
SCOTLAND: AN EXAMPLE OF CONSTITUTIONALISM

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I. INTRODUCTION

This Article covers the development of Scotland as a distinct jurisdiction in the United Kingdom and examines the current proposals for the creation of an independent Scottish state.

II. EARLY DEVELOPMENT

Scots first came to Scotland from Ireland¹ and introduced elements of Celtic

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1. See *Scottish History*, SCOTLAND.ORG, <http://www.scotland.org/about->

culture.² By 850 A.D., “[a] united kingdom of Alba was established . . . and by the eleventh century the boundary between Scotland and England was settled,”³ stretching from Berwick upon Tweed in the east to Carlisle in the west.⁴

III. ANGLO-NORMAN INFLUENCES

England was conquered by the Normans in 1066, but it took until the reign of King David I (1124–1153) for Norman ideas to fully permeate Scotland.⁵ These ideas included a feudal monarchy and system of land tenure, centralized state and justice administration, city organization, and church development.⁶ Roman and church law entered Scotland through the influence of the church.⁷

The other major influence was English law, but due to hostilities between Scotland and England, the paths of development diverged, and the legal and state structures evolved separately.⁸

King Edward I of England made repeated attempts to control Scotland.⁹ His son, Edward II, also attempted to rule in Scotland; however, he eventually was defeated by King Robert the Bruce at the Battle of Bannockburn on June 24, 1314.¹⁰ Even though Scotland asserted its independence by the Declaration of Arbroath in a letter to Pope John XXII on April 6, 1320, and by the Treaty of Northampton in 1328, and England had renounced all claims to rule Scotland, the attempts were continued by Edward III.¹¹ Scotland, however, resisted further

scotland/scottish-history (last visited Feb. 4, 2015).

2. DAVID M. WALKER, *THE OXFORD COMPANION TO LAW* 1109 (1980).

3. *Id.*

4. *See id.*

5. *See* John Hudson, *Overview: The Normans, 1066–1154*, BBC, http://www.bbc.co.uk/history/british/normans/overview_normans_01.shtml (June 20, 2011).

6. *See id.*

7. *See* William M. Gordon, *Roman Law in Scotland*, in *THE CIVIL LAW TRADITION IN SCOTLAND* 13, 15 (Robin Evans-Jones ed., 1995), available at <http://iuscivile.com/legacy/reprints/gordon-1.pdf>.

8. *See* T.B. Smith, *English Influences on the Law of Scotland*, 3 *AM. J. COMP. L.* 522, 522–25 (1954).

9. *See generally* *Edward I, King of England. Born 1239, Died 1307. Reign 1272–1307*, BBC, http://www.bbc.co.uk/scotland/history/articles/edward_i/ (last visited Feb. 4, 2015).

10. *See generally* MAGNUS MAGNUSSON, *SCOTLAND: THE STORY OF A NATION* 178–87 (2000).

11. *See id.* at 187, 192, 196; *see also* S. Res. 155, 105th Cong., 144 *CONG. REC.* 4293 (1998) (enacted) (identifying links between the declaration of Arbroath and Scottish constitutional history and independence and establishing National Tartan Day to be held on April 6 each year as a celebration of Scottish heritage and independence).

subjugation attempts.¹²

The difficult relationship with England led to a Scottish alliance with France.¹³ The historical alliance with France and the lack of universities in Scotland led students to study in continental Europe rather than at Oxford or Cambridge.¹⁴ Scottish students studied in great numbers in Paris, Orleans, and Cologne.¹⁵ Those students learned Roman law and brought this knowledge back to Scotland; this education ensured the divergent development of the Scottish and English legal systems.¹⁶

IV. THE SIXTEENTH AND SEVENTEENTH CENTURIES

The sixteenth century saw a lot of change. The central civil court, the Court of Session, was established in 1532.¹⁷ It is still in operation today.¹⁸ The Scottish Parliament got into its stride in lawmaking, and then the Protestant Reformation happened in 1560.¹⁹ This led to Scotland abolishing papal authority and adopting a Presbyterian form of church governance.²⁰ Mary, Queen of Scots abdicated in favor of her son Charles James in 1567 and later was executed by Elizabeth I on February 8, 1587.²¹ When Elizabeth I died in 1603 without leaving an heir, Mary's son, King James VI of Scotland, became James I, King of England.²² James's accession to the throne united England and Scotland under one crown.²³ This is known as the "Union of the Crowns."²⁴ King James moved to London and took his court with him, but the state apparatus in each of his countries remained separate even though James styled himself King of Great Britain.²⁵

Following James's death in 1625,²⁶ the remainder of the seventeenth century

12. MAGNUSSON, *supra* note 10, at 196–200.

13. *See id.* at 118–19.

14. WALKER, *supra* note 2, at 740.

15. *Id.*

16. *Id.* at 1109.

17. *See id.* at 308.

18. *Id.*

19. *Id.* at 1110.

20. *Id.*; *see also* Anthony L. Chute, *One Lord, One Faith, but Many Expressions: Denominations and Their Stories* 56, 75–76, in *WHY WE BELONG: EVANGELICAL UNITY AND DENOMINATIONAL DIVERSITY* (Anthony L. Chute et al. eds., 2013).

21. MAGNUSSON, *supra* note 10, at 365, 380.

22. *See id.* at 382–83, 400.

23. *Id.* at 399–401.

24. *Id.* at 399.

25. *See id.* at 400–03.

26. *Id.* at 414.

was quite tumultuous. Charles I reigned 1625–1649 and was executed by the Parliamentarians under Oliver Cromwell.²⁷ Cromwell enforced amalgamation of Scotland and England into one Commonwealth.²⁸ That survived until the restoration of the monarchy with Charles II (1660–1685).²⁹ The English empire was expanding at this time in North America, the Caribbean, and, toward the East, in India.³⁰ Trade was making England wealthy, but Scotland, as a separate kingdom, could not participate in the imperial expansion.³¹ Scottish traders tried to establish colonies in America, but these were little more than trading posts.³² As the century drew to a close, Scottish merchants embarked on a risky venture to establish a colony on the Darien peninsula in Panama.³³ Two expeditions sailed to Darien between 1698 and 1699.³⁴ The expedition was an abject failure and was abandoned.³⁵ Many people died from tropical diseases, and the colony could not get help from either the English or Spanish neighboring colonies.³⁶ Not a single ship from the second expedition returned,³⁷ and because the investment failed, Scotland was rendered nearly bankrupt.³⁸

V. THE EIGHTEENTH CENTURY

The eighteenth century saw the beginning of negotiations for political union between the Scottish and English Parliaments.³⁹ The English Parliamentarians were anxious to ensure that when Queen Anne died, a Protestant would succeed her and Scotland would agree to be ruled by the same monarch.⁴⁰ On the other

27. *See id.* at 414, 448–49.

28. *See id.* at 468.

29. *See generally id.* at 473–96.

30. *See generally British Empire*, ENCYCLOPEDIA.COM, http://www.encyclopedia.com/topic/British_Empire.aspx (last visited Feb. 4, 2015).

31. *See* Helen Julia Paul, *The Darien Scheme and Anglophobia in Scotland*, ECON. & ECONOMETRICS, no. 0925, at 2 (suggesting that a main reason for Scotland becoming a part of the United Kingdom in 1707 was to enable it to compete economically, something it was unable to do as an independent nation).

32. *See id.* at 2, 4.

33. *Id.* at 2.

34. *Id.*

35. *Id.*

36. *See id.* at 6.

37. JOHN PREBBLE, *THE DARIEN DISASTER* 300 (1969).

38. *See id.* at 314 (stating that as a part of the Treaty of Union, “England agreed to give Scotland nearly £400,000 Sterling for the liquidation of its public debts.”).

39. *See generally* Peter N. Williams, *A Brief History of Scotland*, BRITANNIA, <http://www.britannia.com/celtic/scotland/scot8.html> (last visited Feb. 4, 2015).

40. *See* Union with Scotland Act, 1706, 6 Ann., c. 11, art. 2 (Eng.); Act of Settlement, 1700, 12 & 13 Will. 3, c. 2, art. 1 (Eng.).

hand, Scots wanted access to the English imperial markets.⁴¹ The result was a treaty between Scotland and England, known as the Treaty of Union, which came into effect in May 1707.⁴² The Treaty and the relative Acts of the Scottish and English Parliaments established one Parliament for the United Kingdom of Great Britain.⁴³ The Treaty also preserved the Scottish courts (expressly providing that no court in Westminster Hall in London should have jurisdiction in Scotland), thus providing that the separate systems of law, the system of Scottish education, and the established Presbyterian church of Scotland as the national church should continue.⁴⁴ The Treaty did not remain inviolate, and many of its terms were changed during the century.⁴⁵ In the first half of the century, there were two Jacobite rebellions—one in 1715 and one in 1745.⁴⁶ Both failed in their objective to return the throne to the Stuarts.⁴⁷ The fact is, although unpopular with some, the Treaty preserved many of the aspects of Scottish culture and identity and some of the apparatus of statehood.

VI. THE SCOTTISH ENLIGHTENMENT

The second half of the eighteenth century and the early-nineteenth century saw the development of the Scottish Enlightenment and a flourishing of Scotland's universities: St. Andrews, Glasgow, Aberdeen, and Edinburgh.⁴⁸ The Scottish Enlightenment was part of a larger European movement that included thinkers such as Voltaire, Rousseau, and Montesquieu.⁴⁹ Scottish contributors included Francis Hutcheson, David Hume, and Adam Smith,⁵⁰ and much of their thinking had a profound effect on the Founding Fathers of the United States. Benjamin Franklin spent time in Edinburgh and stayed with David Hume, a philosopher, and Lord

41. ALAN TAYLOR, *AMERICAN COLONIES* 294 (2001).

42. See Allan I. Macinnes, *Acts of Union: The Creation of the United Kingdom*, BBC (Feb. 17, 2011), http://www.bbc.co.uk/history/british/empire_seapower/acts_of_union_01.shtml.

43. Union with England Act, 1707, 6 Ann., c. 7, art. 3 (Scot.); Union with Scotland Act, 1706, 6 Ann., c. 11 art. 3 (Eng.).

44. Union with England Act, 1707, 6 Ann., c. 7, §§ 19, 25 (Scot.).

45. Union with England Act, 1707, 6 Ann., c. 7 (Scot.).

46. Macinnes, *supra* note 42.

47. See 3 JOHN MACKINTOSH, *THE HISTORY OF CIVILISATION IN SCOTLAND* 223, 229 (1895).

48. See Stewart Sutherland, *Scottish Enlightenment*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/529682/Scottish-Enlightenment> (Aug. 29, 2013).

49. ROBERT WUTHNOW, *COMMUNITIES OF DISCOURSE: IDEOLOGY AND SOCIAL STRUCTURE IN THE REFORMATION, THE ENLIGHTENMENT, AND EUROPEAN SOCIALISM* 20 (1989).

50. *Id.* at 263.

Kames, a judge.⁵¹ Franklin proclaimed that he had enjoyed some of the densest happiness when in Edinburgh.⁵² The Scottish Enlightenment was keenly felt in America—especially in the debates around the Declaration of Independence and the formulation of the U.S. Constitution. Many of the Founding Fathers had Scottish family links. For example, Reverend John Witherspoon and James Wilson—one of the few to sign both the Declaration of Independence and the U.S. Constitution—were immigrants from Scotland.⁵³ Other Founding Fathers had some Scottish ancestry and influence as well, such as Thomas Jefferson, who claimed not only to be descended from King Robert the Bruce, but more importantly was taught at William and Mary College in Williamsburg, Virginia, by Dr. William Small, a Scotsman who exposed Jefferson to Bacon, Locke, Newton, Smith, and other philosophers of the Scottish Enlightenment.⁵⁴ The key to his teaching was to focus on reason, not tradition or superstition, as the basis of philosophical thinking.⁵⁵

One of the significant issues Enlightenment theorists focused on was limited, representative government.⁵⁶ This was particularly important in the development of ideas concerning American independence and constitutional monarchy in the United Kingdom.⁵⁷

VII. THE NINETEENTH AND EARLY-TWENTIETH CENTURIES

From 1745 until the 1880s, Scotland was not represented in the Cabinet of the United Kingdom except when the Lord Advocate—the Scottish equivalent of the Attorney General—was present.⁵⁸ In 1881, Prime Minister William Ewart

51. BENJAMIN FRANKLIN, *THE WRITINGS OF BENJAMIN FRANKLIN* 201–02 (Albert H. Smyth ed., 1907).

52. *Id.* at 202.

53. *James Wilson, 1789–1798*, *THE SUPREME COURT HISTORICAL SOC'Y*, http://www.supremecourthistory.org/timeline_wilson.html (last visited Feb. 4, 2015); *John Witherspoon*, *WITHERSPOON INST.*, <http://winst.org/about/john-witherspoon> (last visited Feb. 4, 2015).

54. *See* JON MEACHAM, *THOMAS JEFFERSON: THE ART OF POWER* 14–15, 17–18 (2012).

55. *Id.* at 18.

56. *See* Constitutional Rights Found., *Hobbes, Locke, Montesquieu, and Rousseau on Government*, 20 *BILL OF RIGHTS IN ACTION*, no. 2, Spring 2004, <http://www.crf-usa.org/bill-of-rights-in-action/bria-20-2-c-hobbes-locke-montesquieu-and-rousseau-on-government.html>.

57. *See* Matthew P. Dziennik, *Scotland & the American Revolution*, *J. AM. REVOLUTION* (Oct. 14, 2013), <http://allthingsliberty.com/2013/10/Scotland-american-revolution/>.

58. *See generally* JAMES G. KELLAS, *THE SCOTTISH POLITICAL SYSTEM* 29–30 (3d ed. 1984); *The Role and Functions of the Lord Advocate*, *SCOTTISH GOV'T* (June 2014), www.gov.scot/About/People/strategic-board/Finance/LPS/glss/glsslsla/RoleLA.

Gladstone made the Earl of Rosebery an undersecretary at the Home Office,⁵⁹ but pressure mounted for the appointment of a Secretary for Scotland.⁶⁰ The government created this office in 1885,⁶¹ and it was upgraded to Secretary of State for Scotland in 1926.⁶² This Minister wielded a significant amount of devolved administrative power.⁶³ The Home Rule movement was an expression of desire for more local control over government in both Ireland and Scotland.⁶⁴ Various discussions proceeded under the liberal governments of the late-nineteenth century, but for many reasons—not least the situation in Ireland—Home Rule plans were not fully implemented.⁶⁵

VIII. RESURGENT NATIONALISM

In the early-twentieth century, Scottish nationalism developed into an organized political movement.⁶⁶ There were bodies such as the Scots National League (1921), Glasgow University Scottish Nationalist Association (1927), National Party of Scotland (1928), the Scottish Party (1932), and the Scottish National Party (SNP) (1934).⁶⁷ The SNP had varying fortunes as a party, including a split in 1942 over its attitude to the Second World War.⁶⁸ However, in 1945 the SNP won its first seat in the House of Commons at a by-election.⁶⁹ It lost the seat in the general election later that year.⁷⁰ During the 1960s and 1970s, varying numbers of SNP members of Parliament were returned to Parliament.⁷¹ In 1979, Parliament held a referendum on whether to establish a Scottish Assembly, but the vote in favor failed to reach the electoral hurdle of 40 percent, and the proposal was dropped.⁷² The conservative government elected in 1979 was not interested in

59. *History: Past Prime Ministers*, GOV.UK, <http://www.gov.uk/government/history/past-prime-ministers/archibald-primrose-5th-earl-of-rosebery> (last visited Feb. 4, 2015).

60. *E.g.*, Secretary of Scotland Act, 1885, 48 & 49 Vict., c. 61, § 2 (U.K.).

61. *See History of Devolution*, SCOTTISH GOV'T, <http://www.gov.scot/About/Factfile/18060/11550> (last updated June 26, 2012).

62. *See* Secretaries of State Act, 1926, 16 & 17 Geo. 5, c. 18, art. 1 (U.K.).

63. *See id.*

64. *See* D.A. HAMER, LIBERAL POLITICS IN THE AGE OF GLADSTONE AND ROSEBERY 117–18 (1972).

65. *See* MAGNUSSON, *supra* note 10, at 670.

66. *Id.*

67. *See generally id.* at 669–72.

68. *See id.* at 672.

69. *Id.*

70. *Id.*

71. *See id.* at 681–82.

72. *History of Devolution*, *supra* note 61.

pursuing further devolution plans.⁷³

IX. DEVOLUTION

The idea of a Scottish Parliament was fostered by the Scottish Constitutional Convention, a grouping of political parties, trades unions, churches, civic society, and individuals, which was established in 1989.⁷⁴ It was not until 1997 with the election of the Labour government under Prime Minister Tony Blair that the process of constitutional change got underway.⁷⁵

X. THERE SHALL BE A SCOTTISH PARLIAMENT

In September 1997, the electorate held a referendum to determine whether the electorate in Scotland wanted a Scottish Parliament to be established.⁷⁶ The referendum result was overwhelmingly in favor of the creation of the Scottish Parliament.⁷⁷ More than 74 percent of those voting approved the idea—a smaller proportion agreeing with tax-raising powers for the Parliament.⁷⁸ This prelegislative referendum enabled the government to bring forward the Scotland Parliament Bill in 1998.⁷⁹ The scheme for the Scotland Parliament Act of 1998 was to establish a unicameral Scottish Parliament⁸⁰ and a Scottish Executive⁸¹ and to list the powers that were retained by the United Kingdom, all other powers by implication being devolved.⁸² The Scottish Parliament was devolved power to legislate on health, education, housing, sports and arts, agriculture, forestry and fishing, emergency services, planning, social work, heritage, justice, some transport, and tourism.⁸³ The United Kingdom Parliament, on the other hand, was reserved power over, among other things, the many areas of constitution, defense, financial matters and the currency, immigration, foreign affairs, common markets, equalities, welfare, and data protection.⁸⁴

73. See MAGNUSSON, *supra* note 10, at 684.

74. *Id.*

75. *See id.* at 691–92.

76. *Id.* at 691.

77. *Id.*

78. *Id.*

79. *Id.* at 691–92.

80. *See* The Scotland Act 1998, 1998, c. 46, § 1 (U.K.).

81. *Id.* § 44.

82. *See id.* §§ 54–56.

83. *Devolved & Reserved Matters*, SCOTTISH PARLIAMENT, <http://www.scottish.parliament.uk/visitandlearn/education/18642.aspx> (last visited Feb. 4, 2015).

84. *Id.*

The election system is an additional member system, a form of proportional representation.⁸⁵ This allows the voter to have a constituency Member of the Scottish Parliament (MSP)⁸⁶ and seven other regional members.⁸⁷ Therefore, each voter is represented by eight MSPs. The system is designed to make it difficult for one party to have an overall majority. This system produced coalitions between the Labour and Liberal Democrat parties during the first two sessions,⁸⁸ a minority SNP Administration in the third session,⁸⁹ and a majority SNP Administration in the current session.⁹⁰ The four sessions of the Scottish Parliament since it opened are session one (1999–2003), session two (2003–2007), session three (2007–2011), and session four (2011–2016).⁹¹ The legislative output has been significant: 62 Acts in session one,⁹² 66 in session two,⁹³ 53 in session three,⁹⁴ and so far, 45

85. The Scotland Act 1998, 1998, c. 46, § 1(3) (U.K.).

86. *Id.* § 1(2).

87. *Id.* at sch. 1, § 2(3).

88. *See generally* *MSP by Party Session 1*, SCOTTISH PARLIAMENT (Jan. 9, 2008), available at http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/Factsheets/MSPs_by_Party_Session_1.pdf; *MSPs by Party Session 2*, SCOTTISH PARLIAMENT (Apr. 7, 2009), available at http://www.scottish.parliament.uk/Research%20briefings%20and%20fact%20sheets/MSPs_by_Party_S2.pdf.

89. *See generally* *MSPs by Party Session 3*, SCOTTISH PARLIAMENT (Apr. 16, 2009), available at http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/Factsheets/MSPs_by_Party_Session_3.pdf; *Devolved Decision Making in Scotland*, BBC, http://www.bbc.co.uk/bitesize/higher/modern/uk_gov_politics/gov_sco/revision/1/ (last visited Feb. 5, 2015).

90. *See generally* *Cumulative List of MSPs by Party Session 4*, SCOTTISH PARLIAMENT (Jan. 24, 2014), available at http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/MSPs_by_Party_Session_4_Cumulative.pdf; *Devolved Decision Making in Scotland*, *supra* note 89.

91. *Previous MSPs*, SCOTTISH PARLIAMENT, <http://www.scottish.parliament.uk/msps/previous-msps.aspx> (last visited Feb. 5, 2015).

92. *Scottish Parliament Legislation Session 1*, SCOTTISH PARLIAMENT (Jan. 10, 2008), at 7, available at http://www.scottish.parliament.uk/SPICeResources/Research%20briefings%20and%20fact%20sheets/Scottish_Parliament_Legislation_Session_1.pdf.

93. *Scottish Parliament Legislation Session 2*, SCOTTISH PARLIAMENT (Jan. 10, 2008), at 8, available at http://www.scottish.parliament.uk/SPICeResources/Research%20briefings%20and%20fact%20sheets/Scottish_Parliament_Legislation_Session_2_NEW_VERSION.pdf.

94. *Scottish Parliament Legislation Session 3*, SCOTTISH PARLIAMENT (Apr. 28, 2011), at 8, available at http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/Factsheets/Scottish_Parliament_Legislation_Session_3_NEW_VERSION.pdf.

bills in session four and 14 in the pipeline.⁹⁵

XI. THE PROPOSALS FOR THE REFERENDUM ON SCOTTISH INDEPENDENCE

The minority SNP Administration began “a National Conversation” in 2007 that ran until 2009.⁹⁶ This produced a White Paper, *Your Scotland: Your Voice*, and a draft referendum bill.⁹⁷ During this period, the Unionist parties, the Labour Party, the Liberal Democrat Party, and the Conservative Party appointed a commission under Sir Kenneth Calman to examine the devolution settlement and make proposals for its modification.⁹⁸ His report recommended more devolution in a number of areas, notably taxation.⁹⁹ In 2010, the United Kingdom election was held, and a Conservative–Liberal Democrat government took power under Prime Minister David Cameron and Deputy Prime Minister Nick Clegg.¹⁰⁰ The U.K. government decided to implement the Calman Report through a bill in the U.K. Parliament.¹⁰¹ A bill was introduced in 2010 and became the Scotland Act 2012.¹⁰² In May 2011, the Scottish Parliament election was held and resulted in an absolute majority for the SNP under First Minister Alex Salmond.¹⁰³ One of the manifesto commitments by the SNP was to hold a referendum on Scottish independence.¹⁰⁴

95. See *Session 4 Bills*, SCOTTISH PARLIAMENT, <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/29432.aspx> (last visited Feb. 2, 2015); *Current Bills*, SCOTTISH PARLIAMENT, <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/576.aspx> (last visited Feb. 2, 2015).

96. See *Choosing Scotland's Future: A National Conversation*, SCOTTISH GOVERNMENT, <http://www.scotland.gov.uk/Topics/constitution/a-national-conversation> (last updated Oct. 8, 2014).

97. See generally *YOUR SCOTLAND, YOUR VOICE: A NATIONAL CONVERSATION* (2009), available at <http://www.scotland.gov.uk/Resource/Doc/293639/0090721.pdf>; see also *id.* at 136–39.

98. See HELEN HOLDEN, *THE COMMISSION ON SCOTTISH DEVOLUTION—THE CALMAN COMMISSION 6* (2010).

99. See *Digesting the Calman Report Calls*, BBC, http://news.bbc.co.uk/2/hi/uk_news/scotland/8100215.stm (last updated June 15, 2009).

100. See *David Cameron is UK's New Prime Minister*, BBC, http://news.bbc.co.uk/2/hi/uk_news/politics/election_2010/8675265.stm (last updated May 12, 2010).

101. See *Scotland Act of 2012*, PARLIAMENT.UK, <http://services.parliament.uk/bills/2010-12/scotland.html> (last visited Feb. 5, 2015).

102. See *id.*

103. *Stunning SNP Election Victory Throws Spotlight on Scottish Independence*, THE GUARDIAN (May 6, 2011), <http://www.theguardian.com/politics/2011/may/06/snp-election-victory-scottish-independence>.

104. *Id.*; SCOTTISH NAT'L PARTY, *SCOTTISH NATIONAL PARTY MANIFESTO 2011 28* (2011), available at http://votesnp.com/campaigns/SNP_Manifesto_2011_lowRes.pdf.

In early 2012, the U.K. government published a consultation entitled *Scotland's Constitutional Future: A Consultation on Facilitating a Legal, Fair and Decisive Referendum on Whether Scotland Should Leave the United Kingdom*.¹⁰⁵ The U.K. government had a number of objectives in issuing this consultation: to make sure there was a legal, fair, and decisive referendum; to provide a constitutional basis for any referendum; and to make sure there was only one question on the referendum ballot.¹⁰⁶ This was followed by a consultation by the Scottish government entitled *Your Scotland, Your Referendum*.¹⁰⁷ This consultation asked about the question for the referendum, the extension of the franchise to 16-year-olds, funding limits for the campaigns, and some other practical issues.¹⁰⁸

In the meantime, the U.K. and Scottish governments were negotiating the best way to ensure that the referendum was legal, fair, and decisive. The result of these negotiations was the Edinburgh Agreement, signed by the Prime Minister and the First Minister in Edinburgh on October 15, 2012.¹⁰⁹ This Agreement between the U.K. and Scottish governments committed both parties to work together to ensure a referendum with a clear legal base, “legislated for by the Scottish Parliament,” which should “command the confidence of parliaments, governments and people” and “deliver a fair test and a decisive expression of the views of people in Scotland and a result that everyone will respect.”¹¹⁰

In order to deliver on the Edinburgh Agreement, the U.K. government agreed to propose an order under the Scotland Act of 1998 giving the Scottish Parliament the power to legislate for a referendum.¹¹¹ This order needed the approval of both Houses of Parliament and the Scottish Parliament.¹¹² That process concluded in

105. See MICHAEL MOORE, SCOTLAND'S CONSTITUTIONAL FUTURE: A CONSULTATION ON FACILITATING A LEGAL, FAIR AND DECISIVE REFERENDUM ON WHETHER SCOTLAND SHOULD LEAVE THE UNITED KINGDOM (2012), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/39248/Scotlands_Constitutional_Future.pdf.

106. See *id.* at 7.

107. See generally SCOTTISH GOV'T, YOUR SCOTLAND, YOUR REFERENDUM (2012), available at <http://www.scotland.gov.uk/Resource/0038/00386122.pdf>.

108. *Id.* at 4–6.

109. See generally SCOTTISH GOV'T, AGREEMENT BETWEEN THE UNITED KINGDOM GOVERNMENT AND THE SCOTTISH GOVERNMENT ON A REFERENDUM ON INDEPENDENCE FOR SCOTLAND (2012), available at <http://www.scotland.gov.uk/Resource/0040/00404789.pdf>.

110. *Id.* at 2.

111. See HOUSE OF LORDS SELECT COMM. ON THE CONSTITUTION, SCOTTISH INDEPENDENCE: CONSTITUTIONAL IMPLICATIONS OF THE REFERENDUM, 2013–14, H.L. 188, at 11 (Gr. Brit.).

112. See The Scotland Act 1998 (Modification of Schedule 5) Order 2013, 2013 (Gr. Brit.).

early 2013.¹¹³

The Scottish Government introduced the Scottish Referendum Franchise Bill in March 2013, which extended the franchise to 16- and 17-year-olds.¹¹⁴ The Scottish Independence Referendum Bill became law on December 17, 2013.¹¹⁵ The Act provided for the referendum to be held on September 18, 2014 and that the question for voters was, “Should Scotland be an independent country?”¹¹⁶ The Act also provided a lot of detail about the role of the Electoral Commission, funding, voting, and other administrative requirements.¹¹⁷

XII. THE REFERENDUM CAMPAIGN

Two campaign bodies were established: “Yes Scotland,” supporting independence,¹¹⁸ and “Better Together,” later rebranded as “No Thanks,” supporting Scotland’s continued membership of the United Kingdom.¹¹⁹

Many areas of controversy emerged over the year; right up to the referendum, both sides were far apart in their interpretation of what would happen in the event of independence.

The U.K. government published a large number of policy papers under the heading “Scotland Analysis.”¹²⁰ These included papers on the European Union

113. *See id.*

114. Scottish Independence Referendum (Franchise) Act 2013, 2013, (A.S.P. 13), § 2, available at http://www.legislation.gov.uk/asp/2013/13/pdfs/asp_20130013_en.pdf.

115. *See* Scottish Independence Referendum Act 2013, 2013, (A.S.P. 14) available at http://www.legislation.gov.uk/asp/2013/14/pdfs/asp_20130014_en.pdf.

116. *Id.* § 1(2), (4).

117. *Id.* § 12.

118. *Scottish Independence: One Million Scots Urged to Sign ‘Yes’ Declaration*, BBC, <http://www.bbc.com/news/uk-scotland-scotland-politics-18162832> (last updated May 25, 2012).

119. *Scottish Independence: Alistair Darling Warns of ‘No Way Back,’* BBC, <http://www.bbc.com/news/uk-scotland-scotland-politics-18572750> (last updated June 25, 2012); *Scottish Independence: Better Together Campaign Adopts ‘No Thanks’ Slogan*, BBC, <http://www.bbc.com/news/uk-scotland-scotland-politics-27779131> (last updated June 10, 2014).

120. *See generally* Collection: *Scotland Analysis*, GOV.UK, <http://www.gov.uk/government/collections/scotland-analysis> (last updated June 18, 2014).

(EU) and international issues,¹²¹ defense,¹²² currency and financial matters,¹²³ and immigration and citizenship.¹²⁴

The Scottish government also published a number of documents, most notably *Scotland's Future: Your Guide to an Independent Scotland*.¹²⁵ This White Paper set out the Scottish government's plans for policies in an independent Scotland and sought to answer some of the issues that emerged during the last year.¹²⁶

The First Minister, Alex Salmond, identified March 24, 2016, as Independence Day.¹²⁷ Questions remained whether negotiations with the United Kingdom to remove Scotland from the Union and negotiations with the EU to confirm membership would be concluded by that date.

There were still a lot of issues to discuss, including:

- (a) Will Scotland be a member of the EU?
- (b) Will Scotland be able to use the pound sterling?
- (c) What will independence cost?

121. *E.g.*, SEC'Y OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS, SCOTLAND ANALYSIS: EU AND INTERNATIONAL ISSUES (2014), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/271794/2901475_HMG_Scotland_EUandInternational_acc2.pdf.

122. *E.g.*, SEC'Y OF STATE FOR DEFENCE, SCOTLAND ANALYSIS: DEFENCE (2013), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/248654/Scotland_analysis_Defence_paper-FINAL.pdf.

123. *E.g.*, CHIEF SEC'Y TO THE TREASURY, SCOTLAND ANALYSIS: CURRENCY AND MONETARY POLICY (2013), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/191786/ScotlandAnalysis_acc-1.pdf.

124. *E.g.*, SEC'Y OF STATE FOR THE HOME DEP'T, SCOTLAND ANALYSIS: BORDERS AND CITIZENSHIP (2014), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274477/scotland_analysis_borders_citizenship.pdf.

125. APS GRP. SCOTLAND, SCOTLAND'S FUTURE: YOUR GUIDE TO AN INDEPENDENT SCOTLAND (2013), *available at* <http://www.scotland.gov.uk/resource/0043/00439021.pdf>.

126. *See generally id.*

127. Matthew Holehouse, *Scottish Independence: How Will Scotland Separate From Great Britain*, THE TELEGRAPH (Sept. 8, 2014), <http://www.telegraph.co.uk/news/uknews/scottish-independence/11080562/Scottish-independence-how-will-Scotland-separate-from-Great-Britain.html>.

- (d) What sort of constitution will Scotland have?
- (e) How will Scotland be defended?
- (f) What will Scotland's economy be like?
- (g) What will the welfare arrangements be?¹²⁸

XIII. POST-REFERENDUM PROJECTS

Even before the vote, both the Scottish government and the pro-Union political parties were busy on post-Referendum work. In June 2014, the Scottish government published a draft interim Constitution Bill for consultation.¹²⁹ In August and September, the pro-Union parties set out their ideas for increased powers or further devolution for the Scottish Parliament in the event of a “no” vote.¹³⁰

On September 18, 2014, the electorate voted “no” to independence from the United Kingdom.¹³¹ The vote was decisive at 55 percent for “no” and 45 percent for “yes”.¹³² Further, no effective challenge can be made under the Scottish Independence Referendum Act of 2013.¹³³

XIV. ISSUES REGARDING THE FURTHER DEVOLUTION PROPOSALS SINCE THE REFERENDUM

1. Each of the pro-Union party proposals for further devolution deal with additional powers in different ways, particularly in relation to additional tax

128. See generally Ishaan Tharoor & Adam Taylor, *9 Big Questions Before Scotland's Big Vote on Independence*, WASH. POST (Sept. 17, 2014), <http://www.washingtonpost.com/blogs/worldviews/wp/2014/09/17/9-big-questions-before-scotlands-big-vote-on-independence/>.

129. See SCOTTISH GOV'T, *THE SCOTTISH INDEPENDENCE BILL: A CONSULTATION ON THE INTERIM CONSTITUTION FOR SCOTLAND* (2014), available at <http://www.scotland.gov.uk/resource/0045/00452762.pdf>.

130. See Simon Johnson et al., *Alex Salmond: No Campaign is 'Spiraling into Self-Destruction'*, THE TELEGRAPH (Sept. 7, 2014), <http://www.telegraph.co.uk/news/uknews/scottish-independence/11080058/Alex-Salmond-No-campaign-is-spiralling-into-self-destruction.html>.

131. *Scottish Referendum: Scotland Votes 'No' to Independence*, BBC (Sept. 19, 2014), <http://www.bbc.com/news/uk-scotland-29270441>.

132. *Id.*

133. See generally Scottish Independence Referendum Act 2013, 2013, (A.S.P. 14) available at http://www.legislation.gov.uk/asp/2013/14/pdfs/asp_20130014_en.pdf (making no reference to an appeals process in the event of a “no” vote).

powers on bonds, rates, and the types of taxes to be devolved.¹³⁴

2. The pro-Union parties have agreed to the appointment, announced by the Prime Minister on September 19, 2014, of Lord Smith of Kelvin to oversee the process to take forward the devolution commitments, with powers over tax, spending, and welfare; all of which was agreed in a report published in November 2014.¹³⁵

3. The commitment on new powers for the Scottish Parliament arose from a speech by Gordon Brown, the former British Prime Minister and Labour politician, which unveiled a crossparty deal on further powers for the Scottish Parliament.¹³⁶ Mr. Brown outlined a fast-track timetable for further devolution, including a debate that took place in the House of Commons on October 16.¹³⁷ In addition, the Unionist Party leaders issued a statement, known as “the vow,” which set out some plans for further devolution to Scotland.¹³⁸ The Prime Minister and Deputy Prime Minister indicated that draft Scotland Clauses would be published for consultation in January 2015.¹³⁹ Draft clauses were published in the paper entitled *Scotland in the United Kingdom: An enduring settlement*.¹⁴⁰ It is likely that a Scotland Bill, implementing the Smith recommendations will be part of the Queen’s first speech

134. SEC’Y OF STATE FOR SCOTLAND, THE PARTIES’ PUBLISHED PROPOSALS ON FURTHER DEVOLUTION FOR SCOTLAND, 15–26 (2014), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/363236/Command_paper.pdf.

135. *See id.* at 9; Smith Commission (2014) Report of the Smith Commission for further devolution of powers to the Scottish Parliament www.smith-commission.scot

136. *See Gordon Brown Outlines Proposals for a Stronger Scottish Parliament*, LABOUR LIST (Nov. 21, 2014), <http://labourlist.org/2014/11/gordon-brown-outlines-proposals-for-a-stronger-scottish-parliament/>.

137. *See Brown Sets Out Scottish Devolution Timeline*, LABOUR LIST (Sept. 8, 2014), <http://labourlist.org/2014/09/brown-sets-out-scottish-devolution-timeline/>; *Gordon Brown Calls for Devolution ‘Free of New Conditions’*, BBC (Oct. 16, 2014), <http://www.bbc.com/news/uk-scotland-scotland-politics-29635967> (“Mr. Carmichael said a debate on devolution, held in the Commons on Tuesday, [October 16,] showed ‘there was no clear consensus in England’ over how to proceed.”).

138. *See* BBC, *supra* note 137 (“Mr. Brown called on current Prime Minister David Cameron to stick to the ‘vow’ made by pro-UK party leaders to deliver more powers.”); James Cook, *What Now for ‘the Vow’?*, BBC (Oct. 1, 2014), <http://www.bbc.com/news/uk-scotland-29443603>.

139. *See* J.C., *After the No Vote*, *Economist* (Sept. 19, 2014), <http://www.economist.com/blogs/blighty/2014/09/scotlands-referendum-1> (“New powers for Edinburgh would be rushed through Parliament, [Gordon Brown] pledged, adding that a draft bill would be published by Burns Night (January 25th).”).

140. *Scotland in the United Kingdom: An enduring settlement*, 2015, CM, Bill cl. 8990 (U.K.).

to the incoming government after the May 2015 U.K. general election.

4. There have been ongoing discussions among the parties. The fit between proposals providing more powers for the Scottish Parliament, a broader agenda including “English votes on English laws,” and more devolution for Wales, Northern Ireland, and the English regions is still to be clarified.¹⁴¹

XV. CONCLUSION

The Scottish referendum process has been acknowledged across the world as a model for democratic engagement on important constitutional questions. President Obama and Secretaries of State John Kerry and Hillary Clinton have all acknowledged the propriety of the process, even if they have expressed their preference for Scotland to remain in the United Kingdom.¹⁴²

The Referendum issue reached out to and energized many people who had no interest in politics, and it will leave a significant legacy. Because the U.K. politicians have made commitments to change the powers of the Scottish Parliament, this will have an effect on the arrangements in Wales, Northern Ireland, and England. The revision of the U.K. Constitution is on the horizon, change is in the air, and the electorate will need to be satisfied.

141. See Hague and Brown Clash Over ‘English Votes for English Laws,’ BBC (Oct. 14, 2014), <http://www.bbc.com/news/uk-politics-29606220>.

142. Severin Carrell, *Scottish Independence Would Weaken UK’s Global Status, Says Ex-Nato Chief*, THE GUARDIAN (Apr. 8, 2014), <http://www.theguardian.com/politics/2014/apr/08/scottish-independence-lord-robertson-uk-global-status>; *Scottish Independence: Barack Obama Backs ‘Strong and United’ UK*, BBC (June 5, 2014), <http://www.bbc.com/news/uk-scotland-scotland-politics-27713327>; *Scottish Independence: Hillary Clinton Opposes ‘Yes’ Vote*, BBC (June 13, 2014), <http://www.bbc.com/news/uk-scotland-scotland-politics-27828454>.