Introduction

1. The Federal Trust is a charity for the purposes of education and research. It is concerned with interconnections between different levels of governance, from local to global. We welcome the present inquiry by the House of Lords Select Committee on the Constitution. It offers the possibility of exploring how authority is distributed between different governmental tiers within the UK, how the balance between them is changing, and what are the implications of these changes.

2. Since the late 1990s, the introduction and expansion of devolution to parts of the United Kingdom (UK) has seen the UK increasingly take on some of the features associated with a federal system. The devolved institutions introduced to Wales, Scotland and Northern Ireland (and perhaps Greater London also) resemble in some senses the structures of ‘states’ found within a federal country. Moreover, the Human Rights Act 1998 has some of the quality of a federal Bill of Rights, and the UK Supreme Court (operative since 2009 under the Constitutional Reform Act 2005) has some similarity to a federal constitutional court.

3. But the UK constitution is not yet fully federal in nature, not is it clear whether it is destined to become so. Most of England, including the bulk of the UK population, has no devolved governance and therefore lacks the equivalent of a ‘state’ tier. Moreover, there is no written constitution, such as would be found in a federal system, to entrench the respective rights of the central and devolved levels. In its place is a principle of parliamentary supremacy, with – in legal theory at least – all other tiers at present ultimately subject to the authority of the Westminster legislature.

4. Nevertheless the pattern of British constitutional development in a partly federalising direction makes federal concepts useful as a tool for analysis of the changing UK polity. Accordingly, the following evidence submission uses a federal perspective as a means of addressing the questions posed by the Committee in its inquiry into the union and devolution.

5. Furthermore, since the idea of a federal UK is gaining increasing support as a possible solution to some of the difficulties of the UK – including the lack of devolution within most of England and uncertainty surrounding the future status of Scotland – it is apt, in a discussion of the condition of the UK constitution, to explore the federal model and its applicability to the UK in greater detail.

Principles underlying the Union and devolution

The Union

1. What are the essential characteristics of a nation state? Are these different for a state in which power is devolved and, if so, how?
The key characteristic of a nation state is that its institutions are underpinned and legitimized by a widely, ideally universally accepted sense of shared national identity, based on varying mixtures of shared history, language, culture and economic interests. This general statement admits however a wide variety of history and structures for individual ‘nation states’. A country such as France, for instance, though often regarded as a nation state, contains within it powerful regional sub-identities that arguably come close to being, or actually are, nationalities in their own rights. The UK for its part came into being through successive combinations, on different terms, of four different nations: England, Wales, Scotland and Ireland (one of which, Ireland, partially left the union nearly a century ago). The national identities making up the UK have remained distinct and have had their own constitutional-administrative expression. In the case of Scotland in particular, specific provision was made at the outset to preserve distinctive institutions such as the legal and educational systems and the established church. Northern Ireland had its own system of devolved government from the 1920s through to the 1970s. The devolved institutions introduced to the UK from the late 1990s, then, though a dramatic and powerful constitutional development, arose from the underlying quality of the UK as a multinational state rather than a unitary, nation state.

To return to the general question of the connection between devolution and nation states, there are a number of undoubted ‘nation states’ that are unitary in structure, that is to say they do not allow for an entrenched ‘state’ level of government, between national and local, possessing firm constitutional protection for its status. Unitary nation-states include the aforementioned France, Poland, Portugal, and Sweden. Some states that are more multi-national in character have adopted systems that are partially or fully federal. Among them are Belgium, Canada, and Spain. But the correlation is not precise. Some of the most well-known federal systems exist in countries that seem to fit the traditional nation-state model, such as the United States, Australia, and Germany (though once again, there are significant sub groups in each, including aboriginal peoples and powerful regional sub-identities verging on the national, such as that prevailing in Bavaria in Germany). If federalism is compatible with the maintenance of the unity of these nation states, then devolution – which implies a less definite separation of power from the centre – is surely compatible with nation-statehood. Moreover, it is surely possible to reconcile federalism with multi-national statehood. Indeed there are cases of countries that, to better reflect their multinational quality, have moved increasingly in a federal direction, as with Spain and Belgium from the 1970s. The UK is seemingly following a similar path, though how far along this route it can and will progress remains to be seen.

What are the key principles underlying the Union between England, Wales, Scotland and Northern Ireland? Are there principles that are unique to the UK’s Union?
8. The proposition that there are any ‘principles’ underlying the Union is open to question. Even if there are such ‘principles’, their precise nature is likely to be contested. From a philosophical perspective, the idea of a state resting in principles does not fit comfortably with UK or English intellectual traditions. From a practical point of view, it is not clear whether there exists anywhere a statement of such principles that could command consensus. In a federal system, one ‘principle’ might be that of a sharing of power between different tiers, and that different authorities should be located at their appropriate level. The arrangements of such a polity would be included in a written constitution, which might contain statements of fundamental systemic principles, perhaps in a declaratory preamble. The UK has no such text, which could, if it existed, provide the opportunity for a definition of its ‘key principles’. The Treaty and Acts of Union, though retaining legal validity, are surely anachronistic as sources of principle, with their focus on protecting against religious and security threats from the continental mainland. Any attempt to infer such principles in the contemporary era is therefore exceptionally vulnerable to the charge of being arbitrary and partial.

Devolution

3. On what principles are the UK’s devolution settlements based, or on what principles should they be based? Have principles emerged through the process of devolving power, or as power has been exercised by the devolved nations and regions?

9. Once again it is difficult to identify a coherent set of principles that might command wide assent. Perhaps in the case of Northern Ireland they are contained in the *Belfast* (or ‘Good Friday’) *Agreement* of 1998 and *St. Andrew’s Agreement* of 2006. In Scotland, the *Claim of Right* of 1989, the *Vow* of 2014 and the report of the *Smith Commission* of the same year possibly provide core principles. In Wales the task of identifying principles is more difficult; possibly the *St. David’s Day Agreement* of 2015 is relevant in this context. It is important to note that, even if there are discernable principles, they differ in important ways in each case. For instance, the Northern Ireland system is the outgrowth of a peace process with an important international dimension. Scottish devolution has, in the *Claim of Right*, an assertion of sovereignty on the part of the Scottish people, and the *Vow* seeks to assert that the Scottish Parliament – in an apparent challenge to the doctrine of parliamentary sovereignty – has a permanent existence. The asymmetrical nature of devolution is matched by an asymmetrical set of principles.

4. Are there applicable examples from other countries with multi-level governance structures?
10. As already discussed, federal systems, numerous examples of which exist worldwide, offer a model whereby the dispersal of power can be combined with clearer principles that might apply to all levels of government. These principles could be stated explicitly in, or inferred from, the constitutional text. Moreover, under this approach, the written constitution and the values it contains are the supreme legal entity within the system, which the judiciary is responsible for upholding, giving them real force.

Implementation
5. How might these two sets of principles be embedded in the UK’s constitution, or entrenched in the work of governments and legislatures across the UK?

11. At the risk of repetition, the surest way of entrenching values, whatever they may be, would be through the establishment of a federal, written constitution. A process that could help reach this outcome and discern the clear set of principles that is at present lacking is a constitutional convention of some kind. Ideally it would take place outside Parliament and beyond Whitehall, and involve a wide range of political parties, other interested groups, and members of the public, seeking as far as possible to reach a consensus about what are the appropriate constitutional arrangements for the UK and what should be the values that underpin them.

Practical steps to strengthen the Union
6. What is the effect on the Union of the asymmetry of the devolution settlement across the UK? What might be the impact of the further proposed devolution of powers to Scotland, Wales, Northern Ireland and English local government? Is the impact of asymmetry an issue that needs to be addressed? If so, how?

12. In a sense, asymmetry has always been inherent in the Union, whether it has been devolved or otherwise. The primary source of this quality is the relative size and related prominence of England. This characteristic, which has become more pronounced over the history of the union, means that asymmetry is unavoidable. The need to offset the potential dominance of England has in turn prompted further asymmetries, such as special provisions for Scotland in the terms of the union, secretaries of state for Ireland, Scotland and Wales (but not England), and, latterly, uneven devolution. Devolution has now triggered complaints from within England about the lack of institutional expression for England, and encouraged proposals such as English Votes for English Laws (EVEL). EVEL would entail providing MPs elected from constituencies in England with a heightened role in legislation that was deemed to be English-only, since it dealt with matters that were handled by devolved institutions in other parts of the UK and therefore not considered at Westminster.
13. EVEL is intended to respond to the complaint that Members of the UK Parliament from constituencies in devolved areas should not be able to determine decisions about English-only matters that do not directly concern them. However, it is advisable to remember that the ultimate motive for apparently asymmetrical arrangements that some in England may find objectionable is the need to accommodate a unit as large as England within a multi-national state in a way that is acceptable to the other participants.

14. To speculate on the impact of further devolution to the nations, regions and localities of the UK is to enter into vast and uncertain conceptual terrain. One possible outcome of further such dispersal of power is that it may lead to increasing calls for the introduction of a federal structure to provide coherence to the overall system, and establish more clearly both the authorities it is appropriate to devolve, and the competencies that need to remain at the centre in the interests of constitutional and political cohesion.

15. As already suggested, asymmetry is in some senses inherent within the UK. To ‘address’ asymmetry by new constitutional arrangements within the United Kingdom will probably not be to eliminate asymmetry, but to alter the precise way in which it manifests itself. At the moment, the most prominent form of asymmetry is the existence of devolution in Northern Ireland, Wales, and Scotland, but not in most of England (limited devolution has been introduced to Greater London, and shortly to some city-regions in northern England). One proposal to offset this asymmetry in its impact on the UK Parliament is EVEL. Another plan is for devolution within England, for instance, as previously mentioned, to northern city-regions.

16. The Federal Trust believes that most satisfactory way of managing asymmetry, if it can be achieved, would be a fully federal constitution for the UK. It could ensure that every part of the UK possessed the same rights of national, regional and local autonomy, and was at the same time incorporated into the whole with the same status as its counterparts, perhaps via a federal upper chamber in the UK Parliament. This approach could avoid some of the potential problems of EVEL, which might well alienate the non-English parts of the UK, through giving ‘English’ MPs the ability to destabilise a government that had a parliamentary majority within the UK as a whole, but not in England.

17. The idea of a federal UK has substantial attractions, as is increasingly being recognised. But it would still need to take into account the same basic issue with which all schemes relating to the territorial governance of the UK must contend: the size of England. A federal UK that included England as a single unit would risk English domination, and might in turn be unacceptable to the other participants. Offsetting mechanisms designed to limit English hegemony within the UK might not be palatable to the English. A model that involved incorporating into a federal UK a series of English regions, none of which was large enough to predominate, would seem to be more likely to succeed. Those seeking to
follow this path need to establish what all of those regions should be, what powers they should possess, and how to bring them into being as functioning units of democratic governance.

7. What might be the effect of devolving powers over taxation and welfare on the economic and social union within the UK? Are there measures that should be adopted to address the effects of the devolution of tax and welfare powers?

18. The current pattern is for the asymmetrical devolution of these policy competencies. Some areas receive more powers than others, while other areas receive none at all. A risk inherent in this approach is that those in possession of powers will use them to pursue a competitive advantage over others. One means of helping to avoid this outcome could be to make the same powers available to all within a federal system, backed up by protocols and mechanisms intended to ensure that authorities are deployed with common interests in mind. The creation of a federal constitution might also provide the opportunity for careful consideration of those powers it was and was not appropriate to exercise below full federal level.

8. What other practical steps, both legislative and non-legislative, can be taken to stabilise or reinforce the Union? How should these be implemented?

19. As already discussed, federal models offer a variety of means by which the post-devolution UK might become a more stable polity. They seem to be the best means of handling the asymmetries of the UK constitution, and of establishing a set of principles on which it can rest. Perhaps most importantly, federalism could provide the chance to bind together the different identities that comprise the multi-national UK state. Under federalism, attachment to a nation such as Scotland might sit comfortably alongside a shared UK identity, both of which would be subsumed within a constitutional system that guaranteed the rights of each. It might be possible to avoid the perception of a competition between the UK centre on the one hand and sub-UK autonomy on the other hand.

20. The constitutional convention that would probably be necessary to establish a federal written constitution for the UK might, as well as producing this document, act as a unifying focus for the UK. It could facilitate a UK-wide debate about the configuration of the system. To some extent a convention might play a public educative role, encouraging greater understanding of both the benefits of a federal system, and the compromises that it necessitates in areas such as redistribution of funds. If a convention was effective in incorporating as broad a range of inputs as possible, it could promote a wider sense of ownership of the written constitution that it produced.
9. Is the UK's current constitutional and legal structure able to provide a stable foundation for the devolution settlement? What changes might be necessary?

21. A federal UK constitution would necessarily overturn some key traditional concepts associated with the UK constitution. Chief among them is the doctrine of parliamentary sovereignty. It would not be compatible with the existence of a federal constitutional text to which all governmental institutions, even the UK Parliament, were subject, upheld by the judiciary and founded in popular sovereignty. Even Acts of Parliament would be held void if the courts decided that they were incompatible with the constitutional text. The definite abandonment of parliamentary sovereignty would be a major step for the UK. However, it would be in line with certain recent trends in the UK constitution. Various changes in the UK system, including membership of the European Union, the Human Rights Act 1998, and devolution have in different ways served many to question how far the parliamentary sovereignty concept is practically and even legally viable. A complete break, entailed by the adoption of a written federal constitution, would be a confirmation of these already existing perceptions. Moreover, it would bring the UK into line with the practices of nearly every other democracy internationally.

22. As already suggested, the adoption of a federal constitution would necessitate the establishment of a written constitutional text. The introduction of this document would be regarded as a dramatic departure for the UK. As we have noted, it would probably contain within it statements of fundamental principle, a concept to which some strands of English political thought have been resistant. However, we should not overstate the extent to which a written constitution is alien to the UK. It has its own long tradition of constitutive documents, including Magna Carta (first promulgated in 1215) and the Bill of Rights (1689). These texts have in turn wielded substantial influence on written constitutions around the world, some of which the UK had a direct hand in drafting. Furthermore, federalism itself is to a substantial extent an outgrowth of political thought originating in the UK. A variety of federal schemes, pursued within states and at supranational level, have also derived important inspiration from ideas emanating from within this country.

23. Under a federal system, there would probably be a need to bring about an end to the House of Lords in its current form. The second chamber could be reconfigured to provide territorial representation for the different ‘states’ making up the federal UK. Members might be directly elected, or it might compose the governments of the states of the UK. Numerous efforts to achieve a full overhaul of the composition of the House of Lords in more than a century since the Parliament Act 1911 have proved unsuccessful (though numerous changes in its composition have taken place). For those who deem fuller reform of the House of Lords desirable, a more effective approach to attaining it might be to
treat Lords reform as part of a wider process of constructing a federal constitution, giving it a clearer purpose and perhaps greater momentum.

24. As is plain, a federal UK would amount to a significant change in our system of government. It would need to overturn powerful constitutional preconceptions and institutions. Yet it would nonetheless channel important pre-existing tendencies, including the multinational character of the UK, and the patterns already detectable in UK constitutional development in the era of devolution. Furthermore, some of the challenges that the UK system currently faces, especially the possibility of Scottish exit from the union, may create a powerful imperative to bring about a federal system, regardless of the challenges that this effort of constitution-building might entail. We recommend that the Committee give serious consideration to this potential future for the Union.

28 September 2015