The Community's Constitution - Rigid or Flexible? The Contemporary Relevance of the Constitutional Thinking of James Bryce

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1. Introduction

It is commonly supposed, on both sides of the Channel, that Britain has little to contribute by way of constitutional theory to the development of the European Community or Union. In mainland Europe the British constitution is seen as an idiosyncratic phenomenon which may work at home but is unsuitable for export. According to the German Vice-President of the Commission, the EC must have "a real constitution" - "a federal structure something like that in Germany".1

In Britain, even those who count themselves most European in outlook are often heard to regret that the institutional shape of the Community was formed in a continental mould without the pragmatic leavening that British thought might have provided. The very suggestion that the Community might have a federal goal is greeted with paroxysms of indignation in London.

Both these points of view start from a false premise. British thought did contribute, albeit at one remove, to the evolution of the Community's institutional structure; and this is so because, so far from being inherently antipathetic to federalist ideas, Britain is the spiritual and intellectual home of federalism.

The reason for the paradox - that Britain should have contributed spiritually and intellectually to what the Community already is but recoils...
from its logical development - seems to be due, amongst lawyers at least, to the strong continuing influence of two constitutionalists who flourished at Oxford at the end of the last century and the beginning of this: Sir William Anson, Warden of All Souls College, and A. V. Dicey, Vinerian Professor of English Law and Fellow of All Souls.

Both Anson and Dicey were the sons of English county families, both were educated at Balliol, and both became Liberal Unionists, a party whose initial *raison d'etre* was opposition to Home Rule for Ireland. The account they offered of the British constitution reflected the natural point of view of Unionists at the apogee of British imperial power and self-confidence.

Dicey’s *Law of the Constitution*, first published in 1885 at the height of the Home Rule debate, is a political tract as well as a work of scholarship. As Professor E.C.S. Wade, editor of the ninth (1939) edition, wrote in his Preface:

“To the historian who seeks to appreciate the outlook of a notable adherent of the Whig school of political thought in the later years of Queen Victoria, the merit of the work needs no recommendation. The lawyer or the statesman who has first studied the constitution as it is today, can find in Dicey as perhaps nowhere else the emphasis on fundamental aspects of that constitution over fifty years ago as it appeared to one who was a firm adherent to a particular school of political thought then current. ...”

Research amongst Dicey’s unpublished papers suggests that even he did not believe in the exaggerated theory of Parliamentary sovereignty that is nowadays attributed to him. Wade remarks in his Preface:

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2. Dicey’s attitude to the Home Rule question, and the reasons for it, can be judged from the following: “[Any] system of Home Rule, whatever be the form it takes, is less beneficial to Great Britain, or (to use popular language) to England, than is the maintenance of the Union, and is at least as much opposed to the vital interests of England as would be the national independence of Ireland.” *England’s Case against Home Rule*, London, 1886; reprinted Surrey, 1973.

3. Anyone who doubts this should read Dicey’s Introduction, written in 1914, to the eighth edition published in 1915.

4. “Even in England the authority vested in Parliament is rather indefinite than absolute and it would be simply ridiculous to press the theory of representation to such an extent as to make the people of a country the slaves of the very body which exists to carry out the will of the people”. See Hand, “A.V. Dicey’s unpublished materials on the comparative study of constitutions”, in Hand and McBride (eds.), *Droit sans Frontières: Essays in honour of L. Neville Brown*, Birmingham, 1991, at p. 83. It is clear from Dicey’s introduction to the eighth edition, supra, that, even after the Parliament Act 1911, he emphatically did not regard the Sovereignty of Parliament as
“I have always felt that Dicey’s reputation as a constitutional lawyer has suffered from the attempts by his successors to erect the constitutional ideas which he expounded into axiomatic principles which must abide for all time.”

Enthusiasts for Dicey’s theory of the sovereignty of Parliament have gone further and perverted the theory of the Rule of Law he sought to expound. His objection to the French system of *droit administratif* was not an objection to judicial control but rather an objection to removal of the executive from control by the ordinary courts: with the exception of the sovereign (the Crown and the monarch in Parliament), everybody was, and ought to be, subject to the jurisdiction of the same courts administering the same laws.5

It is interesting, but perhaps not very profitable, to speculate how Dicey, the ardent Unionist, would have viewed the Community’s institutions, particularly the Court of Justice. It is, to say the least, not obvious that he would have disapproved of a dispensation whereby, *in the absence of a single sovereign legislature*, disputes about competences or *vires* should be justiciable. Still less does it seem likely that he would have objected to the Court’s insistence that the rights conferred by Community law on individuals should be enforceable by them in the ordinary courts of the Member States.

Dicey, however, represents only one strand (or trend) of British constitutional thought. As well as himself and Anson, Oxford was the academic home of James Bryce, Professor of Civil (Roman) Law - a very different kind of thinker who had been taught by Dicey and to whom Dicey acknowledged his debt.6 In spite of deep political differences,7 the three men remained close friends.

2. James Bryce

In his own day Bryce was more famous than either Dicey or Anson. He was a member of Gladstone’s last cabinet, became Chief Secretary for Ireland under Campbell-Bannerman and then British Ambassador in
Washington. He died a Viscount with the Order of Merit and honorary degrees from 31 universities, including Leiden. But, amongst lawyers at least, he is now almost entirely forgotten (perhaps because Anson on Contract and Dicey on Conflict of Laws have stood the test of time better than Bryce on The Trade Marks Registration Act and Trade Mark Law).

Bryce’s entry in the Dictionary of National Biography begins with the information that he was “son of James Bryce the younger, q.v., grandson of James Bryce the elder, q.v.”. It is rare for three generations to figure in the DNB outside the ranks of the monarchy and the aristocracy, and Bryce belonged to neither. His grandfather was a Scottish presbyterian minister of the Antiburgher sect who founded the Associate Presbytery of Ireland. His father was a schoolmaster, first in Belfast and then in Glasgow, and a noted geologist.

James Bryce III was a traveller on the well-trodden path from the High School and University of Glasgow to Oxford, where he achieved four Firsts - three of them, in Greats, Law and Modern History, won in a single year (1861) together with the Gaisford Greek Verse Prize and the Vinerian Scholarship in Law for which he said he had no time to prepare. His prize essay on the Holy Roman Empire was of such distinction that, when he and his wife met a party of Swiss professors in an Alpine pass, “the professors all took off their hats exclaiming ‘Holy Roman Empire’ and salaamed in the most impressive manner”.

Perhaps it is significant that, unlike Anson and Dicey who were undergraduates at the college of Cardinal Manning, Bryce followed Cardinal Newman to Trinity as an undergraduate and to Oriel as a Fellow. Unlike the triumphalist Unionism of Anson and Dicey, Bryce’s political creed was the Liberalism of Gladstone and Campbell-Bannerman. He was a supporter of Home Rule for Ireland. He protested against the British treatment of the Boer Republics and opposed the Boer War. Later, as
British ambassador in Washington, he was criticised for promoting, with Sir Wilfrid Laurier (the first French Canadian premier of Canada), a Treaty of Reciprocity in free trade between Canada and the United States. He was an early supporter of wider access to university education, especially for women, and chaired a royal commission on secondary education.

Although he practised at the English Bar and was elected to Parliament in 1880, Bryce’s tenure of the Regius Chair of Civil Law at Oxford was not a sinecure. He saw it as part of his duty “to awaken an interest in the civil law not as an antiquarian curiosity, but as a great force in the moulding of European thought and history”. 12

He also made a detailed study of the American constitution and his American Commonwealth (1888) was, according to the Encyclopaedia Britannica as late as 1962, “still the classic in its field”. His biographer called him anima naturaliter Americana, although he was not an uncritical admirer of the American Constitution. 14

Bryce’s interest in American federalism is hardly surprising since he came from the same Scots dissenting tradition that had given it birth.

3. Federal thought in Britain and America

It is known that the political thinking of James Madison, the chief architect of the American constitution, was deeply influenced by the President of Princeton, John Witherspoon, as was Jefferson’s by William Small at Williamsburg. Both Witherspoon and Small had come to America from Scotland.

Many Scots believed that neither the Union of the Crowns in 1603 nor the Union of the Parliaments in 1707 had made Britain a unitary state, and it remains significant that the Scots talk of the Treaty of Union, while the

14. “Regarded as a frame of government, i.e. as a piece of mechanism for distributing power between the Executive, the Legislature and the Judiciary, the American system has probably been praised beyond its deserts.” Studies, Essay IV, “Centripetal and Centrifugal Forces”, p. 250.
15. See Ketcham, James Madison, Charlottesville and London, 1990, pp. 36-44.
English refer to the Act of Union. Whatever the correct terminology, it is clear that, in important respects, Britain was not, and is still not, a wholly unitary state in the sense that most continental observers would use that term.

The belief that Britain was not a unitary state was attractive to the American colonists of English stock:

"It was the last, the strongest, and the most far-reaching of the constitutional arguments of Englishmen in the colonies just before the American Revolution that this unitary interpretation of the British constitution was fundamentally false. The true constitution of Britain was not unitary, but federal. This was indeed the central constitutional problem of the British Empire then, and it has remained so ever since and down to our own time." 

After the loss of the American colonies, and in face of the threat from across the Channel, the Union with Ireland in 1800 was intended to put the unitary character of the Kingdom beyond doubt. But interest in federal solutions had revived by the second half of the nineteenth century - partly,
no doubt, because of admiration for the American achievement and notably for the vision of Abraham Lincoln; partly because of the need to devise a satisfactory form of government for the self-governing overseas dominions; and partly because of the ever-present problem of Ireland.

In 1867 the British North America Act created a federal constitution for Canada, and there was quite a lot of discussion about the desirability of federalising the relationship between the component parts of the United Kingdom (England, Wales, Scotland and Ireland) or even, on a wider scale, their relationship with Canada and other parts of the Empire. Bryce himself saw the growing jurisdiction of the Privy Council, as supreme court of appeal of the British Empire, as a federalising force on a par with the Supreme Court of the United States.

Early in the next century, federal constitutions were devised by the British for Australia and South Africa. At that stage, the only democratic federal constitution which did not owe its origins, directly or indirectly, to British constitutional thought was that of Switzerland.

It was thus in an atmosphere far from hostile to federalist ideas that, in 1884-85, while Dicey was writing his *Law of the Constitution*, Bryce delivered two lectures on constitutions, and composed a further essay, which he subsequently revised and published as Essays III and IV of *Studies in History and Jurisprudence* (1901).

4. Bryce’s essays on constitutions

Bryce’s two published essays are entitled “Flexible and Rigid Constitutions” and “The Action of Centripetal and Centrifugal Forces on Political Constitutions”. In the first he looks at the conventional classification of “written” and “unwritten” constitutions, suggests a new classification, and assesses the respective strengths and weaknesses of each type as a pattern for the future. In the second essay he examines “the tendency which draws men or groups of men together into one organised community and

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23. Dicey’s intemperate attack upon such ideas in his Introduction to the eighth (1915) edition, pp. lxxx, ff., tends to confirm the suspicion that his book was originally written to provide an academically respectable legal basis for opposition to Irish Home Rule.

keeps them there [the centripetal force] and that which makes men, or groups, break away and disperse [the centrifugal force]".25 Together, the two essays "embody an effort to examine political constitutions generally from comparatively unfamiliar points of view".26

Both essays display, as might be expected, a formidable range of historical knowledge and they show that Bryce's mind belonged, not to the Oxford of the late nineteenth century, but to the Scottish empirical tradition of the eighteenth. The method is that of Hume or Adam Smith, proceeding from the observed phenomena of human behaviour and human institutions to more general conclusions and lessons for the future.

Bryce insists on the relevance of history for the study of constitutional law:

"The constitutional lawyer ... must always, if he is to comprehend his subject and treat it fruitfully, be a historian as well as a lawyer. His legal institutions and formulae do not belong to a sphere of abstract theory but to a concrete world of fact. Their soundness is not merely a logical but also a practical soundness, that is to say, institutions and rules must represent and be suited to the particular phenomena they have to deal with in a particular country. It is through history that these phenomena are known. History explains how they have come to be what they are. History shows whether they are the result of tendencies still increasing or of tendencies already beginning to decline. History explains them by parallel phenomena in other times and places. Thus the lawyer who has to consider and advise on any constitutional problem, and still more the lawyer who has to contrive a constitutional scheme for grappling with a political difficulty, must study the matter as a historian, otherwise he will himself err and mislead those whom he advises. Great lawyers often have so erred, and with lamentable results."27

But his claim for history is not a historicist exaggeration:

"Of the more remote future, History can venture to say little more than this - that it will never bring back the past. ... All she can do for the lawyer, the statesman and the legislator, when they have to study and use the forces operative in their own time, is to indicate to them the nature and the character, the significant elements of strength and weakness, that belong to each and every force that has been heretofore conspicuous, so as to direct and guide them in observing and reflecting on the present. This is much

Bryce has little time for abstract doctrines, such as the doctrine of sovereignty, "that dusty desert of abstractions through which successive generations of political philosophers have thought it necessary to lead their disciples".

"Upon a review of the long and, on the whole, unprofitable controversies that have been waged regarding the abstract nature of Sovereignty, one is struck by the fact that with the possible exception of the German philosophers from Kant to Hegel, these controversies have been at bottom political rather than philosophical, each theory having been prompted by the wish to get a speculative basis for a practical propaganda. ..."

After long wanderings through many fields of speculation, as well as many a hard-fought fight, all civilized nations have come back to the point from which the Romans started twenty centuries ago. All hold, as did the Romans, that sovereign power comes in the last resort from the people, and that whoever exercises it in a state, exercises it by delegation from the people. All also hold that in the internal affairs of a state, power legally sovereign - even if the Constitution subjects it to no limitation - ought to be exercised under those moral restraints which are expected from the enlightened opinion of the best citizens, and which earlier thinkers recognized under the name of Natural Law. The sphere in which no Sovereignty de iure exists, that of international relations, where all power is de facto only, is also the sphere in which morality has made least progress, and in which justice and honour are least regarded.

Thus, for Bryce, there is a moral as well as a political purpose in the creation and working of constitutions:

"Forms of government are causes as well as effects, and give an intellectual and moral training to the peoples that live under them."

Again,

"Constitutions are the expression of national character, as they in turn

28. Ibid., p. 262.
30. Ibid., pp. 552 and 554.
mould the character of those who use them.”

Having defined a constitution as “a frame of political society organized through and by law”, Bryce seeks to improve upon the conventional distinction between written and unwritten constitutions which, “while they dwell on a superficial distinction, ignore a more essential one”. The essential criterion is to be found “in the relation which each Constitution bears to the ordinary laws of the state, and to the ordinary authority which enacts those laws”.

On this basis he proposes a distinction between the “flexible” constitution, of which he takes as paradigms those of ancient Rome and modern England, and the “rigid” constitution such as that of Switzerland or France. The salient characteristic of the first type is that

“all laws (excluding of course by-laws, municipal regulations and so forth) are of the same rank and exert the same force. There is, moreover, only one legislative authority competent to pass laws in all cases and for all purposes.”

Such a constitution is to be distinguished from the other, rigid, type under which

“there are two kinds of laws, one kind higher than the other, and more universally potent; and there are likewise two legislative authorities, one [e.g. a constituent assembly] superior and capable of legislating for all purposes whatsoever, the other inferior and capable of legislating only so far as the superior authority has given it the right and function to do so.”

Having made this distinction, he points out that, paradoxically, flexible constitutions have tended to be more stable than rigid ones. He suggests three reasons for the paradox: first, that

“the stability of any constitution depends not so much on its form as on the social and economic forces that stand behind it and support it”;

second, that

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32. Ibid., p. 125.
33. Ibid., p. 136.
34. Ibid., p. 127.
35. Ibid. p. 128.
36. Bryce thinks the constitutions of Hungary and Italy also fall into this category. See note 18 supra regarding his reference to “modern England”.
37. Ibid., pp. 129-130.
“the best instances of flexible constitutions have been those which grew up and lived on in nations of a conservative temper, nations which respected antiquity, which valued precedents, which liked going on doing a thing in the way their fathers had done it before them”;

and third, that

“a constitution which has come down in the form of a mass of laws, precedents and customs, is not only more mysterious, and therefore more august, to the minds of the ordinary citizens than one they can read in a document, but is not felt by them to lie at their mercy and to live only by their pleasure”.38

Provided it is acceptable to those who live by it, the distinctive merit of a flexible constitution is to be elastic, which affords a means of preventing or minimizing revolutions by meeting them halfway whereas a rigid constitution may break under the strain.39 “Such constitutions seem especially well suited to countries which are passing through periods of change, whether internal or external.”40

But elasticity may be a danger and “it needs a good deal of knowledge, skill and experience to work a flexible constitution safely”. 41

“Three things seem needful. One is legal-mindedness, a liking and a talent for law. Another is a conservative temper, by which I mean the caution which declines to make changes save when a proved need for change arises, so that changes are made not suddenly, but slowly, and bit by bit. The third is that intellectual freshness and activity which refuses to be petrified by respect for law or by aversion to change.”42

Turning to rigid constitutions, Bryce points out that they have come into existence for a variety of reasons and in a variety of ways:

“(1) The desire of the citizens, that is to say, of the part of the population which enjoys political rights to secure their own rights when threatened, and to restrain the action of their ruler or rulers;
(2) the desire of the citizens, or of a ruler who wishes to please the citizens,

38. Ibid., pp. 141-143.
39. Ibid., pp. 143 and 147.
40. Ibid., p. 164.
41. Ibid., p. 152.
42. Ibid., p. 159.
to set out the form of the pre-existing system of government in definite and positive terms precluding further controversy regarding it;
(3) The desire of those who are erecting a new political community to embody the scheme of polity under which they propose to be governed, in an instrument which shall secure its permanence and make it comprehensible by the people;
(4) The desire of separate communities, or of distinct groups or sections within a large (and probably loosely united) community, to settle and set forth the terms under which their respective rights and interests are to be safe-guarded, and effective joint action in common matters secured, through one government."

Since it is a response to a demand or a felt need, a rigid constitution necessarily represents the past, and Bryce warns that "constitution-makers do well to remember that the less they presume on the long life of their work the longer it is likely to live". Nor do rigid constitutions necessarily provide a definitive answer to all constitutional problems since there may be lacunae or obscurities:

"[The] apparent definiteness and simplicity of documentary constitutions may in a given case be largely qualified by the growth of a mass of quasi-constitutional matter which has to be known before the practical working of the constitution can be understood."

Nevertheless, rigid constitutions offer a guarantee of stability which flexible constitutions do not. They will be strengthened by growth in respect for the constitution which increasing age brings, but

"if the conditions of a country change, if the balance of power among classes, the dominant ideas of reflective men, the distribution of wealth, the sources from which wealth flows, the duties expected from the administrative departments of government, all become different, while the form and constitutionally-prescribed methods of government remain unmodified, it is clear that flaws in the constitution will be revealed which were previously unseen, and problems will arise with which its arrangements cannot cope. The remedy is of course to amend the constitution. But that is just what may be impossible, because the requisite majority may be unattainable; and

43. Ibid., pp. 170-171.
47. Ibid., pp. 187-189.
the opponents of amendment, entrenched behind the ramparts of an elaborate procedure, may succeed in averting changes which the safety of the community demands. The provisions that were meant to give security may now be dangerous, because they stand in the way of natural development.\footnote{Ibid., pp. 190-191.}

In this respect, it is advantageous that the judiciary should have responsibility for interpreting the constitution.

"The courts recognize, in fact, that ‘principle of development’ which is potent in politics as well as in theology. Human affairs being what they are, there must be a loophole for expansion or extension in some part of every scheme of government; and if the constitution is rigid, flexibility must be supplied from the minds of the judges."\footnote{Ibid., p. 197. The reference to the “principle of development” attests Bryce’s debt to Newman. Newman’s \textit{Essay on the Development of Christian Doctrine}, 1845, has been described as “the theological counterpart of the \textit{Origin of Species}” Ker, \textit{John Henry Newman}, Oxford, 1988, p. 300.}

(Given the passionate objections in some quarters in Britain to the interpretative functions of the EC Court of Justice, it is worth noting, as Bryce points out, that during the nineteenth century the function of interpreting the constitution was given to the judiciary in countries that followed the English tradition, but to the legislature in countries that followed the Roman, "This principle of referring to the courts all questions of legal interpretation may be said to be inherent in the English Common Law".\footnote{Ibid., p. 194.}

A corresponding disadvantage is that a rigid constitution “is apt to give a legal cast to most questions, and sets a high, perhaps too high, premium on legal knowledge and legal capacity”. Nevertheless, a documentary constitution can promote democracy since it can be taught at school and valued by the ordinary citizen. It is particularly valuable in making minorities aware of their rights and how to exercise them. But a rigid constitution is not a guarantee of democracy unless the mass of the people are sufficiently well-informed, and sufficiently interested, to insist that it be respected.\footnote{Ibid., pp. 199-204.}

In his second essay, Bryce turns to what he sees as the basic considerations a constitution-maker must have in mind. The form of constitution most appropriate to a particular community will depend on the strength of the forces that bind the members of that community together and of those that drive them apart (the centripetal and centrifugal forces).
“The historian who studies constitutions, and still more the draftsman who frames them, must have his eye constantly fixed on these two forces. They are the matter to which the legislator has to give form.”

Bryce identifies the forces that may operate in this way as being Obedience (or readiness to submit and follow), Individualism (or love of independence), Interest and Sympathy. His analysis of Interest is of particular relevance in the Community context:

“Under the head of Interest there fall all those influences which belong to the sphere of property, including of course industry and commerce as means of acquiring property. These influences usually make for consolidation and assimilation. It is a gain to the trader or the producer that the area of consumers which he supplies without the hindrance of an interposed customs tariff should be as wide as possible. It is a gain that communications by sea and land should be safe, easy, swift, and cheap, and these objects are better secured in a large country under a strong government. It is a gain that coinage, weights, and measures should be uniform over the largest possible area and that the standard of the currency should be upheld. It is a gain that the same laws and the same system of courts should prevail in every part of the state - and the larger the state the better, so far as these matters are concerned - and that the law should be steadily enforced and complete public order secured. All these things make not only for the growth of industry and the spread of trade, but also for the value of all kinds of property. And all these influences, derived from the consideration of such gains, which play upon the citizen’s mind, are usually aggregative influences, disposing him to desire the extension of the state and the strength of its central authority. ...

“In exceptional cases, however, the influences of Interest may be centrifugal. A particular group of traders or landowners, for instance, living in a particular district, may think they will gain more by having the power to enact special laws for the conduct of their own affairs or for the exclusion of competing

persons than they will by entering or by remaining under the uniform system of a large state. ...

Under the head of Sympathy he puts all the less rational influences of emotion or sentiment: the sense of community of belief, of intellectual conviction, of taste, or of feeling; recognition of a common ancestry, use of a common speech, enjoyment of a common literature; religion; and the sense of nationhood. But "though the want of these elements of community is usually an obstacle to unity, their presence is no guarantee for its existence."

"All these tendencies, pulling this way and that, are among the facts which a given constitution has to deal with, are forces which it must use in order to secure its own strength and permanence."53

Bryce sees the bonds and tensions between peoples as facts that the constitution-maker must accept and attempt to deal with. In particular, he sees the sentiment of nationhood or nationality as an objective phenomenon taking various forms, some good and some bad. Much later in life he wrote:

"Let us begin by regarding a nationality as an aggregate of men drawn together and linked by certain sentiments. The chief among these are racial sentiment and religious sentiment, but there is also that sense of community which is created by the use of a common language, the possession of a common literature, the recollection of common achievements or sufferings in the past, the existence of common customs and habits of thought, common ideals and aspirations. Sometimes all of these linking sentiments are present and hold the members of the aggregate together; sometimes one or more may be absent. The more of these links that exist in any given case, the stronger is the sentiment of unity. In each case the test is not merely how many links there are, but how strong each particular link is; and no two cases are quite alike."54

Bryce identifies three purposes of a political constitution
- to establish and maintain a frame of government under which the work of the state can be efficiently carried on;
- to provide due security for the rights of the individual citizen as respects person, property and opinion; and
- to hold the state together by creating good machinery for connecting

53. Ibid., pp. 221-229.
the outlying parts with the centre, and by appealing to every motive of interest and sentiment that can lead all sections of the inhabitants to desire to remain united under one government.

The first two purposes are fairly obvious, the third is less so. A constitution can achieve it, according to Bryce, by setting the centripetal forces to work, and by preventing all or some of the centrifugal forces from working.\footnote{Ibid., pp. 229-231.}

The first and most generally available of the centripetal tendencies that can be promoted is

\begin{quote}
"trade ... which benefits all the producers by giving them a market, all the consumers by giving them the means of getting what they want, all the middlemen by supplying them with occupation. A constitution can render no greater service to the unity as well as to the material progress of a nation than by enabling the freest interchange of products to go on within its limits."\footnote{Ibid., p. 232.}
\end{quote}

Other possible techniques are the establishment of a common law and a common system of courts, a state church,\footnote{Ibid., p. 232.} a common language and, harking back to ancient Greece, common festivities and games.\footnote{Ibid., pp. 232-237.}

The centrifugal tendencies that have to be controlled are, chiefly, "race feeling, resentment for past injuries, grievances in respect of real or supposed ill-treatment in matters of industry, or of trade, or of education, or of language, or of religion, where these grievances or any of them press on a part only of the population".\footnote{Ibid., p. 238, emphasis added.} The disruptive effect of such feelings can of course be controlled by force, but a constitution can seek to meet them:

- "by enacting securities against oppression" (a Bill of Rights);
- "by varying the general institutions or laws of the state in such a way as to exempt particular parts of the state legislation that might be opposed to their special interests or feelings" as in Scotland within the United Kingdom;
- "by relegating certain classes of affairs to local legislatures of communities enjoying local autonomy" as in Quebec within Canada;
- "by assigning certain administrative and, within limits, certain legislative functions also to the inhabitants of minor local areas, such as counties, empowering them to regulate their local affairs in their own way" as in the United States;
"by excluding certain matters [e.g. religion] altogether from the competence of the central government, and thereby keeping them out of the range of controversy."

In Bryce's view, these aims can more readily be achieved by a rigid constitution since it provides a better guarantee to minorities, or to particular subdivisions of the country, than they can have under a flexible constitution with an omnipotent legislature. "Indeed the existence of the grounds of contention and possibilities of disruption we have been considering is among the chief causes which have called federal governments and rigid constitutions into being."

5. The contemporary relevance of Bryce

Bryce's writings - at least those that have been examined here - do not provide us with any positive prescriptions for the construction of a new European constitution, if that is what is desired. They do, however, suggest a way of looking at the problem which merits the attention both of the maximalist and of the minimalist camp.

The debt, both in theory and in practice, of the post-war European institutions to American constitutional thought is obvious. There is enormous scope for fruitful comparison. But there is a risk of repeating, in another form, what Bryce saw as the error of de Tocqueville:

"Like Plato in the Republic, he begins by imagining that there exists somewhere a type or pattern of democracy, and as the American Republic comes nearest to this pattern, he selects it for examination ... In practice he underrates the purely local and special features of America, and often, forgetting his own scientific cautions, treats it as a norm for democracy in general."

The American constitution has been treated by some as a norm to which the ever-closer union of European states must, sooner or later, conform.

60. Ibid., pp. 242-245.
61. Ibid., p. 245.
But, as Bryce said of proposals for a world federation on an American model after the first World War:

"Those who cite that example ought to try to recommend their suggestion by comparing the conditions under which the American Federation was created and those which exist today in the world as a whole and showing that such a comparison supports the plan. Does it not rather dissuade from the attempt to imitate? The thirteen states of 1788 were no doubt independent. But their citizens spoke the same language, had the same social usages, cherished the same historical traditions, lived under the same institutions, were in fact, except that they had no common government (save an ineffective assembly of delegates), already a Nation, a branch of the ancient European nation whose authority they had disclaimed."

The same, mutatis mutandis, could be said of the German form of federalism, which is neither necessarily better, nor necessarily worse, than the American as a model for the European Union.

That is not to say that lessons cannot be learned from the American or German experience. But if lessons are to be learned, it is well to start from the same point as Bryce, and recognise that every democratic constitution is an expression of the history and temper of the people who created it and have consented to be governed by it. Its success depends not only on whether it provides an efficient system of government and protects individual rights, but also on the skill with which it puts the centripetal forces to work and prevents the centrifugal forces from working. These forces, and their relative strength, will be different in each case. The success of a constitution and its usefulness as a model can only be judged in the light of the specific circumstances with which it was created to deal, and with which it has since had to cope.

This is particularly true of those constitutional arrangements which, for want of a richer vocabulary, are classed together as "federal". The very reason for the existence of such arrangements is that they have been devised to meet the needs of those who, in Dicey’s words, "desire union and do not desire unity". The motives for which people may desire union but do not desire unity are very various, and are unlikely to be the same in any two cases. So the form of federal union may be, and perhaps ought to be, quite different.

Madison himself wrote of his own creation towards the end of his life:

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"The more the political system of the U.S. is fairly examined, the more necessary it will be found to abandon the abstract and technical modes of expounding and designating its character; and to view it as laid down in the charter which constitutes it, as a system hitherto without a model; as neither a simple or a consolidated Government nor a Government altogether confederate; and therefore not to be explained so as to make it either, but to be explained and designated, according to the actual division and distribution of political power on the face of the instrument."66

The essence of federal arrangements, as explained by Bryce, lies (though he did not use those words) in subsidiarity and variable geometry - in conscious and willing acceptance of a degree of untidiness and theoretical imperfection which is necessary to make union acceptable to all the participants and which can only be avoided by a fully unitary arrangement.

So the proper question to be asked at this stage is not whether the European Union should have a "real constitution", or whether such a constitution should follow the American, the German or some other model, but what are now, and so far as it can be foreseen for the future, the specific characteristics and problems to which any new constitution should seek to respond.

In any case, so far from not having a "real constitution", the Community already has a rigid constitution in the sense that its legal order recognises a hierarchy of norms in which the law of the treaties takes precedence over national law and subordinate Community legislation, and also in the sense that Kompetenz-Kompetenz lies with an inter-governmental conference of the Member States, the results of whose work is subject to the processes of ratification in the Member States.

While the Community’s constitution is rigid in that sense, it could also be said to be flexible in the sense that its institutional arrangements are relatively imprecise and have shown themselves to be capable of meeting repeated crises without breaking. That achievement is more remarkable than some critics are prepared to allow.

The secret of the Community’s success so far lies in the fact that its constitutional charter addresses itself directly to harnessing Bryce’s prime centripetal force - trade - as the motor of integration: truly “a system

66. The Mind of the Founder, supra, p. 437. In the same vein, Woodrow Wilson, reviewing Bryce’s The American Commonwealth (Political Science Quarterly IV (1889), pp. 153-69), said that “De Tocqueville came to America to observe the operation of a principle of government, to seek a well-founded answer to the question: How does democracy work? Mr. Bryce, on the other hand, came, and came not once but several times, to observe the contrete phenomena of an institutional development, into which, as he early perceived, abstract political theory can scarcely be said to have entered as a formative force ...”.
The Community's Constitution

hitherto without a model'.

That said, recent events have shown that the Community’s constitution has signally failed to engender the affection, the respect and the pride amongst the people of the Member States that Bryce saw as an essential support for a lasting constitution. Not least of the reasons is the length and obscurity of the documents in which it is to be found. To apply one of Bryce's tests, could the EEC treaty, the Single Act or, least of all, the Maastricht treaty be taught at school or provide a focus of loyalty?

There is, as Bryce insisted, a moral and instructive purpose in a good constitution which the Community’s existing charter seems not to be able to fulfil. It is devised to be run by those who have the knowledge, skill and experience to understand it - an aristocracy of talent or, in modern terms, a technocracy. Such an arrangement may be efficient but it is unappealing to those who live under it.

The temper of the present time is, if anything, centrifugal rather than centripetal. Economic recession has dampened enthusiasm for the technocratic achievement of the single market and has brought out the latent centrifugal aspect of economic interest identified by Bryce: the belief that there is more to be gained from protectionism than from freedom of trade. The most immediate problem is not whether the Community needs a “real constitution” but whether, as the new Director-General of GATT has warned, the Community itself could survive a global trade war.

If the temper of our times is centrifugal, this was also true of the later nineteenth century when Bryce wrote,

“[it] is a remarkable feature of recent times that the tendency of a common interest to draw groups together and make them prize the unity of the state is often accompanied by the parallel development of an opposite tendency, based on sentiment, to intensify the life of the smaller group and in so far to draw it apart, and thereby weaken the unity of the state. This arises from the fact that the march of civilization is material on the one hand, intellectual and moral on the other. So far as it is material, it generally makes for unity. On its intellectual and social or moral side it works in two ways. It tends to break down local prejudices and to create a uniform type of habits and character over a wide area. But it also heightens the influence of historical memories. It is apt to rekindle resentment at old injuries.”

Bryce warned that,

“[d]emocracy itself, though most people treat it as a thing likely to grow stronger and advance further, may suffer an eclipse. Human nature no

doubt remains. But human nature has clothed itself in the vesture of every sort of institution, and may change its fashions as freely in the future as it has done in the past.”

Not many years after Bryce wrote, democracy underwent the most severe test it had yet had to face. Today there is, once again, evidence of a disillusionment with existing constitutional expressions of democracy, of which events in Italy are the primary, but not the only, demonstration. A constitutionally permitted partitocrazia where, in place of true representative government, the game of politics is played in and between parties for the benefit of the players, can only lead to parallel expressions of democracy, some entirely praiseworthy but some highly dangerous. If the purpose of creating a new constitution for the European Union is to cure the democratic deficit, this will not be achieved by reinforcement of a discredited partitocrazia.

As to the way forward, it will be worth reflecting upon the analysis offered by the wise and humane scholar to whom the present book of essays is dedicated:

“Gradually, the tasks of parliaments and courts have changed. The ideal that all legislation is made by the people’s representatives is no longer possible in our modern society. Legislation is so complicated that for every subject matter experts are needed. ... Legislation is made by the experts of the administration, but it is supervised by the elected parliament.

“Gradually, the principal task of parliaments has shifted from legislation to supervision. ... Courts also have become supervisory organs. ... To a large extent their principal tasks run parallel: they both supervise the functioning of the other institutions, the one from a legal, the other from a political point of view. ...

“Both for the parliaments and courts the task of controlling the government has become of the greatest importance and it has become increasingly difficult. The two institutions have become allies ...”

As to the necessity of such an alliance to control the power of the executive and the administration, there would not have been any difference between Dicey and Bryce. But let the last word be with Bryce

“The theory of democracy assumes that the multitude are both competent

and interested; competent to understand the structure of their government and their own functions and duties as ultimately sovereign in it, interested as valuing those functions, and alive to the responsibility of those duties. ... Now the average man, if intelligent enough to comprehend politics at all, likes general principles. Even if, as some think, he undervalues them, yet his capacity for absorbing them gives him a sort of comprehension of his government and attachment to it which are solid advantages in a large democracy.  