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**Scottish Independence in a Post-Brexit World:
A Legal Analysis on the Scottish Right to Hold an
Independence Referendum**

An Honors Thesis in International Relations

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ABSTRACT

This thesis analyzes the legal mechanisms that could be used to achieve Scottish independence, following the results of the 2016 European Union membership referendum, which is commonly referred to as the “Brexit” referendum. My analysis is divided into three sections. My first section surveys the historical relationship between Scotland and the other constituent nations of the United Kingdom (UK), ranging from the *Act of the Union* (1707) to the 2016 Brexit referendum. In the second section, I examine the international legal debates on secession and self-determination. My research then analyzes how these concepts are connected to discourses on international human rights. My third section highlights the consequences of the UK Government’s failure to listen to the will of the Scots. More specifically, this section emphasizes how low levels of trust in the UK Parliament to act in Scotland’s best interests combined with fears of economic insecurity, have led to increased Scottish support for independence. Together, this analysis demonstrates that Scotland has the legal right to independence under an international human rights framework.

Keywords: Scottish independence, Brexit, right to self-determination, secession, United Kingdom

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INTRODUCTION

In recent years, secessionist movements have received a significant amount of public attention. Ryan Griffiths' (2020) research argues that there are approximately 60 active independence campaigns around the world (1). In this senior honors thesis, I analyze Scotland's independence movement. Unlike the Catalans or Iraqi Kurds, Scotland won approval from its home country to achieve its independence via a referendum in 2014. While the Scots opted to remain in the United Kingdom (UK) by a margin of 11%, the independence movement has recently gained considerable traction over the last five years. This is a result of the UK's decision to leave the European Union (EU) following the 2016 "Brexit" referendum. Unlike its English counterparts, the Scots overwhelmingly opposed the Leave Campaign. Frustrations with the Conservative-led Government negotiations to exit the EU without taking into account Scottish concerns have fueled calls for the holding of a second referendum on Scottish independence.

Boris Johnson, the current British Prime Minister, has repeatedly opposed granting Scotland the right to hold a second referendum, emphasizing that this type of vote should only be conducted "once-in-a-generation" (BBC 2021a, 1). His opposition is understandable; an independent Scotland would reduce the UK's political and economic power (Jefferson and Doyle 2021, 1). Simultaneously, it could motivate other independence seeking groups in Northern Ireland and Wales to hold their own referendums (Jefferson and Doyle 2021, 1). While an estimated 8% of the UK's 66 million citizens live in Scotland, it represents 32% of the country's territory (CIA Factbook 2021, 1). In addition, Britain would lose most of its oil and gas reserves, which are located off Scotland's North Sea coast (Macalister 2012, 1). Scottish independence would also complicate Britain's national security, as the Royal Navy's nuclear submarines, which serve as Britain's nuclear deterrent, are based in Port Clyde, Scotland (BBC 2016, 1). Although Johnson's

views are important, Scottish voters may decide whether a second referendum will be held in the near future. On May 6, 2021, Scots will elect the members of the Scottish Parliament and the referendum is one of the main issues of contention. If pro-independence parties, led by the Scottish National Party (SNP), win a majority of the seats, they will likely organize a referendum, with or without the approval of the Conservative-led UK Government. This possibility raises a number of questions regarding the legality of this policy.

In this thesis, I explore whether the Scottish Parliament has a right to hold a referendum. Because the Johnson Government opposes such a vote, I consider whether the Scottish authorities can use international law to either pressure the UK Government to acquiesce to Scottish demands or to convince other states to support Scotland's statehood aspirations, if a majority of Scottish voters supported independence. While international law does not recognize groups' rights to secession, it recognizes these groups' right to self-determination, which is considered a key principle of the international human rights regime.

This thesis is divided into three sections. Section one surveys the historical relationship between Scotland and the other constituent nations of the UK, ranging from the *Act of the Union* (1707) to the 2016 Brexit referendum. It is important to note at this time that my thesis only looks at Scotland's relationship with the UK Government, which because of England's larger population, territory and economy, mostly represents English interests. Since its establishment, the UK's territory and population have expanded and contracted. For example, Ireland joined the Union in 1801 and its southern counties gained independence in 1937. In addition, while the UK is often considered to be a single union, it is technically a Union of unions. Thus, historically speaking, the English, as the dominant group, have used different legal mechanisms to integrate the other nations of Scotland, Wales and Northern Ireland in the UK's unwritten constitution. Consequently, each

nation's powers and rights vis-à-vis the UK's national parliament, more commonly known as Westminster Parliament, are not the same.

The second section examines the international legal debates on secession and self-determination and how these are connected to discourses on international human rights. The third section highlights the consequences of the UK Government's failure to listen to the will of the Scots. More specifically, this section emphasizes how low levels of trust in the UK Parliament to act in Scotland's best interests combined with fears of economic insecurity, have led to increased Scottish support for independence. In the conclusion, I summarize the key debates of each section and offer questions for further research. Together, this analysis demonstrates that Scotland has the legal right to independence under an international human rights framework.

HISTORICAL SURVEY OF SCOTLAND'S RELATIONSHIP WITH THE UK

The battle for English control of Scotland extends back to the late 13th century. In 1296, England invaded Scotland, beginning the first war of Scottish independence (BBC 2021b, 1). The first and second wars of Scottish Independence (1296-1357) both ended with Scotland maintaining its independence and sovereignty (BBC 2021b, 1). However, English interference in Scotland continued. In 1603, Queen Elizabeth I of England died without a child to inherit the throne. Her successor was her cousin, James VI, King of Scotland. When King James VI moved to England (and became known as King James I of England), he attempted to unite the kingdoms of England, Scotland and Wales. However, deep distrust between Scotland and England derailed unification efforts (BBC 2021b, 1). This hostility was readily apparent in cultural narratives at the time. For example, the fifth verse of England's national anthem "God Save the Queen," references "Rebellious Scots to crush" (Sutherland 1998, 2).

Despite growing tensions between Scotland and England, in 1707, Scotland came under English rule with the signing of the *Act of the Union* (1707). Also known as the *Treaty of the Union* (1707), it unified England, Scotland and Wales under a single kingdom, establishing Great Britain. Under this constitutional arrangement, the Scottish Parliament was dissolved and Scotland's legislative powers were “absorbed by the new parliament of Great Britain in Westminster, the central institution of the new political system” (Astigarraga 2009, 143). Consequently, almost every aspect of Scottish governance was managed by Westminster. Under Article 22 of the *Treaty of the Union* (1707), “16 peers [or members of the House of Lords] and 45 commoners [or members of the House of Commons, called Members of Parliament (MPs)] were to represent Scotland at Westminster” (Hanham 2021, 1). While the Scottish representation in Westminster was too small to balance against English interests, the *Treaty of the Union* (1707) recognized Scotland's cultural heritage and it provided Scotland some economic benefits. As Jesús Astigarraga (2009) notes, Scotland “managed to retain not only the administration of the Presbyterian Church and its education system but also, its private law and law courts” (143).

Entry into Great Britain allowed Scotland to gain significant “economic and financial compensations” (Astigarraga 2009, 142). Specifically, Astigarraga (2009) notes that:

Scotland achieved monetary union with England... [which] ... meant the same value for coinage all over Britain and the same standards for Scottish and English mints. Customs barriers fell and Scotland was able to transport goods and trade freely throughout Great Britain and the empire. And, henceforth, the same financial regulations would govern the Scottish economy and treasury (144).

His research also notes that the *Treaty of the Union* (1707) included a host of compensatory measures to ease Scotland's entry into Great Britain's economy. For example, there were tax exemptions for certain sectors and compensation was offered for a variety of reasons: the rise in taxes and duties, Scottish participation in the English National debt, financial loss due to the

standardization of the currency, as well as those who had lost money in the Darien scheme (Astigarraga 2009, 144). It is important to stress that these compensatory measures were exceptional and temporary. In the end, the aim of these measures was to make sure “Scotland did not achieve any level of economic autonomy within the Union” (Astigarraga 2009, 144). Astigarraga (2009) concludes that “the decisions adopted in 1707 highlight the fact that once the Scottish Parliament had been dissolved it was no longer possible to dissociate the political and economic union of the two countries” (144).

If the *Treaty of the Union* (1707) stripped Scotland’s political and economic sovereignty, why did Scotland agree to join Great Britain? While the exact answer is unknown, one possible reason is Scotland’s deteriorating economic situation. For instance, Fiona Davidson (1998) introduces, “a few salient facts [which] suggest significant economic coercion was involved in the process” (25). She highlights how the introduction of the “Navigation Acts passed by the English parliament in the 1660s brought legal trade to and from Scotland to a virtual standstill in the late seventeenth century” (Davidson 1998, 25-26). Because this law established that “all trade from English colonies be carried to English ports in English ships,” Scottish leaders, in an effort to preserve their economic livelihoods, decided to establish a Scottish colony in the New World. In 1696, the Scots embarked on the Darien expedition, which tried to set up a colony in the isthmus of Panama to allow Scotland to “trade with the Pacific and Atlantic simultaneously” (Stirrat 2010, 28-29).

The Darien expedition was ill conceived. The isthmus was under Spanish colonial rule and it did not account for the possible hardships the colonizers would encounter. Many of the colonists died in the voyage towards the Caribbean coast and many more perished when they tried to set up New Edinburgh (Stirrat 2010, 29). Davidson (1998) argues this failed venture “stripped Scotland

of approximately one third of her accumulated financial reserves and was followed up by the East India Company's confiscation of all the remaining ships of the Company of Scotland, rendering overseas trade impossible" (26). Similarly, her research demonstrates that "by 1706 it was a simple matter for the English Parliament to threaten trade sanctions every time the Scottish Parliament stepped out of line" (Davidson 1998, 26). The combination of these factors, which left "Scotland deprived of the ability to make any decisions that would adversely affect England, [made it] clear, at least to the land-owning class, that an amalgamation of the Parliaments was the only solution" (Davidson 1998, 26). Davidson (1998) also emphasizes that when the Scottish Parliament voted to accept the *Act of the Union* (1707), "[enfranchisement was limited to] only a minority of male citizens [so] popular discontent was easily ignored [and] any parliamentary opposition was fictionalized and quickly silenced by a reparations grant of almost 400,000 British pounds" (25-26). In addition to the "400,000 British pounds," given to Scotland, the elimination of trade barriers and subsequent economic gains, reflect the "economic compensation" discussed in Astigarraga's (2009) research (144).

In the 200 years following the *Act of the Union* (1707), Scotland's legislative and economic powers changed very little. The Westminster Parliament retained control of the major macroeconomic and foreign policy positions. One noteworthy event was Ireland's entry into Great Britain in 1801. This new union established the United Kingdom. However, more than 100 years after this accession, the fight for Irish independence reached a boiling point. Ultimately, four-fifths of Ireland gained independence in 1937, while the remaining portions of Northern Ireland would continue to be a part of the United Kingdom.

Another important event was the founding of the Scottish National Party (SNP) in 1934. While the SNP was founded on the guiding principles of Scottish independence, it did not become

Scotland's main nationalist voice until the late 1960s (Scottish National Party 2021a, 1). Two campaigns helped the SNP gain influence in Scottish and British politics. The first was the SNP's "It's Scotland Oil!" campaign, triggered by a national debate on the ownership of the oil off Scotland's North Sea coast in the late 1960s. Although adjacent to Scotland's shores, the oil reserves were (and still are) owned by the British government, which leaves Scotland with no direct control over this industry. The absence of authority over this key sector sparked the SNP to call for an independent Scottish state. The campaign focused on the sentiment that Scotland should have the ability to control its own resources, which resonated with many Scots. The second campaign was the SNP's opposition to the UK's accession to the European Economic Community (EEC) in the late 1960s and early 1970s. As Andrew Devenney (2008) explains, "British political culture of the time subordinated regional interests to the national debate, especially regarding what was widely considered a national foreign policy issue" (323). While the SNP leaders were not able to block the UK's entry into the EEC, they thought that their opposition would expand the party's popularity. In 1975, after gaining entry into the EEC, the Wilson Government was forced to hold a referendum on the UK's membership in the regional body. While over 67% of British voters supported Britain's membership in the EEC, the number of supporters in Scotland was lower at 58%. The SNP which led the 'No' Campaign was unable to mobilize its supporters, demonstrating that the EEC was a divisive issue. Shortly after, the party "quietly dropped its opposition to the EEC and began moving in a pro-European direction", culminating in its 1988 policy of "Scotland in Europe", which promised that it would fight for Scottish independence within the EEC (Devenney 2008, 342).

The EEC evolved into the European Union (EU), with the signing of the Maastricht Treaty of 1993. Unlike other EU members, the UK did not favor many of the EU's regional integration

policies. For example, it did not join the European Monetary Union, opting to preserve its currency and independent monetary policy. Even though the UK was able to protect its national interests, Scotland's views on European issues had little sway in Westminster or in Brussels. As Davidson (1998) explains, "as a constituent part of the United Kingdom rather than a sovereign state, Scotland [had] no independent bargaining voice within the EU. This [led] to a situation in which the interests and needs of the Scottish economy tend to be overlooked in the broader context of the needs of the United Kingdom economy with its southeastern focus" (27). The neglect of Scottish economic needs and weak political power, led to increased calls for Scottish independence, but within the structures of the EU.

Driven in part by these growing demands for Scottish independence, the UK Parliament decided to hold a Referendum on Scottish Devolution. Specifically, the Blair Government proposed the restoration of the Scottish Parliament. On September 11, 1997, Scottish citizens were asked to vote on two measures: (1) whether they "agree there should be a Scottish Parliament (or not)"; and (2) whether they "agree that a Scottish Parliament should have tax-varying powers (or not)" (Duclos 2016, 1). A resounding "74.3% of voters voted yes on the first measure, while 63.5% of voters supported the second measure" (Duclos 2016, 1).

The results of the referendum led to the passage of the *Scotland Act 1998* (1998) by the UK Parliament, which established the current Scottish Parliament as a unicameral legislature composed of 129 elected members. While Winnie Ewing, the SNP's President from 1987 to 2005, cheerfully stated on the opening day of the Scottish Parliament's first session that "the Scottish Parliament, which adjourned on March 25, 1707, is hereby reconvened," this legislature's powers were not equal to the Parliament of Scotland, which was disbanded with the signing of the *Treaty of the Union* (1707) (Campsie 2020, 1). Under the *Scotland Act 1998* (1998), the UK Parliament

“devolved powers in relation to local taxes such as council tax and non-domestic rates, and provided for the variation of the basic rate of income tax in relation to the income of Scottish taxpayers” (The Scottish Government 2021b, 1). Even though devolution was a popular policy among many Scots, it did not curb growing demands for Scottish independence.

Increasing pressure was put on the Westminster Parliament to introduce and accept a bill allowing Scotland to have a referendum on independence. As the Westminster Parliament retains sovereignty over Scotland, it must approve such a referendum. In 2012, the Cameron Government approved the *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland* (2012) bill, which laid out the terms for a referendum on Scottish independence. In the referendum, held on September 18, 2014, the Scottish people were asked to vote on a single question, “Should Scotland be an independent country? Yes or No” (Scottish Parliament Information Centre 2014, 1). With an estimated “84.4% voter turnout, 44.7% said Yes and 55.3% said No” (Scottish Parliament Information Centre 2014, 1). Consequently, Scotland remained a part of the UK.

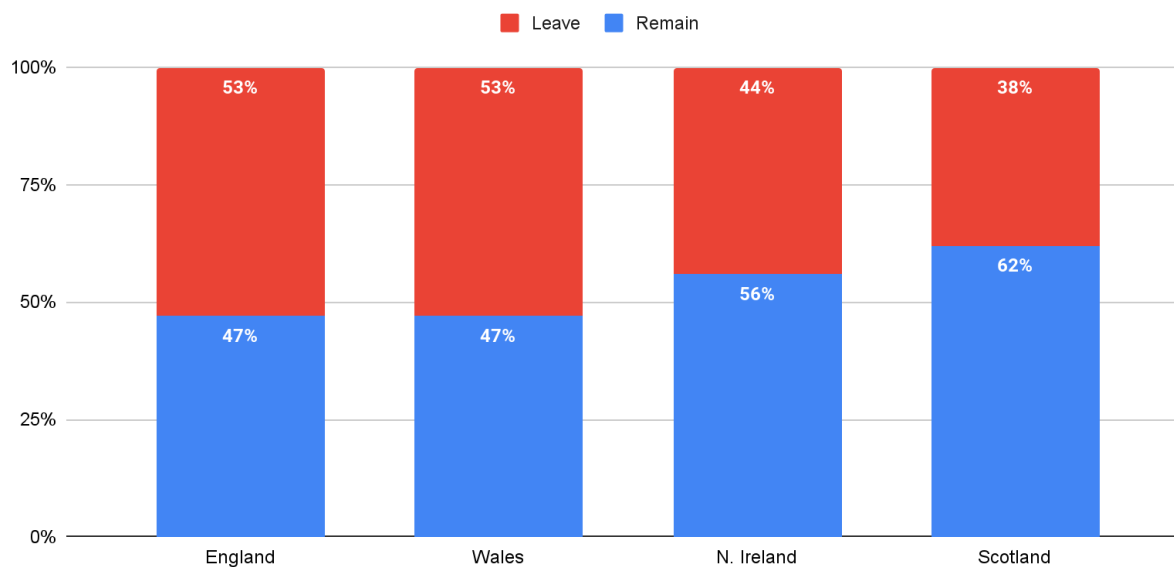
Yet, in spite of the decision to remain in the UK, this referendum had two key impacts. First, the results of the Scottish independence referendum gave Scotland more powers, through the process of devolution. In the lead up to the referendum vote, the Westminster Parliament promised to devolve more powers to Scotland, if Scotland voted to stay in the UK. Critically, “significant new powers of taxation control were promised to Scotland” (Erlanger and Cowell 2014, 4). Two years later, these powers were introduced in the *Scotland Act 2016* (2016), which:

extended income tax powers by enabling the Scottish Parliament to set rates and bands on non-saving, non-dividend income, for example earnings from employment, pensions and property income. Powers over Air Passenger Duty (now Air Departure Tax) and Aggregates Levy were also included, but the powers are yet to be devolved to the Scottish Parliament (The Scottish Government 2021b, 2).

It is also important to note that, “in the days following the referendum the SNP experienced an unprecedented membership boost with party numbers doubling from 25,000 to over 50,000,” which shows how the idea of Scottish independence continued to grow in spite of the referendum loss (Scottish National Party 2021a, 1).

Another significant event in Scotland’s relationship with the UK is connected to the campaign and the results of the 2016 referendum on the UK’s membership in the EU. While I will talk in more detail about the effects of this vote on Scotland’s future with the UK in section 3 of this thesis, it is worth noting that the SNP supported the Remain Campaign. Whereas the Leave Campaign won nearly “52% of the total vote, 62% of Scottish voters wanted Britain to stay in the European Union” (BBC 2016, 1). Indeed, support for the Remain Campaign was strongest in Scotland as demonstrated in Figure 1.

Figure 1: Results of the Brexit Vote at the National Level (BBC 2016)



Source: BBC 2016

Not surprisingly, the SNP has used the results of the Brexit referendum to call for a new vote on Scotland's independence. It has also been able to tap on Scottish frustration with Westminster to grow its influence in both the Scottish and UK Parliaments.

While the UK Parliament has devolved more powers to the Scottish Parliament since 1998, it still remains in control of a significant portion of Scotland's economic and political affairs. Modernly, Scotland enjoys authority over 11 sectors of "devolved matters," which include: "agriculture, forestry and fisheries, education and training, environment, health and social services, housing, land use planning, law and order, local government, sport and the arts, tourism and economic development, [and] many aspects of transport" (The Scottish Parliament 2021b, 1). Conversely, the Westminster Parliament retains full sovereignty over 12 sectors of "reserved matters". These areas are: "benefits and social security, immigration, defence, foreign policy, employment, equal opportunities, broadcasting, trade and industry, nuclear energy, oil, coal, gas and electricity, consumer rights, data protection, [and] the Constitution" (The Scottish Parliament 2021b, 1). Scottish voters' frustration with Westminster control over these areas has forced many to support the SNP and its policy positions.

Currently, the SNP "holds 61 out of 129 seats" in the Scottish Parliament (which is just under a majority and the largest share of seats held by a political party) and "47 of the 59 Scottish MPs [in the Westminster Parliament] are SNP members" (The Scottish Parliament 2021a, 1). For the last few years, as Conservative-led Governments negotiated the UK's exit from the EU, Nicola Sturgeon, Scotland's First Minister and Leader of the SNP, has not only been calling for a new Scottish independence referendum, but has also been convincing many Scottish voters of why independence is an important and realistic option. Even though the Johnson Government will not support a new referendum, the Scottish Parliament may hold a vote without the UK Parliament's

consent. The upcoming elections to the Scottish Parliament on May 6, 2021 will likely determine whether the SNP will have the necessary votes to hold this referendum (Reuters Staff 2021, 1).

In this section, I have examined the historical and modern evolution of power sharing between the Scottish and UK Parliaments. The current division of authority reserves critical macro powers (such as economic and foreign policy decisions) to the UK Parliament. Consequently, a key question that needs to be answered is, does the Scottish Parliament have a legal right to hold a referendum on independence? In the following section, I will analyze the perspectives of national UK law and international law on the right to self-determination and secession for the Scots.

LEGAL QUESTIONS ON A FUTURE SCOTTISH INDEPENDENCE REFERENDUM

Given that the Conservative-led Government is unlikely to start the procedures for a Section 30 Order (which will be discussed later in this section), could Scotland use international law to pressure the Westminster Parliament to approve the Scottish Parliament's desire to hold a second referendum? Before starting this analysis, it is important to stress that international law, much like national or municipal law, "consists of a series of rules regulating behavior, and reflecting, to some extent, the ideas and preoccupations of the society within which it functions" (Shaw 2017, 1). Under international law, the "principle subjects are nation-states," who "constitute a sole person in the eyes of international law" (Shaw 2017, 1; *Convention on Rights and Duties of States adopted by the Seventh International Conference of American States* 1933, 25). There are two types of international law, "conflict of laws (or private international law as it is sometimes called) and public international law (usually just termed international law)" (Shaw 2017, 1). Private international law concerns the application of law "within particular legal systems, in which foreign elements obtrude" (Shaw 2017, 1). Conversely, public international law "covers relations

between states in all their myriad forms” (Shaw 2017, 2). For the purposes of this analysis, I will be focusing on the application of public international law.

Because states are the most important actors in international law, it is necessary to define a state. The most widely accepted definition is found in the *Convention on Rights and Duties of States adopted by the Seventh International Conference of American States* (1933). It notes that states “possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States” (*Convention on Rights and Duties of States adopted by the Seventh International Conference of American States* 1933, 25). Under this definition, Scotland meets the first, second and third requirements for statehood. The Scottish Parliament and its Government, which represents the will of its citizens, are potentially the shell of a future state. However, the crucial areas of governance (such as trade and industry, as well as foreign policy) where “the capacity to enter into relations with other states,” would be possible, are reserved matters to the UK Parliament. Consequently, because of the absence of this fourth criterion, Scotland is not considered to have statehood under international law. This means that Scotland does not enjoy the “fundamental rights” guaranteed to all states, under international law. According to Malcolm Shaw (2017), these rights are “1) sovereignty, 2) sovereign equality, and 3) peaceful coexistence” (166-170). The most important right is sovereignty, or control over a given territory without outside interference.

Scotland’s status has significant implications. Shaw (2017) argues that, “by independence, one is referring to a legal concept...any political or economic dependence that may in reality exist does not affect the legal independence of the state, unless that state is formally compelled to submit to the demands of a superior state, in which case dependent status is concerned” (166). In the case of Scotland, there is some legal sovereignty, specifically over national “law and order” (The

Scottish Parliament 2021b, 1). However, as the Westminster Parliament has sovereignty over numerous areas concerning Scottish law (such as trade and Constitutional matters) along with the ability to dissolve the Scottish Parliament, it is clear that Scotland does not have legal sovereignty (The Scottish Parliament 2021b, 1).

Even though Scotland is not recognized as a state under international law, this body of law confers certain rights to individuals and groups, requiring states to address the needs and interests of their citizens. The increasing importance of international human rights and the growing recognition of democratic norms obligates the Scottish institutions and the British to provide, promote and protect Scottish citizens' human rights. This tension between a sovereign's obligations and citizens' rights are best encapsulated in the right of self-determination, which is one of main principles of international law.

Susana Mancini (2008) explains that, "self-determination means, roughly, the freedom for all peoples to decide their own political, economic, and social regimes. It is, therefore, both a collective right of peoples to decide autonomously the course of their national life and to share power equitably, and a right of all individuals to participate freely and fully in the political process" (554). There are three ways that the right to self-determination can be achieved under international law. The first is that, "the right of self-determination that became recognized in the 1960s was interpreted as the right of all colonial territories to become independent or to adopt any other status they freely chose" (Hannum 2021, 2). The second way is by gaining widespread recognition of sovereignty. An example of this can be seen in the case of Kosovo, which claimed independence in 2008. To date, there are over 100 nations that recognize Kosovo as an independent state, which gives its claim of sovereignty, legitimacy (Ministry of Foreign Affairs for the Republic of Kosovo 2021, 1). The third way to obtain the right to self-determination is through the repeated neglect of

a specific group of people, by the government. Under international law, there is a general principle that the state should work with all its citizens to ensure that it meets their interests and protects their rights (Shaw 2017, 233).

The right to self-determination can be divided into two categories: internal and external. Internal self-determination is, “the right of the people of a state to govern themselves without outside interference” (Hannum 2021, 1). Critically, Ved P. Nanda (2020) clarifies this definition as “pursuit of a people's political, economic and social development *within the framework of an existing state*” (307-308). Conversely, “external self-determination is the right of peoples to determine their own political status and to be free of alien domination, including formation of their own independent state” (Hannum 2021, 1). Another definition of external self-determination also provides that “all peoples have the right to constitute itself a nation-state or to integrate into, or federate with, an existing state” (Senese 1989, 19).

With the *Act of the Union* (1707) Great Britain recognized Scotland as a nation and gave the Scots a measure of political autonomy as already discussed in the first section of this thesis. Through the 1998 devolution of powers, which resulted in the creation of the Scottish Parliament, the UK has acknowledged that the Scottish people have the “right...to govern themselves without outside interference” in certain matters (Hannum 2021, 1). Specifically, the right to pass primary legislation in areas that affect every Scottish citizen, such as “education, law and order, as well as local governance,” make it clear that the Scottish people have a right to internal self-determination (The Scottish Parliament 2021b, 1). Further recognition and support for this right was given by the UK Parliament through the passage of the 2014 Scottish independence referendum. The passage of this referendum by the UK Parliament expanded the powers of the Scottish people in facilitating

their internal self-determination. Similarly, the *Scotland Act 2016* (2016) advances the scope of the Scottish right to internal self-determination.

In contrast to the widespread recognition and support for Scottish internal self-determination, the Scots do not have the right to external self-determination. Reflecting on Senese's (1989) definition of external self-determination, the Scots have neither the right to "constitute itself a nation state [nor the right to] federate with an existing state" (Senese 1989, 19). This right is what the Scottish pro-independence political parties, such as the SNP, are trying to obtain. However, as discussed earlier, options for the Scottish to obtain the right to external self-determination under international law are limited and can only be achieved under particular circumstances. Specifically, the Scots would need other states to recognize their right to self-determination. But the Scottish are unlikely to secure international recognition, if they do not gain independence through the UK's legal mechanisms. To be clear, the Scottish Parliament and its Scottish Government could unilaterally declare independence, but this would be a violation of the *injuria jus non oritur* (unlawful acts cannot create law) principle of international law, which, in turn, would undermine Scotland's claim of sovereign legitimacy. Such a violation could compromise Scotland's ability to join the United Nations, the European Union or other global or regional intergovernmental institutions, which is one of the reasons the SNP and other pro-independence parties want to break the union with the UK, as joining with these multilateral institutions is their goal.

Scotland has to therefore exhaust all local remedies, demonstrating that the UK has blocked its right to self-determination. Under these circumstances, other states may not only pressure the British Government to support holding a second referendum, but it may also build support for a unilateral declaration of independence. As noted above, the UK, based on its longstanding support

for democratic norms and for international human rights, should not ignore Scotland's opinions on this issue. However, under the *Scotland Act 1998* (1998), the Westminster Parliament retains the final authority on matters not devolved to the Scottish Parliament. Critically, "the Union of the Kingdoms of Scotland and England," is a reserved power (*Scotland Act 1998* 1998). Consequently, the Westminster Parliament is the only body that can legally dissolve the union of England and Scotland. This means that Scotland does not have the right to secede unilaterally (or without the consent of the Westminster Parliament). As such, the fact that Scotland does not have the right to "constitute itself a nation-state or to integrate into, or federate with, an existing state" shows that Scotland does not have the right to external self-determination (Senese 1989, 1).

Yet, the 2014 Scottish independence referendum presents an interesting legal challenge to this perspective. With the acceptance of the 2014 Scottish independence referendum, the UK Parliament recognized that the Scottish people had the right to choose whether or not they wanted to continue to be associated with the UK, or in other words, the right to external self-determination. By recognizing the Scottish people's right to external self-determination in 2014, it could be argued that they still have this right today, as it is difficult to take away a right once it has been acknowledged. However, the wording of the 2012 *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland* (2012) (the legislation which laid out the basis for the 2014 Scottish independence referendum), suggests that the Scottish people's right to external self-determination was conditional. The *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland* (2012) derived its power from the agreement of the Scottish and UK Governments "to promote an Order in Council under Section 30 of the *Scotland Act 1998* (1998) in the United Kingdom and Scottish Parliaments to allow a single-question referendum on Scottish

independence to be held before the end of 2014. The Order will put it beyond doubt that the Scottish Parliament can legislate for that referendum” (*Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland 2012*, 1). Section 30 of the *Scotland Act 1998* (1998) identifies the “supplementary legislative competence” and under the second article states, “Her Majesty may by Order in Council make any modifications of Schedule 4 [which refers to ‘Enactments etc. protected from modification’] or [Schedule] 5 [or reserved matters’] which She considers necessary or expedient” (1). Thus, the right to external self-determination was recognized only with the consent of the monarch.

Moreover, the Order in Council (2013), or *The Scotland Act 1998 (Modification of Schedule 5) Order 2013* (2013), written for the creation of the referendum on Scottish independence has its own requirements, which clearly convey that the recognition of the Scottish right to external self-determination was not permanent. The explanatory note for the Order in Council (2013) clarifies, “this Order modifies Schedule 5 to the *Scotland Act 1998* (1998) (c.46). Schedule 5 defines reserved (matters which are outside the legislative competence of the Scottish Parliament) for the purposes of that Act. The Order provides an exception to the reservation of the Constitution under paragraph 1 of Part 1 of Schedule 5 so that a referendum on the independence of Scotland from the rest of the United Kingdom is not a reserved matter if certain requirements are met” (*The Scotland Act 1998 (Modification of Schedule 5) Order 2013* 2013). The certain requirements specified in the Order in Council (2013) are as follows:

- 5A.—(1) Paragraph 1 does not reserve a referendum on the independence of Scotland from the rest of the United Kingdom if the following requirements are met.
- (2) The date of the poll at the referendum must not be the date of the poll at any other referendum held under provision made by the Parliament.
- (3) The date of the poll at the referendum must be no later than 31st December 2014.

(4) There must be only one ballot paper at the referendum, and the ballot paper must give the voter a choice between only two responses (*The Scotland Act 1998 (Modification of Schedule 5) Order 2013* 2013).

This Order in Council (2013) clearly states that the right to hold a referendum on Scottish independence was limited to, among other things, before the “31st [of] December 2014” (*The Scotland Act 1998 (Modification of Schedule 5) Order 2013* 2013). This means that a new Order in Council would be needed for the creation of a second legal referendum on Scottish independence. However, more than just royal assent is needed, as a draft Order in Council must first be “(a) laid before and approved by a resolution of each House of Parliament; and (b) laid before and approved by a resolution of the Scottish Parliament...in accordance with section 115 of, and paragraphs 1 and 2 of Schedule 7 [of the *Scotland Act 1998* (1998)]” (*Scotland Act 1998* 1998). From this, it is clear that in order for Scotland to legally secede from the UK within the national legal framework, the Scottish and UK Parliaments, as well as the monarch, must all be in agreement.

Taken together, it is clear that Scotland has a very small chance of gaining the right to external self-determination through the internal mechanisms of the UK. Yet, there is still the possibility that Scotland might have a case for secession underneath an international law framework. However, this is easier said than done, as under international law, the right to secession is extremely complex.

Traditionally, as pointed out by Matt Qvortrup (2020) in his work, “Breaking up is hard to do: The Neil Sedaka theory of independence referendums,” “the general rule is that referendums [in this case, independence referendums] have to be held in accordance with existing constitutions...Another legal avenue to secession is after an agreement between the area that seeks secession and the larger state of which it is part” (644). This means that state secession is not

recognized under international law, unless there is a legal basis for it. If, for example, there was a clause in the *Act of the Union* (1707) that gave Scotland the right to secede from Great Britain, this would be legally recognized under international law. Yet, such a clause does not exist, as already discussed, forcing the Scottish authorities to either pursue a legal compromise or unilaterally declare independence. But the Brexit referendum's results and the process that eventually led to the UK's exit of the European Union has changed the nature of this debate. Given Scots' strong support for keeping the UK in the European Union and the British Government's decision to pursue an exit without taking into consideration Scottish concerns raises questions as to whether British authorities have already violated Scots' internal self-determination, giving them no other option to pursue a more radical approach. To be sure, Nicola Sturgeon wants to hold a second referendum with the support of the Westminster Parliament along the lines of Section 30 of the *Scotland Act 1998* (1998). However, if the Johnson Government keeps refusing Scotland's request Scottish leaders could claim that Britain is violating their fundamental human rights. This argument could help Scotland make a case for "remedial secession", a concept that has gained more influence since the 1990s (Paylan 2020, 1).

The international human rights framework argues that the protection of individual rights should also be a central focus of international law. One example of the international human rights framework is the growing interest in the "responsibility to protect" or R2P. R2P is the "political commitment to end the worst forms of violence and persecution" (United Nations Office on Genocide Prevention and the Responsibility to Protect 2021, 1). In practice, this means protecting individuals from atrocities such as genocide, by intervening in a sovereign state. This intrusion on sovereignty defies traditional understandings of international law and shows how the international human rights framework is changing interpretations of international law.

The failure of a state to protect certain rights, in particular, minority rights, has built into the emerging international human rights framework. For example, Mancini (2008) argues that “existing states with established borders, thus, are supposed to meet the obligations associated with the right to self-determination of all peoples, of whatever size or nature, by safeguarding their linguistic, ethnic, and cultural heritage and by guaranteeing both their enjoyment of fundamental rights and the possibility of access to government on an equal footing with the rest of the population” (536-537). The emphasis on all peoples is derived from Article 1 of the *International Covenant on Civil and Political Rights* (1976), which states that, “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development” (1). This article will be further analyzed in the following paragraphs.

From this, Mancini (2008) asserts that, “[under] the perspective of international law, there is no legal basis for denying (at least some) minorities the right to political independence as a corollary of the right to self-determination, which, in principle, is granted to all ‘peoples’” (553). Moreover, she clarifies that, “as there are no agreed-upon definitions of a “people” or a “minority,” and because the two categories often overlap, it is impossible to draw a clear line between the two. Therefore, given certain conditions, there is no theoretical obstacle to granting minorities the right to secede on the basis of their right to self-determination” (Mancini 2008, 553). For the Scots, this paradigm is critical to understanding their desire for independence. As mentioned in the previous section, Scots are a minority in the United Kingdom. One of the main platforms of the SNP is based on the belief, that as a minority seat holder in the Westminster Parliament, that England is failing to represent Scottish needs (Scottish National Party 2021a, 1). From this the SNP has

questioned, “who is better to represent Scottish needs than the Scottish people themselves,” which shows their desire to be represented not just as a minority (Scottish National Party 2021a, 1).

The SNP’s desire to be a majority rather than a minority will be difficult to achieve, legally. Under a human rights framework, state secession can only occur in a limited set of circumstances. In her work, Milena Sterio (2018) reflects on challenges of securing the legal right to secession (1). Using the 1920 case of the Aalander people and their quest to secede from Finland, in order to join with Sweden (with whom they share a common language with), Sterio (2018) writes, “[it was] determined [by a committee of jurists within the League of Nations] that the Aalanders did not have a right to separate from Finland because ‘[t]he separation of a minority from the State of which it forms a part...can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees’” (2). The question of whether secession can occur in a non-colonial context has been further analyzed in the Canadian Supreme Court’s (1998) ruling on the legality of a Quebec secession.

In response to the question of “whether a right to unilateral secession exists under international law,” the Canadian Supreme Court (1998) found that an oppressed people could claim the right to self-determination based secession (*Reference re Secession of Quebec* 1998). Critically in this response, the Canadian Supreme Court (1998) rejected the right to unilateral secession for Quebec affirming that, “Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development” (*Reference re Secession of Quebec* 1998). The emphasis on needing “meaningful access to...political, economic, cultural and social development” builds into the human rights framework discussed in the following section (*Reference re Secession of Quebec* 1998).

From the legal precedents set in the Quebec ruling, it is clear that the right to self-determination can be achieved in non-colonial contexts. The condition for the right to self-determination is that a group of people must be oppressed and, through an interpretation of the Quebec ruling (1998), must “have been denied meaningful access to government to pursue their political, economic, cultural and social development” (*Reference re Secession of Quebec* 1998). The emphasis on “political, economic, cultural and social development” echoes the rights guaranteed in numerous human rights conventions, including the *Universal Declaration of Human Rights of 1948*, the *International Covenant on Civil and Political Rights* (1976) and the *International Covenant on Economic, Social and Cultural Rights* (1976). Both of these covenants share the same wording: “all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development” (1). This provision highlights two important concepts. First, the idea that people should be able to “freely determine...and freely pursue” suggests that the right to self-determination should be carried out in a democratic fashion.

Second, the assertions that people should have the rights to “determine their political status... [along with] their economic, social and cultural development,” conveys that these rights must be protected by the state, making them a part of the social contract between the citizenry and the state (*International Covenant on Civil and Political Rights* 1976; *International Covenant on Economic, Social and Cultural Rights* 1976). A violation of these rights could be seen as a breach of the state’s obligations. As a result, the UK’s decision to leave the EU, without securing access to the EU’s single market, demanded by the Scottish Government, could prove to be costly to Scottish citizens. By ignoring the Scottish people’s desire to protect their economic interests, the

Westminster Parliament failed to protect the Scots fundamental rights, which has led to strong feelings of mistrust between Scotland and the British Government.

In a similar manner, the refusal to listen to growing support for Scottish independence could also be seen as a violation of the UK's obligations to its citizenry. As discussed earlier, the Johnson government has repeatedly argued that the 2014 Scottish independence referendum was "once-in-a-generation" and has denied approving a second referendum under a Section 30 order (BBC 2021a, 1). As the sovereign power over Scotland, this refusal is understandable. However, as a democracy, the UK has a commitment to represent the voices of its citizenry, which includes the Scots. Similarly, the UK has advocated for these representative democratic principles on the international stage. The UK is signatory to numerous human rights treaties and explicitly points to its support of Article 1 of both the *International Covenant on Civil and Political Rights* (1976) and the *International Covenant on Economic, Social and Cultural Rights* (1976), "all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development" (1). If a pro-independence majority (such as the SNP) wins the May 6, 2021 Scottish Parliamentary election, it would be very difficult for the UK Government to continue to deny the Scottish people the right to a second independence referendum, without blatantly prohibiting the Scottish people's right to "freely determine their political status" (*International Covenant on Civil and Political Rights* 1976; *International Covenant on Economic, Social and Cultural Rights* 1976). This refusal would represent a violation of both the UK's democratic values and Scots' basic human rights.

With these legal standards in mind, the question is, what comes next in Scotland's quest for independence? Theoretically, Scotland could just declare independence from the UK. As was

seen in the International Court of Justice's (ICJ) Kosovo Advisory Opinion (*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion* 2010), "the declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law" (38). This conclusion followed that, "state practice during [the eighteenth, nineteenth and twentieth centuries] points clearly to the conclusion that international law contained no prohibition of declarations of independence" (*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion* 2010, 38). Notably, the ICJ (2010) argued that any instances of condemned declarations of independence were in violation of the *jus cogens* use of force principle (*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion* 2010, 38). The use of force principle was established in UN Resolution 2625, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations* (1970). The resolution affirms that "States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations" (*Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations* 1970). From this, the ICJ (2010) highlighted that previous United Nations Security Council (UNSC) resolutions condemned declarations of independence, as they "stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)" (*Accordance with International Law of the Unilateral Declaration of Independence*

in Respect of Kosovo, Advisory Opinion 2010, 38-39). As Kosovo did not violate this principle, the ICJ (2010) confirmed “that no general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council” (*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion* 2010, 38-39). Thus, it can be inferred that Scotland can declare independence, so long as it does not violate the *jus cogens* rule on the use of force.

However, as discussed earlier, gaining widespread recognition of this right is very complicated. Recognition of the Scottish right to form “their own independent state,” or external self-determination, remains dependent on international acceptance that Scotland has the right to external self-determination because of the UK’s failure to ensure that the Scottish people have “meaningful access to their economic development” (Hannum 2021, 1; *Reference re Secession of Quebec* 1998). Critically, this right must be recognized by the EU in order for Scotland to gain membership. Without EU recognition, Scotland will not be able to join.

Another argument is to wait for the results of the May 6, 2021 Scottish Parliamentary election. If, as the election polls currently predict, the SNP wins a majority of the seats, they have promised to hold another referendum on Scottish independence, with or without the consent of the UK Parliament. On January 24, 2021, the SNP’s (2021) 11-point plan (called “The roadmap to a referendum that is beyond legal challenge”) for securing the right to have a legal referendum on Scottish independence was introduced to the Scottish National Assembly (Scottish National Party 2021b, 2). In this plan, the SNP (2021) argues that a majority victory for their party in the May 2021 Scottish Parliamentary election, will show a clear will of the Scottish people for independence, which means that a referendum must take place. The SNP (2021) then asserts that, “In these circumstances, in which there has been an unambiguously expressed

democratic decision by the people of Scotland and their Parliament to have a legal referendum the choice of the U.K. government will be clear; to either (1) agree that the Scottish Parliament already has the power to legislate for a referendum or (2) in line with precedent, agree the section 30 order to put that question beyond any doubt; or (3) take legal action to dispute the legal basis of the referendum and seek to block the will of the Scottish people in the courts. Such a legal challenge would be vigorously opposed by an SNP Scottish Government” (Scottish National Party 2021b, 3). This plan offers a clear ultimatum to the Westminster Parliament, a join or fight us mindset. The answer to this ultimatum leaves the question of Scottish independence in the hands of the UK Parliament.

In this section, I have covered the different ways international law may help the Scottish authorities start a political process to hold a second referendum on independence. Because the British Government, led by Prime Minister Johnson and the Conservative Party, have expressed little support for a second referendum via the established legal process found in British law, I explained how Scotland can use international law to remind the British Government of its international legal obligations. Ultimately, Scotland is obligated to exhaust all the British legal requirements before considering holding a second referendum without the consent of the British Government or unilaterally declare independence. But taking these more radical steps could be possible if the British Government ignores Scottish interests, thus compromising their commitment to democratic norms and violating the Scottish people’s basic human rights. In the next section, I demonstrate how Scottish opinion has shifted since the Brexit referendum, documenting how the British Government’s lack of concern for Scottish opinions regarding the European Union and their economic future threaten the unity of the UK.

CONSEQUENCES OF FAILING TO LISTEN TO THE WILL OF THE SCOTS

In its mandate to represent the people of the United Kingdom, the Westminster Parliament has repeatedly disregarded the will of the Scottish people. The failure to listen to Scottish desires has never been more apparent than throughout the Brexit referendum. In his work, “Brexit, Democracy, and Human Rights: The Law between Secession and Treaty Withdrawal”, Jure Vidmar (2018) points out that, “prior to the Brexit referendum, the SNP put forward a proposal that a decision on exiting the EU should not only be a matter of a UK-wide majoritarian vote but would require support in all four constitutive countries: England, Wales, Scotland, and Northern Ireland” (440). From this, Vidmar (2018) asserts that, “if such a solution had been implemented, Brexit would have been rejected. Indeed, Brexit was predominantly supported in England and Wales, which have a significantly larger population than Scotland and Northern Ireland, where Brexit was rejected. The vote for Brexit was thus based on majoritarian decision-making whereby two devolved units of the UK were simply outvoted” (440). Disregarding the will of the Scottish people in the set up to the Brexit process does not bode well for democratic processes’.

As noted at the end of section one, the results of the Brexit referendum for the UK as a whole were “51.9% Leave to 48.1% Remain” (BBC 2016, 1). When looking at the breakdown of voting by national constituencies, the Scottish people voted “38.0% Leave to 62.0% Remain” (BBC 2016, 1). With more than half of Scottish voters voting against separation from the EU, one would think that their voices would be considered. However, their desire to remain in the EU was ignored. Throughout the multiyear negotiation process, the Scottish Government has repeatedly voiced its concerns about EU withdrawal and proposed solutions for Scottish economic security post-Brexit. Time and time again, these suggestions have been disregarded.

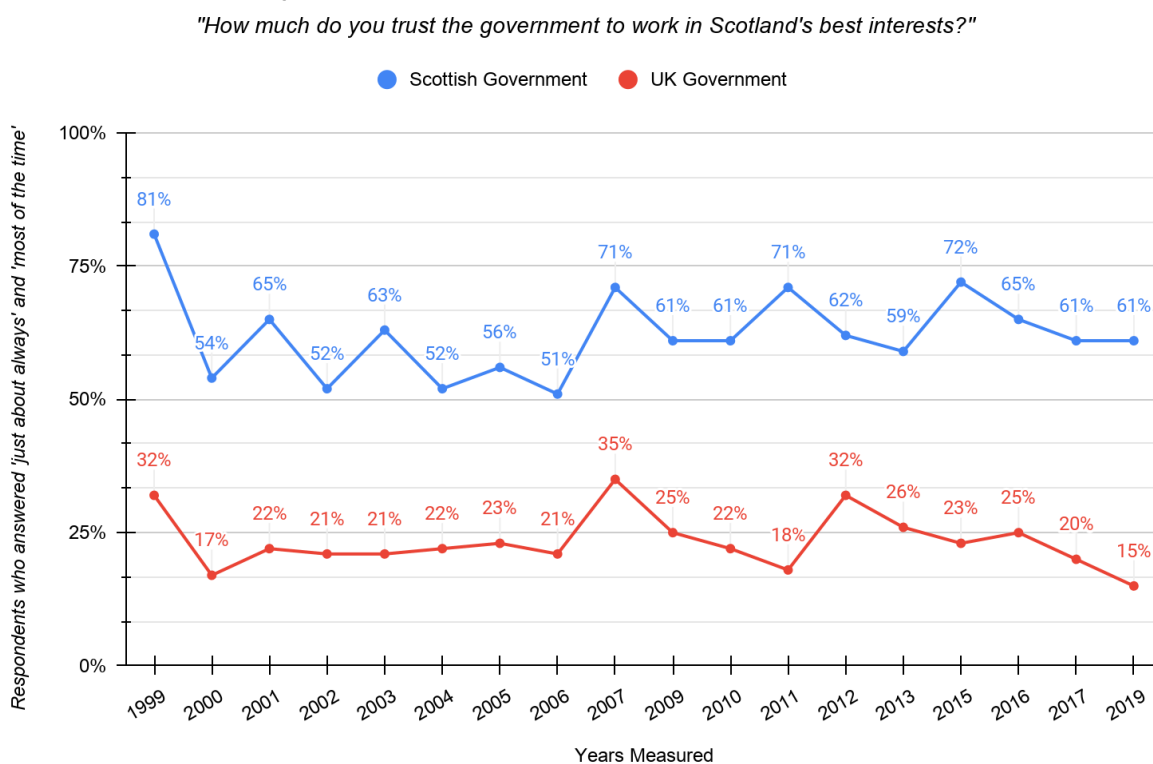
This was clearly seen in December 2016, when the Scottish Government (2016) released “Scotland’s Place in Europe,” which outlined several proposals for Scotland post-Brexit. In the foreword, First Minister Nicola Sturgeon declared that “People in Scotland voted decisively to remain in the European Union and we continue to believe that this is the best option for Scotland and the UK as a whole. However, short of EU membership, the Scottish Government believes the UK and Scotland must stay inside the Single Market and Customs Union” (The Scottish Government 2016, foreword). In this document, the Scottish Government (2016) put forth several proposals calling for Scotland to be able to “maintain its current position in the European Single Market,” even in the event of a “hard Brexit between the rest of the UK and the EU” (The Scottish Government 2016, foreword). Underlying these proposals, Nicola Sturgeon emphasizes that the purpose of this paper was not to call for Scottish independence (which she personally believes is the best option) but rather to, “explore if we can find common ground with the UK Government around a solution that would protect Scotland's place in the European Single Market from within the UK” (The Scottish Government 2016, foreword). Unfortunately, as Sionaidh Douglas-Scott (2019) notes, the proposals for an integrated Scotland, “have been rejected by the UK Government, and, in March 2017, the Scottish Parliament voted to formally request from the UK Government the powers to stage a fresh independence vote at around the time Britain leaves the EU” (1).

More than just a failure to listen to the Scottish people, some scholars have argued that Scotland’s desire to become independent is also a result of societal fractures in identity and trust between Scotland and the UK. First, the divide between identification as ‘Scottish’ versus ‘British’ has been well documented. According to Rachel Ormston (2015), the Head of Social Attitudes at NatCen Social Research, there is a clear divide in how the Scottish people identify

themselves, as compared to the English (11). She argues that “in England, the most common response [to the question of how do you see your identity] is that people feel ‘Equally English and British’ – apparently many people see little tension (or perhaps little difference) between feeling English and feeling British” (Ormston 2015, 11). In contrast, Ormston (2015) notes that “in Scotland most people feel either ‘Scottish not British’ or ‘More Scottish than British’” (11).

When considering the tense history between Scotland and England, it is not surprising that the Scottish people have held little trust in the UK Government. Since 1999, the Scottish Social Attitudes (SSA) survey has “been tracking changes in people's social, political and moral attitudes in Scotland” (The Scottish Government 2021a, 1). In their 2019 survey, the SSA used a “random sample of 1022 people aged 16 and over living anywhere in Scotland,” to measure the levels of trust that the Scottish people have for both the Scottish and UK Governments (Reid, Montagu and Scholes 2019, 7). The SSA’s survey results show that since 1999, the Scottish people have held significantly more trust in the Scottish Government than the UK Government (Reid, Montagu and Scholes 2019, 10-12). The “Scottish Social Attitudes 2019: attitudes to government and political engagement” shows that 61% of respondents answered that they trust the Scottish Government to work in Scotland's best interests, ‘just about always’ or ‘most of the time’ in response to the question “How much do you trust the government to work in Scotland's best interests?” (Reid, Montagu and Scholes 2019, 10-12). In stark contrast, only 15% of respondents in 2019 replied that they trust the UK Government to work in Scotland’s best interests ‘just about always’ or ‘most of the time’ (Reid, Montagu and Scholes 2019, 10-12).

Figure 2: Trust in the Scottish and UK Governments (1999-2019)/ (ScotCen Social Research 1999-2009)



Source: Scottish Social Attitudes surveys 1999-2019

The low levels of trust that the Scottish have in the UK Government to act in Scotland's best interests, was confirmed by the results of the Brexit referendum. Following the decision to leave the EU, the dropping levels of trust in the UK Government, combined with the separation in national identities, signify a chasm between the Scottish people and the UK Government. This disconnect conveys the message that the Scottish do not believe that the UK will act in their best interests in pursuing their economic development, which would represent a violation of state duties if we apply the logic of the Canadian Supreme Court's decision on *Reference re Secession of Quebec* (1998).

With the final negotiations of EU withdrawal just concluding, the future of Scotland remains uncertain. The only certainty is that there will be negative effects for the Scottish economy, following Brexit. Some estimates suggest a “2 -5% reduction in GDP, and employment lower by 1-3%, than if the UK remained in the EU,” though the extent of this hurt remains unknown (Douglas-Scott 2019, 3-4). However, the recent implementation of barriers to trade between Scotland and the EU have already harmed Scottish industries. A key example of this can be seen in the problems facing the Scottish fishing industry. In a *New York Times* article, Stephen Castle and Eshe Nelson (2021) highlighted how under the new trading agreement, the creation of border regulations on seafood exports have extended the transportation process to the determinant of sellers (1). They explain how, “consignments that previously moved with minimal fuss now need voluminous paperwork including customs declarations and, for food products, health certificates” (Castle and Nelson 2021, 2). With these new requirements, the delay in bringing seafood to market could result in the seafood going bad. This has put enormous pressure on Scottish seafood exporters and has contributed to growing uncertainty about the economic future of Scotland following Brexit.

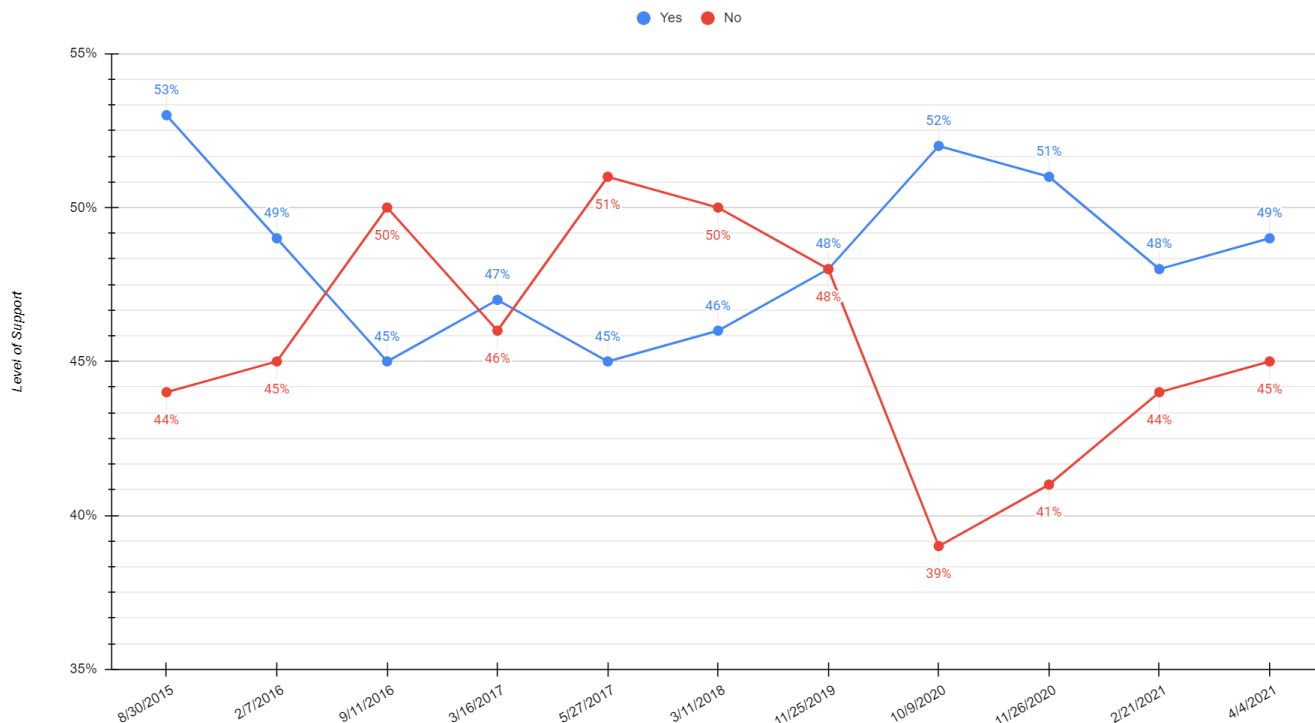
With their attempts to negotiate a deal to remain integrated into the EU market ignored, economically, Scotland is stuck between a rock and a hard place. According to Transport Scotland (2019), the national transport agency for Scotland, Scotland's top 5 export partners in 2018 were: “(1) Netherlands (£6.9 billion), (2) USA (£4.3 billion), (3) Germany (£2.7 billion), (4) France (£1.6 billion), (5) Republic of Ireland (£1.5 billion), with total exports to the EU totaling £16.1 billion” (1). However, Scotland’s biggest trading partner (in terms of exports) is the rest of the United Kingdom. In 2018, the value Scottish exports to the rest of the UK was estimated at “£33.8 billion” (National Statistics 2020, 1). By staying with the UK, Scotland will

lose both the EU single market and will suffer critical financial losses with new barriers to trade. On the other hand, if Scotland were to leave the UK and return to the EU (without securing continuity of the trade agreement it currently has with the UK) Scotland could lose its relationship with the country that it exports to the most, which would also result in substantial economic loss. Beyond that, there is also the possibility that separation from the UK could result in other financial distresses for Scotland, such as the loss of the pound sterling as the national currency. Losing the pound sterling would also create significant economic challenges for the emerging independent country. Between these two poor options, the question remains which one is preferable?

Recent polling by Ipsos MORI (2021) shows a majority support for independence. In their April 2021 “Scottish Political Monitor” report, Ipsos MORI (2021) polled more than 1,000 Scots and estimated that support for Scottish independence was at “49%” with a 4-point lead (3). This lead reflects an overall growing trend in support for Scottish independence. As can be seen in the line graph below, Ipsos MORI (2021) has polled the question of “Should Scotland be an independent country” for the past 8 years (3). In spite of some minor fluctuations, there is a clear upward trend in the answer of “Yes” for Scottish independence (Ipsos MORI 2021, 3).

Figure 3: Support for Scottish Independence (Ipsos/MORI 2021)

"If a referendum were held tomorrow about Scotland's constitutional future, how would you in response to the following question: 'Should Scotland be an independent country?'"



Source: Ipsos MORI 2021

Beyond gauging independence perspectives, Ipsos MORI (2021) also asked respondents to answer the question, “which, if any, issues do you think will be very important to you in helping you decide which party to vote for,” in the May 2021 Scottish Parliamentary election (3). By far, the most answered issue was “Scottish independence/devolution” with “49%” (Ipsos MORI 2021, 3). The Ipsos MORI (2021) poll also highlighted increasing support for Scottish independence in response to the COVID-19 pandemic. This can be seen through high approval ratings for Nicola Sturgeon “as the highest rated party leader among the Scottish public. 62% say they are satisfied with the way she is doing her job as First Minister, while 33% are dissatisfied” (Ipsos MORI 2021, 3). Likewise, the SNP has also been given high approval ratings, with

estimates suggesting that they will win a majority in the Scottish Parliamentary election of May 6, 2021 (“with 53%”) (Ipsos MORI 2021, 3).

For many, the recent increasing support for Scottish independence is surprising, when considering the fact that the Scottish independence referendum failed to pass less than 7 years ago. However, had the knowledge that less than two years later the UK Government would choose to follow through on the nonbinding results of the Brexit referendum (which the Scottish people voted overwhelmingly against), it is likely that the 2014 Scottish independence referendum results would have been different. The importance of economic security in the context of Scottish independence cannot be overstated.

This sentiment is reflected in an exit poll conducted by Lord Ashcroft (2014) following the 2014 Scottish independence referendum. The exit poll showed that “more than half (57%) of No voters said the pound was one of the most important factors in their decision, and the biggest overarching reason for their decision was that ‘the risks of becoming independent looked too great when it came to things like the currency, EU membership, the economy, jobs and prices’ (a more powerful reason for most No voters’ decision than ‘a strong attachment to the UK’ or the promise of the best of both worlds with guaranteed extra powers for the Scottish Parliament)” (1). The implication that economic security was “the biggest overarching reason” for voters who chose “No” in the 2014 Scottish independence referendum, suggests that if any changes to perceived economic security occurred, it could change voter decisions.

Conversely, the Lord Ashcroft (2014) exit poll also highlighted ‘Yes’ voter responses, arguing that “by far the biggest single driver for Yes voters was ‘disaffection with Westminster politics’” (1). Likewise, it also found that, “the principle that ‘all decisions about Scotland should be taken in Scotland’ was the most powerful overarching reason for a Yes vote, ahead of the idea

that ‘Scotland’s future looked brighter as an independent country’ or that ‘independence would mean no more Conservative governments’” (Lord Ashcroft Polls 2014, 1). Seeing that Scottish trust in the UK Government remains very low, it is unlikely that the ‘Yes’ voter would have changed their vote in the years following the Scottish independence referendum.

It is also important to discuss the breakdown of voters in the 2014 Scottish independence referendum. The Lord Ashcroft (2014) exit poll found that younger people (ages 16-54) were more likely to support Scottish independence while older voters, specifically those 65 and older, were most ardently against independence (1). Similarly, Conservative voters were more likely to vote against Scottish independence, while Liberal Democrats and Labour voters were also more inclined to support the No vote (Lord Ashcroft Polls 2014, 1). Conversely, SNP voters were more likely to support Scottish independence (Lord Ashcroft Polls 2014, 1). The trend of younger voters saying Yes to Scottish independence suggests that there is growing support for this movement. Likewise, (as mentioned earlier) there has been a large rise in SNP membership. Recent estimates show an increase “from just 25,200 members in 2013 to more than 90,000 in 2014 to 125,500 members in 2018” (Goodwin 2019, 2). Growing support for this pro-independence party implies that if another Scottish independence referendum were to be held sometime in the next 5 years, the result of the referendum could be a ‘Yes’ vote.

Figure 4: Breakdown of voter responses in the 2014 Scottish independence referendum/ Lord Ashcroft Polls 2014
In response to the question "How did you vote in the referendum?"

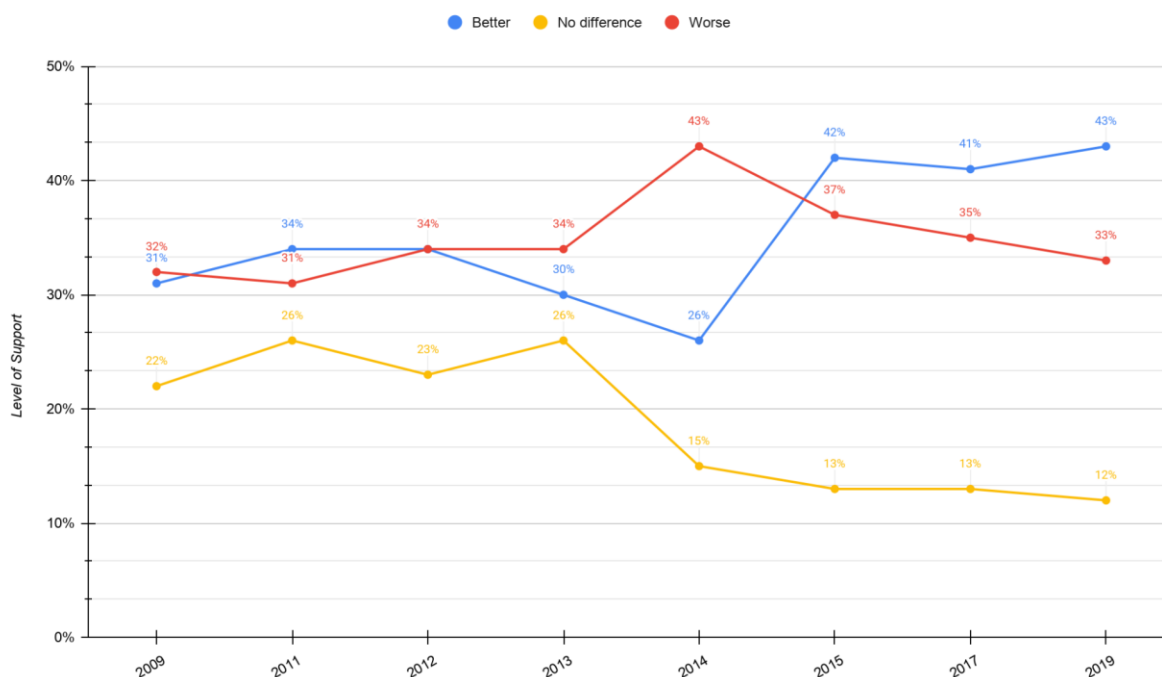
%	All	Men	Women	Age						2010 UK Parliamentary Vote			
				16-24	25-34	35-44	45-54	55-64	65+	Con	Lab	SNP	LD
YES	45%	47%	44%	51%	59%	53%	52%	43%	27%	5%	37%	86%	39%
NO	47%	53%	56%	49%	41%	47%	48%	57%	73%	95%	63%	14%	61%

Source: Lord Ashcroft Polls 2014

In the last few years, one of the biggest catalysts for independence is fear of economic insecurity. The results of the Brexit referendum have left Scotland in a precarious economic situation. The initial drop in the value of the pound sterling combined with the uncertainty that the multiyear Brexit negotiations brought, harmed the Scottish economy. The consequences of these downturns have damaged past, present and future Scottish economic prospects. With the net negative results from the finalization of the EU withdrawal already harming Scotland, it is not surprising that many Scots are worried about the future. The desire to maintain the economic security that being in the EU offered has led to increased demands for independence. A frequently repeated question in the SSA surveys from 2009 to 2019 gauged Scottish perceptions of the consequences of independence. In 2009, 32% of respondents believed that Scotland's economy would be 'worse' or harmed by independence (as compared to 31% who responded 'better' or to 22% who answered 'no difference') (Ormston 2009, 2). In the build up to the 2014 Scottish Independence referendum, 43% of respondents felt that Scotland's economy would be worse off if independent. At the time, only 26% of respondents believed that the Scottish economy would be 'better' independent, while 15% of respondents selected 'no difference' (Reid, Waterton and Wild 2013, 3). Following the announcement of the Brexit referendum in the European Union Referendum Act 2015 on May 27, 2015, a clear shift can be seen in the perceptions of Scotland's economic security. In 2015, only 37% of Scottish respondents argued that Scotland's economy would be 'worse' off by being independent. In a dramatic reversal from the perceptions about Scotland's economy in 2014, 42% of respondents in 2015 believed that the Scottish economy would be 'better' if independent (while 13% of respondents answered 'no difference') (Marcinkiewicz, Montagu, Waterton and Reid 2016, 3). The greater percentage of

voters arguing that Scotland’s economy will be ‘better’ off independent sustained in the 2017 and 2019 polls (Reid, Montagu and Scholes 2019, 2).

Figure 5: Perceived consequence of independence for Scotland's economy (2009-2019)/ (ScotCen Social Research 2009-2019)



Source: Scottish Social Attitudes surveys 2009-2019

In addition, a YouGov poll conducted in February 2016 identified the range of attitudes about the EU across the UK (Dahlgren 2016, 1). YouGov “used the profiles data of over 80,000 British people on the YouGov panel” and found that of the top ten most “europhile” regions (or regions that support the EU), 4 are located in Scotland (Dahlgren 2016, 1). Similarly, the entire country of Scotland showed an overwhelmingly positive attitude towards the EU (Dahlgren 2016, 1). The YouGov poll showed that every area in Scotland (with the exception of one region which identified as “mixed” feelings), all identified as “europhile” (Dahlgren 2016, 1). This support for the European Union ultimately aligned with Scotland’s majority support for

remaining within the EU. Currently, however, some research suggests that Scotland is growing more “Eurosceptic”. For instance, John Curtice and Ian Montagu (2020) use data from the Scottish Social Attitudes 2019 survey to argue that Euroscepticism is increasing in Scotland (10). In contrast, I would argue that the option to “stay in the EU but reduce its powers,” does not show Euroscepticism, but rather a more “Europhile” stance (Curtice and Montagu 2020, 10). This answer, according to Curtice and Montagu (2020), conveys the desire for Scotland to have a “loose relationship” with the EU. To me, a “loose relationship,” although not defined by Curtice and Montagu (2020), is still a relationship (10).

Another perspective is that the desire to “stay in the EU but reduce its powers,” could be seen as a desire for greater autonomy, while still maintaining the open economic relationship that being in the EU offers. This aligns with the growing support for independence as well as the distinction between national identities. Overall, the data shows that while there was an uptick in support for leaving the EU during the lead up to the Brexit campaign, there are generally low levels of support for leaving the EU, in Scotland (Curtice and Montagu 2020, 10).

Figure 6: Euroscepticism vs. Europhilia (1999-2019)/ (ScotCen Social Research 1999-2019)											
Britain's EU policy should be to....	1999	2000	2003	2004	2005	2013	2014	2015	2016	2017	2019
...leave the EU	10%	11%	11%	13%	14%	19%	17%	17%	25%	19%	19%
...stay in the EU but reduce its powers	36%	37%	29%	31%	36%	40%	40%	41%	42%	39%	34%
Eurosceptic	46%	48%	40%	45%	51%	59%	57%	58%	66%	58%	53%
...stay in the EU and keep powers as they are	21%	21%	24%	27%	21%	25%	24%	21%	21%	30%	34%
...stay in the EU and increase powers	14%	13%	19%	12%	13%	8%	7%	9%	5%	5%	5%
...work for formation of a single European government	9%	9%	8%	7%	5%	3%	4%	3%	3%	3%	4%
Europhile	44%	44%	52%	46%	38%	36%	35%	33%	29%	37%	43%

Source: Scottish Social Attitudes survey 2019

In this section, I have examined the effects of the failure of the UK Government to listen to the will of the Scots. Building off of the longstanding history of tense relationships between the two nations, the results of the Brexit referendum highlighted the chasm between the UK and Scotland's priorities. For many Scots, access to the EU is vital to the Scottish economy. Consequently, the decision of the UK Parliament to follow through on the nonbinding results of the Brexit referendum, confirmed not only that the will of the Scottish people is not being represented, but also that the economic development of the Scottish people is not important to the UK governance. By forcing Scotland to leave the EU, the Scottish people are being denied "meaningful access to their economic development," which is a clear violation of the standards set in *Reference re Secession of Quebec (1998)* (*Reference re Secession of Quebec 1998*). In the

conclusion, I tie together these arguments and present questions that can be used for future research on this subject.

CONCLUSION

This paper looked at the question of does Scotland have the legal right to independence following the results of the Brexit referendum? International law tells us that Scotland does not fit the traditional criteria for independence. However, the emerging international human rights framework offers a route for Scottish independence. Through the analysis conducted in the previous sections, it is clear that Scotland has the right to independence from the UK under the emerging international human rights framework.

In the first section, I conducted a historical survey of the relationship between Scotland and England. I began by outlining historical interactions and how that shaped feelings of mistrust between the two nations. Next, I emphasized the importance of the *Act of the Union* (1707) and highlighted the asymmetric power structure that emerged from the joining of Scotland and England. Subsequently, I conveyed how the creation of the United Kingdom in 1801, the emergence of the SNP in 1934, and entry into the EEC in 1973, shaped Scotland's modern day relationship with the UK Parliament. My next analysis centered on the importance of the 1997 Scottish Devolution Referendum, which led to the restoration of the Scottish Parliament and gave the Scottish people the right to some limited powers of internal self-determination. From this, I examined the significance of the 2014 Scottish independence referendum. Although this referendum failed, I called attention to the fact that the Scottish Government was given more powers through devolution and that membership for the pro-independence party, the SNP, dramatically increased. Ultimately, this section concluded by identifying the current power

divide between the Scottish and UK Parliaments, which builds into ongoing conversations about representation of the Scots human rights.

In the second section, I analyzed the legal principles for self-determination under international law. Critically, I highlighted how through the process of devolution, Scotland has all the characteristics of a state, but is missing the power to become one. In this section, I also explained how Scotland has the right to internal but not external self-determination. With the absence of the right to external self-determination, I examined how Scotland could obtain the right to secede under UK national law. Specifically, I analyzed the complexity of obtaining a Section 30 order, which would allow for a second Scottish independence referendum. From this, I scrutinized the legality of secession under international law. Although the right to secession is not recognized under international law, I emphasized the importance of the emerging international human rights framework. Within this framework, I argued that Scotland has a case for independence under a violation of basic human rights set out in the *International Covenant on Civil and Political Rights* (1976) and the *International Covenant on Economic, Social and Cultural Rights* (1976), as well as through the standards set in the *Reference re Secession of Quebec* (1998) court case. Similarly, I also pointed out that the UK has a democratic commitment to represent the will of its citizenry which includes the Scots. I concluded this section by suggesting different legal methods that could be used by the Scots to obtain independence.

Lastly, the third section examined the effects of the British government ignoring the will of the Scottish. Using the case study of the Brexit referendum, I emphasized how repeated denials of Scottish will have built into historical feelings of mistrust towards the UK Government to act in their best interests. I argued that this rift between the interests of Scots and the UK

Parliament is estimated to have serious negative macroeconomic consequences, which will put Scotland in a disadvantageous position. The harmful economic consequences are one of the reasons for current support for independence. Similarly, I highlighted the contrast between modern and 2014 support for independence and showed that changed fears of economic insecurity post- Brexit is a key reason for the modern popularity for Scottish independence. I also countered the claim that Scots do not want to be a part of the EU and instead argued that they still want to have a relationship with the EU.

Together, this analysis conveyed that Scotland has the legal right to independence under an international human rights framework. However, before Scotland can become an independent state, there are still many questions that must be answered. Assuming that a pro-independence majority wins the Scottish Parliamentary election on May 6, 2021, have the Scottish leadership worked to guarantee that an independent Scotland would be allowed membership into the EU? Or does Scottish independence set a dangerous precedent for independence movements in other EU countries, like the Catalans and the Corsicans? Do the Scottish want to resume their original relationship with the EU? Or would a European Economic Area (EEA) relationship with the EU, like the one between the EU and Norway, satisfy the Scots? Conversely, if a pro-independence majority does not win the May 6, 2021 Scottish Parliamentary election, what happens to the Scottish independence movement? The answers to these questions will shape the future of the Scottish independence movement.

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