Summary

1. In this submission, I wish to address the terms of the inquiry of the committee by approaching it through the idea of ‘constitutional essentials’ in constitutional theory and constitutional practice. By analysing the question of the limits of devolution in this way, we can outline certain core features of the constitution which give it its own distinct identity. The undermining of these essentials could put the identity of the British constitution, and the British state as a ‘union state’, in jeopardy. Thus the terms of the current inquiry can be rephrased as ‘what are the constitutional essentials of the UK constitution’?

2. This document will look at the idea of constitutional essentials from a number of perspectives. It will begin by looking at the idea of constitutional essentials in constitutional theory, and in particular the work of US philosopher John Rawls. It will then look at examples from comparative constitutional law, particularly Germany, where the German Federal Constitutional Court has developed a sophisticated constitutional doctrine of constitutional identity. The subsequent section will examine some candidate features of the contemporary British constitution which could qualify as constitutional essentials identifying four key constitutional principles: the rule of law, fundamental rights protection, democracy and the separation of powers. The conclusion explores the practical relevance of constitutional essentials to further constitutional reform.

A Theory of Constitutional Essentials

3. Perhaps the most well-known use of the term ‘constitutional essentials’ is in the work of the renowned US political philosopher John Rawls. The idea of constitutional essentials is central to Rawls ‘liberal principle of legitimacy’ which attempts to outline a blueprint for legitimate government. For Rawls, the liberal principle of legitimacy entails the idea that:

\[ \text{[O]ur exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonable be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational.}\]  

4. Rawls identifies two different kinds of constitutional essentials in this liberal principle of legitimacy:

1. **Fundamental principles** that specify ‘the general structure of government and the political process’ and include ‘the powers of the legislature, executive and the judiciary’ and the ‘scope of majority rule’; as well as

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2. the ‘equal basic rights and liberties’ of citizenship that legislative majorities are to respect\(^2\), including ‘the right to vote and to participate in politics, liberty of conscience, freedom of thought and of association, as well as the protections of the rule of law.’\(^3\)

5. With regard to the first kind, Rawls argues that changes to governing structures such as how power is distributed among the different branches of government should only be changed ‘as experience shows to be required by political justice or the general good’\(^4\) and not for the political advantage of sectarian political interests.

6. What Rawls tells us, then, is that the legitimacy of constitutions relies on certain core features which cannot be violated, that these rely on the fundamental equality of citizens, and that changes to the constitution, not least changes to governing structures must respect the fundamental equality of citizens.

*Comparative Perspectives*

7. Comparative constitutional practice can also shed light on the idea of the ‘essentials’ of a constitution. In particular, analysing provisions of constitutions which explicitly preclude the amendment of parts of the constitution, known as ‘eternity clauses’, provide a good idea of the nature of ‘constitutional essentials’ in constitutional practice.

8. Eternity clauses or doctrines abound in constitutional practice. Examples include the entrenchment of a republican form of government in the French Art. 89,\(^5\) Italian Art. 139,\(^6\) and Greek Art. 110(1).\(^7\) Constitutions; the multiple restrictions on amendments contained in Art. 288 of the Constitution of Portugal,\(^8\) the ‘basic structure

\(^2\) Political Liberalism, 227.

\(^3\) Political Liberalism, 227.

\(^4\) Political Liberalism, 228.

\(^5\) Art. 89.

\(^6\) Art. 139.

\(^7\) Art. 110(1).

\(^8\) Which include the independence and the unity of the state, the republican form of government; The separation between church and state; Citizens’ rights, freedoms and guarantees; The rights of workers, workers’ committees and trade unions; The coexistence of the public, private and cooperative and social sectors in relation to the ownership of the means of production; The requirement for economic plans, which shall exist within the framework of a mixed economy; The elected appointment of the officeholders of the bodies that exercise sovereign power, of the bodies of the autonomous regions and of local government bodies by universal, direct, secret and periodic suffrage; and the proportional representation system; Plural expression and political organisation,
doctrine’ of the Indian constitution\(^9\) and, perhaps most famously, Art. 79(3) of the German Constitution (basic law).\(^10\)

9. German constitutional law enjoys a particularly sophisticated constitutional identity doctrine developed by the German Federal Constitutional Court (GFCC). This doctrine has undergone rapid development in recent times in the light of the challenges of European integration to German constitutional supremacy. The question facing the GFCC in these cases is the analogue of the question animating the current inquiry; how much transfer of powers away from the organs operating under a constitution (whether ‘up’ or ‘down’), leads to the undermining of the character or identity of the constitution itself. It is therefore worth examining in detail.

**German Constitutional Identity Doctrine**

10. The question of the amount European integration permitted by the German constitution, in essence, tests the limits of Art. 24(1) [now also Art. 23(1)] which explicitly permits the transfer of ‘sovereign powers’ to international organisations. In early decisions, the GFCC fleshed out the nature of some of the ‘constitutional essentials’ referred to in Art. 79(3) and clarified their limiting effects, particularly with respect to the application of EU law in Germany. In a series of cases known as the ‘Solange’ decisions, it promised to monitor the activities of the (then) EEC institutions, vowing to step in if they were perceived to violate the guarantees contained in the German constitution. In doing so it set limits to Art. 24(1) by arguing that it does not permit amendments to the ‘basic structure of the Basic Law’\(^11\) which ‘forms part of its identity’\(^12\). This involved:

\(^{9}\) Which provides that ‘the power to amend the constitution does not include the power to alter the basic structure, or framework of the constitution so as to change its identity’. *Kesavanda Bharati v. State of Kerala*, AIR 1973 SC 1461, 1510, 1603, 1624-25.

\(^{10}\) Which prohibits amendments to the constitution which would change the division of the German Federation into *Lander*, violate human dignity, the constitutional order, or the basic institution principles establishing Germany as a democratic and social federal state.


‘the constitution’s essence, [...] the basic framework of the constitutional order in force and the legal principles underlying the Basic Law’s fundamental rights guarantees.’

11. Further development came in the Court’s headline Maastricht\textsuperscript{14} and Lisbon\textsuperscript{15} decisions relating to German ratification of the EU’s Maastricht and Lisbon Treaties respectively. The particular ‘essential’ at stake in these decisions related primarily to the democratic character of the German state and the Court clarified both the nature of this constitutional essential as well as the limits it set to the process of European integration. In its Maastricht decision, the Court relied on Art. 38(1) which guarantees the right to vote and the holding of regular free and fair elections to German Parliament to argue for the safeguarding of democracy as a ‘constitutional essential’ of the German constitution. Interpreting the principle of democracy in this way, the court found that there was an absolute limit on the amount of sovereign power Germany could transfer to the EU set by this particular constitutional essential. Moreover, it required a close monitoring of EU institutions by the Court to ensure that they did not go beyond their conferred powers, thereby running the risk of violating this democratic essential of the German constitution.

12. Again in the Lisbon decision, the ‘democratic state principle’ as enshrined in Art. 38(1) was the basis of the challenge to German ratification of the Lisbon Treaty and set the limits for further expansion of the EU. In finding limits to the potential of European integration, the Court found that an act ratifying a Treaty ‘must protect against violations of the member states’ constitutional identity, which is not open to integration.’\textsuperscript{16} It furthermore asserted its right to undertake ‘identity review’ to ‘preserve the inviolable core of the Basic Law’s constitutional identity.’\textsuperscript{17} It therefore retained the ‘authority to review the inviolable core content of the constitutional identity of the Basic Law [based on Art. 79(3)] is respected.’\textsuperscript{18}

13. Perhaps more strikingly, in this decision the Court went on to enumerate other areas in which European Integration could not interfere, based on its interpretation of the principle of democracy. In expounding upon the idea of sovereign and constitutional identity, the Court found that:

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\begin{itemize}
  \item \textsuperscript{13} Solange II (1986) 73 BVerfGE 339, para. B.2.b
  \item \textsuperscript{14} Maastricht Treaty Case (1993) 89 BVerfGE 155.
  \item \textsuperscript{15} Lisbon Treaty Case (2009) 123 BVerfGE 267.
  \item \textsuperscript{16} Para. C.I.bb.
  \item \textsuperscript{17} Para. C.I.bb.
  \item \textsuperscript{18} Para. C.I.bb.
\end{itemize}
'European unification on the basis of a treaty union of sovereign states may not be achieved in such a way that it deprives the member states of the authority they need to politically shape economic, cultural and social living conditions. In particular, this applies to areas that shape the citizen’s living conditions, including: the private sphere subject to their individual responsibility; political and social security, protected by fundamental rights; and political decisions that rely especially on cultural, historical, and linguistic orientations – political decisions that develop in public discourse through the involvement of political parties and parliamentary process, both of which contribute to public policies. Essential areas subject to this democratic action consist of, inter alia: citizenship, the civil and the military monopoly on the use of force; revenue and expenditure, including external financing; and all acts of state authority that encroach upon fundamental rights, especially including major encroachments on fundamental rights such as the deprivation of liberty in the administration of criminal law or detention in other institutions. These important areas also include cultural issues, including: language policy; family and educational policy; and the manner in which the profession of faith or ideology is addressed.'  

**Constitutional Essentials and the UK Constitution**

14. The partly written, partly un-written, partly legal, partly political and partly customary nature of the UK constitution does not contain an overarching ‘eternity clause’ from which we could start an analysis of the ‘constitutional essentials’ of the constitution to consider the limits of devolution. Furthermore, the absence of a supreme canonical constitutional document allows for a wider variety of views and interpretations of its character and identity than might otherwise be the case. In this section, I will examine a number of candidates for the ‘constitutional essentials’ of the British constitution; the supreme legal authority of parliament, reserved or excepted matters under the devolution settlements, the idea of constitutional statutes and the principles of the common law.

**Parliamentary Sovereignty**

15. It is best, perhaps, at the outset to rule out, or at least identify as inadequate, one of the most prominent legal doctrines of the constitution; the doctrine of parliamentary sovereignty. Leaving out for the moment, the many views which deem the doctrine to be moribund in the contemporary British constitution, the legal doctrine does not contribute much to an understanding of the essentials of the constitution. Simply put, the doctrine of parliamentary sovereignty, at least in its traditional guise, means that ‘anything goes’; parliament can make or unmake any law unfettered by external constraints barring the binding of future parliaments (although even this constraint is subject to dispute). This militates against the idea of

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19 para. 3(b)(aa)
constitutional essentials, at least in the form of substantive limits to amendments of the constitution. Answering the question raised by the current inquiry with the doctrine of parliamentary sovereignty, results in a simple ‘no’. There are no limits to devolution as long as the legal sovereignty of parliament remains intact. The only way this would not hold would be the secession of one of the devolved nations in which case the question posed by the current inquiry would be entirely moot.

Reserved Matters
16. Another possible starting point for the identification of the ‘constitutional essentials’ of the UK constitution would be to examine the specifically ‘excepted’ or ‘reserved’ matters in the devolution legislation itself. The reservation of specific powers relating to political issues such as defence, international relations or the currency could be seen to be a statement of the ‘constitutional essentials’ of the British constitution. However, this is also an inauspicious place to start given that the ‘reserved’ matters themselves are not uniform across the devolved institutions. Moreover, the definition of ‘reserved matters’ has been subject to change to allow for the further devolution of powers such as tax and borrowing powers devolved in the Scotland Act 2012.

Constitutional Statutes
17. The idea of ‘constitutional statutes’ has become an increasingly prominent feature of the contemporary constitutional landscape. First identified by Laws LJ in *Thoburn v. Sunderland City Council* [2002] EWHC 195 (Admin); they are distinct from ordinary statutes in that they are immune from implied (but not explicit) repeal. They are also subject to a more constitutional, ‘purposive’, interpretation than ordinary statutes as the Supreme Court illustrated in cases such as *Robinson v. SSNI* [2002] UKHL 32 and *H v. Lord Advocate* [2012] UKSC 24.

18. In terms of distinguishing constitutional statutes from ‘ordinary’ statutes, in the *Thoburn* decision, Laws LJ stated that:

‘a constitutional statute is one which (a) conditions the legal relationship between citizen and the state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we could now regard as fundamental or constitutional rights.’ (para. 62).

19. He went on to list a number of examples including the devolution statutes, the European Communities Act 1972 and the Human Rights Act 1998. However, in terms of constitutional essentials, this list is over-inclusive. The statutes themselves are subject to amendment, albeit explicitly rather than impliedly, and such amendments could not be said to compromise the identity of the constitution. However, much of the subject-matter of constitutional statutes in terms of, for example, the rights accorded to citizens
and the arrangement of the institutions of government, as captured in the test established in *Thorburn*, seems to provide a solid foundation for identifying the essentials of the constitution. This receives support from the doctrines and principles of the constitution elaborated by the Courts in recent times.

*Principles of the Constitution*

20. In the contemporary UK constitution, notwithstanding the absence of an eternity clause or other provisions which would allow the easy identification of ‘essentials’ of the constitution, decisions of the courts, and particularly recent decisions, allow for the extrapolation and development of key constitutional principles which are arguably the clearest case of constitutional essentials of the UK constitution. Four principles can be identified: the rule of law, fundamental rights protection, democracy and the separation of powers.

*The Rule of Law*

21. Recent judgements have seen the considerable fleshing out of this long-standing principle of the constitution. In the *R (Jackson) v. Attorney General* [2005] UKHL 56, the House of Lords found that the rule of law was the ‘ultimate controlling factor on which our constitution is based.’\(^{20}\) The subsequent Supreme Court decision in *AXA v. Lord Advocate* [2011] UKSC 46 reiterated the commitment to the rule of as a core and foundation aspect of the constitution.

22. The rule of law, moreover, is closely connected with the institution of judicial review. In *Jackson* judicial review was also identified as a ‘constitutional fundamental which even a sovereign parliament cannot abolish.’\(^{21}\) In *AXA*, the court found that the rule of law would be upheld by the Courts were a democratically elected legislature to ‘abolish judicial review or diminish the role of the courts in protecting the interests of the individual.’\(^{22}\)

*Fundamental Rights*

23. That fundamental rights form a part of the basis of the UK constitution is clear from the prominence of the Human Rights Act 1998 in the workings of the Courts. However, whereas the Human Rights Act enhances and renders explicit the protection of fundamental rights under the British constitution, recent decisions have made clear that even if the Human Rights Act did not exist, the principle of the protection of fundamental rights would be ensured by the basic principles of the constitution including the rule of law.\(^{23}\) Indeed

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\(^{20}\) Jackson at [107].

\(^{21}\) Jackson, at [102].

\(^{22}\) AXA at [51]
recent decisions have intimated that the rights protected by the constitution through the common law should, in some cases, take precedence over the Convention rights protected in the Human Rights Act 1998, with the latter relegated to a supporting role in adding to the protections already recognised by the common law.\textsuperscript{24}

\textit{Democracy}

24. It is with respect to the principle of democracy that the doctrine of parliamentary sovereignty can provide a substantive limit to amendments to the constitution over and above the ‘thin’ account discussed above. The \textit{normative} justification of the sovereignty of parliament as being based in the principle of democracy has been recognised by the courts on a number of occasions including in the \textit{Jackson} and \textit{AXA} decisions where the Courts found that the doctrine of parliament sovereignty was, in effect, the embodiment of the principle of democracy.\textsuperscript{25}

\textit{The Separation of Powers}

25. This long-standing principle of the constitution\textsuperscript{26} was given a particular endorsement as a ‘constitutional essential’ of the British constitution in the Supreme Court’s recent decision in \textit{HS2}.\textsuperscript{27} In this case, in an echo of the GFCC in the \textit{Maastricht} and \textit{Lisbon} decisions, the Supreme Court found that the British constitution could set limits to the application of EU law in the UK. For example, in considering the argument (ultimately rejected) of the applicants Lord Reed found that there were certain ‘long-established constitutional principles governing the relationship between Parliament and the courts’\textsuperscript{28} and referred explicitly to Article 9 of the Bill of Rights of 1689 regarding judicial scrutiny of parliamentary procedure. He referred approvingly to the GFCC’s jurisprudence on the reception of EU law in Germany where it found that ‘a decision of the court of Justice should not be read by a national court in a way that places in question the identity of the national constitutional order.’\textsuperscript{29} Lord Neuberger also noted that Article 9 was ‘one of the pillars of


\textsuperscript{25} Jackson at [126].

\textsuperscript{26} R v. SSHD, ex p Venables [1998] AC 407.

\textsuperscript{27} R (HS2 Action Alliance Ltd) v. SST [2014] UKSC 3.

\textsuperscript{28} HS2 at [78].
constitutional settlement which established the rule of law in England\textsuperscript{30} and referred to Lord Browne-Wilkinson’s dictum in \textit{Pepper v. Hart} that it was ‘a provision of the highest constitutional importance’.

\textit{Conclusions: Practical Implications for the Union and Devolution}

26. The analysis undertaken here into constitutional theory and comparative constitutional practice and the constitutional practices of the domestic courts of the UK provide a useful way of analysing the question of whether there are limits to devolution as set by the ‘constitutional essentials’ of the UK constitution. As such the idea of ‘constitutional essentials’ lends support to the idea that where identified, they cannot be transgressed or undermined in the on-going negotiation of the devolution of powers to the regional parliaments and assemblies of the UK. In this regard a number of practical, but necessary speculative conclusions, can be advanced.

27. Firstly, following Rawls, and particularly the restrictions on changes to the structure of government, it can be argued that further amendments to the governing structures in the UK, including the devolution of further powers should only be done in the interests of ‘political justice and the general good’ and not for strategic, partisan or sectarian political interests. Significantly, at the UK level, this must include the general good of the UK as a whole.

28. Secondly, the principles of the constitution as identified by Courts, and shared by many other constitutions in their ‘eternity clauses’ can have practical implications for future developments of the British constitution

\begin{enumerate}
\item With regard to the protection of fundamental rights, some of the proposals being developed around a replacement of the Human Rights Act with a British, or English, bill of rights would be of relevance to the rule of law underpinning the British constitution as well as the status of British citizens. If equality and fundamental rights provide part of the theory as well as the practice of the British constitution, then the protections afforded to British citizens cannot depend on the part of the Union-State in which they reside. Therefore arguably one limit to devolution, but also the amendments of the constitution in other areas, must respect the fundamental rights, as well as the fundamental equality of British citizens.
\item The principle of democracy as noted above, is another important constitutional essential both in theory and practice. In the context of the British Constitution and the Union state, the representative
\end{enumerate}

\textsuperscript{29} HS2 at [111]

\textsuperscript{30} HS2 at [203].
component of the principle of democracy relates to the representation of the British people, including British citizens living under a devolved jurisdiction. Therefore it is arguable that this particular constitutional essential could set limits to the amount of devolution of powers permitted under the constitution. If we consider how the principle has been interpreted by the German Federal Constitutional Court, it could require that some substantive powers remain at Westminster to ensure the continuing and effective representation of the British people. The precise extent, content and nature of those powers would require some specification but some inspiration can be drawn from the GFCC’s Lisbon judgement, particularly where it points to certain areas which must be governed by democratically-representative institutions in order to ensure the effectiveness of the principle of democratic representation of a people. For example, in the case the court identified areas such as citizenship, the civil and the military monopoly on the use of force; revenue and expenditure, language policy; family and educational policy; and the manner in which the profession of faith or ideology is addressed as areas over which democratically-elected institutions must have power in order to give full effect to the principle of democracy.\footnote{Lisbon Treaty Case (2009) para. 3(b)(aa)} Of course this list cannot be directly translated into the British context, not least because some of these powers have already been devolved. However what the GFCC’s interpretation of the principle of democratic representation does is to force our attention to the need for adequate representation of the British people at Westminster with sufficient powers to make such representation meaningful.

2 October 2015