

# Scottish Policy Innovation Forum

**Scottish Policy Innovation Forum**  
***Scotland's constitutional future***  
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**In partnership with the David Hume Institute**

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**Minute of proceedings**

*Chaired by Professor Alice Brown*

The seminar chair, **Professor Alice Brown** of Edinburgh University, explained that the seminar took place at a crucial time. Scotland had had a devolved administration for ten years, and there was an appetite for a revision of the devolution settlement. However, there was widespread disagreement about the form that any such revision should take. This was evidenced by the divergence between the various initiatives currently taking place, most notably between the Scottish Government's National Conversation and the Commission on Scottish Devolution, which had recently published its proposals. There was a lively discussion of constitutional matters within the political sphere and elsewhere. Earlier that week, the SNP administration had announced its plans to bring a bill on an independence referendum before the Scottish Parliament. But the issue of Scottish independence was not the only one at stake: the relationship between Scotland, the United Kingdom, the European Union and the rest of the world were all relevant to the debate.

The seminar intended to bring two important but often overlooked perspectives to the debate: English attitudes to the current devolution settlement, and the legal implications of constitutional change, whatever form it might take. While any constitutional change would necessarily have economic ramifications, it was important that the debate was not given over wholly to considerations about economics and finance. The seminar therefore intended to provide a place for discussions about the constitutional and institutional aspects of the debate on Scotland's future.

The first paper of the day was given by **Guy Lodge** of ippr and **Roger Gough**, of Localis, who discussed some English perspectives on Scottish devolution. **Gough** began with an observation that when so-called English perspectives on Scottish devolution were discussed, the conversation often came back to being about

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England, and not about Scotland: what impact Scottish devolution had had on England, to what extent English interests had been served, and to what extent there were English 'grievances' arising from the devolution settlement. The two most prominent examples of this were the West Lothian question and the Barnett formula, but they were certainly not the only issues. Although Scottish devolution was by no means the most important issue in English policy discourse, aspects of it were being discussed on many levels, particularly in the blogosphere. There was therefore a definite undercurrent relating to Anglo-Scottish relations, and this was something of which the two largest political parties in England were nervously aware. While both parties were sincere in their commitment to the Union, self-interest was pushing them in different directions as to how to deal with unease about the present arrangements. Even if the Conservatives were to make gains in Scotland and Wales in the next general election, they would remain a predominantly English party, whereas Labour might find themselves in a position at some point in the future when support in Scotland and Wales would be critical to them being able to form a UK-wide majority. Both of these were tricky positions, and it was unclear whether either party would become bolder or more circumspect in policies concerning the Anglo-Scottish relationship.

Proposals to replace the Barnett formula and to address the West Lothian question existed, but there was a danger that these proposals, if they were implemented, might reinforce the tendency for political and media elites in Whitehall and Holyrood to drift apart. The greatest challenge for the long-term survival of the Union, Gough argued, did not lie in Scottish ambitions for independence or in real or perceived English resentments, but in indifference and drifting apart. The Calman Commission had touched upon a related issue when it pointed out that the arrangements for intergovernmental working between the Scottish and UK Governments were underdeveloped.

The principles underpinning the West Lothian question were not new, and in fact had been important in the 1880s and 1890s in the discussion of Irish home rule bills. Shortly after Scottish devolution, the Conservative Party adopted the policy of "English votes for English laws", but there was an inherent problem with this position with regard to the governance of Britain as a whole. If it was taken literally, it was feasible that a situation could arise in which a UK government would not be able to implement its legislative programme, given the executive and legislative structure in Britain. The popular media construction of this problem, which described a Labour government with a UK majority confronting a Conservative majority in England was unlikely, but it was possible that a Labour government with



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a UK majority could face a situation of ‘no overall control’ in England, and this would be enough to cause difficulties. The Conservative Party’s Democracy Task Force had been charged with finding a solution to this problem, and developed a modified version of “English votes for English Laws”, which proposed that this would still apply, but only at the committee and report stages of legislation. Under this system, a government would be able to call in its non-English majority to effectively veto unacceptable measures that had been introduced as amendments at committee stage. The Conservative Party felt that this was promising in that it provided an incentive to bargain, which was lacking in the original position of “English votes for English laws”. This meant that an English majority for one party could not dictate to a UK government on English laws but, given the absence of a devolved settlement for England, there would be a mechanism to protect English interests.

Proportional representation was a possible alternative to this system of safeguarding English interests in the UK Parliament. There were clear imbalances in geographical support for political parties, and this was exaggerated by the current electoral system. Proportional representation might serve to soften the impact of these imbalances, but it was unlikely that proportional representation would be introduced for an ‘indirect’ reason. In any case the Conservative Party strongly opposed proportional representation, and Labour’s preferred option was the alternative vote system as opposed to proportional representation.

The West Lothian question was a strange issue in that it was only really deemed problematic when it was unlikely that there would be a parliamentary majority to address it. Furthermore, while the West Lothian question was likely to remain an issue of concern, it would not be given as much priority as other constitutional questions, for example replacing the Barnett formula. The solution proposed by the Democracy Task Force would grant Scottish MPs speaking rights on all matters, and would not preclude them from holding ministerial positions in devolved policy areas. To do otherwise would have been to encourage the emergence of political elites organised around reserved and devolved issues, which would be ultimately damaging to the Union.

**Guy Lodge** began with a reiteration that English perspectives on Scottish devolution were very much shaped by English concerns and interests. Ten years after the devolution settlement, there was still strong support for Scottish devolution within England. Despite this, the English electorate seemingly had no appetite for English devolution – at least not yet – and the campaign for regional government had failed. This was because English voters did not feel they were ‘losing out’ in the same way



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as Scottish voters had felt prior to devolution. However, English people were concerned about the inequities that had arisen from the West Lothian question and the Barnett formula. There was strong evidence that public opinion in England found the Barnett formula neither fair nor equitable: it was not based on need, and spending per head in Scotland was significantly higher than in England. This was indicated by polling evidence, but more importantly the British Social Attitudes Survey had shown that awareness of the issues regarding public spending disparities was growing. Media coverage of Barnett and related issues had increased, and divergence in policy between Scotland and England had raised questions about how Scotland could afford to implement initiatives such as free personal care while England could not. Rightly or wrongly, the notion that English taxes were somehow subsidising Scottish policies had taken hold.

Problems with the Barnett formula were likely to persist, and would remain an irritant in England until a suitable alternative was found. But in addition to this, as the Calman Commission had pointed out, the configuration of funding under the Barnett formula did not help devolved institutions. The lack of financial accountability associated with the fact that the Scottish Parliament was not responsible for raising its own revenue was not indicative of a healthy and mature devolved settlement, and led to inefficiencies. Perhaps most importantly, because of the existence of a block grant, devolved institutions were at the mercy of spending decisions taken in Westminster. This was likely to become more of a problem in times of fiscal austerity.

It was difficult to devise a solution to the finance problems associated with the Barnett formula, but the Calman Commission had proposed a very good answer. This was based on a 'something for something' approach, which offered increased fiscal powers and fiscal autonomy for the Scottish Parliament, linked with a corresponding reduction in the block grant from Westminster. This solution would help satisfy the English concerns about the funding settlement and would address a number of Scottish concerns: it would appease the English by reducing the grant, and give the Scottish parliament some of the fiscal powers for which there was an appetite in Scotland. To this extent, it appeared to be a win-win situation, something which was very rare in policy terms. However, despite its appeal, it was not certain that this solution would be implemented.

Perhaps a revision of the Barnett formula would be a decision for an incoming Conservative administration. But the Conservative position on this matter was as yet unclear, although the idea of fiscal accountability was likely to appeal to

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Conservative instincts. The problem was best viewed in the context of a tightening fiscal climate and the need to make cuts, and this environment might be conducive to a reform of public finance arrangements. It was more likely that a Conservative government would turn its attentions to the Barnett formula than to the West Lothian question, not least because a Conservative majority in England would reduce the problems associated with the latter.

Any moves to revise either the West Lothian Question or the Barnett formula might contribute to the disconnection between Scotland and the rest of the UK. One of the problems with the original devolution settlement was that it did not give much thought to what the Union might mean after devolution and how the shared interests of the four component parts of the UK might be served.

Lodge concluded that there should be institutional reform that would strengthen the mechanisms for dialogue and across the Union: stronger intergovernmental machinery; stronger Joint Ministerial Committees; a Department for the Nations within Whitehall; and better opportunities for dialogue between Parliaments, such as those outlined by the Calman Commission. All of these things could help to bring the Union closer together.

The second paper was given by **Christine O'Neill** of Brodies LLP, who explained some of the legal issues that would emerge from either a revision of the devolution settlement or separation from the rest of the UK. Any constitutional change would certainly involve some legal aspects, particularly to do with the legality of certain actions of government, but it was important to remember that law was only one part of the overall package required to effect constitutional change. The proper role of the law in any constitutional change would be to serve the interests of the community, whether that would be the state or a sub-state entity.

Legal discourse had given rise to some interesting statements regarding the constitutional status of Scotland. During a case concerning fox hunting, Lord Brodie had stated that “the Scottish Parliament is governed by what is, in effect, a mini-constitution”, and the case of Somerville heard that “the Scotland Act was a constitutional statute, it should be read in its own terms as a ‘self-contained, self-standing, self-understood’ instrument”. These could be seen as suggestions that there was in fact some kind of constitution for Scotland, although the meaning of this was open to interpretation. O'Neill argued that this should not be taken to mean that there was a written document outlining the roles of government, the courts, etc., but rather that the Scotland Act provided a framework for the devolution



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settlement, which included within it ways of changing that settlement. There had been no sense when the Scotland Act was passed in 1998 that things would remain static, and the Act deliberately included mechanisms for change. In fact, these mechanisms had been used since devolution without much controversy, and usually took the form of consensual Orders-in-Council. Examples of this included executive devolution of railway powers.

There were a number of possible ways in which the devolution settlement could be revised. In broad terms, the Scottish Parliament was prohibited from amending the Scotland Act, though it could do so in some very minor ways. The Scottish Parliament could not enlarge its own law-making powers or increase the scope of the Scottish Government's authority, which made sense in the context of a union state. But by contrast, the Westminster parliament did have the power to amend the Scotland Act at any time and apparently without consent. This meant that, in effect, the Westminster parliament was able to repeal legislation passed in the Scottish Parliament, even on devolved matters; this mechanism was explicitly contained in section 28 of the Scotland Act. However, it was not clear exactly what would happen if the Court of Session in Edinburgh was presented with an act of the Westminster parliament seeking to abolish the Scottish Parliament the day after a referendum vote in favour of Scottish independence. Scenarios like this, although very unlikely, served to demonstrate that there were some areas of constitutional discourse for which the formal law was not able to provide answers.

Providing there was political agreement, there would be no legal difficulties in delivering many of the Calman Commission's proposals. Some of these proposals related to the devolution of further powers, such as legislation on airguns, the setting of national speed limits and drink-driving limits, and also transferring some powers, such as those relating to insolvency law, back to Westminster. However, although making these changes would be relatively easy, understanding them might be more difficult, and any changes to the law in different regions of the UK would bring with it a need to educate the public. Although this requirement for public education applied to the introduction of any law, it might be more important in relation to the specific changes suggested by the Calman Commission, most notably that of drink-driving.

In addition to this public information perspective, there was a more important legal issue, namely understanding the devolved/reserved boundary. Although the general boundaries were clear, specific legislative or policy proposals could be more difficult. While the Scotland Act did include guidance on these type of questions, they had not

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yet come before a court. This was partly because the UK and Scottish administrations were for a long time controlled by the same party, so questions about the devolved reserved boundaries had been kept largely within the political sphere. Furthermore, the provisions contained in the Scotland Act concerning its interpretation in relation to devolved and reserved matters were replete with subtleties and technicalities, and the absence of case law involving these provisions meant that once again there was uncertainty as to its application.

Legal issues also applied to the question of whether the Scottish Parliament had the capacity to legislate for a referendum on independence, and indeed to what would happen if such a referendum yielded a vote in favour of independence. The first question depended on what specific type of legislation the Scottish Parliament would introduce: while the law of the constitution was reserved, opinion polls were not. Any move towards independence for Scotland would require legislation in both Holyrood and Westminster. But again it was unclear what the courts would do if the Westminster parliament declined to make the legislation necessary for independence if a referendum had demonstrated support for it. Legal issues that would arise after independence included: how Scotland would be recognised as a state in international law; an independent Scotland's status with regards to the UK, the EU and other international organisations; how UK property and assets would be apportioned; and how Scotland might devise its own constitution and develop its legal system. Perhaps Scotland's constitutional future was primarily a political question, but whichever way the political will would lead Scotland, the law would be able to facilitate the necessary changes.

**Jim Gallagher**, secretary to the Commission on Scottish Devolution, responded to the speakers' presentations with reference to the content of the Commission's report.

Gallagher began with an observation that the Scotland Act should be viewed as a technically remarkable piece of constitutional legislation: very few legal issues had arisen in relation to its provisions, whereas comparable pieces of constitutional legislation overseas had led to protracted legal disputes.

The UK constitution was often described as 'unwritten', but this was not wholly accurate. Although very fragmented, the constitution of the UK was written in many documents, including the Scotland Act. The nature of the Sewel Convention was an interesting constitutional issue. Despite criticism that it was a mere courtesy, the Sewell convention was on the verge of becoming an embedded aspect of the UK

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constitution, and the Commission had recommended that its status should be crystallised in parliamentary processes in both Westminster and Holyrood.

Independence was not part of the Commission's remit, and as such it said little on the matter. However, Gallagher agreed that independence was not essentially a legal question, but a political one.

It was useful to have an English perspective on Scottish devolution, and some of the criticisms of the devolution settlement made by Gough and Lodge were valid. A vast amount of time and effort had been spent on successfully creating devolved institutions, and this was validated by the fact that these institutions had operated without much technical difficulty. However, not enough attention had been paid to the question of how devolution affected the wider UK, and the Commission had tackled this question by asking what the post-devolution Union meant and how devolved Scotland fitted into it.

The Commission described various aspects of the Union: political, economic and social. The notion of a political union raised questions regarding the treatment of English issues in an asymmetrical system in which the Westminster parliament made domestic laws for England as well as UK laws. These questions, as Gough and Lodge had pointed out, only really became problematic in particular electoral conditions which had been much rarer than often assumed. Gallagher argued that the West Lothian question was not only about Scotland and England, but also involved Wales: Westminster was also a Welsh legislature, and this was often overlooked in the discourse. Perhaps it was the case that, as Gough and Lodge had suggested, a solution to the West Lothian question might be found by restructuring Westminster parliamentary processes.

Questions regarding future funding for devolved institutions would be much more difficult to solve, however, and the Commission recommended that the wholly-grant-funded system should be replaced by a system of mixed funding, like that of almost every sub-national government worldwide. The Commission felt that the Scottish administration needed to become fiscally accountable, and this would require a mixed system of funding. This raised serious questions about the correct balance in a mixed system, and how a continuation of a degree of central subvention could be justified. The notion of a social union, in which certain values and expectations were shared throughout the UK, particularly around welfare state services, was seen to form the basis of such a justification.

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It was important to note that any changes to the devolution settlement were likely to take place under conditions of constrained public spending growth. This would make particularly difficult to make changes to relative spending. Furthermore, public spending in the UK was allocated according to a baseline plus increment system, and this reflected the commitments to expenditure that public service budgets supported; radical shifts of large amounts of money between budgets were very difficult to manage, and the stability ensured by the present system should not be wholly abandoned. Any changes to the Barnett formula should be cognisant of the likely consequences for Wales and Northern Ireland, where the Barnett formula also applied.

**Professor Michael Keating**, of the European University Institute, asserted that both the nationalists and the unionists had lost the constitutional argument. Debate about Scotland's constitutional future should be seen in the broader context of the changing role of government, not only in the UK but more generally.

The Commission on Scottish Devolution pointed out that devolution in 1999 was not 'home rule' in the historical sense of either Gladstone's era or the 1940s. This was because the responsibilities of government had changed, and the welfare state had come into existence. But perhaps the 1999 devolution settlement was predicated on the existence of the post-war welfare state, which was currently being replaced. If so, perhaps the mechanisms that would be required to face future constitutional challenges did not currently exist. The Scotland Act included a very clear division of responsibilities, which reserved the majority of distributive services, including the welfare state, to the UK Parliament. This was common to both the 1998 and 1978 bills, with one notable exception. In 1978, development policy would have been reserved to Westminster, in keeping with the highly centralised attitudes to regional government that were in fashion at the time. However, in keeping with devolution settlements throughout Europe, the Scotland Act allocated responsibility for development to the Scottish administration. This was consistent with a Europe-wide shift towards a more competitive, federal model of devolution, in which devolved regions were expected to find their own place in the global, European and state-wide division of labour. But it was unclear whether Scotland had the instruments to compete in these terms, and in particular whether the Scottish Parliament had the ability to draw in the social partners that would be instrumental to meaningful development. Perhaps the competences of the Scottish Parliament should be enlarged so as to allow it to compete with other countries in broad terms, not just in narrow economic terms.



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The welfare state was currently being reshaped. It was moving away from passive income support to active support, active participation and active labour market policies. Across Europe, policy decisions on these issues were taken at the intermediate, devolved level, where it was possible to bring together different spatial scales and a variety of policy instruments. The current system saw decisions on welfare taken at a UK level, but placed the instruments for active policy interventions at the devolved level. In order to give more flexibility to the welfare system, and to allow welfare policy to be tailored to employment and social inclusion strategies, some welfare instruments should be devolved.

The Commission on Scottish Devolution was right to flag up the idea of social citizenship. But the particular notion of social citizenship used by the Commission implied UK social citizenship, and this was perhaps not in keeping with emerging ideas on citizenship: modern social citizenship had Scottish and European dimensions as well as a UK dimension. Diverging attitudes to citizenship were precisely what devolution was intended to achieve. During the first ten years of devolution, policy divergence had taken place in health and higher education, but tightening public sector funding would require that the welfare state might have to be radically restructured, and this was likely to result in far more divergence than had been seen to date. There was no fundamental agreement on the underlying principles of the welfare state, as the Commission had accepted, and it was likely that the future of the welfare state in the UK would have regional differences. While the concept of regional divergence in welfare provision was in keeping with the purpose of devolution, it would require increased fiscal flexibility for the devolved administrations, which would in turn require tax-raising powers.

There were therefore good functional reasons for increased devolution, for shifting the boundary between distributive and allocative services and for bringing elements of the welfare state under regional control. But the introduction of these changes would require a great deal more fiscal flexibility than the Commission on Scottish Devolution had proposed.

**Professor Anton Muscatelli**, of Heriot-Watt University, explained that he had been chair of the Independent Expert Group, which advised the Commission on Scottish Devolution on economic and fiscal issues. The Group had specifically asked the Commission to explain its vision for Scotland's constitutional future in order to come up with a technical solution. This demonstrated the role of economists in addressing such issues: they were able to advise on how certain constitutional arrangements might be made to work, but did not have a single view on what these arrangements



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should look like. However, it was essential that appropriate intergovernmental machinery would be put in place in order to facilitate any changes to economic or fiscal arrangements.

While it was true that welfare states in various devolved or federal structures allocated different degrees of control to sub-national administrations, it was common for the federal governments to retain control of some aspects and to intervene when appropriate. In this sense, the Commission on Devolution was justified in framing the UK welfare state in the terms that it had. Furthermore, even independent countries were often bound by economic restrictions, for example in relation to monetary policy and welfare policy. In world economy in which labour and capital were highly mobile, devolving more welfare instruments might not have as great an impact as some people would expect.

The **open discussion** began with an observation that the Barnett formula itself was a replacement of the Goschen formula, which also funded the UK regions according to a block grant. However, the next funding arrangements could not take this form, but would have to allow for regional administrations to raise some of their own revenue. Such a system would improve accountability, encourage more efficient spending and, perhaps most importantly, could allow for a needs-based contribution from the UK government, which would help to ensure equity across UK regions. There would be problems identifying and quantifying differential need between the constituent parts of the UK, but this would be crucial, and was successfully managed in other countries. The dialogue pertaining to funding was largely dominated by the idea of need, and used population size as a proxy for need; all UK allocative systems of public expenditure were currently arranged according to equity and need. However, it could be argued that public expenditure should instead be determined by the geographical spread of taxable capacity. A move towards this interpretation, however, would be likely to create some very serious problems, given the huge imbalances in taxable capacity between the UK regions, and indeed within them. In fact, it was argued, disparities between English regions were as pertinent as disparities between UK regions in the debate about public finance.

It was suggested that the notion of UK citizenship might have implications for citizens' rights; that perhaps being a UK citizen implied certain rights or entitlements. This would have ramifications for policy divergence, for example in relation to prescription charges, university tuition fees, and other services that were available in some regions but not others. If a social union was to apply in future, perhaps access to certain services or entitlements should apply. However, it was suggested that



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British identity was becoming less popular, and citizens increasingly saw themselves as Scottish, Welsh, Northern Irish or English, and not British. While it would be difficult to alter public attitudes towards British identity, it would be possible for government, politicians and the media to enforce the idea of a shared British identity through their own behaviour. However, there was not necessarily a conflict in citizens holding more than one identity simultaneously.

It was suggested that some of the language used in describing changing attitudes to identity presupposed a preference for Britishness. Concepts such as 'drift' and 'disconnect' had been used to describe post-devolution changes to identity, but these were perhaps pejorative, and were not accurate reflections the changing notions of identity in the UK. However, it was argued that these terms were indeed accurate: value judgements could be made about whether the phenomena of drift and disconnect should be arrested, depending on one's commitment to protecting or replacing the Union, but they were nonetheless an appropriate description of what had recently happened. It was argued that that these ideas did not only apply to changing notions of identity, but also to wider social, cultural and political differences that had emerged since devolution and were reinforced by political parties and the media.

While it was important to consider which instruments might be devolved, it was also important to consider the fiscal ramifications associated with such changes, and indeed the implications for social union. Housing policy, for example, which was central to many interpretations of the welfare state, was now largely delivered by tax expenditure, not direct government expenditures. Cases like this were likely to create some very difficult issues around the weighting of different tax bases.

It was suggested that constitutional change would provide opportunities to improve the promotion of equalities and human rights in the UK. In devolved regions in other countries, sub-national governments had the capacity to legislate on social rights, but this area was currently reserved. The system of rights that currently applied in Scotland was derived from the European Convention, and although there had been some discourse concerning the introduction of a British bill of rights, it was feasible that different systems of rights could apply at the global, European, UK and Scottish levels. However, although it would be technically possible to have different rights instruments in different parts of the UK, certain minimum rights would have to apply across the Union. The nature of these minimum rights, and the implication for policy divergence, was essentially a political question. Furthermore, it could be argued that

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certain basic rights should apply to people who were not technically citizens of the UK, and the notion of 'citizen rights' was therefore misleading.

Current constitutional arrangements allowed the Scottish Parliament to be challenged in cases when it was perceived to act outside of its competence. Perhaps any legislation on an independence referendum would be challenged using these mechanisms, and would be subject to judicial review. However, while the constitution was – in very broad terms – reserved to Westminster, a referendum bill was not explicitly precluded by the Scotland Act, and might therefore be within the competence of the Scottish Parliament. But judicial review was not the only way to challenge a bill in the Scottish Parliament: it was possible for bills to be abandoned on legal advice at committee stage at the request of the Presiding Officer of the Scottish Parliament. However, the legal advice to the Presiding Officer was never made public, and perhaps this should be changed, especially when the decisions in question were very significant.

Much of the debate focused on the technical, constitutional arrangements, and how these could be revised in order to strengthen the Union. But perhaps there were other means of achieving this end. For example, a high speed rail system linking up the UK regions might do more to increase the notion of a social union than finding a technical solution to the West Lothian question. Furthermore, it was not clear that government should in fact try to restore any strength that had been lost by the Union, since such changes were perhaps a necessary and healthy consequence of devolution. It would be more important to ensure that there was more transparency and a better flow of information, so that the various governments in the UK were more aware of what the others were doing. This would also create an environment in which policy learning could take place, which had not happened enough since devolution.

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