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# After the Scottish Independence Referendum: Towards a Federal Moment for the United Kingdom?

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## Overview

This chapter addresses the independence referendum in Scotland which took place on 18 September 2014 and its aftermath, which together have created an extended and ongoing constitutional moment, the implications of which for the future of the United Kingdom remain uncertain. In the referendum 55% of Scots said No to the question: ‘Should Scotland be an Independent Country?’. It was a very dramatic event but it should also be seen as part of a long process in the gradual devolution of power in the UK, not only to Scotland but also to Wales and Northern Ireland, a process which continues to move ahead at speed. Although the referendum did not result in a vote for independence, it has sparked a further process of decentralisation. The Smith Commission, established in the days after the referendum,<sup>1</sup> was a body given the task of drawing up further radical powers for the Scottish Parliament. This resulted in the Scotland Act 2016, which sets out a series of powers that could make Scotland one of the most autonomous sub-state territories in the world. In this chapter I discuss the institutional arrangements and political conditions that formed the background to the referendum, the referendum itself, and the aftermath in which we saw such a quick move towards further, radical constitutional change. Insofar as the referendum marks a constitutional moment it is a fluid one, with the question now being asked: is the United Kingdom edging in a federal direction?<sup>2</sup>

The independence referendum stemmed from the electoral success of the Scottish National Party (SNP) which, having ruled as a minority government since 2007, won an overall majority in elections to the Scottish Parliament in May 2011. The aspiration for independence has been the key project of the SNP since the 1970s and for over three decades the party has also accepted that a referendum would be required to legitimise this claim. The SNP has taken the view that were it to put to the UK government a clearly expressed democratic demand for independence, endorsed by the people of Scotland in a direct way, the political legitimacy of this claim would be irrefutable. Similarly, it has long been established at the level of the UK state that, as a political principle, if a majority of Scots wish to leave the UK the territory should be allowed to do so.

In the end the referendum ended in a victory for the No side, and a result of 55% to 45% seems on the face of it to be a clear victory for the unionist side. However, I explore in this chapter how the referendum was certainly not the start of the debate about the territorial organisation of the United Kingdom, and by the same measure it has not served not to end this debate. Rather, the referendum has led constitutional deliberations in a new direction, inspired by the political commitments made towards the end of the campaign by the main unionist parties which promised further powers for the Scottish Parliament in an effort to persuade wavering Scots to vote No. And it was certainly not the end of the story. Reform of the UK’s territorial constitution is now also over-shadowed by the decision taken by the British people to leave the European Union in the ‘Brexit’ referendum held on 23 June 2016. It is unclear what this will mean for devolution, and even for Scotland’s place in the United

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<sup>1</sup> The Smith Commission, ‘The Smith Commission: About’ (*UK Government National Archives*, 2 December 2015) <<http://webarchive.nationalarchives.gov.uk/20151202171047/http://www.smith-commission.scot/about/>> accessed 25 February 2015.

<sup>2</sup> Stephen Tierney, ‘Is a Federal Britain Now Inevitable?’ (*UK Constitutional Law Association*, 27 November 2014) <<https://ukconstitutionallaw.org/2014/11/27/stephen-tierney-is-a-federal-britain-now-inevitable/>> accessed 25 February 2015.

Kingdom itself, with the current SNP Government “seriously considering” a second independence referendum in order to keep Scotland inside the EU.<sup>3</sup>

Another important outcome of the September vote was the success of the referendum itself as an exercise in popular decision-making. The poll was widely hailed as a success in engaging the electorate, resulting in a turnout of nearly 85%, and producing a national conversation which energised citizens. This experience will strengthen the arguments of those who seek to make the referendum itself a stronger feature of future processes of significant constitutional change in Britain and elsewhere; the Brexit referendum being a sign of the continued prominence of direct democracy.

## Background

The lead up to the Scottish independence referendum was one of regular constitutional politics: electoral victory in the Scottish parliamentary elections of 2011 by the SNP led to the organisation of a referendum as promised in its manifesto. One of the reasons why the referendum emerged from, and was organised within, the normal contours of constitutional democracy is that Anglo-Scottish relations within the United Kingdom are not burdened by ethnic strife. The territory of Northern Ireland is in the eyes of many a divided society, but Scotland is not and in the same way its relationship with England and the rest of the UK is, when compared to troubled regions of the world, an amicable and democratic one; any sense of historical injustice is now rhetorical and of little contemporary political salience.

It is for this reason that many observers looking at the situation from outside the UK no doubt wonder why the mood for independence became so strong within Scotland, falling just five per cent short of majority support in the referendum. To explain the strength of nationalism in an otherwise harmonious constitutional environment it is necessary to analyse the referendum as the culmination (or more accurately, the latest stage) in a long-term mobilisation of national sentiment in Scotland which has built upon a strong residual national identity that never fully dissipated after the Anglo-Scottish parliamentary union of 1707. It is also important to see the referendum as an event which, although dramatic and of great significance, was run on the basis of fairly prosaic arguments, with nationalists presenting a largely pragmatic case that Scotland would be economically better off determining its own affairs. For many voters the calculation to be made was indeed a practical one: whether independence would deliver a more or less prosperous country in which to live and not, as in other countries, a principally emotional decision to quit an oppressive state.

The United Kingdom is also unusual compared to most of the other situations addressed in this book in that the independence referendum process took place without any period of major political upheaval or of significant extra-parliamentary activity. The referendum was the direct result of the SNP’s electoral victory, but it was also a consequence of the UK state’s acceptance of the legitimacy of the demand for a referendum, and the state’s acquiescence in not only permitting, but also facilitating, the staging of this referendum. In order to discover how Scotland and the wider United Kingdom got to the situation where, on the one hand a party promoting independent statehood became so popular that it won a general election to the Scottish Parliament, and on the other, the UK state was willing to cooperate with the manifesto commitment of that party to hold a referendum on independence, it is necessary to explain the constitutional history of the UK and the key part Scotland has played in the formation of the ‘union state’. Central to the story are long-term as well as short-term factors in the development of

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<sup>3</sup> Jon Sharman, ‘Scottish SNP government “seriously considering second independence referendum next year”’ (*The Independent*, 24 February 2017) <<http://www.independent.co.uk/news/uk/politics/scottish-snp-government-second-independence-referendum-union-uk-britain-a7596881.html>>.

Scotland as a polity within the United Kingdom, both of which combined to create the path to the 2014 referendum.

The institutions through which nationalists in Scotland were able to organise a referendum were created by the Scotland Act 1998. The passage of this piece of legislation by the UK Parliament created the Scottish Parliament and Scottish Executive (now called the Scottish Government<sup>4</sup>), at the same time as devolution was also extended to Wales and Northern Ireland in other pieces of legislation.<sup>5</sup> The Scottish National Party came to govern under these institutions and it was, ironically, the very institutions created by UK legislation in 1998 which offered the SNP the institutional infrastructure with which to organise the referendum itself. In addition, 15 years of self-rule (the Scottish Parliament was inaugurated in 1999), gave the Scottish people a taste of autonomy, with their domestic parliament enjoying an extensive range of powers over matters such as education, health, transport, the environment, law and order and local government. However, notably this regime of autonomy did not include taxation or other economic levers as a UK Government publication has observed.<sup>6</sup> This disjuncture has allowed nationalists to point to the limitations as well as the advantages of the devolved arrangements.

The starting point for any meaningful study of Scottish devolution and of the path towards the independence referendum is not, however, 1998. Instead we need to return to the origins of the UK state itself and the key role Scotland played in ‘forging’<sup>7</sup> that state. We also need to account for the fact that since 1707 Scotland has retained its own national identity within a plurinational United Kingdom. Another important background factor which lay behind the relatively amicable circumstances within which the independence referendum was agreed to by the UK state and subsequently organised by the Scottish Parliament is the unique nature of the UK’s constitutional arrangements. The UK has an unwritten constitution which has provided the flexibility with which to change the constitution fundamentally simply by way of legislation of the UK Parliament. This allowed very different models of devolution to be created for Scotland, Wales and Northern Ireland through simple acts of Parliament, resulting in a heavily asymmetrical system. It has also allowed ad hoc changes to the system to be made very easily, for example through the Scotland Act 2012 which is again an ordinary act of Parliament but one which cedes further and not insignificant competences (discussed further below) to the Scottish Parliament.<sup>8</sup>

In historical terms, the ‘union’ persona of the state is central to an understanding of the United Kingdom constitution. Although not federal, the UK was founded in full recognition of the national differences of which it was composed and, at least in the case of Scotland, there was a constitutional commitment to continue to recognise these differences in the functioning of the state. The territories of the UK came together, at least formally, in processes of legal union. England’s union with Wales was clearly the result of conquest, but even here this was given legal recognition by an Act of the English parliament.<sup>9</sup> Of greater constitutional significance, the modern British state was shaped by the later and more sophisticated legal unions between England and Scotland to form the United Kingdom in 1707,<sup>10</sup>

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<sup>4</sup> Scotland Act 2012, s 12.

<sup>5</sup> Government of Wales Act 1998; Northern Ireland Act 1998.

<sup>6</sup> Scotland Office, *Scotland in the United Kingdom: An Enduring Settlement* (Cm 8990, 2015) para 2.3.6.

<sup>7</sup> Linda Colley, *Britons: Forging the Nation 1707-1837* (Yale University Press 1992).

<sup>8</sup> For example, this statute extends further tax powers to Scotland. Other constitutional changes have been brought about by the Government of Wales Act 2006 and the Wales Act 2014.

<sup>9</sup> This is traditionally titled in England, the Laws in Wales Act 1535 (27 Hen VIII, c 26), and in Wales, the Act of Union 1536.

<sup>10</sup> Union with Scotland Act 1706 (6 Anne c 11); and the Union with England Act 1707 (asp 7), 406.

and that between the United Kingdom and Ireland in 1800, the legacy of which is Northern Ireland's ongoing membership of the UK.<sup>11</sup>

Although these different unions brought with them distinctive points of constitutional identity, the one with the most enduring constitutional differences is the Anglo-Scottish union. It is the retained sense of difference within Scotland, made manifest in its political and administrative heritage, which kept alive that sense of discrete national identity which, when the political circumstances were conducive to the nationalist movement, led to the referendum of 2014. It is also important to note that the UK state has long accepted the reality of its multinational composition, and it is this recognition of national pluralism which lay behind the acceptance by the UK state of the legitimacy of Scots to elect a party committed to a referendum on independence.

The feature of Scotland's institutional distinctiveness that is particularly significant after 1707 is the retention of an independent legal system. This in turn helped keep alive a particular understanding of the constitutional status of the union within the Scottish legal system which in some respects has differed from the clear acceptance of the doctrine of parliamentary supremacy within the English legal system. From time to time it has been suggested that the very authority of the UK Parliament derives from the Acts of Union of 1707.<sup>12</sup> This argument is now of only historical interest, given both that it was always extremely unlikely that a Scottish court would seek to strike down an Act of the UK Parliament by invoking these Acts, and the subordination of the Acts of Union within the Scotland Act 1998,<sup>13</sup> a statute which (in its amended form) is now treated almost universally as the modern restatement of the Anglo-Scottish union. However, the survival of the idea that Scots and the Scottish legal system looked to a different rule of recognition in the post-1707 period, left open the argument (in constitutional and not just political terms) that Scotland as a society retained its own constituent popular power as a rival source of sovereignty to that of the UK state embedded in Parliament. In other words, the origins of the UK as a mutually-agreed union created a historical and constitutional legacy that in turn helped to shape how the constitutional significance of the devolution settlement for Scotland in 1998 was widely perceived in Scotland. Even after devolution Scots retained the claim that having entered the UK voluntarily, and having retained a strong sense of nationhood including the institutional infrastructure of nationhood within the state, secession would always be a legitimate constitutional option if sought by a majority of Scots. By contrast it is also worth noting that in many ways the Anglo-Scottish union was a far more harmonious one than that with Ireland, which is better characterised as one of conquest. Scotland and England were united by a common Protestantism, which was a particular resource in fostering nation-building, particularly at the time of the Napoleonic wars.<sup>14</sup> This led to a constitutional arrangement which allowed Scotland to keep a number of its own cultural institutions and which operated in greater harmony with the UK state than did those in Ireland which throughout the late 18<sup>th</sup> century, and more markedly at the end of the 19<sup>th</sup> century, helped foster a strong impetus towards independent statehood.

Scotland maintained some degree of governmental autonomy which was consolidated by the creation of the office of Secretary of State in 1885 and of the Scotland Office in 1928.<sup>15</sup> This period of

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<sup>11</sup> Union with Ireland Act 1800.

<sup>12</sup> *MacCormick v Lord Advocate* [1953] UKSC 396, at 411 and see Faculty of Advocates, Response to the consultation paper by the Secretary of State for Constitutional Affairs and Lord Chancellor: Constitutional Reform: a Supreme Court for the United Kingdom (November 2003).

<sup>13</sup> Scotland Act 1998, s 37.

<sup>14</sup> See Colley (n 7).

<sup>15</sup> Rodney Brazier, *Ministers of the Crown* (Oxford University Press 1997) 9.

‘administrative devolution’ not only allowed for discrete civil and administrative patterns to continue to develop, it created a civil service infrastructure within the Scottish Office that was easily adapted to run the new system introduced by the Scotland Act 1998 which created the Scottish Parliament.

Another notable phenomenon during the period of ‘administrative devolution’, was the rise of Scottish nationalism, particularly since the 1960s. The SNP was founded in 1934 but did not win a seat in Parliament until 1967. Its breakthrough came in 1974 when in the October General Election it won 11 seats in the United Kingdom Parliament with 30 per cent of the Scottish vote. Ironically its representation within the UK Parliament was never so high again until May 2015 when it won 56 of the 59 Scottish seats with 50 per cent of the Scottish vote. It now seems set to play a pivotal role in debates about the UK’s constitutional future, particularly by offering an oppositional voice on the Brexit negotiations with Brussels.

The SNP has, at least until 2015, enjoyed its greatest success in the Scottish Parliament rather than at Westminster. Although in opposition following the first two elections to that Parliament in 1999 and 2003, it formed a minority Scottish government in 2007. It built upon this success to win an overall majority of seats in the Parliament in 2011, the first party to do so, which allowed it to pass legislation to hold the referendum.

The rise of the SNP over the past half century does raise the question why, in such a closely integrated country and one that does not have any notable ethnic cleavage between Scotland and England, the SNP emerged and grew as such a political force. Michael Keating identifies a number of the key features which in the past two centuries had established the bonds of loyalty between Scotland and the rest of the UK.<sup>16</sup> In addition to the historical-cultural factors such as Protestantism,<sup>17</sup> in the 19<sup>th</sup> century Scotland benefitted from, and many Scots played a very prominent role in, the British Empire. In the 20<sup>th</sup> century, with the rise of the Labour Party across the UK many Scots came to share in a sense of social solidarity, and consequently in a shared commitment to the welfare state and the National Health Service, as well as to cultural institutions such as the BBC. Keating discusses how the commitment to each of these has dissipated in time and that as a consequence the union has come to seem less relevant to many Scots. The period of Conservative Government in the UK from 1979-1997 placed a particular strain on the union, since in this period the Conservatives were markedly less popular in Scotland, with their vote in Scotland dropping progressively from 31 per cent in 1979 to 17.5 per cent in 1997. Opposition became merged with national identity, and into this vacuum came the Scottish National Party which was able to build support by combining a nationalist approach with a social democratic agenda for social and economic reform.<sup>18</sup> The creation of the Scottish Parliament provided the SNP with the catalyst to turn this support into real governmental power, and it has used this opportunity to the full.

The Scotland Act 1998 is itself a remarkable development since it was passed by ordinary legislation, a product of the flexibility of the UK constitution. The back-story was the campaign by the political opposition from 1979-1997 to bring about devolved government. 1979 was a pivotal year not only because it began an 18 year period of Conservative Party rule but also because the first attempts to implement devolution for Scotland and Wales failed in referendums held that year. The legislation provided that if fewer than 40% of the total electorate voted “Yes” in the referendum, the measure

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<sup>16</sup> Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009).

<sup>17</sup> See Colin Kidd, *Union and Unionism: Political Thought in Scotland 1500-2000* (Cambridge University Press 2008).

<sup>18</sup> Keating, *The Independence of Scotland* (n 16).



would not pass.<sup>19</sup> The result in the Scottish devolution process was 51.6% support for the proposal, but with a turnout of 64% this represented only 32.9% of those registered to vote.<sup>20</sup> The measure therefore failed and became a source of political grievance among nationalists during the 1980s and 1990s. The first concerted reaction came with the Campaign for a Scottish Assembly (CSA) which was launched in 1985 and issued the document, *A Claim of Right for Scotland*, in 1988 declaring the inherent right of the Scots to self-government.<sup>21</sup> This asserted that ‘sovereignty’ in Scotland rested with the Scottish people and as such they had the right to initiate changes to Scotland’s constitutional position. This led to a cross-party Scottish Constitutional Convention (SCC) which was inaugurated in 1989. Over the next seven years it embraced much of Scotland’s political elite, involving inter alia the Labour and Liberal Democratic parties (although not the SNP who objected to the fact that independence was not on the agenda for discussion or the Conservatives who were at that time opposed to devolution), local authorities, churches and the Scottish Trades Union Congress.<sup>22</sup> Although not established by any official route, it was composed of fifty nine of Scotland’s seventy two Westminster MPs and all six of its Members of the European Parliament. This resulted in a series of publications, the most important of which, *Scotland’s Claim, Scotland’s Right*,<sup>23</sup> that set out a detailed blueprint for devolution which proved to be very influential, the eventual model of devolution enacted through the Scotland Act 1998 being remarkably similar to it.

This allowed the Labour Party when in government to hold a referendum in 1997 which endorsed the plan for devolution and then to legislate for this by 1998. In many respects the devolution model of 1998 was the direct creation of the Scottish Labour Party which had been the dominant voice on the SCC. This demonstrated how constitutional change can be effected in the UK very easily, as happened again with subsequent changes to the devolution model through the Scotland Act 2012. This latter Act implemented many of the key recommendations of the Calman Commission, which had been established in 2007 by the main unionist parties in the Scottish Parliament – Labour, Conservative and Liberal Democrats – to ‘review the provisions of the Scotland Act 1998 in the light of experience and to recommend any changes to the present constitutional arrangements that would enable the Scottish Parliament to serve the people of Scotland better, improve the financial accountability of the Scottish Parliament and continue to secure the position of Scotland within the United Kingdom.’ This was in political terms an attempt to see off the SNP proposal for independence by establishing more powers for the Scottish Parliament, including more tax varying powers. In the end its proposals were quite modest in their reach. They were passed by the UK Parliament with the consent of the Scottish Parliament, as it is now a constitutional convention that the Scottish Parliament should consent to changes to the devolution settlement. This consent was also needed for the Scotland Act 2016 which provides radical new powers for the Scottish Parliament.

To conclude, 1998 for Scotland was clearly not year zero. The devolved arrangements which emerged have their roots in a historical story in which Scotland’s relationship with the central state began in the reality of retained cultural institutions after 1707 which in turn were supplemented by gradually strengthening political institutions. This kept alive a strong sense of Scottish national identity which was fully accommodated within a British union, which also shared strong cultural totems – the English

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<sup>19</sup> Scotland Act 1978, s 85(2); Wales Act 1978, s 80(2).

<sup>20</sup> Richard Dewdney, ‘Results of Devolution Referendums (1979 & 1997)’ (1997) 97 (113) House of Commons Library Research Paper <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/RP97-113#fullreport>>.

<sup>21</sup> *A Claim of Right for Scotland* (1988), 19. Its title was of course intended to echo the radical spirit of the pre-Union Scottish Parliament’s revolutionary Claim of Right of 1689.

<sup>22</sup> Jean McFadden, ‘The Scottish Constitutional Convention’ [1995] Public Law 215.

<sup>23</sup> *ibid.*

language, Protestantism, solidarity forged in European wars, and a developing social state. But ironically it was this retained national identity which would, by the end of the 20<sup>th</sup> century, make independence seem a feasible and reasonable constitutional option as the reasons for union, in the eyes of many Scots, began to dissipate. The SNP was to become the vehicle for this option as it set out to hold a referendum from the moment it was elected as a minority government in 2007.

### **The Period of Constitutional Engagement**

A feature of the 2014 referendum, which surprises many external observers, is the fact that the United Kingdom government acquiesced in the process and even cooperated in framing the rules for the vote. The process of the 1980s and '90s emphasises the lingering sense of nationhood within Scotland, but it also demonstrates how attuned the UK state was to this, and the lengths it was prepared to go to in order to accommodate it. When the SNP won its Scottish Parliament majority in 2011 the United Kingdom Government did not oppose the principle that the Scottish Government could pursue its manifesto commitment to hold a referendum on independence. However, this is not the whole story and as we will see, the UK Government's decision to cooperate in the process was in large measure tactical. The UK was certainly not going to let Scotland go without seeking to influence the process, and to this end it questioned the legal basis upon which the Scottish Government proposed to act. It was one thing to concede the principle that Scots could have a referendum, it was another to accept that the Scottish Parliament had the lawful authority under the Scotland Act 1998 to organise one. By the start of 2012 it was clear that a legal dispute could well emerge as to whether or not the Scottish Parliament had such a power, with the UK Government adamant that only the UK Parliament could authorise such a process, and the Scottish Government determined to press ahead with its independence plans.

In January 2012 the Scottish Government announced its intention to hold a referendum on independence, announcing that this would take place in the Autumn of 2014. A draft Referendum Bill to this effect was published, which asserted the authority of the Scottish Parliament to hold such a referendum, while a public consultation exercise was set in motion.<sup>24</sup> The United Kingdom Government, a coalition of Conservatives and Liberal Democrats, immediately challenged the legislative competence of the Scottish Parliament to pass this Bill and in doing so launched its own consultation process.<sup>25</sup> It appeared for a time that the matter would end in the courts as there was considerable disagreement between the two governments as to whether s.29 of the Scotland Act 1998, from which the Scottish Parliament derives its competence, entitled the Scottish Parliament to hold a referendum of a consultative nature only.<sup>26</sup>

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<sup>24</sup> Scottish Government, *Your Scotland – Your Referendum – A Consultation Document* (Scottish Government 2012) <[www.scotland.gov.uk/Publications/2012/01/1006](http://www.scotland.gov.uk/Publications/2012/01/1006)>.

<sup>25</sup> Scotland Office, *Scotland's Constitutional Future*, (Cm 8203, 2012).

<sup>26</sup> For commentary on this dispute see Adam Tomkins, 'The Scottish Parliament and the Independence Referendum' (*UK Constitutional Law Association blog*, 12 January 2012) <<http://ukconstitutionallaw.org/2012/01/12/adam-tomkins-the-scottish-parliament-and-the-independence-referendum/>>; and Gavin Anderson and others, 'The Independence Referendum, Legality and the Contested Constitution: Widening the Debate' (*UK Constitutional Law Association Blog*, 31 January 2012) <<http://ukconstitutionallaw.org/2012/01/31/gavin-anderson-et-al-the-independence-referendum-legality-and-the-contested-constitution-widening-the-debate/>>.

To the surprise of many, on 15 October 2012 an agreement (‘The Edinburgh Agreement’<sup>27</sup>) was reached between the two governments which led to the UK Parliament devolving to the Scottish Parliament the competence to legislate for a referendum, providing that it had to be held before the end of 2014 and only on the issue of whether Scotland should become independent of the rest of the United Kingdom.<sup>28</sup> This condition is the key to understanding why, in a very short space of time, the UK Government moved from a potentially confrontational stance to one of agreement. Constitutional principle and the sociological reality of a multinational state helped inform this decision, but it is also the case that political calculation was at work. Given that there was disagreement as to whether the Scottish Parliament could hold a consultative referendum, the Scottish Government had declared that it would do so, and that it would include a third question on the ballot concerning more powers for the Scottish Parliament – ‘devo-max’ as it came to be known. The UK Government strongly opposed such a move and also wished to avoid a court case which, even if successful from their point of view, would almost certainly help stoke nationalist support. On the other hand, by agreeing to a referendum the UK was able to gain a say in the process rules, in particular making sure the referendum was on the issue of independence and nothing else. Thus, the main benefit of the Edinburgh Agreement from the UK Government’s point of view was that the referendum was a straight contest between independence on the one hand and the status quo on the other. Opinion polls in 2012 (as they had for most of the preceding four decades) rarely showed popular support for independence in Scotland above 30-35%, and so the Government was confident of victory on this issue. Another condition contained in the Edinburgh Agreement was that the referendum be conducted so as to command the confidence of both parliaments, both governments and the people. The stated aim of the Agreement was that the referendum ‘deliver a fair test and a decisive expression of the views of people in Scotland and a result that everyone will respect’.

Regardless of the degree of political calculation behind the deal that was eventually reached, this agreement paved the way for the referendum to be organised through legislation of the Scottish Parliament in a lawful way with the full consent of the UK state. It is of considerable significance that the UK Government accepted the fundamental principle that the Scottish people have the right, by way of referendum, to achieve independence, bearing in mind the protracted and difficult way in which the issue of secession has played out in many parts of the world, including liberal democratic states such as Canada and Spain.<sup>29</sup> This in turn encouraged the Scottish Government to act in a consensual way on process issues. The Scottish Government was willing to adapt the general regime of referendum process law used for UK referendums and to accept the oversight of the independent UK regulator – the Electoral Commission. So much so that both governments accepted the Electoral Commission’s review of the referendum question.

The Scottish Government sent its proposed question to the Electoral Commission. The initial formulation was: ‘Do you agree that Scotland should be an independent country? Yes/No’. The Electoral Commission took the view that ‘based on our research and taking into account what we heard from people and organisations who submitted their views on the question, we consider that the proposed question is not neutral because the phrase ‘Do you agree ...?’ could lead people towards voting ‘yes’.’ It therefore recommended the following alternative question: ‘Should Scotland be an

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<sup>27</sup> Scottish Government, *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland*, (Government of Scotland Website, 15 October 2012)

<[www.scotland.gov.uk/About/Government/concordats/Referendum-on-independence](http://www.scotland.gov.uk/About/Government/concordats/Referendum-on-independence)>.

<sup>28</sup> Scotland Act 1998 (Modification of Schedule 5), Order 2013.

<sup>29</sup> Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004).

independent country? Yes/No'.<sup>30</sup> This was accepted by the Scottish Government and this was the question included in the Scottish Independence Referendum Act,<sup>31</sup> and ultimately put to the voters.

There was also no debate within the UK as to the franchise for the referendum. It was accepted that this would be based upon residence, using the same franchise rules as Scottish Parliament elections.<sup>32</sup> One difference from the existing franchise however, was the provision in the Scottish Franchise Act extending the vote to those aged 16 and 17.<sup>33</sup> This was a notable departure; never before had people under the age of 18 been entitled to vote in a major British election or referendum.<sup>34</sup> On the one hand this could be seen as a cynical ploy to empower younger voters who would be more likely to vote Yes. On the other, it has long been SNP policy that younger people should be allowed to vote and this was the first electoral event where this could be put into practice. In the end it did not arouse particular controversy within the Scottish Parliament's Referendum (Scotland) Bill Committee. Now that the Scottish Parliament has the power to set the franchise for the Scottish Parliament elections in May 2016,<sup>35</sup> it has used this to extend the vote to those over 16 years of age for this election.<sup>36</sup> It is also worth noting also that there was no suggestion that the referendum should be decided on the basis of any rule other than 50% plus 1. In fact this is not particularly unusual. Of course super-majority requirements do exist in certain states such as Australia (where successful amendment requires a referendum in which a majority nationally and majorities in a majority of states vote for the proposition), and in other systems referendums can be a part of a wider amendment process in which various levels of support require to be achieved. But most referendums around the world are settled on a 50% plus 1 basis, some with a participation threshold,<sup>37</sup> and the provision of a supermajority requirement is very much the exception rather than the norm.<sup>38</sup>

It is interesting how the polling data changed in the course of the campaign. As has been noted, historically support for independence has rarely moved above 35% over the past decade, and it was still at this level when the Scottish Government announced the referendum in 2012 and did not change significantly until very late in the campaign. What then led to support for independence reaching 45% in the actual vote? A number of factors may have been at work, including the success of the Yes campaign in allaying the fears of voters about the economic future, and the fact that it was able to improve the share of female support for independence during the campaign. The latter factor is notable since women often gave economic uncertainty as a key reason for their intention to vote no. It is also

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<sup>30</sup>The Electoral Commission, 'Referendum on independence for Scotland: Advice of the Electoral Commission on the proposed referendum question' (The Electoral Commission 2013) <[www.electoralcommission.org.uk/\\_\\_data/assets/pdf\\_file/0007/153691/Referendum-on-independence-for-Scotland-our-advice-on-referendum-question.pdf](http://www.electoralcommission.org.uk/__data/assets/pdf_file/0007/153691/Referendum-on-independence-for-Scotland-our-advice-on-referendum-question.pdf)>.

<sup>31</sup> Scottish Independence Referendum Act 2013, s 1(2). See also Andrew Black, 'Scottish independence: SNP accepts call to change referendum question' *BBC News* (Scotland, 30 January 2013) <[www.bbc.co.uk/news/uk-scotland-scotland-politics-21245701](http://www.bbc.co.uk/news/uk-scotland-scotland-politics-21245701)>.

<sup>32</sup> Scottish Independence Referendum (Franchise) Act 2013.

<sup>33</sup> *ibid* s 2(1)(a).

<sup>34</sup> Representation of the People Act 1983, s 1(d).

<sup>35</sup> Scotland Act 1998 (Modifications of Schedules 4 and 5 and Transfer of Functions to the Scottish Ministers etc.) Order 2015.

<sup>36</sup> Scottish Elections (Reduction of Voting Age) Act 2015.

<sup>37</sup> Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press 2012) 272.

<sup>38</sup> *ibid* 274.

widely thought that the No (Better Together) campaign was not very effective, and that some of the negative campaigning may have been counter-productive. Another feature was the very high turnout of over 84% which mobilised many people who do not normally vote, particularly in the lower socio-economic groups, and polling data shows that they voted heavily for independence.<sup>39</sup>

### Outcome of the Process

The outcome of the referendum was a victory for the No campaign, but the move to radical constitutional change which followed hot on the heels of the referendum was not what many expected even one month before the vote. Rather than a period of calm reflection after the referendum, the UK immediately embarked upon a process of potentially radical constitutional change, with the prospect of many more powers being devolved to the Scottish Parliament.

In the aftermath of the referendum the United Kingdom Government developed a speedy timetable for this extensive decentralisation, a process which by January 2015 had resulted in the publication of draft clauses for a new Scotland Bill which the three main UK parties – Conservative, Labour and Liberal Democrats – committed to legislate upon following the UK general election in May 2015.<sup>40</sup> With a Conservative victory in that election the process moved on quickly and the Scotland Act 2016 was passed in the Spring of the following year.

The background to this development is one of political panic. In the two weeks immediately preceding the independence referendum the opinion polls seemed to suggest that the No side's lead, which had been pretty solid throughout the campaign, was narrowing dramatically, with the occasional poll now predicting that the Yes side may even be poised to win. On 16 September, two days before the vote, the UK leaders of the Conservative, Labour and Liberal Democrat parties issued 'the Vow',<sup>41</sup> undertaking that in the event of a majority No vote they would produce agreed proposals on additional powers for the Scottish Parliament, and setting out a short timeframe within which these powers would be agreed.

The result was that the day after the referendum, the Prime Minister announced that Lord Smith of Kelvin, a non-political figure, had agreed to oversee the process to take forward this commitment to grant further devolution to the Scottish Parliament.<sup>42</sup> The Terms of Reference of the Smith Commission were:

“To convene cross-party talks and facilitate an inclusive engagement process across Scotland to produce, by 30 November 2014, Heads of Agreement with recommendations for further

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<sup>39</sup> Alberto Nardelli, 'Were Scottish independence opinion polls misleading?' *The Guardian* (19 September 2014) <[www.theguardian.com/politics/2014/sep/19/scottish-independence-opinion-polls-referendum-vote](http://www.theguardian.com/politics/2014/sep/19/scottish-independence-opinion-polls-referendum-vote)>; See also John Curtice, 'Scotland's Decision: So How Well Did The Polls Do?' (*Centre on Constitutional Change blog*, 22 September 2014) <[www.centreonconstitutionalchange.ac.uk/blog/scotlands-decision-so-how-well-did-polls-do](http://www.centreonconstitutionalchange.ac.uk/blog/scotlands-decision-so-how-well-did-polls-do)>.

<sup>40</sup> *Scotland in the United Kingdom* (n 6).

<sup>41</sup> David Clegg, 'David Cameron, Ed Miliband and Nick Clegg sign joint historic promise which guarantees more devolved powers for Scotland and protection of NHS if we vote No' *Daily Record* (15 September 2014) <[www.dailyrecord.co.uk/news/politics/david-cameron-ed-miliband-nick-4265992](http://www.dailyrecord.co.uk/news/politics/david-cameron-ed-miliband-nick-4265992)>.

<sup>42</sup> Government of the United Kingdom, '

Press release

Scottish Independence Referendum: statement by the Prime Minister' (*Gov.UK*, 19 September 2014)

<[www.gov.uk/government/news/scottish-independence-referendum-statement-by-the-prime-minister](http://www.gov.uk/government/news/scottish-independence-referendum-statement-by-the-prime-minister)>.

devolution of powers to the Scottish Parliament. This ...will result in the publication of draft clauses by 25 January. The recommendations will deliver more financial, welfare and taxation powers, strengthening the Scottish Parliament within the United Kingdom.”<sup>43</sup>

On 27 November the Smith Commission published its report proposing radical new powers for the Scottish Parliament, in particular tax powers including control over income tax in Scotland and responsibility for certain important welfare powers. The Heads of Agreement in the Smith Report are divided into three pillars:

- Pillar 1 Providing for a durable but responsive constitutional settlement for the governance of Scotland;
- Pillar 2 Delivering prosperity, a healthy economy, jobs, and social justice;
- Pillar 3 Strengthening the financial responsibility of the Scottish Parliament.

This process is open to considerable criticism. The Smith Commission arrived at Heads of Agreement very rapidly.<sup>44</sup> This left little time for full consultation with the UK Parliament, with the Scottish Parliament and other devolved legislatures, or with the citizens of the Scotland or the wider United Kingdom. This is not to criticise the work of Lord Smith, the ways in which the Smith Commission members approached their task or deliberated together, or the conclusions they came to in their report. It is rather a reflection of the remit which the Commission was set and the speed with which it was required to conduct its work.<sup>45</sup>

The proposals, which have now largely been replicated in the Scotland Act 2016, promised the most extensive reorganisation of territorial government in the United Kingdom since 1998. In light of the significance of the changes that have resulted, the brevity, exclusiveness and lack of transparency in the process runs counter to good practice in relation to constitutional reform. Regardless of how sensible or popular constitutional changes prove to be or how well they work in practice, the health of a democratic system depends upon the propriety and legitimacy of the process by which constitutional changes within it are effected. As the House of Lords Select Committee on the Constitution stated in its report on the Fixed-term Parliaments Bill:

“Process is critical in terms of upholding, and being seen to uphold, constitutional values: particularly those of democratic involvement and transparency in the policymaking process. Moreover, we believe that a proper process is the foundation upon which successful policy is built: the lack of a proper process makes an ineffective outcome more likely.”<sup>46</sup>

In many ways the United Kingdom method of constitutional change through parliamentary legislation has been advantageous. It allowed devolution to be created quickly in 1998 and for this to be done in incremental and heavily asymmetrical ways for each of the three devolved territories, without the need for an over-arching constitutional settlement for which there was little political appetite. In other words,

<sup>43</sup> ‘The Smith Commission Report’, The Smith Commission (Edinburgh, 27 November 2014).

<sup>44</sup> Stephen Tierney, ‘Solomon Grundy Does Constitutional Change: The Smith Commission Timetable to Transform the Scottish Parliament’ (*UK Constitutional Law Association*, 31 October 2014) <<https://ukconstitutionallaw.org/2014/10/31/stephen-tierney-solomon-grundy-does-constitutional-change-the-smith-commission-timetable-to-transform-the-scottish-parliament/>>.

<sup>45</sup> House of Lords Constitution Committee, ‘Proposals for the devolution of further powers to Scotland’ (Constitution Committee 18 March 2015) <[www.publications.parliament.uk/pa/ld201415/ldselect/ldconst/145/14502.htm](http://www.publications.parliament.uk/pa/ld201415/ldselect/ldconst/145/14502.htm)>.

<sup>46</sup> Constitution Committee, ‘8th Report (2010–2011): Fixed-term Parliaments Bill’ (UKHL Paper 69), para 160.

devolution was achievable, meeting the specific needs and desires of each of the territories without abandoning Britain's unwritten constitution and without juridifying a political constitution that has worked well for centuries. Furthermore, the flexibility in the system has allowed for further constitutional change from time to time, responding to further demands or correcting what seem to be anomalies or outdated features of devolution.

But a disadvantage in the system is that there are ultimately no procedural checks. Parliament can effect any constitutional change it wishes and it can do so by way of ordinary legislation. In this respect the lack of citizen involvement in the process towards such significant constitutional change, change which in the end was passed in the Scotland Act 2016 by the UK Parliament without a referendum, is very different from the long period of citizen engagement we saw in the referendum. This reminds us of the extent to which the United Kingdom remains an outlier among modern democracies for the degree of flexibility in its constitutional arrangements.

In terms of the substance of the proposals, the Scotland act 2016 has realigned significantly the balance of competences currently set out in the Scotland Acts of 1998 and 2012 ('the 1998 Act' and 'the 2012 Act'). The Scottish Parliament is assuming a range of new powers in policy areas such as taxation, welfare, employability, transport, energy efficiency, fuel poverty, and onshore oil and gas extraction. These proposals have required significant amendments in particular to Schedules 4 and 5 of the 1998 Act. It is the provisions on taxation that have attracted the most attention. In light of the Scotland Act 2016 Scotland will acquire far more fiscal responsibility.<sup>47</sup> In particular it has been given extensive powers in relation to income tax raised in Scotland which is important in symbolic as well as practical terms. This builds upon the more modest tax powers which were included in the 2012 Act, a number of which are still to be implemented.

In introducing this measure, the UK Government noted that: 'Under the Scotland Act 1998 (the 1998 Act), the Scottish Parliament is responsible for almost 60 per cent of public spending in Scotland (e.g. health, education, housing, policing, justice etc.) but is responsible for only around 10 per cent of Scottish tax (council tax and non-domestic (business) rates). While the Scottish Government is also able to vary the basic rate of income tax in Scotland (by up to 3p) it has never used this power.'<sup>48</sup> But: "As a result of the Smith Commission Agreement, the Scottish Parliament will control around 60 per cent of spending in Scotland and retain around 40 per cent of Scottish tax. This will therefore make the Scottish Government one of the most powerful subcentral governments in the OECD, just behind the Canadian provinces and Swiss cantons. Importantly, it will therefore give the Scottish Government substantial choices in relation to levels of tax and spending in Scotland."<sup>49</sup> There is of course disagreement about what this will mean in practice with some scepticism as to the extent to which these powers can be used to produce variation across the state.<sup>50</sup>

The 2016 Act also changes the constitutional status of the Scottish Parliament, providing: 'A Scottish Parliament is recognised as a permanent part of the United Kingdom's constitutional arrangements.'<sup>51</sup>

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<sup>47</sup> Constitution Committee, 'Proposals for the devolution of further powers to Scotland' (18 March 2015) para 95, <[www.publications.parliament.uk/pa/ld201415/ldselect/ldconst/145/14502.htm](http://www.publications.parliament.uk/pa/ld201415/ldselect/ldconst/145/14502.htm)>.

<sup>48</sup> *Scotland in the United Kingdom* (n 6) para 2.3.6.

<sup>49</sup> *ibid* para 2.2.10. See also House of Lords Select Committee on the Constitution, '10th Report of Session 2014–15: Proposals for the devolution of further powers to Scotland' (UKHL Paper 145, 24 March 2015).

<sup>50</sup> Michael Keating, 'Not Devo-Max Yet' (*Centre on Constitutional Change blog*, 27 November 2014) . <https://www.centreonconstitutionalchange.ac.uk/blog/not-devo-max-yet>

<sup>51</sup> Scotland Act 2016, s 1.

It is difficult to see what constitutional effect this might have, given the UK's doctrine of parliamentary sovereignty,<sup>52</sup> but the very statement could be a steer to the courts to consider Scottish devolution now to be an entrenched arrangement at the level of constitutional principle.<sup>53</sup>

The future for the UK is now very unclear. The Conservative Government claims a mandate to pursue further reductions in public spending, the possible repeal of the Human Rights Act 1998 and an agenda of constitutional reform designed to enhance the legislative power of English MPs. This is the so-called English votes for English laws (EVEL) issue, designed to correct the anomaly whereby MPs from the devolved territories can vote, and in some circumstances could even hold the casting votes, in Westminster on bills which will in practice only affect England (the West Lothian question). Although, with a Conservative majority in the Commons, such a casting vote is unlikely to be an issue in practice, the current government moved ahead with a model whereby English MPs in the House of Commons are guaranteed a decisive say on such legislation.<sup>54</sup>

The Government is at the same time challenged by an equally assertive block of Scottish nationalists. The SNP claims the political legitimacy to fight austerity and demands implementation of its own constitutional priorities which include powers which go further even than the Smith Commission recommendations. The most explosive development was the Brexit referendum in June 2016. Given that a majority of Scots (62%-38%) voted to remain in the EU, the Scottish Government sees this result as entitling it to reopen the issue of independence. Depending upon how Brexit negotiations develop, such a poll is a very distinct possibility. In this context the Brexit referendum now poses a very real threat to the future of the Anglo-Scottish union.

Leaving the impact of Brexit to one side, the UK seems to be at a crossroads offering two possible constitutional directions: towards a UK where Scotland is treated as a separate entity in some kind of quasi-independent, confederal arrangement where its influence on the rest of the country is further marginalised, or towards a UK where devolution is reconfigured to include not only the dynamics of autonomy but also the imperative of integration. Notably the issue of federalism has rarely been discussed as a constitutional option for Britain. There are of course very significant objections to both the feasibility and desirability of federalism for the UK. In terms of feasibility it is a standard trope that federalism is a bad fit for the UK firstly because England is too big. There are also other more normative objections: a federal system would bring with it a fundamental restructuring of the constitution by way of a written constitution for which there has traditionally been little appetite. This would also mean the end of parliamentary supremacy, the keystone of the British system of government. Thirdly, it would

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<sup>52</sup> Mark Elliott, 'The Draft Scotland Bill and the sovereignty of the UK Parliament' (*Public Law for Everyone blog*, 22 January 2015) <<http://publiclawforeveryone.com/2015/01/22/the-draft-scotland-bill-and-the-sovereignty-of-the-uk-parliament/>>.

<sup>53</sup> Kenneth Campbell, 'The draft Scotland Bill and limits in constitutional statutes' (*UK Constitutional Law Blog*, 30 January 2015) <<http://ukconstitutionallaw.org/>>.

<sup>54</sup> England's position itself is arguably untenable, and the UK Government proposes a change to parliamentary procedure to ensure 'English votes for English laws'. The plan is that when a Bill is designated as 'England only' by the Speaker of the House of Commons, it will be considered only by English MPs at the Committee stage. The Bill would still need the support of a majority in the House to pass, but in effect English MPs will have a veto power. UK Cabinet Office, 'English Votes for English Laws: An Explanatory Guide to Proposals' (*Gov.UK*, July 2015) <<https://www.gov.uk/government/publications/english-votes-for-english-laws-proposed-changes/english-votes-for-english-laws-an-explanatory-guide-to-proposals>>. See also Mark Elliott and Stephen Tierney, 'House of Lords Constitution Committee Reports on 'English Votes for English Laws'' (*UK Constitutional Law Blog*, 2 November 2016) <<https://ukconstitutionallaw.org/2016/11/02/mark-elliott-and-stephen-tierney-house-of-lords-constitution-committee-reports-on-english-votes-for-english-laws/>>.



deliver new layers of government, a step which does not enjoy significant support in England. And finally, the lessons of other countries where federalism has been grafted onto a parliamentary system is that the role for the courts expands significantly, portending the juridification of Britain's traditionally 'political' constitution.

If we consider federalism to be in effect a balance between autonomy for sub-state territories and representation of these territories in the central organs of the state: 'self-rule' and 'shared rule', the UK devolution system has emphasised the former and almost entirely ignored the latter.<sup>55</sup> The trajectory of the post-referendum proposals leading quickly to a new Scotland Act 2016 are being followed by proposals for further powers for the Welsh Assembly<sup>56</sup> and may also lead to further changes to the powers of the Northern Ireland Assembly. The United Kingdom is therefore heading towards more and more self-rule without any real efforts to build institutions of shared rule.

The prospects for federalism look far less propitious today than they would have in the case of a hung parliament with different parties holding the balance of power along a range of possible governmental configurations; the prospect of Brexit has also done little to promote comity in Scotland and Northern Ireland where majorities voted to remain in the EU. In any case the lack of a formalised approach to shared rule is at present the biggest gap in any federal vision for Britain, although the high level of asymmetry in the system is also extreme by federal standards. In institutional terms however it can be argued these are not insurmountable challenges, but the political question is, who wants it? In other words, is it already too late to forge the political will across the Union for a 'holding together' model of 'shared powers' federalism? Scottish nationalists remain focussed upon independence. At the same time there is Northern Ireland where a federal solution would surely be viewed with deep suspicion for its integrative dynamics by Irish nationalists. Furthermore, can federalism be achieved at a price deemed to be worth paying in England, i.e. without massively diminishing English influence in the state, without imposing a fully codified constitution, without creating new layers of regional government and without abandoning parliamentary supremacy? It would seem that these challenges are in practical terms manageable; the recent, incremental moves towards English votes for English laws shows one way forward. Both the UK constitution and federalism as an idea for government are sufficiently flexible and adaptable to arrive at a new territorial accommodation for the UK. The real obstacle is that such a solution does not appear to be in the political interests of either the Conservative Party or the SNP. Federalism could work for Britain, indeed it may be the only constitutional system which can now hold the country together, but the irony is that two rival political forces are now in place at Westminster neither of which is likely to prefer it to the prospect of a more detached Scotland.

## Lessons Learned

The 2014 referendum offers a number of lessons: the first relates to the democratic potential of the referendum as an instrument of constitutional change; a second is some guidance on how to reach an amicable and consensual settlement of the secession issue; and a third is that territorial issues may in the end never be settled within a complex plurinational state where territorial societies might always seek to reposition themselves in relation to the central state. The constitutional future of the UK will turn on political will more than constitutional capacity. I will discuss each in turn.

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<sup>55</sup> Stephen Tierney, 'Giving with one hand: Scottish devolution within a unitary state' (2007) 5 (4) *International Journal of Constitutional Law* 730; "Federalism in a Unitary State: A Paradox too Far?" (2009) 19 (2) *Regional and Federal Studies* 237.

<sup>56</sup> Wales Bill, 20 October 2015.

A remarkable feature of the Scottish referendum was the level of popular participation. The turnout of 84.65% was the highest for any UK electoral event since the introduction of universal suffrage, significantly trumping the 65.1% who voted in the 2010 UK general election and the 50.6% who bothered to turn out for the 2011 Scottish parliamentary elections. But turnout is only part of the picture. Evidence suggests that citizens felt greatly empowered by the referendum and the role they had in making such a huge decision, seeking out information about the issues at stake and engaging vociferously with one another at home and in public spaces to an unprecedented degree in British politics, on social media etc.<sup>57</sup>

The fact that the process was agreed by both governments was a great benefit here. Voters had plenty of time to discuss and reflect upon the issue (the plan to hold a referendum was announced in January 2012) and the question (“Should Scotland be an Independent Country?”) was very clear, having been reviewed by the independent Electoral Commission. One of the most empowering elements of the entire process was the way in which, as the 18th of September approached and opinion polls narrowed, political elites on both sides had to sit on the side-lines, aware that the power to change or not to change the UK state lay entirely in the hands of the Scottish people.

A related consequence is that arguments of principle against the use of the referendum to make major constitutional decisions have been further undermined by the success of the Scottish process. It does often appear that the opposition we find to referendums in political theory and among political scientists owes more to a broader skepticism with popular politics altogether. Referendums are stereotyped as democratically problematic, not because citizens are in fact ill-informed voting fodder (if this were the case how could we legitimise representative democracy?) but because they get in the way of politics as an almost exclusively elite process interspersed by the occasional inconvenient election. The referendum is not a perfect device, and if not properly regulated it can indeed be manipulated by elites. But if the process is properly designed we now know it can work well.

The success of the referendum as an electoral event comes at a time of great proliferation for the referendum.<sup>58</sup> The success of the Scottish process may well encourage other states to use the referendum for major constitutional decisions and may also encourage other sub-state nationalists to lobby for a referendum.<sup>59</sup> The referendum is indeed on the rise in many other states, and this is itself part of a wider process of grassroots political engagement by citizens through non-conventional avenues. The politics of protest has been much talked about in recent years, but at a more prosaic level the internet has opened up a far more diverse range of sources of information for citizens, and at the same time has presented platforms for horizontal engagement among citizens through social media in ways which even ten years ago were barely feasible. Many citizens who are engaging in political argument to an unprecedented extent with many more interlocutors than ever before will not be satisfied unless they also have the power to make political decisions.

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<sup>57</sup> Ailsa Henderson, Liam Delaney, and Robert Liñeira, ‘Risk and Attitudes to Constitutional Change’ (ESRC Scottish Centre on Constitutional Change Risk and Constitutional Attitudes Survey 16 August 2014) <[www.futureukandscotland.ac.uk/sites/default/files/news/Risk%20and%20Constitutional%20Attitudes%20Full%20Survey%2014%20Aug.pdf](http://www.futureukandscotland.ac.uk/sites/default/files/news/Risk%20and%20Constitutional%20Attitudes%20Full%20Survey%2014%20Aug.pdf)>; ‘AQMen Data Science for Social Researchers’ (*AQMen Research*, 2017) <<http://www.aqmen.ac.uk/>>.

<sup>58</sup> Tierney, *Constitutional Referendums* (n 37).

<sup>59</sup> Stephen Tierney, “And the Winner is... the Referendum”: Scottish Independence and the Deliberative Participation of Citizens’ (*International Journal of Constitutional Law Blog*, 26 September 2014) <[www.iconnectblog.com/2014/09/and-the-winner-is-the-referendum-scottish-independence-and-the-deliberative-participation-of-citizens/](http://www.iconnectblog.com/2014/09/and-the-winner-is-the-referendum-scottish-independence-and-the-deliberative-participation-of-citizens/)>.

A second outcome of the referendum is that it arguably serves as a case study in how the issue of secession can be resolved in a consensual way. The fact that the UK accepted the democratic legitimacy of the SNP government to hold a referendum on the basis that it had won an election with this as a manifesto commitment, and the cooperation of the UK state in making the process free, fair and democratic, is one that other countries might draw lessons from. That a majority of Scots voted No in the referendum may be testimony to the fact that a state which behaves in this way towards a national minority may well encourage members of this minority not to vote for secession. In this way the UK process may be seen as something of a gentle civiliser<sup>60</sup> of the secession question. Of course other countries will argue that secession is simply not permissible under their constitution, at least not without a constitutional amendment which requires broad consensus across the state,<sup>61</sup> and I am certainly not making the case for a general right of constitutional secession. But the UK/Scottish model does offer a template for how a good process can be arrived at, which does offer hope for good relations after the referendum, whatever the outcome.

A final lesson from the process comes with the way in which the referendum has been followed by moves to further constitutional change. The UK immediately embarked upon such change. Although the flaws in the process are deeply frustrating, particularly for people elsewhere in the UK who feel disenfranchised by a process that seems to have been all about Scotland, the reality of the contemporary plurinational state is that there may never be a 'settlement' as such. This may in the longer term prove to be pathological for the UK unless some kind of federal solution can be found which has the buy-in of the United Kingdom's four main territories. In the end all that can be done is to appeal to the consent of these peoples to commit to the United Kingdom. In light of the United Kingdom's history as a union of nations, built upon consent, simply to proscribe secession and refuse to accept the democratic will of sub-state peoples is both undemocratic and potentially counter-productive.

Demands for further constitutional change will likely be a permanent feature of constitutional politics in the United Kingdom as they have been in other states such as Canada, Spain and Belgium. The best that can be done is to try to manage these demands within an evolving state. Frustrating though this may be for those who seek constitutional closure, many situations discussed in this book show that endless constitutional disagreement is far from the worst affliction for multicultural and multinational polities.

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<sup>60</sup> Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press 2001).

<sup>61</sup> This is the position taken by both the Spanish Government and the Constitutional Court in Spain.

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## CONTRIBUTING ORGANIZATIONS

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