

## The 'English Question': Why 'English votes' are not the answer and the better alternatives

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**Abstract** In the short term at least, the outcome of the Scottish Independence referendum has settled the constitutional status of Scotland as part of the United Kingdom. During the referendum campaign, however, the major UK wide parties committed themselves to conferring a package of enhanced devolved powers upon Scotland in the event of a rejection of independence and the exact scope of these powers is in the process of being finalised. Although this ignited calls in Wales and Northern Ireland for an expansion of their own devolved powers, arguably more strongly felt pressures in the aftermath of the referendum have concerned the 'West Lothian' question; the fact that decisions on matters which only affect England are taken by a UK Parliament that comprises representatives from all four constituent parts of the UK, whereas the same matters are often legislated upon locally in those other parts of the UK without the involvement of representatives from England. There is much consensus on the need to address this anomaly of the current UK constitutional framework, but less agreement on how this ought to be done.

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This paper considers the debate over ‘English only votes’ at Westminster and identifies several flaws to such an initiative, which it is argued make it a dangerous mechanism that threatens the integrity of the UK. A new constitutional framework based upon regional or federal mechanisms represents the most logical and workable step forward, but it is doubtful whether sufficient political or public support exists for such a development to take place. The Scottish referendum campaign highlighted, if anything, the extent to which the UK’s future integrity is threatened by ideas of political difference and constitutional reform must take account of such realities. It must not be rushed, but based on sound logic and principle.

**Keywords** English Question – Regionalism – Federalism – Constitutional Reform - Parliament

## **Introduction**

On 18 September 2014, the electorate of Scotland voted in a referendum to reject Scottish independence by a 55%-45% margin. Whilst not precluding a similar referendum being held at some future date, the continued status of Scotland as a constituent part of the United Kingdom – albeit one endowed with substantial devolved powers<sup>1</sup> – was settled in the short to medium term. The pro-Union UK wide political parties had all pledged support during the campaign for the expansion of Scotland’s autonomy in the event of a ‘no’ vote and,<sup>2</sup> notwithstanding continued debates over the exact scope of the enhanced powers to be devolved to the Scottish

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<sup>1</sup> These are devolved to the Scottish Parliament by the Scotland Acts of 1998 and 2012.

<sup>2</sup> See Armstrong & Bowers (2015).

governmental institutions,<sup>3</sup> the main focus of the constitutional debate as far as the UK is concerned quickly moved to settle on the 'English question'.

Whereas Scotland, Wales and Northern Ireland all enjoy varying degrees of power to take decisions affecting matters concerning their populations independently of the Westminster Parliament, England enjoys no similar status. It is unique in the sense that it is the only constituent part of the United Kingdom whose interests are solely represented within the Westminster Parliament, which alone is responsible for legislating on matters affecting England. The controversy, of course, arises from the fact that this is a body comprising representatives of all four parts of the UK and Scottish, Welsh and Northern Irish members can vote on matters which may in practice only affect England. In theory – and indeed in practice on some notable occasions during the term of the Labour government 1997-2010<sup>4</sup> – votes which only concern England can be carried in the face of the opposition of a majority of MPs representing English constituencies. At the same time, those English MPs often have no entitlement to vote on the application of similar measures to the other parts of the UK as the policy areas concerned have been devolved to the institutions established in those regions. This is the so-called 'West Lothian question,' or what in the broader context of the debate over England's status in a union where substantial power is devolved to all other constituent parts, is preferable to term the 'English question'.<sup>5</sup>

This paper seeks to consider the perceived problem posed by the unique status of England in the current constitutional framework of the UK and possible mechanisms for

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<sup>3</sup> As well as pressures for further powers for the devolved institutions of Wales and Northern Ireland.

<sup>4</sup> See below.

<sup>5</sup> For a discussion of the nature of the 'English Question', see Hazell (2006).

addressing it. It begins by providing some background upon the constitutional development of the United Kingdom through the introduction of devolution for Scotland, Wales and Northern Ireland to the present day. It then briefly outlines the nature of the controversy caused by the 'English question', before considering the recent move to introduce 'English only' votes in the Westminster Parliament. In light of the dangers posed by this initiative, alternative mechanisms of an English Parliament and the introduction of regional government throughout England are touched upon. The latter option is arguably the preferred option for addressing the 'English question', but the lack of enthusiasm for such a move mean that ad hoc and piecemeal efforts to strengthen local power are perhaps the best that can be hoped for in the foreseeable future.

### **Background: The United Kingdom from Inception until the Present Day**

In historic terms, the present day United Kingdom is a relatively recent creation. While England and Wales had been administered jointly since the mid-sixteenth century, union between England and Scotland did not occur until the 1707 Act of Union.<sup>6</sup> Unlike Wales, however, Scotland has throughout its membership of the union retained and operated its own legal, educational, and religious systems.<sup>7</sup> The 1800 Acts of Union united the three constituent parts of Great Britain with Ireland in the United Kingdom. Most of Ireland achieved independence in 1922, although the six counties in the North where majority support existed for the union remained part of the UK as Northern Ireland. With the exception of the Northern Irish Parliament, which operated from 1921 until its suspension in 1972, the UK has functioned

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<sup>6</sup> For a perspective on Scotland's history as part of the UK, see Lord Sumption (2014).

<sup>7</sup> See Ronen (1979: 73-79).

essentially as a unitary state until relatively recently, with all executive and legislative powers invested in the UK government and Westminster Parliament.

Pressure for devolution of power to Scotland, Wales and (following the restoration of direct rule) Northern Ireland, built up from the 1960s onwards and enjoyed the broad support of the Labour and Liberal/Liberal Democrat parties. The attempts of the Callaghan government to establish Scottish and Welsh devolved institutions in the late 1970s failed when the population of Wales rejected such a move in a referendum, and a Scottish referendum on the establishment of an Assembly with legislative powers failed – notwithstanding a majority vote in favour – due to a statutory requirement that 40% of the Scottish electorate support the initiative.<sup>8</sup> Following the election of the Labour government in 1997, fresh referendums were held on the establishment of devolved institutions for Scotland, Wales and Northern Ireland. Following positive votes,<sup>9</sup> these came into existence in 1999, the Scottish Parliament and Northern Ireland Assembly enjoying primary legislative powers. In subsequent developments, the Welsh Assembly was also conferred with some primary legislative powers.<sup>10</sup>

While the constitutional status of Wales and Northern Ireland was largely settled, the campaign for Scottish independence has surged since Scotland's acquisition of devolution. Support for Scottish independence can arguably be attributed in large part to political nationalism: the perception that Scotland's political interests do not converge with those of the United Kingdom as a whole, and only through its independence can these be adequately protected. In general terms, Scottish politics have tended to take place within a discourse that

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<sup>8</sup> See Bochel, Denver & Macartney (1981).

<sup>9</sup> On the Scottish referendum, see Michell, Denver, Pattie & Bochel (1998).

<sup>10</sup> On the systems of devolution in place, see Hadfield (2011: 216-232).

is to the left of those of the wider UK. The outcomes of successive general elections reinforce this. Until the 2015 general election, the Labour Party had taken the overwhelming share of Scottish parliamentary seats for several decades,<sup>11</sup> and in an astonishing surge in electoral popularity the SNP won all but three seats in Scotland in 2015.<sup>12</sup> However, as from 2010 onwards, Scotland has often found itself governed at UK level by a Conservative or Conservative led government lacking in much support in that country.<sup>13</sup> This at times has resulted in the charge that Scotland finds itself subjected to policies its electorate have not supported, delivered by governments lacking a popular mandate in Scotland. The tone of the ‘Yes’ campaign in the recent independence referendum campaign reiterated such charges.<sup>14</sup>

The independence cause gained a boost with the ascent to power at Holyrood of the Scottish National Party following the 2007 Scottish Parliament elections – re-elected with a clear majority in 2011 – and polling data has shown a gradual rise in support for independence.<sup>15</sup> The 2014 Independence Referendum was held following negotiations between the Scottish executive and the UK government, taking place with the consent of the UK government, which had committed itself to honour the outcome of the process.<sup>16</sup> Although

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<sup>11</sup> In the 2005 & 2010 general elections, Labour won 41/59 Scottish parliamentary seats. In the previous general elections it took respectively 56/72 (2001 & 1997) and 49/72 (1992).

<sup>12</sup> The Labour, Conservative and Liberal Democrat parties each took one seat to the SNP’s fifty-six.

<sup>13</sup> In the post-WWII era the Conservative Party has not taken the largest number of seats in Scotland since 1955. In recent decades, its support in Scotland has plummeted. It won no seats there in the 1997 general election and has only taken one seat in the successive four general elections.

<sup>14</sup> See, eg., the Scottish Government’s white paper, *Scotland’s Future* (2013). The importance for independence in ensuring that Scotland’s political interests are protected is emphasised throughout. Among the key arguments advanced are that “Decisions about Scotland will be taken by...those who live and work here” (p.xii) and “Governments will always be formed by parties that win elections in Scotland. It will no longer be possible for key decisions to be made by governments that do not command the support of the Scottish electorate” (p.xii). See further pp.40-47.

<sup>15</sup> Lynch (2005: 510-513).

<sup>16</sup> On legal issues surrounding the referendum, see Tierney (2013).

some polling data published in the later stages of the referendum campaign suggested there may be a narrow majority in favour of independence,<sup>17</sup> in the event Scotland's electorate rejected this by a 55%-45% margin.<sup>18</sup>

Arguably a key factor in delivering the 'No' vote was the pledge of all of the pro-union parties to enhance the autonomy of the devolved Scottish institutions. This, however, has only contributed to a strengthened feeling in the other constituent parts of the UK that they are somehow disadvantaged within the current UK constitutional arrangement. Although a body of opinion in both Wales and Northern Ireland favours enhanced powers for their own devolved institutions,<sup>19</sup> our present focus is upon the 'English Question'.

### **The 'English Question'**

A core aspect of the 'English Question' was famously raised by the Labour MP Tam Dalyell in the 1970s and labelled the 'West Lothian' question after the constituency which he represented at the time. Raised during debates in the House of Commons over devolution proposals for Scotland and Wales, Dalyell asked "For how long will English constituencies and English honourable members tolerate...members from Scotland, Wales and Northern Ireland exercising

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<sup>17</sup> See 'Scottish independence: Vote 'will go to the wire'', BBC News Online, 7 September 2014, available at <http://www.bbc.co.uk/news/uk-scotland-29096458>

<sup>18</sup> However, the pressures for independence do not appear to have gone away. Although support for the SNP cannot be assumed to equate with support for independence, its unprecedented 50% share of the vote in Scotland in the 2015 general election arguably reinforces this. Furthermore, the SNP have declined to rule out another independence referendum in the near future. See, eg., 'Nicola Sturgeon refuses to rule out fresh Scottish independence referendum during the next parliament', The Independent, 19 April 2015, available at <http://www.independent.co.uk/news/uk/politics/generalelection/general-election-2015-nicola-sturgeon-refuses-to-rule-out-fresh-scottish-independence-referendum-during-the-next-parliament-10188089.html>

<sup>19</sup> See, eg., 'Offer Wales same powers as Scotland, says Carwyn Jones', BBC News Online, 27 November 2014, available at <http://www.bbc.co.uk/news/uk-wales-politics-30226324>

an important, and probably often decisive, effect on English politics while they themselves have no say in the matters in Scotland, Wales and Northern Ireland.”<sup>20</sup> Although hypothetical at the time in light of the failure to devolve powers to the UK’s constituent parts, the issue became pertinent two decades later following the creation of the devolved institutions in Edinburgh, Cardiff and Belfast.

The position brought about by devolution, whereby many matters affecting Scotland, Wales and Northern Ireland are determined in their devolved bodies without any English involvement while at the same time those matters affecting just England are decided upon by a UK-wide Parliament in which non-English MPs retain the power to cast a vote, has been the source of considerable grievance for English politicians and voters alike.<sup>21</sup> The resulting situation might be criticised on the related grounds of fairness and democracy. It may be regarded as inequitable that those representing some parts of the UK are able to influence matters affecting another part of the UK when the representatives of that part may not similarly influence matters in the other parts of the UK, there being a lack of reciprocity. Similarly, it can be regarded as undemocratic that a matter which affects only England can actually be decided against the will of a majority of its representatives when the votes of Scottish, Welsh or Northern Irish MPs determine the outcome of a Parliamentary vote. Although the Scottish National Party’s MPs have historically adopted a practice of abstaining from voting on English affairs given their absence of any English mandate, the same cannot be said for MPs from the UK wide parties representing non-English constituencies. Some votes in

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<sup>20</sup> HC Deb, 14 November 1977, vol 939, col 123.

<sup>21</sup> See, eg., the report of the McKay Commission (2013: paras.6-7).



Parliament on matters pertaining only to England have indeed been carried without the consent of a majority of MPs representing English constituencies owing to the positive votes of MPs from Scotland and Wales. Examples are found with legislation on Foundation hospitals and University tuition fees.<sup>22</sup>

In the aftermath of the Scottish independence referendum and proposals for further devolved powers to Scotland, there has been renewed attention given to the English question. Only the day after the referendum, Prime Minister David Cameron alluded to the prospect of English only votes within the Westminster Parliament,<sup>23</sup> a prospect which became a central plank of the Conservative party's general election manifesto and extended to votes on income tax setting within England.<sup>24</sup> The House of Commons standing orders were finally amended in October 2015 to effectively empower MPs representing English constituencies to veto legislation applicable only to England.<sup>25</sup>

### **'English Only' Votes**

The idea behind 'English only' votes in the Westminster Parliament is essentially that where legislative proposals only apply to England, as opposed to the UK as a whole, then only those MPs representing English constituencies ought to be permitted to vote upon these matters, or

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<sup>22</sup> See Hadfield (2004: 247).

<sup>23</sup> See 'David Cameron raises West Lothian question after Scotland vote: 'English votes for English laws'', The Guardian, 19 September 2014, available at <http://www.theguardian.com/politics/2014/sep/19/david-cameron-devolution-revolution-uk-scotland-vote>

<sup>24</sup> Conservative Party (2015: 69-70).

<sup>25</sup> Standing Orders 83J-83X. Similarly, where legislation is applicable to England and Wales, MPs serving English and Welsh constituencies enjoy this power of veto.

at least should be empowered to veto the adoption of the measures in question. In practice, very few bills introduced in Parliament are applicable only to England, most legislation being also applicable to Wales. Most so-called 'English only' votes will in fact be taken by MPs representing English and Welsh constituencies.<sup>26</sup> More generally, proposals applicable to some, but not all, parts of the UK could only be voted upon by MPs representing those parts. This seeks to address the West Lothian question by ensuring that the outcome of legislative proposals applicable only to a particular area or areas cannot be determined by MPs representing areas to which they will not apply. The most obvious target of proposals for 'English only' votes are Scottish MPs voting on bills which do not apply to Scotland.

One advantage of the 'English only' votes option as a means of addressing England's perceived disadvantage within current UK legislative processes lies in the fact that it would not require the time-consuming and resource intensive creation of any new layers of government. It would merely involve the adoption of modified procedures for existing legislative processes. Herein, perhaps, is the cause of another advantage, namely the apparent popularity of this initiative among the electorate within England.<sup>27</sup> Arguably, the increased powers to be devolved to Scotland have only strengthened English feeling that the legislative affairs of the Westminster Parliament which only affect England should be entrusted specifically to English MPs. The Conservative party has made the case for 'English only' votes, although this support

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<sup>26</sup> We use the term 'English only' votes in the present paper for sake of convenience. However, it is also used to refer to all situations in which Parliament considers legislative proposals that are only to apply to some parts of the UK, be this England, England and Wales, or England, Wales and Northern Ireland. In such cases, references to 'English only' votes extend to votes taken by all MPs representing constituencies in the parts of the UK to which the resulting legislation will apply.

<sup>27</sup> See McKay Commission (2013: 16) for polling data which showed that 81% of English voters agreed that Scottish MPs should not vote on bills only affecting England. See also commentary provided by YouGov in October 2014, 'England's awkward answer to the West Lothian Question', available at <https://yougov.co.uk/news/2014/10/20/englands-awkward-answer-west-lothian-question/>

must be understood in the context of the potential advantages which such a move could have for it politically, given the Conservatives' electoral strength lies in England, it being poorly represented in Scotland,<sup>28</sup> and to a lesser extent, Wales. The merits of 'English only' votes, however, can only be evaluated once we understand how such procedures will be implemented and their constitutional implications.

### *Models for 'English only' votes*

There are a number of variants upon a model for 'English only' votes, which range in terms of their impact upon established legislative procedures from merely strengthening the extent to which English MPs are specifically consulted upon legislative proposals that will only apply to England to giving them the sole right to vote on these. Although not original proposals, in the aftermath of the Scottish independence referendum the Conservative Party advanced three alternative options for delivering some form of 'English only' votes for bills intended to apply only to England.<sup>29</sup> These alternative proposals were stated to be guided by the McKay principle,<sup>30</sup> emanating from the earlier report of the McKay Commission, namely that matters

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<sup>28</sup> This may, arguably, become less of an issue if the results of the 2015 general election in Scotland are a sign of things to come. Labour, the Conservative, and Liberal Democrats all only won one seat. It is, however, more likely that SNP MPs would vote with Labour than the Conservatives where neither party commands a majority in the House of Commons. See, eg., 'SNP will 'never, ever' prop up a Conservative government, Nicola Sturgeon says', The Telegraph, 14 November 2014, available at <http://www.telegraph.co.uk/news/uknews/scottish-independence/11230432/SNP-will-never-ever-prop-up-a-Conservative-government-Nicola-Sturgeon-says.html>

<sup>29</sup> Cabinet Office (2014: 24-27).

<sup>30</sup> Cabinet Office (2014: 24).

affecting a particular constituent part of the UK should only be decided upon with the consent of a majority of MPs representing that area.<sup>31</sup>

The first option (the Reformed Consideration of Bills at All Stages) was modelled on an earlier proposal of the Norton Commission,<sup>32</sup> and envisaged that legislation affecting only England would be considered at all stages only by MPs representing English constituencies. By convention, MPs representing other parts of the UK would not vote.<sup>33</sup> This is the most absolute approach to the implementation of 'English only' votes, conferring MPs representing English constituencies with the sole decision-making function over legislation only applicable to England. The second option (the Reformed Amending Stages of Bills) was modelled on a proposal of the 2008 Democracy Task Force<sup>34</sup> and envisaged that only MPs representing English constituencies would consider bills applicable only to England at the committee and report stage, where amendments are proposed and voted upon. The ultimate decision on the adoption of the bill would remain with Parliament.<sup>35</sup> While arguably enhancing the role of English MPs in processing 'English bills', there is no fundamental change to the principle that Parliament as a whole is entitled to vote upon the adoption of legislation. The final option (the Reformed Committee Stage and Legislative Consent Motions) effectively envisages a power of veto over English only legislation for MPs representing English constituencies. While bills would still be subject to a third reading in the full House of Commons, a Grand Committee of English

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<sup>31</sup> McKay Commission (2013: paras.12 & 109).

<sup>32</sup> Commission to Strengthen Parliament (2000).

<sup>33</sup> Cabinet Office (2014:25).

<sup>34</sup> Democracy Task Force (2008).

<sup>35</sup> Cabinet Office (2014: 25-26).

MPs would need to give their consent to a bill prior to this stage in order for it to proceed.<sup>36</sup>

This option is along the lines of that advanced by the McKay Commission,<sup>37</sup> and was subsequently expressed to be the favoured option of the Conservative party,<sup>38</sup> and eventually introduced via amendments to standing orders. Although theoretically the full House retains the final word on the adoption of English bills, in reality this option merely retains constitutional formalities while introducing a distinction between different kinds of legislation based upon the intended geographical scope of its application. However, while English MPs will ultimately determine if a bill *can* succeed, oddly their wishes could be overridden where the full House chooses not to pass a bill at its third reading.

### *Constitutional implications*

Notwithstanding the logic underpinning arguments for English only votes and apparent popular support for such a move,<sup>39</sup> significant constitutional implications arise from taking such a step and in the view of this author it should be rejected as a 'solution' to the English question.

Although the extent to which English only votes give rise to constitutional concern is dependent upon the nature of the model adopted, six points might be noted as cause for further consideration. Firstly, as Leyland notes, "The [UK] has traditionally been built on an equality

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<sup>36</sup> Cabinet Office (2014: 26-27).

<sup>37</sup> McKay Commission (2013: paras.14-20).

<sup>38</sup> See 'William Hague unveils plans to stop Scottish MPs voting on English issues', The Guardian, 3 February 2015, available at <http://www.theguardian.com/uk-news/2015/feb/03/william-hague-plan-bar-scottish-mps-voting-english-issues>

<sup>39</sup> According to a poll cited by Curtice (2006: 123), in the aftermath of devolution to Scotland, Wales and Northern Ireland, 60% of English voters agreed or strongly agreed with the proposition that Scottish MPs should not vote on English matters at Westminster.

whereby all members can vote on all matters...as members of a single parliamentary body.”<sup>40</sup>

The Westminster Parliament is the sovereign legislative body of the UK as a whole, and to introduce different classes of votes on legislative proposals risks the creation of a two-tier system of MPs in which Scottish MPs especially, and to varying extents Northern Irish and Welsh MPs will play a much lesser role in Parliamentary business than their English counterparts. This would create something of a constitutional anomaly, in which the state’s primary and sovereign legislature does not provide equal representation for all of its population. It is neither fair to the English, who lack the same dedicated devolved institutions as their Scottish, Welsh and Northern Irish counterparts, nor to the latter nations for whom the legislature of the Union becomes a part-time affair in which they are to play second fiddle to the affairs of the English. This could be avoided if a separate English body (or bodies) was established for the purpose of legislating on England specific matters, akin to the devolved legislative bodies which exist in Scotland, Wales, and Northern Ireland, leaving the Westminster Parliament to tackle UK wide matters in which all representatives perform an equal role. The consequences of English only votes risk strengthening separatist causes in the UK’s constituent parts, especially Scotland, if the populations of these areas come to feel that their representation and participation within UK wide structures has become diluted. The narrow defeat for Scottish independence in 2014’s referendum and the subsequent surge in SNP support leading to its phenomenal success in the 2015 general election should be cause for concern in this respect.

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<sup>40</sup> Leyland (2005: 444).

A more practical constitutional problem potentially arises from the political demographics of England vis-à-vis the UK as a whole. Unlike the other constituent parts of the UK, England does not have its own government. The UK government, ordinarily formed by the party or parties able to obtain a majority in the Westminster Parliament, is essentially also the government for England. It is a fundamental constitutional principle that a government must be able to command the confidence of the House of Commons.<sup>41</sup> However, situations can conceivably arise in which a UK government is formed by a party (or coalition of parties) which does not hold a majority of English constituencies. This is unlikely ever to be a problem for a Conservative led government, which draws its overwhelming strength from England, but could prove to arise in respect of a Labour government with a small UK wide majority in Parliament that is dependent upon Scottish and Welsh MPs.<sup>42</sup> The outcome may be that such a government would struggle to implement its legislative agenda within England, undermining its very position as the sitting government. This would be most bizarre, it being “an accepted feature of the Westminster system that a government must get its legislation.”<sup>43</sup> As the eminent constitutional scholar Vernon Bogdanor has suggested, “a bifurcated government is a logical absurdity.”<sup>44</sup> The effective government may essentially change depending upon whether a matter is considered to be “English” or “UK-wide”, with the UK opposition simultaneously being able to dictate the outcome of legislative proposals for England. In an extreme scenario, Bogdanor envisages circumstances in which “English policies” are implemented against the will

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<sup>41</sup> See, eg., The Cabinet Office (2011: 2, 14, 21),

<sup>42</sup> For example, in the 1964 general election, although Labour won a UK wide majority, it trailed the Conservatives by 16 seats in England. Similarly, despite securing a majority of 1 in the October 1974 general election, Labour again trailed the Conservatives in England.

<sup>43</sup> Hazell (2001: 278).

<sup>44</sup> Bogdanor (2014).

of the government, which is then compelled to fund them.<sup>45</sup> This is a recipe for constitutional chaos. It may even mean that a UK government, with a UK wide majority in Parliament, has to enter into agreements (or even coalition) with smaller parties in order to effectively legislate for England. If this is not possible, a government with a UK-wide majority may even be compelled to resign, disproportionately empowering a minority UK party which might be able to obtain a simple majority of English seats. The potential instability threatened should be a cause for concern, although one unintended consequence may be increased support for a system of proportional representation, as one of the principal objections to its introduction – producing unstable government – would be difficult to sustain if electoral outcomes were already resulting in situations in which UK governments were increasingly forced to rely on alliances and coalitions to govern England.<sup>46</sup>

Third, the idea of English only votes may be implementable within the House of Commons, but it must not be forgotten that all bills must pass through both chambers, and it would be difficult to apply this principle to the procedures of the House of Lords.<sup>47</sup> Its unelected members do not represent constituencies, nor are accountable to groups of people resident in any designated areas, but sit as individuals in their own right. This problem may, however, be overstated given the relatively limited power of the House of Lords. As a consequence of the Parliament Acts 1911 and 1949,<sup>48</sup> bills passed by the Commons may only be delayed, not

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<sup>45</sup> Bogdanor (2009: 103).

<sup>46</sup> Indeed, there is already evidence that the popular vote has entered a stage of fragmentation in which the shares obtained by the major parties, and their ability to obtain parliamentary majorities, has begun to decline. Whereas the combined Labour-Conservative share of the vote was almost 94% in 1945, this had declined to just 65% in 2010.

<sup>47</sup> See Leyland (2005:446).

<sup>48</sup> Sections 1-2, Parliament Act 1911, as amended by the Parliament Act 1949.



blocked indefinitely, by the Lords, and a bill rejected in the Commons cannot proceed on the basis of support in the Lords. From a practical standpoint, supporters of English only votes are predominantly concerned with legislative processes adopted within the House of Commons.<sup>49</sup>

A fourth issue concerns the doctrine of parliamentary sovereignty, the key tenets of which are that Parliament may legislate on any matter which it so chooses, and that no Parliament may bind its successors.<sup>50</sup> From this perspective, there is no obstacle to Parliament choosing to enact new rules which govern its' legislative procedures. As Zhou writes, "as a matter of logic, Parliament's unlimited legislative power...extend[s] to the power to make rules changing its existing lawmaking process as much as it wants."<sup>51</sup> In constitutional terms, the adoption of "English only" votes might be compared to the provisions of the Parliament Acts of 1911 and 1949, which significantly curtailed the role played by the House of Lords in legislative processes, and have been widely accepted as having been constitutionally legitimate devices.<sup>52</sup> Parliament may change the procedures by which certain statutes are made, but as it cannot bind future parliaments, such procedures cannot be entrenched and are subject to later reversal or revision. The Conservative government is likely to be able, by virtue of its majority in the House of Commons, was able to amend the process through which provisions affecting only England are passed into law, but a future government of a different mind can readily reverse these. The controversy arises from the intention to introduce new procedures through

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<sup>49</sup> Note, however, proposals from some quarters to transform the House of Lords into a second chamber in which the UK's constituent parts receive equal representation as part of a new constitutional settlement for the UK.

<sup>50</sup> *Ellen Street Estates Ltd v Minister of Health* [1934] 1 K.B. 590, at p.597 (per Maugham L.J.).

<sup>51</sup> Zhou (2013: 613).

<sup>52</sup> See, eg., *Jackson v Attorney-General* [2005] UKHL 56. Note Lord Bingham's suggestion (at para.27) that a "question of parliamentary procedure...could only, be the subject of parliamentary inquiry" and was not an issue appropriate for investigation by the courts.

amendments to the House of Commons' standing orders. It might be questioned whether it is appropriate for the collective decision-making power of the House of Commons to be restricted by any process other than a collective expression of its support for such a change through the enactment of a provision to this effect contained in primary legislation. Of course, as the full house retains the final decision over the adoption of legislation – with English MPs only empowered to veto measures at a committee stage – the argument can be made that there is no real impact upon parliamentary sovereignty in strict terms. The move towards “English only” votes is only possible because the current government has a UK wide majority, which means that more often than not it should be able to pass its legislative agenda anyway. Ironically, this device would not be able to strike its' main target, namely a Labour government which lacked an English majority, as such a government could simply revise procedures itself to abolish “English only” votes.

From some perspectives, the focus on English only votes overlooks the inherent consequences of any system of political representation in which the wishes of the representatives of any region can be overridden by the majority vote of the collective whole. For example, there remain votes which take place in the Westminster parliament on UK wide matters whereby legislation is implemented for constituent parts of the UK where a majority of elected members for those areas opposed the measures in question. A classic often cited example is the application of the poll tax to Scotland.<sup>53</sup> Even within England, there will inevitably be regions that are poorly represented by the majority party or parties within the

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<sup>53</sup> Hadfield (2005: 298-301).

House of Commons,<sup>54</sup> which can make similar arguments about the unfairness of legislative decisions affecting those regions not to have consented to them. Undoubtedly, the core tenet of the arguments of supporters of English only votes concerns a lack of equality between England and the other countries forming the UK. However, this arguably produces a case for some form of similar mechanisms within England as exist in those other countries, as opposed to tinkering with one of the anomalies of any national legislative system while being unable to address all of them. The argument can also be made that the adoption of ‘English only’ votes addresses the wrong question, which is how to ensure that Parliament’s composition delivers representation which reflects the voting preferences of the electorate, the answer to which lies in the introduction of some form of proportional representation, an issue which received fresh attention following the outcome of the 2015 general election in which parties polling significant shares of the vote obtained very few seats.<sup>55</sup>

A final problem arises from the potential for bills which might be designated as ‘English’ to impact upon affairs in other parts of the UK,<sup>56</sup> for example provisions affecting public services in England which may be used by residents of Scotland, Wales or Northern Ireland, for example health or educational facilities.<sup>57</sup> Although it might be assumed that a distinction can be drawn between bills impacting upon other parts of the UK and bills which do not, this is

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<sup>54</sup> Contrast, for example, the East of England – where only four of fifty-eight MPs elected in 2015 represented Labour – with the North-East, which in the same election returned twenty-six Labour MPs from its twenty-nine constituencies.

<sup>55</sup> See, eg., ‘UKIP and Greens lead calls for electoral reform – but what are the alternatives?’, The Independent, 9 May 2015, available at <http://www.independent.co.uk/news/uk/politics/generalelection/ukip-and-greens-lead-calls-for-electoral-reform--but-what-are-the-alternatives-10238928.html> Collectively, UKIP, the Liberal Democrats and the Greens obtained over 24% of the popular vote, yet only took 10 Parliamentary seats between them (8 Liberal Democrat and 1 each for the other parties), amounting to just 1.6% of the overall number.

<sup>56</sup> McKay Commission (2013: paras.9-11).

<sup>57</sup> Russell & Lodge (2006: 84-88).

arguably simplistic and not so straightforward in practice.<sup>58</sup> For example, where decisions are taken on so-called “English” matters which involve public expenditure, the argument has been made that these are relevant to all parts of the UK as they “will directly affect the size of the block fund going to a devolved body.”<sup>59</sup> The recent changes provide that the speaker of the House of Commons will certify when a legislative proposal is an “English only” matter,<sup>60</sup> but given some of the contentious issues alluded to, this threatens to draw the traditionally neutral and independent speaker into matters inherently political in nature.

## **Addressing the English Question through New Institutions**

### *An English Parliament*

Whereas the ‘English only’ votes option might be regarded as a ‘quick-fix’ or ‘kneejerk’ reaction to pressures for greater fairness for England within the UK constitutional framework, more substantive and principled constitutional change could arguably be achieved through two main mechanisms. One of these, considered below, is the introduction of a number of regional assemblies throughout England conferred with devolved powers along similar lines to that currently enjoyed by the institutions established in the other constituent parts of the UK. The other mechanism is the creation of an English Parliament to function separately from the Westminster Parliament effectively as a devolved legislative body for England akin to the manner in which the Scottish Parliament serves such a function for Scotland. This would mark

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<sup>58</sup> See, eg., Bogdanor (2014).

<sup>59</sup> Bogdanor (2009: 104).

<sup>60</sup> Standing Order 83J (1).

the creation of a federal UK constitutional structure. As by far the largest of the UK's constituent parts, the legislative powers conferred upon an English Parliament would be expected to be substantial and more in line with those enjoyed by the Scottish Parliament than the more limited powers of the Welsh Assembly.

The creation of a federal UK constitutional structure within which legislative bodies exist for all four constituent parts of the union has some logic to it. Theoretically, it addresses the very problem posed by the English question while avoiding the creation of a two tier system. It could provide an English governmental mechanism that is both transparent and democratic.<sup>61</sup> Equality is guaranteed between the four parts of the Union. Matters directly affecting each country individually would be largely handled at that level, while there would remain a UK wide government and Parliament responsible for matters pertaining to the UK as a whole. Such federal structures abound, with the US, Canada, and Australia some of the more prominent examples of states in which power is shared between a federal government and a series of states or provinces. Obstacles to the creation of an English Parliament arise however, from both a lack of popular support and practical dangers.<sup>62</sup>

There is little public support for such a step among the English electorate,<sup>63</sup> which is perhaps best understood within the context of a general disinclination to create further layers of government. As Russell and Lodge note, "While the notion of 'English votes on English laws' appears to be winning popular support there is no sign yet that the English have an appetite for

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<sup>61</sup> Russell & Lodge (2006: 88-9).

<sup>62</sup> See Leyland (2005: 445).

<sup>63</sup> The only notable organisation pushing for an English Parliament is the Campaign for an English Parliament. See <http://www.thecep.org.uk/>

its logical corollary, an English Parliament.”<sup>64</sup> In a 2012 poll only 20% of English voters supported the creation of an English Parliament, in contrast to 36% support for English only votes within the UK Parliament.<sup>65</sup> As the dominant actor within UK-wide structures, England’s electorate is arguably rather satisfied with the suitability of those structures, but simply wishes to tailor them to serve England’s interests better in certain defined circumstances (ie., English only votes for English matters).

Although popular opinion is not fixed, meaning that current opposition should not be used as sufficient reason to discourage proposals for an English Parliament that are based on sound principle, practical objections to its creation have also been advanced. Given the large proportion of the UK population which England accounts for,<sup>66</sup> while the creation of an English Parliament may address some current English grievances, it is suggested that this would not help perceptions of the other regions within the UK that it is dominated by England. Indeed, English dominance at Westminster was a key factor in the growth of support for Scottish, Welsh and Northern Irish devolution. The legislative powers enjoyed by the UK’s constituent parts would be unlikely to be identical, just as Scotland’s powers currently exceed those conferred upon Wales, and to a lesser extent, Northern Ireland. English grievances may be replaced by an aggrieved Welsh electorate, which perhaps finds itself as the ‘poor relation’ in any new constitutional arrangement.

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<sup>64</sup> Russell & Lodge (2006: 89).

<sup>65</sup> Cited in McKay Commission (2013: 18). A similarly low level of support was identified by the Future of England Survey conducted by Jeffery et al (2014: 18-19).

<sup>66</sup> 83.9% according to the 2011 UK Census, available at <http://www.ons.gov.uk/ons/guide-method/census/2011/uk-census/index.html>

The creation of an English Parliament may indirectly further the cause of separatism on the part of other constituent parts of the UK, in particular Scotland. In a new federal UK, there is a risk that the Westminster Parliament and government would perform a relatively small role if an English Parliament took on for England many of the functions currently performed by that Parliament, calling into question the very purpose of UK wide institutions. Within federal states there is a tendency for there to be a body representing its constituent parts on an equal footing, in the way, for example that the US Senate provides equal representation to all fifty states.<sup>67</sup> This generates a sense of equality and unity across the federal state. Nothing like this exists within the UK, although one option canvassed has been to replace the House of Lords with a second chamber which affords equal representation to England's regions, Scotland, Wales and Northern Ireland.<sup>68</sup> It has, however, been noted that there is no precedent for a successful federal structure in which one part accounts for five-sixths of the total population, as England does within the UK.<sup>69</sup> For example, by sake of comparison, the largest states within the US, Australia and Canada only account for 12%,<sup>70</sup> 32%<sup>71</sup> and 38.5%<sup>72</sup> of their overall populations respectively and in national terms amount to a minority within the collective whole.

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<sup>67</sup> While membership of the House of Representatives is based on elections held in 435 districts of roughly equal population size, each state elects two senators. Representation in Australia's senate is also equal among its six states.

<sup>68</sup> See, eg., 'Miliband calls for second chamber to represent all UK's cities and regions', The Guardian, 31 October 2014, available at <http://www.theguardian.com/politics/2014/oct/31/miliband-devolution-elected-second-chamber-regions>

<sup>69</sup> Hazell (2001: 268). Hazell suggests that "there is no successful federation in the world where one of the parts is greater than around one third of the whole."

<sup>70</sup> California, according to the US Census Bureau (2014), available at <http://www.census.gov/popest/data/counties/totals/2014/CO-EST2014-01.html>

<sup>71</sup> New South Wales, according to the Australian Bureau of Statistics (2014), available at <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0>

<sup>72</sup> Ontario, according to Statistics Canada (2013), available at <http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo02a-eng.htm>

### *Regional Devolution within England*

The introduction of a coherent system of regional devolution within England might be regarded as a more appropriate and less constitutionally problematic means of addressing the English question than the full-blown federalism that would be shepherded in through the creation of an English Parliament. It is similar in that it envisages the transfer of power from the Westminster Parliament to further English interests, but instead of identifying these in collective 'English' terms, it recognises these as best represented on a region-by-region basis throughout England, with a series of assemblies established to exercise decision-making powers in respect of each English region. One attraction of such a model lies in that it may be more appropriate for taking account of the size and diversity of England, representing as it does such an overwhelming share of the overall UK population. Using the nine administrative regions of England used for electing members of the European Parliament,<sup>73</sup> the resulting regional institutions would represent populations more akin in size to that of Scotland.<sup>74</sup> The devolved institutions created could potentially result in a constitutional structure for the UK that bore some resemblance to those of successful federations, such as those already mentioned.

In practical terms, the regional option appears less controversial or constitutionally problematic than does the creation of an English Parliament. In some respects, it arguably represents a natural next step in a process already begun in which various regional fora exist to

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<sup>73</sup> See Office for National Statistics: Regions, available at <http://www.ons.gov.uk/ons/guide-method/geography/beginner-s-guide/administrative/england/government-office-regions/index.html>

<sup>74</sup> Based on the 2011 UK census, five regions have larger populations than Scotland (South-East, Greater London, North-West, East and West Midlands), four smaller (South-West, Yorkshire and the Humber, East Midlands and North-East).



represent regional interests,<sup>75</sup> stemming at least as far back as the creation of the Regional Development Agencies by the Blair government in 1999.<sup>76</sup> The establishment the following year of the Greater London Authority and an elected mayor for London might also be regarded as a step in the direction of devolving power to the English regions.<sup>77</sup> A strong case for regional government throughout England can also be made in support of the principle of subsidiarity.<sup>78</sup> The problem, however, lies again in the apparent lack of any enthusiasm among the English population for regional government.<sup>79</sup> Following a white paper produced by the Blair government,<sup>80</sup> which gave eight English regions the option of establish a regional assembly,<sup>81</sup> in June 2003 proposals were announced for referenda to be held in the North-East, North-West, and Yorkshire and the Humber on the question of the creation of such assemblies in those areas.<sup>82</sup> Following an overwhelming rejection of the proposals by the electorate in the North-East,<sup>83</sup> the other proposed referenda were abandoned.<sup>84</sup>

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<sup>75</sup> See Leyland (2005: 447-453).

<sup>76</sup> See Lodge & Mitchell (2006: 106-117).

<sup>77</sup> For the background to this development, see Bogdanor (2009: 197-213).

<sup>78</sup> Originating as a principle of European Union law, subsidiarity holds that decision-making functions should be exercised at the most appropriate level in accordance with economy and efficiency. See Barnett (2011: 148-149).

<sup>79</sup> See McKay Commission (2013: 18). A 2012 poll only uncovered support from 8% of the English electorate for the creation of regional assemblies. See also the Future of England Survey (2014), which put support at 9%. A 2003 poll, however, did put support higher at 24%. See Curtice (2006: 121). Furthermore, there is no significant regional variation apparent in support for regional assemblies (p.123), although a 2003 poll placed support in the North-East 12% higher than in the Eastern and South-East regions (33% vs 21%).

<sup>80</sup> See Department for Transport, Local Government & the Regions (2002). For discussion, see Leyland (2005: 453-456).

<sup>81</sup> Department for Transport, Local Government & the Regions (2002: ch.9).

<sup>82</sup> See 'Regional assembly vote dates set', BBC News Online, 8 July 2004, available at [http://news.bbc.co.uk/1/hi/uk\\_politics/3876437.stm](http://news.bbc.co.uk/1/hi/uk_politics/3876437.stm)

<sup>83</sup> See 'North east votes 'no' to assembly', BBC News Online, 5 November 2004, available at [http://news.bbc.co.uk/1/hi/uk\\_politics/3984387.stm](http://news.bbc.co.uk/1/hi/uk_politics/3984387.stm)

<sup>84</sup> See 'Prescott rules out regional polls', BBC News Online, 8 November 2004, available at [http://news.bbc.co.uk/1/hi/uk\\_politics/3992435.stm](http://news.bbc.co.uk/1/hi/uk_politics/3992435.stm)

Apart from a possible lack of appetite for a new tier of government or general satisfaction with existing constitutional arrangements as far as England is concerned, two observations might be made in respect of the absence of support for regional bodies. One difficulty arises in constructing regions with a sufficient degree of shared identity to underpin support for regional decision-making mechanisms. The nine administrative regions are artificial constructs encompassing diverse areas whose populations may not naturally identify with one another, nor the large regions within which they are placed. For example, the North-West region encompasses the relatively urban Greater Manchester and Merseyside as well as the more rural Cheshire and Cumbria. Many people are more likely to identify with a county, such as Yorkshire or Lancashire, although the viability of tiers of government located at the country level is questionable given their relatively small-size. Even then, such regional identities will often be weak in comparison to the national identities of Scotland, Wales and Northern Ireland.

<sup>85</sup> Secondly, a key factor in generating support for their creation may be the conferment of significant executive and legislative powers upon regional bodies. It is notable that the powers proposed for the assemblies for the North-East, North-West, and Yorkshire and the Humber were very limited in contrast to those enjoyed by the devolved bodies in Scotland, Wales, and Northern Ireland,<sup>86</sup> and would have only been conferred with budgets comprising 3-4% of total regional spending,<sup>87</sup> which may explain their lack of support.

Notwithstanding some of the difficulties which would need to be addressed before proceeding down this route, a sound practical and democratic case can be made for the

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<sup>85</sup> Furthermore, even within country regions there will be limits to shared identities, for example urban and rural areas perceiving their core interests in different terms.

<sup>86</sup> Department for Transport, Local Government & the Regions (2002: ch.4).

<sup>87</sup> Department for Transport, Local Government & the Regions (2002: ch.5). See also Sandford (2006: 185-187).

creation of a tier of devolved regional government within England. It is not a pre-requisite for the establishment of regional institutions that the local populations consent to their creation. Arguably, however, some form of democratic legitimacy is desirable. Any attempt to create regional fora is therefore likely to require considerable effort by way of public information campaigns and similar initiatives.

### *Localism: A Piecemeal solution*

An important development for the devolution of power within England during recent years has been the promotion of the 'localism' agenda, which broadly speaking has seen attempts to enhance decision-making powers exercised upon a local level. The Blair government gave local authorities the option to establish executive style government under the leadership of a directly elected mayor.<sup>88</sup> Building upon this, the Localism Act 2011 introduced by the Coalition government sought to strengthen local power further by establishing a general power of competence for local authorities,<sup>89</sup> giving rise to the assumption that they are empowered to do anything not specifically prohibited. The Act also provided for referendums to be held in England's larger cities on the option of having an elected mayor,<sup>90</sup> and empowered ministers to transfer powers from central government to local authorities.<sup>91</sup> While most cities rejected the

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<sup>88</sup> Local Government Act 2000, s.14. A move towards a directly elected mayor initially required approval by local referendum (section 27), although this requirement was removed by the Local Government and Public Involvement in Health Act 2007.

<sup>89</sup> Section 1.

<sup>90</sup> Section 23.

<sup>91</sup> Section 15.

elected mayor option in 2012,<sup>92</sup> the government pressed ahead with other aspects of the localism agenda. Proposals are currently in motion for the creation of 'super authorities', combined local authorities with enhanced powers to take local decisions and discharge budgets delegated from central government.<sup>93</sup> In a key development, it was announced in early 2015 that a new combined Greater Manchester authority would be conferred with authority over the region's £6 billion NHS budget.<sup>94</sup>

The merits of the aforementioned developments are beyond the scope of the present discussion, although they do indicate a growing perception that the dispersal of power on a local or regional level is desirable. Potentially such steps may eventually lead to more substantive devolution within England along the lines of the kind of regional government which we have already expressed a preference for as a means of addressing the English question. However, the current localism agenda is insufficient for this purpose. It represents a piecemeal approach in which different decision-making structures will exist in different areas, entrusted with varying degrees of decision-making authority. The localism agenda to date has been marked by ad hoc developments devoid of any coherent or consistent vision for the enhancement of local or regional decision-making within England. Nor does it entail the devolution of primary legislative powers along the lines in which these have been conferred upon the existing devolved institutions in Edinburgh, Cardiff and Belfast. Although to some extent a degree of diversity may be justified by reference to the varying needs and desires of

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<sup>92</sup> See, eg., 'Nine cities reject elected mayors', BBC News, 4 May 2012, available at <http://www.bbc.co.uk/news/uk-politics-17949950>

<sup>93</sup> See Cities and Local Government Devolution Bill 2015.

<sup>94</sup> See 'Greater Manchester to control £6 bn NHS budget', 25 February 2015, available at <http://www.bbc.co.uk/news/uk-england-manchester-31615218>

different localities, to address the English question satisfactorily requires a regional tier of government far more robust, coherent, and uniform than what currently exists or is proposed.

## Conclusions

Essentially, the English question has two key parts to it. The first concerns voting processes within the Westminster Parliament which stem directly from the West Lothian question. The second is about enhancing decision-making powers within England through other fora. In many respects, the problem is exacerbated because the UK structure essentially suits England,<sup>95</sup> the population of which desires no radical constitutional restructuring, but is sufficiently aggrieved at the impact of devolution to Scotland, Wales, and Northern Ireland to demand some form of redress which takes account of the English question. The natural conclusion of such pressures is a relatively 'quick-fix' solution in response to the first part of the question: English only votes, as successfully implemented by the Conservative party. While English only votes within the Westminster Parliament appear to enjoy considerable popular support, as we have already established, this mechanism gives rise to various constitutional problems. Against this context it is difficult to disagree with the conclusion of Vernon Bogdanor that, "for the time being, therefore, the West Lothian [aspect of the English] question will have to remain unanswered."<sup>96</sup> This does not mean, however, that the English question cannot be addressed through the devolution of greater power within England.

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<sup>95</sup> This has been attributed in part by John Curtice to the fact that most English people feel equally English and British, meaning that there is no strong urge for a separate English legislative mechanism comparable to that which exists for the other constituent parts of the UK. See Curtice (2006: 128-138).

<sup>96</sup> Bogdanor (2009: 105).

Some form of the regional option, in which considerable power is wielded on a regional level, appears to be the most appropriate option. However, any attempt to address the English question is required to grapple with popular opinion, practicability, and constitutional implications. Tensions arise between these competing considerations and the most obvious prima facie solutions to the English question all appear to come with their drawbacks. An English Parliament or Regional Assemblies lack popular support, and the former threatens to produce dangerous constitutional implications, while the current localism agenda is not a substantive solution to the problem which lies at the heart of the English question.

Any proposed solution to the English question should be underpinned by some guiding principles. Two observations are particularly pertinent here. Firstly, any change should not undermine the status of the Westminster Parliament as the sovereign legislative body of the whole of the UK, and any measures which lead to the creation of a two tier system of MPs should be avoided. This risks undermining the very union itself. Secondly, the politically most popular option for addressing the English question may not necessarily be the most appropriate from a constitutional perspective. If necessary, time must be taken to make the case for a better alternative.

Although possible to resolve the English question fairly quickly to the satisfaction of much of the electorate of England, to do so in a manner that is appropriate to the very constitutional foundations of the UK is likely to prove extremely difficult. There are no “easy fixes” that come without very damaging constitutional implications. The need to address the English question is not in dispute. Charges of unfairness are sufficient in themselves to provoke

a serious debate upon mechanisms for addressing this source of grievance within England. However, it may well be that the better solutions are not necessarily the most popular. There should be no rush to resolve a problem with a similarly problematic solution, but debate should instead centre on approaches that are likely to be sustainable and effective in the long term.

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