[7]](#footnote-6) points out, that has further consequences on Wales’ power to regulate other policy areas: he mentions as an example “40% of male Wels prisoners are held in England” and the fact there is “no women’s prison in Wales”, which curtails Wales’ ability to bring forward social policies on their behalf. However, Wincott further argues legal professionals and law universities around Wales are not looking forward to a change in the system, knowing that would negatively impact their work or the future career expectations of their students. Wincott gives detailed reasons to justify Wales’ differentiation in this aspect and the difficulty to overcome it giving its historical intertwining with England and general lack of interest from the welsh to achieve a higher level of autonomy.

All of this must make us question: is uniformity an insurmountable obstacle for a state to be regarded as federal? It is true each difference (e.g. the lack of a differentiated legal jurisdiction) may have further, deeper, consequences. Nonetheless, especially when there are reasons to justify those differences, that lack of uniformity might not be that relevant.

Going further, if devolved powers got to be uniform, would that imply the United Kingdom is a federal state? The answer is no. On the one hand, because there are examples of federal states with different powers given to different regions (e.g. India). On the other hand, because intuitively for a state to be federal, the powers of its regions need to be relevant, there must be some minimum requirement.

1. Top-down

Elliott and Thomas[[8]](#footnote-7) further argue the United States system comes from a bottom-up approach, whereas the United Kingdom is following a top-down system. Why that would be a problem is not clear. It would be desirable to change the political landscape so citizens would be directly consulted, but the Westminster Parliament is a legitimate institution that could make that decision same as any Parliament of, say Texas, before the federal state of the USA was born. The legitimacy of that institution comes directly from the people and thus its devolving powers works the same as powers arising from a smaller entity flowing towards a bigger one.

1. Constitutional (in)security

For now, Elliott and Thomas approach seems unsatisfying. Symmetry and bottom-up granting of powers do not make a multi-layered government into a federal one. Their third element, however, is different. They signal there is a problem with the constitutional security of the United Kingdom’s regions. Following their comparative logic, the regions have less constitutional security than the states forming the United States and that is enough to justify this point being problematic for the consideration of a state as federalist.

This element does seem relevant although not for the reasons discussed above, and thus we will discuss it shortly.

## The need for an objective approach to identify a *de facto* federal state: Applying Law’s theory to the case of the United Kingdom

From the difficulty in finding a definition arises a difficulty in analyzing whether a state is federal or not. To try and center the debate, we will bring forward John Law’s definition of federalism.[[9]](#footnote-8)

Law defines federalism as a plurality of levels of government with **equal status**. The United Kingdom undoubtedly has a multi-layered political system. The concept of equal status is more complicated. “Equal status” cannot mean equality or it would leave out most systems of European federalism. From Belgium’s system of two components with its minority safeguards to protect the francophone minority (that in practice only lets regions control competences given to them by the federal level); to Germany’s system that allowed the federal government to largely legislate on civil and criminal law thus exhausting the state's capacity to do so (as they can legislate as long as the federal government does not).

According to Law, equal status does not require perfect and permanent equality between governments, but rather a more **general equality of rank or constitutional status within the essential structure of the political system**.[[10]](#footnote-9) In contrast, we can talk of confederation where the general government is subordinate to regional governments and of devolution where the regional governments are the subordinate ones. Mere distribution of power (Germany, Belgium), even if it creates asymmetry (on vertical or horizontal level) does not preclude a country from being a federal state. Therefore, Law’s approach answers the concerns arising from our previous section on uniformity.

What about ascertaining that equality in status? Does it have a relation with the notion of constitutional security? Following his objective approach, Law suggests a three-legged test to assess that equal status:

1. Constitutional protection of the regional governments
2. Direct effect of the law of the general government
3. Majority-voting in the decision-making process of the general government

The second and third elements are directed to ensure enough power is given to the federal level of government, which is not a problem in the case of the United Kingdom. The fact the process of devolution has followed a top-down approach minimizes the need for the central power to protect its own sovereignty and control over the devolved legislatures. Moreover, traditional fundamental principles of the British constitution as parliamentary sovereignty[[11]](#footnote-10) help protect those centralized institutions.

That leaves us with the first leg of Law’s test, the relevant one in the case of the United Kingdom: **constitutional protection of the relevant governments**. For a state to truly be federal it is necessary that the prerogatives of the regional governments are entrenched in the constitution, so they are truly independent. The central government cannot be able to reduce or abolish their powers unilaterally.

The principle of parliamentary sovereignty ensures this first leg of the test is not passed by the United Kingdom. Scotland and Wales have provisions stating that devolution is a permanent feature of the United Kingdom constitution and can only be abolished by referendum. However, no one can impose limits on the Parliament.[[12]](#footnote-11) Should they desire to do so, they could pass any and all acts with the aim to reverse devolution.

What if Westminster imposed a limit on itself? The Scotland Act 2016 passed in Westminster recognizes the permanence of the Scottish Parliament and Government, but it is dubious that a Parliament can legally bind its successor. The Sewel convention (conventions are critical in the United Kingdom’s constitution, too) recognizes that English Parliament will not normally legislate in matters affecting devolved legislatures without consulting, but again it is a political limit, not a legal one. That is because conventions are rules flowing from common use and practice, not Parliament nor the Courts. A convention binds political actors to follow it or else they might face serious political consequences, but it cannot impose legal consequences if disapplied.

Although the Sewel Convention was enacted in Statute by Westminster in the Scotland Act 2016[[13]](#footnote-12) and the Wales Act 2017[[14]](#footnote-13) and thus would be susceptible to have legal consequences, both its literal meaning —Parliament will “not normally” legislate on matters affecting the devolved legislature— and the continued importance of Parliamentary Sovereignty seem to point out it does not really preclude Parliament from legislating in whichever way they deem appropriate.

Bogdanor[[15]](#footnote-14) has defended a federal devolution in the United Kingdom precisely because of the practical difficulty of “going back”. For him, power devolved will be power transferred because it is becoming almost politically impossible for Westminster to unilaterally revoke what is being done. Law dismisses this arguing **theoretical classifications should not depend on what can be done at a certain point in time.**[[16]](#footnote-15) For him, if a right of revocation would be possible at a given point, then “the regional governments must be considered subordinate to the general government”. We can talk then of devolution but not of federalism, a distinction that must be kept away from the “realm of speculation”.

I would argue it from another perspective. Westminster retains the power to decide if devolution continues and how as well as the legal power to go back. Even from a political constitution perspective, that agrees with political limits being correct and enough to quasi-entrench, it would be naive to say reversing devolution “cannot be done”. Indeed, it may “be done”, especially because the process has been done very fast, with not much public consultation and without frontally addressing the “problem of England” which accounts for 85% of the total population.

The West Lothian question is an example of this discomfort. The West Lothian question, first put forward by MP for West Lothian Tom Dalyell, asks what the powers and duties of Westminster regarding the devolved territories are.[[17]](#footnote-16) The problem is the question does not have a satisfactory answer. If Westminster does not look after the interests of the devolved legislatures while having power over them, they will suffer of underrepresentation as they account for roughly 15% of the population. They could become an oppressed minority. On the other hand, if it is the duty of Westminster to look after everyone’s interests, the devolved territories are privileged in that they have their own assemblies, legislating only on their behalf. Oliver[[18]](#footnote-17) has argued England has been left “without a voice” as Westminster Parliament must look after the interests of the whole of the United Kingdom and doing otherwise would look partisan.

Even if addressed by Cameron’s EVEL[[19]](#footnote-18), the West Lothian question remains unanswered.[[20]](#footnote-19)EVEL requires a double majority for matters affecting only England. Firstly, it needs an English-only MP majority; secondly, a general MP majority in the house must agree. As as a general majority of MPs is still needed and because England continues to not have its own executive and its executive may not reflect its wishes, the protection of England remains an open debate.[[21]](#footnote-20) Voices are being raised in this regard, voices which may bring about revocation of certain concessions[[22]](#footnote-21) so Bogdanor’s impossibility may be too far-fetched and we may indeed see his “practically impossible going back” coming into play.

To conclude this point, it is true things are changing very fast on this front. After all, devolution has been characterized as a process not an event. Nonetheless, following Law’s theory of federalism, it cannot be said the United Kingdom is currently a federal country *de facto* because it lacks equal status between layers of government. Even if looked from a political perspective (much loved in the UK) of what is doable, devolved legislatures remain too unentrenched and their powers **potentially reversible**.

As can be seen, an objective and specific definition has allowed for a much more useful and illuminating discussion about the organizational status of a multi-layered state.

## Law applied to the case of the European Union: Effectiveness of the general government and what may be lacking from a democratic perspective

We have discussed Law’s definition of federalism to be useful in ascertaining whether a state is federal or not. Let’s remember the three legs of his test, which are as follows:

1. Constitutional protection of the regional governments
2. Direct effect of the law of the general government
3. Majority-voting in the decision-making process of the general government

In the case of the European Union, the first leg is more than covered. The constitutional entrenchment and independence of regional governments is secured. It is the second and the third one that can be disputed, those whose interest is to protect the **effectiveness of the general government.**[[23]](#footnote-22)

Jean Monnet envisioned an autonomous authority that did not depend on member states for decision-making, with its own Parliament and Court of Justice. His idea was linked to a federal state of Europe. From a formal point of view, the Union could be argued to have those institutions and characteristics: the principles of primacy and direct effect of EU law, a European parliament and the European Court of Justice (from now on, ECJ), etc. However, it is something widely agreed upon that the European Union, while it may be in the process of becoming one, is not for now a federal state.[[24]](#footnote-23)

1. Direct effect of the law of the general government

The Union lacks essential powers characteristic of a state. It lacks competence on tax and finance so its whole budget depends on member states. It does not have competence on security and even though it does on frontier control, the lack of cooperation and a common project on the recent migrant crisis shows states still view these matters as internal. It traditionally lacked competence on foreign relations, although the appointment of a high representative[[25]](#footnote-24) may change that in due time.

This lack of power is not problematic to Law’s theory. He discards previous definitions that might exclude the EU in the sense that they require a certain amount of power for the different layers of government or that they are not subordinate to the other in various aspects.[[26]](#footnote-25) He also discards traditional definitions as that of Wheare[[27]](#footnote-26) because of their ambiguity and over-reaching nature.

He further denies that the EU being able to do only what treaties allow might be a problem. From the one hand, that lack of original power is also accepted in countries with codified constitutions. As those constitutions, treaties can be amended. From the other, he understands coordination is complex and the entrenchment provided by the amending of the constituent treaties ensures a secure position for the general government.

However undeniable it may be that the EU is different to traditional states, especially in the sense that the original treaties give it a lot less power than normal constitutions do, Law defends the EU complies with the requirement of direct effect. That is because the ECJ has developed by itself the necessary mechanisms for the law it applies to be complied with. Indeed, it has been by judicial creation that European law has acquired the desired direct effect status.

Since Van Gend en Loos[[28]](#footnote-27) (1963), it has been clear the European Union has an autonomous and self-sufficient legal order in the sense it is complete in itself and can resort to legal principles to decide cases which it has not specifically legislated on. Furthermore, Van Gend en Loos[[29]](#footnote-28) established that a European law provision will acquire direct effect if it is sufficiently clear, establishes an unconditional obligation and is non-dependent on national implementation. Should a provision be considered to have direct effect, its enforcement could be claimed before national courts. Costa v ENEL[[30]](#footnote-29) (1964) continued this line and established EU law primacy in the sense member states intern laws could not counter it. EU citizens had the right to resort to the ECJ to make sure their rights under EU law were enforced.

The EU has a wide collection of legislative instruments.[[31]](#footnote-30) Although Treaties and Regulations do not need transposing to be enforceable and thus have direct effect, Directives (in this case, only some of them) and Decisions do need members states actioning to transpose them. The Union needs to control this process is done in due time, but also needs to make sure the content of the new national laws is well-suited to the objectives the directive seeks to attain. As delays and lack of transposing are usual, this could be argued to undermine the direct effect needed according to Law.

The reason for this complication (e.g. directives lacking direct effect) can be seen to be that member states are hesitant to give more power to the union, as the transposing process allows them to control their own legal orders up to some point. However, it should be noted directives intend to achieve objectives, so flexibility to accommodate the directive to states specific needs is an asset. Moreover, direct horizontal effect of directives is recognized if the state fails to transpose in time parts of the directive that are directly enforceable or if the provisions are unconditional and sufficiently precise.[[32]](#footnote-31) Francovich v Italy[[33]](#footnote-32) (1991) more recently developed state liability when existing national laws go against a directive. Therefore, these limitations are being reduced with time and even in its current state they cannot be said to counter the direct effect applicable to the rest of EU enacted legislation.

From another point of view, there continue to be many aspects in which EU is directly denied authority (e.g. criminal law) and many others in which its authority is restricted. At the same time, these limits can be interpreted, and ambitious proposals as a codified unification of European contract of law are being discussed, political intention being more of an obstacle than legal limitation. However, its competence is so strong in the substantive areas in which it does have competence, Law’s test is satisfied.

1. Majority-voting in the decision-making process of the general government

Law[[34]](#footnote-33) considers the element of direct effect achieved in the EU. However, it is the case of the EU which brings him to add a third requirement to the test of federalism: that majority-voting is used in the process of legislation itself to take away blocking power from individual member states that may deter the general government from decision-making.

For Law, the Single European Act[[35]](#footnote-34), that came into effect by 1987, achieves this objective. Among others, the Single European Act established competences exclusive to the Union and shared competences in which the Union would only have the ability to cooperate with the primary holders, member states. The Act marked European integration and the role of participation in European institutions.

It is in this point our argumentation will differ from that of Law for a variety of reasons.

#### The democratic deficit

The institutions of the Union have democratic lacks[[36]](#footnote-35) that could be overlooked when analyzed from the perspective that the Union is not sovereign in itself but depends on donations of sovereignty from member states. An example is the lack of separation of powers, especially the confusion between legislative and executive. Another, the lack of democracy with almost no directly elected members in those powers and the decision-making process *per se*, characterized by the following.[[37]](#footnote-36)

Firstly, the **Commission** proposes legislation almost exclusively, but each member is appointed by one-member state, not the public. It may make sense as commissioners are supposed to be appointed on the ground of their competence (art. 17(3) TEU) and act according to the interests of the Union (art. 17(1) TEU); something the public may not be prepared to vote on- that is, following a not-nationalistic line.

Secondly, the **European Parliament**, the only directly elected institution, has historically been the less powerful. The Treaty of Lisbon[[38]](#footnote-37) reforms increased the number of norms that needed to follow the ordinary process to pass —that meaning consent of Parliament—, but that does not apply for all laws and is, in essence, not much more than a veto power. Even if Parliament is needed for a law, its voting process requires a double majority with a minimum number of member states and a minimum percentage of citizens voting for. That may be interpreted to seek to secure all voices are heard (as population is not uniformly distributed) or more straightforwardly, to recognize representatives will work for their national interests, those being different from the ones of the union. According to Article 10(1) of the TEU, states of the Union shall function as a representative democracy, with citizens being directly represented in the European Parliament (10(2)). It is debatable whether that is really so. There are balancing mechanisms put into place, including Parliament’s ability to appoint the members of the Commission (art.17(7) TEU) —although it is well known the vote is a collective one for the whole of the Commission and the proposed configuration of Commissioners has never been voted against— or the power to vote on a motion of censure to the Commission (art. 234 TFEU). However, those mechanisms may not be enough to counter Parliament’s fundamental lack of power.

Thirdly, the institution with more power, which determines policy and is always needed to pass laws and decide on budgetary matters, is the **Council of the European Union**. That the formation of the most powerful institution consists of one minister of each member state says a lot about the relevance of particular states within the union, and more arguably questions the independence of the union from those particular states as an autonomous being and the poor attention paid to democracy and accountability.

Law requires majority voting in the affairs of the general state to take away the option of a veto power, but it is arguable whether majority-voting should refer to a majority **of the people** and whether that can be achieved without a proper representation mechanism.

Hueglin and Fenna’s definition of federalism includes the notion of participation: “In a federal system of government, sovereignty is shared and powers divided between two or more levels of government each of which enjoys a direct relationship with the people”.[[39]](#footnote-38)

Their definition, among others, might supply the biggest criticism to Law, with his potentially being over-including and not taking into account essential qualities to a democratic state, absolutely necessary in a contemporary (supposedly federal) state.

#### The possibility to opt-out

The issue of the priority of EU law over national law is at this point worth noting. EU has been clear on this[[40]](#footnote-39), but member states have not uniformly accepted it. For example, the United Kingdom has traditionally refused to accept this priority. When forced in Factortame[[41]](#footnote-40) to issue an injunction to disapply the Merchant Shipping Act 1988, the House of Lords was not clear on why. Tomkins[[42]](#footnote-41) has argued that the court applied EU law as a separate order, instead of common law; and that parliamentary sovereignty being a product of that common law, it is not affected by the decision. That view faces obvious questions: does a new legal order equally applicable and out of parliamentary direct control not hurt parliamentary sovereignty? The issue is not yet clear.

The most popular view among scholars is that of courts being willingly ambiguous on this issue. Indeed, Lord Bridge’s position in Factortame[[43]](#footnote-42) can be interpreted to suit those pro-national sovereignty that would not want to have their courts yielding to EU requirements, as well as those pro-union that defend EU law as superior to the national jurisdiction. As it was the will of Parliament that the United Kingdom should become a member of the Union, and it can decide to exit it whenever (as indeed it has done), Parliamentary Sovereignty remains intact. Proof that courts look in this direction can be found in R (Miller)[[44]](#footnote-43) in which it was argued that the European Communities Act 1972, by which the United Kingdom joined the Union, established EU laws and its interpretation as new sources of law that became one with the preexistent national ones.

The reason this problem continues to create friction, to the point EU law primacy has become one of the main arguments for Brexiters and general detractors of the Union, may be very much related to that lack of democratic quality within the EU. The fact treaties entertain the option to opt-out seems to me to enhance that democratic quality, leaving the decision directly to the people or its closer representatives while acknowledging the EU lacks the sovereignty to preclude them from exiting.

What does not enhance that democratic quality, and directly affects what Law understands as majority-voting in the federal decision-making process, is another opt-out option. In order to accommodate different views regarding the Union and different intentions of member states, recent developments have allowed for willing member states to **opt-out of enacted legislation**. The UK has so far opted-out four times, on issues affecting key policy areas like the Schengen Agreement and the Monetary Union.

Given Law brings forward the requirement of majority-voting to foster efficiency of the general government as opposed to individual member states having veto power[[45]](#footnote-44), this option is polemic to say the least. It does not grant a member state the power to block that legislation, but it does grant the power to not become bound by it. Which does seem to attack that essential efficiency required for a state to be considered as federal.

## Conclusion

To conclude, the truth is the European Union is very recent. Its very definition has rapidly changed: from the point of view of an economic union, to the more ambitious objectives of the Schuman Declaration (Monnet’s vision), it has been redefining itself almost year to year. From a *lege ferenda* perspective —what would be desirable in utopia—, it is not a federal state just yet. Or it should not be. It clearly lacks essential points of what we consider a democratic state of the XXI century. I have further argued it also lacks *de lege lata* —what actually is— characteristics of a federal state following Law’s theory.

However, the increased areas of law in which it is legislating, the more and more ambitious objectives of that legislation and the constant re-imagining to enhance the legitimacy of its institutions and directly engage the public, sometimes by forcing member states to uneasy positions, are signs. So are the persistence of the ECJ in defending its law and developing more mechanisms and doctrines to enforce it against individual member state’s wishes; and the general direction of the Lisbon Treaty reforms. Signs that point to a federal state in the making. Whether that result will be achieved or not depends on the wishes of member states and, as we have seen with Brexit, those wishes are fundamentally uneven. What is clear is there must be a strict control should we continue to advance towards a closer union.

A similar, if opposite, analysis has been made regarding the United Kingdom. The requirements to foster the efficiency of the general state are not as important in this context as the constitutional security or constitutional protection of the regions. Existing limits and protections have been deemed not enough, and arguments as Bogdanor’s defending the equal protection political measures, as conventions can grant, have been discarded on the grounds of Parliamentary Sovereignty doctrine overcoming them and the actual possibility of change regarding the current *statu quo*.

This article has begun with Elliott and Thomas as an example of how complicated an approach to discussing *de facto* federalism can be, when done badly. Their comparative approach was debatable at most points and failed to deliver a cogent argument about the political organization of the United Kingdom, as an example. It would have failed equally should it have addressed any other political entity. Thus, our main aim seems achieved. A clear, structured and defined approach to the definition of federalism is the only way to analyze a state without causing real mayhem. Whether the chosen definition be that of Law, Weary, Watts, Hueglin and Fenna or many more we fail to mention, is not as relevant as that definition being clearly established beforehand.

## Bibliography

Books and Articles

Bogdanor V, Devolution in the United Kingdom (Oxford University Press 1999)

——, ‘Imprisoned by a Doctrine: The Modern Defence of Parliamentary Sovereignty’ [2012] Oxford Journal of Legal Studies

Brown GW, McLean I and McMillan A, A Concise Oxford Dictionary of Politics and International Relations (4th edn, Oxford University Press 2018)

Elliott M and Thomas R, ‘Devolution and the Territorial Constitution’, Public Law (3rd edn, Oxford University Press 2017)

Gover D and Kenny M, ‘Answering the West Lothian Question? A Critical Assessment of “English Votes for English Laws” in the UK Parliament’ (2018) 71 Parliamentary Affairs

Hayton R, ‘The Coalition and the Politics of the English Question’ (2015) 86 The Political Quarterly 125

Hueglin T and Fenna A, Comparative Federalism: A Systematic Inquiry (Broadview Press 2006)

Kelemen D and Nicolaidis K, ‘Bringing Federalism Back In’, Handbook of European Union Politics (SAGE 2006)

Kincaid J, ‘Confederal Federalism and Citizen Representation in the European Union’ (1999) 2 West European Politics

Law J, ‘How Can We Define Federalism?’ (2013) 5 Perspectives on Federalism

Martin DE, European Union and the Democratic Deficit (John Wheatley Centre 1990)

Oliver D, Constitutional Reform in the United Kingdom (Oxford University Press 2003)

Tierney S, ‘Devolution in Historical and Political Context’, Public Law (3rd edn, Oxford University Press 2017)

Tomkins A, Public Law (Clarendon Law Series, Oxford University Press 2003)

Watts R, Comparing Federal Systems in the 1990s (McGill-Queen’s University Press 1998)

Wheare KC, Federal Government (4th edn, Oxford University Press 1963)

Wincott D, ‘The Commission on Justice in Wales (Thomas Commission)’ (UK Constitutional Law Association, 2018) <https://ukconstitutionallaw.org>

## Legislation

British Legislation

Scotland Act 1998

Scotland Act 2016

Wales Act 2006

Wales Act 2017

European Legislation

Single European Act 1987

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01

Treaty on the European Union (TEU) [2008] OJ L129/35

Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1

Case Law

British Case Law

R (Factortame Ltd) v Secretary of State for Transport [1990] UKHL 7; [1999] UKHL 44

R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5

European Case Law

Flaminio Costa v ENEL [1964] C-6/64

Francovich v Italy [1991] C-6/90

R v Secretary of State for Transport, ex part Factortame [1990] C-213/89; (1991) C-221/89; (1996) C-46/93

Van Duyn v Home Office [1974] C- 41/74

Van Gen den Loos v Nederlandse Administratie der Belastigen [1963] C-26/72

1. Mark Elliott and Robert Thomas, ‘Devolution and the Territorial Constitution’, *Public Law* (3rd edn, Oxford University Press 2017). [↑](#footnote-ref-0)
2. See: Scotland Act 2016 Part 2 “Tax. Borrowing and financial information” and Part 3 “Welfare benefits and employment support”. [↑](#footnote-ref-1)
3. Stephen Tierney, ‘Devolution in Historical and Political Context’, *Public Law* (3rd edn, Oxford University Press 2017). [↑](#footnote-ref-2)
4. The Good Friday Agreement or Belfast Agreement 1998 is the basis for Northern Ireland’s devolved powers and established the general rules for the running of its institutions, with the aim to foster peace. [↑](#footnote-ref-3)
5. 75% of the welsh population voted against creating an Assembly for Wales in 1979. [↑](#footnote-ref-4)
6. Blair’s government offered more powers to Wales in 1997 which were accepted by a 50,3% of the welsh population that same year thus bringing about the creation of their own Assembly; in 2011 Wales votes for that assembly to gain primary law-making powers by 63,5% of votes – BBC’s “How Welsh devolution has evolved over two decades”. [↑](#footnote-ref-5)
7. Daniel Wincott, ‘The Commission on Justice in Wales (Thomas Commission)’ (*UK Constitutional Law Association*, 2018) <https://ukconstitutionallaw.org>. [↑](#footnote-ref-6)
8. Elliott and Thomas (n 1). [↑](#footnote-ref-7)
9. John Law, ‘How Can We Define Federalism?’ (2013) 5 Perspectives on Federalism, p. 88. [↑](#footnote-ref-8)
10. Ibid., p. 102. [↑](#footnote-ref-9)
11. It is a defining feature of the British constitution that no one can act against an act of the Parliament. The United Kingdom’s Parliament can legislate however they want with no limits and their acts cannot be contested, not even by courts. [↑](#footnote-ref-10)
12. This has been disputed in regard to the European Union after cases such as R (Factortame Ltd) v Secretary of State for Transport and, in general, by scholars as Vernon Bogdanor, ‘Imprisoned by a Doctrine: The Modern Defence of Parliamentary Sovereignty’ [2012] Oxford Journal of Legal Studies. [↑](#footnote-ref-11)
13. Which amends the Scotland Act 1998 section 28(8) to state “But it is recognized that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament”. [↑](#footnote-ref-12)
14. Which amends the Wales Act 2006 section 107(6) to state “But it is recognized that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Assembly.” [↑](#footnote-ref-13)
15. Vernon Bogdanor, *Devolution in the United Kingdom* (Oxford University Press 1999), p. 291. [↑](#footnote-ref-14)
16. Law (n 9), p. 111. [↑](#footnote-ref-15)
17. Garrett W Brown, Iain McLean and Alistair McMillan, *A Concise Oxford Dictionary of Politics and International Relations* (4th edn, Oxford University Press 2018), p. 88 [↑](#footnote-ref-16)
18. Dawn Oliver, *Constitutional Reform in the United Kingdom* (Oxford University Press 2003), p. 290. [↑](#footnote-ref-17)
19. Procedures amending the regulation of the House of commons known as “English voter for English laws”. [↑](#footnote-ref-18)
20. For a view explaining why, see Daniel Gover and Michael Kenny, ‘Answering the West Lothian Question? A Critical Assessment of “English Votes for English Laws” in the UK Parliament’ (2018) 71 Parliamentary Affairs 760. [↑](#footnote-ref-19)
21. Richard Hayton, ‘The Coalition and the Politics of the English Question’ (2015) 86 The Political Quarterly 125. [↑](#footnote-ref-20)
22. Tierney (n 3). Argues the piece-meal approach in which constitutional change has been made has “forgotten” England and further believes the coming changes in British federalism will be linked to the English problem. [↑](#footnote-ref-21)
23. Law (n 9). [↑](#footnote-ref-22)
24. The idea of “multi-state federalism” -Daniel Kelemen and Kalypso Nicolaidis, ‘Bringing Federalism Back In’, *Handbook of European Union Politics* (SAGE 2006).- is interesting on this topic but will not be covered for space reasons; so is Kincaid’s “confederal federalism” -John Kincaid, ‘Confederal Federalism and Citizen Representation in the European Union’ (1999) 2 West European Politics 34.-, which will also be avoided. [↑](#footnote-ref-23)
25. Position created under the Treaty of Amsterdam 1997 coming into force on May 1999. [↑](#footnote-ref-24)
26. i.e. Ronald Watts, *Comparing Federal Systems in the 1990s* (McGill-Queen’s University Press 1998).6-7 as cited in Law (n 9). 95: “federations represent a particular species in which neither the federal nor the constituent units of government are constitutionally subordinate to the other, i.e. each has sovereign powers derived from the constitution rather than another level government, each is empowered to deal directly with its citizens in the exercise of its legislative, executive and taxing powers and each is directly elected by its citizens”. [↑](#footnote-ref-25)
27. Kenneth C Wheare, *Federal Government* (4th edn, Oxford University Press 1963), defined a federal state as one in which powers are divided “so that the general and regional governments are each within a sphere coordinate and independent”. [↑](#footnote-ref-26)
28. Van Gen en Loos v Nederlandse Administratie der Belastigen [1963] C-26/72. [↑](#footnote-ref-27)
29. Ibid. [↑](#footnote-ref-28)
30. Flaminio Costa v ENEL [1964] C-6/64. [↑](#footnote-ref-29)
31. Art. 288 Treaty on the Functioning of the European Union (TFEU) 2010. [↑](#footnote-ref-30)
32. Van Duyn v Home Office [1974] C-41/74; Paragraphs [13], [14], [15]. [↑](#footnote-ref-31)
33. Francovich v Italy [1991] C-6/90. [↑](#footnote-ref-32)
34. Law (n 9), p. 107. [↑](#footnote-ref-33)
35. Single European Act (SEA) 1987 was the first important revision to the Treaty of Rome 1957. [↑](#footnote-ref-34)
36. Among others, David E Martin, *European Union and the Democratic Deficit* (John Wheatley Centre 1990). [↑](#footnote-ref-35)
37. As stated in the Treaty on the European Union (TEU) 1992 Title III “Provisions on the institutions” (art. 13 to art.19). [↑](#footnote-ref-36)
38. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01. [↑](#footnote-ref-37)
39. Thomas Hueglin and Alain Fenna, *Comparative Federalism: A Systematic Inquiry* (Broadview Press 2006). [↑](#footnote-ref-38)
40. Flaminio Costa v ENEL [1964] C-6/64. [↑](#footnote-ref-39)
41. Factortame I&II: R (Factortame Ltd) v Secretary of State for Transport; R v Secretary of State for Transport, ex part Factortame [1990] UKHL 7; [1990] C-213/89; (1991) C-221/89; (1996) C-46/93; [1999] UKHL 44; [2000] EWHC 179. [↑](#footnote-ref-40)
42. Adam Tomkins, *Public Law* (Clarendon Law Series, Oxford University Press 2003). [↑](#footnote-ref-41)
43. Factortame (41). [↑](#footnote-ref-42)
44. R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5. [↑](#footnote-ref-43)
45. Law (n 9), p. 107: “majority-voting in the process of legislation itself, attained with the Single European Act of 1987. This is needed in order to make the upper tier fully operative as a second level of government. In acquiring this element, the blocking or ‘veto’ power of individual regional governments is ended within the common sphere of action and a significant measure of regional autonomy is sacrificed for gains in the efficiency of the general government (…) general government ceases to be a dependent or subordinate entity, an agent of the regional governments, and comes into an equal relationship with them; and when the territory of confederalism is exited and that of federalism is entered”. [↑](#footnote-ref-44)