The Road to the Referendum on Scottish Independence: the role of law and politics

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Abstract

In September 2014, the United Kingdom was on the brink of a constitutional crisis. The recent referendum on Scottish independence was the most constitutionally significant event the United Kingdom has encountered in several years. The fact that the constitution was able to facilitate the possibility of such fundamental change by allowing a fair, legal and decisive referendum is no mean feat. The massive role played by politics, and relatively minor role played by the law, in engineering the circumstances for the referendum can shed light on the nature of the British constitution. Despite the British constitution’s gradual move towards a form of legal constitutionalism over the last few decades, the constitutional approach to the referendum on Scottish independence can be seen as a victory for the political constitution. In the context of significant constitutional reform, political agreement was preferred to judicial adjudication. This challenges the presumption that recourse to legal action and appeal to the judiciary are more desirable than political means of constitutional reform.

1. Introduction
‘Rarely do we have an opportunity to debate an issue as fundamental as the future of our country’. Following the landmark majority of the Scottish National Party (SNP) in the 2011 Scottish Parliamentary elections, such an opportunity arose. By virtue of a manifesto commitment to hold a referendum on Scottish independence, the constitutional future of Scotland was called into question.

In January 2012, a dispute arose between the governments at Westminster and Holyrood over the process to be adopted to instigate this constitutional change. This dispute brought the complex relationship between law and politics in the British constitution to the forefront of public discourse. Scotland’s ambiguous constitutional status, initiated by the union of Scotland and England in 1707, kept alive through an independent legal system and nationalist tendencies, and exacerbated by devolution in 1998, adds further complication to the issue of independence and the appropriate process for achieving that independence. ‘What happened in legal and political (and hence constitutional) terms when Britain was created as a country is a matter open to several interpretations’.

A theoretical challenge to Scottish independence, based on a constitutional interpretation of Britain’s conception, will be addressed later. Before that, the concepts of law and politics and the relationship between the two need to be defined, and the characterisation adopted for present purposes highlighted. Secondly, the differing models of political and legal constitutionalism will be outlined. Thirdly, the constitutional effect of the Scotland Act 1998 (hereinafter ‘the Scotland Act’) will be examined. Thereafter, the political disagreement over the competence of the Scottish Parliament to legislate for a referendum on Scottish independence will be scrutinised and the possible reaction of the judiciary if called upon to adjudicate on this issue will be examined. Next, the resolution of this disagreement in October 2012 and the inference that can be drawn from this ‘Agreement’ regarding the nature of the constitution will be considered. Finally, the aforementioned challenge to legislation paving the way for Scottish independence will be analysed.

2. Law and Politics

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1 Margaret Curran, HC Deb (15 January 2013) vol 556, col 752.
2 SNP Manifesto 2011 at 28.
3 The historically unusual character of the United Kingdom and the evolutionary nature of its constitution have created a situation where the constituent parts of the UK have very little definitive constitutional status. Scotland is often described as a nation and a country, however it is not (at the time of writing) a fully independent state. Scotland’s status within the British constitution is unclear.
Law and politics are interdependent disciplines. Although often represented as competing principles, this dichotomy is unhelpful.\(^5\) ‘Any separation between legal and political power is purely conceptual…there can be no real legal authority without some political power… [and] there is rarely real political power without some legal authority’.\(^6\) Articulating a comprehensive definition of politics would be impossible. However, in developing an understanding of the term, certain key characteristics can be posited. Politics is ‘bound up with questions of power and authority’.\(^7\) It attempts to find a ‘right’ answer to disputes in circumstances ‘…where there is no overarching rational or objective standard or principle for resolving that dispute’.\(^8\) This difficulty arises due to the ‘simultaneous existence of different groups, hence different interests and different traditions, within a territorial unit under common rule’.\(^9\) Whenever an attempt is made to exert authority over a group of people, there will be politics.

The definition of law is similarly problematic. Generally, the law can be viewed in three ways. The first, associated with 19\(^{th}\) century jurist John Austin, is law as command: ‘a law is a command which obliges a person or persons to a course of conduct’.\(^10\) Viewed in this way, as commands of the ‘political superior’,\(^11\) law ‘presents itself as the output of the political process’.\(^12\) The second school of thought is law as custom: ‘…law is the product of decisions and practices which have been built up over many generations’.\(^13\) The law has evolved over time, founded upon reason, tradition and an ‘innate measure of right and wrong’.\(^14\) Viewed in this way, the law is ‘a set of conventional practices which frame, but do not establish, political order’.\(^15\) Thirdly there is the notion of law as right. The law, founded upon liberty, autonomy and justice, operates as a constraint on political power to ensure individual freedom. Viewed in this way, law is superior to politics; the law is ‘a set of foundational principles providing the framework within which politics is to be conducted’.\(^16\) When law is based on a foundation of individual rights, politics is cast in a negative light. Politics is ‘dangerous and potentially destructive’.\(^17\)

\(^7\) Loughlin, *Sword and Scales* (n5) 6.
\(^8\) Ibid 123-4.
\(^11\) Ibid 23.
\(^12\) Loughlin, *Sword and Scales* (n5) 9.
\(^13\) Ibid 218.
\(^14\) Ibid 10.
\(^15\) Ibid 218.
\(^16\) Ibid 223.
\(^17\) Ibid 223.
Clearly, the relationship between law and politics changes depending on how one defines these concepts. These categories of ‘law’ are not mutually exclusive and are far from exhaustive, only scratching the surface of the massive jurisprudential question, ‘What is law?’ However, outlining basic definitions of these ‘competing, but also related, modes of public discourse’ provides the starting point for determining the role each played in the lead up to the referendum on Scottish independence. Law as right has limited relevance: ‘the ethical questions about the right of self-determination that bedevil debates around secession in other states have hardly arisen in the Scottish case’. Moreover, this ‘right’ is not a legal one. It is unclear whether Scotland has the right to self-determination under public international law. Generally the right is only enjoyed by colonial territories. According to Malcolm Shaw, ‘...self-determination as a concept is capable of developing further so as to include the right to secession from existing states, but that has not yet convincingly happened.’ In any case, a right to self-determination under international law would be unenforceable in domestic courts. Law as command, in the form of the Scotland Act, is the main focus of this article. The fundamental law argument, based on law as custom, will be explored later as a challenge to the orthodox view that, following amendment of the Scotland Act in February 2013, the competence of the Scottish Parliament to legislate on a referendum concerning Scottish independence was beyond legal challenge.

When discussing the interaction between law and politics, several relationships are engaged. ‘Law and politics collide and combine in a dazzling variety of (not always compatible) ways’. The relationship between law and politics could refer to the relationship between legal and political institutions, legal and political actors or the academic disciplines of law and politics. Similarly, it may denote the relationship between theories of law and theories of politics or the relationship between a particular legal value, for instance individual privacy, and a particular political value, such as national security. For the purposes of this article, the only concern is with the first two relationships: namely that between political and legal institutions (i.e. the courts and the legislature) and that between legal and

22 In Britain, international law is only enforceable if it has been incorporated into domestic law by an Act of Parliament.
24 ibid 166.
political actors (i.e. judges and politicians). Although any attempt to ‘uncover the one true relationship of law to politics… is doomed to fail’, 25 by looking at the nature of the British constitution and how it has functioned in the face of potential dissolution in relation to Scotland, light can be shed on the role law and politics play in the modern day constitutional order.

The independence debate encapsulates elements of both law and politics providing a platform for examining the constitutional relationship between the two. From one perspective, Scottish independence can be seen as a purely political issue. If politics is concerned with questions of power and authority then independence is political in the sense that it would entail a transfer of power and authority from Westminster to Holyrood. Whether Scotland should become independent or not is a matter of personal judgement. Consequently, independence could be seen as a question of politics.

Alternatively, Scottish independence could be seen as a purely legal issue: does the Scottish Parliament have the competence to legislate for a referendum on Scottish independence? Framed in this way the question is strictly legal, as the answer depends upon judicial interpretation of the Scotland Act, which limits the competence of the Scottish Parliament.

Clearly, whether Scottish independence is regarded as legal or political depends on how one frames the question. In reality, Scottish independence is neither purely political nor purely legal. However exploring the various legal arguments surrounding Scottish independence highlights the important role played by politics in the British constitution and emphasises the limited utility of the law, in the form of judicial intervention, in this context. This can go some way to debunking the myth that ‘…an answer to any issue can always be found in the body of law’ 26: a misconception which, it could be said, ‘needs to be put right as a matter of some urgency’. 27

3. Legal and Political Constitutions

Before addressing the role of law and politics in the context of Scotland’s constitutional development, it is necessary to outline the relationship between law and politics in the British constitutional order. Constitutional discourse can be broadly separated into two categories: political constitutionalism and legal constitutionalism. This distinction is usually formulated in terms of accountability. A political constitution secures accountability through ‘political means such as debate,
questioning, and investigative scrutiny, both in Parliament and through the media’. A legal constitution secures accountability ‘...through the legal institutions of the courts, by judges, and through the legal means of adjudicative litigation’. However, when discussing Scottish independence, it is not the accountability of those exercising political authority that is under consideration. Rather, it is the prospect of significantly changing the format of the constitution itself. It is from this perspective that the conflicting ideals of political and legal constitutionalism will be examined. Does the method of constitutional reform adopted to facilitate a referendum on Scottish independence suggest a legal or political constitution?

John Griffith, who laid the foundation for the idea of a political constitution, claimed that ‘it is not possible to argue that something in Britain’s political constitution is ‘unconstitutional’, only that it is ‘politically unwise or undesirable’’. This is because ‘the constitution is no more and no less than what happens. Everything that happens is constitutional. And if nothing happened that would be constitutional also’. This prospect of everything, regardless of its nature or content, being constitutional provokes legitimate concern among those suspicious of unrestricted bureaucratic control. However pragmatic reality may assuage this apprehension: ‘a political institution that can do anything, in the sense of there being no legal limits on its powers, seldom actually does everything within its grasp’. In any case, the solution to unpopular behaviour carried out by a State organ is political, not legal. Tyranny cannot be overcome by the ‘...intervention of the law and the invention of institutional devices... Only political control, politically exercised can supply the remedy’. The law is merely one method used to resolve disputes; it ‘...is neither separate from nor superior to politics, but is itself a form of political discourse’. Thus law is subordinate to politics; in Griffith’s words ‘law is politics carried on by other means’. The foundation underlying Griffith’s account of political constitutionalism is the belief that political decisions should be made by politicians. Constitutional change is therefore a political matter that should be left to the judgement of politicians; if this change is unpopular, the remedies are

29 ibid.
33 Gee & Webber ‘What is a Political Constitution?’ (n30) 290; See also A Tomkins Public Law (OUP, Oxford 2003) 17: ‘the fact that everything can be changed does not mean that everything will be changed. It does not even mean that anything will be changed’.
34 Griffith ‘The Political Constitution’ (n32) 16
35 Gee & Webber ‘What is a Political Constitution?’ (n30) 277.
37 Griffith ‘The Political Constitution’ (n32) 16.
political. The role of the judiciary within a political constitution is to ‘support and nourish the political constitution’. The judiciary should not subvert the democratic process by adjudicating on questions of moral and political judgement. According to political constitutionalism, the process of Scottish independence is a purely political matter; judicial intervention in this context would be inappropriate.

However, Britain’s political constitution is under a great deal of pressure from the idea that the:

…traditional, political manner of dealing with the problem of constitutional accountability is no longer (even if it ever was) the best method, and that a better approach would be to turn instead to the courts. Such a move would bring the British constitution into line with the legal model of constitutionalism that is common in both North America and continental Europe.

The SNP criticises the UK’s uncodified constitution, which allows Westminster to do anything other than bind its successors. As an alternative, the SNP proposes that an independent Scotland should have a ‘written constitution which expresses our values, embeds the rights of its citizens and sets out clearly how institutions of state interact with each other and serve the people’. A written constitution does not necessarily mean a legal constitution; it could provide for political forms of accountability. However, the entrenchment of rights within the written constitution proposed by the SNP suggests the courts will be called upon to ensure these rights are upheld. This would signify a move towards legal constitutionalism.

Legal constitutionalism rejects the premise that judges should not adjudicate on political issues: ‘It is manifestly false that the judges do not, or should not, engage in issues which are at least concerned with political questions’. Sir John Laws claims that although judges must ‘adjudicate in cases which involve questions of acute political controversy’, these decisions cannot be described as political as judicial review does not ‘engage the judge in a trial of the merits of the decision impugned’. The court exercises a supervisory jurisdiction, reviewing the legality of a public decision, not the merits of that decision. The court reviews process and policy implementation; it does not make policy. However, this distinction is difficult to maintain as ‘the uncertain boundary between policy-making and implementation

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38 Tomkins ‘The Role of the Courts in the Political Constitution’ (n28) 3.
41 Scottish Government Publication ‘Scotland’s Future: From the Referendum to Independence and a Written Constitution’ (February 2013) [1.4].
44 ibid.
45 ibid 76.
has become more porous’ and in some cases these processes could be said to be completely indistinguishable. Laws rejects political forms of accountability claiming that Parliament ‘lacks sufficient systematic control over the Executive government... the Executive can bend Parliament to its will’. This autocratic power ‘is only indirectly vouchsafed by the elective process’. As a result, legal forms of accountability are required: ‘the power of democratically elected bodies must be subject to limits’. These limits are imposed by the common law.

According to TRS Allan, Parliament is constrained by the judiciary because legislation is subject to the common law: ‘Legislation obtains its force from the doctrine of parliamentary sovereignty, which is itself a creature of the common law and whose detailed content and limits are therefore matters of judicial law-making’. If Parliament passed legislation that was deemed by the courts to be ‘unconstitutional’ it would be struck down. Legislation is inferior to judicial precedent; a statute cannot ‘displace the common law by providing a rival vision of the constitutional order’. This constitutional review function places the judiciary and the common law above all else. Judges cannot initiate significant constitutional change – ‘politicians may re-invent the wheel; judges may not. Law is evolutive. Politics is revolutionary’ – however when legislation initiates significant constitutional change, it is the duty of the judges to ensure this change is not abhorrent to fundamental rights or democratic principles protected by the common law. ‘It is a necessary part of the judge’s institutional role to reject a law that no conception of public reason could support’. A law that fails to meet the basic requirements of liberal justice is merely a measure that purports to be law. Therefore, according to legal constitutionalism, constitutional change is initiated by law as command but constrained by law as custom and law as right. Law provides a framework within which politics is to be conducted.

Historically, Britain’s constitution has been based on the political model. However ‘support for the idea of a political constitution seems to be dwindling’. Britain’s constitution is becoming more legal and less political; our ‘ad hoc political

48 Laws ‘Law and Democracy’ (n43) 90-91.
49 ibid 92.
50 ibid 85.
52 Laws ‘Law and Democracy’ (n44) 87; Allan ‘Law, Liberty and Justice’ (n51) 282.
53 Allan, Law, Liberty and Justice (n51) 11.
56 ibid 11.
57 Tomkins, Public Law (n42) 21.
58 Gee & Webber ‘What is a Political Constitution?’ (n30) 287.
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constituion… is undergoing a period of almost unprecedented formalisation’. 59 This move from a political constitution towards one which rests on a foundation of law is predicated on several recent developments including membership of the EU, devolution of government responsibilities to Scotland, Wales and Northern Ireland, the passage of the Human Rights Act 1998 and an increase in judicial review of governmental action. 60 Some argue that this move is a mistake. 61 Others attempt to reconcile this development with political constitutionalism, claiming the two models are not mutually exclusive: ‘What we require if we are to move forward is an account that presents legal and political constitutions not as competitors but as partners’. 62 However Gee and Webber believe viewing the two models as partners is an oversimplification. 63 For them the two models ‘ought not to be starkly presented as either in tension or in harmony’. 64 Britain’s constitution will never conform precisely to one specific model: ‘there are elements of both legal and political constitutionalism in most constitutions’. 65 Nonetheless, a model provides ‘an explanatory framework within which to make sense of a real world constitution’. 66 Accordingly, when determining the constitutional future of Scotland, it is important to bear these two models in mind.

These models will now be explored in relation to the Scotland Act and the independence debate. The Scotland Act has changed the relationship between law and politics in Scotland, presenting a challenge to the orthodox doctrine of parliamentary sovereignty. For many, the Act signifies a move towards a legal constitution; the courts’ constitutional role has been enhanced due to their new responsibility for determining the legality of Acts of the Scottish Parliament (ASPs). However, in the context of Scottish independence, the process adopted to instigate constitutional change could be seen as a victory for the political constitution. The dispute over the competence of the Scottish Parliament to legislate on a referendum concerning Scottish independence was resolved through political agreement, not through litigation in court. This conclusion is explored in more detail below. First, the claim that devolution has resulted in a move towards legal constitutionalism is considered. Examining these issues can shed new light on the nature of the British constitution.

60 Loughlin, Sword and Scales (n5) 4.
61 Tomkins, Our Republican Constitution (n40) 10.
63 Gee & Webber ‘What is a Political Constitution?’ (n30) 297.
64 ibid.
66 Gee & Webber ‘What is a Political Constitution?’ (n30) 291.
4. The Scotland Act 1998

Many warned that devolution would lead to the breakup of Britain,67 as such the Scotland Act could be seen as the first step to Scottish independence. The Scotland Act ‘brings a new dynamic to the British Constitution’.68 Establishing a devolved administration in Edinburgh has created a ‘clear division between the legal sovereignty of Westminster and the political sovereignty of the Scottish people’.69 Legal sovereignty is undoubtedly retained;70 the Scottish Parliament is therefore constitutionally subordinate to Westminster. However, this retention of unlimited legislative power has lost its political substance.71 Westminster no longer commands political authority over matters within the competence of the Scottish Parliament: ‘Realpolitik has imposed clearly apparent practical restrictions on the technically limitless power of Parliament to legislate’.72 As a result, Westminster is supreme ‘in constitutional theory alone’.73

This division of power has enhanced the role of the courts in relation to constitutional issues: ‘A constitution which divides power... requires a court to police the division’.74 The Scotland Act introduces a judicial element into the determination of the distribution of powers under the devolution settlement.75 Due to the limited legislative competence of the Scottish Parliament,76 ‘there is wide provision for post-enactment review by the courts’.77 In addition, section 33 of the Scotland Act provides for pre-enactment review. Therefore ‘with devolution comes an enhanced role for the courts’.78 Ian Loveland suggests that the Scotland Act has transformed our higher courts into constitutional courts and that ‘they may in consequence be drawn much more often into making ostensibly party political

67 This was the view of the Conservative Party; see Hansard HC Deb (12 January 1998) vol 304, col 21. Labour MP Tam Dalyell also expressed concern that the Scotlad Bill was ‘the paving Bill for the dissolution of the United Kingdom’ at col 86.
70 Scotland Act 1998 s28(7) states: ‘This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.’
74 ibid 188.
75 ibid.
76 See Scotland Act 1998 s29.
77 Little ‘Scotland and parliamentary sovereignty’ (n72) 549.
judgements’. This has not yet convincingly happened. The courts continue to apply an orthodox Diceyan approach to parliamentary sovereignty in devolution cases and have, thus far, prevented the constitutional significance of the Scotland Act from dictating their interpretation of its provisions. In *Imperial Tobacco Ltd v Lord Advocate* Lord Hope affords the Scotland Act no special significance, stating ‘the description of the Act as a constitutional statute cannot be taken, in itself, to be a guide to its interpretation. The statute must be interpreted like any other statute’. Evidently, judicial impartiality has been maintained.

Nonetheless, the new constitutional role given to the judiciary by the Scotland Act signifies a move away from a political constitution towards a legal one. A legal remedy can now be sought for what is essentially a political question. This juridicalisation of a political conflict leads to the ‘politicisation of the judiciary’. In *Martin v Most* the court recognised that ‘it is not for the judges to say whether legislation on any particular issue is better made by the Scottish Parliament at Holyrood or by the UK Parliament at Westminster’. This question has already been answered by the sovereign Westminster Parliament in the form of the rules enunciated in the Scotland Act. However:

...those rules, just like any other rules, have to be interpreted. That is the court's function. It is for the court to say what the rules mean and how... they must be applied in order to resolve the issue whether the measure in question was within competence.

There is an element of legal fiction inherent in this reasoning. The court may legitimately endorse an expansive interpretation or a restrictive interpretation. In doing so, the court is essentially adjudicating on a question of politics; namely whether legislation on a particular issue should be made at Holyrood or at Westminster. Allowing the courts to adjudicate on matters of competence indicates a move away from political constitutionalism as issues of legislative competence had hitherto been a political issue, decided by Parliament. Thus far the court has managed to avoid making ‘ostensibly party political judgements’. However this does not diminish the significance of judicial adjudication on what were previously

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80 Little ‘Scotland and parliamentary sovereignty’ (n72) 562.
82 ibid [15].
84 *Martin v Most* [2010] UKSC 10.
85 ibid [5]. Also see *Imperial Tobacco Ltd* (n81) [13].
86 ibid.
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political issues. The Scotland Act has ‘elevate[d] the role of judges at the expense of politicians to the position of pivotal constitutional actors’. An increase in the involvement of the judiciary in ‘what have been traditionally seen as political aspects of the constitution’ is described by Tierney as inevitable due to the ‘open ended provisions which invite judicial elaboration’ in the Scotland Act.

This constitutionalisation of the judiciary indicates a move towards legal constitutionalism. This process was not initiated by the Scotland Act; however judicial review of legislation has intensified this pre-existing feature of our constitution. This provided the framework for the political disagreement over the competence of the Scottish Parliament to legislate for a referendum on independence. Combined with the fragmented sovereignty prompted by devolution, the constitutionalisation of the judiciary distorted and confused the role law and politics should play in resolving this dispute. Whether judicial involvement in the resolution of this dispute was necessary was the subject of much speculation and debate. This dispute, and the subsequent resolution thereof marked by the Edinburgh Agreement in October 2012, will now be examined in more detail.

5. The Referendum Debate

A. The political disagreement

In January 2012 the political disagreement over the Scottish Parliament’s competence to hold a referendum on Scottish independence became abundantly clear through consultation papers published by the UK Government and the Scottish Government. The UK Government stated, in Scotland’s Constitutional Future, their view ‘that it is outside the powers of the Scottish Parliament to legislate for a referendum on independence at present and that any such legislation would be declared unlawful by the courts’. This is because ‘legislation providing for a referendum on independence plainly relates to the Union of the Kingdoms and is therefore outside of the Scottish Parliament’s legislative competence’ under Schedule 5 of the Scotland Act. In the Scottish Government’s consultation paper, Your Scotland, Your

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88 Before devolution, whether separate legislation was required for Scotland was a matter for Parliament.
90 ibid 61.
91 ibid.
93 Secretary of State for Scotland ‘Scotland’s Constitutional Future’ (January 2012) Cm 8203.
94 ibid 9.
95 ibid 10.
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Referendum,97 it is stated that ‘The Scottish Government’s mandate to hold a referendum is clear’.98 The SNP conceded that they could not exceed the powers conferred by the Scotland Act; however they claimed ‘a referendum question asking whether the powers of the Scottish Parliament should be extended to enable independence to be achieved’99 would not exceed these powers.

The SNP’s argument rested upon a creative interpretation of the (then) prospective Referendum Bill and the Scotland Act. An ASP is not law so far as any provision is outside the legislative competence of the Parliament.100 A provision is outside that competence if it relates to a reserved matter.101 ‘The question of whether a provision relates to a reserved matter is to be determined… by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances’.102 Due to the focus on purpose in determining whether an ASP is within legislative competence, it could be argued that legislation providing for a referendum on independence would not change the law on reserved matters as ‘it could be read literally as only intended to provide a mechanism for ascertaining what the opinion of the Scottish people upon independence is’.103

The UK Government’s interpretation is undoubtedly the orthodox view; however the alternative argument gained support from many legal academics, including the late Neil MacCormick: ‘The Scottish Executive has unlimited powers to negotiate with the Westminster government about any issue which could be the subject of discussion between them, therefore it could seek an advisory referendum’.104 Loveland also indicates that the question of competence is not necessarily as clear-cut as it initially appears: ‘For the Scots Parliament to seek to discover if the electorate would welcome further constitutional reform does not necessarily amount to constitutional reform per se’.105 In addition, a group of seven academics from the Universities of Glasgow and Edinburgh, Anderson et al, expressed support for this argument in a co-authored post on the Constitutional Law Blog in January 2012.106 They objected to the UK Government’s position, claiming it

97 Scottish Government Publication ‘Your Scotland, Your Referendum’ (January 2012).
98 ibid [1.9].
99 ibid [1.5].
100 Scotland Act 1998 s29(1).
101 ibid s29(2)(b).
102 ibid s29(3).
105 Loveland, Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction (n4) 441.
'conflates the intention of the Scottish Government with the intention of the Scottish Parliament'. The political aspiration of the SNP government to dissolve the Union is not necessarily the purpose of the legislation. MSPs may vote for a Referendum Bill for a variety of reasons, for instance in anticipation of a No vote, which would put the on-going independence dispute to rest. Parliament’s intention would not necessarily be to dissolve the Union. However the court refers to a broad range of background materials when determining the purpose of an ASP. In Martin v Most Lord Hope states that:

Reference to enactment history is an accepted canon of statutory interpretation. In light of this, the House of Lords Constitutional Committee was of the view that ‘the SNP’s political purpose in introducing any Referendum (Scotland) Bill is... highly likely to be relevant to considering the legal purpose of that legislation’. The intention of the Scottish Government is indisputably clear: the SNP manifesto plainly states that ‘a yes vote will mean Scotland becomes an independent nation’. Whether advisory or legally binding, the purpose of the referendum would unambiguously be to deliver independence and therefore it would be outwith the legislative competence of the Scottish Parliament. This conclusion could be seen to be at odds with section 101(2) of the Scotland Act which states that an ASP ‘is to be read as narrowly as is required for it to be within competence, if such a reading is possible’. However, this section adds little substance to the SNP’s argument as whether such a reading is possible depends on whether the purpose of the Referendum Bill is to consult the Scottish people or to dissolve the Union. As already stated, the latter is the more reasonable interpretation.

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107 Anderson et al ‘The Independence Referendum’ (n106)
108 Martin v Most [2010] UKSC 10 [25].
110 House of Lords Select Committee on the Constitution, ‘Referendum on Scottish Independence’ 24th Report of Session 2010-12, 17 February 2012, HL 263 [18].
111 SNP Manifesto 2011 at 28.
112 This distinction offers little assistance as, due to parliamentary sovereignty, referendums are generally advisory in nature: ‘in exercising its sovereignty Parliament could legislate so as to override the result of a referendum’ - House of Lords Select Committee on the Constitution, ‘Referendum on Scottish Independence’ [22]: Also see Scottish Affairs Committee, ‘The Referendum on Separation for Scotland: making the process legal’ Session 2012-13, 7 August 2012, HC 542 [8].
114 Scotland Act 1998 s101(2).
Despite these arguments, Dr Matt Qvortrup claims the Scottish Government’s generous reading of the Scotland Act would be endorsed by the Supreme Court. In his evidence to the Scottish Affairs Committee, Qvortrup expressed the view that it ‘...seems rather unlikely’,\(^{115}\) that the Supreme Court would strike down a decision by the Scottish Parliament to hold a referendum on Scottish independence. However, the majority of academic commentators have expressed the alternative view. Iain Jamieson argues that ‘...it would be difficult, realistically, for a court to take the view that the purpose of the Bill was merely to carry out a market research exercise’.\(^{116}\) In their evidence to the Scottish Affairs Committee Adam Tomkins, Alan Page and Aiden O’Neill all express a similar sentiment, arguing that the proposed Referendum Bill would be out with the competence of the Scottish Parliament.\(^{117}\) The House of Lords Select Committee on the Constitution reached the same conclusion.\(^{118}\) Consequently, the purpose of the Referendum Bill would have almost certainly been found to be a precursor to independence. However, had the Supreme Court been invited to adjudicate on the issue, its ruling would have turned, not merely on the purpose of the Referendum Bill, but on what the court interprets as the purpose of the Scotland Act itself.

Based on the interpretation of the Northern Ireland Act 1998 in Robinson v Secretary of State for Northern Ireland,\(^ {119}\) Anderson et al argue that devolution statutes, as constitutional measures, should be interpreted ‘generously and purposively’.\(^ {120}\) Consequently, the phrase ‘relates to a reserved matter’\(^ {121}\) should be interpreted expansively. However this purposive approach is not peculiar to the Scotland Act:\(^ {122}\) ‘...consideration of the purpose of an enactment is always a legitimate part of the process of interpretation’.\(^ {123}\) Therefore, the mere use of a purposive approach is unlikely to justify such an expansive interpretation of the Scotland Act. In addition, subsequent case law appears to contradict the assumption that the generous and purposive approach can be applied to the Scotland Act. Robinson was expressly distinguished in the Inner House in Imperial Tobacco Ltd;\(^ {124}\) the Scotland Act has no clear background purpose and so can be contrasted with the Northern Ireland Act, which was enacted with the specific purpose of implementing the Belfast

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\(^{115}\) Scottish Affairs Committee ‘The Referendum on Separation for Scotland: Oral and written evidence’ Session 2010-12, 8 May 2012, HC 1608 at 208.

\(^{116}\) Jamieson ‘Playing politics with the law?’ (n103) at 63.

\(^{117}\) Scottish Affairs Committee ‘The Referendum on Separation for Scotland: Oral and written evidence’ (n115); Tomkins 155 [9], Page 167 [8] and O’Neill 170 [3.5].

\(^{118}\) HL Select Committee on the Constitution, ‘Referendum on Scottish Independence’ (n110) [30].

\(^{119}\) Robinson v Secretary of State for Northern Ireland [2002] UKHL 32.

\(^{120}\) ibid [11].

\(^{121}\) Scotland Act 1998 s29(2)(b).

\(^{122}\) See Lord Hope in Imperial Tobacco Ltd v Lord Advocate (n81) [14].


\(^{124}\) Imperial Tobacco Ltd 2012 SLT 749 (Inner House).
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Agreement. For the Scotland Act ‘...there is nothing in the statute or in its background which suggests that one should read the provisions... expansively or restrictively’.125 In addition, the principle derived from Robinson was deemed to provide little assistance to the Court for the purpose of determining what is reserved and what is devolved.126 This approach was endorsed by Lord Hope, with whom all the other Justices agreed, when the case was appealed to the Supreme Court.127 More to the point, advocating a purposive interpretation of the Scotland Act does not necessarily support the Scottish Government’s position. According to Lord Hope, the Scotland Act was ‘intended, within carefully defined limits, to be a generous settlement of legislative authority’.128 Its provisions must have been intended to create ‘a rational and coherent scheme defining the legislative competence of the Scottish Parliament’.129 The purpose of the Act was to create a limited legislature; independence was arguably regarded to be out with those limits.

During passage of the Bill in 1998 Donald Dewar, the Secretary of State for Scotland, stated that ‘...a referendum that purported to pave the way for something that was ultra vires is itself ultra vires’.130 This unambiguous statement of intent by the promoter of the Bill may provide assistance when determining the purpose of the Act. Following the judgement in Pepper v Hart,131 reference to Parliamentary material is permitted ‘as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity’.132 The material relied upon must be a clear statement from the promoter of the Bill.133 This was to ensure that where the words used in the statute are capable of more than one meaning, Parliament’s true intention is ‘enforced rather than thwarted’.134 It is clear Parliament’s ‘true intention’ when passing the Scotland Act was to reserve matters relating to the Union including a referendum on independence. The limited utility of material introduced under the Pepper v Hart rule was recognised in Robinson;135 consequently it is unclear whether Dewar’s statement would have any influence on the courts’ interpretation of the Scotland Act. Nonetheless, it provides a further indication that the Scotland Act would be interpreted as excluding competence to hold a referendum on Scottish independence.

125 ibid [14].
126 ibid [183].
127 Imperial Tobacco Ltd v Lord Advocate (n81) [15].
128 ibid.
129 Martin v Most (n84) [52] per Lord Walker.
132 ibid 634.
133 ibid.
134 ibid 635.
135 Robinson v Secretary of State for Northern Ireland [2002] UKHL 32 [40] per Lord Hoffmann and [65] per Lord Hobhouse; Also see J Steyn ‘Pepper v Hart; A Re-examination’ (2001) 21(1) Oxford Journal of Legal Studies 59 for extra-judicial criticism of the decision in Pepper v Hart by Lord Steyn.
Qvortrup, writing before the Supreme Court passed judgement on the case, claims the judgement of the Inner House in *Imperial Tobacco* ‘suggests that a decision to hold an advisory referendum would not be ultra vires’.  

Qvortrup bases this claim on Lord Brodie’s statement that ‘The scheme whereby legislative competence is conferred on the Scottish Parliament is one where what is not specifically identified as being outside competence is devolved’. An advisory referendum on independence is not expressly prohibited, therefore it is within competence. However, this argument fails to recognise s29(2)(b) of the Scotland Act. Express reservation is not required; an ASP is out with competence if it relates to a reserved matter. In addition, Qvortrup argues that it would be inappropriate for a court to rule on such a politically sensitive issue; in *R (Countryside Alliance) v Attorney General*, Lord Bingham stated, ‘The democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament’. However, the constitutionalisation of the judiciary, exacerbated by the Scotland Act, distorts this distinction between matters of legal judgement and matters of political judgement. The Scotland Act has assigned the court the role of arbiter in relation to devolution issues; it is therefore unlikely they would declare a challenge to the competence of the Scottish Parliament non-justiciable.

Nonetheless, the Supreme Court has recognised the democratic legitimacy of the Scottish Parliament; in *AXA General Insurance Ltd v HM Advocate* Lord Hope held that:  

…the elected members of a legislature... are best placed to judge what is in the country’s best interest as a whole. A sovereign Parliament is, according to the traditional view, immune from judicial scrutiny because it is protected by the principle of sovereignty. But it shares with the devolved legislatures, which are not sovereign, the advantages that flow from the depth and width of the experience of its elected members and the mandate that has been given to them by the electorate. This suggests that the judges should intervene, if at all, only in the most exceptional circumstances.

For Qvortrup, Lord Hope’s reference to a ‘mandate’ from the electorate suggests it would be unlikely for the Supreme Court to strike down an Act giving effect to the

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136 Scottish Affairs Committee ‘The Referendum on Separation for Scotland: Oral and written evidence’ (n115) 206.

137 *Imperial Tobacco Ltd* (Inner House) (n124) [165].

138 Scottish Affairs Committee ‘The Referendum on Separation for Scotland: Oral and written evidence’ (n115) 206 (Matt Qvortrup).

139 *R (Countryside Alliance) v Attorney General* [2007] UKHL 52.


141 ibid [49].
manifesto commitment that secured the SNP their majority in the Scottish Parliament. However, in the same judgement Lord Hope observes that ‘the Scottish Parliament’s power to legislate is not unconstrained. It cannot make or unmake any law it wishes’.\(^{142}\) This limitation is recognised every time a court addresses a challenge to the competence of an ASP.\(^{143}\) As Tomkins observes, the limitations restricting the competence of the Scottish Parliament are not displaced by the SNP’s landmark majority: ‘…winning a Scottish parliamentary election entitles a party to govern subject to the rule of law; it does not entitle a party to seek to rule in a manner that disregards the legal limits to its powers’.\(^{144}\) Therefore, if the dispute had reached court, it is unlikely the Scottish Government would have been successful.

B. The Edinburgh Agreement

Despite this speculation over how the Supreme Court would interpret the prospective Referendum Bill and the reservation of the Union in the Scotland Act, the view that it would be ‘wiser to agree on an express transfer of powers’\(^{145}\) from Westminster to Holyrood was never disputed. Even before resolution of the dispute, both the Scottish and UK Governments agreed that it was not in Scotland’s best interests to have the country’s constitutional future decided in court.\(^{146}\) Fortunately, the signing of the Edinburgh Agreement on 15\(^{th}\) October 2012 dramatically decreased the likelihood of this. The UK Government agreed to pass an Order in Council under section 30 of the Scotland Act, amending the Act and providing a ‘clear legal base’\(^{147}\) for the Scottish Parliament to hold a referendum on Scottish independence. This Order received consent from the Scottish Parliament and both Houses of the UK Parliament and came into force on 13\(^{th}\) February 2013.\(^{148}\) Holyrood subsequently passed two Acts paving the way for a Referendum on Scottish Independence: the Scottish Independence Referendum (Franchise) Act 2013 and the Scottish Independence Referendum Act 2013, which came into force on 7\(^{th}\) August 2013 and 17\(^{th}\) December 2013 respectively. As a result of political deliberation and compromise between the Scottish and UK Governments, the law was changed and the dispute over the competence of the Scottish Parliament faded into political history.

\(^{142}\) ibid [46].
\(^{143}\) For example, see Whaley v Lord Watson 2000 SC 340, 348 per Lord Rodger and 358 per Lord Prosser.
\(^{144}\) Scottish Affairs Committee ‘The Referendum on Separation for Scotland: Oral and written evidence’ (n115) 155; Also see the subsequent report: Scottish Affairs Committee ‘The Referendum on Separation for Scotland: making the process legal’ Session 2012-13, 7 August 2012, HC 542 [14].
\(^{145}\) Anderson et al ‘The Independence Referendum’ (n106).
\(^{147}\) Edinburgh Agreement 2.
\(^{148}\) See Scotland Act 1998 Sch 5 para 5A.
The legal status of the Edinburgh Agreement is unclear; Alan Trench suggests the document may create legitimate expectations enforceable in court.\footnote{Referendum (Scotland) Bill Committee ‘The Scotland Act 1998 (Modification of Schedule 5) Order 2013 [draft]’ 1st Report, 2012 (Session 4), 23 November 2012, SP Paper 221 [23].} However, the prevailing view is that the document does not create legal obligations and has no legal standing.\footnote{See C Bell ‘The Legal Status of the ‘Edinburgh Agreement’ (Scottish Constitutional Futures Forum Blog, posted 5 November 2012) <http://www.scottishconstitutionalfutures.org/> accessed 7 October 2014, and opinion of Aileen McHarg cited in Referendum (Scotland) Bill Committee ‘The Scotland Act 1998 (Modification of Schedule 5) Order 2013 [draft]’ (n149) [23].} The only limited legal utility the Agreement may provide would be as an aid to interpretation; it could be regarded as background material when interpreting the s30 Order.\footnote{Aileen McHarg giving evidence to the Referendum (Scotland) Bill Committee, 3rd Meeting 2012, Session 4, 8 November 2012 Transcript at col 34.} It was described in the House of Commons by Secretary of State for Scotland, Michael Moore, as ‘a statement of political intent by Scotland’s two Governments’.\footnote{Hansard HC Deb vol 556, col 745 (15 January 2013).} Therefore, the Agreement is undoubtedly political. This lack of legal status ‘challenges ideas about the usefulness of law’\footnote{C Bell ‘The Legal Status of the ‘Edinburgh Agreement’ (n150) [155].} and highlights the importance of politics in the British constitutional order. The law cannot provide a solution to every problem.

This approach to constitutional reform is symptomatic of political constitutionalism and the notion of law as command. The remedy sought to resolve the dispute over competence to hold a referendum was political, not legal. The s30 Order was the output of this political process. Scotland’s future relationship with the rest of the UK is a political issue; consequently it was dealt with by politicians, not judges. This can be contrasted with the approach taken in Canada where the Canadian Supreme Court was asked to adjudicate on the legality of a unilateral declaration of independence by Quebec;\footnote{Quebec Secession Reference [1998] 2 SCR 217.} it held that there was no right to unilateral secession under Canadian or international law.\footnote{ibid [155].} However the court determined that there was a legal duty to negotiate: ‘...if a clear majority of the people of Quebec voted in a referendum on a clear question in favour of secession, federal and other provincial governments could not remain indifferent’.\footnote{ibid [69].} The Court’s jurisdiction in this case was founded upon section 53 of the Supreme Court Act which provides that the Governor in Council may refer certain constitutional issues to the Court for consideration. With reference to Scotland, this power is similar to section 33 of the Scotland Act 1998, which provides that the Advocate General, the Lord Advocate or the Attorney General may refer to the Supreme Court the question of whether a Bill, or any provision thereof, would be within the

legislative competence of the Scottish Parliament. However, despite similar legislative structures for judicial review, the UK and Canada adopted diametrically opposed approaches to the complicated constitutional question of secession. The UK adopted a political remedy through the Edinburgh Agreement. Canada, in referring the case to the Supreme Court, favoured a legal remedy.

The constitution of Canada encompasses elements of both legal and political constitutionalism. Prior to 1982, the federal and provincial legislatures ‘…collectively exercised the same parliamentary sovereignty enjoyed by the mother Parliament at Westminster’.158 The legislature was supreme and accountability was purely political. However, over the last few decades the Canadian constitution, like the British constitution, has become less political and more legal. As such, today the Canadian constitution does not rigidly conform to either model. Under section 52 of the Constitution Act 1982, traditional parliamentary supremacy is replaced with constitutional supremacy - any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. In addition, under section 24(1) of the Canadian Charter of Rights, incorporated into the Constitution Act 1982, anyone can apply to the court for an appropriate remedy if they feel their rights have been infringed or denied. A ‘constitutionalized and entrenched bill of rights with full judicial review powers’159 is indicative of a legal constitution. ‘Although there is no explicit provision granting the courts the power to strike down laws inconsistent with the Charter, this seems the clear intent of Section 52 of the Act’.160 Thus accountability is legal – if parliament enacts an unconstitutional law, the courts will declare it of no force or effect. However, section 33 of the Charter permits the federal and provincial legislatures to declare that a statute will apply notwithstanding section 2 or sections 7 to 15 of the Charter (the substantive rights provisions). Therefore, the legislature has the final word and can override certain rights by ordinary majority. This is indicative of a political constitution. This override provision preserves the core element of parliamentary sovereignty: the legislatures rather than the courts have ‘the ultimate power to determine whether or not an enactment is the law of the land’.161

Commentators disagree on where the Canadian constitution falls on the spectrum of constitutionalism. Scott Stevenson observes that ‘the legislature’s power to have the final word does not apply to all rights, expires after five years (although invocations of the power are renewable), and is phrased in a manner that is not conducive to its use as it connotes that the legislature is overriding a Charter right

159 S Gardbaum ‘Reassessing the new Commonwealth model of constitutionalism’ (2010) 8(2) International Journal of Constitutional Law 176, 178
160 S Gardbaum ‘The New Commonwealth Model of Constitutionalism’ (n158) 723
161 ibid 724
rather than overriding a judicial interpretation of a Charter right.’\textsuperscript{162} With these considerations in mind, Stevenson questions the distinctiveness of the Canadian constitution from a system of judicial supremacy.\textsuperscript{163} Similarly, for Janet Hiebert the ability of the courts to nullify inconsistent legislation means that, ‘...short of amending the constitution, the judiciary is the ultimate authority when determining the constitutional validity of legislation’.\textsuperscript{164} Thus, for Stevenson and Hiebert, Canada’s constitution is essentially a legal one.

However, Peter Hogg and his co-authors Allison Bushell Thornton and Wade Wright, observe that ‘most Charter decisions, even though they are the final word on the meaning of the Charter, leave room for a range of legislative responses and generally receive a legislative response.’\textsuperscript{165} They reject the idea that the judiciary is supreme, preferring the view that judicial decisions are the beginning of a dialogue between the courts and the legislature. When a court strikes down an unconstitutional law, this is not the last word; it is the beginning of a dialogue, because legislative bodies usually enact subsequent legislation that accomplishes the main objective of the unconstitutional law. For Hogg et al, ‘the last word can nearly always be (and usually is) that of the legislature’.\textsuperscript{166} Viewing judicial decisions as the beginning of a dialogue suggests that Canada has a political constitution as the ultimate decision on how to further a legislative objective rests with the legislature. If politicians have the last word, then accountability is political, not legal.

Interestingly, the Canadian constitution has always left the power to decide questions of legislative competency to the courts. Even before the aforementioned move towards legal constitutionalism, Canadian courts could competently adjudicate on which jurisdiction (federal or provincial) should have the power to legislate on a particular matter.\textsuperscript{167} Thus, the question of whether a subordinate legislature has the power to enact a particular law is not a new or novel issue in Canada. It is not surprising that a constitution with a federal distribution of legislative powers, express constitutional supremacy and judicial nullification of unconstitutional legislation provided a legal remedy to the issue of secession.

In contrast, up until 1998, the United Kingdom only had one legislature and so the judiciary was never called upon to adjudicate on issues of legislative competence. It is therefore equally unsurprising that the United Kingdom adopted a

\begin{thebibliography}{99}
\bibitem{163} ibid

\bibitem{165} A Bushell, P Hogg & W Wright ‘Charter Dialogue Revisited – Or ‘Much Ado About Metaphors’” (2007) 45 Osgoode Hall Law Journal 1, 53
\bibitem{166} ibid 54
\bibitem{167} P Hogg, Constitutional Law of Canada (The Carswell Company Limited, Toronto 1977) 43
\end{thebibliography}
political approach to the issue of secession. However, for Walters, the significance of the Quebec Secession Reference for the UK is not as ‘a model for the courts to follow’\textsuperscript{168} but as a reminder to governments that ‘unless they negotiate amongst themselves a secession framework when necessary a court may just possibly intervene to impose one’.\textsuperscript{169} As a result of the Edinburgh Agreement, the sort of judicial intervention intended to address the possible secession of Quebec from Canada was not necessary to resolve the possible secession of Scotland from the UK.

C. Fundamental law argument

According to legal constitutionalism, law as command is subject to law as custom. Legislation is inferior to judicial precedent; a statute cannot ‘…displace the common law by providing a rival vision of the constitutional order’.\textsuperscript{170} On this view, the s30 Order passed by Westminster, the Scottish Independence Referendum (Franchise) Act 2013 and the Scottish Independence Referendum Act 2013, both passed by Holyrood, are only legitimate if they do not displace the common law constitution. According to some commentators, the common law affords a fundamental status to the 1707 Union Agreement that founded Great Britain.\textsuperscript{171} If the common law limits the legislature, any legislation violating this fundamental law could be struck down by the courts. Challenging legislation passed by Westminster would be problematic as Acts of Parliament cannot be judicially reviewed.\textsuperscript{172} However, ‘Acts of the Scottish Parliament are amenable to the supervisory jurisdiction of the Court of Session at common law’,\textsuperscript{173} creating a forum for mounting a judicial challenge to Scottish independence.

The fundamental law argument asserts that certain provisions of the Union Agreement are unalterable fundamental law. One such provision is Art I which states ‘That the two Kingdoms of England and Scotland shall upon the First day of May which shall be in the year One thousand seven hundred and seven and for ever after be united into one Kingdom by the name of Great Britain’.\textsuperscript{174} The fundamental status is derived from the constituent nature of the Agreement: ‘what occurred in

\begin{itemize}
  \item \textsuperscript{168} M Walters ‘Nationalism and the Pathology of Legal Systems: Considering the Quebec Secession Reference and its Lessons for the UK’ (n157) 396.
  \item \textsuperscript{169} ibid.
  \item \textsuperscript{170} TRS Allan, \textit{Law, Liberty and Justice} (n51) 11.
  \item \textsuperscript{171} This agreement involves three separate documents; The Articles of Union agreed between the Commissioners appointed to negotiate the union (sometimes misleadingly referred to as the Treaty of Union; these Articles do not form a Treaty that is enforceable under international law), the Union with England Act 1707 passed by the Scottish Parliament and the Union with Scotland Act 1706 passed by the English Parliament. The inconsistent dates are due to the fact that England did not join Scotland in adopting the Gregorian calendar until 1752.
  \item \textsuperscript{172} Pickin \textit{v} British Railways Board [1974] AC 765, 789.
  \item \textsuperscript{173} AXA \textit{General Insurance Ltd} (n140) [47].
  \item \textsuperscript{174} Union Agreement, Art I.
\end{itemize}
1707 was not the merging of one state (or part of a state) into another, as is usually the case with cession of territory: rather, two states merged together to form a new (third) state.\textsuperscript{175} Neil MacCormick and Thomas Smith argue that this constituent nature elevates the Union Agreement to the status of a written constitution.\textsuperscript{176} Elizabeth Wicks rejects this conclusion, arguing that a constitution must go ‘…beyond constituting a legal order and also [determine] how that legal order will function today, tomorrow and into the future’.\textsuperscript{177} Consequently, Wicks concludes the Union Agreement is merely constituent, not a constitution.\textsuperscript{178}

Whether constituent or constitutional, both MacCormick and Wicks agree that the Union Agreement imposed limitations on the Westminster Parliament: ‘logic dictates that a legislature cannot repeal its constituent document’.\textsuperscript{179} Michael Upton compares Westminster to a statutory body, declaring it to be ‘bound by its constituent charters’.\textsuperscript{180} This conclusion is shared by Smith who is ‘…quite unable to accept the view of those English constitutional lawyers who hold that the terms of Union have no more force than an ordinary Act of Parliament’.\textsuperscript{181} The argument has even gained extra-judicial support from Lord Hope: ‘… the argument that the legislative powers of the new Parliament of Great Britain were subject to the restrictions expressed in the Union Agreement by which it was constituted cannot be dismissed as entirely fanciful’.\textsuperscript{182}

The fundamental law argument is supported by the language used in Art I, which suggests permanence; the Article essentially declares itself fundamental and unalterable: ‘There seems little doubt the Union legislation was intended by its drafters to be a higher law, binding upon the legislature which it created’.\textsuperscript{183} Even Dicey conceded that the drafters intended to give certain provisions ‘more than the ordinary effect of statutes’.\textsuperscript{184} However, for Dicey this intention did not change the status of the Union Agreement; he maintained that the Act of Union has no more

\begin{footnotesize}
\begin{enumerate}
\item Wicks ‘A New Constitution for a New State? The 1707 Union of England and Scotland’ (n175) 118.
\item ibid 119.
\item Wicks ‘A New Constitution for a New State? The 1707 Union of England and Scotland’ (n175) at 118.
\end{enumerate}
\end{footnotesize}
claim to supremacy than the Dentists Act 1879. Happold echoes this orthodox view saying, ‘The Acts of Union have no higher status in UK constitutional law than any other law’. However, in MacCormick v Lord Advocate, Lord Cooper recognises the different types of clauses in the Union Agreement: some expressly allow Parliament to modify them; some declare themselves fundamental and unalterable in all time coming; and some leave the issue of modification unaddressed. Lord Cooper says he has ‘...never been able to understand... the adoption by the English constitutional theorists of the same attitude to markedly different types of provisions’.

However, some historians contend that ‘...at the time the union was passed few politicians seem to have regarded it as permanent’. The fundamentalist language was simply the legislative style used at the time. Consider, for example, the Union with Ireland Act 1800. Despite its similar use of fundamentalist language, every Article and section of that Act has subsequently been repealed. According to Munro, ‘The Anglo-Scottish Union is not so obviously in tatters. However, close examination reveals that almost all of the Article and sections of the legislation have been repealed or amended in whole or in part’. Thus the post-1707 Parliament has regarded itself as sovereign and so capable of amending and repealing provisions of the Union Agreement. Even so, ‘...the fact that Parliament has done something cannot prove that it was entitled to do it’. Amendment of ‘fundamental’ provisions of the Union Agreement, most notably through the Universities (Scotland) Acts 1853 and 1932, has been rationalised with the argument from consent: ‘The consent of the Scottish people provides an informal mechanism of constitutional amendment, and in so doing respects the different and (at least partly) entrenched status of the fundamental provisions of the Union Agreement’. However, Wicks rejects this argument claiming it to be ‘...merely an attempt to

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185 ibid 145.  
187 MacCormick v Lord Advocate 1953 SC 396.  
188 ibid 411.  
190 Stair Memorial Encyclopaedia, Constitutional Law (Reissue) 2 Fundamental Law [62]; Wicks ‘A New Constitution for a New State? The 1707 Union of England and Scotland’ (n175) 118.  
192 ibid.  
194 Now that the Scotland Act 1998 provides for a referendum on Scottish independence, section 37 of that Act, which states that the Union Agreement has effect subject to this Act, could also be seen as repealing fundamental provisions of the Union Agreement.  
195 SME Constitutional Law (Reissue) 2 Fundamental Law (n190) [63].
bolster an argument which has no legal basis’.196 Public support cannot excuse a breach of fundamental law.197

Therefore, as a matter of legal theory, the fundamental law challenge may be sustainable; according to Wicks ‘…any move towards independence for Scotland, or a federal arrangement for Britain, would… breach Article I of the Acts and Treaty of Union’.198 As a result, there is no legal or constitutional path to independence. Upton would not subscribe to this view. He believes that, because the Union Agreement is silent on the question of amendment, ‘…a mechanism of reform must be inferred from the moral logic of their historical context’.199 Likewise, MacCormick believes that ‘…both from the point of view of Scots law and from the point of view of English law, the existence of a constitutional path to independence is clear’.200 In any case, as a matter of practical reality, Westminster does not consider itself bound by the terms of the Union Agreement. Wicks identifies an essential distinction ‘…between what Parliament can do in reality and what it can do in law’.201 Lord Cooper was also influenced by this pragmatism: ‘…it is of little avail to ask whether the Parliament of Great Britain ‘can’ do this thing or that, without going on to inquire who can stop them if they do’.202 On the other hand, Smith maintains that ‘…the Judiciary would be bound by their oath to pay regard to the fundamental law in preference to a mere Act of Parliament’.203

These conflicting views mirror the conflict explored earlier between the political and legal models of constitutionalism. Wicks demonstrates affinity with political constitutionalism; the fundamental law argument has little weight as, in political reality, Parliament can do anything. Accountability is political not legal, therefore reference to legal limits are of little practical value. Smith, on the other hand, demonstrates commitment to legal constitutionalism. Parliament is restricted by the common law; the judiciary must ensure Parliament does not exceed these limits. So far, the judiciary has not given preference to the Union Agreement.204 However, neither has any Scottish court expressly declared that certain provisions of the Union Agreement should not be regarded as fundamental law. Thus Smith’s confidence in the courts is not necessarily misplaced. Nevertheless, although it could be said Britain’s constitution is moving away from its roots in political constitutionalism towards a more legal constitution, this development is piecemeal. Such a significant leap into the realms of legal constitutionalism would be wholly unprecedented and is incredibly unlikely. Therefore, in the rare event that a court accepted an invitation to adjudicate on this issue, it is doubtful that such a bold interpretation of the Union Agreement, disregard for the orthodox doctrine of

197 Wicks, The Evolution of a Constitution (n179) 50.
198 ibid 41.
200 MacCormick ‘Is There a Constitutional Path to Scottish Independence?’ (n104) 733.
201 Wicks, The Evolution of a Constitution (n179) 50.
202 MacCormick v Lord Advocate (n187) 413.
203 Smith ‘The Union of 1707 as Fundamental Law’ (n181) 114.
204 See Gibson v Lord Advocate 1975 SLT 134; Stewart v Henry 1989 SLT (Sh Ct) 34; Pringle Petitioner 1991 SLT 330; Fraser v MacCorquodale 1992 SLT 229; and Murray v Rogers 1992 SLT 221.
parliamentary sovereignty and unfettering commitment to legal constitutionalism would be endorsed.

The prevailing view of the Union Agreement is that the fundamental law argument is only sustainable in relation to Articles XVIII, XIX and XXV, which concern preservation of Scots private law, the unalterable jurisdiction of the Court of Session and the protection of the Church of Scotland respectively. In MacCormick v Lord Advocate Lord Cooper reserves his opinion regarding judicial interference if Westminster purported to breach Articles XVIII and XIX.205 This sentiment was echoed in the subsequent case Gibson v Lord Advocate206 with the addition of Article XXV.207 Therefore it seems208

...that the only legislation which might be successfully challenged before a Scots court on the grounds of constitutionality would be an Act purporting to abolish the Court of Session or the Church of Scotland, or to substitute English law for the whole body of Scots private law.

Even this cannot be taken for granted. The precedent is relatively weak; there is nothing to compel a future court to intervene: ‘A Scottish court might hold that the later Act ought not to have been passed, but equally it might very well not’.209 Accordingly any challenge to Scottish independence based on the fundamental law argument would be rejected as independence would not affect Scots private law, the Court of Session or the Church of Scotland.

Nonetheless, the fundamental law argument, although unlikely to form a practically justiciable challenge, suggests that the s30 Order does not necessarily solve all of the legal problems. At least in theory, the law may still have a role to play in the context of Scottish independence. An additional legal complication may have arisen in the interim period between a ‘Yes’ vote and independence. The Scottish Parliament would not have had the competence to actually bring about independence through negotiations with the UK Parliament and relevant international bodies. However, as Aileen McHarg observes: ‘... if what we’re contemplating is a break with the current legal order, and the establishment of an independent state, then absence of a strict legal pedigree within the current legal order cannot and will not be allowed to stand in the way’.210

Whether in the form of a fundamental law argument or in the form of a competency challenge under the Scotland Act, a legal challenge to Scottish

205 MacCormick v Lord Advocate(n187) 412.
206 Gibson v Lord Advocate 1975 SC 136.
207 ibid 144.
independence, if there had been a ‘Yes’ vote, would have been unlikely to be entertained. Now that there has been a ‘No’ vote, the argument that the Scottish Parliament has the competence to unilaterally secede from the rest of the UK may be revived to justify a subsequent referendum at a later date. McHarg claims that this is possible based on the argument that the s30 Order ‘…merely clarified rather than conferred the Scottish Parliament’s legal authority to authorise a referendum’. The passing of the s30 Order does not affect the merits of this argument; however McHarg concedes that, in practice, ‘it seems likely to weigh against it were the issue ever to be tested in court’. Throughout the independence debate, the law, in the form of judicial intervention, had no role to play. This can be seen as a victory for the political constitution. In the context of significant constitutional reform, political agreement was preferred to judicial adjudication. The law was used as the output of the political process, not as a restraint. As observed by Anderson et al, ‘…the legality issue remains important even if it becomes practically irrelevant… it has significance… for our understanding of the UK constitution as a whole’. From the foregoing analysis, it is clear the issues of legality surrounding Scottish independence are now practically irrelevant. However, the limited utility of the law in this context affords an understanding of the British constitution as a whole. It demonstrates that, despite criticism, the political constitution works and that political agreement is often preferable to judicial intervention.

6. Conclusion

The independence debate highlights the importance of politics in the British constitution. In paving the way for a referendum on Scottish independence, politics played a central role. Law was utilised only as the command of political actors. The law facilitated the political process, rather than restricted it. The judiciary are yet to be called upon to adjudicate on any issue relating to Scottish independence; instead the notion that such a constitutionally significant issue should be dealt with

212 ibid.
213 Anderson et al ‘The Independence Referendum’ (n106)
214 With the exception of Moohan and Another v Lord Advocate UKSC 2014/0183 which involved a challenge to the exclusion of convicted prisoners from voting in the Scottish Independence Referendum (Franchise) Act 2013. However this is ‘better seen as part of the long-running battle over prisoner disenfranchisement than as a challenge to the legitimacy of the referendum’. – A McHarg ‘The Independence Referendum, the Contested Constitution, and the Authorship of Constitutional Change’ (17 April 2014) (available at SSRN: <http://ssrn.com/abstract=2431050> 3> accessed 7 October 2014
by politicians has been endorsed. Whilst certain constitutional developments over the last 25 years have signified a move towards a legal constitution, the process adopted in relation to Scotland’s constitutional future signifies satisfaction with the political constitution. Even if a challenge to legislation paving the way for independence had been brought before the courts, it is unlikely that the tentative arguments relating to the fundamental status of the Union Agreement would have been entertained. Similarly, any subsequent attempt to unilaterally secede from the UK following the ‘No’ vote is unlikely to be looked upon favourably by the courts. The central role played by politics challenges the presumption that recourse to legal action and appeal to the judiciary are more desirable than political means of constitutional reform.