



RESIST, REFORM OR RE-RUN?

Research and practitioners' insight

Short- and long-term reflections on Scotland
and independence referendums

By Ciaran Martin

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A photograph of the Edinburgh skyline at dusk, featuring the Belfrage monument in the foreground and the city buildings in the background under a dark, cloudy sky.

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PROFESSOR SIR TOM DEVINE

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About the author

Ciaran Martin is Professor of Practice in the Management of Public Organisations at the Blavatnik School of Government at the University of Oxford. He has held this position since September 2020.

Before that, Professor Martin was a senior UK civil servant. From 2014 to 2020 he led the government's work on cyber security, founding and leading the National Cyber Security Centre, a subdivision of the intelligence agency GCHQ. He was appointed CB in 2019 in recognition of this work, and has been recognised for his cyber-security leadership by the governments of the United States, Israel and elsewhere. In the course of a 23-year career in the civil service, he held a range of positions in the Cabinet Office, HM Treasury and the National Audit Office. He graduated from the University of Oxford (Hertford College) in 1996 with a First Class Honours degree in Modern History.

The background to his experience in respect of this paper is his work as Constitution Director in the Cabinet Office between July 2011 and January 2014. He was brought into this role by the then Cabinet Secretary, Sir Gus O'Donnell, following the election of a pro-referendum majority in the Scottish parliament weeks before. By the time he arrived, the then Prime Minister David Cameron had already undertaken to honour the mandate given to the Scottish government, but had taken no decisions on how to deliver on that commitment. Reporting to the Prime Minister, and the then Secretary of State for Scotland, Michael Moore, Professor Martin helped negotiate what became the Edinburgh Agreement. This provided the basis for the agreed, time-limited delegation of power from the UK parliament to the Scottish parliament to provide for a referendum on independence for Scotland. When the Agreement was signed in St. Andrew's House on 15 October 2012, Professor Martin was one of six people seated at the table, alongside Mr Cameron and Mr Moore on the UK government side, together with First Minister Alex Salmond, his then deputy Nicola Sturgeon, and civil service opposite number Ken Thomson (Martin and Thomson did not sign the Agreement).

Subsequently, Professor Martin was deputy chair of the committee overseeing HM Government's Scotland Analysis Programme, led by Sir Nick Macpherson, then Permanent Secretary at HM Treasury. This group oversaw the series of publications by the UK government on the potential consequences of independence. Professor Martin was the principal author of the first paper, on how the process of negotiation leading to the creation of an independent Scottish state would be most likely to unfold.

About this paper

The paper deals with three issues. Chapter 1 is about the circumstances under which a new referendum on independence should be called, and the potential clash of democratic mandate and law. Chapter 2 is about the crisis of the Union, and analyses the proposed alternatives to it. Chapter 3 looks at how a referendum might take place, and how the referendum campaign sets the tone for what happens thereafter, depending on the result.

The whole paper is summarised in a lecture, given at the Blavatnik School of Government on 13 April 2021. The lecture is published [here](#), before and in addition to the main text.

RESIST, REFORM OR RE-RUN?

Short- and long-term reflections on Scotland and independence referendums

FOREWORD

by Professor Sir Tom Devine

Over the last year there has been a veritable Niagara of media comment and discussion on the possibility of another referendum on Scottish independence, and on what might follow if one were held. Much has been mediocre, and some of interest. But in my view, little if any of the commentary yet published can compare with this powerful and penetrating contribution by Professor Ciaran Martin.

It is not directly about the case for union or independence, though some parts of the discussion bear on those momentous issues. Rather, as he explains, the treatise “is about how the UK and Scottish governments should seek to resolve a hugely important and contentious political issue should there be a clash between the mandate of the Scottish electorate and the powers of the UK government”.

Professor Martin is formidably well qualified to be able to offer wise counsel on these crucial matters. He brings to the problems academic detachment and impartiality, as Professor of Practice in the Management of Public Organisations in the Blavatnik School of Government at Oxford. Anyone reading this paper will immediately be impressed by the cool objectivity of his judgement on issues of huge complexity. But, in addition, he has a remarkable wealth of practical experience: as a senior civil servant in the Cabinet Office, as Principal Private Secretary to the Cabinet Secretary and head of the civil service, and from his years of service at GCHQ.

Most important, however, for the thinking underpinning this paper, Professor Martin was, as Constitution Director at the Cabinet Office from 2011 to 2014, the principal UK civil service negotiator, reporting directly to the then Prime Minister, David Cameron, and the then Scotland Secretary Michael Moore, during the discussions which led to the agreed procedures for the 2014 referendum on Scottish independence. He therefore brings unrivalled knowledge of the events of that period to current debates on a future referendum. Time and again in this text he is able to reference this experience, and to extrapolate from it lessons that might be used to inform any future negotiations.



Professor Martin brings acute observations to a whole range of key issues: the economic weaknesses of the case for independence in 2014; how the global community of nations – as well as organisations Scotland might wish to join, such as the EU and NATO – would treat an independent Scotland; whether there is any merit in the view that the franchise for another referendum should be extended to those of Scottish birth living elsewhere in the UK; and many other fascinating questions.

But the principal focus of the paper is the current UK government’s opposition to conceding another referendum to the Scottish government, and how sustainable that might be. In analysing this question, Professor Martin demonstrates not just his insider’s knowledge of the UK’s constitution, conventions and laws, but a deep understanding, reflecting his earlier historical studies at Oxford, of the history and character of the Anglo-Scottish Union and how it has developed over decades and centuries. His account of the Union’s evolution, from its pre-democratic beginnings to the modern voluntary arrangement based explicitly on consent, is profoundly important to anyone seeking to understand the current imbroglio facing the UK.

Likewise, there is at present much talk from the Labour Party and the Liberal Democrats about the possibility of federalism in the UK as an alternative to a Scottish divorce. They would be well advised to read Professor Martin’s shrewd assessment of the grave obstacles to such an option before proceeding further down that particular track.

Indeed, this treatise should be a must-read for politicians of all parties, and especially for the denizens of Downing Street and Bute House. As a lucid, well-informed and fluent examination of one of the great issues of our time, it also deserves wide readership among the electorate of the UK.

Sir Tom Devine Kt, OBE, HonMRIA, FRSE, FBA

Sir William Fraser Professor Emeritus of Scottish History and Palaeography The University of Edinburgh

SUMMARY LECTURE

In the middle of the noisiest electoral campaign in the short history of the Scottish parliament, one important fact is being overlooked.

The formal position of the government of the United Kingdom appears to be that there will be no lawful or democratic route by which to achieve Scottish independence for an unspecified number of decades.

This is irrespective of how Scotland votes in May, or at any subsequent election during this unspecified period.

My principal contention in the paper published today is that should events transpire – either later this year, or in subsequent years – that make this currently rhetorical position a firm constitutional reality, then the Union as we understand it will have changed fundamentally.

In effect, it would change the Union from one based on consent, to one based on the force of law.

That would be the most profound transformation in the internal governance of the United Kingdom since most of Ireland left, almost exactly a century ago.

It is very possible – some say highly likely – that in May, or at some other point in the future, the Scottish parliament will have a majority elected on a very specific commitment to hold another independence referendum. Whether it is made up solely of Scottish National Party MSPs, or SNP plus Greens, or Alba – or, hypothetically, 65 non-party independents – is of zero constitutional or legal significance. A majority is a majority, and – as we shall come to – no one has attempted to define a different threshold for a trigger for a referendum.

It was this very scenario that prompted David Cameron's coalition to enter into talks with the Scottish government to provide for a temporarily devolved power to hold the 2014 referendum. I was present throughout these discussions as Constitution Director at the Cabinet Office, and as the lead civil servant on the negotiations, answering to Prime Minister David Cameron and Secretary of State for Scotland Michael Moore. The paper I am publishing today draws on the lessons of that period, as well as on wider constitutional law, British history, and international comparators. It avoids, as far as possible, specific references to parties, politicians, or current political events, aiming to stick to constitutional principles. It is not about the merits of union or of independence. It is about how the British state faces up to the possible clash between votes and laws.

In the event of such a clash, the UK government and its parliament has broadly three options for how to respond. These are as follows:

- **Resist** a referendum, by force of law (this is the UK government's current policy);
- **Reform** the United Kingdom, and Scotland's place within it, alongside that resistance, with the aim of providing an alternative to independence capable of overcoming its current position in opinion polls (which is, by historical standards, very strong); or
- **Re-run** the 2014 referendum, or some variant thereof, having abandoned the resistance policy in the light of the electoral mandate.

I draw four key conclusions in the paper.

First: That the Union can be maintained by force of law is not, ultimately, in doubt. The question is whether it is wise to seek to do so. Questions of precise constitutional powers are, arguably, beside the point.

The evolution of the British constitutional system is a strange business. In the late 2000s, the then Cabinet Secretary, Sir Gus O'Donnell, whose private secretary I was, came up with the idea of a Cabinet Manual to help handle what looked like being the first hung parliament for several decades. This is now often regarded as a constitutional tablet of stone. And so it is with the now famous 'Section 30' power that provided the basis for the 2014 referendum. It too has acquired seemingly sacrosanct constitutional status; in fact, it was a hastily improvised response to the circumstances facing the two governments following the Scottish National Party's surprise electoral win in 2011. Although some academics had pointed out some years earlier its potential for use as a route to holding a referendum, Section 30 was not designed for existential constitutional issues. It was designed to iron out mistakes in the way devolved and reserved powers work in more mundane matters, such as road transport, and to provide flexibility for new developments.

It was never regarded as the only legal path to a referendum. Indeed, Whitehall gave serious if brief consideration in 2011 to running the referendum under Westminster law, before deciding that it needed to be, as in the slogan, 'Made in Scotland'. The Scottish government may find ways around a refusal to grant a Section 30 order, as it has said it will. But that's potentially beside the point. Westminster is sovereign, and could pass a further law blocking whatever path Holyrood had found. Ultimately there are no constraints on what Westminster can do to block a lawful path to Scottish independence if it's so minded.

There are, in effect, only two things that matter.

One: The law is in Westminster.

Two: The votes are in Scotland.

So if these two forces clash, one has to give way to the other. But there are no rules as to how such a situation should be resolved. It didn't have to be this way, and it isn't in other countries. But the UK government and parliament conspicuously failed to show any interest in setting out rules for what voting to stay in the Union should mean in terms of future referendums – a measure which, for example, Canada took following the second Quebec referendum in 1995. You might not like Canada's rules – and many of Quebec's separatists don't – but they are clear. Surely it would have been wise, in the aftermath of the close vote in 2014, to accept that Scottish nationalism was not going away, and that as such it might be wise to think about establishing a clear framework – thresholds, timeframes and so on – around what would and would not trigger a further referendum. But Westminster instead turned its attention to English votes for English laws, and thence to Brexit. There was no interest in reform.

So here we are now. A vote next month, or at any time after, in favour of any majority – however constituted – of MSPs elected on an explicit pro-referendum mandate, in effect puts Scotland's consent for the Union on pause.

We have no other means by which to measure that consent. Mr Cameron and Mr Moore correctly recognised in 2011 that the pro-referendum parliamentary majority was the principal legitimate measure of the view of the Scottish people at that time. In the words of Mr Cameron in his memoirs: "a referendum was unavoidable. People had voted for it: we would deliver it."¹ There is no rational basis on which to depart from Mr Cameron's view in 2021, should it be the wish of the Scottish people that a referendum is held.

No political argument should override the democratic mandate. If, as the present Prime Minister has argued, a referendum is not the priority of the Scottish people, they can indicate this by voting for one or two of several parties who do not wish to hold one. Indeed, a referendum is far higher up the agenda in the 2021 election than it was in 2011, when it was barely discussed. And a referendum doesn't have to be immediate: the electoral mandate is for the next Scottish Parliamentary term, as it was in 2011. The other argument that can be expected is that not enough time has passed since the 2014 referendum. This, too, is an entirely political argument. Quoting back remarks from that period that it was a "once in a generation" experience is just politics: it's just a slogan, with the same constitutional standing as the famous promise of £350 million per week for the NHS that was made during the Brexit campaign.

The distinction between law and sloganeering may come out in court. If the Scottish government proceeds with its so-called Plan B – legislating for its own referendum because Westminster has withheld its consent – then the UK government will be duty-bound to challenge it in court. Arguments about the priorities of the Scottish people, or slogans from 2014, will not feature in the courtroom. Instead, UK law officers will have to say out loud that, although they like to describe Scotland as a nation in its own right in a great multinational partnership, the country has, in fact, no legal right to self-determination. In the event – in my view, an unlikely one – that the Scottish government won the case, the UK parliament could pass any legislation it wanted to prevent the Plan B referendum anyway, thus removing any doubt about who is in control of the Union.

Overruling a democratic mandate by force of law, however it is done, would have two profound implications.

First, a century of union by consent would effectively come to an end: the Union would become an entity sustained by law alone.

The Anglo-Scottish Union in 1707, and the extension of a similar arrangement to Ireland just short of a century later, took place in the pre-democratic era, though the concept of partnership and consent was at the core of the subsequent narrative of the Anglo-Scottish story, if not the Anglo-Irish one. The later history of the 19th century and early 20th century showed that the Union had clearly evolved to command the consent of Scots (despite what could charitably be described as a rocky first half-century). Ireland was a different story, of course, and it was Ireland's experience that set the early rules of the British Union: no constituent part was allowed to leave.

¹ David Cameron, *For The Record*, William Collins (2020), p. 316

A century and a decade ago, the then Unionist, now Conservative, Party was explicit that even a UK-wide parliamentary majority (as distinct from an Irish one) for modifying the Union, through what we would now call devolution for Ireland, needed to be resisted: and resisted by any means necessary. Andrew Bonar Law, the (Scottish) leader of the party, famously said that “there are things stronger than parliamentary majorities” when it came to maintaining the Union. The Union of the crisis of a century and a decade ago was demonstrably not a voluntary union of four willing nations, free to leave at any time. But since the resolution of the Irish question in 1921, to the satisfaction of most parties other than the Northern Ireland minority, the British Union has been based on an assumption of the separate and collective consent of four constituent parts, each of which is free to withdraw its consent if it wants to. This principle of consent emerged slowly: it was enshrined for Northern Ireland in the 1949 Ireland Act, and has been implicitly accepted since Scottish nationalism became a visible, if erratic, political force during the course of the 20th century. But it has been formally articulated by every Prime Minister since Margaret Thatcher. (Intriguingly, the current administration has been rather vague about Scotland’s right of self-determination; maybe the spirit of Bonar Law is – after all – back in charge of the Conservative Party. We shall see.)

Secondly, and relatedly, the UK government would be telling Scottish nationalists that there is no lawful path by which to achieve their objectives, at least until such time as the UK government gets round to deciding what it thinks “a generation” means.

The two clearest statements of UK government policy, coming from the Secretary of State for Scotland and the Prime Minister, close off that parliamentary and electoral route for a very long time. They speculate a timeframe for a future referendum reaching from 2039 (because 25 years from the last such vote is the earliest that one could take place, according to the Scotland Secretary) to 2055, the Prime Minister’s professed preference being for a gap similar to that between the European referendums – that is, 41 years. There is no formal, written policy countermending these statements; there is only a stated intent to refuse any request for a referendum.

It is therefore not hyperbole to say that the UK government’s position is that there is, and will be, no lawful, democratic path to Scottish independence for an unspecified number of decades, regardless of the wishes of Scottish voters during that period. Let us dwell on this for a moment. I am not speculating for a second that Scottish politics could turn violent: there is no history, and no sign, thankfully, of that. As one SNP senior put it to me in 2012, there’s been nearly a century of active Scottish nationalist politics and “no one has suffered so much as a nosebleed”.

What matters, however, is that hundreds of thousands of Scots who quite clearly support independence have been told throughout their lives, however old they are, that if they succeed through lawful, democratic parliamentary politics – of the type pursued by the SNP and the Greens, for example – then their objectives will be realised. Now, for the first time in our lifetime, the UK government is saying that this is no longer the case, and that for an indefinite period, the lawful, democratic pursuit of a legitimate political objective cannot result in success, no matter how many people vote for it, and however often.

Such a position is not, in and of itself, undemocratic: plenty of democracies do not allow secession. Spain is a democracy, and Article II of its constitution thunders that “The Kingdom of Spain is indivisible.” It is this that renders what Catalan nationalists have attempted to do unlawful under Spanish law. But Spain does not pretend to be a voluntary union of different nations; the United Kingdom does.

So could the United Kingdom still be a voluntary partnership, if those who pursue independence for Scotland lawfully, peacefully and reasonably are left with the choice of, in effect, taking it lying down, or setting out to test the law and the political process? It is not hard to see how this could do terrible damage to trust, not just in government but in the Scots’ sense of participation in a union of equal partners – this being the core historic principle of the Union. A union is not a union of equal partners if the bigger partner does not allow the smaller one the option to leave.

This dilemma perhaps explains why some of the more thoughtful unionists are keen to float alternative structures for the United Kingdom. Such suggestions involve buying time by resisting a referendum, and using that time to try to gain support for something else: in other words, ‘resist’ must be accompanied by ‘reform’.

Two options are commonly put forward. One is procedural, and involves having some sort of ‘constitutional convention’. The second involves bypassing this more deliberative phase and moving straight to some sort of federal alternative model for the United Kingdom. Beguiling though these ideas are, the second key conclusion I draw is that, in my view, **there is no viable alternative model for the United Kingdom. Ultimately, the choice facing Scotland, whether soon or at some point later, is between the status quo (or some variant of it) and independence.**

Some reformers are fond of pointing out that it is half a century since the Kilbrandon Commission looked seriously at the British constitution. But there has been no shortage over the years of either suggestions or analysis in regard to constitutional reform, and it is impossible to envisage a new commission coming up with an idea that no one has previously considered. A convention might explore worthy enough ideas, such as including a so-called 'regional' dimension within the House of Lords. Fine, but it would seem highly unlikely that people tempted to vote 'Yes' to an independent Scotland would find their concerns assuaged by such a measure.

Another set of suggestions would likely be unveiled under the banner of 'improving' the devolution settlement. In the first two decades of devolution, this tended to involve extending it. But devolution is at or near its limits: it cannot be extended further without infringing on the core competencies of a nation state, such as immigration, defence, or foreign policy, including relations with the European Union. Practically, there just isn't much left that can sensibly be devolved. Expanding it any further, even if it were possible, may even exacerbate tensions within the UK. Conservative unionists, including Mrs Thatcher and the late David McLetchie (the first leader of the Scottish Conservatives at Holyrood) have drawn a distinction between Scotland's right to national self-determination – in other words independence – which they support, and the right of Scotland to, in effect, dictate favourable terms unilaterally within the Union, which they do not. The bigger picture is that Brexit has laid waste to a delicate constitutional balance. In terms that, in particular, those who advocated Brexit will understand, a nation is either 'sovereign' or it is not. There is no in-between. Scotland is not a sovereign state. As far as the rest of the world is concerned, the UK may or may not be 'four nations', but all that matters is that it is one state. And that one state can only make a single choice about big issues. Given the population balance of the United Kingdom, and its decision-taking structures, this means that – in important issues such as relations with the rest of the continent – what England wants, England gets.

Events since 2016 have shown that the UK has not become – as some suggested it had, after the 2014 referendum – a quasi-federal state as a result of devolution. Scotland was, of course, removed from the European Union by a narrow majority of a much bigger – combined English and Welsh – electorate. But perhaps more damage was done in the consequent negotiations. The terms on which the UK sought to leave were negotiated between the UK government and its English backbenchers – not with the legislatures, or MPs, or in fact anyone representing Scotland. The process showed that the Scottish parliament was not, in reality, a 'national' parliament in the proper sense of the word. Politically, the Scottish parliament was established because a clear majority of Scots voted for it in a referendum in 1997. But legally, it is a creature existing entirely at Westminster's pleasure: constitutionally, it is nothing more than a large, powerful

county council. And during the Brexit process, it was treated commensurately. A 50-plus-one majority in the Commons is all that matters in UK politics, if the government chooses to govern in that way. And it did.

So, viewed from the perspective of 2021, the devolution settlement is unlikely to expand, as it has nowhere further to go. Long term, it is more likely in fact to be rolled back, given the current political mood amongst Conservatives, who are increasingly vocal that the whole enterprise was a mistake. Lest this sound fanciful, let us look at two post-Brexit developments which took place without the consent of the devolved administrations. One is the abandonment of the so-called Sewel Convention, which existed as a carefully observed undertaking from London not to alter the powers of the devolved administrations without their consent. It is now effectively gone. The second is the Internal Market Act, which, perfectly lawfully but without the consent of Scotland or Wales, confirmed the powers of the UK government to act directly in devolved areas. There are no limits to the powers of Westminster to curtail the powers of the devolved bodies.

A properly federal arrangement for the UK would however afford such protection for some form of self-government in Scotland. Federalism would confer unchangeable guarantees on the existence and powers of the Scottish parliament in the matters for which it was responsible, as well as a clear set of rules for decisions on UK-wide matters.

Could the UK become properly federal? Realistically, no. This is not just because England is so vastly bigger than the other parts and has no desire to 'regionalise' into smaller blocs. It is because it is simply impossible to see democratic consent materialising for such a proposal. Federalism would require the abolition of the ancient doctrine of parliamentary sovereignty. It is worth explaining why. When Gordon Brown was preparing his package of constitutional reforms, on becoming Prime Minister in 2007, one of those he most wanted to introduce was a law to make the Scottish parliament permanent. He was quickly, and correctly, advised that such a measure was absolutely impossible. Parliament is sovereign, and a future parliament cannot be bound, save by treaties with other sovereign nations. There is no lawful way of telling the UK parliament that it can't abolish the Scottish parliament, or of curtailing its powers if it feels like doing so in the future. That is not the case in properly federal countries like the United States. So, for true federalism, parliamentary sovereignty would have to go.

The catch is that parliamentary sovereignty has been the bedrock of the English constitution for centuries. So such a change would surely meet the threshold for a referendum. We have just endured five years of the most tumultuous political wranglings of the post-war period, brought about entirely because a largely English and Welsh majority wished to 'reclaim' what it perceived to be a state of full sovereignty that the UK had previously enjoyed. It is nearly impossible to see the same English voters turning out in a referendum to limit the powers of the London parliament in perpetuity – including, presumably, giving the non-English parts of the UK some sort of a 'lock' in major UK-wide decisions – so that Scotland might feel more comfortable within the Union. If one of the senior pro-Brexit leaders were to say in public that he or she was willing to recommend the renunciation of parliamentary sovereignty, federalism might stand a chance. But even then, the union with Scotland, unlike separation from Brussels, is not an issue that excites the English popular vote.

And would Scotland vote for it? That too seems unlikely. Current polling shows that so-called 'devo-max', a sort of proxy for federalism, is much less popular than it was in 2014. And surely Scotland could not be expected to vote for federalism if it had been denied a referendum it actually wanted on independence. Would the ratification of a federal constitution require the separate consent of all four parts of the UK? If so, it seems likely that at least one would vote against (and let's not get started on whether a simple or cross-community majority would be needed in Northern Ireland). And if it were a UK-wide vote, and Scotland voted against federalism but was overruled by England – as it was in the case of Brexit – then imposing a constitution on Scotland by way of English votes would be a strange way to win round Scots to the Union.

The difficult truth for unionists is that two huge political trends have quite possibly funnelled Scottish politics into a second binary decision between union and independence, with no third option. The first is the abandonment of the tradition of English majoritarian restraint that has often (though not always) been evident in the history of the Union. Ironically it used to be Conservatives in particular who were acutely sensitive to accommodating Scottish differences. For example, Winston Churchill – in post-war opposition, but in the process of building the foundations of the 1950s dominance of Scotland, which saw the Conservatives (still calling themselves the Unionists) win an outright majority of the popular vote in Scotland in 1955 – openly fretted that the post-war nationalisation of industry on a UK-wide basis would replace local Scottish control of key Scottish employers with London-based bureaucracies.

But this sensitivity to Scotland, already in long-term decline, has now been completely abandoned. Brexit is done; and it was done to Scotland, not with it. The manner in which the post-Brexit constitution was delivered was not as a United Kingdom of

partners, but as a 'Greater England'. The genius of the British Union was always that England was disproportionately powerful within the Union, but didn't act like it was. With the English imposition of a hard Brexit on Scotland, that is no longer the case, and noticeably so.

And this comes on the back of a period where, more often than not – and in a manner that is somewhat out of kilter with the history of the Union – Scotland has made very different political choices to England. This has been underway for four decades, at least, but has become much more pronounced in the last half-decade, as Scotland, on the instruction of its voters, has effectively withdrawn from any leading part in UK-wide politics.

In three consecutive general elections, Scottish voters have sent to Westminster an overwhelming majority of MPs whose core political objective is to withdraw Scotland from UK public life. This has killed off one of the core narratives of the Union over the course of its three centuries: that Scots have played a disproportionate part in the leadership of the UK as a whole. When Sir Malcolm Rifkind, then Foreign Secretary, lost his Edinburgh seat in 1997, it was not obvious that he would be the last Conservative sitting for a Scottish seat to hold a senior position in the Cabinet. The only current senior Conservative with a Scottish accent, Michael Gove, sits for Surrey. The Commons no longer has its Gordon Browns, Alistair Darlings or John Reids: Labour's most senior Scot, Shadow Chancellor Anneliese Dodds, holds a seat here, in Oxford. The last senior MP for a Scottish seat to play a major role in a British government was Danny Alexander. There isn't even a Sir Nicholas Fairbairn figure loitering around Westminster reminding us of the now defunct tradition of laird Scottish Toryism. This is a fundamental change to the Union that no constitutional tinkering can fix.

So if events do bring us to the position of a second binary choice, either soon or in the more distant future, my third conclusion is that the **2014 template is broadly replicable for a further referendum.**

Should there be such a referendum, a high threshold should be applied to changing any of the arrangements that worked well in 2014. The Edinburgh Agreement, along with the 2014 vote, should be recognised as a remarkable achievement, given the history of constitutional disputes in the UK and the experience of other countries: a free and fair vote in a hotly contested campaign, but with no serious complaints from either side, before or after the result. Fear of a different result should not be allowed to validate unwarranted criticism of the process.

But we can expect such a debate. It would, for example, be possible to vary the terms, or the franchise, or to insist on holding a confirmatory subsequent referendum following a 'Yes' vote in principle. But all this comes back to questions about consent, and in what way unionists seek to maintain the Union. There are numerous ways in which Westminster could try to tilt the balance, to prevent Scottish independence from happening by democratic means. But none of them would be invisible. For example, extending the franchise to Scots living in other parts of the UK might gain marginal support for a 'No' vote. I understand this argument, as someone who found it painful not to have a vote on the 1998 Agreement in Northern Ireland, having left there permanently just two years earlier. But such a decision would be prohibitively complex; there would be bound to be hard cases and questionable implementation; and it would introduce a potentially troublesome form of ethno-nationalism into the contest. It would therefore be wildly contentious. If expatriate Scots' votes proved decisive, it would hardly settle the matter. Similarly, we already know from the 1979 devolution referendum that a turnout threshold is liable to cause great resentment. And despite – given the Brexit experience – the allure of a second referendum on terms of exit, a requirement for a confirmatory referendum incentivises the following dreadful outcome: a heavy vote in favour of the principle of independence (because there are no consequences at that point) followed by very tough negotiations whereby London seeks to disincentivise Scotland from leaving; and a second referendum with a narrow vote to stay in the Union because the terms of exit are so harsh. It is hard to think of a better recipe for sullen Scottish discontent within the Union for decades to come.

What would be needed in the aftermath of another 'No' vote would be a positive attempt to shore up the Union, as well as new rules for how Scotland should be allowed to exercise self-determination in future. There is much discussion about what a 'Yes' vote for independence would lead to. There was too little last time about what a 'No' vote to stay in the Union might mean. This is why we are facing the possibility of such a constitutional mess next month. Should the same situation recur at some point, it would be perfectly reasonable for the UK government to seek to agree, at that juncture, a set of rules for the future exercise of Scottish self-determination.

Such a move cannot legitimately be used, in my view, as a way of dealing with an outcome next month that provides a parliamentary majority for a referendum. If Scots vote next month for a referendum, there should be one. Legislating for new rules to impose new requirements for a referendum after votes have been cast is, in effect, legislating to set aside the result of an election. My fourth and final conclusion is that **the conduct of the campaigns on both sides in 2014 unnecessarily complicated what is a huge, but actually reasonably straightforward, political choice which is easily understood by most people. If there is another referendum, this need not be so again.**

It is now becoming clear that another objection to a referendum – or perhaps a precondition for one – is giving 'detail' on what an independent Scotland would look like. Here the experience of 2014 should be studied carefully.

Both sides made implausible assertions in 2014. The Scottish government sought to assert that independence would mean broad continuity in many areas, stretching credulity in the process, most notably with its utterly implausible claims of automatic entitlement to a currency union – one of many areas where it insisted, to a sceptical public, that little would change under independence.

But the UK side was hardly blameless. It undertook three main strands of work. One was around economic forecasting, which invariably showed a high likelihood of severe economic trouble for Scotland under independence. The professional quality of these forecasts was unimpeachable. But the future is unknowable. No one could have predicted that, within a century of each, the Anglo-Scottish Union would be proved a roaring economic and political success but the British-Irish Union would be proved a disaster. As with Brexit, voters are invited to take the long view.

The second strand was the most questionable: a series of analyses implying that an independent Scotland would be alone and friendless in the world. Whilst the question of EU membership has changed completely since 2014, it remains troubling to me that when it came to what was, at the time, the issue of continuing EU membership for Scotland, the UK government asserted as near-fact that Scotland would be expelled. In reality, no one knew what would happen, and there was a powerful counter-argument on the table from no less a figure than Sir David Edward, the Scottish former judge at the European Court of Justice, who argued powerfully that the court on which he used to sit would not countenance the involuntary expulsion of five million European citizens.

So beware seemingly authoritative warnings about the EU in a future campaign. Spain is normally the unionists' strongest card, and the then Prime Minister Mariano Rajoy helpfully waded into the 2014 debate. But Spain's recent decisions show it would be likely to be open to an application from Scotland, providing the UK recognised the existence of the new state. Spain has no problem with Montenegro's accession, but blocks Kosovo's: that's because Serbia recognises one but not the other. Similarly, in 2014, the eminent Scottish diplomat Dame Mariot Leslie demolished arguments about the perceived difficulty of Scotland joining NATO, a very different organisation to the EU (Dame Mariot herself being a former UK Ambassador to NATO). As a former securocrat, I would concur with her view that it is very difficult to envisage NATO rejecting an application from a willing Scotland in the present geopolitical climate.

The final piece of work, however, is likely to have been the most enduring. It is worth anyone interested in the subject revisiting the legal opinion by Professors James Crawford and Alan Boyle² on the laws of statehood and how new states come into existence, published by the UK government and based on voluminous precedent from the UK itself, and the rest of the world, over the previous hundred years or so. What that paper shows is that whilst negotiations bringing new states into existence are lengthy and difficult, involving very hard choices, there is a clear path to negotiated independence. The ‘continuing’ state – in this case the United Kingdom – starts with many of the advantages conferred by the ownership of assets, though this is not without its drawbacks, as ‘ownership’ also extends to public debt. So if the continuing state isn’t fair on asset division, it won’t get its way on debt. Taken together, these factors normally incentivise an equitable agreement, and this has happened in numerous examples across the world over the past century.

There are huge consequences to independence. Should there be a further referendum, those proposing separation would do well to avoid silly assertions to the contrary. As with Brexit, independence would involve the creation of barriers that do not currently exist. There would be a land border of some sort with England – just as there has been in Ireland for a century, both before, during and after EU membership. There would be, in time, different currencies, as there have been for decades across the Irish border, both during and after the UK’s EU membership. Nationalists would also have to address very challenging fiscal numbers, assuming a reasonable settlement of debt in the negotiations. Similarly, EU membership would be likely, but not inevitable, and almost certainly not immediate. And history shows that setting up a new state is time-consuming, resource-intensive, and disruptive. The challenge for nationalists is to persuade voters that the disruption would be worth it.

Equally, however, unionists should not repeat their 2014 mistake of, in effect, claiming that the enterprise of creating a successful Scottish state is impossible. The history of northern Europe, with its numerous small, independent states forged from larger ones, shows that such an assertion is plainly ludicrous. Nor should unionists be allowed to demand, as they did in 2014 and show every sign of doing again, that their opponents be required to provide certainty about future arrangements for an independent Scotland. These are demands that are designed to be impossible to meet. How an independent Scotland would fare would depend in large part on the decisions taken by its voters and by the sovereign government it elected after independence, as well as on the actions of others, such as the UK and the EU, and the circumstances of the time (no one predicted Brexit would take effect during a pandemic). As the present UK government knows perhaps better than most, major constitutional change is a mixture of risk and opportunity, of certainty and unknowables. Voters understand this.

Put bluntly, surely it is not beyond voters to compare Scotland as it is now, with the benefits and drawbacks of being part of a larger state, with what it might look like as a small, independent, northern European nation? It is not as if there is a shortage of comparators for Scotland to look at.

There is ample basis for Scots to make an informed choice on this question. Scots will vote shortly on whether they wish to make this choice. But I shall conclude by returning to what might become, in a few short weeks, the most pressing question: whether or not they are to be allowed a choice at all. The temptation for the UK government to push Scotland’s choice into the distant future – into someone else’s tenure of office – is obvious. No one wants to be the Lord North of the 21st century. But history reaches its own conclusions regardless of exact timeframes. Ronald Reagan’s term of office expired before the fall of the Berlin Wall, but history records that he won the Cold War. Conversely, history will recall the attempts of the Major and Blair administrations to put the UK at the heart of Europe as failed efforts, even if it took years for their failure to become a reality. If it is clear that the Union suffered fatal damage during this period in our history, no future historian will absolve this government from blame for its collapse, even if it finally happens long after our present leaders have left office.

So in defending the Union it professes to cherish, the first choice the UK government might face, whether in May this year or at some point in the future, is whether it will try to maintain that Union through force of law, or to win renewed consent for it in people’s hearts and minds. It is one or the other.

² [Devolution and the Implications of Independence, HMSO, February 2013, Cm 8554](#)

CHAPTER 1:

RESIST – The ghost of Bonar Law

Scotland might vote for a pro-independence referendum in May 2021, or it might not. Whether that majority is down to a single party, two parties, or a collection of individual MSPs makes no constitutional or democratic difference. Whatever happens in 2021, it seems realistic to assume that even if there is no mandate for a referendum now, there could well be one in the future. And there are no real rules for what happens then. There is only one overarching rule: that the UK government can block any and every lawful path to Scottish independence if it wants to. This is a statement of fact, but not widely understood. If it were, the debate, and accompanying speculation, over the power to hold a referendum would be quite different. The focus would be on the policy choice of Westminster alone in the event of a pro-independence majority being elected to the Scottish parliament, rather than on whether any alternative proposed by the Scottish government could get past the courts.

In one sense, the decision-takers of 2011 understood this point – that this is a political choice about consent – arguably better than many commenting on events now. It is worth, therefore, understanding the events of the period between the SNP victory in the summer of 2011 and the signing of the Edinburgh Agreement in October 2012, which set out the agreed framework for a lawful referendum two years later.

Understanding that process is important to understanding the current position, and not just because it provides a clear and obvious template for any future referendum. It matters for a further three reasons:

- First, it's essential to understanding the improvised constitutional arrangement of a decade ago, which the Scottish government seeks to repeat should it win the election and which the UK government wishes to resist;
- Second, it shows that the current looming constitutional crisis between powers and mandate is the result of a conscious choice by London to avoid doing either of two things – to devolve permanently to Edinburgh the power to hold a referendum, or, instead, to follow Canada's example and set out some clear rules – as to do either of these things would trigger a future referendum, or constitute an acceptable mandate for separation through one, or both;

- Third, it reminds us that the decisive issue during that period was not law, or even party or parliamentary politics, but mandate: the firm conviction of the Conservative and Liberal Democrat coalition that it was inconceivable that a majority in the Scottish parliament, elected on a clear manifesto in favour of a referendum, could be ignored.

An improvised solution: The story of the Edinburgh Agreement

The starting problem in 2011 – and a permanent feature of UK constitutional policy, as well as the debate about it – was that there is remarkably little mainstream expertise in the subject, unlike, for example, in the United States. Sometimes this leads to harmless and vaguely comical outcomes. Those of us who worked closely with Lord O'Donnell when he was Cabinet Secretary remain bemused that his 2007 innovation of a draft Cabinet manual – a ruse he came up with on a plane ride home from New Zealand while trying to work out some rules of the road for handling a possible hung parliament at the next election – started to acquire a constitutional status in media reporting not far off Magna Carta. It is still sometimes reported as if it were some ancient, revered constitutional tome.

Given the stakes, the problem of the lack of constitutional expertise is less amusing in the Scottish context. But what is now treated as a constitutional tablet of stone – that Scotland cannot lawfully have a referendum on independence without the consent of Westminster – was in fact shrouded in uncertainty a decade ago. The path to the Edinburgh Agreement – a remarkable achievement allowing a peaceful vote on an existential issue, with no substantive or substantiated serious complaints from either side, before or after the vote, about its fairness – was an improvised and uncertain one.

No one in London had prepared for an SNP majority victory: as is well known, the Scottish electoral system was designed to prevent such an outcome for any party. So the inclusion of the manifesto commitment for a referendum on independence passed unnoticed: the SNP had always had such a commitment. The best it could hope for, conventional wisdom held, was a strong minority position in the Scottish parliament, with the unionist parties having a comfortable majority in the event of any vote on holding a referendum. (This had been the position between 2007 and 2011.) When I arrived in the Cabinet Office a few weeks after the Scottish parliamentary elections, as part of the post-election panic measures to strengthen the UK government's constitutional policy capability, I found that there was no paper on file analysing the question: "What is the legal position on an independence referendum in Scotland in the event that there is a majority for one in the Scottish parliament?"

Against this background, it remains, to my mind, astonishing – but fundamentally correct – that David Cameron instantly agreed, on the morning of the election result, not to stand in the way of a referendum. Anyone with a sense of history would have felt similarly struck: as we shall see, it was exactly a century since the party he now led had taken the UK to the brink of civil war – over what we would now see as modest devolution, not independence, for Ireland – under the leadership of a Scot, Andrew Bonar Law.

Mr Cameron understood that the politics of our age are different. A victorious Alex Salmond had already declared that his victory meant there would be a referendum. But the grasp of legal details was shakier: an interesting counterfactual would have been if the SNP's manifesto had included a commitment to force the expulsion of Britain's nuclear deterrent from Scottish waters. If Scotland's First Minister had moved to implement that, surely Mr Cameron would have pointed out that he did not have the power to do so, and would have instinctively understood that the Scottish government had no such power?

The truth, as I found out when I arrived as Constitution Director several weeks later, was that the government in Whitehall did not know definitively what the legal position was. A few old Cabinet Office hands had a pretty strong hunch that the powers reserved to Westminster in the constitution, spelt out in the Scotland Act 1998, precluded Holyrood lawfully organising a referendum. But that was a far cry from a substantive piece of analysis validated by the law officers.

Such a piece of work was underway at the request of No 10 when I arrived, but its findings were not reported conclusively until the early autumn of 2011. When the advice eventually came, it was strongly of the view that the power over constitutional referendums belonged to Westminster. However, ministers collectively were still nervous about both the robustness of this assessment and the political consequences of saying it out loud.

They therefore retreated into internal deliberations, and said nothing of substance between Mr Cameron's statement agreeing to a referendum in principle in May 2011 and a white paper on that referendum in early January 2012.

In the meantime, three things happened. First, tentative negotiations began between London and Edinburgh on how a referendum might be held (I was appointed as the lead civil service negotiator, reporting to the Secretary of State for Scotland, Michael Moore, and the Prime Minister). But these were strange affairs. From our side, that of the UK government, we were not yet allowed to say that our view was that a lawful referendum could only be held with Westminster's agreement. On the other hand, there was, to use the parlance of Brexit, no threat of 'no deal', because the Prime Minister had already told the TV cameras that he wasn't going to stand in the way of a referendum. Unsurprisingly, in these circumstances, the talks didn't get very far very quickly.

Second, in the absence of any substantive statement from the UK, the Scottish government seized the initiative, as well as the public narrative, to foster an alternative reality in which Edinburgh was in sole control of the process. The SNP had won the election, and therefore the Scottish parliament would be legislating for a referendum – no ifs, no buts – and Westminster didn't have a role. It worked: researchers going through the archives will have trouble finding any debate from that time on whether Scotland had the right to a referendum – something which is a common topic in today's discourse. Indeed, the main objective of the January 2012 white paper was not so much to gain a negotiating advantage as to secure for the UK government the right to be heard in a procedural debate about how to hold the referendum, which up to that point had been entirely set by the Scottish government.

And this, in turn, led to a third development: a real fear in London of the constitutional conundrum ending up in court. This, ultimately, turbocharged the search for a political agreement with the Scottish government. Thanks to both Mr Cameron's statement and some clever politics from the SNP, the clear public expectation was of a referendum legislated for by Holyrood. But if this was unlawful, going beyond the powers of the Scottish parliament, then someone was going to have to challenge it. Indeed the law officers fretted that they had a solemn legal duty to refer unconstitutional legislation from the devolved legislatures directly to the Supreme Court.

The political risk was obvious: that the UK government would end up in court arguing that the Scottish people had no legal right to determine their own future despite having voted to do so. The political consequences of this, in terms of the UK as a voluntary union, would have been horrendous in the view of UK ministers.

So this led to the offer of a deal being put to the Scottish government in January 2012. In the paper *Scotland's Constitutional Future: A Consultation on a Fair, Legal and Decisive Referendum in Scotland*, published on 8 January 2012, the UK government set out first an emphatic statement that a referendum was beyond the powers of the Scottish parliament, followed by an offer of a clear legal path to change that.

That legal path – which was accepted by the Scottish government quickly, leading to fairly straightforward negotiations that in turn led to the Edinburgh Agreement – involved the use of a provision in the Scotland Act designed for entirely different purposes. Section 30 of the 1998 Scotland Act allows for the powers of the Westminster and Scottish parliaments to be varied, without primary legislation, with the agreement of both. It was designed to allow the correction of bureaucratic mistakes (“This category of public highway really should have been devolved”) or to adapt to new developments, for example in regulating technology. It was not designed to provide for fundamental constitutional change. But it worked: there was nothing stopping a power designed for trunk roads, or other such mundanities, being used to allow for a lawful vote on the break-up of the country. So that’s what we did.

The point here is that what is now regarded as a British constitutional cornerstone – that the way to have a referendum on Scottish independence is through a Section 30 order agreed by both parliaments – was in fact a hastily improvised product of its time, and not the only option. UK ministers briefly considered suggestions from some unionists to ignore Holyrood and hold a referendum under UK legislation (as in the case of the 1997 Scottish and Welsh referendums), the legality of which could not be in doubt. It is unlikely that this option would prove attractive to the present UK administration; I make the point only to demonstrate that Section 30 is not the only possible path to an independence referendum. More problematically for London, we considered a range of scenarios about the sort of vote Edinburgh might be able to hold that could potentially withstand a legal challenge – including some of the very things that have now emerged in the Scottish government’s 11-point plan (published in January 2021), which includes contingency measures to be considered in the event that the UK government holds firm in refusing a referendum.

These could involve weaker wording about consultations on mandates to negotiate independence, or some such workaround. This might be lawful; it might not. The only way to know would be to test it in court. So we don’t know, and if the SNP proceeded with its plan, the worst fears of the 2011 decision-takers in London could be realised, and the UK government could end up in court. Even if the anti-referendum case prevailed, there would be the spectre of UK law officers arguing in a public court that Scotland cannot decide its own future, even having voted to do so, whilst at the same time telling Scots to enjoy the benefits of the “precious Union” they have no right to decide to leave. And if the UK government lost the case, the only options, if they wished to pursue the strategy, would be either to refuse to recognise the outcome of a referendum, or to pass legislation at Westminster to put it beyond doubt that Scotland has no right to self-determination.

The conclusion here is that it is important to understand what the 2011 legal precedent is and what it is not. It tells us that there is *an agreed* path to a referendum on independence for Scotland. But it does not tell us that there is *only one* path to such an outcome. There is nothing in law that says a referendum has to be agreed between London and Edinburgh: for example, London certainly has the right to impose a particular type of referendum on Scotland, because parliament is sovereign. Whether Holyrood can devise a legal-proof referendum of its own³ remains to be seen, and can only be tested in court. And of course Westminster can, *in extremis*, change the law if it doesn’t like the judicial outcome, and make whatever the Scottish parliament plans to do unlawful. The direct precedent for this is the Supreme Court’s ruling on triggering Brexit via Article 50 of the Treaties of the European Union: when the Supreme Court held that the government did not have the power to invoke Article 50, the government promptly got parliament to bestow that power. Thus, were the Supreme Court to hold that the UK government did not have the power to block a referendum legislated for by Holyrood, the government could get parliament to confer on it that very power.

³ This concept is sometimes referred to in the media as an “advisory” referendum. This is incorrect. All referendums in the UK are advisory to some extent: only Westminster, or bodies making law under its authority, can enact the result, and doing so is a choice for the members of those law-making bodies. The 2014 referendum was ‘advisory’; so too, strictly speaking, was the 2016 Brexit referendum. Even the 2011 referendum on the alternative vote system was technically advisory: even though a piece of legislation could only be brought into force in the event of a ‘Yes’ vote, a minister would still have had to lay an order before parliament to implement the result of that referendum.

The absence of any agreed basis for the exercise of Scotland's self-determination

So the point here is that if there is no political agreement to hold a referendum, there is currently no fixed, adjudicated law to determine what happens next, nor any commonly held political understanding or consensus about what a legitimate trigger for a further referendum might be. And that ambiguity is Westminster's fault, which brings me to the second lesson of the period leading up to, and following, the 2014 referendum. To understand this point, it is necessary to look at the positions of the nationalist and unionist sides (as represented by the Scottish and UK governments respectively) of the debate going into the 2021 Scottish parliamentary elections. These can be characterised brutally, though not unfairly, as follows:

- The position of the Scottish government is that it seeks the unambiguous mandate of Scottish voters for an independence referendum by seeking a majority in the parliament, elected on that basis. Interpreting this as a clear and conscious decision of the will of the Scottish people, it will seek to replicate the 2012 Agreement and the 2014 referendum. If that is not allowed, it will explore other lawful options.
- The position of the UK government is that it will not agree to replicate the 2012-14 arrangements, because, during the campaign seven years ago, nationalists said that 2014's referendum would be a "once in a generation" vote. When asked to clarify what this means, ministers sit on TV-studio sofas and wonder aloud, as both the Prime Minister and Secretary of State for Scotland have done, about what "a generation" might mean, concluding that it's somewhere between two-and-a-half and slightly more than four decades from a 2014 starting point.

It is not hard to pick which of these arguments has the greater democratic credibility. The position of the Scottish government is arguably morally stronger than it was in 2011, when no one expected an SNP majority and the issue of holding a referendum did not feature prominently in the campaign. In 2021, it is impossible to miss. If – and given the electoral system, it is a huge if – the SNP and its pro-independence referendum allies win an overall majority (whether SNP only, or SNP plus like-minded allies makes no difference), it will be impossible to argue that this was not a conscious choice by Scottish voters in favour of a referendum. Proof of this would follow in due course, with a vote on the floor of Holyrood confirming support for a referendum. Constitutionally, it makes no difference if that vote is the product of 65 or more SNP MSPs, or a similar number of SNP, Greens, and the new Alba party, or, in theory, a majority of non-party independent MSPs elected on an explicit pro-referendum platform.

The argument that the Prime Minister made in January this year on a visit to Glasgow – that a referendum is "irrelevant" to most people in Scotland – will have been comprehensively disproved. In effect, consent for the Union will have been put on pause. If, as UK ministers sometimes argue, an independence referendum is not the priority of Scottish voters, they have the option not to vote for parties committed to holding one.

The UK government's argument implies, in effect, that previous electorates can bind future ones. But surely such a hugely controversial contention would be better supported were there some rules, or at least conventions, in place to provide clarity on an issue like this. After all, even though 'No' prevailed in 2014, a campaign which had started with unionism ahead by a two-to-one majority in the polls and ended with a 55-45 win for 'No' was unlikely to just disappear off the political radar. But addressing the need for constitutional clarity on Scotland is something three Conservative-led administrations since 2014 have declined to do. That is now the direct cause of a looming crisis between democratic mandate on the one hand and legal powers on the other.

This was a foreseeable problem. One might have expected the UK government, having been caught on the hop by the SNP's victory in 2011 and plunged into an existential crisis for the Union, to demonstrate some foresight on how to avoid problems arising in the future following a 'No' vote. Broadly, there were two options open to UK ministers. One was to devolve the power in perpetuity to the Scottish parliament. This would have been a brave decision: it would have allowed Holyrood to have a further referendum whenever it wanted, with the "once in a generation" pledge being nothing more than another broken political promise rather than the basis for a refusal by London to facilitate another referendum.

This almost happened by accident anyway. The first draft of the Section 30 order, published in the January 2012 white paper as a suggestion for scrutiny and negotiation, had a fixed end-date of 31 December 2014 for the power conferred on Holyrood to lapse. But it also had written into it a series of stringent requirements that the Scottish government follow UK electoral legislation. During the negotiations, these requirements were dropped, providing for the Scottish parliament to legislate for the electoral rules. Apart from allowing 16- and 17-year-olds to vote, this was a meaningless concession by London, as the Scottish government had pledged publicly to follow UK practice anyway. Given this, the Cameron coalition happily traded it in return for the Scottish government dropping their demand for a multiple-choice referendum including the option of more powers.

This meant that near-final drafts of the Edinburgh Agreement and associated paperwork, including the draft Section 30 order, could have been interpreted as providing the power to Holyrood to legislate for a referendum in the near future, but, crucially, allowing it to retain that power forever in the event of a 'No' vote. Ahead of the final ministerial meeting at UK government level to approve the Edinburgh Agreement, a small team of officials, including me, spotted this and brought it to the attention of ministers. Mr Cameron, worried by the prospect of what he publicly called a "neverendum", was emphatic that the referendum power needed to be one-off and time-limited. His Conservative and Liberal Democrat coalition partners agreed. I nervously took the proposed new wording, making clear that the Section 30 power would lapse at the end of 2014, to my Scottish opposite number; like the ministers, I was worried that this late intervention might destabilise the whole deal. To our pleasant surprise, the Scottish government agreed immediately. It was a political call: they knew they were trapped. To dispute a time limit would have shown two things: first, that they expected to lose; second, that on losing they'd re-run the process as soon as they could and give effect to Mr Cameron's fears of a 'neverendum'. So the deal was done.

After the referendum, the option then was to put in place some rules to avoid a repeat of the 2011 surprise. Canada provided an obvious example to follow. Having been forced into conceding two referendums on the secession of Quebec within 16 years – the second, in 1995, a near-death experience for the Canadian Federation – Ottawa had introduced very strict rules about how in future secession might take place. The length of time between referendums was not dealt with, as that was not a controversial issue in Canada; issues like the wording of the question and the nature of negotiations following a vote in favour of separation were, however, and so those are the focus of the Clarity Act, rather than triggers for a referendum. It is not, therefore, a template for the UK in terms of content.

But in terms of principle, it is a template that Westminster could and should have followed. Westminster could, had it wanted to, have entered into post-referendum negotiations with the Scottish government on the triggers for a further referendum. Had those failed – or had Westminster chosen not to start them – it would have been perfectly within its rights to start a UK-wide consultation on the rules governing membership of the United Kingdom, and to legislate accordingly, even if unilaterally. A minimum time period could have been part of a new settlement enshrined in law, giving the courts no discretion.

Constitutional clarity was possible, but there was no interest in London in pursuing it. The Cameron coalition therefore bequeathed to its successors the worst of all constitutional worlds: a very strong precedent that the election of a pro-referendum majority constitutes a trigger for a referendum, but no procedure for deciding how and when that precedent

should be repeated. And that is the procedural root of the present difficulties. UK ministers, instead of having a framework of good governance to fall back on, are reduced to portraying the rhetorical campaign remark of "once in a generation" from 2014 as some sort of binding constitutional rule that constrains voters for several decades to come.

It is a nonsensical position, and the dangers it presents for democracy are obvious. This brings us to the third point – the meaning and legacy of the precedent established in 2011.

2012: A decision for union by consent

Given that the Scottish government ultimately accepted the Cameron coalition's offer of a Section 30 order, and in so doing could be seen implicitly to have accepted the contention that Holyrood has no power to hold a referendum, it is tempting to see Mr Cameron's immediate concession of the principle of a referendum in May 2011 as an impetuous mistake. That would, in my view, be wrong.

Although I was not Constitution Director until a few weeks after Mr Cameron's remarkable concession, all subsequent events led me to conclude firmly that both Conservative and Liberal Democrat ministers, and the Labour politicians whom they frequently consulted, understood and supported what he had done. That was because they all understood that in a clash between democratic mandate on the one hand and legal powers on the other, on an issue of national sovereignty, the democratic mandate had to win.

To put it more bluntly and more politically, they knew that what was at stake was whether or not the Union of Great Britain could, if they resisted a referendum, genuinely be viewed as a voluntary one that commanded the consent of Scotland, given that Scotland had voted in a majority government whose *raison d'être* was Scottish independence and whose signature policy was to hold a referendum on the subject.

Implicit in this position was an understanding of the profound shift in the nature of the United Kingdom as a multinational state over the course of the 20th century. For most of its history, the British Union had been regarded as unbreakable. Indeed there was no lawful mechanism for it to break up. A century before Mr Cameron was confronted with his dilemma, his predecessor as leader of the Conservative Party (then, of course, known not as the Conservative Party but as the Unionist Party), Andrew Bonar Law, was threatening civil war over what we would now call modest devolution for Ireland within the Union – not independence.

Bonar Law spoke of “things stronger than parliamentary majorities” and said that he would not shrink “from any action ... we think necessary to defeat one of the most ignoble conspiracies ... ever formed”. This was in spite of 25 years – what one might call a generation – of Irish voters sending very large Home Rule majorities to the House of Commons. Lest anyone not familiar with the historical background think this was blustering rhetoric, the Ulster Volunteer Force was at that time being heavily armed, and officers stationed in Irish garrisons were mutinying, with the active approval of Unionist parliamentary leaders in London. The anti-democratic intransigence of the Unionist leadership a century and a decade ago is not relevant to the Scottish situation of our time by virtue of its role in precipitating the violent end of the union between Great Britain and most of Ireland a decade later. As Scottish National Party leaders correctly point out, in a near century of the SNP, no one has suffered so much as a nosebleed as a result of its political activities.

Its relevance instead lies in highlighting the remarkable journey of the British Union, from one in which the English centre was prepared to use legal and even illegal force to maintain it, to one predicated on consent. From the first Stuart rebellion of 1715 to the Irish Home Rule Crisis of 1912-14, leaving the Union, or even altering its terms, was not to be allowed. Then, through a quiet, evolutionary process of political change that almost went undetected, a union which had been put together in a variety of ways became a voluntary one. Wales had been subjugated by military force in the late 13th century, and had effectively been made a legal annex of England by Henry VIII in the 16th. In subsequent centuries, there was no substantial separatist sentiment in the principality. The Union with Scotland in 1706 and 1707 had been a peaceful, voluntary (insofar as democratic opinion could be gauged in such times) marriage of convenience, albeit conducted under the shadow of severe economic threat from England. The new Union twice had to withstand violent insurrection within the first 40 years of its establishment, before becoming wildly successful, popular and stable.

The Union with Ireland was carried out in a way that was intended to make it look consensual – like the Union with Scotland – but in reality was coercive, and, unlike Scotland, the Irish majority were never persuaded to adapt to the Union and support it. Once the Irish situation was eventually resolved in 1921, to the satisfaction of most on both islands (other than the northern nationalist minority in the new Northern Ireland state, who numbered no more than half a million souls), there was no longer any barrier to a sense of union by consent across the United Kingdom. Pride in the Union strengthened after the shared sacrifices of two world wars, including the heroic year of standing alone in the world against Nazism. And the end of the Empire then reinforced the lack of appetite, in the British state and broader populace, for trying to hold on to territory where British rule wasn't wanted.

It is remarkable that in the three quarters of a century that followed the Unionist fomentation of civil war over Irish self-government at the height of the Empire, the United Kingdom, peacefully and voluntarily, evolved into a state which no longer included, or sought to rule, distinctive geographic entities without the consent of those who lived there. No less strident a British patriot than Margaret Thatcher used this argument forcefully to justify British sovereignty over areas as diverse as Northern Ireland, Gibraltar, and the Falkland Islands: the Union flag only flew there because the majority of people wanted it to.

The same Mrs Thatcher is widely regarded as the first British Prime Minister explicitly to acknowledge Scotland's right to leave the Union if it should choose to. She made several remarks on the subject as Prime Minister, but her most succinct summary came in her first batch of memoirs in 1993, in which she wrote that “as a nation, they [the Scottish people] have an undoubted right to national self-determination; thus far they have exercised that right by joining and remaining in the Union. Should they determine on independence no English party or politician would stand in their way”⁴.

Mrs Thatcher never had to worry about how the demand for Scottish independence would be determined, because there patently wasn't enough support for it during her time in office to imply that such an eventuality was likely. Mr Cameron did not have the luxury of detachment. I am convinced, however, that it was this new post-war, post-southern-Ireland, post-Empire, new unionist creed of consent, first espoused by Mrs Thatcher, that was behind his immediate impulse to agree to a referendum on the ground that it was what Scotland had voted for. It was this same obvious modern respect for democratic consent that prompted Alex Salmond, in an extraordinary sentence in his foreword to the Scottish government's independence consultation in January 2012, to pronounce that “Scotland is not oppressed and we have no need to be liberated.” The problem for Mr Johnson, or for any future British Prime Minister, is that should Scotland vote for a majority in favour of a referendum in 2021, or at any point subsequently, Mr Cameron's logic will still hold true.

The question before the Prime Minister, in such circumstances, will not be about how long it has been since the last referendum, not least because no time limit is mentioned in law or in any political agreement. It will be about something more fundamental: whether the Union can be said to command the consent of Scotland.

⁴ Margaret Thatcher, *The Downing Street Years*, London: Harper Collins, 1993, p. 624

Downing Street's current position is that "the issue of Scottish independence was settled in 2014", to quote the Prime Minister's official spokesman. However, if Scotland votes for a pro-referendum majority in its parliament, that will categorically no longer be true, whether Downing Street likes it or not. The Scottish people will have sent an unmistakable message that they do not consider the matter settled.

Can Scotland be held in the Union by legal force? Absolutely. Without question. The Scottish parliament might be able to hold a legal referendum, though if it got through the courts, Westminster could pass legislation to kill it. In the event of a referendum showing support for Scottish independence, Westminster could refuse to annul the Union. In the event of a unilateral declaration of independence, the UK government could ask its allies not to recognise Scotland's nationhood, making the establishment of a viable Scottish state incredibly difficult. But this is a point about the constitutional fabric of the UK, not about legislation or court rulings. It is a political point, not a legal one. Should the UK government decide to ignore a duly elected majority in the Scottish parliament, either in 2021 or subsequently, it will have sent Scotland three clear, related messages.

The first is that insofar as Scotland has a right to national self-determination at all, it is for Westminster, not Scotland, to decide when – and if – that right is to be exercised.

The second is that, at this time, Westminster has made a choice to disallow the exercise of that right to national self-determination for an indefinite period, in spite of an explicit vote in favour of it. And this position will hold until London decides what it thinks some Scottish nationalist politicians meant by the phrase "once in a generation" when they uttered it on the campaign trail seven years ago.

The third is that, until such time as Westminster chooses, there are no lawful, constitutional and democratic means by which to pursue the cause of Scottish independence.

The conclusion Scotland, and the rest of the world, is entitled to draw from these messages is that the UK is no longer a voluntary union of different nations. Its second-largest member, Scotland, has expressed its wish to exercise national self-determination, and has been told "No". It is as stark as that. The ghost of Bonar Law will be back to haunt the British state.

The Union is protected by law. But a union of law is not the same thing as a union of consent. Intrinsic to the modern British sense of self is that the Union is voluntary. Resisting a clearly expressed wish to exercise self-determination within the Union changes the Union from one of consent, to one of law.

That is what is at stake.

⁴ Margaret Thatcher, *The Downing Street Years*, London: Harper Collins, 1993, p. 624

CHAPTER 2:

REFORM – The myth of federalism

This chapter deals with the possible options if Scotland's democratic will is set aside, either later this year or at some point in the future, and the UK government stands firm against a second referendum.

The next move would be for the Scottish government. Its choices would be to accept Westminster's ruling and wait until London's position changed; to stretch the law and try to plan some form of referendum, and to defend those plans in court; or to campaign peacefully, possibly including civil disobedience (I am discounting a lurch to political violence because there is no serious tradition of that, thankfully, in Scottish nationalism). That these would be the options facing the leaders of an entirely democratic movement with an entirely legitimate political objective shows just how serious an act of folly it would be for the UK government to allow such a situation to arise. But governments are capable, as we all know, of dreadful acts of folly.

It is not the purpose of this paper to speculate on the choices Scottish nationalist leaders might make in these circumstances. These would be political decisions for them to take. Instead, we will look at the options available to the UK government in addition to a strategy of just saying no. Faced with a terrible binary choice, governments usually seek to manufacture a third way; and so it may well be here.

In this case, there are calls from across the pro-Union political spectrum to 'reform' the British state in a way that is more accommodating to Scotland and less conducive to separatist sentiment. Various ideas, including vaguely defined notions of 'federalism', greater regionalism, and even Lords reform, are being put forward as part of a package, alongside the well-worn promise of 'more powers' for Holyrood.

Any attempt to fend off a choice between Scottish independence and maintaining the Union through some package of further constitutional reform is doomed to fail. This is one of those few occasions in politics when there is no third way. A set of timeless and time-specific circumstances have conspired to create a situation wherein the ultimate destiny of the United Kingdom has become a choice between the status quo (or some slightly modified version of it) and Scottish independence, however and whenever that choice is made.

There are broadly three reasons why a redesigned constitutional settlement cannot work as an antidote to Scottish nationalist sentiment, and why the Union can only survive either by the force majeure of refusing to allow a referendum indefinitely, or by winning an argument for the Union as it stands on its merits.

Devolution is not quasi-independence, or quasi-federalism, and has reached its limits

The first reason is that Brexit, and the manner in which it was done, has highlighted what was previously visible but not obvious: that there is a world of difference between devolution – even high degrees of devolution – and independence. Independence is a different state of being: it is not an end-point of a spectrum between centralisation and local power. In language that Brexiteers will understand, a nation is either sovereign or it is not. And Scotland is not sovereign – not remotely so. It is not an equal partner in a union; it is not a member, with a meaningful veto, of a federation. Brexit proved that.

The anomalies of the British constitution have often been hidden by ambiguities and complexity. But the raw politics of Brexit exposed them painfully. In the immediate aftermath of the 2014 referendum, with the – later fulfilled – promise of 'The Vow' to give Scotland more devolved powers, there was much speculation that the UK was becoming a 'federal', or quasi-federal, state. There is no such talk any more. The UK is nowhere near a federal state. A properly federal state has two distinctive characteristics. One is constitutionally guaranteed powers for specific functions: there is a clear and consistent delineation between what is done by the national federal government and what is done at 'state' level, as there is in the United States; and, as in the US, this cannot be changed: the state's power cannot be taken away. This is not the case in the UK – something we shall come to later.

More important in the UK context is the second feature of federalism: protection for the different entities to make it impossible – or less likely, at least – that their interests will be set aside by a simple majority of the whole country. So the US, for example, cannot repeal the Second Amendment on the right to bear arms without either a two-thirds majority in both Houses of Congress – bearing in mind that the Senate has a distinct bias towards smaller states, so Wyoming has the same voting rights as California despite having one hundredth of its population – or by a constitutional convention called by two thirds of all states. By contrast, in a unitary state such as the United Kingdom, a majority – however constituted – in the House of Commons is sufficient to govern fully for five years. There is no need to worry about regional interests.

And in UK-wide referendums, it is a 50-per-cent-plus-one majority that counts, however that majority is made up. In a state in which England constitutes 84 per cent of the voting population, this means in general that what England wants, England will get, and what the rest of the UK wants doesn't matter. The same is often true in general elections, strikingly so in the last forty years, when Scotland has repeatedly voted very differently to England: invariably, the English view has prevailed. The UK system is entirely legitimate, fair and democratic; it is just not federalism, quasi-federalism, or anything like it. The Brexit vote was completely free and fair: there is no basis to dispute its validity. But it was anti-federalism at its purest: two of the four constituent parts of the UK voted against Brexit by decisive margins, but this had no bearing on the result. David Davis, the Conservative MP, sitting alongside Alex Salmond in a TV studio as the results began to show a surprise lead for Leave, was asked if he was concerned about the implications of the result for those parts of the UK that had voted to stay. "No," he replied, "because we are one United Kingdom." In constitutional terms, he was entirely accurate. As far as the rest of the world is concerned, and as far as international law is concerned, the UK is not four nations. It is one.

That is the point: for the purposes of the outside world, such as the EU institutions, the sovereign state is all that matters. In the brief period between the 2014 referendum in Scotland and the 2016 Brexit referendum, many tried to delude themselves that the UK was something different from a normal 'nation': that it was in fact an equal partnership of different 'nations'. Brexit laid bare the vacuity of this mythology: the UK is a single state dominated by England; and in the big things that matter, what England wants, England gets.

The UK government could have tried to disguise this brutal reality in the way it approached the subsequent negotiations. It would surely have been more tactically and presentationally astute to convene some powerless but credible-looking body like a 'Council

of the Nations', with some 'consultative' role about the UK's negotiating mandate and the sort of Brexit it wanted to see. Instead, everything was done at UK level. The political imperative was to keep the English and Welsh popular majority together to deliver the outcome needed. In outcome terms, Scotland, by far the most pro-Remain part of the United Kingdom, ended up uniquely wronged by Brexit: England and Wales got what they voted for, and Northern Ireland got a special deal (it remained in the EU single market, and all its citizens remain entitled in any case to EU citizenship via the Irish state by virtue of the 1998 Agreement). Scotland got nothing: it got the same deal as the rest of Great Britain, despite voting heavily against Brexit, and heavily against the Conservative implementation of it at both post-referendum general elections. It was simple majoritarianism: perfectly democratic, but not quasi-federal.

And the process made no attempt to disguise this reality. The EU's negotiating position carefully and visibly took strong account of the disparate interests of its members, and gave disproportionate influence to one of its smallest but most directly affected members, Ireland. By contrast, the UK's negotiating position, throughout all four-and-a-half years, was dominated by Downing Street negotiations with Conservative English backbench MPs. The test of the British negotiating position from 2016 to 2020 never included considering whether it could garner the support of Edinburgh – or Cardiff, for that matter.

The test, as always in the UK, was only whether or not it could get through the House of Commons. Under Theresa May – because of the outcome of the 2017 election, as well as her admirable determination to secure arrangements that would not be different for Northern Ireland – attempts to overcome this hurdle failed. Under Mr Johnson, the test was whether or not the deal could secure the endorsement of the European Research Group of English and Welsh backbench MPs.

When the phase-two trade deal was negotiated at Christmas last year, attempts were made by unionists to highlight the opposition of the Scottish government, nicknaming the first minister "No Deal Nicola". But this attracted little attention, because, frankly, what Scotland's first minister thought about the outcome never mattered at any point in the negotiations. Instead, London's cameras were focused on the ERG meeting and whether Mr Johnson had finally united the Conservative Party. Brexit was an English enterprise, carried out in England, by the English, from start to finish.

This is not about the merits or drawbacks of Brexit. It is about how the UK is governed. It may be a multi-national state, but on the most important issue of its governance in decades, it is emphatically *just not federal*. It is not even a partnership. In the United States – a properly federal system – James Madison, Alexander Hamilton and John Jay wrote *The Federalist Papers* to convince the different states to sign up to the new constitutional arrangements. Under Brexit, all that mattered was Downing Street, the ERG, and the 1922 Committee – and the maintenance of an English electoral coalition.

Brexit was a short and fast way of revealing something that was already true of the Scottish constitutional settlement but had hitherto gone relatively unnoticed. Despite devolution, Scotland is certainly not oppressed. It has a strong sense of nationhood. But it is not really all that autonomous. It has some very strong powers in specific areas, and these have been spotlighted by the pandemic: notably control over health and education, and some fiscal powers around tax and borrowing.

But the modern world is divided up into sovereign states, and, for better or worse, Scotland is not one of them, and with it that brings realities. It brings things widely seen to be benefits – for example, the clout of the wider UK in crises requiring moves such as bank bailouts or vaccine procurement. It brings a full and complete single market of more than 60 million people. And so on.

But it also puts limitations on what Scotland can do, which come into focus when Scotland is overruled and pressed into doing things it doesn't want to. When the great divergence between Scottish and English politics – of which more later – began in the 1980s, the idea of devolution became popularised as the solution: it would reconcile Scotland's different choices within the United Kingdom framework.

But this is only true of some areas in health and education, and only up to a point. As 'more powers' advocates know full well, there are basically no more powers left to devolve without going into impossible territory and intruding on what can and must be the powers of the nation state – in this case, the United Kingdom.

Here, as often, a reference to the Brexit debate is instructive. Nigel Farage's success in linking concerns about immigration to opposition to the EU is widely seen as crucial in building the electoral coalition needed to deliver a majority for Brexit. His entirely accurate contention was that it was impossible for the UK to do anything about inward migration from the rest of the EU, particularly southern and eastern Europe, whilst being a member of the European Union (his argument ignored the fact that a very significant amount of migration to the UK is from

outside the EU, but it was still legally sound and politically clever). In the same way, there are very important examples of areas where Scotland cannot, ever, make a different choice to the rest of the United Kingdom whilst being a member of it. Three spring to mind: the first is, indeed, immigration. Scotland cannot have a separate immigration policy to the rest of the UK whilst being part of it, even if it assesses that its economic and social needs would benefit from such a policy. A second is external trading relations. Neither the UK as a whole, nor the EU, will allow Scotland a different relationship with the EU: the EU, reluctantly, stretched the rules of the internal market to cater for the specific and sensitive circumstances of Northern Ireland only, and will not go beyond this. It is equally unlikely that any other bilateral trade deal will provide special arrangements for Scotland, and even if one does, it will be because the UK government has willed it. A third is foreign and defence policy. Scotland cannot sit out any future UK military operations it objects to; it can never take its own decisions on the likes of the Iraq or Afghan campaigns whilst it remains part of the United Kingdom. Yes, Scotland can set its own lockdown policy and maintain free secondary education. Some transfers of social-security policy and fiscal powers are still possible. But we have now, in effect, reached – or very nearly reached – the limits of what can be devolved.

So 'more powers' is not, any longer, an effective antidote to the independence case. And indeed its pursuit could in fact further destabilise the UK's constitution. I have considerable sympathy for the argument, most cogently articulated by the late David McLetchie in a brave speech to the Scottish parliament in January 2012, shortly before his untimely death, that the 1989 pro-devolution Claim of Right is fundamentally flawed because it confuses Scotland's unilateral right to end the Union with a right unilaterally to dictate its place within it⁵. Devolution has delivered a fundamentally unbalanced constitutional settlement: an English majority for major issues like Brexit is enough to impose major change on the other parts, whether they like it or not, yet at the same time many in England feel squeezed by the fiscal subsidies and legislative autonomy that provide, for example, for free tertiary education in Scotland.

Indeed, my entire contention in this section is that a grown-up debate on Scottish independence needs to recognise that independence and devolution are two profoundly different things. You don't argue against independence by devolving more powers.

⁵ Speech by David McLetchie, Scottish parliament, in a debate on the Claim of Right, 26 January 2012

Why federalism isn't viable in the United Kingdom

The second reason that trying to use further constitutional reform as an antidote to Scottish independence sentiment will not succeed is that the most conceptually powerful alternative, proper federalism, cannot realistically work in the UK.

Federalism is fundamentally different from either devolution or independence. It is also, unfortunately – for this argument at least – impossible to implement in any meaningful way in the United Kingdom. That is not just because of the size of England relative to the other parts of the UK, and the lack of support for splitting England into smaller-sized regions within a federal Britain.

It is primarily because – at the risk of offending Scottish sensibilities – the British constitution is fundamentally (though not exclusively) an extension of England's constitutional arrangements going back several centuries. It is about the gradual inception and solidification of the concept of parliamentary sovereignty: that the Crown in Parliament can do as it pleases, going back to the Provisions of Oxford in 1258 and secured in perpetuity during the Glorious Revolution – just before, of course, the beginning of the Union with Scotland. The Glorious Revolution confirmed the gradual evolution of the English constitution under the sovereignty of the Crown in Parliament; the very different Scottish constitutional path to accepting the victory of the House of Orange was extinguished within two decades of its occurrence.

Parliamentary sovereignty, of course, has no place in the Scottish legal and constitutional tradition, a point made forcefully all the way back in 1953 by Lord President Lord Cooper⁶. In law, this ambiguity can be accommodated within Scotland's distinctive legal system. But in politics, it cannot. With the Union of 1707, the constitutional tension between the Westminster tradition of parliamentary sovereignty and the Scottish tradition of popular sovereignty, embodied by the 1320 Declaration of Arbroath, was *de facto* settled in favour of the primacy of the former.

The best illustration of this is the idea, once toyed with by Gordon Brown as part of his package of constitutional reforms on becoming Prime Minister, of making the Scottish parliament 'permanent'. He quickly found that this was impossible: parliamentary sovereignty means parliament cannot bind its successors, so a future parliament cannot be told that it cannot abolish the Scottish parliament. Indeed, in law – again at the risk of offending Scottish sensibilities – the Scottish parliament exists not as the embodiment of the will of the people, but only because Westminster created it via the Scotland Act. It is the constitutional equivalent of a very powerful local authority. It can be abolished at will. That is, of course, highly unlikely without a referendum. But it's possible. Westminster abolished the Greater London Council – which did not embody any

national identity, but was still responsible for providing some public services to a population larger than that of Scotland – without consulting the population.

The politics aside, the law is clear: the Scottish parliament is not permanent. If the modern reality of the UK as a democracy is that 'what England wants, England gets', then in law that reflects a parliamentary reality: that in theory, at least, what England giveth, England can taketh away.

Indeed there are some embryonic signs that this could happen, at least in the longer term. The UK government has – perfectly lawfully – amended the devolution settlement, without the consent of the devolved legislatures, through the Internal Market Act. In the context of the current crisis in Holyrood, senior backbenchers have openly called for Westminster to invoke its ultimate constitutional power – including over Scotland's civil service, which is not devolved, but in respect of which London has never sought to exercise oversight, given the competing loyalties of civil servants to their bosses in Edinburgh and in London (such conflicts being the essence of devolution). A core part of one particular variant of the unionist narrative is that devolution itself is the problem, and that therefore the powers of the Scottish parliament need to be curtailed. In Wales, there is already a strengthening movement for the outright abolition of the assembly.

In genuine federalism, this would have to change. The US Congress cannot abolish or curb the powers of a state, except in the most extreme circumstances. A higher authority than Congress – the Supreme Court – can adjudicate who has what power. In the UK, there is no higher authority than parliament, and everything is subordinate to it.

All that would have to go in a federal UK. The problems of consent with this are obvious, even if it could be made to work administratively. The effective abolition of England's ancient constitution would surely require the consent of its voters in a referendum. But Brexit was about the English tradition of 'sovereignty' embodied by parliamentary sovereignty. It would be a tough sell to English voters.

⁶ *MacCormick v. Lord Advocate* (1953) SC 396 – Court of Session. Lord President Cooper's opening ruling states that "The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law"

And Scotland? Suppose Scotland had sent a majority of MSPs to Holyrood armed with a mandate to request an independence referendum, and that request had been denied, and a referendum on federalism offered instead. It is difficult to foresee in those circumstances how such a proposal could command support in Scotland. If ratification of the new constitution required the separate consent of all four constituent parts of the UK, then Scotland's 'No' would sink the proposal, and independence would be back on the table as a political issue. If it were a UK-wide referendum, and, as in the Brexit vote, Scotland voted one way and England voted decisively in the other direction, the imposition upon Scotland of a new constitution via English votes would be a remarkable way to implement a strategy designed to assuage demands for Scottish independence. And that's before dealing with the complexities of Northern Ireland, where a new federal constitution would certainly impinge on Strand One of the Belfast Agreement on internal arrangements within Northern Ireland, and arguably Strand Three on East-West relations, too.

So neither federalism nor further devolution are viable third ways. Those looking for alternatives then turn either to minor and only tangentially relevant reforms, like changing the composition of the House of Lords, or to processes such as constitutional conventions. On the former, it is surely a fallacy to believe that any plausible reform of the House of Lords – whilst potentially worthy, and useful, and no doubt a huge improvement on the current indefensible arrangements – could be a properly effective dampener on support for Scottish independence. And the latter is instructive: the argument, made by Mr Brown and others, is that it is a half-century since the Kilbrandon Commission, and a fresh look at the UK constitution is necessary in the light of the tumultuous changes since then. But this does not hold water: it may be half a century since a formal commission was last appointed to the task, but there is no evidence at all that there is some solution waiting to be found for the current tensions in the Union if only we set up a process to look for it.

This debate ignores the profound change in UK and Scottish politics

Instead, unionists will need to face up not to the iniquities of current constitutional arrangements, but to two profound political trends that, although they have nothing to do with the constitutional arrangements, are stretching them to the limit. The first is the emergence of English majoritarianism, or, to put it another way, the abandonment of restraint by the English majority. Throughout the history of the Union, Scotland and England have politically aligned much more often than not. But when they haven't, England has tended to make adjustments to accommodate – at least to an extent – Scotland's differences. It is a tradition founded in the Treaty of Union itself with its carve-outs for Scots law and the Kirk, and established in the early years, with the careful

exercise of new British power in Scotland, by the 3rd Duke of Argyll under the benign gaze of Sir Robert Walpole until their eventual falling out.

The 19th century saw Scotland as a liberal stronghold, with some awakenings of nationalist sentiment in Home Rule campaigns, but never as fervent as that in Ireland. Scotland then mostly aligned, of course, with wider UK politics – famously in 1955, with more than half the votes cast being for the Conservatives. Mr Heath in 1970 was the first Prime Minister in the democratic age to win a UK-wide majority without a similar majority in Scotland, triggering strains in the tradition of common politics, which widened sharply in the 1980s and 1990s. Then, Scotland consistently voted strongly against four terms of Conservative government which reshaped the British state and its economy. Devolution was the price exacted by Scotland from a sceptical and often unenthusiastic UK Labour Party for its continued support.

But with a further decade of Conservative-led government, these tensions have re-emerged. As we have already seen, Scottish sentiment was completely ignored by the UK government through the entirety of the Brexit process. Minor but important proof of this comes from the *de facto* collapse of the Sewel Convention: the devolution-era constitutional principle that the powers of the Scottish parliament would not be adjusted without that parliament's consent. In pre-Brexit times, including the period in which I was Constitution Director, enormous care was taken not to break the convention. During Brexit, it was flouted so routinely that it has now effectively ceased to exist.

But it is not only Brexit that reflects this state of mind. UK political leadership pays no attention to Scottish issues unless Scotland is on the brink of leaving. As soon as that's not the case, the gaze drifts away. The failure to address the question about triggers for a future referendum is an example of that, as we have seen. But a more obvious example was the spectacularly misjudged statement by Mr Cameron, less than an hour after the formal 'No' vote was declared in 2014, which pivoted to English nationalist resentment and promised English votes for English laws, rather than speaking to the nine out of every twenty Scottish adults who'd just voted to leave. That message was heard in Scotland. It was symbolic of a decade in which, at each and every turn, faced with choosing between addressing the concerns of those at the margins of the Union and shoring up the English national popular coalition needed to keep their party in power, the Conservatives chose the latter (the sole exception being Mrs May's failed attempt to deliver the same form of Brexit for Northern Ireland as for the rest of the United Kingdom – which had, of course, nothing to do with Scotland, and in any event was swiftly abandoned by Mr Johnson).

Perhaps this reflects the second great political shift, which is probably the most important but one of the least analysed. Since the inauguration of the Union, Scotland has played a full part in the political life of the United Kingdom. Until the last five years. Arguably, too much has been made of the fact that Scotland and England started to vote differently in the 1980s, and too little of the fact that in the last three Westminster elections, Scotland has returned huge majorities of Scottish National Party MPs. The impact of this is profound. There is no longer any room in the major parties for serious political leaders taking senior roles at a UK-wide level. Until a mini-revival in 2017, the Conservatives have always struggled to field even a ministerial team for the Scotland Office. The last senior Conservatives to hold senior office whilst sitting for a Scottish seat were Malcolm Rifkind as Foreign Secretary and Ian Lang as Trade Secretary, both of whom lost their seats at the end of the last century. The only Scottish voice in the current senior ranks of the Conservative party, Michael Gove, sits for Surrey. Labour have never replaced Gordon Brown or Alistair Darling at national level; the only senior Scottish voice in the Shadow Cabinet, shadow chancellor Anneliese Dodds, sits for Oxford. The last senior UK minister sitting for a Scottish constituency in the House of Commons to serve in a Cabinet who played a major role in the direction of UK-wide government was Danny Alexander. There isn't even an eccentric backbencher like Sir Nicholas Fairbairn to remind us of some of the more quaint, now extinct, Scottish political traditions within Britain.

This is nothing to do with federalism or devolution, and everything to do with what is becoming the sustained political choice of the Scottish electorate. Scotland's voters have opted out of UK-wide politics. They seem no longer to be interested in sending senior figures to Westminster, and to want to send separatists instead. This is a profound democratic rupture, and only a change in the voting habits of Scots can change it. It is a symbol of growing apart politically. It is a symbol that for the Union to work as it used to requires convincing people to think and vote differently – not changing the constitution, or resisting the will of the people by legal force.

CHAPTER 3:

RE-RUN? – The virtues and vices of repetition

Should it come to pass, therefore, that a democratic mandate is given by the Scottish people for an independence referendum, and the UK government – however reluctantly and nervously – decides to permit one, it is worth contemplating what such a vote and campaign would look like.

There are essentially two sets of issues: electoral law and how the referendum would be organised; and campaign practice, and in particular how the Westminster and Holyrood governments would frame their arguments, given that both would have the force of some of the apparatus of the state behind them, and both would still be in office the morning after any referendum, dealing with whatever the result might be. Referendum law and campaign practice are full of obscure details, and the challenge is to work out which of these would matter to the fair conduct of a referendum that would be conducive to good government afterwards. This section is an attempt to map that out.

Referendum rules

In narrow constitutional and procedural terms, the 2014 referendum ended up a success. There were no serious disputes about the rules, either before or after the vote. One option therefore would be simply to repeat it exactly. The debate may not prove that simple, particularly in the UK parliament, whose consent would be needed for a repeat. So it is worth analysing a series of questions, the answers to which point towards two major strategic choices for UK policymakers and parliamentarians.

The first of four questions of detail concerns under whose authority the referendum would be held: that of Westminster or Holyrood. The 2014 referendum was held under Holyrood legislation: the express purpose of the Section 30 order was to provide for that. This reflected a philosophy – driven in particular, within the UK governing coalition, by the Liberal Democrats – that the referendum had to be ‘Made in Scotland’, and not ‘imposed’ by Westminster. That said, this seemingly major concession, allowing for the first constitutional referendum in the UK not authorised directly by Westminster, was less important than it seemed. In return, the Scottish government made a public and written commitment, as part of the Edinburgh Agreement, to follow the same UK electoral law that the UK parliament would have followed anyway, with most of the laws following the Political Parties, Elections and Referendums Act 2000 (PPERA), and most of the discretionary decisions, such as on the wording of the question, left to the Electoral Commission to advise on, with the

explicit assumption that the Scottish parliament would accept the commission’s recommendation (it did). So in practice, the legal framework for the referendum was almost identical to the one the UK parliament would have put in place, had it been required to legislate for it.

If a UK government were to take the major step of conceding the principle of holding an agreed independence referendum, it is therefore hard to see why it would bother to insist on Westminster passing the necessary legislation this time round, rather than Holyrood, given that the outcome would be the same regardless.

The one major difference, in 2014, from normal electoral practice was in respect of the franchise. This provides the second question for policymakers. In a decision it may come to regret, the Scottish government insisted on what many regarded as the gimmick of being allowed to vary the franchise to reduce the voting age from 18 to 16. For pragmatic (some would say cynical) reasons, the UK government willingly conceded this: the dynamics of the negotiations, now largely forgotten, were focused around getting a single ‘in or out’ decision on the ballot paper, and keeping the third, undefined and hugely destabilising option of ‘maximum devolution’ off it. The UK government calculated that the extension of the franchise to 16- and 17-year-olds would make no appreciable difference to the outcome, and was proved correct.

The reason the Scottish government – and nationalists more generally – may come to regret this decision is that, in a debate about the rules for a second referendum, we can expect the noise about votes for Scottish-born adults living elsewhere in the United Kingdom to be much louder than last time. Indeed, one of the most senior members of the UK government, Mr Gove, took part in an unlikely social media flirtation on this very point, with the Scottish socialist George Galloway, now himself standing for election to Holyrood.

One would assume the unionist side to be incentivised to push for such a development, and the nationalist side to resist it. And morally there is at least a case for considering it. But there are two serious and linked problems. One is administrative: what should be the basis of the franchise? (Being born in Scotland? Having been resident for a certain number of years before leaving?)

Let's take two realistic but hypothetical examples. Person A is 75. He was born in Scotland, but his parents moved to England when he was three, and he has never lived in Scotland since. He describes himself as English. He takes the same approach to Scottishness as the Duke of Wellington famously took to being born in Ireland: "Just because one was born in a stable doesn't make one a horse." Person B is 25. She was born in Wales, but moved to Scotland when she was three and went to school and university there. She describes herself as Scottish. After she graduated she got a job in London and moved there two years ago, including switching to the English electoral register. Clearly the moral outcome here would be for person B to have a vote, but not person A. There are countless more tricky examples one could conjure up. So on what fair, implementable set of rules could a system for deciding such matters be based?

These administrative tensions would inflame social tensions. The 2014 campaign was remarkably free from any sense of ethno-nationalism, and indeed a remarkable achievement of modern Scottish nationalism is that its electoral growth has not been based on any ethnic or sectarian grandstanding. Indeed, one of the reasons for its electoral potency has been its success in detoxifying the prospect of Scottish independence in the eyes of many of those in the west of Scotland who are descended from Irish Catholic backgrounds. It is difficult to think of anything more conducive to poisoning a heated but, by international and historical standards, courteously conducted dispute than constructing, in effect, a legal definition of Scottishness for the express purpose of choosing whether or not Scotland stays in the United Kingdom. And what would it mean for social cohesion in Scotland if exit poll analysis proved that a narrow 'No' vote was carried by those who had Scottish roots but had chosen not to live in Scotland?

Administratively and morally, some established franchise is the worst option – apart from all the others. That probably means using the Scottish parliamentary franchise, which now includes 16- and 17-year-olds. When the loud calls come for votes for Scottish expatriates, it will be harder for the Scottish government to credibly resist them, because of its own decision to meddle with an established franchise in its own perceived interest in 2014 and to extend those changes in perpetuity. It is, justifiably, open to charges of hypocrisy. It cannot credibly say that it is wrong in principle to vary the franchise for an independence referendum under the guise of 'fairness' when the real motive is to suit one's own political interests. It has form.

Two wrongs don't make a right, and what's more, the Scottish government's extension of the franchise to 16- and 17-year-olds living in Scotland was at least administratively feasible – if complicated, not least because, given the time lag, it involved gathering the personal details of 14- and 15-year-olds. But no one could reasonably dispute the qualifying characteristic of the group to whom it applied. As we have seen, that is not the case with extending the franchise to expatriate Scots. The onus is on those who would wish to extend the franchise beyond Scotland's borders to come up with a feasible and fair plan for doing so; currently there seems no more chance of that than of a viable blueprint for a federal Britain.

The third issue is to do with the general conduct of the campaign, including matters such as finance and the wording of the question. Here, the 2014 template should be uncontentious. Law and precedent dictate that the question would be determined in effect by the Electoral Commission: they would advise on wording suggested by the government, inevitably recommend changes, and those changes would become the final word, even though it would fall to the parliament enacting the referendum legislation to have the last, formal say. The merits of this approach are not the issue: there is plenty to question about the Electoral Commission's handling of the 2014 and 2016 referendums, including how the same body came up with two completely different formats – 2014 being Yes/No, and 2016 being Remain/Leave – for what were effectively identical questions about staying in or leaving a union of other nations. The point is that for either the Scottish or Westminster parliament to overrule the Electoral Commission would call into question the integrity of the vote in such a way as to render such a move unthinkable. So no legislature approving a referendum is likely to do it. The same would be true of the campaign finance laws. What the Electoral Commission recommended would be what happened. So the third question – who should set the wording of the question and the campaign rules – has one easy answer, no matter how it's organised: the Electoral Commission. Any other answer is going to be really complicated and fiendishly controversial, and is therefore probably not worth the candle.

The final question is about thresholds. Many countries have established rules about major constitutional change; it could require a supermajority of two thirds, a regional plurality, or a minimum level of approval by all eligible voters, not just those who turned out. That last provision was, of course, the wrecking amendment inserted into the 1978 Scotland Act, which torpedoed devolution for Scotland in the 1979 referendum because the proposal, whilst approved, did not meet the threshold of 40 per cent of available turnout.

The UK government, with a clear majority in the primary chamber of the sovereign parliament, could put in place any threshold it wanted. But even a simple statement by ministers, that they would not consider starting independence negotiations if a certain threshold of voters did not turn out, would be sufficient: no referendum, of any kind, anywhere in the UK, legally binds parliament. The obvious charge of hypocrisy would follow, and be entirely justified, given that this would have come from a government that had forced through massive constitutional upheaval on the basis of a 52-48 vote, on a 72 per cent turnout, and in the face of the clear opposition of two of its four parts. It could be done legally: of that, there is no question. But the 1979 experience shows that over the long run, it doesn't work. The settled mood in Scotland following that referendum was that Scotland had been cheated. Time did not heal: as soon as the Conservatives, who refused to contemplate devolution, were out of office – after an 18-year period which saw them lose all of their Westminster representation in Scotland – Scottish politics instantly returned to the question of devolution, and gave it a thumping majority. The toxic legacy of the 1978 Act manoeuvre was still so strong in 2011 that no one in Westminster seriously gave repeating it a second's thought. The same should apply in any future referendum.

The threshold question is, therefore, the perfect illustration of the point that all these questions of detail are premised on the same political choice as is the question of whether or not to allow a referendum in the first place: is Westminster going to defend the Union through legal means, or seek to win decisive popular approval for it? It is lawful for Westminster to take certain actions to try to tilt the probability of the outcome in favour of staying in the Union through some fairly obvious procedural chicanery. That is the first strategic question for the referendum, and the clear balance of the argument would seem to be that there are no compelling reasons to deviate from the 2014 template, with one exception – which brings us to the second strategic question. If Scotland chose to stay in the Union, under what terms would Scotland's self-determination work in future?

In 2014, the crux of the referendum debate was about what a 'Yes' vote might and might not mean. That would dominate any future referendum debate, and we shall turn to it shortly. What did not feature adequately in 2014 was the question of what a 'No' vote might mean. Towards the end of the campaign, the hurriedly assembled 'Vow' from the three unionist parties was presented as meaning a 'No' vote would bring more powers, which duly arrived. But, as we saw in Chapter 1 of this paper, there was no thought given to the conditions under which Scotland might exercise its choice again. The "once in a generation" slogan was enough for both sides to get through the campaign, but of course, it did not solve anything.

If Scotland voted twice, within a reasonably short timeframe, to stay in the Union voluntarily, the government of the Union would be entitled to seek clear procedures for the future exercise of the right to self-determination, so that this did not become a constantly destabilising force in UK-wide politics. The UK government conspicuously chose not to deal with this point during or after the 2014 referendum, and it is too late now to do so in advance of the 2021 elections. The precedent has been established that a majority in the Scottish parliament, elected on a clear manifesto, is sufficient to mandate a referendum. That should be honoured, should such a vote transpire. But as a condition of implementing the wishes of that majority, there would be nothing wrong with the UK spelling out, in primary law if necessary, that any further, third referendum in the event of a 'No' vote would require a time gap of a certain number of years, a particular threshold in the Scottish parliament, a repeat majority, a plurality of Scottish constituencies, or whatever the terms might be.

Arguably, a simple majority at Holyrood would be too low a threshold for such profound constitutional change, given that the SNP has had, or been close to, such a position for a decade, and that its popularity has a decent chance of being sustained. A 'No' vote, with the clear understanding of what 'No' means, validates the position as one that commands consent. There is nothing wrong with a modernised union with fresh consent having clear rules for its maintenance. The current tensions are in part a result of the absence of such rules, leaving us with a profound clash of mandate versus powers, played out in the form of precedent versus slogans.

The conduct of the referendum campaign: lessons of 2014 and 2016

The best course for a referendum would be, therefore, a re-run of the 2014 procedures with the additional proviso that a future referendum would have to meet specified requirements before it could lawfully be triggered. It is now worth looking at the ways in which a referendum campaign might be conducted that would be most conducive to effective governance in its aftermath.

During and since the 2014 campaign, much of the focus has been on how those seeking radical constitutional change – the Scottish government – sought to portray their case. As with those proposing Brexit two years later, on the positive side this consisted of a mixture of properly authoritative statements and legitimate aspirations they hoped to pursue. On the negative side, they offered a mix of unprovable and implausible assertions.

The core authoritative statement amongst both Brexiteers and Scottish nationalists was that there was a smooth legal path to the change they sought. For Brexit, the least contentious aspect of the whole process was Article 50: it worked as it was supposed to. For Scottish independence, the Scottish government's paper on the mechanics of independence set out a similarly smooth path. The core implausibility for both Scottish nationalists in 2014 and Brexiteers in 2016 was that change would be minimal and involve no hard choices: it was striking that campaigners for such radical change sought to emphasise that all the benefits of the arrangements they sought to leave would be maintained after withdrawal from observing the obligations that gave rise to those benefits.

The most obviously implausible aspect of the 2014 campaign, which did the independence cause great and deserved damage, was the bizarre and frankly ridiculous assertion by the 'Yes' campaign that Scotland would have a right to "share the pound". Whilst most fair-minded voters and observers recognised that there would have to be some sort of division of assets and debts between Scotland and the rest of the UK – and that those negotiations would prove tough – the same fair-minded voters and observers understood that a currency is not an 'asset' that can be 'shared' involuntarily. Instead, a state-backed currency is, amongst several other things, and as the phrase suggests, a measure of confidence in the solvency of the state. It is therefore part of the essence of the UK state, and would not be something that Scotland had any claim to at all having chosen to leave. Scotland would, of course, be free to use the pound in 'shadow' form, as the Irish Free State, and from 1948 the Irish Republic, did between 1922 and 1979. But that was profoundly different from having any control over the currency.

The Scottish government would need to avoid repeating the mistake of making completely undeliverable and implausible promises again. One unavoidable observation at this time is that it still seems unable to confront its currency conundrum: the current policy appears to be 'sterlingisation' in the mould of post-independence Ireland before its accession to the exchange rate mechanism. That, in the eyes of many, would complicate adherence to European Union accession criteria, because the country would have no control over its currency. For an administration seeking sovereignty for Scotland, the Scottish government seems, after a whole decade of deliberation, to remain peculiarly petrified of Scotland having its own currency even for a brief period.

These sorts of issues would have to be addressed. Indeed, Professor Sir Tom Devine, Scotland's leading historian, has urged independence campaigners to be "absolutely honest" about the "many and real challenges" which could lie ahead after a 'Yes' vote, warning that to do otherwise would "fatally undermine any future campaign". And many commentators have pointed to the obvious irony that, following Brexit, the UK government would

be highlighting the severity of the barriers Scotland would face trading with England from within the EU, having previously sought to talk down the disruption caused by Brexit, whilst the Scottish government, having protested strongly about the extent of such disruption, would be incentivised to play it down.

It is undoubtedly the case that Scottish independence would, like Brexit, be hugely disruptive, and any independence campaign that dishonestly underplayed this point would deserve to fail. Heavy scrutiny would no doubt fall on independence campaigners in this regard, as it did in 2014. Attempts to play down barriers to trade and freedom of movement with England would be particularly risible following the Brexit debate. There is plenty of data about Scotland's public finances and fiscal options, which would allow for an informed discussion.

What is much less analysed is the approach of the UK government, and what it says – and said in 2014 – about what would happen in the event of negotiations for an independent Scotland.

Looking at the relative merits of this requires looking carefully at the conduct of the UK government in the 2014 campaign. In essence, this involved three things.

Setting out a negotiated path to independence

The first of the UK's pronouncements in the 2014 campaign involved setting out how separation would come into being. This was useful, done fairly and objectively, and would be transferable to a future referendum. Drawing on the expertise of the world's leading academic authority on the law of statehood, the Australian professor James Crawford, and that of another world-leading expert, Professor Alan Boyle of Edinburgh University, it set out in painstaking detail decades of evidence about how new states come into existence and what the process involves⁷. Professors Crawford and Boyle set out three options for Scotland. One was based on what happened when what is now the Irish Republic became independent, and the remainder of the UK (rUK) retained the legal personality of the UK. In international law, the UK was the 'continuing' state. Scotland would become a new state (confusingly described in international law as the 'successor' state). The second option, as with Czechia and Slovakia in 1992, was that both states would agree to 'extinguish' themselves (to use the legal terminology again) and two new states would be born. The third option was that international law would recognise a new Scottish state as the resumption of the one 'extinguished' in 1707.

⁷ Devolution and the Implications of Independence, Scotland Analysis programme, 2013

Professors Crawford and Boyle quickly and compellingly concluded that the first option was the only realistic one for Scotland. The international community would not take the ‘restoration of the ancient kingdom’ argument seriously. The Czechoslovak model was not an option either, not least because of the profound importance of the legal personality of the United Kingdom to the post-war legal international order, as one of five permanent members of the United Nations and a lawful nuclear power under the non-proliferation treaty. There was a clear precedent here: when Boris Yeltsin engineered the break-up of the Soviet Union in the early 1990s, the international community blocked his plan to dissolve the legal personality of the Soviet Union and introduce Russia as a new state: the world order depended on Russia accepting the obligations of the Soviet Union as the continuing state. For the same reason, the UK would have to continue to exist in international law, to say nothing of the constitutional trouble of requiring the English population to accept that their country had been ‘extinguished’ in international law by virtue of Scottish votes. This seemingly arcane constitutional conclusion still holds true, and matters profoundly for two key and related reasons. First, Scotland’s smooth entry into the community of nations would depend on the UK recommending it. So this is consistent with the dilemma of a union maintained by force of law or a union by consent: it is another way whereby the UK could in effect block Scottish independence, or at least create very serious obstacles in its path. A Scotland seeking recognition on the basis of a clear mandate would have to hope for something akin to Germany’s controversial recognition of Croatia against the will of Yugoslavia in 1992; it seems highly unlikely that the UK’s allies would entertain such an option any more than the US did when the fledgling self-proclaimed Irish government sought recognition from it, and was given short shrift by President Woodrow Wilson, in 1919.

The second and more important reason it matters is how it would affect the negotiations. As Professors Crawford and Boyle pointed out, in theory it means that Scotland would start out its negotiations with nothing but its land and its people: everything else in public ownership would belong to the United Kingdom, including all the pooled resources, such as financial assets; defence, military and intelligence assets; social security administrative systems; and so on.

This is legally true, and implies that the United Kingdom would – to use the phrase from the Brexit years – ‘hold all the cards’, and Scotland would be in a very weak position. But there is a catch, as Professor Crawford himself acknowledged on UK media on the morning that his legal opinion was published: the same principle would apply to the UK national debt.

Every penny of UK public debt would belong to the continuing UK, and none of it to an independent Scotland, unless there were an agreement to the contrary. It might well be unwise for a newly independent Scotland to seek to avoid its share of UK debt: indeed, Ukraine conspicuously sought a share of the former USSR’s debts

to help establish itself as a credible sovereign state. But a new negotiating slogan for Scotland, in a variation of the Brexit phrase ‘No deal is better than a bad deal’, could very well be: ‘No deal, no debt’.

As a technical proposition, ‘No deal, no debt’ is extremely silly and unrealistic, but only as silly and unrealistic as a UK government threat to strip Scotland of its fair share of assets. It would only happen in the context of a first-order crisis. Scotland would be keen to avoid weaponising debt, not least because of the interests of creditors who might subsequently block finance to an independent Scotland. So it would be a ‘nuclear’ option, but an option nonetheless. The only retaliation the UK government would have in that eventuality would be equally nuclear: to block the process of Scotland becoming independent, and in effect, to unilaterally decide to ignore the democratic result of a referendum.

In practice, history shows that the outcomes of such negotiations, involving the separation of countries and the creation of new ones in the democratic mould, invariably avoid such ridiculous stand-offs. So speculating about them is irresponsible and provocative. The obvious conclusion to draw is that there would be a negotiation. The contours of a negotiated settlement, at least between the UK and an independent Scotland, would, in fact, be relatively straightforward. That is not to say that they wouldn’t be contentious. It is not to say that some of those choices might not prove to be very bad ones. It is not to say that it would be quick: the details could take years to be finalised, and some transitional arrangements might have to be put in place first.

It is simply to say that there is a well-trodden path for new, democratic states to come into existence as a result of the break-up of existing ones. Much of the content of the negotiations that led to the creation of the Irish Free State is directly applicable a century later in terms of things like state pensions, official resources – and indeed public debt – and so on. Scotland is a comparatively rich country, with clearly defined borders, a functioning economy, and – crucially – centuries of tradition of the rule of law. What the first part of the UK’s narrative in the 2014 campaign essentially said was that there were no insuperable barriers to the successful establishment of an independent Scottish state through negotiation. The Scottish government, mistakenly, rejected the analysis simply because of its origin. What Professors Crawford and Boyle actually gave to the debate was a methodical, and workable, way through.

‘Project Fear’: predicting the future of Scotland as an independent state

The second and best-known part was what was officially known as the Treasury-led Scotland Analysis Programme, but popularly known as ‘Project Fear’ after some political advisers were overheard using the term in a pub, to the fury of political leaders across all three UK-wide unionist parties. Truthfully, the term was never used in Whitehall. The author should declare an interest, having been the deputy chair of the cross-Whitehall governance body for the programme⁸, which was chaired by Sir Nicholas Macpherson, then Permanent Secretary to HM Treasury.

Guided by chancellor George Osborne – the one senior minister on the Conservative side of the coalition to devote serious time and effort to the unionist cause – it was, in political terms, cleverly conceived. It was grounded in the Treasury’s experience of providing Gordon Brown with a justification to temper Tony Blair’s enthusiasm for joining the euro in 2003, via a mountain of economic analysis. The methodology was credible, providing a range of modelling options. Given that they all involved disruption to existing assumptions, and because of the Scottish deficit in the public finances, they were invariably seized upon and simplified – via helpful government briefings – by unionist news outlets as serious warnings of hardship ahead should independence be the chosen path of Scots. The programme covered everything from tax projections to social care pressures, from trade disruption to pensions, bank bailouts and much else, in a remorseless onslaught of gloomy but professional economic analysis, at the rate of about one paper per month during the key campaigning months of 2013 and early 2014.

The programme was seen to have played a decisive role in delivering an electoral victory for the ‘No’ side. It is very hard to prove, though it does seem that economic worries were an important factor for wavering voters, and those fears were undoubtedly fed by the programme. The programme’s output certainly rankled nationalist leaders enough for Alex Salmond to devote three pages of his autobiography to attacking Sir Nicholas, now Lord, Macpherson (whose memorandum advising the chancellor to rule out a currency union was published as part of the cross-unionist-party decision to rule one out).

There was nothing wrong in principle with the programme – and even if there was, the Scottish government was doing the same in reverse, harnessing the resources of the civil service to put the best possible gloss on the prospects for independence. Complaints from Scottish unionists about the Scottish government’s use of the civil

service for ‘propaganda’ always fell on deaf ears in London for two reasons: one was Cabinet Secretary Sir Jeremy Heywood’s astute tactical decision to ignore the complaints so he could keep a single UK-wide service together, providing, as it did, an important channel for communication in times of difficulty and tension; and secondly – and more importantly – to have shut down the Scottish government’s analysis programme would likely have made the maintenance of the UK government’s considerably more effective effort harder to sustain.

The very success of this programme, of course, was one of the factors that contributed to the end of the Cameron premiership, Mr Osborne’s career, and the UK’s membership of the European Union, itself one of the major factors making a second independence referendum more likely. That’s because the Scotland Analysis Programme – or Project Fear – was viewed as a successful template for winning a referendum. The UK government adopted it wholesale for the EU referendum, only to find voters either unwilling to believe the apocalyptic presentations of their analysis, or willing to take the risk anyway because of their wider political beliefs.

So it remains to be seen if the same approach becomes a feature of any future independence referendum. Much will depend on whether voters are driven by values or economic interests, and over what timescale. There was always something simultaneously plausible and ridiculous about such exercises, depending on whether one was looking at the short or long term. In the short term, it was reasonable to forecast some form of minor economic shock. That said, that none happened in the aftermath of the Brexit vote (as distinct from after Brexit itself) has probably blunted the effectiveness of such doom-mongering in future.

There are, of course, hard economic questions to ponder. Like Brexit, independence is, in part, about erecting barriers that do not currently exist. The recent London School of Economics report, highlighted by unionists and very much in line with the 2014 Scotland Analysis Programme, starts from the obviously correct premise that Scotland and the rest of the UK are more economically integrated than the UK and the European Union ever were. That said, the headlined claim that “independence will cost Scotland at least two to three times as much as Brexit”⁹ contains so many unknowables about both that it is difficult to know where to start.

⁸ Strictly speaking, the Scotland Analysis Programme covered all the activity mentioned in this section. Professors Crawford and Boyle’s paper was an annex of the first paper in the series. Other papers covered issues like defence and the European Union. But the bulk of the SAP was based around economic projections: fiscal posture, the welfare state, pensions, oil revenues and so on.

⁹ Disunited Kingdom? Brexit, trade and Scottish Independence, Hanwei Huang, Thomas Sampson and Patrick Schneider, London School of Economics, February 2021

But over the course of decades and generations, attempts to forecast economic prosperity based on political unions or disunions should be discounted. The history of British unions is the proof of that. In 1707, there was no basis to believe that the Union of Great Britain would be successful. Indeed, politically, it wobbled badly, witnessing two violent insurrections in its first forty years. Well within its first century, however, it was a roaring political, economic and social success which commanded comfortably the consent of the people. By contrast, the first century of the (legally) very similar Union of Great Britain and Ireland was an unmitigated disaster: Ireland was the only part of Europe to exit the 19th century with a population below that with which it entered it. Even today, the island's population is substantially below what it was in 1840. The potato blight that caused the Great Famine would undoubtedly have hit the island anyway, Union or not. But no serious analysis is possible as to whether either the subordinate parliament of Church of Ireland aristocrats, had they stayed in power in Dublin, or the alliance of revolutionary Presbyterians and nativist Catholics who tried to overthrow them, triggering full union, would have handled it better than Peel, Lord John Russell and co in London. There are too many imponderables to be able to predict the future with confidence.

Scotland's place in the world

The final and most troubling part of the UK government's narrative was its approach to issues where third parties were involved, principally around Scotland's place in the world. Here, the UK government often came very close to replicating the Scottish government's bluster over the likes of the currency issue. In effect, what the UK government did here was to predict the response of third parties to Scottish independence, even though – unlike, say, in the case of the Scottish proposal to share currency – the UK would not have had a decisive role in the eventual outcome. Most of the time these 'predictions' were carefully shrouded in the language of 'uncertainty', so it was rarely the case that the UK government was asserting with total clarity what would happen (though on occasion, as we will see, it probably did make assertions that could reasonably be categorised as untrue). The cumulative impact was to paint a picture of a newly independent Scotland, alone and friendless in the world, facing multiple rejections, although there was precious little credible evidence to support that contention.

The major example that springs to mind is the EU. This is cited not because of a relevance to any future referendum: clearly the issue has changed beyond recognition. I mention it because it serves as a warning to be clear about the sort of speculation that might feature in a future referendum campaign, and because it is the clearest example of either unfounded or highly questionable assertions, made at the time, that Scotland would find itself alone and friendless should it leave the United Kingdom.

The UK government's position on an independent Scotland's membership of the EU was set out in one of the Scotland Analysis Programme's papers¹⁰. Whilst carefully inserting occasional caveats that no member state had ever witnessed secession before, and that it was therefore not possible to know what would happen, it confidently asserted that Scotland's membership of the EU was based on the UK's, and that an independent Scotland would therefore be expelled from the European Union and forced to reapply. To further complicate matters, the UK government pointed out, Scotland's readmission would require unanimous consent from all members, with a strong suggestion that Spain would veto it so as not to encourage the Catalans. To reinforce this point, Downing Street pulled off a stunning political tactical success by quietly teeing up the then Spanish Prime Minister, Mariano Rajoy, to assert that an independent Scotland would indeed find itself outside the EU. Mr Rajoy's intervention was timed to coincide with the eve of the Scottish government's independence white paper at the end of November 2013; the timing of his trenchant remarks (though he notably stopped short of saying Spain would veto Scotland's admission) meant that he delivered them standing alongside a somewhat baffled President Hollande of France at a press conference following a bilateral summit in Madrid. His comments, delivered to Spanish and French broadcasters with no subtitles, were swiftly translated by British officials and briefed to the UK media. The intervention was so successful in undermining the Scottish government's assertion that continued EU membership would be feasible after independence that the then leader of the opposition in Holyrood, Johann Lamont, began her response to the Scottish government's white paper the following day with the words: "Muchas gracias, Presiding Officer."

Whilst this argument had some merit, and some in the EU institutions seemed to echo it, there was a problem for unionism in the form of a compelling counter-argument. Articulated by Sir David Edward, himself a Scot and a former judge at the European Court of Justice – the EU's highest judicial authority – this argument was centred on the concept of European citizenship. There was no provision in the Treaties, argued Sir David, for how to deal with the break-up of a member state. But citizenship was paramount in those treaties. Five million Scots were existing European citizens, and provided they wished to remain so, the court would not tolerate their expulsion if Scotland were to become a sovereign nation (Brexit, obviously, would be a different matter). So, if the EU institutions as a whole concluded that Scottish independence meant Scotland was outside the European Union, and representatives of a newly independent Scotland petitioned the court, as they likely would, Sir David predicted confidently that the court would prevent five million Scots, in a country which met the *acquis communautaire*, from losing their European citizenship. Instead it would order the EU institutions to find new arrangements for accommodating Scotland's membership from within. And under the treaties, there would be nothing Spain, the commission, or anyone else could do to overturn the court's ruling.

¹⁰ Scotland Analysis series: EU and international issues, Cm 8765, January 2014

Clearly, as already noted, these conditions no longer apply: Scotland, along with the rest of the UK, is outside the European Union. The relevance of the story is this: in making its case ahead of the 2014 referendum, relying so much as it did on the complexities and potential horrors of independence rather than the benefits of union, the UK government was equally confident in making assertions about issues on which it could not be certain, and over which it did not have primary control, as it was about those issues on which it could and did. Sir David may have been right or wrong; we will never know. But given his standing, and the crucial role in the process of the court on which he once sat, his opinion was at least worth a more balanced analysis.

On reflection, this facet of the UK's approach looks highly problematic and wrong. The UK government was perfectly entitled to set out, on a three-party basis covering every plausible future UK administration, that a currency union with Scotland was out of the question. That was the UK government's decision to make and no one else's, despite the 'Yes' campaign's ludicrous claims to the contrary. But the UK government was not entitled to assert that Scotland would probably be kicked out of the European Union, in the face of compelling arguments to the contrary. Defenders of the UK's approach would likely say that there was a difference: that the language on Europe was couched around 'uncertainty'. This is true in terms of the letter. It is not true in terms of the spirit, in terms of the manner in which the debate was conducted. The UK government was just as capable of the sorts of wild, unprovable assertions it was fond of accusing the Scottish government of (with some justification).

And such 'assertionitis' would be likely around a range of other issues in any future referendum campaign. No doubt there would be warnings about the complexity of rejoining the EU, if that were the wish of an independent Scottish parliament, ignoring the bigger picture that if a wealthy, rule-of-law, recently acquis-compliant ancient European country with a convincing majority in favour of membership wanted to be admitted, it surely would be. We may well also see the return of poorly informed assertions in other aspects of the international debate too. So it is worth looking briefly at how some of those issues were handled in 2014. One was NATO. As with the European Union, the UK government's analysis papers spoke of uncertainty, but the broad tone of the output was that there would be an atmosphere of deep hostility towards Scotland, and suspicion of it. This was based on two assumptions. One was that the Scottish government's commitment to removing the UK's nuclear deterrent from Scottish waters would likely rule it out of membership of what is, after all, a nuclear alliance. The second was that, as with the EU, Scotland would find itself expelled from the club and at the back of a long queue of prospective applicants, facing angry existing members when it reached the front, who would be worried about the implications of granting it admission.

The UK government found the first argument easy to sustain because the Scottish government had no convincing plan for what it intended to do about the UK's deterrent. In reality, given the costs, security and safety issues around nuclear submarines, and the lack of an easy alternative location in non-Scottish UK waters, there is no practical prospect of getting nuclear weapons safely out of Scottish waters for decades to come, and a grown-up Scottish government would have to come to an arrangement with the UK government based on a recognition of that reality. As with the other hard choices involved in independence, the Scottish government would do well to come clean about this in a future campaign.

The second argument suffered the same treatment as Sir David Edward had administered to the UK government's European Union case. This time, the case was demolished by Dame Mariot Leslie, a Scot and one of the most distinguished UK diplomats of the early 21st century, who had herself recently retired as UK ambassador to the NATO alliance. In a short letter to *The Scotsman*, in which she also announced she planned to vote 'Yes' in a referendum, she set out the very simple criteria for NATO admission – which are completely different from, and much, much simpler than, those for joining the European Union. "There is no 'queuing order' for membership of NATO. Each candidature, and its timing, is considered separately on its own merits by the NATO council." In essence, it was a matter of international politics, and she added that "I am in no doubt that the other 28 NATO allies would see it [as] in their interests to welcome an independent Scotland into NATO. No ally would wish to interrupt the integrated NATO defence arrangements in the North Sea and North Atlantic – least of all at a time of heightened tension with Russia".

The EU question has changed profoundly since 2014, but the NATO question is pretty much the same. So too are questions about Scotland's position in other alliances. There will likely be debates around the Five Eyes intelligence-sharing alliance, which comprises the United States, the UK, Canada, Australia and New Zealand, with the assertion from the unionist side again likely to be that Scotland would lose the considerable benefits of that alliance. That too is possible. But the politics of the situation are even simpler than those pertaining to NATO. The Five Eyes alliance is very powerful (though far more narrowly focused around intelligence sharing than many realise; it is not even a military or broader security alliance, let alone a political one. It is just intelligence). It has almost no formal governance, and very little informal governance. It has, in practice, just one unwritten rule – that America makes the rules. The question of whether Five Eyes became Six Eyes would essentially boil down to the following: first, whether Scotland wanted in; and second, whether Washington wanted to let it in. More generally, the security picture for an independent Scotland would be likely to be a 'swings and roundabouts' situation. It may lose, at least for a while, some capabilities by not being part of the UK.

However, on the other hand, should it rejoin the EU, it would have access to the Schengen Information Systems security database that the UK has lost. Plainly, it is very hard to see, as Sir David Omand – one of the most distinguished security officials and scholars Britain has seen in the last half-century – has argued, an independent Scotland achieving a *greater* level of security than it enjoys at present within the United Kingdom. But it is also unlikely that Scotland would become some sort of sitting duck in northern Europe; that it would be uniquely less secure than Norway, the Netherlands, or other small but rich countries in the region who have a tradition of taking security seriously and of having competent people employed in it.

And some of the lessons of 2014 still stand with respect to the issue of the EU, despite the fact that Britain has left. One is that no British government can predict, or has any right to try to, what other European nations' attitudes would be towards Scotland's accession. The issue where this crystallises is, once again, the attitude of Spain. Spain plainly hates the idea of Scottish independence because of the succour it gives to Catalan separatism: there is no sugarcoating that. But Spain is a pragmatic country, and it is also a democracy in which power is regularly transferred between parties, and its attitude would in part depend on who was in power. Spain has also dealt with precedents of sorts, in the form of the very different case of the various parts of the former Yugoslavia that remained in Serbia's ambit after the Balkan War of the mid-1990s. Spain's position has been to recognise Montenegro, because of its amicable and recognised separation from Belgrade, pointing out that this is Serbia's decision and not a situation it is willing to replicate in respect of Catalonia. On the other hand, Spain has declined to recognise Kosovo because its secession was not agreed with Serbia. This – the main relevant precedent to go on – implies that were Scotland to be recognised by the continuing UK state as an independent country, which would be the whole basis of any referendum and of the consequent negotiated independence, Madrid would have no reason to withhold either recognition, or support for accession to the EU.

Finally, it is generally accepted that, providing Scotland's independence were to be recognised by the UK – which under a referendum and negotiated path to independence it would be – then Scotland's admission to the United Nations, and other organisations of the international community, would be a formality. All of this reflects part of the broader picture. Independence would involve very difficult and complex choices, from trade and travel barriers between Scotland and England to what to do about the British nuclear submarines at Faslane. Given that the consequences of a 'Yes' vote, like those of Brexit, would have to be lived with, it serves no one to repeat the approach of the Scottish government in 2014 and imply that there would be no hard choices and that all the benefits of being part of the UK would continue. But equally, whilst there may be political capital in highlighting the uncertainty and complexity around independence, it is wrong to promote a narrative that there are insuperable barriers to independence, or that a newly independent Scottish state would be an economic and international failure. There are no insuperable barriers to the creation of a viable Scottish state, and there is no reason to believe that a nation of highly educated, English-speaking citizens, in a high-tech country with one of the world's oldest and most respected legal systems, could not successfully take its place alongside other successful northern European democracies of similar size.

CONCLUSION:

The moment and method of choice

The discussion of the nature of the campaign debate also matters for one narrow but important reason: the question of what sort of referendum to have. As already discussed, the rules and franchise for a new referendum should broadly follow those of 2014. But there is a bigger issue about the timing and nature of a vote. The UK's limited experience of referendums has seen one model become pre-eminent. That is: a single vote, at the beginning of a process, on the principle of a reform. So, for example, in 1997 the people of Scotland and Wales were asked in principle whether or not they wanted a parliament and assembly based on fairly thin proposals contained in a white paper. They said yes, and detailed legislation was brought forward. In 2016, voters decided in principle to leave the European Union; the detailed negotiations followed. There is no further consultation of the electorate, save for a general election should one occur before the process of implementation is complete.

There are exceptions to this approach. The 2011 referendum on changing the voting system came after detailed legislation had been passed; the Act said it would not come into force unless a referendum approved it. This provides another model. In fact, there are three to choose from:

- the 'in principle', single referendum, as is proposed now, at the start of the process;
- 'pre-negotiations': the UK and Scottish governments negotiate the terms of independence before a vote and then put it to the Scottish electorate for approval or rejection; or
- two referendums: one on the principle, and then a confirmatory vote at the end of the negotiations.

Some voices on the unionist side are now pushing the second option. This would involve the Scottish government (which would not yet have a mandate for independence) and London working out the terms of separation. The political attraction is obvious: there would be so much detail that there would likely be bits of it that everyone would object to, and the 'No' campaign could highlight those. This could be called the 'Australian monarchy' gambit: Australia never replaces the British Crown, not out of affection for it, but because there is never a clear majority in favour of the detailed arrangements for replacing it. But the Cameron coalition was understandably wary of this approach because, confident as it

was for most of the time of a 'No' victory, it worried about spending a period of years being required visibly to put the interests of the rest of the UK ahead of those of Scots (which is what the negotiations would require), given that Scotland was still part of the UK and it was the UK's fervent hope that it should remain so. 'Pre-negotiations' would invariably involve the London government being very tough on Scotland; should Scotland choose once again to stay in the Union based in part on brow-beating from London, that would hardly provide the foundations for renewed enthusiasm for the partnership.

The 'two referendums' option could be expected to have very prominent supporters, and after the experience of Brexit, would be seen by many to have much to commend it (though it would be very hard for the present UK government to advance the case given its stance on a second Brexit referendum). But its advocates should be careful what they wish for. It should be perfectly obvious what this arrangement would incentivise: an emphatic 'Yes' vote on the principle, because it would be a free hit with no consequences, and a 'No' vote following negotiations in which it would benefit the London government to impose the most brutal terms. We would then be left with a UK where Scotland wanted to leave, but had decided it couldn't afford to because of the punitive terms imposed by London. That would be an even worse basis for renewal of the Union than pre-negotiation ahead of a 'No' vote. And what – in reality – are the real questions which are so unclear now in advance of negotiations that we would do better to await their completion? Much of the 'complexity' and 'uncertainty' of the 2014 campaign was, as we have seen, invented by choice, for political reasons on both sides of the debate. It need not be this way. So the conclusion must be that the existing model of an 'in principle' referendum at the beginning of the process remains the least bad option.

As with much else about the framing of a future referendum process, there is a choice for unionists as to the end state they seek. Do they seek positive fresh consent for the Union, accepting that this raises the risk of losing it altogether? Or is the desire to save the Union at all costs so all-consuming that they don't care if it's achieved by the sullen acquiescence of Scotland, based on procedural chicanery on things like the franchise and the threat of brutal terms of separation?

I suspect those in the pro-Union camp who genuinely love and value the Union would veer towards the former, and want to win or lose the argument on its merits. But there is an undercurrent which will favour the latter approach. Some of the arguments about frustrating a referendum – whether that’s resisting having one at all, extending the franchise to expatriate Scots, fabricating federal alternatives, or having a second referendum to reverse a ‘Yes’ vote – appear to be motivated not so much by love of the Union as by fear of the historic ignominy of losing the Union and becoming the ‘Lord North’ of the 21st century. This is an understandable fear, and an incentive to postpone for a future administration what may become an inevitable choice. But it is also a false fear. History reaches its conclusions anyway. Ronald Reagan won the Cold War even though his term of office ended nine months before the Berlin Wall came down. Tony Blair’s mission to put Britain at the heart of Europe failed nearly a decade after his departure. And so on. If the present UK government is seen to create conditions that make Scottish independence inevitable, but a vote to separate takes place after its departure from office, history will not care about the fine details of timing.

Despite all the deliberately created myths to the contrary, in the grand scheme of human affairs, the choice facing Scotland is not all that complicated. It’s a huge decision, of course. It’s uncertain. But it’s not complicated.

The choice is basically this:

Does Scotland want to be a small, independent nation, likely back in the EU but with new barriers to trade and travel with the rest of the UK; or does it wish to remain in the UK, with its own powers over some areas but subordinate to the will of the English majority on others?

There is ample basis for Scots to make an informed choice on this question, and if they vote for the opportunity to do so, they should be given it. If that choice is not allowed, the United Kingdom is no longer a voluntary union.

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