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ORIGINAL ARTICLE

Brexit and Scotland: between two unions

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Abstract This article addresses the territorial dimension of the Brexit referendum and its consequences, especially with respect to devolution and the independence debate within Scotland. The convincing Scottish majority vote for Remain alongside the UK vote to leave the EU has exposed the difficulties in reconciling rival self-determination claims. The Brexit vote has also raised again the issue of Scotland's place within the UK, and for some justifies reconsideration of the decision the Scottish electorate made to remain within the UK by rejecting independence in 2014. The article considers the explanations for the Remain vote in Scotland, and the reactions of the Scottish and UK Governments to the competing preferences north and south of the border. It argues that the 'one nation' nationalist rhetoric of the UK Government in the aftermath of the vote is at odds with the plurinational character of the United Kingdom. It critically examines the effects of the Brexit process to date on the influence and constitutional authority of the devolved institutions, while pointing to the challenges that would confront advocates of independence were that issue to re-emerge as the Brexit process unfolds.

Keywords Brexit · Self-determination · Scotland · Devolution · Independence

Introduction

In September 2014, Scots voted to remain within the United Kingdom, with just over 10 percentage points between yes and no. Less than 2 years after the independence referendum, the Scottish electorate voted by a significantly larger majority—62% to 38%—for the UK, including Scotland, to remain within the

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European Union. In a referendum offering a binary choice, and against the backdrop of a heated, highly salient and divisive campaign, this was an impressive victory for the Remain side in Scotland. But this was not a Scottish referendum. It was a UK-wide referendum with a UK-wide electorate. As such, UK Government ministers have frequently made clear that it is the decision of the whole of the UK which must be respected, and the job of the UK Government alone to negotiate the UK's departure from, and new relationship with, the EU. In her speech to the 2016 Conservative Party conference, Theresa May insisted: 'Because we voted in the referendum as one United Kingdom, we will negotiate as one United Kingdom, and we will leave the European Union as one United Kingdom. There is no opt-out from Brexit' (May 2016). From this perspective, the majority vote for Remain in Scotland is legally inconsequential in the face of a UK vote to leave.

But what of the political consequences? In the immediate aftermath of the referendum result, the First Minister, Nicola Sturgeon, pledged 'to take all possible steps and explore all options to give effect to how people in Scotland voted—in other words, to secure our continuing place in the EU and in the single market in particular'. She also immediately put the option of a new independence referendum on the table, insisting that the result represented 'a significant and a material change of the circumstances in which Scotland voted against independence in 2014' (Sturgeon, 2016a). In the months following the referendum, the Scottish Government convened a Standing Council on Europe, chaired by Professor Anton Muscatelli, Principal and Vice Chancellor of the University of Glasgow, and including diplomats, academics, industrialists and a former European Court judge. Their deliberations led to the publication of *Scotland's Place in Europe*, in which the Scottish Government offered what it called a compromise proposal to enable Scotland to remain within the EU single market even if the rest of the UK left (Scottish Government 2016a). Following the formal rejection of that proposal and the triggering of Article 50, the SNP Government, with the support of the Scottish Greens, secured a mandate to seek a transfer of powers from the UK Government to facilitate an independence referendum once the terms of Brexit are known.

The General Election result in May has not halted these ambitions, but the pause button has been pressed. The SNP won in Scotland comfortably, securing by some margin the second best performance in a General Election in the party's history. However, its best performance had come just 2 years previously, and it lost ground to the Conservatives and the Labour Party, both of whom made opposition to a second independence referendum central to their campaigns. There are, however, challenges on the road ahead, and the constitutional question is never far from the political agenda in Scotland. This article takes a closer look at the Brexit referendum vote in Scotland and its aftermath. It considers the reaction and priorities of the SNP Government, the responses of the UK Government, and the debates over the consequences of Brexit for territorial dynamics within the UK. After the losses endured by the SNP at the 2017 General Election, the option of a new independence referendum may not be on the table, but it remains on a shelf and within reach should circumstances and public opinion be conducive.

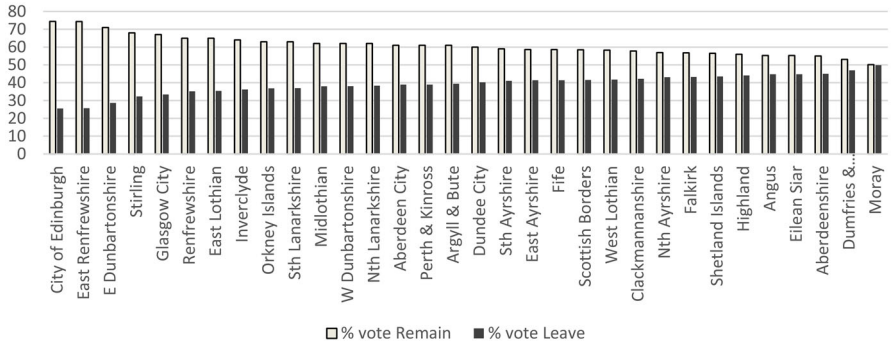

Fig. 1 EU Referendum Vote in Scotland Source: Electoral Commission (2016)

The Brexit vote in Scotland

The claim that Scotland voted to remain within the EU was bolstered by the scale and breadth of the Remain vote. Scotland did not register the highest Remain-supporting areas—even if we set aside Gibraltar, seven London boroughs recorded a higher vote share for Remain than the city of Edinburgh, Scotland's highest Remain-supporting local authority area (Electoral Commission 2016). Nonetheless, taken collectively, Scotland delivered the biggest endorsement of the EU of any nation or region of the UK, with majority support for Remain in each of the 32 local authority counting areas (Fig. 1).

The breadth of support for EU membership stands in sharp contrast to the outcome the last time the electorate was asked to determine the UK's relationship with the (then) European Community. Although voters in Scotland (and Northern Ireland) in 1975 shared the majority preference of their English and Welsh counterparts for the UK to remain within the European Community, they did so with markedly less enthusiasm.[1] Indeed, the Shetland Isles and the Western Isles (Eilean Siar) were the only two No-voting counting areas in the UK.

There was, of course, variation in the depth of support in the 2016 referendum, ranging from 50.1% in Moray, with just 122 votes between the Remain and Leave tallies, to just under 75% in the city of Edinburgh and East Renfrewshire. Indeed, Hanretty's vote share estimates suggested that two Scottish parliamentary constituencies, Banff and Buchan, in the north east, and the Highland constituency of Caithness, Sutherland and Easter Ross, probably voted Leave (Hanretty 2017).

Aggregate-level analysis of the UK vote has pointed to demographic patterns in the Remain and Leave vote. Goodwin and Heath suggested that 'Leave' won its strongest support in the areas of relative economic disadvantage, and whose resident populations are disproportionately older, less ethnically diverse, have below average levels of education, and house large numbers of 'the left behind' (Goodwin and Heath 2016). While not altogether absent from the Scottish picture, these voting patterns

[1] Whereas the vote for remain in England and Wales in 1975 was 67.8 and 64.8%, respectively, it was just 58.4% in Scotland and 52.1% in Northern Ireland.

appear weaker. Ethnicity is not a major factor shaping attitudes or political mobilisation, perhaps stemming from the fact that the cities of Glasgow, Edinburgh, Aberdeen and Dundee are the only local authority areas where, according to the 2011 census, the non-white resident population is above 5% (Scotland's Census 2016). The association with relative economic disadvantage is also less clear in Scotland. While less than 1%, respectively, of the 15% most deprived areas of Scotland can be found amid the relative affluence of East Dunbartonshire, East Renfrewshire and Stirling, and just over 5% in the City of Edinburgh—the four counting areas with the highest support for Remain—the next highest Remain vote was in the city of Glasgow, which includes over 30% of the most deprived communities in Scotland. Conversely, none of the 15% most deprived communities are to be found in Moray, which turned out the highest Leave share of any of Scotland's counting areas (derived from Scottish Government 2016b). When modelling the effect of age and education on the vote, Goodwin and Heath found that the Leave vote in Scotland was 22 percentage points lower than might have been expected in light of the country's educational and age profile (Goodwin and Heath 2016, p. 328).

Aggregate data can only paint a sketchy picture; local authority areas don't vote, people do. Individual-level data from the British Election Study suggest similarities in the demographic characteristics of Remain and Leave voters across Britain. As Table 1 indicates, north and south of the border, young people, and those with University qualifications were much more likely to have voted Remain than older and less qualified people. But in Scotland, the gap between these demographic groups was narrower; among Scots, there was a 24 percentage point gap between the youngest and oldest age group, and a 38 percentage point gap between those with postgraduate degrees and those with no qualifications, compared to gaps of 32 and 48 percentage points, respectively, among Remain voters in England. Indeed, what stands out from Table 1 is the extent to which Remain was the preference of almost every demographic in Scotland.

A comprehensive analysis of the vote is beyond the scope of this paper, but the BES data (wave 9) give some indicators. Scots appeared more favourable towards European integration than voters in England, and held a stronger European identity. Just over a third of Scots surveyed expressed broadly positive or enthusiastic attitude towards EU integration, compared to a quarter of the English sample. Those most hostile to the EU accounted for half of English respondents compared to around a third of Scots. Just under half of Scots said they felt somewhat or strongly European compared to just over a third of English respondents. Conversely, around a third of Scots felt only a little or not at all European compared to just under half of the English sample (Fieldhouse et al. 2016).[2]

Identities and social attitudes do not develop in a vacuum. They are shaped by the societal and political context in which voters live. A significant part of the explanation underpinning the Remain vote is the absence of Europe as an issue of contention

[2] The BES sought attitudes towards integration by using an 11-point scale, ranging from 0 to unite fully with the EU—to 10—protect our independence. I have taken scores of 0–3 as reflective of a positive attitude towards integration, and scores of 7–11 as a more hostile attitude. European identity is measured using a 7-point scale, ranging from 1 ('not at all European') to 7 (very strongly European). I have taken scores of 5 and above as indicative of feeling somewhat or strongly European, and scores of 1–3 of feeling only a little or not at all European.

Table 1 Demographic characteristics and the vote

	Scotland		*England*	
	Remain	Leave	Remain	Leave
Female	61	39	49	51
Male	62	38	49	51
18–25 years	75	25	71	29
26–35 years	69	31	55	45
36–45 years	64	36	48	52
46–55 years	54	46	43	57
56–65 years	58	42	40	60
66+	51	49	39	61
No qualifications	41	59	25	75
GCSE D-G	51	49	34	66
GCSE A-C	47	53	35	65
A level	63	37	54	46
Undergrad	73	27	62	38
Postgrad	79	21	73	27

Source: BES Wave 9, see also Henderson and Liñeira (2017)

within the Scottish political party system and the structure of party support. Having been sceptical at the time of the 1975 referendum, both the SNP and the Labour Party in Scotland came to embrace European integration in the 1980s. The increasing Euroscepticism of the Thatcher Government encouraged a more sympathetic re-evaluation of my enemy's enemy, but the change of heart also reflected developments in the EU and Scotland's experience of it (Mitchell 2014, pp. 231–234). The internal market heightened the significance and authority of the EU across member states, while the simultaneous expansion of cohesion funding and targeted EU regional policy helped Scottish local authorities and political parties orientate themselves more towards EU institutions and programmes. From 1988 and throughout the 1990s, large swathes of Scotland were eligible for cohesion funding as a consequence of their relative poverty, rurality or as areas affected by industrial decline. Investments in transport, development and infrastructure may have helped promote and accentuate the benefits of EU membership to a wider public. The European social model and the 'Europe of the Regions', promoted by Jacques Delors as Commission president, also contrasted favourably to the neo-liberal and centralist thrust of the Thatcher governments. As for many others within the family of sub-state nationalist parties (Nagel 2004; Elias 2009), for the SNP, which committed itself to the goal of 'independence in Europe' from 1988, the EU also provided a secure external framework and market that could facilitate a transition to independence and minimise the economic and security risks it might otherwise encounter. This reversal in attitudes towards European integration among nationalists and the left appears to have been mirrored by a shift in public attitudes (Henderson et al. 2016, pp. 190–194).

Since then, the parties in Scotland have maintained a broad consensus on the issue of EU membership. The Euroscepticism that gripped the UK Conservative Party never took hold of the party north of the border, in part because its rise in the

UK party coincided with a steep decline in the Tories' electoral significance in Scotland. While a few, mainly newly elected, Conservative members of the Scottish Parliament campaigned for a Leave vote in the June referendum, no senior elected Scottish Tory supported Leave. Ruth Davidson, the Scottish Conservatives' popular leader, was a prominent Remain supporter in the referendum campaign as was SNP leader and First Minister, Nicola Sturgeon. Scotland's political class was thus united in its support for Remain. Against that backdrop, one might be forgiven for expressing surprise that over a million Scots voted Leave.

When two national projects collide

National self-determination—expressed in the UN Covenant as the right of 'peoples' to 'freely determine their political status and freely pursue their economic, social and cultural development' (UN, 1976, Part 1, Article 1)—has long been recognised, at least among scholars, as an 'idealistic element of state formation' (Danspeckgruber 2002, p. 2) rather than a sound organising principle. Notwithstanding that every concept within the aforementioned right to self-determination has been contested (Tesón 2016), we focus here on the concepts of 'people' and 'political status'. The concept of 'a people' is often synonymous with 'a nation' as the basis of solidarity and locus of sovereignty (Greenfeld 1992, pp. 4–9; Connor 1994, p. 94–95), but determining who or what constitutes a nation, and who doesn't, is no less ambiguous. Contrary to some beliefs, nations are not primordial communities but are socially constructed over time and, while many may share some cultural or linguistic characteristics, migration and cultural plurality make these insufficient criteria of nationhood. A shared national identity and mutual sense of belonging—captured in Benedict Anderson's (1991) celebrated definition of nations as 'imagined political communities'—overcomes the limitations of objective criteria. Ernest Renan's equally celebrated essay *Qu'est-ce qu'une nation?*, originally published in 1882, underlined the importance of shared solidarity, built on the collective myths of a shared past and a shared commitment from those within a political community to continue living together, with all of the sacrifices that may entail. His metaphor of a nation as '*un plebiscite de tous les jours*' to underline the importance of consent may be especially apt when considered alongside the UK's recent referendum experiences (Renan 1882).

Among constitutional scholars, there is less ambiguity over the concept of 'political status', which is usually interpreted as international political status, and the idea that a nation, or people (however defined) can decide whether they should remain with the parent state, join another state or seek independence (Tesón 2016, p. 6). One of the many problems associated with recognising and implementing the right to national self-determination is that national boundaries often overlap, which can lead to divergent political objectives and competing expressions of self-determination. Brexit has shone a light on two distinctive cases of self-determination in the UK which are difficult to reconcile.

The UK is relatively unusual in the international community for the extent to which it has given recognition both to the plurinational character of the state and the

right of nations within it to self-determination. This is especially evident in the case of Scotland. The Anglo-Scottish 'Union' centralised political power in the Westminster Parliament but preserved distinctive Scottish institutions which, over time, would become carriers of national identity which helped preserve and nurture the Scottish *nation* alongside the British *nation*. The state resisted giving recognition to Scottish national identity in a separate parliament and government until the development of Scottish nationalism in the late 20th century demanded a constitutional response, but even ardent Unionists and anti-devolutionists recognised on some level Scotland's right to self-determination. As Margaret Thatcher noted of Scotland in her memoirs: 'As a nation, they 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, however much we might regret their departure' (Thatcher 1993, p. 624). That historic recognition may help to explain why David Cameron, when confronted by the election of a majority SNP Government in 2011, immediately recognised its right to hold an independence referendum in line with its manifesto commitment to do so. Over the subsequent 18 months, the two governments negotiated 'the Edinburgh Agreement', which temporarily transferred constitutional authority to the Scottish Parliament to facilitate a legal referendum, and committed both governments to respect the outcome of the referendum, whatever it may be (HM Government/Scottish Government 2012).

Although the issue of EU membership was a feature of the independence referendum campaign, it was not a debate on the merits of membership. Rather, the issue concerned whether or not an independent Scotland would be excluded from the EU, and whether an accession process would be long, drawn-out and carry obligations to adopt the Euro and the Schengen Agreement. The desirability of being part of the EU was largely uncontested. The No vote in 2014 was an expression of Scottish self-determination—voters freely determined that their political status should be to remain part of the United Kingdom. But the UK they voted to remain part of was a member of the European Union. The Brexit referendum was thus presented by the Scottish First Minister in the immediate aftermath of the vote as 'a significant and a material change in the circumstances in which Scotland voted against independence in 2014', claiming that 'for many people the supposed guarantee of remaining in the EU was a driver in their decision to vote to stay within the UK' (Sturgeon 2016a). Independent analyses of the independence referendum vote points towards some evidence to suggest that the contested issue of EU membership influenced voting behaviour, although this issue mattered much less than uncertainty over the economy and the currency (Liñeira, et al. 2016, 176–182).

The Brexit referendum can also be characterised as an expression of self-determination. The central claim of the Leave campaign was the demand to 'take back control'—a quintessential articulation of a nationalist demand for self-government. This resonated among voters concerned about control over borders and immigration, and the effect of the EU on Britain's independence (Swales 2016). Indeed, since accepting the outcome of the referendum, the UK Government has embraced the rhetoric of sovereignty and control. The Prime Minister's Lancaster

House speech, where she first set out her priorities for Brexit, characterised the referendum outcome as 'a vote to restore, as we see it, our parliamentary democracy, national self-determination, and to become even more global and internationalist in action and in spirit' (HM Government 2017a). Her letter to Donald Tusk, which triggered the Article 50 process, reiterated the description of the vote as a desire 'to restore, as we see it, our national self-determination' (HM Government 2017a).

This begs the question as to which nation, which people, she is referring. For Theresa May and the UK Government, it is the UK, as a whole, that has freely determined that its political status, its political destiny, is to be outside of the EU. That presupposes a shared national solidarity among the citizens of the UK that can transcend the territorial (and class and age) divisions between them. While this is possible—there is nothing inherently contradictory about feeling Scottish and British at the same time—it can't be taken for granted in a plurinational state when the will of the majority community runs counter to the will of territorial minorities. Moreover, the Brexit result presents most clearly as an expression of English self-determination than British self-determination. Henderson et al. (2016) found that, across England, negative attitudes towards the UK's EU membership and an inclination to support Brexit was felt most keenly among those with a relatively strong or exclusively English identity (see also Swales 2016; Clarke et al. 2017, offer a more qualified view of the importance of national identity).

The pro-Remain consensus within the Scottish political elite on the issue of EU membership does not imply consensus over how to deal with the prospect of Brexit. In the immediate aftermath of the Brexit referendum, the Scottish Parliament gave its backing to the First Minister to negotiate with the UK Government, EU institutions and member states 'to explore options for protecting Scotland's relationship with the EU, Scotland's place in the single market and the social, employment and economic benefits that come from that' (Scottish Parliament 2016). But the deep constitutional fissure that dominates Scottish politics—the debate between Independence and Union—soon came to the fore.

Contributions to the debate by Scottish party leaders reveal how the boundaries of the political community—the boundaries of the demos—are contested within Scotland. The Scottish Conservative leader, Ruth Davidson, urged the Scottish Government to preserve the integrity of 'the UK internal market' and to commit to 'making the best of Brexit', by respecting both the UK-wide result in the Brexit referendum and the 2014 independence referendum: 'The 2016 referendum was a UK wide vote … As democrats, it behoves us to respect both (referendum results)' (Davidson 2016). Following the Scottish Government's formal request to the UK Government for a new agreement that could facilitate a new independence referendum, Davidson made opposition to an independence referendum her central platform, with evident electoral benefits in the election that followed soon after. The then Labour leader, Kezia Dugdale, called for a solution that meets the demands of the Scottish electorate 'To be part of the UK and with a close and abiding relationship with Europe', thus implicitly giving more weight to the 2014 referendum outcome than the 2016 vote in Scotland (Dugdale 2016). Contrast this with the Scotland-centred expression of self-determination presented by Nicola Sturgeon: 'we didn't vote to leave—we voted to remain. To be told that we have to leave, regardless, is tantamount

to being told that our voice as a nation doesn't matter' (Sturgeon 2016b). To those for whom the boundaries of political community lie around Scotland, the Scottish demos will always take precedence.

Negotiating Brexit

The Prime Minister's first official visit following her appointment was to Edinburgh for a formal meeting with the Scottish First Minister. That was a symbolic gesture, intended to provide reassurance that the Scottish Government and the other devolved administrations would be engaged in the discussions around Brexit. It came with a promise that the PM wouldn't trigger Article 50 'until I think that we have a UK approach and objectives for negotiations' (BBC 2016). This was followed by an intensification of formal and informal engagement between the UK and devolved governments. The Joint Ministerial Committee (JMC), the main forum for bringing together the leaders of the UK's four governments, was resurrected in its plenary format after a hiatus of two and half years. A new sub-committee—the JMC (EU Negotiations)—was established specifically to provide the devolved governments with an opportunity to engage with the negotiation process, discuss their requirements of the future UK–EU relationship, and to 'seek to agree' a UK approach to Article 50 negotiations (Joint Ministerial Committee 2016). However, the commitment to securing a UK approach was short-lived, and this first phase of Brexit exposed fundamental weaknesses in the machinery and culture of the UK's intergovernmental relations (McEwen 2017).

The Scottish Government, along with the Welsh Government, prioritised remaining within the EU single market and customs union (Scottish Government 2016a; Welsh Government 2017). If the UK were to leave the single market, the Scottish Government proposed that Scotland could remain within it, through separate continued inclusion within the EEA. Clearly, the prospect of Scotland remaining more closely embedded within the single market than England and Wales would raise considerable practical and legal difficulties, for example, around the legal status of Scotland in the international community and the free movement of money, goods, services and people across two separate markets. Unsurprisingly, the proposal was formally rejected by the UK Government. The failure of the JMC (EN) process, though, was more evident in the inability of the devolved governments to have any influence over shaping a 'UK approach' to Brexit. Indeed, the Prime Minister's Lancaster House speech, which effectively ruled out remaining within the single market and the Customs Union, was delivered without consultation with the devolved governments. Likewise, the Article 50 letter was apparently not discussed with the devolved governments prior to its publication; indeed, the Scottish Minister for UK Negotiations on Scotland's Place in Europe, claimed to have only found out that notification was to be given to the President of the European Council when it was reported on the BBC.[3]

[3] In a tweet on 20 March at 12.17 pm, he tweeted from his personal Twitter feed @feorlean: Thank you @BBCNews for letting JMC members like me know that #Article50 is to be triggered next week. @GOVUK somehow forgot to inform us.

The European Union has provided a discursive framework for the expression of multiple identities and self-determination claims within the UK, as well as a regulatory framework within which the UK's system of multi-level government has developed. The overlap between EU and devolved competences has necessitated intergovernmental cooperation within the UK; notably the only intra-UK intergovernmental forum which has met regularly since devolution to the relative satisfaction of the participating governments is the JMC (Europe), which discusses upcoming issues on the European Council agenda. The need for the UK and the devolved governments to comply with EU law has represented a centripetal force containing some policy and regulatory divergences that institutional and political pressures may have otherwise generated. The UK Government appears to have belatedly recognised this in its intention that, in leaving the EU and leaving the EU single market, 'no new barriers to living and doing business within our own Union are created … That means maintaining the necessary common standards and frameworks for our own domestic market' (May 2017).

The EU (Withdrawal) Bill is the first indication of that intention. Its primary function is to repeal the European Communities Act 1972, while preserving existing EU law in order to ensure continuity and certainty as the UK exits the EU. The Bill achieves this by creating a new category of law—retained EU law—and gives powers to ministers to use secondary legislation to modify it in order to 'prevent, remedy or mitigate' any deficiencies. However, it is the provisions of the Bill that relate to devolution, and their underlying assumptions, which pose the biggest challenge for UK territorial politics. At time of writing, the Bill is progressing through the Committee stage in the Commons, and its fate is as yet unknown. In its current form, however, it represents a significant challenge to the constitutional authority of the devolved governments and the devolved legislatures.

The legislation that created the devolved institutions required devolved laws to be compatible with EU law. In the absence of any other change, this requirement would be removed after Brexit, leaving these legislatures free to pass laws in devolved areas like agriculture, the environment and fishing that have been governed by EU law. This would give rise to the possibility of greater policy and regulatory divergence in these fields. However, Clause 11 of the Bill replaces the need for compatibility with EU law with the need for compatibility with 'retained EU law', and at the same time stipulates that the devolved legislatures 'cannot modify, or confer power by subordinate legislation to modify, retained EU law'. These restrictions are intended to be transitional. There is provision in the Bill to transfer further powers to the devolved legislatures, that is, to release them from the new constraint, if negotiations between the UK and devolved governments determine that a common legislative approach isn't necessary. For their part, the devolved governments have signalled a willingness to develop common frameworks where necessary, so long as this is achieved by agreement. But if agreement can't be reached, the default position created by the Bill would leave authority for retained EU law with the UK Government and Parliament. In that event, the devolved legislatures may not have fewer powers than they have today, but the balance of authority between them and the UK Parliament would have shifted considerably. The Bill also gives devolved ministers some time-limited powers to modify retained

EU law in areas that are already fully devolved. These come with the restriction that any changes made by the devolved institutions must be consistent with modifications made by the UK Government. Also implicit within the Bill is that the latter may use secondary legislation to alter the powers of the Scottish Parliament and the National Assembly for Wales (but not the Northern Ireland Assembly) without requiring the consent of devolved ministers or legislatures.

The Scottish SNP Government and Welsh Labour Government, in a coordinated response, have criticised the bill as a 'power grab' that will weaken their respective devolution settlements. At time of writing, it remains to be seen whether ongoing intergovernmental deliberations can reach a compromise position which would enable them to recommend to their respective legislatures that the Bill be given legislative consent for the changes it will make to devolved powers. Such consent is sought by convention—it is not a legal requirement. As the Supreme Court made clear when ruling on the devolution issues raised in the Brexit appeal, this convention, commonly known as the Sewel Convention, acts as 'a political restriction on the activity of the UK Parliament' which serves to promote harmonious relationships with the devolved legislatures, 'but the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law' (The Supreme Court 2017: paras 145 and 151; for a discussion of the devolution dimension of the Brexit appeal, see McHarg and Mitchell 2017). If consent is withheld, politics, not law, will determine what happens next.

Conclusion: a choice of two unions?

In her foreword to *Scotland's Place in Europe*, Nicola Sturgeon warned that: 'If the real and substantial risks that Brexit poses to Scotland's interests cannot be mitigated within the UK, the option of choosing a better future through independence should be open to the Scottish people' (Scottish Government 2016a, p. viii). With the support of SNP and Green MSPs, she secured a mandate from the Scottish Parliament to formally request a Sect. 30 order from the UK Government to facilitate a new independence referendum. The motion read 'That the Parliament acknowledges the sovereign right of the Scottish people to determine the form of government best suited to their needs', and it called for the powers to legislate for a referendum 'that will give the people of Scotland a choice over the future direction and governance of their country', setting a timescale of between autumn 2018 and spring 2019, when the terms of Brexit are clear but before exit day (Scottish Parliament 2017). Sturgeon's subsequent letter to the Prime Minister invoked the right of the Scottish people to self-determination and the right of the people of Scotland 'to determine the form of government most suited to their needs'. She also noted purposefully 'the importance you attached to the principle of self-determination in your letter to President Tusk.' (Scottish Government 2017). The Prime Minister's carefully crafted rejection of the request, on the basis that 'now is not the time' for an independence referendum, translated into a more forceful opposition in the snap UK General Election. The SNP lost 21 seats in that election, and a combination of opposition to, or lack of appetite for, another

referendum has been widely interpreted as one explanation, though it is among others (see Henderson and Mitchell 2017). Nonetheless, the SNP Government's independence referendum plans have been put on hold.

These are, however, deeply uncertain times and support for independence remains historically high. The political circumstances may yet become more conducive to a new independence vote. If they do, the architects of independence will be forced to confront some complex and difficult issues over the kind of independent Scotland they could deliver within the context of Brexit. The independence vision presented in 2014 was predicated on both Scotland and the UK remaining within the EU, and envisaged many shared institutional, political and economic ties with the rest of the UK, including a formal currency union, a strategic energy partnership, continuity of the Common British Isles Travel Area, a common research area, and defence and security cooperation. Brexit, especially where it entails withdrawal from the EU single market, the Customs Union and regulatory divergence, would make it difficult to combine such an interdependent form of independence with Scottish membership of the EU or even of EFTA. As is evident in the issues surrounding the border on the island of Ireland, it would raise the spectre of a 'hard border' between Scotland and England which would almost certainly make independence less palatable.

The outcome of the Brexit process remains unclear, both with respect to the future relationship between the UK and the EU, and the domestic implications of withdrawal. What happens next may depend as much on the actions, reactions and discourse of the UK Government as to developments within Scotland. Can Theresa May's government survive, and can it secure in a *plebiscite de tous les jours* the consent and legitimacy to speak for the whole of the UK? Can it secure a deal with the EU which enables Brexit to appear as an opportunity not a threat? Will it respect Scottish distinctiveness and the devolution settlement by making some concessions, for example, by removing or loosening the constraints on the devolution settlement and transferring sufficient additional powers to the Scottish Parliament and the other devolved legislatures? If the answer to one or more of these questions is 'No', we can expect further challenges to the UK's territorial constitution. A new independence referendum may seem less likely today than it did a year ago, but it remains a possibility. If that happens, Scots may be confronted with a choice few wanted to have to make: a choice between remaining within the UK Union or seeking an alternative future within the European Union.

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