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 Ireland\(^1\) and introduced elements of Celtic

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1. See Scottish History, SCOTLAND.ORG, http://www.scotland.org/about-
By 850 A.D., “[a] united kingdom of Alba was established . . . and by the eleventh century the boundary between Scotland and England was settled,” stretching from Berwick upon Tweed in the east to Carlisle in the west.  

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. These ideas included a feudal monarchy and system of land tenure, centralized state and justice administration, city organization, and church development. Roman and church law entered Scotland through the influence of the church.

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.

King Edward I of England made repeated attempts to control Scotland. 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. 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. Scotland, however, resisted further

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2. DAVID M. WALKER, THE OXFORD COMPANION TO LAW 1109 (1980).
3. Id.
4. See id.
6. See id.
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.\textsuperscript{12}

The difficult relationship with England led to a Scottish alliance with France.\textsuperscript{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.\textsuperscript{14} Scottish students studied in great numbers in Paris, Orleans, and Cologne.\textsuperscript{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.\textsuperscript{16}

\textbf{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.\textsuperscript{17} It is still in operation today.\textsuperscript{18} The Scottish Parliament got into its stride in lawmaking, and then the Protestant Reformation happened in 1560.\textsuperscript{19} This led to Scotland abolishing papal authority and adopting a Presbyterian form of church governance.\textsuperscript{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.\textsuperscript{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.\textsuperscript{22} James's accession to the throne united England and Scotland under one crown.\textsuperscript{23} This is known as the “Union of the Crowns.”\textsuperscript{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.\textsuperscript{25}

Following James's death in 1625,\textsuperscript{26} the remainder of the seventeenth century

\begin{footnotes}
\item 12. 
\textsc{Magnusson}, \textit{supra} note 10, at 196–200.
\item 13. \textsc{See id.} at 118–19.
\item 14. \textsc{Walker}, \textit{supra} note 2, at 740.
\item 15. \textit{Id.}
\item 16. \textit{Id.} at 1109.
\item 17. \textsc{See id.} at 308.
\item 18. \textit{Id.}
\item 19. \textit{Id.} at 1110.
\item 20. \textit{Id.; see also} Anthony L. Chute, \textit{One Lord, One Faith, but Many Expressions: Denominations and Their Stories} 56, 75–76, in \textsc{Why We Belong: Evangelical Unity and Denominational Diversity} (Anthony L. Chute et al. eds., 2013).
\item 21. \textsc{Magnusson}, \textit{supra} note 10, at 365, 380.
\item 22. \textsc{See id.} at 382–83, 400.
\item 23. \textit{Id.} at 399–401.
\item 24. \textit{Id.} at 399.
\item 25. \textsc{See id.} at 400–03.
\item 26. \textit{Id.} at 414.
\end{footnotes}
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.
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.
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.”).
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. The result was a treaty between Scotland and England, known as the Treaty of Union, which came into effect in May 1707. The Treaty and the relative Acts of the Scottish and English Parliaments established one Parliament for the United Kingdom of Great Britain. 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. The Treaty did not remain inviolate, and many of its terms were changed during the century. In the first half of the century, there were two Jacobite rebellions—one in 1715 and one in 1745. Both failed in their objective to return the throne to the Stuarts. 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. The Scottish Enlightenment was part of a larger European movement that included thinkers such as Voltaire, Rousseau, and Montesquieu. Scottish contributors included Francis Hutcheson, David Hume, and Adam Smith, 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

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).
50. Id. at 263.
Kames, a judge. Franklin proclaimed that he had enjoyed some of the densest happiness when in Edinburgh. 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. 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. The key to his teaching was to focus on reason, not tradition or superstition, as the basis of philosophical thinking.

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

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. In 1881, Prime Minister William Ewart

52. Id. at 202.
55. Id. at 18.
Gladstone made the Earl of Rosebery an undersecretary at the Home Office, but pressure mounted for the appointment of a Secretary for Scotland. The government created this office in 1885 and it was upgraded to Secretary of State for Scotland in 1926. This Minister wielded a significant amount of devolved administrative power. The Home Rule movement was an expression of desire for more local control over government in both Ireland and Scotland. 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.

VIII. RESURGENT NATIONALISM

In the early-twentieth century, Scottish nationalism developed into an organized political movement. 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). The SNP had varying fortunes as a party, including a split in 1942 over its attitude to the Second World War. However, in 1945 the SNP won its first seat in the House of Commons at a by-election. It lost the seat in the general election later that year. During the 1960s and 1970s, varying numbers of SNP members of Parliament were returned to Parliament. 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. The conservative government elected in 1979 was not interested in

60. E.g., Secretary of Scotland Act, 1885, 48 & 49 Vict., c. 61, § 2 (U.K.).
63. See id.
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.
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.
81. Id. § 44.
82. See id. §§ 54-56.
84. Id.
The election system is an additional member system, a form of proportional representation. This allows the voter to have a constituency Member of the Scottish Parliament (MSP) and seven other regional members. 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, a minority SNP Administration in the third session, and a majority SNP Administration in the current session. 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). The legislative output has been significant: 62 Acts in session one, 66 in session two, 53 in session three, and so far, 45

86. Id. § 1(2).
87. Id. at sch. 1, § 2(3).
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

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).
102. See id.
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*. 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. This was followed by a consultation by the Scottish government entitled *Your Scotland, Your Referendum*. 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.

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. 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.”

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. This order needed the approval of both Houses of Parliament and the Scottish Parliament. That process concluded in


106. *See id.* at 7.


108. *Id.* at 4–6.


110. *Id.* at 2.


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

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113. See id.


116. Id. § 1(2), (4).

117. Id. § 12.


(EU) and international issues, defense, currency and financial matters, and immigration and citizenship.

The Scottish government also published a number of documents, most notably Scotland’s Future: Your Guide to an Independent Scotland. 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.

The First Minister, Alex Salmond, identified March 24, 2016, as Independence Day. 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?


126. See generally id.

(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?

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. 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.

On September 18, 2014, the electorate voted “no” to independence from the United Kingdom. The vote was decisive at 55 percent for “no” and 45 percent for “yes”. Further, no effective challenge can be made under the Scottish Independence Referendum Act of 2013.

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


132. Id.

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


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.\footnote{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.\footnote{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.