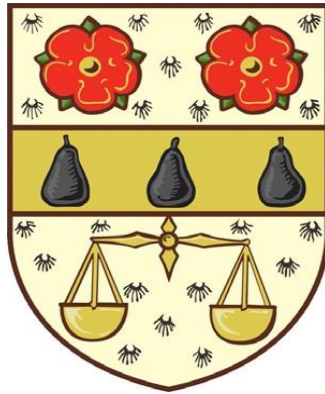


**Nuffield College**

**A Gwilym Gibbon Centre for Public Policy  
Working Paper**



**The Problem of EVEL**  
*English Votes and the British Constitution*

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July 2015

## ***Executive summary***

*Why should Scottish MPs vote on English issues, when the same matters are devolved to the Scottish Parliament in Edinburgh? This is the famous “West Lothian question”. After an election in which the possibility that SNP MPs might hold the balance of power in Westminster was a major campaign theme of the Conservative party, it remains at the forefront of UK politics. The government have now produced proposals for “English votes for English laws”. This paper reviews them, from the perspective of an author sympathetic to the idea, and suggests significant rethinking of some aspects is needed.*

*This question needs to be kept in perspective. England usually gets the government that it votes for, and Scottish MPs only make a difference if England is split down the middle. There are in fact remarkably few occasions in which Scottish MPs make a difference on English matters. The government propose new House of Commons Standing Orders, and a new Committee to give English MPs a vote on English issues. This is the right approach. The government's plans, however, are for a system that gives English MPs substantial veto powers, under a so-called “dual majority”. The attraction of this principle is that it stops change being forced though against an English majority, but does not allow that majority to control the government. But the government's plans have no opt out for exceptional circumstances. Like the convention which restricts Westminster legislating on devolved matters, these rules should apply “normally”.*

*Ministers propose to extend the idea of English votes into secondary legislation. This has not been properly thought through. Much secondary legislation is really part of the executive responsibility of ministers, and unlike Acts of Parliament some of it needs to be made every year. The example the government give, of the distribution of local council finance, is apt. If no Order is made, councils get no money. This would allow an English majority to hold an executive to ransom, exercising the powers of government but not taking its responsibilities. It would not be not a dual majority system in practice.*

*Similar issues arise in relation to taxation. All the detailed work which has been being done on English votes, such as the McKay Commission, relates to ordinary law making, not tax. But the government propose to extend the consent regime to English taxes, such as the rates of income tax. This may seem obvious, but creates substantial problems. Income tax has to be renewed every year. So once again an English majority would be able to hold a government to ransom—income tax is a quarter of total revenue. A government which cannot decide on a quarter of its budget is in no position to govern either England or the UK. And because there is no separate English budget, there is no mechanism for English tax decisions to be reflected spending that affects England only. This is not because of the Barnett formula, but because there is no separately identified English-only spending budget.*

*English votes is a real issue, even though its importance may have been exaggerated by the recent election campaign. It should be seen not through party political but constitutional spectacles. It would be a mistake for the Conservative party to assume*

*that this could only constrain a future Labour government, and wrong in principle for any government to write the rules of this game on the assumption that they could only ever play one role in it. Devolution has changed the British constitution, but Westminster has sailed on as if nothing has happened. So something does need to be done, and some form of English votes is the right answer.*

*England does have to be recognised in the territorial constitution of the United Kingdom, but its position as the dominant partner in the union requires a quite different approach to that for Scotland, Wales or Northern Ireland. The UK will never be a fully formal federal state. Westminster will remain England's Parliament, and the UK government will remain England's government. The trick in designing an English votes procedure is not to undermine that, and not to make the government of England, or the United Kingdom, impossible in some, infrequent, circumstances. The government's present proposals do not take that trick: they carry the risk that in these circumstances, England might have no effective government at all. As with constitutional changes generally, it would be better if development of English votes proceed by consensus, for which there does seem to be political scope in a number of possible formats. Such a constitutional change should be made in a way that it can be expected that the procedures do not change if there is a change of government.*

## ***Introduction***

Every Conservative party election manifesto since 2005 has included a promise to change the voting rights of MPs at Westminster so that Scottish MPs do not decide English laws on topics devolved to Edinburgh. So it is hardly a surprise, a matter of weeks after the general election delivered a Tory majority, that the Leader of the House of Commons announces plans for English votes for English laws. What is surprising is the apparent difficulty these plans are giving the government, even from some of its own backbenchers. This working paper reviews the issue – the “West Lothian question” – the problems which the plans have thrown up, and the options for way forward.

The West Lothian question has a long history. It was Irish before it was Scottish, and Gladstone wrestled with the problem in his efforts to bring about Irish home rule in the 19th century. (See Gallagher, 2012, for an account of this.) He gave up, concluding that separating issues at Westminster was “beyond the wit of man”. When home rule was finally applied in Northern Ireland, the legislation included the pragmatic, if crude, solution of discounting the number of MPs from the Province by one third, rather than restricting their voting rights. The issue was then quiescent for decades, rumbling only briefly in two occasions in the 1920s and 1960s, until the creation of the Scottish Parliament in 1999.

This created, on the face of it at least, a more noticeable constitutional anomaly. The Scottish Parliament was responsible for a very wide range of primary legislation and, under a solidifying constitutional Convention, Westminster did not vote on these issues – Scottish justice, health, education etc. But Scottish MPs could, and did, vote on the very same issues for England, and there were a lot more of them than from Northern Ireland, even though the Northern Ireland discount had been removed. Votes in the House of Commons, therefore, might not represent the balance of representation from England. A constitutional anomaly, however, is only salient if it becomes a political problem. Scottish MPs voting on English issues was a political problem for the Conservatives because Scotland provided not just 20% of Labour MPs, but much of the leadership of the Labour government after 1997. Of course Labour had a majority in England as well during those years, though there were a couple of occasions (as we will see) when rebellions among Labour English MPs were offset by the votes of their Scottish colleagues.

The Conservative commitment to English votes, therefore, was as much partisan as principled, and it may have reflected a wider English resentment that Scotland seemed to have it both ways, with polling evidence showing the question was increasingly salient (See, e.g., Wyn Jones *et al* 2013, or Kenny, 2014). Labour’s strategy was to stop asking the question. The fact of the matter was that Westminster was both the UK and England’s Parliament, and the government governed both the UK and England. Undermining the basis of government by restricting the voting rights of MPs could only create more problems than it would solve, and might make the UK ungovernable in some circumstances. Of course there was a partisan element to this response too: a Labour government might depend on Scottish MPs (and Welsh, with legislative devolution to Cardiff creating the same problem). The partisan politics underwent a dramatic change in 2015. The Conservative success in the general election may well owe a great deal to their skilful use of the threat that Scottish Nationalist MPs could hold the Westminster balance of power, contrary to England’s interest. And the election

of 56 of them, who could support either of the major parties on any division, changes the dynamic of the question.

Back in 2010, however, it was the Liberal Democrats who held the balance of power. Their commitment was to a “federal” UK (though not to an English Parliament) and so not to an English votes solution. The compromise, inevitably, was a Commission to consider the question. Eventually one was set up under Sir William McKay, (McKay 2013) and it proposed a cautious and careful set of Westminster procedures to provide an opportunity for English votes to be registered on legislation. This appeared not to satisfy the Conservative side of the coalition, and a further White Paper was produced towards the end of the Parliament, under the leadership of the then Leader of the House William Hague (HM Government, 2014). It set out a range of more aggressive procedural options, which have provided the basis for the government’s present plans, announced by his successor Chris Grayling in July 2015 (Cabinet Office, 2015).

These plans are for a “dual majority” system in the House of Commons for legislation, or parts of legislation, applying only in England. This legislation will require the consent of the whole House and of English MPs, or in some cases English and Welsh MP’s. The Speaker will decide which Bills and provisions of Bills have to follow the new procedures. The essence of the argument is that the government will require the support of a majority of English members before changing the law as it applies to England, but an English majority cannot force through legislation to which the government, or strictly the majority in the whole House of Commons, is opposed. Section 3 of this paper reviews these procedural issues, which are complex.

In a striking development, however, presaged in neither the MacKay report nor the previous government’s White Paper, these procedures will also apply to taxation, in Finance Bills. This is because during the Scottish referendum campaign, the complete, or virtually complete, devolution of some taxes to the Scottish Parliament was proposed. In particular the rates and bands of income tax will be decided in Holyrood if legislation currently before Parliament goes through in its present form. So income tax will become an English (or English, Welsh and Northern Irish) tax, and the same arguments about Scottish members voting on it arise. But tax decisions are different from normal legislation: they must be made every year, and they have spending consequences. Moreover a government which cannot get its Budget through because of a Commons procedure is in a different position from one which is thwarted on a particular piece of legislation. The questions which this throws up do not seem to have been properly answered in the government’s plans. This is discussed more in section 4 of this paper.

There is however more to the English votes question than the detail of Commons procedure, whether over legislation or budgetary issues. It goes to the heart of the nature of the UK as a union. This union was challenged in the Scottish referendum, and continues to be challenged by the election of SNP members, despite their referendum defeat. The referendum debate made more explicit – and perhaps more evident to people outside of Scotland than it had been before - what sort of union the UK is. It is a voluntary association of nations, but a deeply asymmetric one, simply because England is so much larger than the other constituent parts of the UK. England’s place in that union, and how England’s separate interests are identified (as well the connected issue of how power is decentralised in England itself) are critical to its continued

stability. The UK is not a federal state, with a separate sub-state legislature for its largest nation as well as the three small ones. The risk to be managed in any system of English votes is of creating, unthinkingly, a separate English legislature and executive in Westminster and the UK government. That would render the UK unstable. This risk, and the extent to which the government's plans run it, is discussed in more detail than the concluding section of this paper.

First of all, however, it is worth assessing the scale of this problem. Asymmetrical devolution may throw up a constitutional anomaly; and English Votes may be a politically useful slogan and thus a salient issue; but does it really matter in practice?

### *A solution in search of a problem?*

Size does matter. The West Lothian question was live from 1923 and 1972, when virtually all domestic policy was devolved to the Stormont Parliament in Northern Ireland, but 13 Northern Ireland MPs sat at Westminster. There was no restriction on their voting rights, and they voted on domestic issues for Scotland, Wales and England, even though those Bills did not affect their constituents. Typically the Unionist members supported the Conservative party. No one really minded much about this, as it seldom created any problems in practice. The one recorded instance was in 1965 (Straw, 2007). Prime Minister Harold Wilson had a bare majority over the Conservatives, and wanted to renationalise the steel industry. Ulster Unionists sided with the Conservative opposition, and the measure was lost. Wilson was furious. There were no steel plants in Northern Ireland. So he commissioned his Lord Chancellor, Elwyn Jones, to review the West Lothian question. Jones duly did, and no doubt once the prime ministerial ire had subsided, concluded there was no answer. So tolerating a constitutional anomaly is by no means impossible: the UK managed it for 50 years.

Scotland, arguably, is a different case. 59 Scottish MPs could in principle decide the balance of power in Parliament at Westminster, certainly more often than 13 or even (nowadays) 18 Northern Irish ones. So Scottish opinion could tip the balance in determining England's government; or Scottish votes could be critical in determining individual English decisions. It is reasonable to ask if these are real risks.

### *Getting the government you vote for?*

So far as government formation is concerned, history suggests the risks are small. Of 19 governments since 1945, 16 (84%) have held a majority among English MPs. Between the advent of universal suffrage and the Second World War, no UK administration depended on Scottish MPs votes for its formation. In the decades immediately following, the partisan balance in Scotland did not differ hugely from the UK as a whole. (It's often forgotten that the only party before 2015 to gain a majority of the seats and votes in a general election in Scotland was the Conservatives in 1955.) In 1964, however, England was split down the middle, and Harold Wilson's government depended for two years for its majority on having more than twice as many Scottish seats as the Tories. The issue arose again for 9 months in February 1974, but Labour gained a stronger mandate in October of that year in both in England and Scotland. So, overall, in the 60 years since 1945 there have been around 2½ years in which the balance of government formation for the UK (and hence, hypothetically for England, had there been Scottish devolution at the time) has been tipped by Scottish MPs. This however was at a time when Scotland was consciously overrepresented in Westminster, having around a dozen more MPs than its population share. The number of Scottish MPs was reduced after 1999, so any arithmetic is hypothetical. But majorities in both those governments were so small that had there been 59 Scottish MPs rather than 71, the results might have differed: Wilson would probably have scraped in in 1964 but perhaps not in 1974.

There are, arguably, two other factors which might increase the risk of England's government being chosen by non-English MPs who are not affected by its decisions.

The first is legislative devolution to Wales, which is extending to areas comparable to Scotland. Welsh opinion tends to be different from English, and there has been one occasion (the Labour government of 1950- 51) when Welsh MPs tipped the balance in government formation. That too depended on the arithmetic of Welsh overrepresentation, which remains; but if Wales were reduced to a population share MPs – as has been proposed – this risk too is reduced. The second factor is if Scottish MPs are elected as a bloc, as the SNP were in 2015. In those circumstances as the third party at Westminster, they could be crucial in forming the UK and English governments. This was the position of Parnell's Irish nationalists from the 1880s onwards. (See Gallagher and McLean, 2015). The Irish Party were prepared to do a deal with either of the main British ones, though for the moment at least the SNP say they would only align with the Labour party. This was of course for electoral reasons in Scotland, and that could change; after all from 2007-11 the SNP minority administration in Edinburgh was sustained by Conservative support. So it would be a mistake to think that only the Labour party might be in minority in England but in government thanks to Scottish MPs.

So the risk that Scottish MPs could tip the balance in the government of England and the UK is small but real, and there have been a few elections in which Scottish, or Scottish and Welsh votes did so. If this were not so, there would be little point in Scottish or Welsh citizens voting in UK elections at all. Nearly nine times out of ten, (or 2½ years out of 60) however, England’s vote determines the UK’s government. It does not do so only when England is split down the middle, and when each of the main parties seems only to be able to attract between 30 and 40% of the vote, claims about how undemocratic this is can easily be exaggerated.

*Overturing English opinion?*

The second argument for English votes is that individual decisions affecting England are determined at the margin by non-English votes, even when the government has an overall English majority. Examples are drawn from the experience of the Labour government from 1997 onwards. Labour had an English majority until it lost the election of 2010, but there were occasions when rebellions in its own English ranks were offset by the votes of Scottish members. A fascinating analysis by the House of Commons library demonstrates how remarkably infrequent this was (House of Commons, 2015). The table shows, of divisions in the Commons from 2001-2015, how many would have been different had Scottish MP’s not voted:

*Table 1: Divisions whose outcome would have differed had Scottish MPs not voted*

Total Number of Divisions 2001-15	Number different “without Scotland”	%
<b>3773</b>	<b>25</b>	<b>0.7%</b>

*Source House of Commons library, paper cited*

This number of divisions is so small the House of Commons library lists them all. Table 2 is the library list, with an analysis of the geographical extent of each division. Remarkably only a handful show that “English laws” amended by Scottish votes:



*Table2: Divisions whose outcome would have differed had Scottish MPs not voted, 2001 to 2015, with extent*

<b>Date</b>	<b>Session</b>	<b>Reference _</b>	<b>Extent of issue</b>
29/10/2002	2001-02	Modernisation of the House of Commons	UK
04/02/2003	2002-03	House of Lords Reform	UK
19/11/2003	2002-03	Health and Social Care (Community Health and Standards)	England and Wales Bill
27/01/2004	2003-04	Higher Education Bill	Second Rdg, UK Bill
31/03/2004	2003-04	Higher Education Bill	England and Wales
22/04/2004	2003-04	Security Screen	UK
28/02/2005	2004-05	Prevention of Terrorism	UK
02/11/2005	2005-06	Terrorism Bill	UK
02/11/2005	2005-06	Terrorism Bill	UK
15/03/2006	2005-06	Education and Inspections Bill	England (and Wales)
02/06/2008	2007-08	Planning Bill, Second Reading	England and Wales
11/06/2008	2007-08	Counter-terrorism Bill	UK
12/11/2008	2007-08	Regional Accountability, Amend C	Motion
12/11/2008	2007-08	Regional Accountability, Amend A	Motion
08/12/2008	2008-09	Speaker's Committee on the Search of Parliamentary Offices	UK
09/11/2009	2008-09	Coroners and Justice Bill Amendment (a)	England and Wales
24/02/2010	2009-10	Energy Bill, Proceedings interrupted	UK
24/04/2012	2010-12	Food Labelling (Halal and Kosher Meat): Motion to bring in bill	England and Wales
31/10/2012	2012-13	Multiannual Financial Framework: Motion Amendment (a) proposed	UK
29/01/2013	2012-13	Electoral Registration and Administration Bill: consideration of Lords Amendment	UK
29/08/2013	2013-14	Syria and the use of Chemical Weapons	UK
05/09/2014	2014-15	Affordable Homes Bill – that the Bill be committed to a Select Committee	England
18/11/2014	2014-15	Small Business, Enterprise and Employment Bill — New Clause 2	England
21/01/2015	2014-15	Onshore Wind Turbine Subsidies (Abolition)	UK
26/03/2015	2014-15	Elections for position in the House, secret ballot for re-election of a Speaker	UK

Source: House of Commons Library paper cited, extended

### *Getting a sense of perspective*

In summary, therefore, the situations in which the West Lothian question actually matters have turned out in practice to be infrequent. Over 90% of the time, England has the government it voted for in the last general election. In 15% of elections England does not, because it is split down the middle, or even split 3 ways. The occasions on which Scottish votes have overruled an English majority on an English issue have over the last 15 years extraordinarily close to zero. (This is perhaps something of an irony that one which is well remembered—a Higher Education Bill which imposed student fees on England but not on Scotland – implemented what is now well-established Conservative policy.) This assessment of the seriousness of the question in practice should be taken into account in devising the answer, that is to say the procedure by which English voices are held on English issues, and how English votes impact on English laws.

### *Voice or Veto: how best make English votes count*

Even if it is accepted that “English votes” is more of a political than a practical problem, very careful thought has to be given to the mechanism by which it might be put into practice, as it carries serious risks. Badly designed, it could create the sort of gridlock which could make England or even the UK ungovernable in some circumstances. The key issue is not the detail of legislative process but the fact that the majority in the House of Commons forms the government of England; and if that administration does not have an English majority, is it able to govern England, or does the majority of English members exercise the powers of government, without taking on its responsibilities? A great deal of evidence was taken and very detailed consideration given to the topic by the McKay Commission, which included expertise on House of Commons procedure and parliamentary drafting. The subsequent Hague White Paper did acknowledge this work, but consciously looked for more powerful and less carefully nuanced options. The Conservative party's manifesto commitment was clearly based on the Hague approach; by contrast the Labour Party's manifesto suggested an approach starting from McKay. Both however looked at this from the perspective of ordinary, non-tax, primary legislation.

There is a sense in which Parliamentary procedure is like Lego, and it can be put together in different ways to achieve the same objectives. So rather than concentrate on the detail of procedure, it is more fruitful to look at the major choices which have to be made in devising a way of dealing with this question and the implications of each. They are:

1. What sort of legal instrument is used to create an English votes procedure?
2. What is the nature of that procedure and how powerful is it in practice?
3. What does the procedure apply to?
4. Who decides whether it applies?

#### *What instrument?*

This question is the easiest to answer, though it has significant implications. There is a broad (though not complete) consensus that the appropriate instrument to create an English votes procedure is the Standing Orders of the House of Commons. It is certainly the obvious solution, as this issue concerns the Commons alone, and is about the procedures of the House, which are regulated by Standing Orders. The alternative would be primary legislation, but this has several disadvantages. First, it would be an unusual way to deal with an internal House of Commons issue. Second, it is inflexible: if the procedures turn out to be awkward to work in practice they will be harder to change. Third, it might in principle render the decisions made under the procedure subject to judicial review. Standing Orders do not suffer from these defects. But they are a decision of the whole House and can be amended, repealed, or suspended by the whole House. This is unavoidable, but arguably also desirable: it could provide an important safety valve if the operation of these procedures became unmanageable, provided the UK government were willing to pay any political price of doing so. The government's proposals are for new Standing Orders.

### *What sort of procedure?*

The key insight in developing an English votes procedure is the use of committees of the Commons. This is important, because it solves the problem which Gladstone thought beyond the wit of man. He conceived the problem as identifying issues for which Irish members would be “in or out” of the House of Commons, or at least unable to vote. Using committees to consider particular stages of legislation solves this problem, and avoids the charge that an English votes procedure creates two classes of MP. It is the Bill which moves “in or out”, of (consideration by) the whole House, not the MPs. It is rightly seen as constitutionally objectionable that members of Parliament should be unable to speak and vote on an issue on the floor of the House of Commons, as the McKay Commission noted. The use of committees to consider legislation is well precedented, with the most relevant precedent perhaps being the use of the Scottish Grand Committee to take the Second Reading of Scottish legislation, which was commonly done during the 1980s.

Various options for which committees, and at what stages, had been canvassed. Sir Malcolm Rifkind suggested the Second Reading of an England only Bill in an English Grand Committee. Most of those who have considered the issue propose a Public Bill Committee to look at the detail consisting of English members in proportion to party shares in England (or England and Wales as appropriate). McKay suggested an English pre-Second Reading vote and an English Report Stage as well. The government’s proposals are for a normal Second Reading, an England-only Public Bill Committee (for those few Bills which are England-only in the entirety), a “normal” Report and Third Reading, but an additional English consent stage, in an English Grand Committee (to be called, for some reason, a Legislative Grand Committee) and if necessary additional stages to sort out any disagreements.

The detail of individual procedures is less important than the underlying principles, though it is reasonable to ask whether the additional complexity will simply gum up the Westminster works. The first big choice here – which was enunciated by the McKay Commission, but not in earlier proposals such as Gallagher, 2012, is that these plans do not merely a lot for English voice, but English veto. The less aggressive alternative would be to allow for an English vote which could be overridden by the whole House of Commons, if the government were willing to pay the political penalty. In practice it probably would not, but *in extremis* it might feel able to do so. If however legislation follows the procedures the government now propose, a majority of English members can stop it in its tracks. The government would have to negotiate with them if it wished to get legislation through. Only other hand, the whole House is also required to agree to legislation: so a majority of English members could not force legislation through against the wishes of a UK government was in overall Westminster majority. This is why the government describes the plans as a “dual consent” system. The main question which this this raises is whether it would make it impossible for government in the minority in England to be an effective government of England. It would certainly make it markedly more challenging, as ministers would not be able to guarantee the manifesto promises they made for legislation, and it is possible that some of those could be key not merely to the government’s political objectives, but to any coherent programme of administration for the country. But of course the underlying cause is that the government has been unable to sustain an English majority, and, more likely than not, has a very narrow overall majority. So far as legislation is concerned, an England-only

procedure would make what would already be a difficult position for an administration even more difficult: but it is not possible claim that it having to seek consent for legislative change is guaranteed to make the government of England completely impossible.

The government's "dual majority" system is clearly intended to ensure that change cannot be forced on England unless it has the support of a majority of English MPs, while at the same time making it impossible for English MPs, say, to legislate to require a UK government to act against its wishes and so make governing England impossible. So the plans apply only to government Bills, and not Private Members' legislation. This is a desirable objective, though I discuss below some respects in which the government's plans fail to achieve it. But it is worth noting that what the plans cannot do is allow English MPs to force through change against the will of Parliament as a whole. The recent fox-hunting arguments illustrate this well. Some English MPs want to change the law to make fox-hunting legal again. They might have a majority in England, but English opinion is very evenly divided, and so if SNP members oppose the change, it is unlikely to go through. In the absence of an English votes procedure at present, Scottish MPs are entitled to vote at all stages; whether they do so is up to them. (Although fox-hunting is an issue they have previously given this as an example of a topic on which they would choose not to vote, the SNP now say they will - for reasons that have nothing to do with fox-hunting; that's politics.) But even if the government's plans are introduced, Scottish MPs could still vote at other stages of the Bill and could if they chose veto the change if English opinion is split down the middle. Nothing short of creating an English Parliament can wholly avoid this risk.

From the perspective of the effective government of England, it would be better if the procedures allowed for an override in exceptional circumstances (as recommended by McKay). It is not possible to envisage all the situations which might arise. McKay suggested that there should "normally" be English consent to such laws, just as Parliament "normally" does not legislate on devolved matters without devolved consent. In the latter case, "normally" is a genuflection to the doctrine of Parliamentary sovereignty. But no such genuflection is made in the case of English votes. That does not seem right. In the end, however, if the government is unable to pass the Acts of Parliament that it wishes, the existing law will remain in place unchanged; and governments have wide scope for administrative action short of legislation.

*What does the procedure apply to?*

English Acts of Parliament are like hens' teeth. Even with Welsh legislative devolution growing, many Acts of Parliament apply to England and Wales. Most Acts of Parliament deal with a bundle of related subjects; often some of them will be English, some England and Wales only and some of wider application. For example the legislation dealing with student fees in 2001, mentioned above and sometimes regarded as the *locus classicus* of English votes, was actually a Bill of UK application as it dealt with the research councils as well. So unless legislation were rigorously separated out into Bills of different geographical extent – which would mean many more Bills - an English votes procedure which dealt with entire Acts of Parliament only would be of very limited application indeed.

It was this consideration which led the McKay Commission to suggest that individual

provisions of Bills might be subject to an England-only process. Under the government's proposals such provisions would be considered at the English consent stage. But they will be either accepted or rejected, as there will be no scope for amendment. (Presumably the government's view is that amendments will have been considered, and possibly rejected by the UK majority, at the committee stage so that the issues which would lead to an English veto are already identified.) The government's idea is that there would be a subsequent stage at which elements of the bill could be reconsidered and amended after negotiation. In practice this sounds like a difficult process and a sketchily described one. Certainly if every single provision which had a separate and distinct effect on England (as originally proposed by the McKay Commission) were subject to such a procedure, there would be a serious risk of the legislation granting to a halt.

Most discussions about English votes, and all of the detailed work done before now, has been implicitly or explicitly about Acts of Parliament. But the government's proposals go markedly wider. First they move into the world of taxation, discussed more fully in the next section of this paper. But they also apply to secondary legislation, statutory instruments of all kinds, which might apply to England only. These might, for example, be commencement orders for legislation, regulations under almost any act of Parliament, or regular administrative actions, such as distribution of resources. Most such regulations receive little debate in Parliament. Under the government's plans any statutory instruments which apply in England only and relate to devolved matters would be subject to an English consent process.

This is a major step, and has not been subject to detailed debate or scrutiny. The McKay Commission argued that although similar principles might apply, further detailed consideration was needed before any new procedure was developed for Statutory Instruments. It appears that any consideration which has been given has been entirely within government. Statutory Instruments differ from primary legislation, in that they involve the exercise of ministerial, and not Parliamentary, powers and are often concerned with the day-to-day administration of government. Sometimes, unlike with primary legislation, it is not the case that if no regulation is made, matters continue unchanged. The most obvious example is one which the government have themselves chosen to emphasise, for obviously political reasons. The distribution of resources to local authorities within England through government grant is set out in regulations, subject to the approval of Parliament. If no regulations are made in any one year, no resources will be distributed. But if these regulations, or other similar ones, are subject to an English consent motion, English members can in effect exercise the powers of government, as it is the government which would have to cope with the problems created if no grant distribution were made. On the face of it, this takes us beyond the definition of English laws, into the creation of a sort of English executive consisting of the UK government directed on a subset of its responsibilities by a minority of MP's. That is anything but a recipe for good government.

*Who decides when the procedure applies?*

The government proposes that the Speaker of the House of Commons will decide which Bills or provisions these new procedures apply to. This was not the only choice available to them. The alternative is for the House as a whole to make that decision, as it did when Scotland-only bills used to be referred to the Scottish Grand Committee. Of

course that puts more power in the hands of the government, but again only if they are willing to pay the political penalty of using non-English votes to push through English legislation. As it is, the decision facing the speaker will be one of great technical complexity, no matter how hard legislative drafters try to disentangle its geographical application, and in the circumstances where the issue matters of great political salience.

*The government's procedural proposals overall*

From looking at the choices which the government have made in developing these plans, it is clear that they have chosen to err on the side of giving more power to English members than to a government which is in an English minority. The politics of that may seem obvious to a Conservative administration coming out of the 2015 election campaign, but political alliances shift, and it cannot be assumed that the only situation in which these procedures might operate is one in which a Labour government is sustained by non-English votes. So under these proposed procedures, a government would not have the option of exceptionally overruling an English majority. And on the face of it, in English majority could engage in very detailed bargaining over clauses at a late stage in legislation. The government have ignored the advice of the McKay Commission that the procedures involved should operate “normally” (just as the Sewel Convention under which Westminster does not legislate on devolved matters without the consent of the devolved legislature is said to applied “normally”). Not only would this be symmetrical in constitutional terms, it would be wise in practical terms. This is not possible to envisage all the circumstances in which these procedures would operate. In the end, of course, the majority in the House of Commons can amend or disapply Standing Orders. But this is a nuclear option, and could put an administration in the position of destabilising not merely its relationship with English voters on an individual issue, but England's relationship with the UK. Equally significant, the government have extended the plans into secondary legislation, at the risk of not merely constraining the legislative but the administrative capability of an administration with no English majority. This needs more thought especially in cases where, if no regulation is made, it is not merely a question of no change being made, but of a gap which has to be filled. The same issue arises the next section, which considers the other substantial, and imperfectly considered, extension of this principle, into the realm of taxation and spending.

## *Tax and spending*

Every discussion of the West Lothian question or English votes has explicitly or implicitly been about ordinary, non-tax, legislation. But parliaments are taxing bodies as much as, or more than, they are lawmaking bodies. Indeed Gladstone stumbled into the West Lothian question when his first proposals for complete legislative and tax devolution to Ireland were unacceptable to British business interests: so Ireland had to be represented in Westminster. Devolution to Scotland and Wales has until now been mainly about lawmaking, rather than tax raising. But that is changing, and hence the Prime Minister's announcement immediately after the Scottish referendum campaign, to the discomfort of his campaigning partners, that something would have to be done about English votes not on English laws, but on English taxes.

The Scotland Act 2012, based on the recommendations of the Calman Commission, comes into effect in 2015 and 2016, and gives the Scottish Parliament substantial tax raising powers. Stamp duty land tax has already been devolved, as has landfill tax; but these are both relatively small taxes. From April 2016, income tax in Scotland levied by the UK government will reduce by 10p the pound across all bands, and the Scottish Parliament will be able to substitute a new Scottish rate, raising very substantial revenues. These income tax powers lead to no issues for English votes: any decision on UK income tax made by Parliament at Westminster will still have effect across the United Kingdom, albeit at different levels. So there is no argument that Scottish MPs should not be able to vote in it.

### *English votes on devolved taxes?*

But the complete devolution of any tax, so that the tax decisions of Parliament at Westminster applies only in part of the UK, raises "English votes" questions, though practice these are likely to be English, Welsh and Northern Irish votes, for the most part. (Some small taxes are being devolved to Wales, and the possibility of the devolving corporation tax in Northern Ireland remains. For simplicity, this analysis deals only with Scotland, but the same principles apply, *mutatis mutandis*.) No one seems to have noticed that this issue has been around since 1999, when local taxes were devolved to the Scottish Parliament. Both the levels of and the legislative framework for council tax are devolved, and so is the decision on the level of business rates. So when Parliament at Westminster votes on business rates for England and Wales, Scottish and Northern Irish members have for the last 25 years routinely taken part in that decision. Even if the business rates decision were decentralised to local government, as many argue it should be, there would still be a problem: business rates and government grant to local councils are decided together. Similarly, devolving stamp duty land tax and landfill tax from 2015, and other small taxes in future will raise this issue.

But once again, this is a constitutional anomaly which the British political system appears to be willing to tolerate. Not so for income tax, for the present government. Under the recommendations of the Smith Commission (Smith, 2014), set up to offer a more powerful Scottish Parliament after a No vote in the referendum, income tax will be much more substantially devolved, and the Scotland Bill currently before Parliament will give effect to these recommendations. The Scottish Parliament will control the rates of income tax and various thresholds, though not some other aspects of the tax.



Income tax is of course a much larger and politically much more salient tax. It is a quarter of the government's revenues, even excluding the amount raised in Scotland. So the government's proposals are for the new dual majority system to apply to those parts of a Finance Bill which deal with devolved income tax decisions (for some reason, other devolved taxes are not mentioned). In this case MPs from Wales and Northern Ireland will be part of the dual majority, as there are no definite plans at present to the devolve income tax except to Scotland.

On the face of it, if one accepts the English votes premise, this sounds entirely plausible. After all, despite its special status, a Finance Bill is a law like any other; and if it is objectionable for the Scottish MPs to vote to impose laws on English citizens which do not apply their own constituents, it is *a fortiori* even more objectionable for them to impose taxes.

### *Unanswered questions*

But these proposals have not been thought through to the depth or in the same way even as the proposals for ordinary legislation. They were not considered by the McKay Commission, nor canvassed in the Hague proposals. Any consideration has been purely inside government, and that plans merited only one short paragraph in the three pages of text of the proposals published on 2 July. There are a number of major unanswered questions, and proposals for English votes on taxes go to the heart of sustaining an executive which can govern England and the UK at the same time.

The big question is whether a government which cannot sustain a majority for its budget can be a government at all. Income tax is hardly a marginal part of the budget: it is a quarter of the total. It was concerns like these which made the Labour party nervous about the idea of complete devolution of income tax, but the other parties in the Smith Commission brushed these aside, with Smith offering the reassurance do nothing in the proposals would prevent all MPs from voting on the government's budget. In the government's plans, for dual majority, it can be argued that this is so, but this argument is specious. To see why it is necessary to understand the nature of a Finance Bill and how it differs from ordinary legislation.

As noted above, legislation generally changes the law, substituting a new statute for existing provisions, or sometimes existing common law. No Act of Parliament, no change, but there is still law. Finance Bills are different. They authorise taxation each year. This is one of Parliament's ancient privileges. Section 1 (1) of the Finance Act 2015 illustrates the point exactly: it reads

“Income tax is charged for the year 2015-16”.

Without that legislation, income tax would not be charged at all.

As a result, an English majority would be able to hold a gun to the head of government. They would be able to say that unless their tax proposals were accepted, there would be no income tax at all. (It is the government which would have to deal with the consequences, not the opposition. This is reminiscent of the threat not to renew the then annual Army Act in the run up to the “Curragh mutiny” of 1914: something encouraged by the great theorist of Parliamentary sovereignty AV Dicey.) This system is therefore

not one of an effective dual majority, but also the English majority's absolute control over English income tax, and hence a quarter of the UK budget. That would give that group of MPs much more power than they would have over ordinary legislation, and indeed power without responsibility. It is hard to see how a government in that position could govern effectively. (This difference between finance bills and ordinary legislation is the same point which arises in relation to some statutory instruments, such as those dealing with resource distribution: it appears to have been wholly ignored by the government.)

And that leads to a second problem. We are used to the idea in Britain that, at least parliamentary terms, tax decisions and spending decisions are taken separately. Nowadays they are announced in budgets and spending reviews, but Parliament approves them in Finance Bills and in Appropriations. But in this case, if a subset of the House of Commons can make a tax decision that will reduce revenue (or even one that would increase revenue) those MPs also have to take ownership of the spending consequences. As a matter of simple justice, a tax cut in rUK only shouldn't lead to spending reductions in Scotland. (Devolved income tax decisions in Scotland only affect Scottish spending.) But there is no ring fenced English budget: so an English (or rUK) tax reduction, for example, might be made up by increased all-UK resources supporting English spending. The government seem to envisage that the spending consequence of such an event would just be dealt with in the normal UK spending processes. That is not good enough. It has to be clear that rUK tax changes affect only rUK spending (ie not devolved spending, not all-UK spending like defence, or UK borrowing), and those making the decision need to know what those effects will be.

As a technical level, this is already going to be dealt with in part by amendments to the Barnett formula: changes in UK tax income for taxes which are devolved in Scotland will not lead to changes to devolved spending via the Barnett formula. (Certainly they should not, and the government seem to understand this, though the simplest way to achieve it via formula may not be the route they choose.) But there is no mechanism under which the government's plans demonstrate that rUK tax decisions will affect only rUK spending.

The root of this problem is that there is not an English budget, nor an English executive to control it. But creating such a budget and executive is tantamount to creating an English Parliament. As I will discuss later, that in its turn is arguably tantamount to ending the union. In the absence of such a budget, the English budget is intimately tied up with the UK budget in tax as well as spending terms, and there is an entirely defensible argument of principle that all MPs should vote on all aspects of the budget: after all that has to add up to a total, and any reductions in tax revenue on, say, income tax have to be matched by increases in other taxes or reductions in spending. For as long as these consequent tax or spending changes are not ring fenced to be purely English, it is wrong to stop MPs who would be affected by them voting on the decisions which determine them.

#### *Not the Barnett formula*

Most all the debate on whether the government's proposals have unacceptable implications for finance has been about the Barnett formula. For the avoidance of doubt,

the Barnett formula is not the problem. The idea that Scottish MPs should vote on purely English legislation because it will affect Scottish spending through the Barnett formula is simply wrong. The government has made this even clearer than it already was by explicitly exempting the legislation which determines spending from the new process in its proposals. Even though they might have spending implications, Acts of Parliament do not of themselves affect budgets. Quite often they are driven by spending decisions in the first place. So if ministers set budgets for university support which require fees to be paid, they will have to legislate to allow for fees. Whatever the spending plans are, they will still be voted on in legislative processes in which all MPs, Scottish, Welsh and Northern Irish as well as English, will have a vote. In any event, non-English MP's will have the opportunity under the government's plans to vote at most stages of Bills, under the "dual majority" principle. So Barnett is a red herring. It would be better however if the government acknowledged that the Estimates process – under which Parliament confers spending authority might in cases where English votes were relevant might in a few cases have to become more than purely formal if non-English MPs needed to speak and vote on spending consequences. There are however substantial and serious tax and spending issues which the government's plans do not properly address.

### *England and the UK's territorial constitution*

As will be evident from Gallagher, 2012, I start from a position which is broadly sympathetic to the idea that changes need to be made at Westminster to reflect the reality of devolution. Devolution to Scotland and Wales in particular was a sea change in the British constitution, but Parliament at Westminster sailed on as if nothing had happened. There were a few less Scottish members, and a lot less Scottish legislation. There will be increasingly less Welsh legislation. But England's position is unchanged.

It is hard however to escape the conclusion that the present Government has looked at the proposals solely through the lens that it is the Labour party which would be in the minority in England, as the Conservative party have in recent decades done so poorly in Scotland. After the recent general election campaign in which the Conservative party made very successful use of possibility of Scottish nationalist MPs supporting a Labour administration, this is understandable: but it is wrong. It is wrong in principle because the governing party are writing the rules of the game on the assumption they are going to play one role in it. (This is exactly contrary to Rawls' principle of fairness: the principles that govern systems should be chosen behind a 'veil of ignorance' so that parties cannot tailor them to their own advantage.) It is unwise in practice also in that it cannot be assumed that the Conservative party themselves will never be in this position. It is not necessary to posit a Conservative revival in Scotland for this to happen: it is entirely conceivable that some future Conservative UK administration could be supported by a bloc of Scottish MPs, just as the minority SNP administration in Edinburgh was sustained in office by the Conservatives from 2007.

### *The UK's Territorial Constitution*

But this is a constitutional issue that needs to be seen through constitutional and not partisan spectacles (by any party). Additionally, plans should be developed in a way appropriate to constitutional change. It is now a commonplace to refer to the UK as a union state. After all it was the "union" which was under threat in the Scottish referendum. But this phrase is more than just a description of the historical process by which the UK was formed. A union state is rightly described in the literature as one formed by union, but retaining some of its pre-union institutions. So Scotland in particular retained, for example, a legal system and an administrative one. The UK is the union of one large nation, England, comprising 85% of the total, and three much smaller ones. This is not a federal union – the problems discussed in this paper would be simple if it were, but a fully and formally federal UK would not be stable, as the Royal Commission on the Constitution explained as long ago as 1974. The English Parliament and government would dominate UK political discourse (just as the Scottish Parliament and government have dominated Scottish political discourse) and the Prime Minister of England would be a more powerful figure than the Prime Minister of the UK. That situation would not last. In any event the people of England want Westminster still to be their Parliament, as well as the UK's.

So instead of a federal union, the UK is and will remain a deeply asymmetrical one. In such a union, the small nations have particular constitutional protections, as indeed small states do in federal countries – eg Rhode Island (population 1m) has the same

number of US senators as California (population 39 million). In particular these safeguards have to deal with the fact that the smaller nations are always at risk of being outvoted by the large one. As we have seen, in UK general elections, England gets “the government that it votes for”, in the sense of comprising the majority of MPs it returns, nearly 9 times out of 10. Because the main UK parties do not campaign in Northern Ireland, Northern Ireland never gets the government that it votes for. By the same measure, Scotland gets what it votes for a bit less than half the time, and Wales under a quarter of the time. The number of seats secured in a first past the post system is a measure of “what a country votes for” which should be treated with caution, as the balance of votes may differ markedly from the number of seats. Nevertheless the deal for small nations is in effect that, within a union, on domestic issues that need not be the same across the UK, devolution means that, if their balance of opinion differs, they can choose to do things differently. Indeed a sensible principle is that each nation should have the maximum devolution that is consistent with the maintenance of the union.

There is a sense in which the same principle applies to England, but the caveat “consistent with the maintenance of the union” means a great deal more than for the smaller nations. A system which requires or effectively creates a separate English executive and parliament, or one which renders England or the UK ungovernable in some circumstances would fail that test. And that is the test which the government’s proposals must meet if they are to sustain the union.

#### *Assessing the government’s plans*

Drawing on the analysis earlier in this paper one can draw the following conclusions about the plans published by the government on 7 July 2015:

- They seem to have been drawn up still in the heat of an election battle in which the idea that Scottish MPs would indeed hold the balance of power was talked up, and it is hard to avoid the conclusion that at this partisan lens has somewhat distorted the picture. There is no acknowledgement that the situation envisaged is an unusual one which can only arise when English opinion is split down the middle, and no administration will be able to claim a strong mandate.
- The government are right to proceed via Commons Standing Orders, and to propose additional committee stages to avoid the risk of creating two classes of MP on the floor of the House. Nevertheless the procedures which the government has designed for legislation choose wherever possible the option that will give the maximum power to English MPs, at the expense of the executive. In particular the government have disregarded the advice of the McKay Commission that the consent of English MPs should “normally” be required. There is an obvious parallel with the Sewel Convention that Parliament does not “normally” legislate on devolved matters without devolved consent – ie does not “normally” override Scottish (or Welsh or NI opinion) on a Scottish matter. This symmetry seems to have eluded Ministers and as a result an administration which felt it had no choice but to override English opinion would have no choice but to use the nuclear option of suspending or even repealing the Standing Orders. That takes the issue from the particular change under consideration, at least partly on its merits, straight into constitutional dispute with potentially serious implications for the stability of the UK.

- The government have extended the ambit of English votes in two ways, neither looked at by any external advice. The first is into the realm of Statutory Instruments. Although these make law, they are often essentially administrative instruments, and are a core element of the exercise of executive power by Ministers. Many are not like ordinary primary legislation in that they have to be made, sometimes every year: in the one example the government has given – which is in a highly political area - English MP’s could hold an administration to ransom over the distribution of resources to local councils, as there is no fallback for government. This is not a “dual majority” but effectively allowing English MPs to direct certain executive functions of government. This needs to be rethought and considered in the detail recommended by the McKay Commission.
- These proposals have significant implications for public spending and tax. This is not because ordinary legislation has an effect on devolved spending via the Barnett formula. It doesn’t. Acts of Parliament do not of themselves change budgets, and the legislation which does change budgets is specifically and rightly exempted from the government’s plans. Not need it be because changes in English income tax will impact devolved spending either: changes in the Barnett formula, which need to be seen alongside these plans, should prevent that.
- The tax and spending implications arise from extending these plans the “English votes” to “English taxes”. This is a very big move, and does not seem to have been adequately considered. Tax legislation is different from ordinary laws, and English income tax is a quarter of UK revenues. If a Finance Bill is not passed, it is not as if last year’s income tax carries on unchanged: no income tax will be collected at all. As a result, a “dual majority” system becomes a ransom note: unless an administration has an English majority it will have to accept that majority’s decision on income tax. But there is no requirement for that majority to accept the expenditure consequences of their decision and, because there is no separate English budget, no guarantee that those consequences will be confined to English spending programmes. This too needs to be rethought, and not in a hurry.

A good case can be made for an “English votes” solution to the West Lothian Question. It is superior to the alternative, a so-called devolution discount. That suffers from two defects. First it breaches the principle of equal representation for Scotland, Wales and Northern Ireland in Parliament and under-represents them on reserved matters. Secondly it does not solve the problem. It just reduces the likelihood of an already unlikely problem a bit. Those who want an English voice will find it still has a little Celtic chorus. The government’s plans however do not meet the need, particularly on tax and spend issues, and need some careful rethinking.

#### *A Way Forward?*

There really is no hurry on this. The present government has both a UK and an English majority. This is a constitutional change, and such changes are best done via developing

as wide a consensus as possible round them. This principle was one which was accepted in developing the constitutional changes which have been made for Scotland in both the Calman and Smith Commissions. It would reduce the risk that in the event of a future change of government, the present administration's Standing Orders would simply be abolished or replaced. And in an area as complex and interconnected as this, there is much to be gained from expert and disinterested analysis to inform the choice and help build that consensus. There does appear to be scope for consensus here, in that the election manifestos of both major parties, proposed "English votes" procedures, in Labour's case based on the McKay recommendations.

Some have argued for a Constitutional Convention. It is not at this stage wholly clear how that would operate, what its remit or output would be; but if one were set up clarifying and codifying the UK's changing territorial constitution would be an obvious early task for it. There are other mechanisms available. A Speaker's Conference could discharge this function, but maybe a sledgehammer for quite a small nut. Alternatively, the government might agree a cross party working group of parliamentarians and experts to suggest detailed plans dealing amongst other things with the problems identified in this paper.

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