

FREEDOM AND WHISKY: THE RENEWED CASE FOR SCOTTISH INDEPENDENCE IN A POST-BREXIT EUROPE

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THE AUTHOR'S EARNEST CRY AND PRAYER¹ [ORIGINAL EXCERPTS]

Tell them wha hae the chief direction,
 Scotland an' me's in great affliction,
 E'er sin' they laid that curst restriction
 On aqua-vitae;
 An' rouse them up to strong conviction,
 An' move their pity.

...

Is there, that bears the name o' Scot,
 But feels his heart's bluid rising hot,
 To see his poor auld mither's pot
 Thus dung in staves,
 An' plunder'd o' her hindmost goot,
 By gallows knaves?

...

But bring a Scotsman frae his hill,
 Clap in his cheek a Highland gill,
 Say, such is royal George's will,
 An' there's the foe!
 He has nae thought but how to kill
 Twa at a blow.

...

Scotland, my auld, respected mither!
 Tho' whiles ye moistify your leather,
 Till whare ye sit on craps o' heather
 Ye tine your dam,
 Freedom and whisky gang thegither,
 Tak aff your dram!

¹ ROBERT BURNS, THE AUTHOR'S EARNEST CRY AND PRAYER (1786). When Robert Burns wrote this poem, it was aimed at the Scotch Representatives in the House of Commons. Burns intended to make known his frustration with the Scotch Distillery Act of 1786 and what he perceived to be Parliament's bias against the national drink of Scotland. This was one of several legislative attempts by the British to disadvantage local distillers and those using domestic stills to produce the aqua-vitae (water of life). Jon Sanders, *Freedom and Whisky Go Together Like Tyranny and Oppression*, AM. INST. FOR ECON. RSCH. (Jan. 25, 2022), <https://www.aier.org/article/freedom-and-whisky-go-together-like-tyranny-and-oppression>.

I. INTRODUCTION

On the twenty-third of June, 2016, the eyes of Europe were cast on the British Isles as the United Kingdom voted to leave the European Union, effectively withdrawing from the European community with just under 52% of voters deciding in favor of the decision, known as *Brexit*.² Voters in Scotland, however, cast their ballots overwhelmingly against the move, with 62% of Scots voting in favor of the UK remaining a member of the European Union.³ This dramatic restructuring came just two years after the failure of a national referendum in which Scottish voters were asked whether the nation should seek independence from the United Kingdom, with 45% voting in favor.⁴

Many believe that the Brexit decision and the corresponding loss of European citizenship sufficiently changes the calculus to produce an outcome in favor of Scottish independence should a second referendum be put forth.⁵ Additionally, recent legislation passed by the UK Parliament systematically undermines the devolution of powers and the Scottish Parliament as Westminster attempts to formulate new internal trade policy to replace the EU single market system.⁶ This is by design, with UK ministers in London lambasting the “constitutional vandalism” that was the creation of the Scottish Parliament and hoping to “find an effective way of restoring [the] constitution to its

² *EU Referendum Results*, THE ELECTORAL COMM’N (2016), <https://web.archive.org/web/20160630063455/https://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/upcoming-elections-and-referendums/eu-referendum/electorate-and-count-information>.

³ *Id.*

⁴ *Scottish Referendum: Scotland Votes ‘No’ to Independence*, BBC NEWS (Sept. 19, 2014), <https://www.bbc.co.uk/news/uk-scotland-29270441>. See also Steven Erlanger & Alan Cowell, *Scotland Rejects Independence from Britain*, N.Y. TIMES (Sept. 19, 2014), <https://www.nytimes.com/2014/09/19/world/europe/scotland-independence-vote.html>.

⁵ See Ashley Cowburn, *Clear Majority in Favour of Scottish Independence, Poll Shows*, THE INDEP. (Oct. 14, 2020), <https://www.independent.co.uk/news/uk/politics/scotland-indy-ref-nicola-sturgeon-majority-boris-johnson-b1036611.html> (highlighting a recent survey in which 58% of Scottish respondents said they would vote ‘Yes’ on a second independence referendum). But see Severin Carrell, *Nicola Sturgeon Seeks Supreme Court Ruling on Scottish Independence Vote*, THE GUARDIAN (June 28, 2022), <https://www.theguardian.com/politics/2022/jun/28/nicola-sturgeon-seeks-supreme-court-ruling-on-scottish-independence-referendum-vote> (noting that Scottish Tory leader, Douglas Ross, is concerned that the First Minister is fomenting division at a time of economic crisis: “Nicola Sturgeon has shown again today that the SNP’s selfish obsession with another divisive referendum is always their top priority She will use government time and resources to further her plan to break up the country, just when we need to be pulling together and working as one.”).

⁶ United Kingdom Internal Market Act 2020, c. 27, <https://www.legislation.gov.uk/ukpga/2020/27/contents/enacted>. Because of the geographic location of its central operations in the Westminster area of Central London, the UK government is commonly referred to simply as *Westminster*. *History of 10 Downing Street*, UK GOV’T, <https://www.gov.uk/government/history/10-downing-street> (last visited Oct. 11, 2022).

proper form.”⁷ In reality, the euphemistic “proper form” amounts to a unitary power structure issuing edicts from London. By way of comparison, “Wales, Scotland and Northern Ireland ... have as much power in the U.K. as Puerto Rico in the U.S. – none.”⁸ With the passage of the United Kingdom Internal Market Act of 2020,⁹ Westminster severely constrained the ability of the Scottish Parliament to legislate effectively in devolved policy areas, violating the Sewel Convention.¹⁰ Since 1997, when 74% of the Scottish electorate voted to establish an independent Scottish Parliament, the devolution settlement has provided the Scottish people with a measure of self-governance, allowing matters of national importance to be decided closer to home by a democratically elected Parliament of Scots.¹¹

The practical effect of the Internal Market Act is that UK ministers now exercise discretion over the scope of devolved powers, recklessly constraining Scottish self-governance in a way that is antithetical to the values of local autonomy notably protected within the framework of the EU single market.¹² In the EU single market, emphasis is placed on allowing states to pursue social policy objectives alongside economic growth, which allowed Scotland to take a balanced approach that promoted sustainable economic growth against the broader backdrop of social and environmental policy goals.¹³ Unlike the EU single market, the approach adopted by the UK Government “does not recognise that there is a far greater range of legitimate policy goals – for example tackling inequality or environmental protection – that nations in a shared market area can pursue through market regulation.”¹⁴ Additionally, the Internal Market Act enables UK ministers to diminish the powers of the Scottish

⁷ HC Deb (26 Nov. 2020) (684) col. 989 (UK).

⁸ Benjamin Verheiden, Opinion, *How Brexit Exposed the Truth on the UK Power Structure*, DAILY SUNDIAL (Sept. 28, 2021), <https://sundial.csun.edu/165741/opinions/opinion-how-brexit-exposed-the-truth-on-the-uk-power-structure>.

⁹ United Kingdom Internal Market Act 2020, c. 27, <https://www.legislation.gov.uk/ukpga/2020/27/contents/enacted>.

¹⁰ Paul Bowers, *The Sewel Convention*, PARLIAMENT & CONST. CENTRE (2005), <https://researchbriefings.files.parliament.uk/documents/SN02084/SN02084.pdf>. The Sewel Convention is the constitutional rule that the UK Parliament “w[ill] not normally legislate with regard to devolved matters” or alter the competence of the Scottish Parliament without its consent. *Id.*

¹¹ *Scottish Referendum Live – The Results*, BBC NEWS (1997), <https://www.bbc.co.uk/news/special/politics97/devolution/scotland/live/index.shtml>.

¹² CONST. & CABINET DIRECTORATE, AFTER BREXIT: THE UK INTERNAL MARKET ACT & DEVOLUTION 2 (Mar. 8, 2021), <https://www.gov.scot/publications/brexit-uk-internal-market-act-devolution>.

¹³ ECON. DEV. DIRECTORATE, SCOTLAND’S PLACE IN EUROPE: PEOPLE, JOBS AND INVESTMENT (Jan. 15, 2018), <https://www.gov.scot/publications/scotlands-place-europe-people-jobs-investment>.

¹⁴ CONST. & CABINET DIRECTORATE, *supra* note 12, ¶ 59.

Parliament and bring formerly devolved policy areas within the scope of central market control.¹⁵

Given the loss of local control along with the substantial economic and social consequences resulting from Scotland's removal from the European Union against the will of its people, this Note argues that it is in the Scottish national interest to hold a second independence referendum to achieve sovereignty and independence from the United Kingdom through democratic secession. Because of the radical shift in geopolitical circumstances occasioned by the Brexit decision, a second Scottish independence referendum is likely to succeed, allowing Scotland to secede from the United Kingdom and rejoin the European Union and the corresponding economic community.

II. BACKGROUND

A. *Parliament of Scotland*

For over a millennium, Scotland has enjoyed a distinct and unique cultural identity, and has for almost as long been engaged in a perpetual battle for sovereignty and self-determination.¹⁶ With the Acts of Union in 1707, Scotland and England, who had shared a monarch since the Union of Crowns in 1603, were “United into One Kingdom by the Name of Great Britain.”¹⁷ The decades that followed brought significant cultural, religious, and political conflict, culminating in the Jacobite uprisings of 1715, 1719, and 1745.¹⁸ The final Jacobite stand at the Battle of Culloden in 1746 signified a *de facto* end to traditional Scottish highland culture.¹⁹ The Age of Enlightenment that

¹⁵ *Id.* ¶ 8.

¹⁶ See generally *History*, BRAND SCOTLAND, <https://www.scotland.org/about-scotland/history> (last visited Sept. 28, 2022) (“The history of Scotland is fascinating and complex; there are Roman soldiers, Vikings, noble clansmen and powerful monarchs, but more recently there are world-changing discoveries and innovations, groundbreaking technologies and an incredibly progressive society. This is Scotland, now.”).

¹⁷ Union with England Act 1707 § 1, c. 7, <https://www.legislation.gov.uk/aosp/1707/7/contents>. See generally *Union of Crowns*, UK PARLIAMENT, <https://www.parliament.uk/about/living-heritage/evolutionofparliament/legislative scrutiny/act-of-union-1707/overview/union-of-the-crowns> (last visited Oct. 11, 2022) (discussing the unification achieved by the 1603 Union of Crowns).

¹⁸ See generally *Jacobite Risings*, NAT'L ARMY MUSEUM, <https://www.nam.ac.uk/explore/Jacobites> (last visited Sept. 28, 2022) (“The Jacobites sought to restore the House of Stuart to the British throne. Staging rebellions in Scotland in 1715, 1719 and 1745, they attempted to overthrow the ruling Hanoverian Royal Family. The Jacobites were encouraged and assisted by Britain's enemies, in particular the French, who saw support for the Stuarts as a way of distracting Britain from its military campaigns overseas.”).

¹⁹ *Id.* (“On 16 April 1746 the two armies faced each other at Culloden, to the south west of Nairn. Pounded by artillery, the outnumbered Jacobites launched a fearsome Highland sword charge. Although [the English] came under heavy pressure, [their] soldiers held firm with their bayonets. Charles's army was routed and the ‘Bonnie Prince’ was forced to

followed brought new ideas about philosophy, politics, economics, and science, propelling Scotland into the nineteenth century characterized by new industrialism and urbanism.²⁰

From the early thirteenth century until its unification with England in 1707, the Parliament of Scotland served as the national legislature of Scotland and played a central role in the administration of justice, foreign affairs, taxation, war, and all other matters of public policy.²¹ With the formation of the United Kingdom came the dissolution of the Parliament of Scotland, and legislative authority was consolidated into a single Parliament of Great Britain, sitting at Westminster in London.²² Following World War I, in which Scottish soldiers fought and died in overwhelming numbers, came a resurgence of the idea that the Scottish people should enjoy a unique national identity with the right of self-determination.²³ This nationalist sentiment grew throughout the twentieth century, culminating in the devolution referendum of 1997, in which a majority of Scots voted to establish an independent Scottish Parliament of devolved powers.²⁴ The new Scottish Parliament held its first session on May 12, 1999.²⁵

B. Impact of Devolution

The devolution settlement following the 1997 referendum was based on a model of reserved powers, meaning that a power is devolved to the Scottish Parliament unless expressly reserved to Westminster.²⁶ With a few narrow exceptions, UK ministers have no authority to review or influence the decisions of the Scottish Parliament in devolved policy areas.²⁷ Major areas over which the Scottish Parliament has traditionally exercised legislative

make a dramatic escape to France. ... After Culloden, wounded Highlanders were bayoneted where they lay and Charles's fleeing soldiers were ruthlessly hunted down."). In the aftermath, Parliament outlawed "the wearing of 'Highland clothes,' including the kilt, tartan, [and] plaid," as well as the playing of bagpipes and the teaching of the Gaelic language. Sanders, *supra* note 1.

²⁰ See generally ALEXANDER BROADIE, *THE SCOTTISH ENLIGHTENMENT: THE HISTORICAL AGE OF THE HISTORICAL NATION* (2001) (considering "the achievement of this most astonishing period of Scottish history").

²¹ SCOTTISH PARLIAMENTARY CORP. BODY, *THE SCOTTISH PARLIAMENT – PAST AND PRESENT* 2–13 (2013), http://www.parlamaid-alba.org/EducationandCommunityPartnershipsresources/SP_Timeline_English.pdf.

²² *Id.* at 13.

²³ Brooke Krancer, "Winning Little Bannockburns": *Memory, the Great War, and the Rise of Scottish Nationalism*, 26 *PENN. HIST. REV.: J. UNDERGRAD. HIST.* 50, 56–67 (2019).

²⁴ James Mitchell et al., *The 1997 Devolution Referendum in Scotland*, 51 *PARLIAMENTARY AFF.* 166, 166 (1998).

²⁵ SCOTTISH PARLIAMENTARY CORP. BODY, *supra* note 21, at 18.

²⁶ CONST. & CABINET DIRECTORATE, *supra* note 12, ¶ 12.

²⁷ *Id.*

competence include land use, alcohol and tobacco regulation, social services, higher education, healthcare, and the environment.²⁸ Over the last decade, the legislative competence of the Scottish Parliament has expanded through the Scotland Act of 2012 and Scotland Act of 2016, most notably in public policy areas such as taxation and social security.²⁹ This increased democratic control over legislative affairs has proven highly beneficial for Scotland, as decisions affecting the local economy and the Scottish people can be made closer to home by popularly elected and democratically accountable representatives that reflect Scotland's unique social, demographic, cultural, economic, environmental, and geographic makeup.³⁰

C. *Twenty-first Century*

The May 2007 Holyrood election brought an abrupt end to the social democratic Labour Party's eight-year control of the Scottish Government, with the Scottish National Party (SNP) winning the most seats in the parliament (47 out of 129) and forming a minority government.³¹ Two months later, declaring that "[n]o change was no longer an option," First Minister Alex Salmond published a White Paper entitled *A National Conversation*, setting out the "full range" of options for Scotland's constitutional future, including the possibility of an independence referendum.³² Four years later, the SNP achieved an even more decisive electoral victory by taking sixty-nine seats and winning a majority in the parliament, paving the way for an unprecedented national independence referendum.³³ In January 2012, Salmond announced his government's intention to hold the independence referendum in the autumn of 2014.³⁴ The question to be presented to voters was simply, "Do you agree that Scotland should be an independent country?"³⁵ and was altered slightly on the

²⁸ *Id.* ¶ 16.

²⁹ *Compare* Scotland Act 2012, c. 11 (UK), <https://www.legislation.gov.uk/ukpga/2012/11/contents>, *with* Scotland Act 2016, c. 11 (UK), <https://www.legislation.gov.uk/ukpga/2016/11/contents>.

³⁰ GOV'T OF SCOTLAND, NATIONAL PERFORMANCE FRAMEWORK (2021), https://nationalperformance.gov.scot/sites/default/files/documents/NPF_A2_Poster.pdf (setting out the overall purpose of the Scottish Government: "[t]o focus on creating a more successful country with opportunities for all of Scotland to flourish through increased wellbeing, and sustainable and inclusive economic growth").

³¹ *Timeline: Scottish Independence Referendum*, BBC NEWS (Oct. 15, 2012), <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-19907675>.

³² *Id.*; ALEX SALMOND, YOUR SCOTLAND, YOUR VOICE: A NATIONAL CONVERSATION (2009), http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/30_11_09_referendum.pdf (setting out the options for Scotland's future and potential referendum).

³³ *Timeline: Scottish Independence Referendum*, *supra* note 31.

³⁴ *Id.*

³⁵ *Scottish Independence: Alex Salmond Outlines Referendum Question*, BBC NEWS (Jan. 25, 2012), <https://www.bbc.com/news/uk-scotland-scotland-politics-16702392>.

official referendum ballot to read, “*Should Scotland be an independent country?*”³⁶ The authority to legislate for the initiation of a referendum was transferred to the Scottish Parliament following the Edinburgh Agreement,³⁷ which was signed both by UK Prime Minister David Cameron and Scotland’s First Minister Alex Salmond on October 15, 2012.³⁸ With this power, the Scottish Parliament passed the Scottish Independence Referendum Act of 2013 and the similarly titled Scottish Independence Referendum (Franchise) Act to memorialize the plan for the referendum.³⁹ The referendum was held on Thursday, September 18, 2014, with polling places operating from 7:00 A.M. until 10:00 P.M., and the official results were announced the following day.⁴⁰ The referendum produced an exceptionally high voter turnout, with nearly 85% of eligible Scots participating in the decision.⁴¹ The referendum ultimately failed, with 55% of Scots voting to remain a part of the United Kingdom and just 45% voting in favor of Scottish independence.⁴² After the results were finalized, Scotland’s First Minister Alex Salmond told disappointed pro-independence supporters, “Today of all days as we bring Scotland together, let us not dwell on the distance we have fallen short, let us dwell on the distance we have travelled and have confidence the movement is abroad in Scotland that will take this nation forward.”⁴³

The overwhelming sentiment among those who voted against seceding from the United Kingdom was concern about the economic viability of an independent Scottish state.⁴⁴ Of course, this decision was made in the context of UK membership in the EU single market. It is against this background that the consequences of the United Kingdom’s decision to relinquish membership

³⁶ *Scottish Independence Referendum*, UK GOV’T (emphasis added), <https://www.gov.uk/government/topical-events/scottish-independence-referendum/about> (last visited Sept. 29, 2022).

³⁷ Agreement Between the United Kingdom Government and the Scottish Government on a Referendum on Independence for Scotland, UK-Scot., Oct. 15, 2012, <https://webarchive.nationalarchives.gov.uk/ukgwa/20130109092234/http://www.number10.gov.uk/wp-content/uploads/2012/10/Agreement-final-for-signing.pdf>.

³⁸ OFF. OF THE SEC’Y OF STATE FOR SCOTLAND, MILESTONES IN THE SCOTTISH INDEPENDENCE REFERENDUM PROCESS (2014), <https://www.gov.uk/government/publications/scottish-independence-milestones-on-the-road-to-the-referendum/milestones-in-the-scottish-independence-referendum-process>.

³⁹ Scottish Independence Referendum Act 2013 (ASP 14); Scottish Independence (Franchise) Act 2013 (ASP 13).

⁴⁰ OFF. OF THE SEC’Y OF STATE FOR SCOTLAND, *supra* note 38.

⁴¹ Christine Jeavans, *In Maps: How Close Was the Scottish Referendum Vote?*, BBC NEWS (Sept. 19, 2014), <https://www.bbc.com/news/uk-scotland-scotland-politics-29255449>.

⁴² *Scottish Referendum: Scotland Votes ‘No’ to Independence*, *supra* note 4.

⁴³ *Id.*

⁴⁴ Sam Ball, *Why Scotland Said No to Independence*, FRANCE 24 (Sept. 19, 2014), <https://www.france24.com/en/20140919-why-scotland-said-no-independence-scottish-referendum-uk>.

in the European Union, against the will of the Scottish people, become salient, opening the door to a renewed conversation about the economic and political future of Scotland.⁴⁵

III. ANALYSIS

A. *United Kingdom Internal Market Act 2020*

Following its withdrawal from the European Union, the United Kingdom began efforts to formulate its own internal trade policy to replace the EU single market system, within which the nation had operated its economy for several decades.⁴⁶ Of the EU single market, one journalist noted:

Its creation served the UK's economic interests, as it grew the home domestic market available for British exporters without tariff or non-tariff barriers, eventually to nearly half a billion Europeans. It was not without irony that the tortuous negotiations of the past four years were made tougher by the EU's insistence on defending what it calls the "internal market", itself created by the British.⁴⁷

While the idea of an internal market does not have a universal definition, a country's production and trading activities tend to intersect with various areas of governance and legislative activity, implicating paramount public policy considerations. In the words of Professor Michael Dougan, internal markets are "not merely about 'trade,'" but are also about "fundamental policy choices concerning how to structure your economy and society; as well as basic constitutional questions about the institutions, processes and values that underpin your public and democratic realm."⁴⁸

The UK Internal Market Act is not simply a reversion back to the trading relationships as they existed within the United Kingdom before the formation of the EU single market; rather, "it is a new, unilaterally designed and imposed regime, that will operate in a manner that does not allow for adequate consideration of the types of fundamental policy choices outlined by Professor

⁴⁵ See generally John Curtice, *How Brexit Shapes People's Views on Scottish Independence*, BBC NEWS (Jan. 26, 2021), <https://www.bbc.com/news/uk-scotland-scotland-politics-55803103> (discussing the extent to which the implications of Brexit have led to a shift in attitudes about Scottish independence).

⁴⁶ Faisal Islam, *Adieu to the Single Market Created by the UK*, BBC NEWS (Jan. 1, 2021), <https://www.bbc.com/news/business-55494101>.

⁴⁷ *Id.*

⁴⁸ Michael Dougan, *How the UK's 'Internal Market' is Dependent on EU Rules*, UNIV. OF LIVERPOOL NEWS (Mar. 2, 2018), <https://news.liverpool.ac.uk/2018/03/02/watch-professor-michael-dougan-uks-internal-market-dependent-eu-rules>.

Dougan.⁴⁹ Following the 2016 Brexit referendum, the governments that comprise the United Kingdom undertook to cooperate on the formulation of common frameworks, giving particular attention to a range of factors, including “ensuring the functioning of the UK internal market, *while acknowledging policy divergence*.”⁵⁰ Among the policy areas formerly governed by EU market rules—which are now purportedly subject to common frameworks agreements—are agriculture, public procurement, fisheries, plant and animal health, and food safety.⁵¹ Contrary to the stated goal of *agreeing* to common frameworks that respect differences between the nations, the UK Internal Market Act introduces a new market access system, mandating that each constituent country accept all goods sold within the United Kingdom, regardless of the particular state’s local standards.⁵² In response to the legislation, Scottish Cabinet Secretary for Constitution, Europe and External Affairs, Michael Russell, lamented:

The Internal Market Act means that if chlorinated chicken and hormone-injected beef are accepted for sale in England after a trade deal with the US, then they would have to be accepted for sale in Scotland too. And any future legislation in Scotland to ban single use plastics and the environmental damage they cause, or measures to tackle health issues such as obesity, could be rendered ineffective. Given the direction of travel, who knows what further restrictions on the Scottish Parliament could be on the way?⁵³

In March 2019, after two years of discussions, the Scottish Government ceased participation in the common framework talks when it became evident that its serious concerns regarding the project’s implications for the devolution framework were not given adequate weight.⁵⁴ Having shared a similarly frustrating experience in its attempt to influence the legislation, the Welsh Government criticized the process, arguing that “it was agreed that this would be a joint piece of work, [and] it is wholly unacceptable that we now seem to be faced with a solely UK Government generated proposal.”⁵⁵ Additionally,

⁴⁹ CONST. & CABINET DIRECTORATE, *supra* note 12, ¶ 57.

⁵⁰ *Id.* ¶ 60.

⁵¹ *Id.*

⁵² United Kingdom Internal Market Act 2020, c. 27, <https://www.legislation.gov.uk/ukpga/2020/27/contents/enacted>.

⁵³ CONST. & CABINET DIRECTORATE, *supra* note 12, at 2.

⁵⁴ *Id.* at 1.

⁵⁵ Letter from Jeremy Miles, Couns. Gen. and Minister for European Transition, Welsh Gov’t, to The Rt. Hon. Michael Gove, C. of the Duchy of Lancaster and Minister for the Cabinet Off., United Kingdom Gov’t, and The Rt. Hon. Alok Sharma, Sec’y of State for Bus., Energy and Indus. Strategy, United Kingdom Gov’t (July 7, 2020),

the UK Government did not give the devolved administrations an advanced copy of its White Paper on the internal market, allowed the governments just four weeks to review and respond to the proposals, and placed the consultation period during the Scottish Parliamentary recess.⁵⁶ The bill itself was published on September 9, 2020, its language shared with the devolved governments for the first time late the night before.⁵⁷ Despite the refusal of both the Scottish Parliament and Welsh Senedd⁵⁸ to consent to the Act, the UK Government proceeded with implementing the legislation, which came into force on January 1, 2021, disregarding the constitutional norms set out in the Sewel Convention.⁵⁹ Because the Internal Market Act is not amenable to modification by the Scottish Parliament, there is growing concern within the devolved governments over the future exercise of legislative powers.⁶⁰

B. United Kingdom Internal Market Contrasted with the European Union Single Market

The United Kingdom's devolution structure was created against the backdrop of membership in a supranational body governing external trade relationships among member states and issues of trade and regulatory uniformity within the UK's constituent countries.⁶¹ The UK Government intends for the Internal Market Act to adequately replace the previous EU market regulatory scheme; however, unlike the democratic processes within the European Union, the Internal Market Act unilaterally places severe restrictions on the ability of devolved governments to set local standards.⁶² Further, the European Union is governed by the general principles of proportionality and subsidiarity, aiming to balance economic growth and other policy goals as well as local decision-making power to the greatest extent possible.⁶³ In contrast, the UK

<https://gov.wales/sites/default/files/inline-documents/2020-07/letter-to-gove-and-sharma.pdf>.

⁵⁶ CONST. & CABINET DIRECTORATE, *supra* note 12, ¶ 68.

⁵⁷ *Id.*

⁵⁸ See generally *About the Senedd*, SENEDD CYMRU [WELSH PARLIAMENT], <https://senedd.wales> (last visited Sept. 23, 2022) (“The Welsh Parliament is the democratically elected body that represents the interests of Wales and its people. Commonly known as the Senedd, it makes laws for Wales, agrees Welsh taxes and holds the Welsh Government to account.”).

⁵⁹ Bowers, *supra* note 10.

⁶⁰ CONST. & CABINET DIRECTORATE, *supra* note 12, ¶ 36.

⁶¹ MICHAEL DOUGAN, UNITED KINGDOM INTERNAL MARKET BILL: IMPLICATIONS FOR DEVOLUTION (2020), <https://www.liverpool.ac.uk/media/livacuk/law/2-research/eull/ukIM,Briefing,Paper,-,Prof,Michael,Dougan,15,September,2020.pdf>.

⁶² CONST. & CABINET DIRECTORATE, *supra* note 12, ¶ 57.

⁶³ See *Proportionality (EU)*, THOMSON REUTERS PRACTICAL LAW (UK), [https://uk.practicallaw.thomsonreuters.com/3-503-0887?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/3-503-0887?transitionType=Default&contextData=(sc.Default)&firstPage=true) (last visited Sept. 23, 2022).

Government perceives any potential deviation from the principles of non-discrimination and mutual recognition through local regulation of domestic markets as detrimental to the flow of internal trade.⁶⁴ While the EU single market is governed by a broad commitment to the principles of non-discrimination and mutual recognition, exceptions to both principles are permitted as long as they “can be justified as necessary and proportionate to the outcome that is obtained, and which cannot be achieved by other means.”⁶⁵ The rigid nature of the UK Internal Market Act’s treatment of the non-discrimination and mutual recognition principles, on the other hand, ultimately works against the overarching goals of a free market to the extent that the Act operates to the detriment of social, environmental, and public health initiatives.

In sum, the EU single market was developed over decades based on principles of trust, equality, cooperation, co-decision, proportionality, subsidiarity, and consent, while the UK Internal Market Act was all at once imposed on the devolved governments with no baseline standards and—perhaps more significantly—created the authority for UK ministers to unilaterally alter the scope of the Act without seeking consent from the devolved administrations.⁶⁶ The unprecedented way in which this new centralized regime governs the nature of economic policymaking goes well beyond the regulatory scheme provided by the EU single market and significantly undermines the ability of the devolved parliaments to legislate in areas that have fallen within their competence for over twenty years, alarming lawmakers across the Isles.⁶⁷

⁶⁴ CONST. & CABINET DIRECTORATE, *supra* note 12, ¶¶ 99–100.

⁶⁵ *Id.* See also Consolidated Version of the Treaty on the Functioning of the European Union art. 36, May 9, 2008, 2008 O.J. (C 115) 47 (providing that prohibitions or restrictions on the movement of certain goods may be permitted if justified on a number of bases, including the protection of “public morality, public policy or public security; the protection of health and life of humans, animals or plants...”).

⁶⁶ See CONST. & CABINET DIRECTORATE, *supra* note 12, at 2 (discussing the consequences of this UK legislation).

⁶⁷ Communiqué from the Joint Ministerial Comm. (October 24, 2016), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/562364/joint-ministerial-committee-communique-24-october-2016.pdf (listing the three principal agenda items of the Joint Ministerial Committee, chaired by then-Prime Minister Theresa May, as: “the state of relations between the administrations, exiting the European Union and economic growth and industrial strategy.”). See also Written Statement, Jeremy Miles, Wales Coun. Gen. and Minister for European Transition, Legal Challenge to the UK Internal Market Act 2020 (Jan. 19, 2021), <https://gov.wales/written-statement-legal-challenge-uk-internal-market-act-2020> (announcing the initiation of formal proceedings by the Welsh government in the Administrative Court seeking judicial review).

C. *Effect of the United Kingdom Internal Market Act on the Scottish Devolution Settlement*

i. *Structural and Investment Funds*

One way in which the constituent nations of the United Kingdom are particularly disadvantaged as a result of withdrawal from the European Union is through the loss of access to EU Structural and Investment Funds, which are jointly managed by the European Commission and the EU member states themselves.⁶⁸ The purpose of these funds is to support job creation and economic development throughout member states and to foster a “sustainable and healthy European economy and environment.”⁶⁹ As plans came together for the execution of Brexit, the Scottish Government expected to manage whatever UK-wide structural fund was established in its place, just as it had done for decades within the framework of the European Union.⁷⁰ The Scottish Government published a detailed report outlining how it planned to allocate the replacement funds, which was developed through broad public consultation at the beginning of 2020.⁷¹ Regarding the goal of the proposed program, the Executive Summary states:

The key aim of the programme will be to focus on addressing and reducing economic and social disparities within and between places and people in Scotland[.] Decentralisation of funding is at the core of this approach, and we want to ensure that decisions are made as closely as possible to the people, businesses and communities who will be impacted[.] The themes for the Scottish programme will be Improving Places, Reducing Poverty, Increasing Skills, and Growing Business and Jobs to aid a just and green recovery from the COVID pandemic[.] Enhancing wellbeing and responding to the climate change emergency will be underpinning principles of the programme.⁷²

⁶⁸ *European Structural and Investment Funds*, EUR. COMM’N, https://ec.europa.eu/info/funding-tenders/funding-opportunities/funding-programmes/overview-funding-programmes/European-structural-and-investment-funds_en (last visited Sept. 29, 2022).

⁶⁹ *Id.*

⁷⁰ CONST. & CABINET DIRECTORATE, *supra* note 12, at 26.

⁷¹ ECON. DEV. DIRECTORATE, SCOTTISH REPLACEMENT FOR EU STRUCTURAL FUNDS (2020), <https://www.gov.scot/publications/scottish-replacement-eu-structural-funds/pages/2>.

⁷² *Id.* at 7.

The UK Government disregarded the comprehensive proposal of the Scottish Government, opting instead to operate the replacement to the EU Structural and Investment Funds (entitled the Shared Prosperity Fund) unilaterally, without respect to local prioritization.⁷³ The result amounts to a usurpation of powers previously devolved to Scottish ministers to make localized spending decisions reflecting the investment priorities and unique needs of the Scottish people, businesses, and communities.⁷⁴ The UK Internal Market Act represents an unprecedented barrier to market regulation across a wide range of industries and will likely be the subject of extensive constitutional challenges in the courts. In contrast to the Parliament of England, on which the Internal Market Act will serve as a domestic legislative constraint imposed and controlled locally at Westminster, the Act will serve to disproportionately limit the devolved competence enjoyed by the governments of Scotland and Wales. Drastically limiting the powers of the devolved legislatures in favor of imposing an artificially homogenous approach to market regulation is likely to result in negative economic effects felt across the United Kingdom.

ii. *Education*

Another area in which citizens of the United Kingdom are beginning to feel the impact of Brexit is in higher education, as Brits no longer have access to membership in the European Union's Erasmus Program.⁷⁵ The program is now consolidated with the other EU programs for education, training, and youth sports under a single umbrella program called Erasmus+ (pronounced Erasmus *plus*).⁷⁶ Education in the United Kingdom is a devolved policy area, and the Scottish Government has been consistently vocal about its fervent desire to continue its participation in Erasmus+.⁷⁷ Unfortunately for Scottish students, President Ursula von der Leyen of the European Commission has confirmed that as long as Scotland remains a part of the United Kingdom, it will not be permitted to participate in the Erasmus Program as a full "Third Country" in its own right.⁷⁸

⁷³ CONST. & CABINET DIRECTORATE, *supra* note 12, ¶ 91.

⁷⁴ *Id.*

⁷⁵ *Extremely Disappointing: Britain Pulls Out of the Erasmus+ Program*, ERASMUS PROGRAMME (Dec. 24, 2020), <https://www.erasmusprogramme.com/guide/2021-Brexit-Extremely-Disappointing-Britain-Pulls-Out-Of-The-Erasmus-Programme>.

⁷⁶ *Erasmus Plus*, EUR. COMM'N, https://ec.europa.eu/programmes/erasmus-plus/node_en (last visited Sept. 29, 2022).

⁷⁷ CONST. & CABINET DIRECTORATE, *supra* note 12, at 28.

⁷⁸ Cristina Gallardo, *MEPs Ask if Scotland, Wales Can Rejoin Erasmus Student Program*, POLITICO (Jan. 22, 2021), <https://www.politico.eu/article/meps-push-to-welcome-scotland-and-wales-back-in-erasmus-mobility-scheme>.

The UK Internal Market Act purports to give the UK Government control over funding for international education and training.⁷⁹ In an effort to quickly replace the robust educational network previously accessible to citizens of the United Kingdom through the Erasmus Program, the UK Government announced its intention to circumnavigate the devolved administrations altogether and unilaterally impose a new plan, entitled the United Kingdom Turing Scheme, named after the famed English mathematician and cryptographer Alan Turing, who played an integral role in breaking the German naval Enigma code during World War II.⁸⁰ The Scottish Government is concerned that this proposed replacement infrastructure would be disadvantageous for Scots, predicting that the vast reduction in opportunities for students and teachers will leave Scotland unable to compete academically at the level historically enjoyed under the Erasmus Program.⁸¹ Scottish Further Education, Higher Education and Science Minister, Richard Lochhead, spoke pessimistically about the scheme:

The U.K. government's proposed replacement Turing scheme is a shadow of the real thing, and does not fund the adult or youth work sectors. It also significantly limits funding in other areas, and offers no support for students wishing to visit Scotland. Without Erasmus, it is highly likely we will see a decline in the numbers of European students visiting Scotland, while those students who do visit are more likely to be from wealthier backgrounds. Education is one of the powers devolved to the Scottish government — so it's unacceptable that the U.K. government is trying to impose this inadequate scheme upon Scotland and Wales.⁸²

Furthermore, the usurpation of legislative competence in education policy is likely to constrain Scotland's ability to provide its citizen-students with the best opportunities for educational mobility and exchange.⁸³

⁷⁹ United Kingdom Internal Market Act 2020, c. 27, § 50, <https://www.legislation.gov.uk/ukpga/2020/27/data.pdf>.

⁸⁰ CONST. & CABINET DIRECTORATE, *supra* note 12, at 28. See also *About the Turing Scheme*, TURING SCHEME, <https://www.turing-scheme.org.uk/about/about-the-turing-scheme> (last visited Sept. 29, 2022) (“The Turing Scheme is the UK government’s global programme to study and work abroad. The scheme provides funding for international opportunities in education and training across the world. Supporting the government’s Global Britain objectives, the Turing Scheme unlocks the opportunity for UK organisations to offer life-changing experiences across the world for their students, learners and pupils.”).

⁸¹ CONST. & CABINET DIRECTORATE, *supra* note 12, at 28.

⁸² Richard Lochhead, *Opinion, Scotland Needs Erasmus, Not Britain's Poor Replacement*, POLITICO (Jan. 29, 2021), <https://www.politico.eu/article/scotland-erasmus-uk-turing-scheme-brexit-europe-eu>.

⁸³ *Id.*

iii. *Market Access Principles*

Under the devolution settlement, the countries comprising the United Kingdom have for years employed varying import standards determined by each individual state, rather than imposing a uniform regulatory scheme, in order to reflect consumer preferences.⁸⁴ In its attempt to achieve regulatory coherence following Brexit, the UK Government threatens to destabilize the devolution settlement by restricting the Scottish Parliament's ability to set regulatory standards in the area of trade policy.⁸⁵ As a result, the following is a concern commonly echoed in Scotland and Wales:

The UK Internal Market Act is built on an aggressively deregulatory structure. Its "market access principles" ensure that if a product or service is freely marketed in one of the constituent elements of the UK then it is entitled to unrestricted access to the markets of the other constituent elements, subject only to a very cramped range of possible exceptions to this general rule. This is likely to undermine the regulatory autonomy promised to Scotland and Wales under their devolution settlements.⁸⁶

The scope of the UK Internal Market Act is much broader than the framework governing states within the EU single market, while providing far fewer exemptions to its application and severely limiting how Scottish businesses can respond to consumer preferences in the marketplace.⁸⁷

One key policy area in which the Scottish Government has legislated is the regulation of alcohol sales. In 2018, finding that heavy alcohol consumption has negative effects on individuals and families that tend to bleed into society at large, the Scottish Parliament passed legislation to implement minimum unit pricing of fifty pence per unit of alcohol.⁸⁸ The rationale behind the decision was that making alcohol more expensive would reduce related deaths and hospitalizations, decrease secondary harms related to heavy alcohol use, and ultimately benefit the Scottish healthcare system and society.⁸⁹ With the

⁸⁴ CONST. & CABINET DIRECTORATE, *supra* note 12, ¶ 116.

⁸⁵ Stephen Weatherill, Commentary, *Will the United Kingdom Survive the United Kingdom Internal Market Act?*, UK IN A CHANGING EUROPE (May 7, 2021), <https://ukandeu.ac.uk/will-the-united-kingdom-survive-the-united-kingdom-internal-market-act>.

⁸⁶ *Id.*

⁸⁷ CONST. & CABINET DIRECTORATE, *supra* note 12, ¶ 115.

⁸⁸ POPULATION HEALTH DIRECTORATE, ALCOHOL FRAMEWORK 2018: PREVENTING HARM (Nov. 20, 2018), <https://www.gov.scot/publications/alcohol-framework-2018-preventing-harm-next-steps-changing-relationship-alcohol>.

⁸⁹ *Id.* at 2 (noting that alcohol-specific deaths in Scotland totaled 1,120 in 2017: "Let me be clear – each and every one was preventable. Scotland's families and communities are paying too high a price, we need concerted efforts; across Government, across the

implementation of the UK Internal Market Act, such public health measures taken by the devolved governments are no longer permitted under the non-discrimination principles, constraining the ability of the Scottish Parliament to make decisions in the interest of the Scottish people.⁹⁰ The Internal Market Act effectively bars any variation in the approaches taken by the devolved governments in service to local consumer, health, and environmental considerations in favor of imposing a uniform set of standards, which has been referred to as a “lowest common denominator.”⁹¹

Scotland’s food and drink industries have historically been held—through local regulation—to high quality and safety standards.⁹² Through its market access provisions of mutual recognition and non-discrimination, the UK Internal Market Act forces the devolved governments to accept lower import standards unilaterally put in place by Westminster.⁹³ The result is likely to be a flood of low-quality products entering the marketplace because administrations will no longer be empowered to advance public health initiatives through import regulation.⁹⁴ Furthermore, the Act goes so far as to prohibit the Scottish Parliament from passing legislation to require appropriate labelling for such products now being sold in Scotland, preventing consumers from making informed choices when shopping for groceries.⁹⁵ This is again by design, as forcing mutual recognition of relaxed health and quality standards on the domestic market will certainly facilitate the speedy execution of international trade agreements, which are urgently needed following the United Kingdom’s exit from the European Union and the loss of its single market framework.⁹⁶

iv. Sustainability

Within the United Kingdom, Scotland is leading the way in its efforts to mitigate the issue of climate change through increased energy efficiency, zero and low emissions heating, reduced reliance on single-use plastics, and its robust microgeneration supply chain.⁹⁷ These are important steps towards

public and voluntary sectors, across Parliament; to turn around the harms associated with higher-risk alcohol consumption and problematic drug use.”).

⁹⁰ United Kingdom Internal Market Act 2020, c. 27, § 5, <https://www.legislation.gov.uk/ukpga/2020/27/data.pdf>.

⁹¹ CONST. & CABINET DIRECTORATE, *supra* note 12, ¶ 114.

⁹² *Id.*

⁹³ Weatherill, *supra* note 85.

⁹⁴ CONST. & CABINET DIRECTORATE, *supra* note 12, ¶ 119. For example, if the Scottish Parliament desires to maintain its current ban on the sale of chlorinated chicken or hormone-fed beef in Scotland—in violation of the Act’s regulatory equivalence measures—the UK Parliament may now override the will of the Scottish people acting through their elected representatives. *Id.* ¶ 121.

⁹⁵ Weatherill, *supra* note 85.

⁹⁶ *Id.*

⁹⁷ CONST. & CABINET DIRECTORATE, *supra* note 12, at 31.

reducing greenhouse gas emissions and addressing fuel poverty.⁹⁸ The Scottish Government is particularly concerned with the environmental damage caused by single-use plastics and has taken considerable steps to reduce their prevalence in the country, including becoming the first nation in the United Kingdom to ban plastic-stemmed cotton swabs in 2019.⁹⁹

The mutual recognition principle of the UK Internal Market Act threatens to undermine these policy goals by constraining the ability of the Scottish Parliament to impose restrictions on products that it considers harmful to the environment.¹⁰⁰ While Scotland retains the ability to limit the local production of such items, if more permissive standards are in place elsewhere in the United Kingdom, Scotland would have no power to ban or restrict the sale of imported products within its market, in turn undermining the Scottish Parliament's ability to exercise its devolved powers to mitigate the serious economic, social, and environmental impacts of large-scale single-use plastic consumption.¹⁰¹

IV. LEGAL OPTIONS FOR SECESSION

Speculation about the possibility of a second independence referendum is widespread, and the prospect has been colloquially dubbed "Indyref2."¹⁰² The First Minister of Scotland, Nicola Sturgeon, hopes to see a second referendum take place in October 2023, once again asking Scottish voters, "Should Scotland be an independent country?"¹⁰³ The push for a second referendum has long been at the forefront of the Scottish National Party's platform, and with its strong performance in the May 2021 Scottish Parliamentary election,¹⁰⁴ the party is determined to move forward with Indyref2.¹⁰⁵ Following the SNP's strong electoral finish, the party's spokesperson for constitutional affairs, Tommy Sheppard, declared that the Scottish people "have voted to have the choice" and that his government "will make sure that they get it."¹⁰⁶

⁹⁸ *Id.*

⁹⁹ *Scotland Bans Plastic Stemmed Cotton Buds*, THE ROYAL ENV'T HEALTH INST. OF SCOT. (Oct. 16, 2019), <https://www.rehis.com/news/scotland-bans-plastic-stemmed-cotton-buds>.

¹⁰⁰ Weatherill, *supra* note 85.

¹⁰¹ *Id.*

¹⁰² Chris Lomas, *The Long Road to Indyref2*, POLITICS.CO.UK (Sept. 24, 2021, 9:32 AM), <https://www.politics.co.uk/in-depth/2021/09/24/the-long-road-to-indyref2>.

¹⁰³ Carrell, *supra* note 5.

¹⁰⁴ *Scottish Election 2021: Nicola Sturgeon Celebrates 'Historic' SNP Election Win*, BBC NEWS (May 9, 2021), <https://www.bbc.com/news/uk-scotland-scotland-politics-57038039> (noting that the SNP won 64 of the 129 seats in the Scottish Parliament, just one seat away from attaining a controlling majority).

¹⁰⁵ Lomas, *supra* note 102.

¹⁰⁶ *Id.*

A major obstacle to securing a second independence referendum could be convincing the staunchly opposed UK Government to grant Scotland consent to hold the vote under Section 30 of the 1998 Scotland Act, which allows the Scottish Parliament to legislate in areas normally reserved to Westminster.¹⁰⁷ While there is some disagreement among authorities and constitutional scholars about whether or not Scotland *needs* permission from Westminster to hold a second referendum, First Minister Nicola Sturgeon has stated that there is “no democratic justification” for UK ministers to block the will of the Scottish people.¹⁰⁸ Seeming to disagree, then-UK Prime Minister Liz Truss dismissed Sturgeon as an “attention seeker” whose calls for a second referendum “should be ignored.”¹⁰⁹ To resolve this question, Nicola Sturgeon requested that her lord advocate, Dorothy Bain QC, write to the Supreme Court in London, asking it to establish whether the Scottish Government has the necessary legal powers to stage a consultative referendum on its own.¹¹⁰ A decision is expected in early 2023.¹¹¹

Whether or not the Scottish Government has the constitutional authority to go forward with a second referendum on its own, Scotland would ultimately need the blessing of the UK Government in order to achieve meaningful recognition on the international stage.¹¹² In 2019, with the approval of the Scottish Parliament, First Minister Sturgeon formally wrote to then-Prime Minister Boris Johnson, requesting the transfer of powers to legally hold another independence referendum under Section 30 of the Scotland Act.¹¹³ The Scottish First Minister said, “I want to have a legal referendum . . . to give people the right to choose. That’s democracy. It’s not about what I want or what [the UK Government] wants.”¹¹⁴ This strikes a drastically different tone than the first independence referendum:

¹⁰⁷ Libby Brooks, *Sturgeon Demands Independence Referendum Powers Be Devolved*, THE GUARDIAN (Dec. 19, 2019), <https://www.theguardian.com/politics/2019/dec/19/nicola-sturgeon-requests-independence-referendum-powers>.

¹⁰⁸ *Scottish Election 2021: Nicola Sturgeon Celebrates ‘Historic’ SNP Election Win*, *supra* note 104.

¹⁰⁹ Matthew Weaver, *Sturgeon Warns Truss Not to ‘Gerrymander’ Scottish Referendum Rules*, THE GUARDIAN (Sept. 4, 2022), <https://www.theguardian.com/politics/2022/sep/04/sturgeon-warns-truss-not-gerrymander-scottish-referendum-rules>.

¹¹⁰ Carrell, *supra* note 5.

¹¹¹ Weaver, *supra* note 109.

¹¹² Andrew Cannon & Hannah Ambrose, *Scottish Independence: The International Law Implications*, HERBERT SMITH FREEHILLS (Apr. 22, 2021), <https://www.herbertsmith-freehills.com/latest-thinking/scottish-independence-the-international-law-implications>.

¹¹³ Brooks, *supra* note 107. See also Philip Sim, *Scottish Independence: What is a Section 30 Order?*, BBC NEWS (Dec. 19, 2019), <https://www.bbc.com/news/uk-scotland-scotland-politics-50744526>.

¹¹⁴ Libby Brooks, *Sturgeon: SNP Will Hold Scottish Independence Vote if it Wins in May*, THE GUARDIAN (Jan. 24, 2021, 7:14 AM), <https://www.theguardian.com/politics/2021/jan/24/scotland-independence-referendum-nicola-sturgeon-snp-wins-may->

The previous referendum in 2014 was underpinned by an agreement between the Scottish and UK governments to formally transfer powers to Holyrood. This meant [the Scottish Parliament] could legislate for a referendum without any wrangling over who actually had the powers in the first place - everyone was signed up to the process.¹¹⁵

It is unlikely that the UK Government will grant the Section 30 order; however, the Scottish National Party previously said that if pro-independence parties won a majority of seats in the May 2021 Scottish Parliamentary election (which—coalesced with the Scottish Greens—they did), the Scottish Government would move to authorize a referendum even in the absence of a Section 30 order.¹¹⁶ An affirmative vote on a second referendum held without Westminster's consent could be used to show the democratic will of the Scottish people and subsequently pressure the UK Parliament to relinquish sovereignty over Scotland.¹¹⁷

V. INDEPENDENCE AND BEYOND

A. *European Union Membership*

Following a successful execution of the democratic secession process from the United Kingdom, the first logical step for Scotland would be to regain membership in the European Union. There is some indication that the European Union would welcome Scottish membership, with Former European Council President Donald Tusk, on the level of support in the European Union for Scotland becoming a member state, stating, “Emotionally I have no doubt that everyone will be enthusiastic here in Brussels, and more generally in Europe.”¹¹⁸ The application process for joining the European Union is set out in Article 49 of the Treaty on European Union, printed below in its entirety, and allows any “European State” to apply to become a member:

Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The

¹¹⁵ Philip Sim, *Scottish Independence: Could the Supreme Court Rule on a Referendum*, BBC NEWS (May 9, 2021), <https://www.bbc.com/news/uk-scotland-scotland-politics-57047898>.

¹¹⁶ Brooks, *supra* note 114.

¹¹⁷ *Id.*

¹¹⁸ ‘Empathy’ for Independent Scotland Joining the EU Says Tusk, BBC NEWS (Feb. 2, 2020), <https://www.bbc.com/news/uk-scotland-scotland-politics-51342714>.

applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account. The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.¹¹⁹

Because of the requirement that applicants be independent, sovereign states, Scotland must formally resolve its independence from the United Kingdom before making its application.¹²⁰ The requirement that Scotland achieve sovereignty before initiating the application process means that there would be a period of time following independence during which Scotland would be neither a member of the European Union nor a party to the European Union-United Kingdom Trade and Cooperation Agreement (and similar free trade agreements) which currently apply to Scotland by virtue of being within the United Kingdom.¹²¹

Under Article 49 of the Treaty on European Union, all membership applications require the unanimous approval of the Council of the European Union, along with a majority of member states in the European Parliament.¹²² One potential area of concern is that Spain, an EU member state, is currently resisting a movement in Catalonia to secede from Spain and become independent, which might lead Spain to veto an attempt by a newly independent Scotland to join the European Union.¹²³ A key distinction between the situations in Spain and in the United Kingdom, however, is that the Scottish National Party is seeking independence only in accordance with the laws of the United Kingdom, whereas Spain's 1978 Constitution provides for the "indissoluble unity of the Spanish nation," meaning that the Catalan attempts at independence are, by definition, not in accordance with the laws of Spain.¹²⁴ At the end

¹¹⁹ Consolidated Version of the Treaty on European Union, art. 49, Oct. 26, 2012, 2012 O.J. (C326) 13 [hereinafter TEU].

¹²⁰ Paul Butcher, *Scottish Independence and EU Membership: Process and Implications*, HERBERT SMITH FREEHILLS (Apr. 22, 2021), <https://www.herbertsmithfreehills.com/latest-thinking/scottish-independence-and-eu-membership-process-and-implications>.

¹²¹ *Id.*

¹²² TEU, *supra* note 119, at art. 49.

¹²³ Butcher, *supra* note 120.

¹²⁴ CONSTITUCIÓN ESPAÑOLA, B.O.E. n. 311, Dec. 29, 1978 (Spain).

of the voting process, all existing EU member states must ratify the accession terms in accordance with their respective constitutional requirements.¹²⁵

In addition to the unanimous approval of the Council of the European Union and the majority of the European Parliament, the European Commission has laid out accession criteria, known as the Copenhagen criteria, which are essential conditions that each candidate state must meet in order to become an EU member state.¹²⁶ These conditions include the political criteria of maintaining stable institutions which guarantee democracy, the rule of law, human rights, and respect for and protection of minorities.¹²⁷ The general economic requirements are a demonstrated ability to maintain a functioning market economy and the capacity to cope with competition and market forces.¹²⁸ More specifically, factors considered in evaluating the strength of a potential member state's market economy include:

[H]igh quality of economic governance[,] macroeconomic stability (including adequate price stability as well as sustainable public finances and external accounts)[,] proper functioning of the goods and services market (including business environment[,] state influence on product markets, and privatisation and restructuring), proper functioning of the financial market (including financial stability and access to finance)[, and] proper functioning of the labour market.¹²⁹

Additionally, remaining a competitive economy within the EU single market system requires:

[A] sufficient amount of human capital, education, research, innovation, and future developments in this field[;] a sufficient amount and quality of physical capital and infrastructure[;] changes in the sector and enterprise structure in the economy... [and] a sufficient degree and pace of economic integration with the Union, and price competitiveness.¹³⁰

¹²⁵ Butcher, *supra* note 120.

¹²⁶ *Accession Criteria*, EUR. COMM'N, https://ec.europa.eu/neighbourhood-enlargement/enlargement-policy/glossary/accession-criteria_en (last visited Sept. 30, 2022).

¹²⁷ *Id.* See also Minimum Standards for Minorities in the EU, EUR. PARL. DOC. (INI 2036) 3 (2018).

¹²⁸ *Accession Criteria*, *supra* note 126.

¹²⁹ Economic Accession Criteria, EUR. COMM'N, https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/international-economic-relations/enlargement-and-neighbouring-countries/enlargement/economic-accession-criteria_en (last visited Sept. 30, 2022).

¹³⁰ *Id.*

Finally, candidate countries must possess the administrative and institutional capacity to effectively implement the *acquis* (the rights and obligations that are binding on European Union members) and the ability to take on the obligations of EU membership.¹³¹ The European Commission also notes that the European Union's capacity to absorb new member states, while maintaining the momentum of European integration, is an important additional consideration.¹³² While Scotland likely meets the political and economic criteria for membership, in order to achieve the administrative capacity to effectively meet the obligations of EU membership, the newly independent country would need to fill the institutional gaps created by its secession from the United Kingdom, including establishing a central bank and other regulatory structures.¹³³ The process of joining the European Union is notoriously lengthy, with Finland being the quickest to achieve accession in just under three years.¹³⁴

B. Scotland's Currency

A hotly debated issue of particular significance is what currency an independent Scotland would adopt. As a group of British policy analysts observed:

That partly reflects currency's role, like flags, as emblems of national identity and continuity. More fundamentally though, different currency regimes have profound implications for a sovereign State's control over its monetary and fiscal policy, access to capital markets, its ability to respond to unforeseen economic shocks and support financial stability.¹³⁵

During the 2014 Scottish independence campaign, the Scottish Government proposed that an independent Scotland continue using the British

¹³¹ *Accession Criteria*, *supra* note 126. See also *Acquis*, EUR. COMM'N, https://ec.europa.eu/neighbourhood-enlargement/enlargement-policy/glossary/acquis_en (last visited Sept. 30, 2022) (noting that the *acquis* of the EU "is constantly evolving and comprises: the content, principles and political objectives of the Treaties; legislation adopted pursuant to the Treaties and the case law of the Court of Justice; declarations and resolutions adopted by the Union; instruments under the Common Foreign and Security Policy; international agreements concluded by the Union and those entered into by the member states among themselves within the sphere of the Union's activities").

¹³² *Id.*

¹³³ Butcher, *supra* note 120.

¹³⁴ *Id.*

¹³⁵ Paul Butcher & Dorothy Livingston, *Scottish Independence and Currency: Choices, Issues and Implications*, HERBERT SMITH FREEHILLS (Apr. 22, 2021), <https://www.herbertsmithfreehills.com/latest-thinking/scottish-independence-and-currency-choices-issues-and-implications>.

sterling as part of a currency union with the rest of the United Kingdom.¹³⁶ Although rejected by leaders in the United Kingdom, under this proposal, the Bank of England would be responsible for the monetary policy of both Scotland and the United Kingdom and accountable to both countries.¹³⁷ The decisionmakers in Westminster ultimately felt that it would not be fair to expose UK taxpayers to the aggregating of economic stability risks with an independent Scotland, absent a political union.¹³⁸ Adding credibility to this concern, the governor of the Bank of England at the time, Mark Carney, made a speech a few days before the 2014 independence referendum in which he argued that a well-functioning currency union would need “tax, revenues and spending flowing across those borders to help equalise, to an extent, some of the inevitable differences.”¹³⁹

In 2018, the Scottish National Party initiated the Sustainable Growth Commission, which proposed that an independent Scotland continue to use sterling informally “for a possibly extended transition period” before establishing its own currency down the road.¹⁴⁰ Outside of a formal sterling currency union which has been rejected by leaders in the United Kingdom, Scotland has four main options for its post-independence currency: joining the eurozone (thereby adopting the Euro), continuing to use sterling informally (limited to the medium-term), establishing a new Scottish currency that is allowed to float freely against other currencies, and introducing a new Scottish currency the value of which is pegged to another existing currency.¹⁴¹ Each of the latter three options reflects a currency arrangement already in existence within other small, advanced economies elsewhere in the world.¹⁴²

In order to join the eurozone, there are formal procedures that prospective members must follow, “including showing for two years that they can maintain the value of their currency against the euro” and the rule that a state cannot

¹³⁶ *Id.*

¹³⁷ GEMMA TETLOW & TERESA SOTER, INST. FOR GOV'T (UK), CURRENCY OPTIONS FOR AN INDEPENDENT SCOTLAND 16 (2021), <https://www.instituteforgovernment.org.uk/sites/default/files/publications/currency-independent-scotland.pdf>.

¹³⁸ *Id.* at 36.

¹³⁹ Butcher & Livingston, *supra* note 135.

¹⁴⁰ THE SUSTAINABLE GROWTH COMM'N, SCOTLAND – THE NEW CASE FOR OPTIMISM: A STRATEGY FOR INTER-GENERATIONAL ECONOMIC RENAISSANCE 47 (2018), <https://static1.squarespace.com/static/5afc0bbbf79392ced8b73dbf/t/5b0a988c352f53c0a5132a23/1527421195436/SGC+Full+Report.pdf>.

¹⁴¹ TETLOW & SOTER, *supra* note 137, at 4. *But see* Ronald MacDonald, *Currency Issues and Options for an Independent Scotland*, UNIV. OF GLASGOW (2013), <https://policyscotland.gla.ac.uk/currency-issues-and-options-for-an-independent-scotland> (arguing that “the current proposal of the Scottish government to remain part of the sterling zone is doomed to failure, both because it falls short of a full political and monetary union and because it fails to recognize the reality of the Scottish economy post independence” and that “the only tenable solution for an independent Scotland is to have a separate currency and for this currency to have some flexibility against Scotland’s main trading partners”).

¹⁴² TETLOW & SOTER, *supra* note 137, at 4.

have a deficit of more than 3% of its gross domestic product (GDP).¹⁴³ Currently operating at a deficit of more than twice that number and without the freedom to use monetary policy, the Scottish Government would have to make more active use of fiscal policy to cushion economic shocks.¹⁴⁴ Therefore, joining the eurozone could most optimistically be a medium-term option for Scotland; however, if the UK Government continues to shut down the possibility of a formal sterling currency union, this might not ever be possible, leaving a newly independent Scotland with a choice between continuing to use sterling informally or launching a new currency (either free-floating or pegged).¹⁴⁵

Based on its current economic prognosis, it seems unlikely that Scotland would be able to accrue enough foreign exchange reserves at a reasonable price to support a pegged currency.¹⁴⁶ As one economist explains:

The challenges and costs of setting up a new currency have been debated extensively, including the amount of reserves needed to back it and how a newly independent Scotland might work with the remaining parts of the UK. The reserves needed to back any new currency would be substantial, most likely tens of billions depending on how Scotland's financial system was structured. These reserves are ... unlikely to be met by any inheritance from the UK.¹⁴⁷

As a consequence of this reality, the most viable options seem to be establishing a new Scottish currency that is allowed to float freely against other currencies, or continuing to use sterling in the absence of a formal currency union until conditions are proper for the introduction of a new Scottish currency.¹⁴⁸ Each option would come with challenges, and the main points of consideration in weighing the trade-offs between currency options involve trade costs, ability to respond to economic shocks, exchange-rate volatility, constraints on fiscal policy, and impact on financial services.¹⁴⁹

¹⁴³ *Id.* See also Butcher, *supra* note 120.

¹⁴⁴ TETLOW & SOTER, *supra* note 137, at 5.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 4. See also *Currency Risk in an Independent Scotland Would Be Unavoidable, Think Tank Finds*, HOLYROOD (Sept. 17, 2021), <https://www.holyrood.com/news/view/currency-risk-in-an-independent-scotland-would-be-unavoidable-think-tank-finds>.

¹⁴⁷ Richard Marsh, *Which Scottish Currency?*, SCEPTICAL SCOT (Oct. 18, 2020), <https://sceptical.scot/2020/10/which-scottish-currency>.

¹⁴⁸ TETLOW & SOTER, *supra* note 137, at 5.

¹⁴⁹ *Id.* See also Marsh, *supra* note 147 (noting that “[t]here are questions over whether the UK’s monetary policy is best suited to the Scottish economy, what resources are needed to back a new currency, or whether Scotland should adopt the euro: There is no easy answer to the question of currency”).

C. Economic Borders

The Scottish National Party has stated that its policy will be to seek an opt-out from the Schengen area as part of its EU application because “joining the Schengen area would be incompatible with agreeing to continue passport free travel and free movement” between Scotland and the rest of the UK, Ireland, the Isle of Man, and the Channel Islands.¹⁵⁰ The border-free Schengen Area guarantees free movement to more than 400 million European citizens in 26 countries (22 out of 27 EU member states) along with non-nationals living within the Area or visiting as tourists, exchange students or for business purposes (anyone legally present).¹⁵¹ Free movement enables citizens to travel, work and live in another European country and move around the Schengen Area without being subject to border checks.¹⁵² However, as an EU legislative summary notes:

Opening up internal borders is one side of the Schengen coin. The other is to ensure the safety of its citizens. This involves tightening and applying uniform criteria on controls on entry by non-Schengen nationals at the common external border, developing cooperation between border guards, national police and judicial authorities and use of sophisticated information exchange systems.¹⁵³

Before the United Kingdom left the European Union, it and Ireland were the only EU members who were allowed opt-outs from the Schengen area when it became part of EU law in 1997 with the Treaty of Amsterdam.¹⁵⁴ If Scotland is not granted an opt-out, a hard border would be created between an independent Scotland and the United Kingdom, which is its largest trading partner by far.¹⁵⁵ The estimates published by the Scottish Government for 2018 indicate that 60% of Scottish exports go to the rest of the United Kingdom, while the rest is split about evenly between the European Union and the

¹⁵⁰ Butcher, *supra* note 120.

¹⁵¹ *Schengen Area*, EUR. COMM'N, https://ec.europa.eu/home-affairs/policies/schengen-borders-and-visa/schengen-area_en (last visited Sept. 30, 2022); *Schengen Area – The World's Largest Visa Free Zone*, SCHENGEN VISA INFO, <https://www.schengenvisa-info.com/schengen-visa-countries-list> (last visited Oct. 11, 2022).

¹⁵² *Id.*

¹⁵³ *The Schengen Area and Cooperation*, EUR-LEX, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:l33020> (last visited Sept. 30, 2022).

¹⁵⁴ Butcher, *supra* note 120.

¹⁵⁵ CHIEF ECONOMIST DIRECTORATE, EXPERT STATISTICS SCOTLAND: 2018, at 2 (2020), <https://www.gov.scot/publications/export-stats-scotland-2018>.

rest of the world.¹⁵⁶ As for Scotland's imports, 67% came from the United Kingdom in 2017.¹⁵⁷

An alternative, middle-ground approach to its new relationship with the European Union, short of membership, would be for Scotland to join the European Economic Area (EEA) which would mitigate issues presented by a hard border between Scotland and the United Kingdom.¹⁵⁸ The Agreement on the European Economic Area (EEA Agreement), which entered into force on January 1, 1994, brings together the EU member states along with Iceland, Liechtenstein and Norway into a single market, referred to as the "internal market."¹⁵⁹ The EEA Agreement:

[G]uarantees equal rights and obligations within the internal market for individuals and economic operators in the EEA. It [also] provides for the inclusion of EU legislation covering the four freedoms — the free movement of goods, services, persons and capital — throughout the 30 EEA States. In addition, the Agreement covers cooperation in other key areas such as research and development, education, social policy, the environment, consumer protection, tourism and culture, collectively known as "flanking and horizontal" policies.¹⁶⁰

Thus, joining the European Economic Area would allow Scotland to attain many of the major benefits it previously enjoyed as part of the European Union.

D. Maritime and Land Boundaries

With three decades of violent conflict known as "The Troubles" in Northern Ireland fixed in the national memory of the United Kingdom, the delineation of future land and maritime boundaries between the United Kingdom and Scotland must be approached with significant care, especially "given the intrinsic relationship between territory and national identity, and also in view of sovereign rights over natural resources such as existing and potential oil and gas fields, and offshore wind, wave, tidal and Carbon Capture Usage and

¹⁵⁶ *Id.*

¹⁵⁷ HANWEI HUANG ET AL., CENTER FOR ECONOMIC PERFORMANCE, DISUNITED KINGDOM? BREXIT, TRADE AND SCOTTISH INDEPENDENCE (2021), https://cep.lse.ac.uk/_new/publications/abstract.asp?index=7714.

¹⁵⁸ Butcher, *supra* note 120.

¹⁵⁹ *EEA Agreement*, EUR. FREE TRADE ASS'N, <https://www.efta.int/eea/eea-agreement> (last visited Sept. 30, 2022); Agreement on the European Economic Area, Mar. 17, 1993, 1994 O.J. (L1) 3.

¹⁶⁰ *Id.*

Storage (CCUS) projects.”¹⁶¹ The original land boundary between Scotland and England was established in 1237 with the Treaty of York.¹⁶² While some borderlands were disputed during the following two centuries, it remains one of the oldest continuously existing borders in the world with the exception of Berwick-upon-Tweed, which was annexed by England in 1482.¹⁶³ In the event of a successful referendum in favor of Scottish independence, it would be vital for an agreement to be reached regarding the maritime boundaries between Scotland and the United Kingdom. The United Nations Convention on the Law of the Sea (UNCLOS) spells out the procedure for the delimitation of maritime boundaries between adjacent coastal states.¹⁶⁴ First, the two states must seek to agree on the boundary together.¹⁶⁵ If an agreement cannot be reached, the territorial dispute can be resolved either by a tribunal or by the International Court of Justice.¹⁶⁶ Because international law has been extensively developed in this area, there are clear principles to be applied through three key steps: determine whether a historic agreement is in place between the parties in relation to all or part of the boundary in question; determine the line of equidistance; and assess whether any special circumstances exist which might necessitate adjusting the line of equidistance to achieve a fair and equitable outcome.¹⁶⁷

Traditionally, this included geographical factors such as length and configuration of coastlines, as well as non-geographical factors like historical rights and socio-economic circumstances, including fishing rights.¹⁶⁸ Pending a formal agreement regarding delimitation, UNCLOS provides that states must “make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.”¹⁶⁹ Practically speaking, the United Kingdom and Scotland “should be able to reach temporary agreements (such as establishment of a joint development zone) to facilitate (continued) investment in, and exploitation of, natural resources in territory yet to be finally delimited.”¹⁷⁰

¹⁶¹ Cannon & Ambrose, *supra* note 112.

¹⁶² *The Treaty of York*, BBC, https://www.bbc.co.uk/scotland/history/scotland_united/treaty_of_york (last visited Oct. 13, 2022).

¹⁶³ *English Invasion of Scotland (1482) Explained*, EVERYTHING EXPLAINED TODAY, [https://everything.explained.today/English_invasion_of_Scotland_\(1482\)](https://everything.explained.today/English_invasion_of_Scotland_(1482)) (last visited Sept. 30, 2022).

¹⁶⁴ U.N. Convention on the Law of the Sea art. 15, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at art. 188.

¹⁶⁷ Cannon & Ambrose, *supra* note 112.

¹⁶⁸ *Id.*

¹⁶⁹ U.N. Convention on the Law of the Sea, *supra* note 164, at art. 74.

¹⁷⁰ Cannon & Ambrose, *supra* note 112.

In this case, the conversation between Scotland and the United Kingdom concerning the maritime boundary is likely to center on the difference between two lines sitting about 5,500 nautical miles apart.¹⁷¹ The first of these was drawn in 1987 under the Civil and Criminal Jurisdiction (Offshore Activities) Orders, which divided the United Kingdom's territorial waters and waters within its continental shelf into English, Scottish, and Northern Irish parts and provided that the respective civil and criminal law of each state would apply to its waters.¹⁷² Following devolution and the 1998 Scotland Act, a different boundary line was adopted in the Scottish Adjacent Waters Boundaries Order, which had the stated purpose of dealing with environmental protection and fisheries delimitation.¹⁷³ However, because this new boundary significantly reduces the area of Scotland's territorial waters (and the corresponding number of oil and gas fields), some have seen it as an attempt by the United Kingdom to establish a clear marker following devolution that is more consistent with the line of equidistance.¹⁷⁴ While the issues of international law that are likely to arise in the event of Scottish independence may be somewhat unique, established principles exist to guide the process.¹⁷⁵

VI. CONCLUSION

As a result of vast changes in the political, economic, and social landscape of the United Kingdom, combined with the functional breakdown of the devolution settlement in the two years following Britain's exit from the European Union, it is now in the Scottish national interest to hold a second independence referendum and achieve sovereignty and independence from the United Kingdom. While any democratic secession process is bound to encounter obstacles and uncertainties, the Government of Scotland has published extensive research and policy propositions for handling any difficulties that may arise, both expected and unexpected, on its journey to becoming, once again, a free Scotland.

¹⁷¹ *Id.*

¹⁷² The Civil Jurisdiction (Offshore Activities) Order 1987, SI 1987/2197, No. 2197 (UK), <https://www.legislation.gov.uk/uksi/1987/2197/made>.

¹⁷³ The Scottish Adjacent Waters Boundaries Order 1999, SI 1999/1126, No. 1126 (UK), <https://www.legislation.gov.uk/uksi/1999/1126/contents/made>.

¹⁷⁴ Cannon & Ambrose, *supra* note 112.

¹⁷⁵ See U.N. Convention on the Law of the Sea, *supra* note 164.