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For freedom alone: secession after the Scottish referendum

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In September 2014, the people of Scotland voted on whether or not to become an independent state. The consequences of independence would have been complex – decisions about accession to the EU, currency union, defense. Seemingly less dramatic, yet no less important, are the consequences of Scotland not seceding – the effects in global law and politics of the very fact that the referendum happened, and that it failed. Many elements of the Scottish case find close parallels in claims for secession elsewhere in the world. Yet those claims more often meet less welcoming receptions. Indeed, it is not the attempt to secede, but the existing state's acquiescence that marks this case as different: The UK is the rare country that acknowledges the possibility of its own division. Great Britain's acquiescence both made Scottish secession possible and made it an outlier, whose precedential value must be closely interrogated. The key missing element is any evidence that the process was shaped by a sense of international legal obligation – indeed, the pathways of Scottish secession have been an insular affair, a function of particularly British law and politics, in which international law played little role. This article argues that the Scottish referendum provides little precedent for a changing legal norm – yet also offers a compelling model for how such a new norm ought to look. This article is about something that did not happen, and why it does not matter – but also why precisely that is so important.

Keywords: secession; referendum; international law; independence; Scotland

In the climactic scene of "Braveheart," William Wallace, the thirteenth-century Scottish patriot more recognizable as Mel Gibson, cries out "Freedom!" as his body – but by God, nae his spirit! – is broken by the perfidious English.[1] On 18 September 2014, Scots expressed themselves, in more mundane fashion, on an equally momentous question: "Should Scotland be an independent country? Yes/No." That was the tamer wording of the referendum in which the people of Scotland decided whether to break their ancient bond with England, or not.

Today's Scots did not need to go to Wallace's – or at least Gibson's – extremes. Today's Englishmen, in impressively unperfidious fashion, had agreed to the entire exercise. Had Scots voted yes, Her Majesty's government was pledged to initiate negotiations over the details of an orderly transfer of sovereignty to an independent Scottish state. Though in the final weeks the contest appeared close – closer than anyone in British government had imagined when they agreed to the referendum – in the end, by 55% to 45%, Scots chose to stay (The Telegraph 2014).

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Had the vote gone the other way, the consequences would have been bewilderingly complex – decisions about EU membership, currency union, the monarchy, common defense, North Sea oil, none of which were clarified before the referendum. Yet no less important are the consequences of Scotland *not* seceding – the potential effects in global law and politics of the very fact that the referendum happened, and that it failed.

Scotland's brush with secession is hardly an isolated phenomenon, and the Scottish referendum has close parallels in claims for secession elsewhere in the world. Yet these claims generally meet less welcoming receptions than has the Scottish case. Indeed, it is not the attempt to forge a *new* state, but the *existing* state's acquiescence that most marks this case as different: The UK is the rare country that has acknowledged the possibility of its own territorial division – in a way that, say, neither Spain nor Ukraine did in the same year – and that has done so without a preceding period of great violence, such as marked the independence of East Timor, Kosovo, or South Sudan. The more common course is the language of sovereignty, territorial integrity, even treason – in China, advocating separatism is a capital offense (Branigan 2014; Grammaticas 2014)[2] – and resort to state-sanctioned violence, all consistent with the contours of international law.

So Great Britain's acquiescence is what makes the case both a potential precedent – it made Scottish secession possible – and an outlier with limited precedential value. In addition, the referendum played out in a particular, historically and administratively defined space, bounded by the borders of Scotland. This shaped the process in ways which may not be apposite to other contexts in which not only the right to depart but the definition of the unit is contested.

The pathways of Scottish secession have been an insular affair, a function of particularly British law and politics. What then are the lessons it holds for secession and self-determination in the broader world? Does this case change the contours of the laws governing state formation? This essay examines the implications of the Scottish model for broader claims about secession, and the case's fit as a model for international processes of state formation.

This essay proceeds, first and briefly, to locate the recent referendum in its historical context; then to identify the key elements of the referendum process, including the processes by which they were negotiated; finally it considers the referendum's precedential potential and limits – and its role as a model – for governing secession and self-determination. This essay, then, is about something that did not happen, and why it does not matter – but also why that, precisely that, is so important.

The place of departure: the context of the Scottish secessionist referendum

Scottish Independence: Split blamed on Romans. (*headline in The Scotsman*)[3]

Scotland has a long history as a political unit. That history includes periods of independence in the pre-modern era, but also increasing entanglement with and integration into a common state with England (as well as Wales and Ireland), culminating in the Acts of Union of 1706–7 that ended the juridical existence of Scotland as a separate state, while preserving its separate political identity within the UK (Union with Scotland Act 1706; Union with England Act 1707).

Although its sovereignty was merged with England's in the institutions and governance of the UK, Scotland has remained a separate, territorially delineated juridical unit within the UK. The border between the kingdoms of Scotland and England, established by the Treaty of York in 1237 and surviving despite interruptions until the union, was repurposed as a boundary within the UK; north of that line, Scotland has separate legal and educational

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systems, a separate established Church, separately minted (although inter-circulating) currency – features of a substantial autonomy, both symbolizing and sustaining a separate national identity.[4]

That identity has remained separate in many respects, though the potential political consequences of Scottish identity varied considerably: at times manifesting as a strong political force, at other times marginal – though always available.[5] The long period from the late eighteenth to early twentieth centuries in which continental nationalisms were most actively forming found Scots already possessed of a separate identity but also already firmly integrated into the UK and its global empire.

With its developed doctrine of parliamentary sovereignty, the UK was long a unitary state, though with strong regional identities. Historically, the principal challenges to this model arose with the gradual devolution of authority to Britain's imperial dominions[6] and especially in relation to the Irish national question, which implicated the integral territory of the kingdom itself,[7] but it was only in recent decades that the UK embraced broader models of devolution to Northern Ireland, Wales, and Scotland.

In 1999, by an act of the Crown in Parliament, a devolved Scottish Parliament, Holyrood, was established – or reestablished, after a nearly 300-year hiatus – with considerable powers to regulate social and economic matters within Scotland.[8] Extensive authority over finances, defense, and matters pertaining to the whole of the UK were reserved to Westminster, however (Scotland Act 1998, Chap. 46–1988, Art. 2(b) and 29) – including questions dealing with the Union itself.[9] More generally, the Scotland Act clearly acknowledges Parliament's continued power to legislate for Scotland – in theory, even on devolved matters. This is a theoretically necessary feature of a sovereign Parliament, but is practically resolved by the so-called Sewell Convention, under which Parliament undertakes not to exercise its formal authority.

Devolution originally occurred in response to more assertive demands by Scottish autonomists – it followed a 1997 referendum in Scotland calling for a local parliament – and arguably has, in turn, validated and intensified those demands.[10] In 2007, in the third Parliament elected under Scotland's devolved system, the Scottish National Party – which had long been a marginal presence in Scottish and UK politics[11] – became the largest party in Holyrood and, upon forming a minority government, advanced a program for an independence referendum. During this period, the governments of the UK and Scotland agreed to expand Scottish devolution, granting Holyrood expanded power to vary income tax rates in Scotland by up to 10 percent, rather than three (Scotland Act 2012). The proposal for a referendum, which would have offered voters a choice between two levels of devolution (the more extensive termed "devo-max") and independence, failed to gain a majority in Holyrood. However, after new elections in May 2011 for the fourth Parliament, the SNP, now with a governing majority, announced its intention to again ask Holyrood to authorize a referendum.

Insularity: the referendum process – legal frame and political negotiation

> We believe that whether or not Scotland should leave the United Kingdom is a matter for Scotland and I don't think it would be good for relationships within the United Kingdom if they are being prevented from doing so by other parts of the United Kingdom[.]– *Lord Wallace, in the House of Lords*[12]

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Legality and effect of the referendum – the Edinburgh Agreement

In response the SNP's initiative, the UK Conservative government under Prime Minister David Cameron offered to negotiate terms to authorize Holyrood to hold a referendum – in other words, it was unclear if a devolved Scottish Parliament even had this power. The SNP's announcement of its plan to hold a referendum, and the UK government's offer to negotiate terms, represented the opening salvoes in a hard-fought political contest to define the referendum – whether it could even occur and, if so, under what conditions.

Part of the dispute was expressly constitutional, at least in the particular British sense. (The UK does not have a written constitution, but a number of laws and principles are considered foundational, and are commonly referred to as the British constitution.) Referenda are relatively unusual in the UK, but are an available tool of governance.[13] In particular, the principle of a referendum on secession has been expressly established for Northern Ireland (Northern Ireland Act 1988).[14] No such legal authority existed for Scotland, however: Under the Scotland Act's devolution regime, Holyrood clearly has no power to legislate matters affecting the Union.[15] Only the Crown in Parliament can change or dissolve the Union, and therefore a referendum – or any act by Scottish institutions affecting political union with England – would either be an *ultra vires* exercise, or, at most, would be merely advisory.

For example, Lord Wallace, the Advocate General for Scotland, declared in early 2012 that Holyrood had no power to hold an independence referendum (The Courier.Co.UK 2012). Nonetheless, Wallace did not reject the fundamental legitimacy of a claim for independence, and even anticipated the legal solution ultimately adopted:

> The UK Government acknowledges the political mandate achieved by the SNP at the May 2011 election. It is precisely because of this political mandate that the UK Government is offering means to ensure that the Scottish Parliament has the power to deliver a referendum that is fair, legal and decisive (The Courier.Co.UK 2012).

The political and technical compromise which cleared the path was an agreement to expand Holyrood's powers, under a so-called Section 30 order – a provision of the Scotland Act allowing for additional transfers of authority – passed by both Parliaments, confirming that Holyrood could hold an advisory referendum.

The original proposal to use Section 30 came with conditions, which Scotland's government rejected, but in a manner as accommodating as London's earlier objection: a spokesman for First Minister Salmond noted that "we have absolutely no objection to a Section 30 enhancement of Holyrood's powers to hold a legally binding referendum, but what we cannot possibly accept is Westminster dictating the terms of Scotland's referendum" (The Courier.Co.UK 2012). Nonetheless, as we shall see in the next section, the final resolution in fact included a number of clarifications that defined the contours of the referendum and brought them into conformity with British practice in formal and informal ways.

The Edinburgh Agreement was signed in October 2012, confirming the agreement of both governments "to work together to ensure that a referendum on Scottish independence can take place[,]" (Edinburgh Agreement 2012) and providing for a Section 30 order that would "put it beyond doubt that the Scottish Parliament can legislate for that referendum" (Edinburgh Agreement 2012).[16] Parliament approved a modification of the Scotland Act (1998), which indicated certain constraints on that power, such as the timeframe (no later than the end of 2014) and, critically, the number of options the question should include (just two choices).[17] Then, deploying its enhanced (or reconfirmed) powers, Holyrood passed the Scottish Independence Referendum (Franchise) Act in June 2013.

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In the British context – in the context of its unwritten constitution – this was effectively a binding commitment: "Whilst as a matter of law, the United Kingdom Parliament could still refuse to accept the outcome of the 2014 referendum, as a matter of political practice the Edinburgh Agreement is sufficient to render the vote binding" (Barber 2014). Whatever the initial incapacity, a legal authority was created (or confirmed), and the idea was in practice conceded as an operative principle for Scotland. It is clear that in this instance, the UK government committed itself to enter into negotiations for independence if the referendum is approved, not merely as a hortatory view but in an explicit agreement with the Scottish government. This represents, or rather, is part of, a significant secular shift of British practice away from the unilateral sovereignty principle that remains predominant in the international state system.

There is a certain ambiguity in the debates of 2011 and 2012 – reticence on the part of the Scottish government to concede that it needed authorization for a referendum, and, equally, reluctance on the part of Westminster to admit Scotland's power to do it as of right. Whether the agreement "clarif[ied] the Scottish Parliament's powers to hold the referendum" (Scottish Government 2013a, 3) as the Scottish government claimed, or "grant[ed] Holyrood the power to hold a historic referendum on independence" (Prime Minister's Office 2012) as the UK government claimed, is a fine question, but the main lines of agreement were premised on a broader political consensus: that although Parliament is sovereign, the nations of the UK indeed have the right, by some means, to withdraw from the Union if that is their will.[18] Despite the high stakes it was, by international standards, a remarkably civil and restrained debate, an entirely internal, insular discussion shaped by a particular culture of political discourse and, critically, by an existing consensus on the governing principle.

The referendum process

That agreement left considerable detail to be determined – but here too existing consensus shaped much of the outcome. Under the Edinburgh Agreement, the Scottish Parliament was empowered to set most of the terms for the referendum, with the proviso that the "principles underpinning the existing framework for referendums held under Acts of the UK Parliament – which aim to guarantee fairness – should apply to the Scottish independence referendum" (Edinburgh Agreement 2012, Memorandum of Agreement ¶ 2). In addition, the "referendum rules should be based on the PPERA [Political Parties, Elections and Referendum Act], with particular Scottish circumstances" (¶ 3).

Following the PPERA formula, an Electoral Commission was given responsibility for many aspects of the referendum, including a role in the phrasing of the question, registration of campaigners, regulation of spending, publishing guidance, and reporting on the process (Edinburgh Agreement 2012, ¶¶ 12, 14). The Commission was not given certain powers it normally has: to give grants to campaign organizations (because the Scottish government had proposed public monies not be used in the campaign), to actually conduct the referendum, and to announce the result (Edinburgh Agreement 2012, ¶ 14).

The Memorandum of Agreement attached to the Edinburgh Agreement extensively outlined commitments regarding process and fairness, including broadcasting and finance regulations, and a campaign quiet period – commitments that mostly related to how Scottish institutions should exercise their authority to order the referendum, though they also committed the UK government to follow some of the same regulations. Thus while the Edinburgh Agreement and Section 30 order confirmed the authority of Holyrood and the Scottish government to carry out the referendum, they did so in ways that constrained

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Scottish institutions' scope of action and kept it closely in conformity to established UK electoral practice.

After the referendum was confirmed and procedures established, hard contestation of the substantive question continued. The Yes Scotland campaign sought in equal measures to entice voters with the attractions of independence and reassure them that very little would actually change; the no campaign, branded Better Together, reminded voters of the advantages of union and – as a leaked internal memo from the pro-UK side reportedly using the term "Project Fear" suggested (Carrell 2014) – tried to promote fear of the risks independence carried. But this heated contest focused entirely on the decision voters would make, rather than the referendum itself, whose legitimacy was never contested.

The referendum question

The referendum question was impressively straightforward: "Should Scotland be an independent country? Yes/No." One might compare the clarity of the choice to the defective question in the Crimean referendum held earlier the same year. That ballot offered two choices – restoration of far-reaching autonomy under the 1992 constitution or union with Russia – but no option for the status quo, making it impossible to know if voters' apparent preference for change was meaningful (BBC News Europe 2014).

Yet this simplicity was itself the result of hard negotiation. The SNP originally favored including an option for increased devolution – commonly referred to as "devo-max" – consistent with their earlier effort in the third Parliament, and recognizing the weakness of popular support for full independence. But the UK government insisted on an in-or-out question – a calculation that a stark choice would favor a unionist rejection of independence – and this preference won out, appearing in the modifications of the Section 30 order. The two governments had agreed that the "question must be fair, easy to understand and capable of producing a result that is accepted and commands confidence" (Edinburgh Agreement, Memorandum of Agreement, ¶ 5).

Holyrood determined the precise wording, but subject to the Electoral Commission's review process, which included a period of comment. The SNP had wanted the question to read "Do you agree that Scotland should be an independent country?," but the arbitral Electoral Commission determined that the introductory phrasing implicitly solicited a positive response, and the SNP accepted this proposal (Black 2013). Thus, although the final phrasing rested with Holyrood, in practice even this decision was embedded in a layered administrative and political process. The result was a clear, binary question that – given the UK's political commitment – could produce a consequential decision.

The referendum's boundary – reliance on the existing Scottish administrative unit

The issue in the referendum is the independence of Scotland – a question affecting not only people, but also territory. Many of the features of the referendum, and of the pathways leading from it, were determined by the choice of the recognized administrative territory of Scotland as the plebiscitary unit.

Firstly, the territorial border defined the referendum's franchise. The vote was extended to a defined set of individuals resident in Scotland. This was not a necessary, but a contingent and negotiated limit, and indeed during negotiations the case was made that other populations ought to be enfranchised. But the conceptual frame of Scotland – rather than, say, "Scots" or "all British citizens" or "people affected by this question" – proved determinative.

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In the Memorandum of Agreement, "[b]oth governments agree[d] that all those entitled to vote in Scottish Parliamentary and local government elections should be able to vote in the referendum" (Edinburgh Agreement, Memorandum of Agreement, ¶ 9). This left the precise contours to Holyrood, but within the general frame of devolution, meaning that both the franchise and the area of potential effect were defined by an existing political framework: Scotland.

This might seem obvious, but in fact one could imagine alternative frameworks. The referendum affected not only Scotland, but the entire country. Nonetheless, proposals for the entire population of the UK to vote were rejected.[19] The SNP also rejected extending the franchise to Scots resident outside Scotland (with very limited exceptions), including the roughly 800,000 Scots living elsewhere in the UK – a decision based either on a principled position about participation, the complexity of extending the franchise, or a calculation that it would harm the chances for a yes vote. In any case, it is not clear that Holyrood would have had the authority to enfranchise extra-territorial Scots – at least, this authority would have had to have been grounded on a claim of existing, devolved authority, a claim which the UK's institutions would have had to acknowledge.

Although ultimately defined by residence on Scotland's territory, the scope of the franchise was clearly a contested question. By contrast, there does not seem to have been almost any serious consideration – with one exception – given to modifying the *territorial* reach of the referendum. Scotland as an existing unit was the object, and there were no public plans to disaggregate the results – allowing, for example, districts that vote solidly to remain in union to do so (a model analogous to the division of Ireland). This general assumption of Scotland as a unitary decisional territory was confirmed by the one exception: the Orkney, Shetland, and Western Islands, whose relationship to the referendum was contested, but which already have forms of autonomy and had been given an express opt-out in an early autonomy referendum in 1979.[20]

The very framing of the process – a negotiation between the UK and Scottish governments – effectively ensured the territorial frame of the referendum would be Scotland as a whole. Both in general political decisions and in working out procedural details, the UK and Scottish authorities relied on the existing, devolved frame, which in turn relied on the existing territorial units and their established decisional mechanisms. The fact of the pre-existing Scottish autonomy – and behind it the pre-existing principle – that the UK had nations, and that each of these nations had a defined territorial address – shaped and governed the process from beginning to end.

The post-referendum process

The result of the referendum was to be determined by a simple majority of the vote, no minimum turnout required. The Electoral Commission had recommended that the two governments agree in advance on a process for negotiations following the referendum. In the event, no precise framework was agreed – and certainly no agreement on a range of substantive matters – although the Edinburgh Agreement's cooperation clause implied some further negotiations, committing the two governments to "continue to work together constructively in the light of the outcome, whatever it is, in the best interests of the people of Scotland and of the rest of the United Kingdom" (Edinburgh Agreement 2012, Memorandum of Agreement, ¶ 30).

A yes vote

If there had been a majority yes vote, the Scottish government contemplated independence only in March 2016, just prior to scheduled elections that May, which would therefore have

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been the first election for an independent Scottish Parliament. Along with being a pragmatic and political calculation, this was an assertion of legal continuity, and an implicit assertion of sovereignty. It was not, however, an undiluted assertion; in fact, the Scottish government's strategy and timing suggested it knew the opposite was rather more true.

The Scottish government indicated its strong preferences regarding the future state's constitutional order, including a written constitution, but deferred the drafting until after independence; in the meantime there was to be a period of negotiations with the UK. Thus the Scottish government contemplated a transitional constitutional platform, whose purpose would have been to transfer to Holyrood powers currently vested in Westminster, which it would have needed to effect final independence: power to alter or void the Acts of Union; an independent Scottish Treasury and Scottish Supreme Court; definition of Scottish citizenship; amendments to the Scotland Act (1998); the power to declare independence; and Westminster's acknowledgement that it no longer had power to legislate for Scotland (Scottish Government 2013a, 15–16).

On the Scottish government's rather optimistic interpretation, the two governments had committed to negotiate additional agreements establishing a timetable for independence and transitional provisions, and determining the contours of the divorce on such matters as the currency union, North Sea oil revenues, and military bases and overseas sovereign assets.

Some of these issues would, almost of necessity, have had to be decided prior to formal independence, but others could have been deferred. Some provisions would, in turn, have influenced the final constitutional arrangements of an independent Scotland; some were clearly the subject of highly contentious debates, whose outcome were not at all clear – EU membership and currency union most prominently. All of these were acts that would have had to be undertaken by Westminster, not Holyrood – at least, within the cooperative framework assumed by all parties.

The Scottish government's public reasons included the need for unity in the drafting process, which would be hard to achieve in the contested context of the referendum (Scottish Government 2013a, 5). Other reasons reflected strategic ambiguity: the need to avoid divisive positions that would limit support for the independence vote, and recognition that certain issues require London's cooperation, even after independence.

By contrast, the UK's consistent position was not to pre-negotiate the terms of divorce.[21] It accepted the authority of the referendum, and the principle of negotiation, but left the terms open. Which is to say, many parts of the independence project were entirely uncertain and very much subject to contingent negotiations in which a still-sovereign UK would have had an active role. Indeed, the Scottish government sought to make a virtue of this transitional political relationship to reassure Scots on a contentious issue – membership in the EU – noting that a post-referendum Scotland would need to negotiate with the EU, but "as a part of the UK – and, therefore, an integral part of the EU – during these negotiations" (Scottish Government 2013a, 15).

While the Scottish government had its own reasons for preferring the constitutional process to begin after independence, its decision to defer indicated both a sequence and an expectation that the process would be cooperative. The Scottish government's own documents speak of its "intention"[22] to complete the transfer of sovereignty by 2016 – recognition not only of the practical difficulties, but also the role the UK played, and would have played, in the process.

The language of the Scottish government's position papers on the transition is carefully calibrated: assertions of sovereignty, but also a qualified, moral, non-legal language: not the language of legal right, but of rightness – what "should" happen, rather than what "shall." An acknowledgement, in other words, that the entire enterprise rested upon the

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acquiescence and authority of the sovereign in Westminster, who, if it was bound, was so by its own will.

A no vote

Throughout the campaign, it was clear that the government and opposition parties in London (generally united in favoring a no vote) would initiate negotiations for increased autonomy for Scotland even if the voters rejected independence. Even though almost all polls showed – accurately as it turned out – that unionism was the majority view, clearly a sizable percentage of voting Scots preferred independence, and this was generally seen as compelling the government to expand Scotland's devolved powers. In the last weeks of the campaign, this general promise became more urgent and more specific, clearly in response to heightened concern that a yes vote was becoming more likely.

However, although after the referendum's defeat the government promptly appointed a commission to consider the question of further devolution,[23] there was no predetermined political pathway, and no absolute obligation on Westminster in this regard, and the contours of devolution remained a contested political question; it is possible that real devolution will occur, or only minor and cosmetic reforms. It appears clear that the debate will not involve Scotland alone, but will involve the powers of other parts of the UK and their interrelationship. This includes discussions of the so-called West Lothian question, the asymmetrical relationship in which much policy affecting Scotland is voted on solely by MSPs in Holyrood, while Scotland continues to send MPs to London – including the eponymous representative of West Lothian – who vote on matters affecting England and Wales.

Finally, whether Holyrood could call additional independence referenda – not "once in a generation" as was suggested during the referendum campaign, but quite soon, as some of the SNP's enlarged and energized base would like – is a different question. The Scottish National Party experienced an enormous surge in membership in the months following the referendum, leading to varying claims by SNP or Labour figures about whether a second referendum might be called (BBC News 2015; Green 2015).

The Scottish Parliament can certainly legislate referenda on *devolved* issues – the Edinburgh Agreement notes explicitly that the Scottish Parliament has this power (Edinburgh Agreement, Memorandum of Agreement, ¶ 10) – but the particular political process leading to the 2014 referendum clearly involved a closely negotiated confirmation-*cum*-transfer of authority, approved expressly by Westminster; the Section 30 order speaks only about a referendum to be held before the end of 2014, not a general grant.[24] In any event, in any future referendum, as in this one, the final, necessary stage would be enactment of the referendum's outcome in legislation by the Crown in Parliament, and that implies, necessarily, the political will to do that – British political will to acquiesce in a Scottish determination for independence.

The success of failure: precedential limits and models of emulation

> … as long as a hundred of us remain alive, never will we on any conditions be subjected to the lordship of the English. It is in truth not for glory, nor riches, nor honours that we are fighting, but for freedom alone, which no honest man gives up but with life itself. (Declaration of Arbroath, 1320)
>
> "… the people of Scotland will still have access to all current programming, including *EastEnders*, *Dr Who*, and *Strictly Come Dancing* … " – Scotland's Future, 2013. (Scottish Government 2013b)

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The thin relationship of the Scottish case to the international legal order

The referendum failed. But viewed from a different perspective, it actually succeeded, if we say the real measure of success is devising a process for part of a state's population to make a peaceful determination about its political future, a determination that the other, affected part of the population is prepared to allow and enable.

This is a formula that has largely escaped the political imagination of most countries, which do not deal with separatism this way. How then should we understand the Scottish referendum in relationship to the broader legal and political universe of claims about secession? Classically – since the Second World War and the UN Charter – the doctrine of external self-determination has been addressed only to non-self-governing territories – in effect, colonies.[25] It has not been considered applicable to the territory of existing states save perhaps under very exceptional conditions, as a form of remedial secession (Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo 2010, 82) to protect some sub-group of the population from grave persecution or a systematic denial of its right to participate in governance of the common state (*Reference re Secession of Quebec* [1998] 2 S.C.R. 217; del Mar 2013, 79). Yet Scotland came within a few percentage points of claiming independence despite being fully, peacefully, and prosperously integrated into the governance of the UK.

A vote favoring independence would surely have been interpreted as a fillip for an expanded right to external self-determination: most immediately, an encouraging contagion for secessionists in Catalonia, who had scheduled their own (unapproved and unconstitutional) referendum for just two months later, in November 2014; but it would surely also have been cited in an endless stream of scholarship as evidence for an emerging norm of customary international law that extended the right to form new states beyond the colonial and remedial contexts. And even the negative vote might be seen as establishing the precedent of a secessionist referendum, much in the way that, say, the indictment of Augusto Pinochet served as a precedent and proof of the principle that former heads of state can stand trial even though he himself was never actually extradited for trial. So either way, it might be supposed that the Scottish referendum process expands the right of secession.

This view is unduly optimistic. It is not at all clear that the actual outcome – or indeed the alternative – should be seen as doing that kind of precedential work in expanding legal doctrine, because the most problematic cases of secession today demonstrate two key elements not present in the Scottish case: a compliant sovereign and a predetermined frontier. The absence of these two elements – especially the attitude of the sovereign – vitiates the value of the Scottish case for the construction or discovery of a generalizable legal norm.

Metropolitan acquiescence, international silence

The defining element of the referendum that limits its precedential reach was the UK's acquiescence in the referendum process – in particular its acquiescence *as an artifact of the UK's legislative will*.

The British governing elite strongly opposed independence, but conceded and cooperated in the referendum. Critically, the compliant attitude of the British state, which made the referendum possible, arose out of domestic imperatives, not any sense of international legal obligation. This actually makes the Scottish case of little use in making a claim in customary international law about self-determination.

Customary international law requires, as its critical doctrinal ingredient, the element of *opinio juris* – a sense of legal obligation compelling the state to act in a particular way.[26]

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For the Scottish referendum to constitute evidence of an emerging customary right to secession, the UK would have had to acquiesce in the referendum process because it believed itself under an international legal obligation to do so. But it is clear the UK acted out of domestic political considerations and domestic constitutional imperatives.

The UK government published an extensive report on the international legal implications of Scottish independence (Crawford and Boyle 2013). But at its outset, the report notes the context for the whole discussion: "If Scotland were to become independent after the referendum ... , it would be with the UK's agreement rather than by unilateral secession" (Crawford and Boyle 2013). The report is therefore not concerned with the international legitimacy of a unilateral secession opposed by the sovereign – a matter not at issue in this case.[27]

For its part, the Scottish government based its arguments almost entirely on British law, rather than on international frameworks. The draft Scottish Independence Bill specified that "[i]n accordance with international law, the territory of Scotland [will] continue[ ] to consist of all the land, islands, internal waters and territorial sea that formed the territory of Scotland immediately before Independence Day" (Scottish Government 2013a, Chap. 1, p. 12, Art. 6) – a decidedly ambiguous formula that gestures toward the law of state succession, but also implicitly acknowledges that the territory of Scotland might be changed before independence. Within Scotland, there was some reliance on the claim that Scottish sovereignty traditionally vests in the people, which could theoretically legitimate a demand for independence in the absence of UK acquiescence. But this was a minor note in the rhetorical basis for the Scottish government's actions, not clearly linked to any international legal claim. Moreover, it does not seem that this claim was accepted in the UK more broadly. The main lines of the project were thoroughly legalistic, and thoroughly British.

Indeed, in the deluge of negotiations, position papers, journalism, blogging, and scholarly analysis preceding the referendum, there was very little reference to international law as justification for the referendum as such. There was considerable discussion of international and European law as it might affect the status, rights, and liabilities of Scotland after independence;[28] there was also some discussion of how international law might interpret the outcome – whether, for example, Scotland would be considered to have seceded, or the UK to have dissolved (Crawford and Boyle 2013; Tierney 2013, 11). But there was almost no reference to international law affirming or prohibiting the referendum process itself, or independence.[29]

And, most critically, missing is any indication that the UK acted as it did out of a sense of legal obligation. In short, there is almost no suggestion that international legal norms even informed, let alone compelled, this particular, very British, outcome; the entire process was what in international law one would call an act of comity or grace.

And even if one optimistically thought the Scottish referendum *did* contribute to a new international customary norm, or if one adopted a more flexible, advocacy-based model of how customary law is constructed, the referendum is still only one piece of evidence. There are precious few such cases, even of states conceding the right in principle. Many states explicitly prohibit secession or other threats to the state's territorial integrity. (A number of socialist states acknowledged a constitutional right of self-determination including secession, but the effectiveness of those rights was often questionable.) By contrast, plenty of states adamantly oppose the very idea of secession; thus Madrid's rejection of a referendum in Catalonia surely is evidence of Spain's belief that it is not under a legal obligation to recognize secession referenda (AP 2014). Any rigorous analysis of state practice would have to conclude, even had there been a successful yes campaign in Scotland, that there is no international customary right to secede.

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The limited value of the territorial precedent

In addition, reliance on Scotland's administrative border to define the referendum limits the value of this case for any broader claims about an international norm, because it is not clear that the case is generalizable to the much harder cases of communities lacking a pre-existing historical or administrative unit.

As we have seen, the territorial demarcation of Scotland determined many aspects of the referendum; most critically, it provided an identifiable, pre-existing unit to which the very right to hold a referendum attached. But many ethno-national groupings – Turkish Kurds, say – are not blessed with a pre-existing federal state or autonomous district; it is not clear how they could negotiate an analogous claim, since they would first have to negotiate the relevant unit itself. Indeed, the sticking point for broader applications of external self-determination has been the need for a pre-existing territory in and to which a people could make a claim. Scotland, because it is an existing territory, does not provide guidance for how that requirement might be overcome.

A model nonetheless – (limited, non-doctrinal) opportunities

Although doctrinally the precedential value of the Scottish secession is very limited, as a social and political fact, it surely matters. The bare fact of its having happened is significant for those who wish to argue for the possibility and rightness of such things – if nothing else, the Scottish referendum shows that at least one important state does not think secession is *contrary* to international law. But that is a small and unsatisfying meal – international law and politics are quite hostile to secession, but it is already clear there is no prohibition – and there is more of substance here. The process of negotiating the referendum, and the procedures developed for it, are in a real sense a model for how these things can and indeed should be done.

Many particular elements of the Scottish referendum – its reliance on existing electoral rules and procedures; the negotiations that left ultimate claims about the principled or historical basis for a right to secede ambiguous but confirmed that the domestic legal framework both allows and governs the process; the negotiated agreement for a precise, limited, and clear question; a commitment not to use the state's recognized right to suppress treason – which in the British case is one of the reserved Union powers – are aspects that might be profitably copied.

But most generally, the very concept of negotiating the terms of a secession referendum with a metropolitan sovereign who does not like the possibility but concedes the principle, and of treating the entire exercise as a sequence, rather than a moment of decision – the Scottish government describes independence, "Scotland's journey," as "not an event, but a process" (Scottish Government 2013a, 16) – is a model that can be emulated.

That key element – the UK's acquiescence – vitiates the precedential role of the referendum, but also points to its real value. The hard cases are unilateral secessions, but the reality – as the Scottish case suggests – is that even the most permissive approach necessarily involves close, hard negotiation, both of the process leading to decision and of the pathways beyond. Indeed, it is precisely the cooperative cases – which is to say, the very rarest ones – in which those negotiations will be most prominent; in cases of divisive, even violent secession, negotiations may be minimized, but at great cost; even then, as Kosovo shows, there is no escaping the necessity of dealing with the new neighbors.

The Scottish referendum suggests an evolutionary process, political in nature but guided and framed by existing institutional structures. The alternative is a revolutionary process, in

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which new institutions – or existing institutions radically repurposed – make decisions about the organization of society, under enormous, often violent pressure and in conditions of considerable uncertainty about legality and legitimacy. Although the UK and Scottish governments disagreed strongly about what would follow a yes vote, that is in a sense the point: Both accepted that the post-referendum, pre-independence period would be one of negotiation to determine the contours of the new state's authority; by contrast, in a contested, unilateral secession, many of these are things the new state would simply do under its own authority, in the teeth of resistance from the parent state.

To be sure, the features of the referendum process were specific to the context of the UK – as this essay has argued, that is precisely why they do not contribute, doctrinally, to a new global legal norm – but as models, their particular Britishness does not bar them from export. It is the Scots who asked for independence, but it is the English who agreed – who chose to agree. They therefore are the model: We might all do better to be a bit more English.

Hearts not here – the value of not being something

Finally, although it is very clear that the referendum says very little about international law, in a curious way, it is what the Scottish referendum is *not* that will prove more substantial; and its defeat may actually do more for the cause of secession than its success ever could have. The most important and educative value of Scotland's process arises from the claims *not* being made: The desire for independence was not framed as a remedy for great and pressing harms – it therefore was nothing like remedial secession models, which treat secession as a remedy of last resort for great suffering.

The independence movement certainly had and has grievances; many are deeply felt and touch questions of core identity – even when, on the surface, they concern mundane things.[30] But considered objectively, the grievances are mostly administrative, technical, economic[31] – not, by any stretch of the imagination, the kind of violent repressions that might meet the standards of remedial secession doctrines. Indeed, the most consistent theme in the yes campaign, apart from the promise of economic and social improvement – and the reassurance that as little as possible will change – was the possibility for Scots to rule themselves.[32] That is to say, the underlying grievances, and the underlying desires, were not urgently humanitarian, but simultaneously pragmatic and grounded in identity.

That they are pragmatic is self-evident – so much of the discussion was about the likely costs and benefits of independence, oil revenues, and £500 a year more or less; yet it is equally clear that the desire for independence is also grounded in identity, because a belief that Scots are losing out economically implies someone else to whom they are losing out; and a belief that Scots are not ruling themselves is only possible to the degree they affirm an identity other than British.[33] The pragmatic calculations of the referendum campaign, in other words, were calculated as they were in relation to some felt identity.

Consider this argument, advanced by the Scottish government, which begins like some invocation of primordial nationalism, but quickly resolves into the aspirations of the social democratic state: Independence will

> allow our ancient nation to fulfil its potential. In the autumn of 2014 the people of Scotland will have the opportunity to gain the powers that independent nations throughout the world take for granted: powers to create jobs, encourage sustainable economic growth, secure social justice, tackle inequality and promote fairness. (Scottish Government 2013a, 2)

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Here, the arguments for independence are about the power to determine everyday policy – the unit determining, however, is a function of identity.

This matters, because the pragmatic underpinnings of secessionist claims are often invoked as reasons to distrust or dismiss them: A group which seeks to secede for economic reasons is simply seeking advantage; certainly it is not responding to the kinds of urgent, existential threats that motivate remedial theories. Yet in Scotland's case we have witnessed a legal, legitimate secession referendum in which questions of identity and money predominated: The fact that such considerations are the principal motivations in an approved referendum process suggests that they are valid grounds on which to consider such grave questions, not disqualifying, self-dealing marginalia.

We can expect that future independence movements – as past ones – will be governed in significant part by calculations of economic and social self-interest. The Scottish referendum failed precisely because such interests led a majority of Scots to favor the status quo of union over an uncertain future alone. Those calculations of self-interest may have been right or wrong, but the referendum validated the idea that we may, and must, take such calculations seriously.

So these two bases – identity and interest – suggest a model for legitimating secessionist claims. Rather than relying on the static classical definition – in which, after decolonization, external self-determination as right became a dead doctrine – or the harm-threshold logic of remedial secession, the Scottish referendum affirmed the more radical possibilities adumbrated in the *Quebec Reference*,[34] and indeed in a line of thinking on self-determination dating back to Wilson and the Fourteen Points: that the right to form a state is based, not on some quantum of suffering, but on a self-defined nation's identity and desire to rule itself.

And this logic is available even though the referendum failed. Indeed, its failure actually refutes a common misapprehension about the risks incumbent in allowing secession. It is often suggested, against a right of secession, that any relaxation of territorial integrity norms would lead to an atavistic flight for the exits. But the case of Scotland stands for the fairly obvious proposition (as did Quebec before it) that, in fact, populations can and do deliberate on their interests, values, and identities. They will not necessarily go, even if they can.

And their decision to go or stay can be made peaceably, free of violence and coercion. The arguments favoring Scottish secession were economic, particular, bourgeois – not infused with atavism or primal hatred of some English Other. It does not automatically follow, in other words, that opening the Pandora's box of secession leads to blood and primitivism. Certainly, asking foundational questions raises the political temperature – I might have chosen my pub carefully in Glasgow or London on referendum day – and the extraordinary rise of the SNP in the aftermath of the referendum, with its crushing electoral success in the 2015 UK parliamentary elections (BBC 2015), suggests that independence is hardly off the agenda. But if our standard and goal is, as it should be, to forge pathways for political change without violence, there is every reason to believe that the Scottish referendum was a success.

At first blush, the Scottish referendum seems attractive as a source for new global norms of self-determination. Doctrinally, however, it lacks the elements to do that work: The hard cases of self-determination are precisely those in which the existing state is resistant to secession. A robust, globalized right of self-determination would require the acquiescence of those states – either through change in their internal, constitutional attitudes or out of deference to some external norm; otherwise, only in those rare, enlightened states that are prepared to accept division would the right be available, and that, in international legal terms, is not a right at all.

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Yet that first, failed blush may, on further reflection, be worth something after all. Despite the referendum's lack of formal, doctrinal value, it is nonetheless a predictable, socio-legal fact that observers can and will treat the Scottish referendum as a kind of precedent, an inspiration and source for possible practice. One might simply ignore the doctrinal awkwardness and make use of that fact: The UK's acquiescence is not, in itself, evidence of *opinio juris*, but it is a model for how states can and even ought to behave, regardless of the precise basis – domestic or international – for their decision. If even a few significant powers like Britain adopted this as their own domestic practice, we might well find them beginning to advocate for it in their diplomacy, or conditioning their development aid on more openness to similar processes: Britain's own practice is an insular one, but history is full of examples of sovereigns offering their own norms as generalized, universal patterns.

The Scottish case – more precisely, the British case – is instructive of the kind of attitude states would need to have in order to foster a higher, internationalized norm that is absent – because it is unnecessary – in the British logic. The Scottish referendum offers no evidence that the world has yet embraced its model, but a model is nonetheless what it may be.

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Notes

1. Mel Gibson as William Wallace, in *Braveheart* (Gibson 1995) (uttered during the character's torture and execution by his English captors). The historical William Wallace, knight son of a minor landowner, began an initially successful revolt against the English in 1297, but was defeated, captured in 1305, tortured, and executed; his final words are not recorded. See BBC (2015) and connecting page.
2. China convicted seven of Tohti's students on separatism charges for contributing to a website run by Tohti (BBC News China 2014).
3. Quoting MP Rory Stewart regarding Hadrian's Wall (*The Scotsman* 2014).
4. It is beyond the scope of this paper to consider the historical, even causal, relationship between Scotland's political status within the United Kingdom and Scots' cultural and political identity. Nor, for that matter, do I take a view on the nature of Scottish identity today: clearly it is different from British or English identities in certain respects, but equally clearly it is not monolithic. I am concerned simply with the political and legal expression of Scottish separatism, whatever its origins, and its interaction with British law and politics, as well as with the broader international legal space.
5. Cf. Scott [1818] 2004 ("'I dinna ken muckle about the law,''answered Mrs Howden; "but I ken, when we had a king, and a chancellor, and parliament-men o' our ain, we could aye peeble them wi' stanes when they werena gude bairns - Bit naebody's nails can reach the length o' Lunnon."').
6. Britain's imperial structures were highly heterogeneous and decentralized, a reality given express form in the Statute of Westminster (1931). In addition, several feudal holdings of the Crown – the Channel Islands and the Isle of Man – have long had complex juridical and political relationships to the Crown, to England, and to the UK.
7. After protracted political debates in the nineteenth century on Irish home rule, and several years of armed conflict, in 1922 an Irish Free State was established in the southern parts of Ireland, which had been an integral part of the United Kingdom, as a dominion of the British Commonwealth of Nations; under a provision of the same treaty, Northern Ireland elected to remain part of the United Kingdom. In 1949, Ireland declared itself a republic, terminating its final ties with the Crown. *See* Articles of Agreement (1921) and Republic of Ireland Act (1948).

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8. Scottish devolved powers include regulation of the "National Health Service, education, justice, social services, housing, the environment, farming, fisheries and aspects of transport" (Scotland Act 1998, Chap. 46-1988). Holyrood also has the power to vary the income tax rate set by Westminster. See Scottish Government (2013a).
9. *See* Scotland Act (1998), Chapter. 46-1988, Sched. 5 ('Reserve Matters'), Art. 1(b), and Sched. 4, Art. 2(a)('Enactments, etc. Protected from Modification').
10. One of the factors commonly noted as having alienated Scots from Westminster has been the near-extinction of the Tories in Scotland since the Thatcher era: In periods of Tory rule at Westminster, Scots – among whom SNP and Labour dominate – are not represented in the UK government.
11. The party, founded in 1934, first won a seat for a full term in the House of Commons in 1967. The party also won a by-election in 1945 but only held that seat for three months.
12. Advocate General for Scotland Lord Wallace of Tankerness, QC, rejecting a call in the House of Lords for the entire population of the UK to vote in the referendum (BBC 2012).
13. *See* House of Lords Select Committee on the Constitution (2009, 9–10) ¶¶ 1-6 and Box 1 discussing referenda in the UK since 1973, including a single UK-wide referendum, though there has since been one more.
14. Chap. 47-1988, Part 1, 1(1-2): "Status of Northern Ireland. (1) It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll … (2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland."

    Two points: This creates a power in the people of Northern Ireland to initiate a parliamentary process, not to effect their independence (or rather union with Ireland) outright; and this is an Act of Parliament, revocable at Parliament's pleasure. The principle of a referendum on these terms long predates the Northern Ireland Act, and figures in the original decision to create an Irish Free State while giving the north the option to remain within British sovereignty. Anglo-Irish Treaty (1921), Art. 12.
15. Scotland Act (1998), Chap. 46-1988, Sched. 5 ('Reserve Matters'), Art. 1(b).
16. *Cf.* press release from the Prime Minister's office, "Today's landmark event is facilitated by a technical measure known as a Section 30, which passes power from Westminster to Holyrood to legislate on the referendum" (Prime Minister's Office 2012).
17. The Scotland Act 1998 (Modification of Schedule 5) Order 2013, Art. 3, making the following relevant modifications:
    "5A. (1) Paragraph 1 does not reserve a referendum on the independence of Scotland from the rest of the United Kingdom if the following requirements are met.
    (2) The date of the poll at the referendum must not be the date of the poll at any other referendum held under provision made by the Parliament.
    (3) The date of the poll at the referendum must be no later than 31st December 2014.
    (4) There must be only one ballot paper at the referendum, and the ballot paper must give the voter a choice between only two responses."
18. A typical statement: "The UK government believes Scotland is stronger in the UK, and the UK is stronger with Scotland in it. However, we recognise that the Scottish government was elected with a mandate to hold a referendum on Scottish independence." "Facilitating a legal, fair and decisive referendum in Scotland" (Scotland Office 2013).
19. *Cf.* BBC (2012), discussing one such failed proposal in the House of Lords.
20. The SNP issued contradictory positions on the right of the islanders to determine their own political future. See, for example, Johnson (2013) noting that "the SNP has previously recognised the islands' right to decide their own future but has since changed its mind amid concerns over the impact on a separate Scotland's finances." Activists on the islands themselves proposed referenda to be held a week after the Scottish referendum. See Riley-Smith (2014).
21. This did not prevent various ministers from asserting that the UK would not support a currency union. See, for example, Bell (2014), noting Chancellor George Osborne's comments to this effect, and the Scottish government's retort that it might refuse to accept a share of the UK's debt.
22. 'Under the Edinburgh Agreement the referendum *will be* made in Scotland. That principle *should* apply equally to Scotland's constitutional platform.')(emphasis added) (Scottish Government 2013a, 10).

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23. The Smith Commission was appointed on 19 September 2014 to consider further devolution. The Smith Report, issued in November 2014, recommended a number of expanded powers in taxation and regulations (The Smith Commission 2014). Following the release of the Smith Report, the UK government drafted a Command Paper, outlining its plan to put forward a new Scotland Bill defining devolution (UK Secretary of State 2015).
24. The Scotland Act 1998 (Modification of Schedule 5) Order 2013, Art. 3.
25. U.N. CHARTER, art. 1(2); G.A. Res. 1541 (XV), U.N. GAOR, 15th Sess., Supp. No. 16, princ. VI, at 29, U.N. Doc. A/4684 (1960) ("A Non-Self-Governing Territory can be said to have reached a full measure of self-government by: (a) Emergence as a sovereign independent State; (b) Free association with an independent State; or (c) Integration with an independent State."); *Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 8, at 124, U.N. Doc. A/8028 (1970) [hereinafter *Declaration on Friendly Relations*] ("The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right to self-determination by that people."). *See also* Horowitz (2003, 5–6). External self-determination is typically contrasted with internal self-determination, in which peoples or minorities may enjoy political and social rights within a state (Guibernau 2015).
26. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987); see Guzman (2005) noting that "[f]ocusing on practice rather than opinio juris is sometimes referred to as the 'traditional perspective' on CIL formation. The alternative 'modern approach' is more normative … "
27. Most analyses in which international law comes into play have this hypothetical quality. *Cf.* Tierney (2013) noting that "[p]rovided the United Kingdom does not oppose the independence of Scotland … this should in turn avoid the need for any serious debate about the legality of the act of secession under international law."
28. See, for example, Bell (2014) discussing international law governing distribution of debt if the UK retains the legal status of successor.
29. Professor Tierney's article does, but in a section entitled "After the Referendum: International Law Issues" considering the possibility of unilateral secession in the event that negotiations after a yes vote failed to reach an agreement to which Westminster would agree (Tierney 2013, 9–10 and 14–16).
30. About a year before the referendum, I witnessed a conversation in a bar in Germany between an Englishman and a Scottish woman that began in friendly fashion but rose to such an intense pitch that they had to be cut off, followed by an icy and awkward silence; the trigger was the subject of tuition charges.
31. See, for example, Scottish Government (2013c), the "Gains of Independence," including examples such as "Scottish Parliament has power to stop services being privatized;" "Taxes from people in Scotland no longer used to pay for nuclear weapons;" "A guarantee that tax and social security rates will be set in line with the wishes of the people of Scotland."
32. See, for example, Scottish Government (2013c, 5). "An independent Parliament elected entirely by people in Scotland;" "Decisions about Scotland will be taken by the people who care most about Scotland [–] those who work & live here."
33. *Cf.* Scottish Government (2013b) (chart). "83% of the Scottish population feel they have a Scottish national identity … 20% of the population share their Scottish connection with another identity," and citing these statistics to the 2011 census).
34. *Reference re Secession of Quebec* [1998] 2 S.C.R. 217. The *Quebec Reference* rejected an international right to secession, and denied that the Quebecois has a unilateral right within the Canadian constitutional structure. The Court identified a standard that prefigures contemporary remedial secession doctrine: no claim without evidence of persecution or systematic exclusion from participation in governance within the broader state. However the Court also suggested the availability of a very different threshold principle: a right to negotiations in good faith following a clear vote, which is rather close to what was agreed in the Scottish case.

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References

AP (Associated Press). 2014. "Scotland Independence: SNP Accepts Call to Change Referendum Question." *New York Times*, April 9.

Barber, Nick. 2014. "After the Vote: Regulating Future Independence Referendums." UK Constitutional Law Association, 21 March. http://ukconstitutionallaw.org/2014/03/21/nick-barber-after-the-vote-regulating-future-independence-referendums/.

BBC (British Broadcasting Company). 2012. "Scottish Independence: SNP Dismisses Expat Voting Call." BBC, 18 January. http://www.bbc.co.uk/news/uk-scotland-scotland-politics-16607480.

BBC (British Broadcasting Company). 2015. "Wars of Independence – William Wallace." Accessed September 15, 2015. http://www.bbc.co.uk/history/scottishhistory/independence/features_independence_wallace.shtml.

Bell, Christine. 2014. "Getting to Maybe: Currency, Debt and the Pre-negotiation of Independence." Scottish Constitutional Futures Forum, 13 February. http://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/3035/Christine-Bell-Getting-to-Maybe-Currency-Debt-and-the-Pre-negotiation-of-Independence.aspx.

Black, Andrew. 2013. "Scotland Independence: SNP Accepts Call to Change Referendum Question." BBC, January 20. http://www.bbc.com/news/uk-scotland-scotland-politics-21245701.

Branigan, Tanya. 2014. "China Charges Uighur Scholar Ilham Tohti with Separatism." *Guardian*, July 30. http://www.theguardian.com/world/2014/jul/30/china-uighur-scholar-ilham-tohti-charged.

Carrell, Severin. 2014. "Scotland 'Could Vote for Independence Unless Pro-UK Campaign Improves'." *The Guardian*, March 28. http://www.theguardian.com/politics/2014/mar/28/scotland-vote-independence-uk-campaign.

"China Jails Students of Uighur Scholar Ilham Tohti." 2014. BBC News China, 9 December. http://www.bbc.com/news/world-asia-china-30390801.

Crawford, James and Alan Boyle. 2013. "Annex A: Opinion: Referendum on the Independence of Scotland – International Law Aspects" in Scotland analysis: Devolution and the Implications of Scottish Independence. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79408/Annex_A.pdf.

"Crimea Referendum: What Does The Ballot Paper Say?" 2014. BBC News Europe, 10 March. http://www.bbc.com/news/world-europe-26514797.

del Mar, Katherine. 2013. "Myth of Remedial Secession." In *Statehood and Self-Determination: Reconciling Traditional and Modernity in International Law*, edited by Duncan French, 79–108. Cambridge: Cambridge University Press.

"Election 2015: Parties Clash Over Second Referendum During FMQs." 2015. BBC News, 30 April. http://www.bbc.com/news/election-2015-scotland-32522279.

Gibson, Mel, dir. 1995. *Braveheart*. Randall Wallace, screenwriter. Hollywood, CA: Paramount.

Grammaticas, Damian. 2014. "China Jails Prominent Uighur Academic Ilham Tohti for Life" BBC, 23 September. http://www.bbc.com/news/world-asia-29321701.

Green, Chris. 2015. "General Election 2015: Scottish Independence Referendum Will Be The 'First Line' of Next Year's SNP Manifesto, Says Former Deputy Leader." The Independent, 1 May. http://www.independent.co.uk/news/uk/politics/generalelection/general-election-2015-scottish-independence-referendum-will-be-the-first-line-of-next-years-snp-manifesto-says-former-deputy-leader-10216628.html.

Guibernau, Montserrat. 2015. "Self-determination in the Twenty-First Century." *Ethnopolitics* 14: 540–546.

Guzman, Andrew T. 2005. "Saving Customary International Law." *Michigan Journal of International Law* 27: 115–176.

House of Lords Select Committee on the Constitution. 2009. Referendums in the United Kingdom, 12th Report of 2009–10. HL 99. http://www.publications.parliament.uk/pa/ld200910/ldselect/ldconst/99/99.pdf.

Horowitz, Donald L. 2003. "The Cracked Foundations of the Right to Secede." *Journal of Democracy* 14 (2): 5–17.

Johnson, Simon. 2013. "Alex Salmond leads independence charm offensive in Northern Islands." *Telegraph*, July 26. http://www.telegraph.co.uk/news/uknews/scotland/10203172/Alex-Salmond-leads-independence-charm-offensive-in-Northern-Isles.html.

Prime Minister's Office (press release). 2012. "David Cameron Signs Historic Deal Granting Scottish Referendum." Gov.UK, 15 October. https://www.gov.uk/government/news/david-cameron-signs-historic-deal-granting-scottish-referendum.

https://doi.org/10.1080/00905992.2015.1101434 Published online by Cambridge University Press

Riley-Smith, Ben. 2014. "Shetland and Orkney 'Should Get Vote On Whether to Leave Scotland'." *Telegraph*, March 18. http://www.telegraph.co.uk/news/uknews/scottish-independence/10705477/Shetland-and-Orkney-should-get-vote-on-whether-to-leave-Scotland.html.

Scotland Office, Office of the Advocate General for Scotland and Cabinet Office (UK). 2013. "Facilitating a Legal, Fair and Decisive Referendum in Scotland." Gov. UK, January 28. Updated February 19, 2013. https://www.gov.uk/government/policies/facilitating-a-legal-fair-and-decisive-referendum-in-scotland.

Scott, Sir Walter [1818]. 2004. *The Heart of Midlothian*, Reprint. Edinburgh: Edinburgh University Press.

Scottish Government. 2013a. Scotland's Future: From the Referendum to Independence and a Written Constitution. http://www.gov.scot/Resource/0041/00413757.pdf.

Scottish Government. 2013b. "Broadcasting" Section Three in Scotland's Future: Your Guide to an Independent Scotland: A Summary.

Scottish Government. 2013c. "The Case for Independence." Chap. 1 in Scotland's Future: From the Referendum to Independence and a Written Constitution. http://www.scotland.gov.uk/Publications/2013/11/9348/5.

"Scottish Independence: The Results." 2014. *The Telegraph*, September 19. http://www.telegraph.co.uk/news/uknews/scottish-independence/11106917/Scottish-independence-live-results-as-they-happen.html.

The Courier.Co.UK. 2012. "Advocate General says SNP's Referendum Plans Would Be 'Contrary to the Rule of Law." 17 January. Updated November 26, 2012. http://www.thecourier.co.uk/news/politics/advocate-general-says-snp-s-referendum-plans-would-be-contrary-to-the-rule-of-law-1.49938.

The Scotsman. 2014. "Scottish Independence: Split blamed on Romans." *The Scotsman*, March 25. http://www.scotsman.com/news/politics/top-stories/scottish-independence-split-blamed-on-romans-1–3352328.

The Smith Commission. 2014. Report of the Smith Commission for further devolution of powers to the Scottish Parliament. https://www.smith-commission.scot/wp-content/uploads/2014/11/The_Smith_Commission_Report-1.pdf.

Tierney, Stephen. 2013. "Legal Issues Surrounding the Referendum on Independence for Scotland." *European Journal of Constitutional Law* 9 (3): 359–390. (SSRN version viewed. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2330750).

UK Sec'y State. 2015. Scotland in the United Kingdom: An *Enduring Settlement.* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/397079/Scotland_EnduringSettlement_acc.pdf.

Legal texts

Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, http://www.icj-cij.org/docket/files/141/15987.pdf.

Articles of Agreement for a Treaty between Great Britain and Ireland [Anglo-Irish Treaty], 6 December 1921.

Declaration of Arbroath 1320, National Archives of Scotland, http://www.nas.gov.uk/downloads/declarationArbroath.pdf.

Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 8, at 124, U.N. Doc. A/8028 (1970).

Edinburgh Agreement: Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland, Edinburgh 15 October 2012. http://webarchive.nationalarchives.gov.uk/20130109092234/; http://www.number10.gov.uk/wp-content/uploads/2012/10/Agreement-final-for-signing.pdf; http://www.scotland.gov.uk/About/Government/concordats/Referendum-on-independence.

Northern Ireland Act 1998 (UK).

Reference re Secession of Quebec [1998] 2 S.C.R. 217.

Republic of Ireland Act 1948 (22/1948).

Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987).

Scotland Act 1998 (Modification of Schedule 5) Order 2013.

https://doi.org/10.1080/00905992.2015.1101434 Published online by Cambridge University Press

Scotland Act 1998 (UK).
Scotland Act 2012 (UK).
Statute of Westminster, 1931, 22 and 23 Geo 5, Chap. 4 (UK).
U.N. Charter, art. 1(2); G.A. Res. 1541 (XV), U.N. GAOR, 15th Sess., Supp. No. 16, princ. VI, at 29, U.N. Doc. A/4684 (1960).
Union with Scotland Act 1706 (Eng.).
Union with England Act 1707 (Scot.).

https://doi.org/10.1080/00905992.2015.1101434 Published online by Cambridge University Press