

“FREEDOM!”¹ FOR SCOTLAND: A HOLLYWOOD TAGLINE, BUT A HOLYROOD PREROGATIVE

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¹ BRAVEHEART (Paramount Pictures 1995).

I. INTRODUCTION

Scotland is in a relatively new position within the United Kingdom (U.K.) and the global community. Having spent a millennium or more as a sovereign nation—with its own culture, economy, laws, and even monarchy—Scotland joined with England (and Wales) in creating the United Kingdom of Great Britain by ratifying the Articles of Union with the passage of the Union with England Act of 1707 (the Union).¹ Within a few years of the Union, however, Scots fought to restore their independence.² For many, the fight continues today.³ With the U.K.'s massive constitutional overhaul of the past two decades,⁴ including the re-establishment of the Scottish Parliament and the devolution to Scotland of some aspects of national governance and sovereignty (under the Scotland Act of 1998),⁵ the issue of independence has gained renewed significance.⁶ In the 2007 Scottish parliamentary elections, for instance the Scottish National Party (SNP) made an incredible showing; a “central plank” of the SNP platform is a referendum for independence.⁷ Parallel developments across the U.K. include increased devolution of powers

¹ The Articles (or Treaty) of Union, signed on July 22, 1706, led to “Acts of Union” that were passed by the separate parliaments of both England and Scotland. The pre-Union Scottish Parliament passed the Union with England Act on January 16, 1707. Union with England Act, 1707, Scot. Parl. Acts xi 406, c. 7, *available at* <http://www.rps.ac.uk/trans/1706/10/257>. The pre-Union English Parliament passed the Union with Scotland Act later that same year. Union with Scotland Act, 1706, 6 Ann., c. 11 (Eng.), *available at* <http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=2078400>. Both Acts worked to dissolve the former national governments of England and Scotland and replaced them with a single United Kingdom of Great Britain. *See infra* Part II.B (setting out the provisions of the Union with England Act in more detail).

² T.B. SMITH, SCOTLAND: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION 55 (1962). In 1711, for instance, “a motion was actually made in the House of Lords to dissolve the Union in protest at the abolition of the Scottish Privy Council” and other parliamentary actions targeting Scottish participation. *Id.*

³ Maria Dakolias, *Are We There Yet?: Measuring Success of Constitutional Reform*, 39 VAND. J. TRANSNAT'L L. 1117, 1168–69 (2006) (claiming that the majority of Scots believe that Scotland should be governed by the Scottish Executive).

⁴ *Id.* at 1118.

⁵ Scotland Act, 1998, c. 46 (U.K.), *available at* http://www.opsi.gov.uk/acts/acts1998/ukpga_19980046_en_1; Dakolias, *supra* note 3, at 1118, 1167.

⁶ *See, e.g.,* Fergus Ewing & Jennifer Erickson, *The Case for Scottish Independence*, 25 FLETCHER F. WORLD AFF., Summer 2001, at 89.

⁷ Hector L. MacQueen, *Scots Law News, Scottish Parliamentary Election 2007: The Union Challenged?*, 11 EDINBURGH L. REV. 295, 296 (2007). The SNP is now the most represented party in the Scottish Parliament, with forty-seven seats against forty-six Labour and thirty-six other seats. *Id.*

to Wales and Northern Ireland, the establishment of a U.K. Supreme Court,⁸ and the increasing influence of European Law on the U.K.⁹

While many Scots would like more, or even absolute, independence from the Parliament at Westminster, it remains to be seen how recent developments have affected this goal. This is a question of the constitutional situation-in-fact, and of the legal justification for future independence-directed actions by the Scottish Parliament. It is not a question of policy, though policy may inform some aspects of the discussion. The argument proceeds from the Scottish constitution and legal system, as opposed to the U.K. system or the English system. By examining the respective effects of the Scotland Act of 1998, the establishment of the U.K. Supreme Court, British economic policy, and the influence of European Union law on the U.K. and Scottish constitutions, this Note argues that Scottish independence is consistent with the still-extant Scottish constitution and is potentially on the horizon.

The legislative, economic, and judicial avenues of independence are all available, and each can justifiably be utilized. Part II of this Note begins with a brief legal history of Scotland and culminates with a description of the U.K.’s constitutional arrangement under the Union. Part III describes the powers devolved to Scotland and reserved to Westminster under the Scotland Act of 1998, and discusses the introduction of the U.K. Supreme Court and the supranational impact of European Union law. Part IV analyzes the legal justifications of possible paths to independence, based on the evolution of the Scottish constitution. Part V concludes with a suggestion that Scotland would be constitutionally justified in regaining complete independence.

II. SCOTTISH LEGAL AND CONSTITUTIONAL HISTORY

A. Early Influences and Development

In any legal argument for a nation’s independence, it is particularly important to emphasize the nation’s independent legal and constitutional development. This is especially true where neither the parent country nor the country asserting independence has a unitary, written constitution. Scotland’s legal and constitutional development began in the middle of the first millennium after Christ, and has been subject to multiple influences since

⁸ Robert Walker, *The New Supreme Court and Other Changes in the Justice System*, 6 LEGAL INFO. MGMT. 292 (2006).

⁹ Dakolias, *supra* note 3, at 1167; David Jenkins, *Both Ends Against the Middle: European Integration, Devolution, and the Sites of Sovereignty in the United Kingdom*, 16 TEMP. INT’L & COMP. L.J. 1, 1–2 (2002).

then.¹⁰ The various tribes inhabiting the area now known as Scotland—the Picts, the Scots of Dalriada, the Britons in the southwest, and the Angles in the southeast—each followed already-developed practices of governance and law.¹¹ The Picts, for instance, had a distinctive system of royal succession based on maternal heredity, which was otherwise unknown in Western European history.¹²

The Dalriadic Scots, on the other hand, were the dominant influence on early Scottish legal development. Their systems can be traced to the Dalriadic dynasty of Ireland.¹³ Geographically defined and ethnically distinct, these groups gradually came under the rule of a single monarch: “In the middle of the 9th century, the Picts . . . came under the kingship of Kenneth mac Alpin of the Dalriadic dynasty.”¹⁴ Kenneth I founded “the kingdom of Alba, or Scotia, the forerunner of the later Scottish kingdom . . . [which] expanded in the 10th and 11th centuries to incorporate both the British south-west and the Anglo-Saxon south east.”¹⁵ The Scots’ victory over the Northumbrians in 1018 also served as a major catalyst in this geographic expansion.¹⁶ The Scottish mainland was under monarchic rule by the eleventh century, with a legal

¹⁰ W. David H. Sellar, *A Historical Perspective*, in *THE SCOTTISH LEGAL TRADITION* 29, 31 (Scott C. Styles, ed., 1991).

¹¹ See *id.* at 31 (describing the notable, unique governance practices of each group). The Picts were an aboriginal tribe that inhabited the east, from modern-day Edinburgh and Northumbria, and the north, including the area of Aberdeen, Inverness, the northern Highlands, and the Grampian Mountains. JAMES BALFOUR & HENRY MAULE, *THE HISTORY OF THE PICTS, CONTAINING AN ACCOUNT OF THEIR ORIGINAL, LANGUAGE, MANNERS, GOVERNMENT, RELIGION, BOUNDS AND LIMITS OF THEIR KINGDOM* 31–33 (printed by Robert Freebairn, 1706). Their name comes from the Latin *picti*, meaning “painted men.” OXFORD LATIN DICTIONARY 1377 (P.G.W. Glare ed., 1982). The Scots were of Irish ancestry and inhabited primarily the west and southwest, including the Western Isles. Sellar, *supra* note 10, at 31 (noting that the Scots came from Dalriada, and that Ireland was “the original home of the Gaelic language and the Dalriadic dynasty”). Both territories overlapped at various points with those of the Angles and Britons, who advanced from the south in the early centuries of the first millennium. DUNCAN H. MACNEILL, *THE HISTORICAL SCOTTISH CONSTITUTION* 24–25 (1971).

¹² Sellar, *supra* note 10, at 31.

¹³ *Id.* The *Cain Adomnain* is one example of early Scottish legal writing, negotiated between several Scottish and Irish tribes, and resulting in “a . . . Dark Age Geneva Convention” from 697 A.D., which protected women and children from battle. *Id.* at 32.

¹⁴ *Id.* at 31.

¹⁵ *Id.*

¹⁶ DAVID M. WALKER, *THE SCOTTISH LEGAL SYSTEM: AN INTRODUCTION TO THE STUDY OF SCOTS LAW* 113 (8th ed. 2001). The new Scottish kingdom included everything north of Glasgow and the Strathclyde area in the west, as well as Edinburgh, Lothian, and the Borders in the east (basically modern-day Scotland). A. Grant, *Scotland in the Central Middle Ages*, in *ATLAS OF MEDIEVAL EUROPE* 80 (Angus MacKay & David Ditchburn eds., 1997) (showing a map illustrating the expansion of the kingdom of Alba).

system that became further consolidated over the next two centuries.¹⁷ The period was characterized by a system of provinces with subsidiary "thanages," or estates, which were responsible for local administration.¹⁸

Following the expansion of Gaelic-Pictish Alba and its administrative system, the next major influence on Scottish legal development was feudal law, introduced after the Norman invasion of England in 1066.¹⁹ The effects of the invasion were not immediately felt by Scotland; it was not until about 1081 that Normans began entering Scotland.²⁰ However, by about 1150, Scotland was "Normanised beyond recall."²¹ Thus, the feudal system of governance that had already dominated in Europe was gradually implemented in Scotland, where it was seen that "the best way for rulers to consolidate power was through subordinate feudal knights and castle-based lordships."²² This type of arrangement allowed the "rulers of the kingdom . . . to shape a law which was largely national rather than local, co-terminous with the bounds of their kingdom, a *common law*."²³

Some elements of feudal governance were easily accepted in Scotland, given their similarity to old norms. The feudal land-tenure system was, in one sense, well-suited to assimilation with the previous Celtic practices: under the older Gaelic-Pictish system, land was held by the "chief and his near kindred."²⁴ Subsequent to Norman influence, and with little "disposition," the same land was now held by "a 'vassal' from a lord," conferred by "royal charter" on "native Scottish chiefs, who had their customary rights confirmed and enlarged by the grant of feudal jurisdiction."²⁵

The land-tenure aspect of feudalism was thus largely superimposed on the preexisting Scottish land law structure.²⁶ On the other hand, the prior Scottish system was one based on patriarchy and family relations,²⁷ hence the continued use of the words "chief," "families," "clan," and so on.²⁸ The king himself was

¹⁷ See Sellar, *supra* note 10, at 33–35 (discussing the development of Scotland's Common Law system).

¹⁸ Grant, *supra* note 16, at 79.

¹⁹ *Id.*

²⁰ WALKER, *supra* note 16, at 114.

²¹ *Id.* (quoting ROBERT RITCHIE, NORMANS IN SCOTLAND, at xv (1954)).

²² Grant, *supra* note 16, at 79.

²³ Sellar, *supra* note 10, at 33–34.

²⁴ WALKER, *supra* note 16, at 115–16; see also Grant, *supra* note 16, at 79 (discussing the feudalization of Scotland).

²⁵ WALKER, *supra* note 16, at 115.

²⁶ *Id.* at 115–16.

²⁷ MACNEILL, *supra* note 11, at 15.

²⁸ *Id.* at 15–16.

seen as the “chief” or “patriarch” of the people.²⁹ Land had thus already been held in a way that could be described as hierarchical, but not as part of a formalistic feudal system such as that which was practiced in Europe and imposed on newly-conquered Norman England.³⁰ After the introduction of the feudal land tenure system, moreover, the Old Celtic patriarchal and clan-oriented aspect of the Scottish identity, and the Scottish constitution, retained its ancient meaning.³¹ While the superficial structure was adopted with relative ease, the underlying societal and constitutional assumptions appear to have remained thoroughly Scottish.

Other feudal requirements were also markedly different from the prior Scottish system. The Normans encountered some basic constitutional principles or assumptions which were too firmly ingrained to be dislodged. One example relates to the familiar English tort principle that “the King can do no wrong.”³² Though “the idea that the King was lord of the whole land and the fountain of all justice” was introduced by feudalism and accepted in Scotland in the thirteenth century,³³ the Scots never held that the King was actually beyond the law (until 1897, when their own courts erroneously and with “but a weak foundation” imported that notion from English tort law).³⁴ Rather, one of Scotland’s most significant constitutional documents makes quite clear that the king is emphatically not beyond the law, and is bound by the Scottish constitution.³⁵ The Declaration of Arbroath of 1320 states:

Quem si ab inceptis desisteret, Regi Anglorum aut Anglicis nos aut regnum nostrum volens subicere, *tanquam inimicum nostrum et sui nostrique juris subversorem, statim expellere niteremur, et alium regem nostrum qui ad defensionem nostram sufficeret faciemus.*³⁶

²⁹ *Id.* at 15.

³⁰ See WALKER, *supra* note 16, at 115 (noting that “[t]he [feudal land tenure] system was by this time well developed in England and on the Continent”).

³¹ See *id.* at 116 (“By the end of the thirteenth century, old Celtic institutions had been feudalised, . . . however, Celtic custom in the main lasted for sever more centuries.”).

³² SMITH, *supra* note 2, at 65.

³³ WALKER, *supra* note 16, at 116.

³⁴ SMITH, *supra* note 2, at 65.

³⁵ *Id.* at 49–50.

³⁶ *Id.* at 50 (“But if he should leave off from his first principle, and willingly subject us or our kingdom to the King of the English or to the English people, *we would immediately seek to drive him out as our enemy and the subverter of his law and ours, and would make for ourselves another king who would rise to our defense.*” (author’s translation) (emphasis added)).

This declaration provides a clear indication of Scotland's tradition that royal power flows from the people. It is a tradition which, from earliest times, has been a powerful force in Scottish political thought and in the development of the Scottish constitution.

In contrast, feudal law introduced a new administrative organization, probably at the hand of David I.³⁷ Like the feudal land-tenure system, this new administration, including the office of "sheriff," was probably well-received, as "[a] network of sheriffdoms began to spread over the whole country."³⁸ "The Scottish sheriffdom seems to have been an artificial unit which did not coincide with previous divisions of the land or natural boundaries"; it created an officer of the king who was responsible for judicial, financial, administrative, and military matters.³⁹ Sheriffs held court at their local castles, deciding over civil and criminal matters.⁴⁰ The sheriff court survives today as the basic unit of the Scottish judicial system.⁴¹ Moreover, the decentralized network, of which the sheriffs were a part, gave the kingdom greater administrative efficiency than previously existed.⁴² To a great extent this system rested on, and continued to reflect, protection for the individual. The office was new, but it was adapted to the pre-existing Scottish mindset that perceived government as a creation of the people.⁴³ Whereas the feudal land-tenure system matched pre-existing Scottish customs and was therefore easily adapted to, the feudal system of governance introduced by the Normans did not displace the Scottish approach wherein power began at the local level with municipal assemblies.⁴⁴ Power thus seems to have flowed upward through the

³⁷ See WALKER, *supra* note 16, at 117, 122 (discussing David I's introduction of "political officers and institutions of the feudal monarchy" and sheriffs offices in Scotland).

³⁸ *Id.* at 117.

³⁹ *Id.* at 122.

⁴⁰ *Id.*

⁴¹ Michael C. Meston, *Scots Law Today: Scotland's Place in the International Legal Order*, in THE SCOTTISH LEGAL TRADITION, *supra* note 10, at 1, 4–5.

⁴² WALKER, *supra* note 16, at 118 (noting that "the inadequate central machinery of government, combined with feudal theory to effect a wide dispersion of judicial functions and powers . . . all over the country"). Of particular importance was the development of the burghs, which were "fundamentally economic organisations acting as market-centres for the sheriffdoms." *Id.* at 118–19. These organisations exemplified the type of local unit that managed governance and would represent its constituents in the greater Scottish Parliament. See *id.* at 130 (noting that the early Parliament was composed of representatives of the three estates, including the "clergy, tenants-in-chief, and burgesses").

⁴³ See *supra* notes 35–36 and accompanying text.

⁴⁴ See MACNEILL, *supra* note 11, at 105–07 (describing the locally oriented Scottish system of governance wherein, even after the introduction of feudalism, "[t]he power of rejecting or accepting the advice of their governors was exercised by the Scots" through a referendum-like

newly-feudalized, and now administrative, family- and clan-based network. This is yet another example of the vitality of the Scottish constitution and its ability to withstand and adapt to new ideas and structures without losing its unique character.

The introduction of feudalism also affected the judicial system in Scotland. Under the feudal system, but also in his traditional role as patriarch, the Scottish king held court to settle appeals in important matters, sitting with members of his household and other important persons.⁴⁵ Eventually, the king used the feudal network to call to court representatives of the three social estates: clerics representing the Church; "tenants-in-chief" representing the family; and burgesses representing the burghs.⁴⁶ This was the beginning of Parliament. The *parliamentum*, the first sitting of the three estates, was recorded in 1326.⁴⁷ Though Parliament began as a judicial body with the king as its head, it soon took on legislative functions deriving from the king's authority,⁴⁸ but was always representative of the people and sustained by their power.

And so, a kingdom-wide system developed from the manifold practices of various groups, beginning under Kenneth I, and became feudalized under David I. The Scottish legal system was based on longstanding tradition, decentralization, and the rule of law, the power of which reached even the sovereign.

Like the feudal network's historical development, the structure of the pre-union Scottish legislature also reveals the concern, inherent in the Scottish constitution, for local control over local affairs. The original Scottish Parliament was unicameral, for it grew out of the sittings of the king's court.⁴⁹ It evolved into an elected body, comprised of "ninety commissioners from the shires, sixty-seven from the burghs, and a like number of peers in regular attendance."⁵⁰ These delegates, particularly the burghal representatives, were elected by the town councils, comprising and representative of the merchant and craftsman classes.⁵¹ Thus, the Scottish Parliament was a national

"local veto" system that permitted refusal or acceptance of directives by the local parish or parish council).

⁴⁵ WALKER, *supra* note 16, at 116.

⁴⁶ *Id.* at 117.

⁴⁷ University of St. Andrews: Records of the Parliaments of Scotland to 1707, A Short History, <http://www.rps.ac.uk> (follow "A Short History" hyperlink) (last visited Apr. 6, 2010).

⁴⁸ WALKER, *supra* note 16, at 130–31.

⁴⁹ SMITH, *supra* note 2, at 70; *see also* WALKER, *supra* note 16, at 130–31 (discussing the origin of the Scottish Parliament).

⁵⁰ SMITH, *supra* note 2, at 70.

⁵¹ *Id.*

legislative body almost directly accountable at the local level to most of its constituents: "Parliament could legislate, but the people in their local councils decided whether or not to put the enactments into operation."⁵² This local control waned after 1707.⁵³

It is no surprise that the dominant nation, England, imposed its own legal philosophy on Scotland through acts of Parliament and through judicial decisions, but it is important to note that this philosophy is fundamentally at odds with the Scottish approach. Scotland began as an amalgamation of ethnic groups gradually coming under the rule of a monarch, but keeping sovereignty in the hands of the people. The power flowed upward from the people to the patriarchal king.⁵⁴ The people "followed" the king because they had given him power to lead, not because he was naturally endowed with autocratic authority over them.⁵⁵

In contrast, England fell under a sovereign that gained his power by conquering the natives and establishing himself as the supreme power.⁵⁶ The Norman laws imposed by William the Conqueror were social controls meant to protect the supremacy of the king, and the feudal system provided the network through which those controls were exerted on the conquered English.⁵⁷ Scotland, on the other hand, was not conquered by the Normans, but rather accepted the gradual influx of Normans and their ideas.⁵⁸ These ideas were adapted to the existing Scottish system, and the philosophical underpinnings of the Scottish constitution did not change.⁵⁹ The English constitution is based on the idea that law is something a superior can impose upon an inferior; the Scottish constitution presents the law as something protecting the individual from inappropriate imposition by the titular sovereign.⁶⁰

⁵² MACNEILL, *supra* note 11, at 38.

⁵³ See *infra* Part II.B (discussing the Union with England Act of 1707).

⁵⁴ See MACNEILL, *supra* note 11, at 38–39 (describing the lack of enforcement power of the Scottish king absent support of the various "clansmen").

⁵⁵ See *id.* at 38 (explaining how the Scottish Constitution evolved, giving "the people the power to control their rulers"). Scotland was a nation under almost constant threat of invasion, and it was the repulsion of these invasions that united the country behind their king, their chosen leader. *Id.* at 105.

⁵⁶ *Id.* at 106–07.

⁵⁷ *Id.* at 106–08.

⁵⁸ WALKER, *supra* note 16, at 114.

⁵⁹ See *supra* pp. 447–48 (noting the feudal land-tenure system was superimposed onto a pre-existing, and complementary, Scottish land-tenure system). It is the position of this Note that, because the old land-tenure system was essentially retained, it makes good sense to suppose that the constitutional ideal of land-tenure also was retained.

⁶⁰ Compare MACNEILL, *supra* note 11, at 58, 106–07 (describing the English as "a conquered people with the Normans self-imposed as a military aristocracy" whose constitution

Moreover, though in modern Britain it is Parliament, and not the Crown, that has become more sovereign and that exercises legislative control,⁶¹ the Scottish conception of the monarchy was fundamentally different from the English conception.⁶² In addition to the Declaration of Arbroath, other documents display the same Scottish abhorrence of granting the king unlimited power.⁶³ For instance, the Claim of Right of 1689 "declared that James VII [of Scotland] by abuse of prerogative powers had altered the fundamental constitution of the kingdom 'from a legal limited monarchy to an arbitrary despotick power . . . whereby he hath forefaulted the right to the Crown, and the throne is become vacant.'"⁶⁴ Thus, any policies effected by Westminster (whether by Parliament in its legislative capacity or the House of Lords in its judicial capacity) post-Union would be antithetical to the Scottish constitution to the extent that these policies afforded the monarch more authority than he or she would otherwise have been due.

Though the early Scottish constitution may be seen as protective of the individual, personal freedom was not explicitly dealt with therein.⁶⁵ Considering the extent to which the early Scottish constitution protected the rights of the citizenry from abuse at the hands of the monarch, it may seem surprising that so many fundamental constitutional liberties were not enumerated until the last century or two.⁶⁶ On the other hand, their enumeration is only part of a process, and would not have occurred unless the rights were already part of the constitutional scheme.

enshrines "the powers of conquerors . . . wrested from the crown by parliament, yet . . . [nonetheless] intact", *with id.* at 123 ("Let us conclude the picture of [the Scottish] constitution by seeing it as a kind of umbrella, in the shelter of which [Scottish] citizens went about their business undisturbed by the commands of an omnipotent sovereign . . .").

⁶¹ See Dakolias, *supra* note 3, at 1118, 1167 (discussing the shift in rule and governance in the United Kingdom).

⁶² See SMITH, *supra* note 2, at 62–65 (describing the powers of the Scottish Crown and noting some important differences between it and the English Crown).

⁶³ *Id.* at 62–63 (discussing the Claim of Right, 1689, by which the Scots "declared that James VII by abuse of prerogative powers have altered the fundamental constitution of the kingdom" and thereby forfeited the throne, as opposed to corresponding English documents that referred to James as having "abdicated"; also discussing the affirmative proclamation of Queen Elizabeth in 1952, which may, strictly speaking, have been unnecessary, but which the Scots clearly felt obliged to provide).

⁶⁴ *Id.* at 62.

⁶⁵ *Id.* at 79. Smith elaborates, "[p]ersonal freedom rests on the common law," detailing the modern law regarding freedom from arbitrary arrest, search, detention, and imprisonment; the right to free expression of opinion; and the right of public meeting. *Id.* at 79–84.

⁶⁶ See *id.* at 79–84 (noting that many rights, such as freedom of expression and assembly, were not enunciated until judicial decisions by the House of Lords in the last two centuries).

Another important influence on the early Scottish constitution was civil law and, through it, Roman law. As the Normans brought feudalism and continuing Scottish contacts with France, they also brought a code-based system that can be traced back to the Roman emperor Justinian.⁶⁷ While some scholars downplay the influence of civil law, at least as compared with the later impact of English common law,⁶⁸ others give civil law significant weight in explaining the development of Scots law.⁶⁹ Of particular note is the importance of civil law education for Scottish lawyers,⁷⁰ and the traditional, if somewhat mythical, concision of Scottish legislation.⁷¹ As one author states, “The Scots law is based on statute”;⁷² its “[c]ontact with the [English] Common Law has turned [Scotland] into a mixed jurisdiction,” though “Scotland in the general lines of its legal development followed the Civilian tradition until . . . 1707.”⁷³ This Civilian tradition underscores both the uniqueness of Scottish law and the displacement of traditional Scottish legal principles wrought by the United Kingdom’s House of Lords.⁷⁴

B. The Union with England Act of 1707

There is reason to conceive of the Union as having come about through the independent but concerted actions of independent parliaments, though the result was to dissolve each of the above and create one in their stead. That is, two parliaments made the decision to create the United Kingdom of Great Britain, which entailed the dissolution of each prior legislative body and the establishment of a new, unitary legislature.⁷⁵ Keeping in mind what actually

⁶⁷ Sellar, *supra* note 10, at 46.

⁶⁸ See WALKER, *supra* note 16, at 139 (claiming that, despite “sixteenth century . . . references to Roman law, . . . its influence was not great”).

⁶⁹ See generally WILLIAM M. GORDON, ROMAN LAW, SCOTS LAW AND LEGAL HISTORY 303 (2007) (discussing the Roman heritage of Scots law, which is “based on statute,” and noting that “Scotsmen . . . [before the fifteenth century] went to the universities of the Continent” in search of an education in Roman law).

⁷⁰ See REINHARD ZIMMERMANN, ROMAN LAW, CONTEMPORARY LAW, EUROPEAN LAW: THE CIVILIAN TRADITION TODAY 152 (2001) (noting the introduction of civil law to Scottish legal culture and education in the eighteenth century).

⁷¹ See Nigel Jamieson, *The Scots Statute – Style and Substance*, 28 STATUTE L. REV. 182, 190 (2007) (discussing the brevity and “dryness of wit” of Scottish statutes, though taking issue with a characterization of Scots statutes as “Lacedaemonian”).

⁷² GORDON, *supra* note 69, at 303.

⁷³ *Id.* at 323.

⁷⁴ SMITH, *supra* note 2, at 87–88; see also *infra* Part III (detailing the effects of the Union on Scottish legal principles).

⁷⁵ Union with England Act, 1707, Scot. Parl. Acts xi 406, c. 7, art. I, available at <http://>

happened—the unification of two separate bodies into a single, new body—brings into view the blatantly unequal continuation-in-fact of the English Parliament alongside the mere dissolution of the Scottish Parliament.

Also, as there is no single, comprehensive constitutional document either Scottish, English, or British, so there is no union, despite the custom of referring to it as such.⁷⁶ Rather, a series of negotiations resulted in a treaty as well as “a complex [set] of documents” which “may, for convenience, be described as the Union Agreement.”⁷⁷ The Union was the product of negotiations between the Scottish and English Parliaments that began in earnest with a proposed draft on July 22, 1706, with each country sending thirty-one Commissioners to the bargaining table.⁷⁸

A century earlier, the Union of the Crowns⁷⁹ had occurred, under which James VI of Scotland became James I of England, assuming sovereignty as the head of both Scotland and England.⁸⁰ Over the following century, several attempts to more thoroughly unite the countries would fail, allowing old animosities to continue.⁸¹ Scotland and England remained essentially separate cultural and administrative entities, despite being ruled by the same monarch.⁸²

This century was also the period in which—following the death of Charles I and the English opposition to the claim of Charles II, whom the Scottish parliament had recognized immediately—Oliver Cromwell invaded Scotland.⁸³ He had become “supreme” in England, and intended to “improve” Scotland and take it under his control.⁸⁴ Cromwell caused many swift governmental changes after invading Scotland, including the temporary dissolution of Parliament

www.rps.ac.uk/trans/1706/10/257; SMITH, *supra* note 2, at 53.

⁷⁶ See SMITH, *supra* note 2, at 52 & n.16 (in the same way that the Scottish, English, and British constitutions are all unwritten, but are rather comprised of entire bodies of written law, so there is no single “Union,” but there are a complex of documents, among the most important of which is the Act of Union).

⁷⁷ *Id.*

⁷⁸ *Id.* at 53.

⁷⁹ See WALKER, *supra* note 16, at 141 n.77 (noting that in fact, the crowns were not “united”—the same person became King of Scotland and King of England, but each nation retained its own crown).

⁸⁰ MACNEILL, *supra* note 11, at 89.

⁸¹ See *id.* at 89–104 (detailing the attempts at governmental unification throughout the period between the Union of the Crowns in 1603 and the Union in 1707).

⁸² WALKER, *supra* note 16, at 141–43 (discussing several attempts to harmonize Scottish and English economies, cultures, and administrations, but showing that the kingdoms remained essentially separate in these respects).

⁸³ MACNEILL, *supra* note 11, at 94–95.

⁸⁴ *Id.* at 95.

(which reconvened in 1661).⁸⁵ Cromwell also “appoint[ed] his supporters to be Justices of the Peace on the English model, and Englishmen to be Judges of the Court of Session.”⁸⁶ Though ultimately unsuccessful, Cromwell’s efforts to Anglicize the Scottish legal system were, at that time, indicative of the English project to subdue Scotland.⁸⁷

After Cromwell died, Charles II was “restored to his throne” and recognized by the English eleven years after the Scots had done so.⁸⁸ Unfortunately, Charles II shared Cromwell’s desire to bring Scotland under English control, and he and his successors (James VII of Scotland and II of England, and William of Orange, who became William III after 1688) continued the efforts to bring this result about.⁸⁹ Significantly, under this Darien Scheme, William “[let] it be known that any help given to the Scots [,specifically merchants,] would be regarded by him with disfavour [sic],” and so the international community was forestalled from doing business with Scottish entrepreneurs.⁹⁰ This action led to a period of economic hardship for the Scots, and the country thus entered union negotiations in an artificially weakened state (due to the English-imposed trade sanctions that stifled the Scottish economy).⁹¹ The Union of 1707 was the product of a century-long movement that was not without some opposition on both sides, Scottish and English. This opposition, and the generally anti-Scottish behavior of the English establishment at the time, may be seen as a precursor to the Union’s consequences for Scotland.

The Union “[u]nited [the two kingdoms of Scotland and England] into One Kingdom by the Name of Great Britain,” and mandated that “the United Kingdom of Great Britain be Represented by one and the same Parliament”⁹² Yet, even with the creation of the United Kingdom, there appear to be clear examples of the intention to preserve significant aspects of sovereignty to the two constituent nations. Though the two nations were expected to come under a single legislature and become part of a new United Kingdom, the Scottish and English constitutions continued to exist. One of the

⁸⁵ WALKER, *supra* note 16, at 145.

⁸⁶ MACNEILL, *supra* note 11, at 95.

⁸⁷ *See id.* at 95–96 (noting that both Cromwell and, after his death, Charles, aimed to bring Scotland under the control of the Parliament at Westminster).

⁸⁸ *Id.* at 97.

⁸⁹ *See id.* at 96–97 (noting that James VII and II “had no interest in an independent Scotland,” and that William III’s Darien Scheme put the Scots “in the position of rebels” as opposed to an independent nation).

⁹⁰ *Id.* at 97.

⁹¹ *See id.* at 98–99 (providing details of Scotland’s turmoil since 1702).

⁹² Union with England Act, 1707, Scot. Parl. Acts xi 406, c. 7, arts. I & III, *available at* <http://www.rps.ac.uk/trans/1706/10/257>.

most important aspects of the Union is the preservation of Scots law: Article XIX specifically provides for the continued independence of Scottish private law and the judiciary.⁹³ Specifically, the Union Agreement provides that no English court would be competent to hear matters of Scots law.⁹⁴ The preservation of Scottish private law, of course, was subject to the caveat that the United Kingdom Parliament could not alter “[l]aws which concern private Right except for evident utility of the subjects of Scotland.”⁹⁵ The “Publick” law, moreover, was made subject to the U.K. Parliament, the relevant phrase being that the public law could be made “the same” throughout the U.K.⁹⁶ Despite the terms of Article XIX, the House of Lords quickly asserted jurisdiction over civil appeals in Scottish cases—though no justifying provision existed in the Union documents.⁹⁷ Nonetheless, since the continued force of the prior Scottish legal system was clearly countenanced in the Union, it only makes sense that the Scottish constitution survived. Without this result, there would be no basis or guidance for the remaining legal system.

The voluntariness of the Union indicates that Scotland assented to the union and, thus, to the dissolution of its own Parliament in acquiescence to rule by the U.K. Parliament. Indeed, consent was given and negotiations were made;⁹⁸ yet, the practical consequences of the Union likely manifested themselves in a way that the Scottish commissioners did not expect or particularly desire. Beginning almost immediately and continuing through the following centuries, Parliament consistently interpreted the Union in a distinctly anti-Scottish manner.

As for the relationship between the Scottish, English, and overall British constitutions, Parliament interpreted it in a potentially unconstitutional manner. For instance, the Scottish Privy Council, “which had till then conducted Scottish administration, was abolished” in 1708.⁹⁹ This is particularly surprising because, though technically allowed by the language of the Union,

⁹³ *Id.* art XIX; see also SMITH, *supra* note 2, at 53–54 (discussing the preservation of Scots law after the Union); WALKER, *supra* note 16, at 155 (outlining preserved Scots law).

⁹⁴ Union with England Act, 1707, art XIX. Though, as one scholar puts it, “[t]he majority Party in Parliament representing a minority of Scottish voters would not seem the appropriate arbiter of ‘evident utility.’” SMITH, *supra* note 2, at 58 n.26.

⁹⁵ Union with England Act, 1707, art. XVIII.

⁹⁶ *Id.*

⁹⁷ SMITH, *supra* note 2, at 55; see also the *Greenshield’s* case, *infra* text accompanying notes 127–30 (reasoning that it was not another “court” at Westminster, but simply the upper house of the legislature, the House of Lords, that appropriated jurisdiction of Scots appeals, probably in contravention of the Union Agreement).

⁹⁸ See SMITH, *supra* note 2, at 57 (detailing the negotiations).

⁹⁹ *Id.* at 66.

this move seems contrary to the Union’s spirit.¹⁰⁰ The Union’s preservation of the Scottish private law and judiciary, coupled with the fact that the “Public” law was left mostly unchanged, implies that a significant amount of sovereignty over national affairs was expected to remain with Scotland.¹⁰¹ Therefore, it seems inconsistent that the domestic administrative authority in Scotland should be so swiftly abolished with control falling to Parliament in Westminster.

The English-dominated Parliament at Westminster treated the Union with less deference than might have been expected.¹⁰² Because English constitutional theory conceived of the Crown as the supreme lawgiver, and of Parliament as an extension of that lawgiving power,¹⁰³ Parliament was thought able to alter or repeal any legislative act.¹⁰⁴

In 1066 England was more than conquered; she was cowed
And now, in 1707, we have a sovereign who still stands above the
law; parliament exercises the power of compelling obedience
Constitutionally, the powers of a conqueror have been, through
the six preceding centuries, wrested from the crown by
parliament, yet these powers have been retained intact.¹⁰⁵

If the English-dominated Parliament could have attributed this kind of power to itself, it also could have seen the Union as a product of its own action (and not as a joint undertaking of the former Scottish and English parliaments).¹⁰⁶

¹⁰⁰ *Id.* at 55.

¹⁰¹ Union with England Act, 1707, art. XVIII (providing that only “laws concerning regulation of trade, customs, and . . . excises” be imposed on Scotland as a direct effect of the Union; that other public laws should remain the same in Scotland, though the Parliament at Westminster had the power to modify them; and that no private laws in Scotland could be modified by Parliament at Westminster “except for evident utility of the subjects within Scotland”).

¹⁰² Compare SMITH, *supra* note 2, at 53 (describing Parliamentary actions that seem to contradict the spirit of the Union), with Union with England Act, 1707, art. XVIII.

¹⁰³ MACNEILL, *supra* note 11, at 108.

¹⁰⁴ See SMITH, *supra* note 2, at 57–59 (summarizing two views, by either of which the Parliament at Westminster was acting within its powers in altering the Union: “English theories that Parliament is an unlimited sovereign, and can lawfully vary any conditions of the Union by ordinary legislation,” and a prevailing theory as expressed in a 1953 House of Lords opinion holding that Parliament might not be able to alter fundamental constitutional documents with “ordinary legislation” but, either way, no judicial body is competent to assess whether Parliament was acting beyond its powers).

¹⁰⁵ MACNEILL, *supra* note 11, at 108.

¹⁰⁶ SMITH, *supra* note 2, at 57 (describing the English theory that Parliament could as

Finally, since the assumptions carried into the new Parliament were mostly those of English constitutional tradition, and were not representative of Scottish legal history, it was as if the pre-union English Parliament simply took in a few Scottish representatives in return for complete control over Scotland.¹⁰⁷

Under this interpretation of Parliament's power, England and Scotland would not have united; rather, England would have been like a conqueror of Scotland, Scotland having transferred sovereignty to the English government.¹⁰⁸ Yet, considering that the Union was actually a dissolution of the two prior legislatures and the establishment of a new lawmaking body, it is unclear

why it should have been supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament, as if all that happened in 1707 was that Scottish representatives were admitted to the Parliament of England. That is not what was done.¹⁰⁹

This is further evidence of the continued vitality of the Scottish constitution, and points again to the fundamental difference between the Scottish and English constitutions. Whereas the English constitution grew out of an impulse to control the people with government, the Scottish constitution represented an attempt by the people to put their governors under their control.¹¹⁰ Certainly, the Scottish commissioners who negotiated the Union would not have expected a wholesale departure from their previous constitutional scheme, but the English-dominated parliament at Westminster did, in a real way, make such a departure.¹¹¹

Shortly after the passage of the Union and in the decades that followed, Parliament changed or revoked several aspects of it.¹¹² Only some of these changes were permissible under the Union, some sections were made at least

sovereign repeal or alter provisions of any law, including the Union).

¹⁰⁷ See *infra* note 109 and accompanying text (discussing effect of perpetuation of English assumption of "unlimited sovereignty").

¹⁰⁸ But see Elspeth Reid, *Scotland (Report 1)*, in MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY 201, 201 (Vernon Valentine Palmer ed., 2001) ("Scotland did not transfer sovereignty to England: she voluntarily entered into the Treaty of Union of 1707.").

¹⁰⁹ *MacCormick v. Lord Advocate*, [1953] S.C. (H.L.) 396, 411 (Scot.); SMITH, *supra* note 2, at 57.

¹¹⁰ MACNEILL, *supra* note 11, at 16.

¹¹¹ SMITH, *supra* note 2, at 57.

¹¹² *Id.* at 55.

partially revocable, but other sections made no mention of revocability, or were specifically irrevocable.¹¹³ Since, as some scholars argue, the Union “took effect as a skeletal, but nonetheless fundamental, written constitution for the new Kingdom of Great Britain,”¹¹⁴ variance of the irrevocable articles would necessarily be in contravention of the Scottish and British constitutions.

As an example of such unconstitutional variation, the Heritable Jurisdictions Act of 1746 abolished heritable jurisdictions in Scotland,¹¹⁵ the preservation of which had been guaranteed under Article XX of the Union.¹¹⁶ The Act was in response to Highland uprisings and general dispute of the royal succession.¹¹⁷ The immediate effect of this Act was to revoke clan chiefs’ traditional jurisdictional powers, including their ability to call men to arms.¹¹⁸ Another instance of parliamentary disregard for the Union occurred with the malt tax of 1713.¹¹⁹ Article XIII of the Union Agreement read “that during the continuance of the Duty payable in England on Malt . . . Scotland shall not be charged with that Duty.”¹²⁰ The malt tax, however, declared that “all Malt made in Scotland, not to be consumed there, which . . . shall be brought into England, Wales, or the Town of Berwick upon Tweed . . . the Sum of six pence per Bushel . . . for the same Malt, shall be paid to such officer before landing thereof.”¹²¹ This tax was not well-received by the people of Scotland, being both economically inequitable and in contravention of the Union Agreement.¹²²

¹¹³ *Id.* (noting that some provisions, such as Article XIX, were “expressly made liable to variation,” while other provisions “were expressly made irrevocable”)

¹¹⁴ *Id.*

¹¹⁵ Heritable Jurisdictions Act, 1746, 20 Geo. 2, c. 43 (Scot.).

¹¹⁶ Union with England Act, 1707, Scot. Parl. Acts xi 406, c. 7, art. XX, available at <http://www.rps.ac.uk/trans/1706/10/257>.

¹¹⁷ See Encyclopedia Britannica, United Kingdom: Britain from 1742 to 1754, <http://www.britannica.com/EBchecked/topic/615557/United-Kingdom/44893/Britain-from-1742-to-1754#ref=ref483271> (last visited Apr. 6, 2010) (noting that James II was expelled to France following the Glorious Revolution of 1688, but his son and, as of 1744, grandson continued to claim the family’s right to succession; being Scots, they found much support in Scotland).

¹¹⁸ See Proceedings of the Scottish Parliament, Debate on Highland Clearances (Sept. 27, 2000), transcript available at <http://www.his.com/~rory/hlndclr.html> (“Formerly, the Scottish kings, without a standing army, had found it necessary to delegate authority to subjects who in return were granted large areas of land. Consequently, the power of a chief lay in the number of men he could call to arms. The Heritable Jurisdictions (Scotland) Act 1746 ended that prerogative and landlords, as real money replaced barter, began to make their land commercial through improvement and charging higher rent. The old system of township farming, in which rent was paid mostly in kind, became increasingly uneconomic.”).

¹¹⁹ WALKER, *supra* note 16, at 156.

¹²⁰ Union with England Act, 1707, art. XIII.

¹²¹ Taxation, etc. Act, 1712, 12 Ann. c. 2, § 39 (U.K.).

¹²² WALKER, *supra* note 16, at 156.

Another arbitrary parliamentary repeal of an irrevocable provision occurred in 1712 with the Toleration Act,¹²³ which directly contravened a portion of the Union Agreement.¹²⁴ Under this portion of the Union Agreement, the Presbyterian Church was to "be the only Government of the Church within the Kingdom of Scotland . . . for ever [sic]."¹²⁵ Great Britain's Toleration Act, however, "sanctioned" Episcopacy in Scotland, in a direct offense to the Scottish clergy and government.¹²⁶

While a modern audience may interpret this increased religious tolerance as a positive development, the change, like the others mentioned, nonetheless exposes that particularly troubling anti-Scottish attitude held by the English-dominated Parliament at Westminster. This same attitude of parliamentary sovereignty had manifested itself a year earlier in *Greenshield's* case, which arose from the religious strife preceding the Toleration Act.¹²⁷ In that case, the House of Lords accepted an appeal by a Scottish Episcopalian minister, who had been "imprisoned in Edinburgh for openly using the Anglican form of service";¹²⁸ the House of Lords ultimately supported the minister's right to continue practicing, surprising some and potentially violating the Union in two ways.¹²⁹ As previously noted, the Union preserved the exclusivity of the Presbyterian Church in Scotland, and this decision flew directly in the face of that provision.¹³⁰ Furthermore, Article XIX of the Union preserved the jurisdiction of Scottish courts and specifically denied to English courts "in Westminster-hall" any jurisdiction over Scottish matters.¹³¹ Lastly, the Union did not specifically provide that the House of Commons would have jurisdiction over Scottish appeals in cases of any kind, and so the House of Lords did not have clearly-defined authority to rule in the case.¹³²

The lords, however, reasoned that the House of Lords was not one of the "other court[s] in Westminster-hall,"¹³³ but was simply the upper house of

¹²³ Toleration Act, 1711, 10 Ann., c. 6, § 10 (U.K.).

¹²⁴ WALKER, *supra* note 16, at 156.

¹²⁵ Protestant Religion and Presbyterian Church Act, 1707, c. 6 (Scot.), available at <http://www.statutelaw.gov.uk/content.aspx?ActiveTextDocId=1519703>.

¹²⁶ WALKER, *supra* note 16, at 156.

¹²⁷ *Id.*

¹²⁸ *Id.* at 158.

¹²⁹ SMITH, *supra* note 2, at 55.

¹³⁰ Protestant Religion and Presbyterian Church Act, 1707, c. 6.

¹³¹ Union with England Act, 1707, Scot. Parl. Acts xi 406, c. 7, art. XIX, available at <http://www.rps.ac.uk/trans/1706/10/257>.

¹³² See Reid, *supra* note 108, at 206 ("The Treaty of Union did not specifically provide for Scots appeal to be taken to the House of Lords.").

¹³³ Union with England Act, 1707, art. XIX.

Parliament.¹³⁴ Thus, with this decision, ultimate jurisdiction over Scottish civil appeals passed to Parliament, acting in its supreme judicial capacity.¹³⁵

At the same time, Scots were denied representation in the House of Lords,¹³⁶ a prohibition that continued until the Appellate Jurisdiction Act 1876;¹³⁷ even after Scots Law Lords were allowed to sit on House of Lords appeals, they were almost always in the minority.¹³⁸ Either way, the practice of hearing Scots' appeals in the House of Lords has been established, "however erroneous" it may be.¹³⁹ This is another example of Parliament's undue exercise of control, whether legislative or judicial, over the underrepresented Scottish people.

Aside from acting unconstitutionally in the immediate aftermath of the Union, the House of Lords also generally exerted potentially undue influence over the Scottish legal system (as will be discussed below). Parliament's meddling illustrates Scotland's constitutional tension with England, and Great Britain as a whole,¹⁴⁰ while offering a reason to afford Scotland greater judicial independence in the future.

From about 1800 onward, Scottish appeals to the House of Lords were frequent.¹⁴¹ During this period, Scots' appeals were heard by English Law Lords, most of whom were ignorant of Scots law and some of whom even admitted this ignorance.¹⁴² Thus, "[i]t is not surprising that decisions of the Lords continued to be worthless as statements of Scots law and, so far as influential, to be seriously detrimental to the principles of Scots law."¹⁴³ A telling example is the case of *Bartonshill Coal Co. v. Reid*,¹⁴⁴ in which the widow of a coal miner sued her husband's employer after a co-worker's negligence caused him to fall to his death. Under Scots law, the Scottish

¹³⁴ See Reid, *supra* note 108, at 206 (stating that via the *Earl of Roseberry v. Pirrie* and the *Greensheild*'s case, "the House of Lords accepted jurisdiction of Scots appeal").

¹³⁵ WALKER, *supra* note 16, at 158.

¹³⁶ Reid, *supra* note 108, at 206.

¹³⁷ See Appellate Jurisdiction Act, 1876, 40 Vict., c.59, § 6 (U.K.) ("For the purpose of aiding the House of Lords in hearing and determination of appeals, Her Majesty may . . . by letters patent appoint . . . qualified persons to be Lords of Appeal in Ordinary A person shall not be qualified to be appointed by Her Majesty a Lord of Appeal in Ordinary unless he has been . . . (b) an advocate in Scotland, or a solicitor entitled to appear in the Court of Session and the High Court of Judiciary").

¹³⁸ Reid, *supra* note 108, at 206.

¹³⁹ WALKER, *supra* note 16, at 158.

¹⁴⁰ This tension implies a surviving, if beleaguered, Scottish constitution.

¹⁴¹ WALKER, *supra* note 16, at 171.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Bartonshill Coal Co. v. Reid*, (1858) 3 Macq. 266 (H.L.).

Session Court decided, the employer was liable for the negligence of his workers, including negligence against other employees.¹⁴⁵

The rule in England, though, was the "Doctrine of Common Employment," which stated that "a master is not responsible for negligent harm done by one of his servants to a fellow-servant engaged in a common employment with him."¹⁴⁶ Though the employer relied upon this rule, the Scottish Session Court rejected the argument.¹⁴⁷ The widow and her family won in that Scottish court, but on the employer's appeal to the House of Lords, an English Lord imperiously queried, "[b]ut if such be the law of England, on what ground can it be argued not to be the law of Scotland?"¹⁴⁸ The mere utterance of this question belies ignorance, not only of Scots law, but of the terms of the Union. Although it was never a part of Scots law, the English Doctrine of Common Employment was imported (though repealed by statute in 1948) to the detriment of Scottish workers and their families.¹⁴⁹

III. RECENT CONSTITUTIONAL REFORM

A. *The Scotland Act of 1998*

The constitutional arrangement after the Union of 1707 remained fairly constant for quite some time, though since at least the mid-twentieth century that arrangement was matched by an undercurrent of support for greater independence from the Parliament at Westminster.¹⁵⁰ In 1978, this movement towards independence culminated in a failed attempt at devolution. The Scotland Act of 1978 passed in Parliament, and would have devolved significant powers to Scotland, but the referendum required for its implementation found support among only 33% of the electorate.¹⁵¹ The 1978 Act was revoked in 1979, at which time a vote of no confidence ousted the Labour government and the new Conservative regime took power.¹⁵²

¹⁴⁵ *Id.*

¹⁴⁶ JOHN W. SALMOND, *THE LAW OF TORTS* § 21.8 (R.F.V. Heuston & R.A. Buckley eds., 12th ed. 1992) (1907).

¹⁴⁷ *Bartonsill Coal Co.*, 3 Macq. at 285.

¹⁴⁸ *Id.*

¹⁴⁹ WALKER, *supra* note 16, at 171 & n.46.

¹⁵⁰ The Scottish Parliament, History, The Path to Devolution, <http://www.scottish.parliament.uk/vli/history/pathtodevolution/index.htm> (last visited Apr. 8, 2010) [hereinafter *The Path to Devolution*].

¹⁵¹ *Id.*

¹⁵² *Id.*

The Conservative government allowed some devolution to Scotland and Wales but, fearing the dissolution of Great Britain, did not allow for the same degree of independence countenanced by the 1978 Act.¹⁵³ In the late 1980s, representatives from several Scottish political parties began meeting to discuss the constitutional situation, and in 1989 this group united with other Scottish church and business leaders to form the Scottish Constitutional Convention (SCC).¹⁵⁴ After meeting for several years, the SCC produced its final report in 1995, entitled *Scotland's Parliament, Scotland's Right*.¹⁵⁵ The report was notable for the lack of arguments in direct support of independence; rather, the SCC furnished proposals for implementation of devolution, the “momentum for change” being simply “too great to deny.”¹⁵⁶

Whether the pro-devolution tone was a persuasive strategy or indicative of a sincerely conservative approach, the report had a significant impact. Following its release, and based on its recommendations, the Labour government staged a referendum and prepared for the introduction of a new Scotland Bill.¹⁵⁷ The September 11, 1979 referendum contained two items, both of which passed overwhelmingly: the people of Scotland expressed their will that a Scottish Parliament be established and that such a Parliament have tax-varying powers.¹⁵⁸ The new Scotland Bill was introduced in 1979 and became law in January 1980.¹⁵⁹ By late 1989, the first Scottish Parliamentary elections and meetings had taken place, and the Queen had officially opened the new Scottish Parliament at Holyrood.¹⁶⁰ There have been two subsequent Scottish Parliament elections, in 2003 and 2007.¹⁶¹

The contours of the Scotland Act create a quasi-federal silhouette, as the Act devolves to Scotland whatever powers are not reserved to Westminster.¹⁶²

The long and detailed list of powers reserved to the Parliament at Westminster includes, most notably, changes to the constitution and the union arrangement

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ SCOTTISH CONSTITUTIONAL CONVENTION, *SCOTLAND'S PARLIAMENT, SCOTLAND'S RIGHT* (1995), available at http://www.almac.co.uk/business_park/scc/scc-rep.htm.

¹⁵⁶ *Id.*

¹⁵⁷ The Path to Devolution, *supra* note 150.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ HELEN HOLDEN, PARLIAMENT AND CONST. CTR., THE UK DEVOLVED LEGISLATURES: SOME COMPARISONS BETWEEN THEIR POWERS AND WORK 4 (Nov. 9, 2007), available at <http://www.parliament.uk/commons/lib/research/briefings/snpc-04505.pdf>.

¹⁶² See Scotland Act, 1998, c. 46, § 29(2)(b) (providing that an act of Scottish Parliament is law unless it relates to a matter reserved to Westminster, inter alia), available at http://www.opsi.gov.uk/acts/acts1998/ukpga_19980046_en_1.

of Scotland and England, international commerce and economic policy, and elections to supranational organizations such as the European Parliament.¹⁶³ Speaking broadly, the devolved powers include the authority to make primary and secondary legislation on many issues.¹⁶⁴ These devolved powers are significant and numerous, and include topics from public health, education, and tourism, to economic and industrial development, criminal (and most civil) law, as well as agriculture, forestry, and fishing.¹⁶⁵ The Act also gives the Scottish Parliament the ability to vary the income-tax rate.¹⁶⁶

Some specific exceptions to reserved powers are enlightening: though the Act reserves to Westminster the control of imports and exports, the Scottish Parliament retains control over the "prohibition and regulation of movement into and out of Scotland of food, animals, animal products," and the like.¹⁶⁷ Lastly, the Scotland Act stipulates that the Acts of Union of 1706–1707 remain, in effect, subject to the Scotland Act.¹⁶⁸ The resulting scheme divides power asymmetrically between the Scottish Parliament and the Parliament at Westminster.

The competency of the Scottish Parliament is relatively far-reaching, and a great deal of democratic power has been handed back to the Scottish people. Once more, Scottish control most domestic affairs, and the preservation of Scots Law (as stipulated in the Union) remains. The broad range of powers is striking when compared to the devolution arrangement with Northern Ireland.¹⁶⁹ Many similar areas are devolved to each legislature, but the Scottish Parliament has additional areas of competency. Notable examples include most aspects of criminal and civil law (including prosecutions and the courts), local government, some transportation infrastructure and planning, and public records, none of which fall within Northern Ireland's domestic competency.¹⁷⁰

¹⁶³ *Id.* sched. 5, §§ A1, B3; HOLDEN, *supra* note 161, at 7–8.

¹⁶⁴ HOLDEN, *supra* note 161, at 7–8. Primary legislation is law, typically statutory-made by Act of Parliament or by the sovereign's prerogative (e.g., royal warrants, royal proclamations), while "secondary legislation," or "subordinate legislation," "is made under powers conferred by or under statute on Her Majesty in Council or on a Minister, Department, the National Assembly for Wales or other body or person." HER MAJESTY'S STATIONERY OFFICE, STATUTORY INSTRUMENT PRACTICE ¶ 1.2.1 (3d ed. 2003), *available at* <http://www.opsi.gov.uk/official-publications/publishing-guidance/si-practice.doc>.

¹⁶⁵ HOLDEN, *supra* note 161, at 8.

¹⁶⁶ Scotland Act, 1998, § 73.

¹⁶⁷ *Id.* sched. 5, § C5.

¹⁶⁸ *Id.* § 37.

¹⁶⁹ See HOLDEN, *supra* note 161, at 6–7 (outlining Northern Ireland devolution arrangement, which divides competency into excepted, reserved, or transferred powers).

¹⁷⁰ *Id.*

Thus, the U.K. Parliament has recognized the distinct needs of each kingdom, and has allowed a somewhat wider range of power to the Scottish Parliament.

The Scottish constitution continues to develop alongside the British constitution, and it has received more room to grow. On the other hand, Westminster continues to control important aspects of sovereignty, many of which are undeniably essential for the viability of any independent state. With control of international affairs and economic policy resting in British hands, and with the all-important ability to alter the Union and its constitution remaining outside of Scottish control, it is clear that Scotland's full independence is not yet in effect. The Scotland Act, like devolution in general, presents a tension between the people, their home rulers, and the British authority which still controls so much.¹⁷¹

B. The U.K. Supreme Court

In 2003, British Prime Minister Tony Blair announced that he was abolishing the office of Lord Chancellor, and introducing legislation that would establish a United Kingdom Supreme Court (the Court).¹⁷² The new Court assumed the appellate jurisdiction of the House of Lords and the devolution jurisdiction of the Privy Council (meaning it handles challenges to the legislative competency of devolved legislatures, such as the Scottish Parliament), and consists of twelve justices.¹⁷³ There are still no criminal appeals from Scotland.¹⁷⁴ Of course, not everyone in the U.K. has accepted the change enthusiastically or trustingly:

Nothing has been worse handled by the Prime Minister than his judicial reforms. He did not consult the law lords; he did not consult the Lord Chief Justice; he could not get the past Lord Chancellor's agreement He thought he had abolished the office of Lord Chancellor, which he did not have the power to do.¹⁷⁵

¹⁷¹ This tension will be explained and explored as part of the analysis in Part IV, *infra*.

¹⁷² Press Release, Prime Minister's Office, Lord Falconer Appointed Secretary of State for Constitutional Affairs (June 12, 2003), <http://www.number10.gov.uk/Page3894>; Robert Walker, *The New Supreme Court and Other Changes in the Justice System*, 6 LEGAL INFO. MGMT. 292 (2006).

¹⁷³ U.K. Ministry of Justice, Supreme Court, <http://www.justice.gov.uk/whatwedo/supremecourt.htm> (last visited Apr. 8, 2010) [hereinafter Supreme Court]; Walker, *supra* note 172, at 293.

¹⁷⁴ Walker, *supra* note 172, at 293.

¹⁷⁵ William Rees-Mogg, *The Supreme Court: Isn't There Some Law Against It?*, TIMES ONLINE (U.K.), Aug. 4, 2003, http://www.timesonline.co.uk/tol/comment/columnists/william_

Whether or not Blair had the authority to perform what he had declared in the press release, the reforms are coming to pass. The Constitutional Reform Act of 2005 was an important step in this process: "[The Act] modifies the office of Lord Chancellor and . . . the way in which some of the functions vested in that office are to be exercised. The Act also creates the Supreme Court of the United Kingdom and abolishes the appellate jurisdiction of the House of Lords."¹⁷⁶ The Court began its first term in 2009.¹⁷⁷

There may be several reasons for the change. Perhaps the most facially obvious reason is an increased desire for the independence of the judiciary.¹⁷⁸ Whereas the appellate jurisdiction of the House of Lords required that the upper house of the legislative body also act in a judicial capacity, the justices of the new Supreme Court act only in a judicial capacity.¹⁷⁹ The Constitutional Reform Act requires the first justices of the new Supreme Court to be twelve Law Lords from the House of Lords who are in office when the Court begins its session; they will be subsequently disqualified from sitting in legislative sessions as members of the House of Lords.¹⁸⁰ The reason for the disqualification is to ensure that "[t]he court will be an independent institution, presided over by independently appointed law lords."¹⁸¹

Some argue that the Court is either an unnecessary creation or a truly bad idea. This is because the Law Lords have been capable of separating their legislative and judicial roles, with the new Court merely an attempt by the executive to isolate from Parliament a stumbling block that—because of its

rees_mogg/article856607.ece.

¹⁷⁶ Constitutional Reform Act 2005, Explanatory Notes, ¶ 3, *available at* http://www.opsi.gov.uk/ACTS/acts2005/en/ukpgaen_20050004_en.pdf.

¹⁷⁷ Supreme Court, Ministry of Justice, <http://www.justice.gov.uk/about/supremecourt.htm> (last visited Apr. 27, 2010).

¹⁷⁸ Walker, *supra* note 172, at 292 ("Within the principled [reasons for the change] I include the embarrassment which the British Government may have felt in its dealings with the Council of Europe, at a time when many former iron-curtain countries were seeking admission to the European Union, at a constitution under which the individual who was (at least in theory) the most senior judge was also a cabinet minister and speaker of the upper house of the legislature, and under which the highest court of appeal was (at least in theory) merely a committee of the upper house.").

¹⁷⁹ See Supreme Court, *supra* note 173 ("The introduction of a Supreme Court for the United Kingdom provides greater clarity in our constitutional arrangements by further separating the judiciary from the legislature.").

¹⁸⁰ Constitutional Reform Act, 2005, c. 4, §§ 23–24 (U.K.), *available at* http://www.opsi.gov.uk/ACTS/acts2005/ukpga_20050004_en_1; GLENN DYMOND, HOUSE OF LORDS LIBRARY NOTE, THE APPELLATE JURISDICTION OF THE HOUSE OF LORDS 17–19 (Nov. 15, 2007), *available at* <http://www.parliament.uk/documents/upload/hllappellate.pdf>.

¹⁸¹ Crimlinks, October 1, 2009: New UK Supreme Court, <http://www.crimlinks.com/Oct32009.htm> (last visited Apr. 8, 2010).

ancient prestige and significance—they say would be better to maintain.¹⁸² Others, however, see the Court as an appropriate innovation, bringing the U.K. in line with the democratic checks and balances its neighbors and allies—European nations and the—value so highly.¹⁸³

The Ministry of Justice says the Court will “provide greater clarity in [the U.K.’s] constitutional arrangements by further separating the judiciary from the legislature.”¹⁸⁴

Either way, the new Court’s implications for Scotland are unclear. It is possible that very little change will be felt at the local or regional levels. On the one hand, challenges to devolution legislation will now be heard by the Court, instead of by the Privy Council.¹⁸⁵ On the other hand, Scottish criminal appeals remain beyond the Court’s jurisdiction.¹⁸⁶ Scotland does have a say in the selection of justices; the First Minister of Scotland must be consulted as to each appointee.¹⁸⁷ Although it is unclear whether the introduction of a U.K. Supreme Court will have a distinct impact on Scotland, it is undeniable that the development is part of a trend toward an arguably stronger democracy, further decentralization, devolution of powers, and greater recognition of the various national identities within the United Kingdom.

C. *The European Community*

The United Kingdom has long been part of the European Union, and is bound by certain rules and decisions made by various other European supranational bodies.¹⁸⁸ Evidence of this overriding influence, and of particular constitutional significance for the U.K. and Scotland, is the European Convention on Human Rights.¹⁸⁹ As enacted by the U.K. Parliament in 1998, the Human Rights Act represents a new set of constitutional standards that are

¹⁸² Walker, *supra* note 172; Rees-Mogg, *supra* note 175.

¹⁸³ See Walker, *supra* note 172, at 292 (reluctantly attributing a “principled” reason for the change by Blair to the pressure from the Council of Europe for a more democratic separation of powers in the U.K.).

¹⁸⁴ Supreme Court, *supra* note 173.

¹⁸⁵ Constitution Reform Act, 2005, c. 4, § 40(4)(b).

¹⁸⁶ The Scottish Government, Final Appellate Jurisdiction in the Scottish Legal System § 1.2.2 (2010), <http://www.scotland.gov.uk/Publications/2010/01/19154813/3>.

¹⁸⁷ Constitutional Reform Act, 2005, § 27(2)(c).

¹⁸⁸ See British Foreign & Commonwealth Office, Britain in the European Union, <http://www.fco.gov.uk/en/global-issues/institutions/britain-in-the-european-union/> (last visited Apr. 8, 2010) (noting the United Kingdom has been a member nation since 1973).

¹⁸⁹ Walker, *supra* note 172, at 295.

externally imposed.¹⁹⁰ According to its preamble, the Human Rights Act exists “to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights.”¹⁹¹ By the terms of the Human Rights Act, primary and secondary U.K. legislation is to be given effect in a manner compatible with the Convention.¹⁹² It is binding on Scotland, and would continue to be so were Scotland to become independent and join the European community (Scotland is already represented in the European Parliament).¹⁹³ Thus, by this Act the Parliament at Westminster has incorporated another written document into its constitution—another example of the constitutional change occurring in the U.K., the move toward written documents that establish constitutional principles, and Parliament’s derogation of power over the essential constitutional issue of human rights.¹⁹⁴

IV. ANALYSIS: PATHS TO INDEPENDENCE

The tide of Scottish independence already engulfs the United Kingdom’s constitution, defining an ever-shrinking coastline of parliamentary power. This tide potentially demands two things. First, the Parliament at Westminster ought to allow an independence referendum in Scotland. Second, and in the alternative, a more conservative “legislative path” is available: the Scottish Parliament can handle, and should be given, the power to make the primary legislation that is currently within the exclusive competence of Parliament at Westminster.

The Scotland Act devolved many powers to Scotland.¹⁹⁵ Among those reserved to the Parliament at Westminster is the power to effect constitutional change in Great Britain; Parliament also controls matters of devolution.¹⁹⁶ As

¹⁹⁰ *Id.*

¹⁹¹ Human Rights Act, 1998, c. 42, pmbl. (U.K.), available at http://www.opsi.gov.uk/ACTS/acts1998/ukpga_19980042_en_1.

¹⁹² *Id.* § 3(1).

¹⁹³ UK Office of the European Parliament, Office in Scotland, available at <http://www.euro.parl.org.uk/scotland> (last visited Apr. 8, 2010).

¹⁹⁴ This Convention, which surely would remain binding on an independent Scottish constitution, finally addresses the issue of which human rights are guaranteed by the Scottish constitution. Cf. SMITH, *supra* note 2, at 79 (noting that “there is no written code setting forth the fundamental liberties in Scotland”).

¹⁹⁵ See *supra* Part III.A (detailing the powers devolved to Scotland, including the power to make secondary domestic legislation, and the power to vary the income tax).

¹⁹⁶ See *supra* Part III.A (enumerating some of the powers reserved to the Parliament at Westminster, especially the exclusive power to enact changes to the United Kingdom constitution).

history has shown,¹⁹⁷ a popular referendum can induce Parliament to take action toward decentralization of its power. Scotland is thus faced with a difficult situation: it seeks to gain independence from the very body that must approve (indeed, must be the one to perform) any actions toward that goal. Likely, Parliament will be less than willing to increase Scottish independence on its own, as this would mean a significant reduction in power.

Balancing this inherent obstacle, though, is the willingness of Parliament to listen to the people. A referendum that is supported by two-thirds of the eligible voting population will carry significant weight.¹⁹⁸ The real question, then, is whether the popular support for such a referendum exists. Fergus Ewing, a ranking member of the Scottish National Party and Member of the Scottish Parliament (MSP), provides an answer, citing a “national identity” poll in which Scottish citizens were asked how they identify themselves.¹⁹⁹ Sixty percent of respondents identified themselves either as Scottish and not British, or as more Scottish than British (these responses were roughly equal to one another); another 27% said they were equally Scottish and British.²⁰⁰ Only 3% said they were more British than Scottish, and 9% said they were British, not Scottish.²⁰¹

Under the argument that self-identified national groups ought to be afforded “their autonomous place in a fraternity of equals,”²⁰² the poll provides convincing evidence both that a referendum would be successful and that it is a good idea in the first place. Ewing quotes a “young Scot” who puts it wittily, and bluntly: “I don’t dislike the English. I don’t dislike the Norwegians either. But I’d rather not be governed by either of them.”²⁰³ This poll data is supported by the fundamental differences between the Scottish and English constitutions, as discussed above, and by the hundreds of years of oppression England has imposed on Scotland. Still, it seems unlikely that Parliament will countenance a referendum any time soon.²⁰⁴

¹⁹⁷ See *supra* Parts II.A, IV (discussing the ancient Scottish tradition recognizing the primacy of the people, and the recent history of constitutional reform).

¹⁹⁸ Ewing & Erickson, *supra* note 6, at 93.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 93 tbl. I.

²⁰¹ *Id.*; According to 2001 Census, more than 409,000 of Scotland’s residents were born in England—about 8% of Scotland’s population. See Scotland’s Census Results Online (SCROL), SCROL Browser (Apr. 29, 2001), <http://scrol.gov.uk/scrol/browser/profile.jsp> (8.08% of the total resident population of 5,062,011).

²⁰² BENEDICT ANDERSON, *IMAGINED COMMUNITIES* 84 (1996).

²⁰³ Ewing & Erickson, *supra* note 6, at 93.

²⁰⁴ See *id.* at 98–99 (detailing the results of a poll where 59% responded “likely” and 41% “unlikely” to the question “At any time in the next twenty years, do you think it is likely or

Due to the unlikelihood of complete independence via popular referendum, a more conservative approach might gain support in the U.K. Parliament. The other option, though it entails continued sovereignty for the Parliament at Westminster, is a greater breadth of devolution competency for the Scottish Parliament. The primary argument for this option stems from the tension inherent in the present devolution scheme, a tension that makes the current arrangement seem untenable.²⁰⁵

For example, there is tension between the provisions of the Scotland Act that provide Parliament at Westminster shall have competency over issues of international relations and commerce, and that Scotland shall retain control over the development of agriculture and industry and the export of animals and animal products.²⁰⁶ This tension surfaced in 1999, at the height of the "Mad Cow Disease," a crisis which had plagued Great Britain since 1986.²⁰⁷ This was a situation in which certain farming practices, particularly the use of meat and bone meal (MBM) in animal feed, led to the outbreak of Bovine Spongiform Encephalopathy (BSE, or Mad Cow Disease); as a result, British beef was taken off the international market and thousands of cows were euthanized.²⁰⁸

In October of 2000, France's Prime Minister Lionel Jospin offered to lift the ban on some British beef, specifically herds of exclusively grass-fed Angus cattle from the Aberdeen region.²⁰⁹ In a private phone call between the French and British leaders, Prime Minister Tony Blair unilaterally rejected the offer, presumably because he felt any re-opening of trade should apply to the U.K. as a whole.²¹⁰ Blair did not consult Scottish officials or industry leaders.²¹¹ Moreover, the continuation of this ban almost certainly had negative (perhaps devastating) effects on Scottish farmers: "Scottish beef exports topped £18

unlikely that Scotland will become completely independent from the United Kingdom?").

²⁰⁵ *Id.*

²⁰⁶ Scotland Act, 1998, c. 46, § 37, sched. 5, C5, available at http://www.opsi.gov.uk/acts/acts1998/ukpga_19980046_en_1.

²⁰⁷ BSE ADVISORY COMMITTEE, *Finding and Conclusions*, in 1 THE BSE INQUIRY REPORT 1 (2000), available at <http://collections.europarchive.org/tna/20090505194948/http://bseinquiry.gov.uk/report/index.htm>.

²⁰⁸ *Id.* at 1, 13.

²⁰⁹ Colin Brown et al., *Blair Rejected Jospin Deal on Scottish Beef*, INDEPENDENT (U.K.), Dec. 15, 1999, <http://www.independent.co.uk/news/blair-rejected-jospin-deal-on-scottish-beef-1132429.html>.

²¹⁰ *Id.* ("Mr [sic] Blair turned it down immediately as 'unworkable' without telling colleagues because it would have undermined the national date-based scheme backed by the European Commission.").

²¹¹ *Id.*; see also Ewing & Erickson, *supra* note 6, at 95 (discussing the same incident, from the perspective of a leader of the Scottish National Parliament (SNP)).

million following the reopening of exports in May 2006,” evidencing the significant revenues that were lost and that could have been realized years earlier.²¹²

Under part of the Scotland Act, which reserved international relations and commerce to Parliament, Blair seems to have had some authority to make this move. On the other hand, the Scotland Act also allows Scotland to control agricultural development and the export of animals. As applied in this situation, these provisions work in contradiction to one another, illustrating the tension inherent in the current devolution arrangement, making greater legislative freedom for Scotland a clearly advantageous alternative. Whereas the conflicting provisions may be defended as an attempt to strike a balance of power “for the evident utility of the Scottish people” (to paraphrase the Union),²¹³ it seems more like another attempt by the Parliament at Westminster to confuse issues, using legislation and usurping Scottish authority to act in an unjustified and paternal way. Even if an independence referendum is not in the near future, a re-working of the current power arrangement seems in order and would be a positive legislative step toward Scottish independence.

The new U.K. Supreme Court likewise provides an opportunity for increased Scottish independence. As described above, the Court presents some significant changes from the current appellate regime. First, the members of the Court are independently appointed, and the Scottish First Minister (alongside the Lord Chancellor, the Secretary of State for Northern Ireland, and the Assembly First Secretary for Wales) have to be consulted with each appointment.²¹⁴ This guarantees Scottish input on a roughly equal footing to that of the other national representatives. Second, one judicial body (the U.K. Supreme Court) now has jurisdiction over devolution challenges and any justiciable Scottish appeals. This is much different from the former arrangement, under which the Privy Council handled devolution questions and the House of Lords handled appeals. Hopefully, this arrangement will provide a uniform treatment of Scottish questions.

Lastly, the constitutional change, engendered by the establishment of the U.K. Supreme Court, continues the momentum of reform. It is clear that Scottish criminal appeals are not within the powers of the Court. It is also clear, under the Union, that the continuation of Scots law generally is

²¹² Press Release, The Scottish Government, Scottish Meat Back on the Menu in Europe (Oct. 14, 2007), <http://www.scotland.gov.uk/News/Releases/2007/10/15130834>.

²¹³ Union with England Act, 1707, Scot. Parl. Acts xi 406, c. 7, art. XVIII, *available at* <http://www.rps.ac.uk/trans/1706/10/257>.

²¹⁴ Constitutional Reform Act, 2005, c. 4, § 27(2), *available at* http://www.opsi.gov.uk/ACTS/acts2005/ukpga_20050004_en_1.

constitutionally guaranteed. The appellate jurisdiction of the House of Lords was dubious to start with, and probably deleterious to Scots law (with English Law Lords wrongly deciding questions of Scots law, thus artificially modifying the Scottish common law which was itself dubiously imported). Creating a new, more independent judicial body removes some of the risk of English "home cooking" or impartiality when it comes to decisions regarding Scots law.

One might ask why any Scottish appeals continue to be within the jurisdiction of the new Supreme Court. The establishment of the Court presents an opportunity for undoing the historical wrong that was, arguably, perpetrated by the years of Anglo-centric judicial decisions that have influenced the course of Scots law. Moreover, the preservation of Scots law, alongside the non-justiciability of criminal appeals, brings out another tension in the devolution arrangement. It seems to make more sense that Scots law matters are generally beyond the jurisdiction of the U.K. courts. Still, this new Supreme Court could provide increased judicial independence for Scotland.

V. CONCLUSION

The question of Scottish independence is inherently political and, as such, raises many policy issues. While these issues are not always law-centered, contextual examples may inform the overall legal discussion. Thus, this Note references economic policy and some recent history. On the whole, though, the present argument is one of constitutionally justified legislative and judicial independence. The potential for political action is beyond the scope of this discussion,²¹⁵ as is the balancing of economic viability, tax policy, and social issues. What is clear is that at least some constitutional justification exists for Scotland to regain complete independence from Great Britain. With any luck, the devolutionary momentum will continue, and the Parliament at Westminster will one day follow the current trajectory to its logical conclusion: freedom for Scotland.

²¹⁵ It is not, as Ewing and Erickson wittily point out, a discussion motivated by "patriotism . . . stirred watching an Australian actor wear a kilt in an American movie set in the Irish countryside." Ewing & Erickson, *supra* note 6, at 89.