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Brexit and the Erosion of the UK's Territorial Constitution: Legislative Consent, Intergovernmental Relations, and Policy Divergence in an Uncodified, Asymmetric State

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ABSTRACT

Brexit has operated not only as a political rupture but as an acute stress test for the United Kingdom's uncodified and asymmetric territorial constitution. This article argues that withdrawal from the European Union has accelerated a process of constitutional erosion, whereby the political conventions and informal mechanisms sustaining devolution have been progressively weakened through repeated breaches, institutional distrust, and unmanaged policy divergence. In the absence of entrenched legal safeguards, the stability of the territorial settlement has always rested on voluntary political restraint - most notably the Sewel Convention - and on cooperative intergovernmental practice. By dismantling the EU's shared legal framework, Brexit exposed the fragility of these arrangements and magnified vulnerabilities that had long remained dormant. Conceptually, the analysis adapts theories of constitutional erosion and unsettlement - typically applied to federal or codified systems - to the UK's framework of political conventions and asymmetrical autonomy. Empirically, it examines Scotland, Northern Ireland, and Wales, tracing how divergent constitutional designs and political contexts mediated similar destabilising pressures. The article concludes by evaluating the Labour government's recent reform efforts and their limited potential to stabilise the territorial constitution absent more fundamental restructuring.

Keywords: Brexit, UK constitution, Devolution, Sewel Convention, Intergovernmental relations, Constitutional erosion.

I. INTRODUCTION

Constitutional erosion is often associated with what Huq and Ginsburg term authoritarian reversion. A rapid collapse in which incumbents deliberately dismantle institutional checks and rewrite the political rules in their favour. Yet, as they also show, erosion can take the form of constitutional retrogression. A slower and more incremental process that unfolds even in

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democratic states, particularly those lacking codified constitutional safeguards, where the constraints on central authority rest on political rather than legal foundations.[1] This article examines such a process in the United Kingdom's territorial constitution, tracing how the withdrawal from the European Union transformed long-dormant vulnerabilities into active strains.

The UK's devolution settlement is distinctive in comparison. It is asymmetric, granting markedly different powers to Scotland, Wales, and Northern Ireland, and it is uncodified, subsisting within a constitutional order defined by parliamentary sovereignty.[2] Stability has relied less on entrenched legal guarantees than on conventions, above all, the Sewel Convention, and on informal channels of intergovernmental cooperation. EU membership provided a stabilising external framework: common rules limited the scope for internal divergence, and contentious regulatory questions were frequently resolved within a European rather than a domestic arena.[3]

Brexit removed that stabilising layer, subjecting the territorial constitution to an unprecedented stress test. In doing so, it revealed the limits of relying on voluntary political norms in the absence of legal entrenchment.[4] This article contends that Brexit has acted as an accelerant of constitutional erosion through three interlocking mechanisms: the normalisation of side–stepping the Sewel convention, the exposure of structural weaknesses in intergovernmental relations, and the proliferation of unmanaged policy divergence within the UK internal market.

The analysis unfolds in two key stages. First, it develops a conceptual framework that links constitutional erosion to the UK literature on 'constitutional unsettlement,' a condition in which there is no longer a shared agreement on the basic terms of constitutional order.[5] This framework draws on comparative scholarship on plurinational and federal systems, while recognising the distinctiveness of an uncodified settlement dependent on political self-restraint.

Not all scholars regard the absence of constitutional entrenchment as inherently destabilising. Some have argued that the flexibility of the United Kingdom's uncodified constitutional order may itself constitute a source of resilience, allowing political institutions to adapt pragmatically to changing circumstances without the rigidity associated with formal constitutional structures.[6] This article does not deny the adaptive capacity of the UK's political constitution. Rather, it argues that the Brexit process exposes the limits of such flexibility when the political conventions and cooperative practices that previously mediated territorial relations are repeatedly disregarded.

[1] Aziz Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy' (2018) 65 UCLA Law Review 78.
[2] Alan Trench, *Devolution and Power in the United Kingdom* (Manchester University Press 2007).
[3] See generally: Michael Keating, *State And Nation In The United Kingdom* (OUP 2021) 145 -147 (on EU law as a framework mitigating asymmetrical tensions). See also: A. Glencross, 'Managing Differentiated Disintegration: Insights from Comparative Federalism on Post-Brexit EU–UK Relations' (2020) 23 British Journal of Politics and International Relations 593.
[4] Anthony Glencross, 'Managing Differentiated Disintegration: Insights from Comparative Federalism on Post-Brexit EU–UK Relations' (2020) 23 British Journal of Politics and International Relations 593.
[5] Neil Walker, 'Our Constitutional Unsettlement' (2014) 173 PL 529.
[6] See for example, Mark Elliott, *The Constitutional Foundations of Judicial Review: Issues of Constitutional Legitimacy* (Hart Publishing 2001); Mark Elliott and Robert Thomas, *Public Law* (5th edn, OUP 2024).

Second, the article examines the post-Brexit experience of Scotland, Northern Ireland, and Wales, each of which has confronted the same destabilising forces but responded in constitutionally distinctive ways.

By drawing these threads together, the article illuminates both the distinctive features of the UK case and its implications for wider debates on sustaining multi-level governance in states where constitutional stability relies on the continued observance of political norms. In this respect, the argument also resonates with wider scholarly assessments of Brexit as a moment of profound constitutional disruption within the United Kingdom.[7] It considers not only the ways in which Brexit has reshaped the UK's territorial constitution, but also what its aftermath discloses about the inherent vulnerabilities of uncodified, asymmetrical governance arrangements in an era of political forces pulling the state apart.

The article is structured as follows. Section 2 develops a conceptual framework that situates the UK's territorial constitution within the broader comparative literature on constitutional erosion. Section 3 explains the pre-Brexit constitutional settlement, highlighting the stabilising functions of conventions, intergovernmental relations, and EU membership. Section 4 offers three detailed territorial case studies of the UK's devolved jurisdictions, each concluding with an analysis of its constitutional implications. Section 5 identifies the overarching mechanisms driving constitutional destabilisation. Section 6 considers Labour's 'reset' reforms and assesses their ability to address constitutional erosion. The article concludes by placing the UK's experience in comparative context and reflecting on the challenges of stabilising multi-level governance in constitutional systems predicated on voluntary political norms.

II. Conceptual Framework: Territorial Constitutions and Constitutional Erosion

A. Territorial constitutions and political constitutionalism

A territorial constitution comprises the rules, institutions, and practices through which a state distributes public authority across its constituent units. These arrangements encompass both formal competences and the procedures for resolving disputes, adapting to change, and maintaining the integrity of the political community. In classical federal systems such as the United States, Canada, or Germany, these territorial distributions of power are entrenched in a codified constitution, safeguarded against unilateral amendment by the centre, and enforced by an independent judiciary. Such systems typically combine judicial review with amendment procedures requiring sub-state consent, providing a form of legal insurance against central encroachment even in times of political strain.[8]

The United Kingdom's territorial constitution differs fundamentally from this model. It operates within an uncodified constitutional order in which parliamentary sovereignty remains the organising legal principle.[9] Devolved legislatures, therefore, exercise authority

[7] Claudio Martinelli, *Brexit and the British Constitution* (Routledge 2025); Martin Loughlin, 'Brexit and the British Constitution' in Thomas Jaeger, Matthias Lehmann, Alexander Somek and Michael Waibel (eds), *Consolidating Brexit: The Future of EU/UK Cooperation* (Jan Sramek Verlag 2023) 265–83.

[8] Ronald Watts, *Comparing Federal Systems in The 1990s* (McGill-Queen's University Press 1996). See also USA Constitution article V; Canada Constitution Act 1982, s 38; German Basic Law art. 79(3).

[9] Roger Masterman and Colin Murray, *Constitutional And Administrative Law* (3rd edn, Pearson Education Limited 2022) 131.

through statutes that may, in principle, be amended or repealed unilaterally by the UK Parliament. The practical stability of territorial governance has historically depended less upon legally entrenched guarantees than upon political conventions and cooperative practices.[10]

Central to this political constitution of territory is the Sewel Convention, which provides that Westminster will "not normally" legislate on devolved matters without the consent of the relevant devolved legislature.[11] Alongside Sewel, intergovernmental relations (IGR) have functioned as a mechanism for consultation, coordination, and dispute management between the UK Government and the devolved administrations.[12] Neither mechanism is legally enforceable; their effectiveness has depended largely upon political self-restraint and mutual trust between constitutional actors.[13]

Not all constitutional scholars regard this reliance on political norms as a structural weakness. Mark Elliott has argued that the flexibility of the United Kingdom's uncodified constitution can itself serve as a source of resilience, enabling institutions to adapt pragmatically to political change without the rigidity associated with entrenched constitutional frameworks.[14] Situated within the broader tradition of political constitutionalism, Elliott emphasises the capacity of parliamentary accountability, constitutional conventions, and political culture to restrain the exercise of central authority without the need for formally entrenched constitutional limits. From this perspective, constitutional stability is maintained not through rigid legal constraints but through the continued observance of institutional practices and political accountability mechanisms.[15]

This article does not deny the adaptive capacity of the UK's political constitution. However, Elliott's account implicitly assumes that the conventions and practices underpinning the territorial constitution will continue to command a shared commitment among constitutional actors. Where such norms lose their constraining force, the flexibility of the political constitution may cease to function as a stabilising mechanism and instead expose territorial arrangements to unilateral central intervention. In such circumstances, constitutional change may occur not through formal amendment but through the gradual erosion of the political norms that previously structured relations between Westminster and the devolved institutions.[16]

The Brexit process illustrates this dynamic with particular clarity. The repeated sidelining of legislative consent and the growing marginalisation of cooperative intergovernmental mechanisms demonstrate how constitutional arrangements dependent upon political restraint may become vulnerable when that restraint weakens. In this sense, Brexit reveals the limits of

[10] Paul Anderson, 'Spain and the United Kingdom: Between Unitary State Tradition and Federalization' in Soeren Keil and Sabine Kropp (eds), *Emerging Federal Structures in the Post-Cold War Era* (Palgrave Macmillan 2022) 49–72.

[11] Scotland Act 2016, s 1 and the Wales Act 2017, s 1. See also: *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [148].

[12] Council of the Nations and Regions, *Report* (PolicyWise, October 2024) <www.policywise.org.uk/sites/www.policywise.org.uk/files/The%20Council%20of%20the%20Nations%20and%20Regions%20Report.pdf> accessed 09 March 2026.

[13] Nick Barber, *The United Kingdom Constitution: An Introduction* (OUP 2021) ch 18. See also *Miller* (n 11) [148].

[14] Elliott (n 6); Elliott and Thomas (n 6).

[15] Mark Elliott, 'The British Constitution, Devolution And "Doublethink"' <https://publiclawforeveryone.com/2012/09/13/the-british-constitution-devolution-and-doublethink/> accessed 10 March 2026. See also Martin Loughlin and Stephen Tierney 'The Shibboleth of Sovereignty' (2018) 81 MLR 989.

[16] JAG Griffith, 'The Political Constitution' (1979) 42 Modern Law Review 1-21; Adam Tomkins, 'In Defence of the Political Constitution' (2002) 22 OJLS 157.

relying exclusively on political constitutionalism to sustain territorial governance within an uncodified constitutional order.

B. CONSTITUTIONAL EROSION

The concept of constitutional erosion provides a useful analytical lens for examining how constitutional orders may weaken without formal institutional collapse. Huq and Ginsburg distinguish between two broad modes of constitutional erosion.[17] The first, authoritarian reversion, is a rapid and often visible collapse of democratic institutions, typically marked by the centralisation of power in the executive and the dismantling of electoral or judicial safeguards.[18] The second, constitutional retrogression, is more gradual and far less overt; it involves a series of individually defensible changes that, taken cumulatively, weaken institutional constraints and alter the competitive political order without necessarily breaching formal legality. Retrogression proceeds incrementally, often under the guise of legitimate reform, but its end result is a substantial reduction in the effective checks on governmental authority.[19]

While this framework was originally developed with codified constitutional systems in mind, it has particular relevance for political constitutions such as that of the United Kingdom. In such systems, constitutional safeguards often depend upon informal norms rather than entrenched legal rules. Erosion may therefore manifest not through formal constitutional amendment but through the gradual weakening of conventions, institutional practices, and cooperative relationships between governing actors.[20]

In the context of the UK's territorial constitution, erosion may occur through several mechanisms. These include the repeated bypassing of legislative consent conventions, the marginalisation of intergovernmental coordination mechanisms, and the expansion of unilateral central authority into policy domains previously governed through shared frameworks. Each of these developments may be legally permissible within a system grounded in parliamentary sovereignty. Yet their cumulative effect may nevertheless alter the practical balance of authority within the territorial constitution.[21]

C. CONSTITUTIONAL UNSETTLEMENT

The concept of constitutional unsettlement provides a complementary framework for understanding the broader political consequences of such erosion. Neil Walker introduced the concept to describe a distinctive phase in the United Kingdom's constitutional development in which fundamental questions about the distribution and legitimacy of constitutional authority remain persistently contested.[22]

Walker distinguishes between a settled constitution, an unsettled constitution, and a constitutional unsettlement. A settled constitution reflects a broadly shared understanding of

[17] Huq and Ginsburg (n 1) 78.
[18] Nancy Bermeo, 'On Democratic Backsliding' (2016) 27 Journal of Democracy 5-19; Huq and Ginsburg (n 1).
[19] Huq and Ginsburg (n 1). See also David Landau, 'Abusive Constitutionalism' (2013) 47 UC Davis Law Review 189, 194–198.
[20] Huq and Ginsburg (n 1).
[21] See for example: *Miller* (n 11) [146]–[151] (Lord Neuberger on the Sewel Convention's non-legal status). Further example includes Westminster's bypassing of the Sewel Convention for many Brexit related pieces of legislation including the UK Internal Market Act 2020.
[22] Walker (n 5).

institutional authority and constitutional rules. An unsettled constitution represents a transitional phase during which those arrangements are contested but where a new equilibrium is anticipated. Constitutional unsettlement, by contrast, describes a condition in which contestation itself becomes enduring. Foundational questions regarding sovereignty, territorial authority, and constitutional legitimacy remain unresolved.[23]

In such conditions, constitutional actors may no longer share a common understanding of the rules governing political authority. Disagreements extend beyond policy outcomes to encompass the processes through which constitutional decisions should be made and the institutions entitled to make them. This environment increases the likelihood that constitutional conventions will be contested or disregarded, thereby accelerating processes of constitutional erosion.[24]

D. BREXIT AND THE INTERACTION BETWEEN EROSION AND UNSETTLEMENT

Brexit intensified these dynamics within the UK's territorial constitution. Devolution had already introduced plural constitutional narratives concerning sovereignty, autonomy, and the distribution of authority within the state.[25] EU membership had partially mediated these tensions by providing a shared legal framework that structured regulatory governance across the UK.[26]

The withdrawal from the European Union removed this stabilising framework and forced constitutional disputes back into domestic political institutions. In doing so, it exposed the fragility of constitutional arrangements that relied heavily upon political restraint rather than legally enforceable safeguards.[27]

This article therefore treats constitutional erosion and constitutional unsettlement as analytically distinct but mutually reinforcing phenomena. Erosion describes the weakening of institutional norms and practices that sustain a constitutional order. Unsettlement captures the broader political condition that emerges when those stabilising norms lose their constraining force. The Brexit process illustrates how these dynamics can interact within an uncodified territorial constitution, producing a gradual but cumulative destabilisation of the constitutional order.

[23] ibid.

[24] For example, see the persistence of constitutional contestation in Scotland following the 2014 independence referendum, where a 'No' vote did not settle the territorial question and the Scotland Act 1998 remained in force, but political debate over the Union's legitimacy intensified: Keating (n 3). A parallel can be drawn with Catalonia, where the 2010 judgment of the Spanish Constitutional Court on the 2006 Statute of Autonomy triggered sustained disputes over autonomy and self-determination, without any formal rupture of the 1978 Constitution: José Joaquín Fdez-Allés, 'Spanish Constitutional Jurisprudence: Secession in Catalonia' (2018) 13 *Journal of Comparative Law* 179.

[25] See the Scottish and Welsh Governments' challenges to the European Union (Withdrawal) Act 2018 in relation to retained EU law, culminating in *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A Reference by the Attorney General and the Advocate General for Scotland* [2018] UKSC 64.

[26] Masterman and Murray (n 9). See also: Vernon Bogdanor, Beyond Brexit: Towards A British Constitution (IB Tauris 2019) 234.

[27] Keating (n 3); Chris McCorkindale, 'Legislative Consent, Constitutional Convention, and Constitutional Ill-Health' (2024) 75(1) NILQ 83.

III. THE PRE-BREXIT TERRITORIAL CONSTITUTION

Devolution refers to the decentralisation of certain powers and responsibilities from the central or national authority to the constituent units.[28] It is an ambiguous concept in that it both dispenses power (allowing for autonomy at the constituent level) and retains sovereignty at the centre (the power is reversible; thus, the State remains de jure unitary). Thus, devolution is often used as a solution to address regional disparities, promote local decision-making, and accommodate the diverse needs and preferences of different parts of the state.[29]

The territorial constitution that emerged following the devolution reforms of the late 1990s established a distinctive system of multi-level governance within the UK.[30] Scotland, Wales, and Northern Ireland each acquired legislative institutions and varying degrees of policy autonomy, producing what is widely described as an asymmetric model of devolution.[31] While the Scotland Act 1998 created a legislature with primary law-making powers across a broad range of domestic policy areas, Wales initially received more limited administrative competences before gradually acquiring primary legislative authority through subsequent reforms.[32] Northern Ireland's institutions were established through the Belfast/Good Friday Agreement, embedding devolution within a wider constitutional settlement designed to manage deeply contested political identities.

Despite these institutional differences, the territorial constitution operated within a common structural framework. Devolved authority was exercised through statutes enacted by the UK Parliament, reflecting the continuing centrality of parliamentary sovereignty within the UK's uncodified constitutional order. Devolution therefore did not entail a formal division of sovereignty but rather the delegation of legislative authority within a system that remained legally unitary.[33]

In practice, however, the stability of this arrangement depended upon a series of political and institutional mechanisms that limited the practical exercise of Westminster's formal supremacy. Three stabilising features were particularly significant: the Sewel Convention, cooperative intergovernmental relations, and the regulatory framework provided by EU membership.

As mentioned, the Sewel Convention provided that Westminster would "not normally" legislate on devolved matters without the consent of the relevant devolved legislature. Although recognised in statute through provisions inserted into the Scotland Act and Government of Wales Act,[34] the convention retained its political rather than legal character. As the Supreme Court confirmed in *Miller*, the convention "plays an important role in facilitating

[28] Trench (n 2) ch 1.
[29] Stephen Tierney, 'Federalism in a Unitary State: A Paradox too far?' (2009) 19 Regional & Federal Studies 237, 238.
[30] Scotland Act 1998, Government of Wales Act 1998 and Northern Ireland Act 1998.
[31] Trench (n 2) 8; A. W Bradley, K. D Ewing and Christopher Knight, *Constitutional and Administrative Law* (Pearson Education 2014) 36.
[32] See for example: Wales Act 2017, and Richard Rawlings 'The Welsh way' in Jeffrey Jowell and Colm O'Cinneide (eds) *The Changing Constitution* (9th edn, OUP 2019) ch 11.
[33] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1915). See also: Mark Elliott, 'Devolution, Federalism And A New Constitution For The UK' at <http://blogs.lse.ac.uk/constitutionuk/2014/01/08/devolution-federalism-and-a-new-constitution-for-the-uk> accessed 11 May 2026.
[34] Scotland Act 2016, s 1 and the Wales Act 2017, s 1.

harmonious relationships" between the UK Parliament and the devolved legislatures, but remains non-justiciable.[35]

Prior to Brexit, the Sewel Convention functioned relatively smoothly as an established element of the UK's constitutional practice. Legislative consent motions were routinely sought by the UK Government and, in the vast majority of cases, granted by the devolved legislatures, often with little political controversy.[36] Disagreements were rare and typically resolved through informal negotiation between ministers and officials, reflecting a shared commitment to co-operative intergovernmental relations.[37] The convention was not perceived as a significant constraint on Westminster, but rather as a procedural norm that reinforced mutual respect between the central and devolved institutions. In this period, legislative consent operated as a largely technical mechanism to manage overlapping competences, rather than as a focal point for constitutional or political dispute.[38]

Alongside Sewel, intergovernmental relations functioned as a mechanism for coordinating policy across different levels of government. The Joint Ministerial Committee and related forums were designed to facilitate consultation and resolve disputes between the UK Government and the devolved administrations.[39] Although these structures were often criticised as under-institutionalised and dominated by the centre, they nevertheless provided an important venue through which territorial disagreements could be managed through negotiation rather than unilateral decision-making.[40]

A third stabilising factor was the United Kingdom's membership of the European Union. EU law structured regulatory governance across a wide range of policy areas that were otherwise devolved domestically.[41] Common European regulatory frameworks, therefore, limited the scope for policy divergence within the UK while simultaneously providing a shared legal reference point for resolving regulatory conflicts.[42] In effect, EU membership externalised a significant proportion of the coordination that might otherwise have required domestic constitutional negotiation.

Taken together, these mechanisms helped sustain a workable territorial constitution despite the absence of entrenched constitutional safeguards. Legislative consent provided a political restraint on Westminster's legislative supremacy, intergovernmental relations offered a forum for negotiation between territorial executives, and EU law supplied a common

35 *Miller* (n 11) [148].

36 Institute for Government, *Presumed Consent? The Role of Scotland, Wales and Northern Ireland in the Brexit Process* (11 August 2016) <https://www.instituteforgovernment.org.uk/article/comment/presumed-consent-role-scotland-wales-and-northern-ireland-brexit-process> accessed 11 May 2026.

37 From 1997 until the end of the Gordon Brown Government, IGR were largely cordial, facilitated by Labour's control of the UK, Welsh, and Scottish Governments and conducted primarily through informal channels. Relations gradually deteriorated after 2010, when each administration was led by a different party, and were further strained following the 2016 Brexit referendum, which significantly increased political disputes.

38 Nicola McEwen, "The Sewel Convention and Brexit" (*The Constitution Unit Blog*, 7 April 2020) <https://constitution-unit.com/2020/04/07/the-sewel-convention-and-brexit> accessed 11 May 2026.

39 See for example: Memorandum of Understanding between the UK Government and the Devolved Administrations (2013) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf> accessed 11 May 2026.

40 Nicola McEwen and others, 'Intergovernmental Relations in the UK: Time for a Radical Overhaul?' (2020) 91 Political Quarterly 632.

41 In fields such as agriculture, environmental protection, and consumer regulation, EU law imposed common rules that applied uniformly across all parts of the UK.

42 European Communities Act 1972, s 2(4); see also *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151, which affirmed the constitutional significance of EU law's supremacy.

regulatory framework that reduced the likelihood of internal policy conflict. The stability of the pre-Brexit territorial constitution, therefore, depended less on formal legal entrenchment than on the continued observance of political norms and cooperative governance practices.

It is precisely these stabilising mechanisms that came under increasing strain following the United Kingdom's withdrawal from the European Union. Brexit did not formally alter the legal foundations of devolution, but it disrupted the political and institutional practices that had previously mitigated the tensions inherent in an uncodified and asymmetric territorial settlement. The following sections examine how these pressures manifested across the devolved jurisdictions.

IV. Brexit as a Stress Test – Territorial Case Studies

The removal of the European Union's common legal and regulatory framework exposed the United Kingdom's territorial constitution to stresses it was never designed to absorb. Without this external stabilizing layer, disputes over competence, market access, and constitutional authority were forced back into domestic structures defined by parliamentary sovereignty and non-binding political conventions. Consequently, Brexit transformed long-dormant vulnerabilities into active strains, testing the limits of a settlement predicated on voluntary political restraint.

The following analysis focuses on pivotal legislative and institutional episodes in Scotland, Northern Ireland, and Wales to illustrate how constitutional tensions became visible in the post-Brexit era. By tracing disputes over legislative consent, the adaptation of intergovernmental relations, and the management of regulatory divergence, these case studies reveal a differentiated but systemic pattern of constitutional erosion. Taken together, they demonstrate how the repeated breach of formerly integral norms has led to a state of permanent constitutional unsettlement across the UK's asymmetric settlement.

A. Scotland

(i) The Limits of the Sewel Convention

Scotland's experience of Brexit is perhaps the clearest demonstration of the constitutional erosion that followed the removal of EU membership. The most visible rupture concerned the operation of the Sewel Convention. Prior to 2016, the withholding of consent was rare, and bypass was regarded as constitutionally exceptional.[43] That pattern shifted decisively with Brexit process. The Scottish Parliament withheld consent for a series of key statutes central to the withdrawal process – the European Union (Withdrawal) Act 2018, the European Union (Withdrawal Agreement) Act 2020, the United Kingdom Internal Market Act 2020, and the Subsidy Control Act 2022 – on the basis that they altered devolved competences without agreement.[44] Westminster nevertheless legislated in each case.

[43] Institute for Government (n 36)
[44] 'Brexit' (*Gov.scot*, 2020) at <https://www.gov.scot/brexit> accessed 11 May 2026.

The UK Government defended its approach by arguing that Brexit constituted "not normal – [but] unique" circumstances.[45] This argument was rooted in section 28(8) of the Scotland Act 1998 (as amended by the Scotland Act 2016), which provides that:

> "But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament".

For the Government, the words "it is recognised" confirmed the continued sovereignty of Westminster, leaving it to Parliament alone to decide what counted as "not normal". Lord Keen, then Advocate General for Scotland, made this position explicit:

> "The words 'it is recognised' ... reflect the continued Sovereignty of the United Kingdom Parliament and that it is for Parliament to determine when a circumstance may be considered not normal".[46]

In practice, this meant that the UK Government only clarified its stance once it became clear that devolved legislatures would not give consent. The result was that repeated bypasses not only normalised override but also weakened the remaining political force of the Sewel Convention.[47]

The deeper constitutional significance lies in the dismantling of Sewel's ambiguous status as a safeguard. The Supreme Court in the *R (Miller)* case confirmed that the Convention had no legal effect.[48] What emerged after 2016 was therefore not merely the affirmation of its non-justiciability, but the progressive political hollowing out of the Convention itself. The phrase "not normally" became a dead letter as repeated bypasses exposed the limits of the convention's force. This development raised a broader constitutional question: whether statutory recognition of political conventions in a constitution without entrenchment offers genuine protection, or whether, by highlighting their non-binding character, it accelerates their erosion. In Scotland, the political understanding of Sewel as a democratic safeguard was thus directly at odds with the legal interpretation of it as a merely declaratory provision.[49]

(ii) Judicial Limits of Devolved Autonomy: The Continuity Bill

The Continuity Bill litigation further underscored the fragility of devolved law-making under parliamentary sovereignty.[50] The Bill, passed by the Scottish Parliament in 2018, sought

[45] 'Michael Gove MP, Chancellor Of The Duchy Of Lancaster, Update On The EU (Withdrawal Agreement) Bill Statement' (*Parliament.uk*, 2020) <https://questions-statements.Parliament.uk/written-statements/detail/2020-01-23/HCWS60> accessed 30 September 2020.
[46] HL Deb 21 March 2016, vol 769.
[47] Nicola McEwen, 'Brexit: What Next?' (*The UK in a Changing Europe*, 2020) at <https://ukandeu.ac.uk/wp-content/uploads/2020/02/Brexit-what-next-report.pdf> accessed 11 May 2026.
[48] *Miller* (n 11) [151].
[49] Aileen McHarg, '' Constitutional Change and Territorial Consent: The Miller Case And The Sewel Convention' in Mark Elliott, Jack Williams and Alison Young (eds) *The UK Constitution after Miller* (Hart Publishing 2018) ch 7.
[50] *Reference by the Attorney General and the Advocate General for Scotland – UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64.

to preserve EU law within devolved competence after Brexit. The UK Government immediately referred the legislation to the Supreme Court under section 33 of the Scotland Act 1998.

In its ruling, the Court held that significant provisions fell outside competence because they were inconsistent with the subsequently enacted EU Withdrawal Act 2018.[51] The judgment made clear that devolved legislation, even if intra vires when passed, could be rendered void by subsequent Westminster enactment. This confirmed an asymmetry at the heart of the territorial constitution. While devolution provides meaningful legislative authority, that authority ultimately remains contingent upon the continuing tolerance of the sovereign Parliament.

(iii) Intergovernmental Relations and Institutional Asymmetry

The structural flaws of the JMC - previously noted as a product of its non-statutory nature - became a critical bottleneck during Brexit. As the stakes of coordination rose, the absence of formal accountability and binding procedures shifted from a theoretical weakness to a functional failure. Brexit did not just expose these institutional gaps; it magnified them, proving that a body grounded solely in political goodwill could not withstand the pressures of constitutional divorce.[52]

Disputes over repatriated competences, particularly in policy areas such as agriculture, environment, and trade regulation, could not be resolved through any binding arbitral mechanism. Outcomes therefore depended largely on the political discretion of the UK Government, which, as both participant in and ultimate arbiter of the process, enjoyed a structurally dominant position.[53]

These tensions produced a political backlash. By 2019, Scottish ministers had withdrawn from certain JMC meetings, declaring the process ineffective and increasingly unwilling to legitimise it through participation.[54] The Scottish Government instead advocated the development of binding common frameworks to regulate repatriated competences, presenting these as a cooperative mechanism for managing divergence within devolved areas.

However, the introduction of the United Kingdom Internal Market Act 2020 (UKIMA) effectively sidelined this approach.[55] Despite categorical opposition from the Scottish Government and the withholding of legislative consent by the Scottish Parliament, the Act was enacted unilaterally. As Chris McCorkindale observes, the episode represented one

[51] Some of the key inconsistencies the Court found within the Scottish Bill and thus deemed to amount to a modification of the EU Withdrawal Act 2018 were the retention of the EU Charter as law (s 5), the preservation of the Francovich principle (s 8(2)) and the need for Scottish Ministerial consent on UK Ministerial secondary legislation that applies to Scotland (s 17).

[52] Paul Anderson, 'Plurinationalism, Devolution And Intergovernmental Relations In The United Kingdom' in Yonatan Fessha, Karl Kossler, and Francesco Palermo (eds), *Intergovernmental Relations in Divided Societies* (Palgrave Macmillan 2022) 97-100.

[53] Richard Rawlings, 'Brexit and the Territorial Constitution: Devolution, Reregulation and Intergovernmental Relations' (2020) 36(1) PL 64.

[54] In response to these tensions, a joint review of IGR was launched in 2018, culminating in the replacement of the JMC framework in early 2022 with a more elaborate three-tier structure. See: *Review of Intergovernmental Relations* (*HM Government*, January 2022) <https://www.gov.uk/government/publications/the-review-of-intergovernmental-relations> accessed 11 May 2026.

[55] The Labour Government has in recent times renewed emphasis on Common Frameworks over strict reliance on UKIMA enforcement. See: Thomas Horsley, 'Reforming the UK Internal Market: The UK Government's Response to the Review of the United Kingdom Internal Market Act 2020' (*UK Constitutional Law Blog*, 21 July 2025) <https://ukconstitutionallaw.org/2025/07/21/thomas-horsley-reforming-the-uk-internal-market-the-uk-governments-response-to-the-review-of-the-united-kingdom-internal-market-act-2020/> accessed 11 May 2026.

of the most striking instances of constitutional ill-health during the Brexit process, reinforcing perceptions that meaningful influence had been removed from devolved institutions.[56]

Although subsequent reforms to intergovernmental relations have been introduced - first under the Conservative Government [57]and more recently under the Labour Government [58] - these reforms remain grounded in political agreement and ultimately preserve the structural dominance of the UK Government.[59]

In contrast, many federal systems embed intergovernmental mechanisms within law. In Canada, the division of powers under the Constitution Act 1867 is constitutionally entrenched and disputes are adjudicated by the Supreme Court.[60] In Germany, the Bundesrat provides Länder governments with a constitutionally guaranteed role in federal legislation.[61] The UK's reliance on informal and politically mediated intergovernmentalism therefore stands in marked contrast to these legally structured federal arrangements.

(iv) Regulatory Divergence and the Internal Market

Policy divergence provides a further vivid illustration of the constitutional consequences of Brexit for Scotland. The Scottish Government committed itself to maintaining alignment with EU standards in fields such as environmental regulation, food labelling, and the banning of single-use plastics, presenting this both as a substantive policy preference and as part of a broader political project of European orientation.[62]

Yet UKIMA curtailed the effect of such divergence. By enshrining the market access principles of mutual recognition and non-discrimination, the Act requires that goods lawfully produced in any part of the UK must be admitted elsewhere, regardless of local regulatory standards.[63]

Although the devolved legislatures retain competence to legislate in these fields, the practical enforceability of higher Scottish standards is compromised: Scottish legislation remains formally valid, but is effectively disapplied in respect of incoming goods from England and other jurisdictions. The Act's exemptions offer limited protection; they are narrowly defined through an exhaustive list of 'excluded' areas - such as certain environmental and public health measures - which are interpreted strictly to favour market fluidity. Furthermore, these protections are centrally administered, as the power to amend or expand the list of exclusions (under ss 10 and 17) rests solely with UK Ministers, allowing the UK Government to unilaterally determine the boundaries of devolved regulatory autonomy.[64]

56 McCorkindale (n 27).

57 *Review of Intergovernmental Relations* (HM Government, January 2022) <https://www.gov.uk/government/publications/the-review-of-intergovernmental-relations> accessed 28 June 2025.

58 The Council of the Nations and Regions Report (*PolicyWise*, October 2024) <http://www.policywise.org.uk/sites/www.policywise.org.uk/files/The%20Council%20of%20the%20Nations%20and%20Regions%20Report.pdf> accessed 11 May 2026.

59 Nicola McEwen, 'Still Better Together? Purpose And Power In Intergovernmental Councils In The UK' (2017) 27 Regional and Federal Studies 667.

60 Constitution Act 1982 (Canada) ss 38–49; see also A. Heard, *Canadian Constitutional Conventions* (OUP 2012).

61 Basic Law for the Federal Republic of Germany (1949) articles 70–77; see also: Arthur Gunlicks, *The Länder And German Federalism* (Manchester University Press 2003).

62 European Union (Continuity) (Scotland) Act 2021, s 1(1).

63 UKIMA, ss 2-3 on mutual recognition and ss. 5-6 on non-discrimination for goods; ss 17-20 and ss 21-23 for equivalent provisions on services.

64 McCorkindale (n 27).

From Edinburgh's perspective, this amounted to a form of backdoor recentralisation.[65] Not only was the Act imposed without Scottish consent (bypassing the Sewel Convention), but its substantive design also subordinated devolved autonomy to the requirements of the UK internal market. The point is not merely political: in legal terms, the Act created a new statutory hierarchy in which devolved legislation can be neutralised not by express repeal but by systemic displacement. This mechanism departs from the previous model of devolution, where divergence within devolved competence was accepted and managed, and instead reasserts a centralised conception of uniformity grounded in the economic unity of the UK.[66]

(v) Constitutional Implications

The constitutional significance of UKIMA is profound. Its effect is not to invalidate devolved law but to hollow out its practical authority. This demonstrates how legally permissible exercises of Westminster sovereignty can destabilise the balance of authority underpinning the territorial constitution, rendering devolved autonomy conditional and contingent. More broadly, it exemplifies the phenomenon of constitutional erosion without formal rupture: devolved competence remains intact in law yet is functionally constrained to the point of ineffectiveness.

Taken together, these developments exemplify the three mechanisms of constitutional erosion identified earlier. First, the repeated disregard of Sewel normalised override and stripped the convention of symbolic force. Second, the collapse of trust in intergovernmental machinery hollowed out one of the few mechanisms available for cooperative resolution. Third, the imposition of UKIMA and the limits revealed by the Continuity Bill demonstrated how central authority could pre-empt or neutralise devolved initiatives.

In Scotland, these erosive processes interacted with an existing constitutional agenda – independence – amplifying their significance.[67] What in another constitutional context might have led to institutional reform or recalibration here reinforced arguments for secession, deepening the state of constitutional unsettlement.[68] Scotland thus illustrates not only the vulnerabilities of the UK's territorial constitution but also the ways in which Brexit has transformed political contestation into constitutional fracture.[69]

65 'UK Internal Market White Paper : Initial Assessment By The Scottish Government' (*Gov.scot*, 2020) at <https://www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2020/08/uk-internal-market/documents/uk-internal-market-initial-response/uk-internal-market-initial-response/govscot%3Adocument/UK%2Binternal%2Bmarket%2Binitial%2Bresponse.pdf> accessed 11 May 2026.

66 Thomas Horsley and Jo Hunt, 'Brexit and the UK Internal Market Act 2020: Domestic Constitutional Dislocation and the Reimagination of Internal Trade' (2024) 75(1) NILQ 19; see also Thomas Horsley, 'Constitutional Reform by Legal Transplantation: The United Kingdom Internal Market Act 2020' (2022) 42 OJLS 1143.

67 Klaus Stolz, 'Scotland, Brexit, And The Broken Promise Of Democracy' in Guderjan Marius, Mackay Hugh and Stedman Gesa (eds) *Contested Britain: Brexit, Austerity and Agency* (Policy Press 2020) ch 13.

68 This dynamic was evident in the two major waves of devolutionary reform: the first, led by the SNP Government and culminating in the Scotland Act 2012, and the second, negotiated between Edinburgh and London to avoid constitutional crisis, which concluded in the Scotland Act 2016. See: Aileen McHarg, 'Devolution In Scotland' in Jeffery Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, OUP 2019).

69 While Brexit was an exceptional catalyst, the resulting constitutional fracture appears structural rather than episodic. The shift from a "consensual" to a "hierarchical" model of unionism- evidenced by the formalisation of Westminster's power to bypass devolved consent and the introduction of permanent market-access constraints - suggests a durable realignment of the territorial constitution. Rather than a one-off deviation, these developments have established a new "constitutional baseline" where devolved autonomy is legally subordinate to centralising mechanisms, ensuring that the vulnerabilities exposed by Brexit will persist as a defining feature of the UK's internal governance.

B. NORTHERN IRELAND

(i) Treaty Foundations and Constitutional Fragility

Northern Ireland represents the sharpest stress test of the UK's territorial constitution in the Brexit era. Unlike Scotland or Wales, its devolved arrangements are inseparable from the 1998 Good Friday Agreement (GFA), itself an international treaty. The Northern Ireland Act 1998 gave domestic effect to the GFA's three interlocking strands: power-sharing within devolved institutions at Stormont, North-South cooperation through cross-border bodies, and East-West cooperation via the British-Irish Council. This multi-layered settlement rested on assumptions of dual EU membership.[70] The single market and customs union eliminated the physical border on the island of Ireland, thereby easing a historically fraught site of contestation and supporting the functioning of the GFA's institutions in the aftermath of the Troubles.[71]

Brexit destabilised this equilibrium. By removing the shared EU legal framework, it reopened the border question and, with it, the fragile balance on which the territorial settlement depends.[72] Northern Ireland thus became not only a site of competence and authority disputes, as in Scotland and Wales, but also a theatre in which international law, domestic law, and political identity clashed directly.

(ii) Parliamentary Sovereignty and the Limits of Treaty-Based Guarantees

The reliance on international treaty guarantees within a constitution still formally anchored in parliamentary sovereignty generated profound legal tensions. The GFA is unusual because it combines an international obligation with domestic statutory incorporation.[73] While the NI Act 1998 entrenched key institutional commitments, Parliament remained legally free to legislate inconsistently with them.

Brexit exposed the fragility of that arrangement. Westminster enacted the EU (Withdrawal Agreement) Act 2020, giving domestic effect to the Protocol on Ireland/Northern Ireland, without the legislative consent of Stormont.[74] This illustrated that even treaty-based territorial commitments could not bind Parliament in law.[75]

[70] Brice Dickson, 'Devolution in Northern Ireland' in Jeffery Jowell and Colm O'Cinneide (eds) *The Changing Constitution* (9th edn, OUP 2019).

[71] Katy Hayward and Mary Murphy, 'The EU's Influence On The Peace Process And Agreement In Northern Ireland In Light Of Brexit' (2018) 17 Ethnopolitics 276.

[72] David Phinnemore, 'Northern Ireland: A 'Place Between' In UK–EU Relations' (2021) 25 European Foreign Affairs Review 631; Cathy Gormley-Heenan and Arthur Aughey, 'Northern Ireland And Brexit: Three Effects On 'The Border In The Mind'' (2017) 19 British Journal of Politics and International Relations 497.

[73] Comparable examples of statutory incorporation of international obligations include the European Communities Act 1972 (repealed by the EU (Withdrawal) Act 2018), the Human Rights Act 1998, and the EU (Withdrawal Agreement) Act 2020. None, however, combine treaty obligations with constitutional settlement in the manner of the Northern Ireland Act 1998.

[74] Emma Dellow-Perry and Raymond McCaffrey, 'Legislative Consent Motions' (*Niassembly.gov.uk*, 2020) at <http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2017-2022/2020/procedures/5920.pdf> accessed 11 May 2026.

[75] Other treaty-based incorporations display similar fragility: the European Communities Act 1972 (repealed), the Human Rights Act 1998 (implementing the ECHR but permitting incompatible legislation: s.4), the Geneva Conventions Act 1957, the Extradition Act 2003, and the United Nations Act 1946. In each case, international obligations bind domestically only through statute, and Parliament remains free to legislate inconsistently or repeal them.

The constitutional significance of this override was heightened by the suspension of devolved institutions in Northern Ireland from 2017 to 2020, and again between 2022 and 2024.[76] In the absence of a functioning Assembly, the very safeguards that the Sewel Convention was designed to provide were unavailable. This created a profound democratic vacuum: while the suspension of Stormont left devolved governance inert, Westminster's continued use of the legislative override without the possibility of securing local consent further entrenched the normalisation of central intervention.

(iii) The Protocol, Windsor Framework, and Legal Asymmetry

The Northern Ireland Protocol, and later the Windsor Framework, entrenched Northern Ireland's differentiation from the rest of the UK. By keeping Northern Ireland aligned with significant areas of EU law, the Protocol avoided a hard land border and legally safeguarded key elements of the GFA.[77]

However, the arrangement simultaneously imposed regulatory and customs barriers in the Irish Sea, prompting unionist parties to denounce it as an internal UK trade border and a dilution of Northern Ireland's constitutional status.[78] Nationalist parties, by contrast, regarded the arrangement as a pragmatic mechanism to protect all-island integration and preserve the peace settlement.[79]

The Windsor Framework sought to reduce frictions through 'green lane' and 'red lane' systems for goods and introduced the Stormont brake, allowing the Assembly to block certain new EU measures.[80] Yet these adjustments left intact the core asymmetry: by virtue of section 7A of the EU (Withdrawal) Act 2018, EU law continues to apply in Northern Ireland with supremacy over inconsistent domestic provisions. The Supreme Court in *Allister* reaffirmed that Parliament had lawfully enacted this regime, emphasising the continued orthodoxy of parliamentary sovereignty. In doing so, the Court acknowledged that the Acts of Union and the NI Act 1998 are constitutional statutes of great significance, but confirmed that even such statutes may be impliedly modified by subsequent legislation.[81]

The effect has been to sharpen both institutional distrust and constitutional unsettlement. Intergovernmental mechanisms were ill-equipped to manage these disputes: many of the most contentious questions were refracted through UK-EU negotiations, leaving devolved

[76] The 2017–2020 suspension followed the resignation of deputy First Minister Martin McGuinness amid the Renewable Heat Incentive controversy and the subsequent breakdown in Executive relations. The 2022–2024 collapse stemmed from the DUP's withdrawal in protest at the Protocol on Ireland/Northern Ireland and its operation.

[77] C R G Murray, 'From Oven-Ready to Indigestible: the Protocol on Ireland/Northern Ireland' (2022) NILQ 73(S2) 8-36.

[78] See, for example, *In the matter of an application by JR 181(3) for Judicial Review* [2022] NIQB 16, where the High Court quashed the DUP DAERA Minister's order halting checks required under the Protocol, a move taken in express opposition to its operation.

[79] Cathy Gormley-Heenan and Arthur Aughey, 'Northern Ireland And Brexit: Three Effects On 'The Border In The Mind'' (2017) 19(3) British Journal of Politics and International Relations 497.

[80] The Windsor Framework introduces a green-lane/red-lane system to reduce checks on goods moving from GB into NI. Those staying in NI go through a simplified green lane, while goods destined for the EU are routed via a more stringent red lane. Additionally, it creates the Stormont Brake, allowing 30 MLAs from at least two political parties to trigger a process enabling the Northern Ireland Assembly to pause or oppose new EU-derived legislation applying under the Protocol. See: Tobias Lock, Mary Dobbs & Karen Lynch Shally, "The Windsor Framework – Guarantees, Gaps and Governance" (2024) NILQ 75(3) 433–42.

[81] *Re James Hugh Allister & Ors* [2023] UKSC 5 [66]-[68].

voices marginalised.[82] Even the 2022 reforms to intergovernmental relations preserved the UK Government as the final arbiter of disputes, while Northern Ireland's constitutional fate was effectively decided in talks between London, Brussels, and Dublin. The overlay of international obligations thus hollowed out domestic mechanisms of resolution, reinforcing perceptions of marginalisation within the Union.

(iv) Divergence and Constitutional Unsettlement

The practical consequence has been the emergence of a structural divergence between Northern Ireland and Great Britain. Goods regulation, agri-food standards, and customs processes now operate under two distinct legal regimes, aligning Northern Ireland more closely with the EU than with the rest of the UK.

These frictions have become politically charged evidence of inequality: for unionists, a breach of equal citizenship and a sign of constitutional downgrading; for nationalists, proof of the feasibility of all-island integration.[83]

Divergence has entrenched political polarisation and highlighted the fragility of a territorial constitution underpinned more by political bargains than by entrenched legal safeguards.

Northern Ireland, therefore, exemplifies compounded constitutional erosion. Override has become normalised in a context where devolved institutions were absent or unstable; distrust has been exacerbated by the prioritisation of international obligations over internal consent; and managed divergence has entrenched asymmetry in ways that intensify, rather than alleviate, polarisation.

Unlike Scotland, where constitutional erosion feeds into a single alternative project of independence, in Northern Ireland, it has deepened the binary contest between Union and reunification.[84] Brexit has thus transformed political disagreement into constitutional unsettlement of a profound and enduring kind.

C. WALES

(i) From 'Good Unionism' to Radical Reformism

Wales entered the Brexit process in a constitutionally distinct position compared to Scotland and Northern Ireland. Although the Welsh Government adopted a pro-Remain

[82] These contentious questions specifically concerned the unique regulatory and fiscal frictions facing Northern Ireland, including the application of EU State Aid rules to UK-wide tax measures, the alignment of VAT and excise duties on a dual-regime basis, and the technical criteria for 'at risk' goods crossing the Irish Sea. Because these issues were resolved via international treaty rather than domestic intergovernmental channels, the Northern Ireland Executive was effectively excluded from the core decision-making processes that reshaped its own regulatory environment. See also: David Phinnemore, 'The Protocol On Ireland/ Northern Ireland: A Flexible And Imaginative Solution For The Unique Circumstances On The Island Of Ireland?' in Martin Westlake (ed) *Outside the EU: Options for Britain* (Agenda Publishing 2020) 163-176.

[83] John Garry and others, 'The Future Of Northern Ireland: Border Anxieties And Support For Irish Reunification Under Varieties Of Ukexit' (2021) 55 Regional Studies 1517.

[84] Murray (n 77).

stance during the 2016 referendum, a majority of the Welsh electorate voted to leave the EU (52.5%).[85]

This alignment with the UK-wide result, in contrast to the clear 'Remain' majorities in Scotland and Northern Ireland, created a complex strategic environment for Cardiff. On one hand, the 'Leave' mandate weakened the Welsh Government's bargaining leverage in negotiations with Westminster, as it could not frame Brexit as an external constitutional imposition.[86] On the other hand, the subsequent centralising response from the UK government catalysed a period of constitutional activism that marked a sharp departure from the historical norms of Welsh devolution.[87]

Historically, Welsh devolution had been characterised by incrementalism and a deferential, cooperative approach. This 'good unionist' disposition meant that constitutional reforms - from the Government of Wales Acts of 1998 and 2006, to the reserved powers model in the Wales Act 2017 - were secured largely through negotiation and consensus, reflecting an acceptance of the sovereignty of Westminster as the ultimate constitutional arbiter. However, the Brexit process acted as a catalyst for a sharp departure from this tradition, giving rise to period of constitutional unsettlement often described as the "awakening of the Welsh dragon".[88]

(ii) The Collapse of Deferential Unionism

The passage of the European Union (Withdrawal) Act 2018 marked the first major constitutional flashpoint of the Brexit process for Wales. At the heart of the controversy was the UK Government's initial approach to the allocation of competences returning from Brussels. From the outset, the UK adopted a conferred powers model: powers repatriated from the EU would, by default, return to Westminster unless and until they were deliberately devolved. This approach was justified in functional terms - as a means of preserving the integrity of the UK internal market, ensuring legal continuity, and maintaining a free hand for negotiating international trade agreements.[89] This approach was formalised in the EU Withdrawal Bill introduced in 2017 (Clause 11).[90] In response to the perceived 'power grab,' the Welsh Government advanced its own Continuity legislation – the Law derived from the European Union (Wales) Act 2018. The act sought to empower Welsh Ministers to amend retained EU law through secondary legislation and, most controversially, to create mechanisms that

85 'Brexit Results, By Nation' (*Statista*, 2016) <https://www.statista.com/statistics/568701/brexit-results-by-nation> accessed 11 May 2026.

86 Jo Hunt and Rachel Minto, 'Between Intergovernmental Relations and Paradiplomacy: Wales and the Brexit of the Regions' (2017) 19 The British Journal of Politics and International Relations 647.

87 Rawlings (n 32).

88 Darryn Nyatanga, 'Welsh Independence: Can Brexit Awaken The Sleeping Dragon?' (*LSE Brexit*, 2020) at <https://blogs.lse.ac.uk/brexit/2020/06/04/welsh-independence-can-brexit-awaken-the-sleeping-dragon/> accessed 11 May 2026. See also: Jonathan Bradbury, 'Welsh Devolution and The Union: Reform Debates After Brexit' (2021) 92 Political Quarterly 125.

89 Stephen Tierney, 'The Territorial Constitution and the Brexit Process' (2019) 72 Current Legal Problems 59.

90 Clause 11 dealt with the constitutional question of competence allocation. Under the existing settlement, the Government of Wales Act 2006, s 108(6)(c), the Scotland Act 1998, s 29(2)(d), the Northern Ireland Act 1998, s 6(2)(d) prohibited devolved legislatures from enacting provisions incompatible with EU law. Clause 11 proposed to replace that constraint with a prohibition on modifying the new category of retained EU law, with any release of competence dependent on the exercise of ministerial discretion at the centre. In effect, all EU-derived powers - including those falling within devolved fields such as agriculture, fisheries, environment, and aspects of justice and transport -would initially be re-reserved to Westminster, to be devolved only if and when Whitehall so determined through secondary legislation.

would allow Welsh Ministers to veto certain retained EU law measures adopted by UK Ministers where these applied to devolved fields.

The UK Government's immediate response was to refer the legislation to the Supreme Court to test its legislative competence. At the same time, in a bid to secure legislative consent for the EU Withdrawal Bill, ministers tabled a series of amendments to Clause 11. These amendments represented a partial retreat: competences falling within devolved fields would now, by default, return to the devolved level, with limited powers temporarily "frozen" at the centre to facilitate the design of common UK-wide frameworks.[91] In the end, the Welsh Government accepted the revised settlement, repealing its Continuity Act in the process. For Wales, the episode marked a pivotal shift from deference to assertiveness. While the Welsh Government chose pragmatism in repealing its Continuity Act, it simultaneously reframed its constitutional position, advancing proposals for a reconstituted Union grounded in parity of esteem and legally entrenched safeguards. This episode thus became an early inflection point in the post-Brexit erosion of the UK's territorial constitution, signalling the limits of political constitutionalism in managing territorial pluralism.

(iii) The Institutionalisation of Override

The subsequent imposition of the UK Internal Market Act marked another decisive shift. This was not merely an episodic disagreement but a structural realignment of power. By proceeding despite the Senedd's formal withholding of legislative consent, Westminster demonstrated that the Sewel Convention - despite its statutory recognition - offered no legal protection against the normalisation of central intervention.

The effect was doubly corrosive. First, the mutual recognition and non-discrimination principles in UKIMA created a permanent regulatory ceiling, where Welsh standards (for example, on single-use plastics or food safety) could be effectively neutralised by lower standards elsewhere in the UK.[92] Second, it eroded the incentive for the very cooperative Common Frameworks that Wales had championed. Cardiff had invested heavily in these frameworks as a consensual alternative to central regulation, only to see them bypassed by the UK Government when political stakes were highest.[93] This revealed a chronic constitutional instability where the centre reserves the right to act unilaterally whenever consensus proves inconvenient.

(iv) A New Constitutional Baseline and the Federal Vision

Brexit prompted a strategic reorientation of Welsh constitutional discourse - moving it closer to a quasi-federalist critique of the British state as a means of resolving this unsettlement. Through successive White Papers, the Welsh Government articulated a coherent programme for radical constitutional reform.[94] These proposals called for a reimagining of the

[91] EU (Withdrawal) Act 2018, s 12.

[92] Horsley and Hunt (n 66); Horsley (n 66).

[93] The Welsh Government in their opposition to UKIMA, lodged a legal challenge against it. This marked the first time that a devolved Government had initiated legal proceedings against the UK Government, to challenge a piece of Westminster legislation. Nonetheless, the Welsh Government's legal challenge failed on the grounds of prematurity. See: *The Counsel General for Wales, R (on the application of) v The Secretary of State for Business Energy and Industrial Strategy* [2021] EWHC 950 (Admin).

[94] See for example: 'Brexit And Devolution' (*Gov.Wales*, 2017) at <https://beta.gov.wales/sites/default/files/2017-06/170615-brexit%20and%20devolution%20%28en%29.pdf>; 'Reforming Our Union: Shared Governance in the

Union as a voluntary partnership of equals, underpinned by shared sovereignty and entrenched legal protections for devolved competence. Recommendations included replacing the ineffective Joint Ministerial Committee with a statutory UK Council of Ministers governed by parity of esteem; codifying or replacing the Sewel Convention with binding legal guarantees; and embedding devolved participation in the negotiation of international agreements affecting devolved areas. Notably, this constitutional agenda stopped short of advocating independence, but it nonetheless challenged core orthodoxies of the UK constitution by seeking to constrain parliamentary sovereignty and move towards a quasi-federal model.[95]

The distinctiveness of the Welsh position lies in its attempt to reconcile a unionist commitment with demands for deeper autonomy. While Scotland has leveraged constitutional tensions to advance independence and Northern Ireland's debates remain polarised around the Union and reunification, Wales has framed Brexit as an opportunity to reform the Union rather than exit it. Yet, the legal and political feasibility of this vision is limited.

The UK Labour Government has sought to "reset" devolved relations, most notably through reforms to the IGR framework by the creation of the Council of the Nations and Regions. Ultimately, however, these reforms fall short of Welsh Labour's proposals for deeper constitutional change, including a formal redefinition of sovereignty.[96] The Welsh experience suggests that the UK's territorial constitution has shifted into a state of permanent unsettlement, where the formal continuity of the law masks a profound and perhaps irreversible hollowing out of devolved autonomy.

V. Cross-cutting Analysis: Mechanisms of Constitutional Erosion

The territorial case studies reveal divergent political trajectories but a shared, systemic pattern of constitutional erosion.[97] Brexit did not produce a discrete rupture in the UK's territorial constitution; rather, it acted as a catalyst, accelerating latent vulnerabilities within an uncodified, asymmetric settlement that depends on political norms rather than enforceable legal constraints.[98] Across Scotland, Northern Ireland, and Wales, common mechanisms of erosion have emerged, though they have been refracted through the distinct constitutional and political contexts of each jurisdiction.

UK' (*Gov.wales*, 2019) at <https://gov.wales/sites/default/files/publications/2019-10/reforming-our-Union-shared-governance-in-the-uk.pdf>; 'Reforming Our Union: Shared Governance In The UK - June 2021' (*Gov.Wales*, 2021) at <http://gov.wales> accessed 11 May 2026.

95 More recently, the Welsh Government has expressed clear support for the findings of the Independent Commission on the Constitutional Future of Wales, which emphasised a need for significant steps to strengthen devolution, including greater fiscal autonomy, the devolution of powers over justice, and policing, and legally enforceable intergovernmental mechanisms to safeguard Wales's position within the Union. See: Independent Commission on the Constitutional Future of Wales, Final Report (*Welsh Government*, 2024) <https://www.gov.wales/sites/default/files/publications/2024-07/independent-commission-on-the-constitutional-future-of-wales-final-report.pdf> accessed 11 May 2026.

96 *Miller* (n 11) [151].

97 Huq and Ginsburg (n 1).

98 Michael Keating, 'Brexit and the Nations' (2018) 90 Political Quarterly 167.

A. THE NORMALISATION OF THE 'SEWEL BYPASS'

The most striking mechanism of constitutional erosion has been the normalisation of the bypassing of the Sewel Convention. Since 2018, each devolved legislature has fruitlessly withheld consent for key Brexit-related legislation. Bypasses of the Sewel Convention were rare before 2016, but the post-Brexit period marks a qualitative shift.[99] A routine disregard for Sewell has undermined the political salience of consent, transforming a once meaningful constraint into a hollow formality. The repeated exercise of unilateral legislative authority has sent a clear signal that devolved consent, though desirable, is neither constitutionally required nor politically decisive.[100]

In an uncodified system, a convention that is repeatedly breached without political consequence ceases to perform its stabilising function. This suggests that the flexibility of the British constitution - often defended by scholars such as Mark Elliott as a source of resilience - has instead facilitated a form of executive unilateralism that leaves the territorial settlement inherently fragile.[101] When the centre abandons its commitment to self-restraint, the lack of legal entrenchment transforms political constitutionalism into a vehicle for central dominance.

B. INSTITUTIONAL ATROPHY AND ADAPTIVE CENTRALISM

A second mechanism is the failure of IGR to adapt to a high-stakes, post-EU environment. The UK has practised a form of adaptive centralism: implementing minor procedural adjustments to the intergovernmental framework while strictly maintaining the legal and political hierarchy of Westminster. This has resulted in a pervasive institutional atrophy where the mechanisms of coordination are increasingly perceived by devolved actors as instruments of central management rather than forums for genuine negotiation.[102]

This is particularly acute in the context of Northern Ireland, where the complexities of the Windsor Framework have seen key regulatory decisions refracted through UK–EU bargaining. This international overlay effectively marginalises the devolved Executive, creating a democratic deficit where Northern Irish institutions are spectators to the regulation of their own internal market. This reinforces the process of erosion: by establishing new consultative structures that lack binding dispute-resolution powers, the centre maintains a veneer of cooperation while hollowing out the substance of devolved participation. The result is a deepening of institutional distrust that renders the settlement less governable.

C. SYMBOLIC DIVERGENCE AND THE REGULATORY CEILING

Policy divergence, once the hallmark of successful devolution, has been transformed into a site of constitutional strain. In Scotland and Wales, the pursuit of distinct regulatory standards has been neutralised by the regulatory ceiling established by the principles of mutual recognition in the UK Internal Market Act 2020.

99 Institute for Government (n 36).
100 *Miller* (n 11) [146]–[151].
101 Elliot (n 6); Elliott and Thomas (n 6).
102 McEwen and others (n 40) 632–40.

These dynamics have produced a state of 'symbolic divergence,' where the enactment of devolved legislation reflects the distinct values of a local electorate but remains unenforceable because the centre has reclaimed the practical power to govern the domestic market. This hollowing out of competence does not merely cause policy friction; it actively destabilises the territorial bargain by demonstrating that devolved autonomy is now legally subordinate to the demands of a UK internal market as defined by Westminster.

D. THE SLIPSTREAM OF CONSTITUTIONAL UNSETTLEMENT

The cumulative effect of these mechanisms is a state of permanent constitutional unsettlement. The question arises as to whether this process of erosion is reversible. While the current administration has sought a 'reset' of relations through improved rhetoric and the creation of new consultative bodies, these measures address the symptoms rather than the structural causes of the fracture.[103] They remain grounded in political grace rather than legal right.

In comparative territorial theory, systems that fail to adapt to such pressures often move into a slipstream of gradual disintegration. The UK's current trajectory suggests that the informal constitution has been stretched beyond its elastic limit.[104] Without a fundamental recalibration of the relationship between law and politics - specifically a move toward legally entrenched safeguards that Westminster continues to resist - the territorial constitution will remain in a state of chronic instability. The 'rules of the game' are now permanently contested, and the vulnerabilities exposed by Brexit have become a defining, and perhaps irreversible, feature of the modern British state.

As Martin Loughlin suggests, the failure to consider the consequences of a centralised, Anglo-centric approach has exposed the severe drawbacks of the UK's system of government.[105] By prioritising a singular vision of parliamentary sovereignty over the requirements of territorial pluralism, Brexit has not only accelerated the erosion of the 1998 settlement but has made radical outcomes – such as the independence of Scotland or the reunification of Ireland - increasingly plausible. The slipstream of erosion leads toward a constitutional destination where the Union, as currently constituted, may no longer be sustainable.

VI. LABOUR'S RESET: ADDRESSING, BUT NOT RESOLVING, CONSTITUTIONAL EROSION

The post-Brexit period has laid bare the structural fragility of the UK's territorial constitution. As the cross-cutting analysis makes clear, the normalisation of bypassing the Sewel Convention, institutional distrust in intergovernmental relations, and the re-centralisation of regulatory authority under the UK Internal Market Act 2020 have collectively eroded the political norms that once mediated legal centralisation. These developments have underscored the absence of entrenched constitutional limits, revealing a settlement in which devolution operates at the pleasure of Westminster, with little recourse to enforceable legal remedies. The

[103] See the Labour Government's proposals to 'reset' devolved relations: Labour Party, *Change: Labour Party Manifesto 2024* (13 June 2024) at <https://labour.org.uk/change/serving-the-country> accessed 11 May 2026.
[104] Watts (n 8).
[105] Loughlin (n 7).

result is a model in which constitutional stability depends on political restraint - restraint that has been steadily diminishing since 2016.

A. THE COUNCIL OF THE NATIONS AND REGIONS: PROCEDURAL VERSUS STRUCTURAL INNOVATION

Labour's entry into office in 2024 has brought what it terms a "reset" of devolution, combining a commitment to institutional cooperation with an avoidance of radical reform.[106] The most visible innovation has been the creation of the Council of the Nations and Regions. This forum, bringing together the Prime Minister, devolved leaders, and English metro mayors, seeks to remedy the deficiencies of the ad hoc, often reactive, arrangements that predominated in the post-Brexit period. The Council operates as a forum for policy coordination in areas of shared competence, and incorporates a nascent dispute resolution function, serving as an early-warning mechanism for intergovernmental tensions and providing a structured environment within which disagreements may be ventilated and, where possible, resolved consensually. This function is reinforced by the establishment of a permanent secretariat, mandated to provide continuity, manage agendas, and monitor the implementation of agreements.[107]

However, viewed through the lens of constitutional erosion, the Council represents a procedural improvement rather than a structural fix. It possesses no statutory footing; its existence and influence remain entirely dependent on the political will of the centre. This lack of legal entrenchment means that the Council does not resolve the underlying institutional atrophy. While it may lower the political temperature, it fails to provide the parity of esteem or the legally binding mechanisms required to shield devolved autonomy from future unilateral override.

B. REFORMING UKIMA: THE LIMITS OF ADAPTIVE CENTRALISM

The 2025 reforms to UKIMA mark a second significant shift, aimed at softening the regulatory ceiling that has stifled devolved policy divergence. By elevating Common Frameworks as the primary mechanism for managing regulatory divergence and by introducing a minimum economic impact test before market access principles can override devolved policies, these reforms have marginally rebalanced the relationship between the centre and the devolved administrations. In practice, they have increased the scope for negotiation and technical collaboration in areas such as environmental standards and agricultural policy, reducing the perception - especially acute in Scotland and Wales - that market rules function as a blunt instrument of recentralisation. The introduction of a joint referral process to the Office for the Internal Market (OIM) has also provided a procedural avenue for devolved voices in internal market disputes, though the process remains advisory and lacks binding force.[108]

106 Labour Party, *Change: Labour Party Manifesto 2024* (13 June 2024) at <https://labour.org.uk/change/serving-the-country> accessed 11 May 2026.

107 The Council of the Nations and Regions Report (n 58).

108 UK Government, *Response to the Review of the United Kingdom Internal Market Act 2020 and Public Consultation* (Department for Business and Trade, January 2025) at <https://assets.publishing.service.gov.uk/media/686fa10e2cfe301b5fb679d0/uk-government-response-to-the-review-of-the-united-kingdom-internal-market-act-2020-and-public-consultation.pdf> accessed 11 May 2026.

However, these changes leave the core pathology of the Act untouched. The UKIMA reforms do not repeal the principle of central override; they merely add a layer of procedural complexity to its exercise. This is a classic example of adaptive centralism: minor technical adjustments that preserve the legal hierarchy while attempting to restore a veneer of cooperative legitimacy. For Scotland and Wales, the market access principles remain a latent threat to their regulatory autonomy, illustrating that the reset has altered the conduct of centralisation without dismantling its legal architecture.

C. THE SLIPSTREAM OF EROSION: WHY PROCEDURAL RESETS FAIL

In England, Labour's reset has been accompanied by a rapid expansion of local and regional devolution. The 2025 English Devolution and Community Empowerment Bill demonstrates a willingness to extend decentralisation within England, though it also highlights the asymmetry of the UK's territorial architecture: the empowerment of English regions contrasts sharply with the absence of equivalent structural reforms for Scotland, Wales, and Northern Ireland. This highlights the central tension of the Labour reset: the gap between incrementalism and the radical reform proposals advocated by the Brown Commission or the Independent Commission on the Constitutional Future of Wales.[109]

These commissions argued for a quasi-federal architecture, justiciable intergovernmental mechanisms, and a legally enforceable consent principle. Such proposals recognise that the UK is in a slipstream of constitutional erosion where informal norms no longer suffice.

The result of a constitutional moment best characterised as a partial reset without structural repair. Labour's reforms have reduced the immediate friction and fostered a more collaborative tone, but the deeper vulnerabilities - legal centralisation and the fragility of political norms - remain unaddressed.

VII. CONCLUSION

Brexit has laid bare the structural fragility of the United Kingdom's territorial constitution. The collective experiences of Scotland, Northern Ireland, and Wales reveal a sustained process of constitutional erosion, in which the political conventions and cooperative practices that once mediated the relationship between law and politics have progressively withered. In an uncodified and asymmetric order where legal authority remains concentrated in Westminster and devolved autonomy relies on voluntary restraint, withdrawal from the European Union acted as the catalyst that activated long-dormant vulnerabilities.

This trajectory of decay transcends mere political disagreement or institutional strain. It exposes a fundamental paradox: a system grounded in absolute parliamentary sovereignty, even when tempered by norms like the Sewel Convention, lacks the robust safeguards required to sustain multi-level governance during periods of acute contestation. The

[109] Labour Party, *A New Britain: Renewing our Democracy and Rebuilding our Economy. Report of the Commission on the UK's Future* (December 2022) at <https://labour.org.uk/wp-content/uploads/2022/12/Commission-on-the-UKs-Future.pdf>; Independent Commission on the Constitutional Future of Wales, *Final Report* (Welsh Government, 2024) at <https://www.gov.wales/sites/default/files/publications/2024-07/independent-commission-on-the-constitutional-future-of-wales-final-report.pdf> accessed 11 May 2026.

normalisation of the 'Sewel bypass', the degradation of intergovernmental trust, and the centralisation of market regulation have effectively hollowed out the practical autonomy of devolved nations. Consequently, while the UK's territorial constitution remains doctrinally unitary, it has become politically plural and increasingly contested.

Labour's current programme of reform, from the establishment of the Council of the Nations and Regions to modest adjustments to UKIMA, represents a pragmatic attempt to stabilise the territorial order without altering its core legal architecture. However, these measures address the symptoms rather than the structural cause of the fracture. By remaining grounded in political grace rather than legal right, they fail to arrest the slipstream of erosion. As this article has argued, procedural innovations cannot substitute for structural repair; without a willingness to move toward justiciable constraints on Westminster's sovereignty, the UK remains caught in a state of permanent constitutional unsettlement.

The implications for comparative constitutional theory are significant. The UK's experience demonstrates that erosion can occur without a formal breach of rules, precisely because the absence of enforceable constraints renders the settlement more pervasive and harder to contest. It confirms that the resilience of a territorial settlement depends less on legal continuity than on the durability of shared political understandings. When those understandings collapse, as they have in the post-Brexit decade, legal continuity becomes a mask for institutional fragmentation.

Ultimately, the UK faces a choice between radical restructuring or continued decline. As Martin Loughlin has observed, the prioritisation of an Anglo-centric vision of sovereignty has exposed the severe drawbacks of an over-centralised system. Without a fundamental recalibration of the relationship between law and politics – one that recognises the limits of informal constitutionalism in a plural state – the centrifugal pressures unleashed by Brexit will continue to unsettle the Union. The instability of the post-Brexit constitution suggests that the erosion of the 1998 settlement may not be a temporary phase, but the beginning of a transformative and perhaps final chapter for the United Kingdom.