


2015

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### Recommended Citation

Benjamin Levites, *The Scottish Independence Referendum and the Principles of Democratic Secession*, 41 Brook. J. Int'l L. (2015).  
Available at: <https://brooklynworks.brooklaw.edu/bjil/vol41/iss1/8>

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# THE SCOTTISH INDEPENDENCE REFERENDUM AND THE PRINCIPLES OF DEMOCRATIC SECESSION

## INTRODUCTION

A dejected man, slumped with dozens of others in Glasgow's George Square was draped in a crumpled saltire, the flag of Scotland.<sup>1</sup> A couple in Edinburgh sobbed, each in matching tartans.<sup>2</sup> Across town, jubilant girls, each wearing bright pins emblazoned with the word "No" hoisted the King's Colours high.<sup>3</sup> On September 18, 2014, Scots both celebrated and grieved, as fifty-five percent of voters in Scotland's independence referendum chose not to secede from the United Kingdom.<sup>4</sup> To many, the outcome prevented the "huge economic, political and military imponderables that would have flowed from a vote for independence."<sup>5</sup>

Secessions like the one recently sought by Scotland are indeed a persistent problem for the international state system. Such secessions threaten two of the central principles of the state system: territorial integrity and sovereignty.<sup>6</sup> Yet international law<sup>7</sup> has remained largely silent on the matter of secession.<sup>8</sup> Despite the fact that secessions occur, and some seceding states attain legitimacy and recognition, the breadth of secessionary

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1. Steven Erlanger & Alan Cowell, *Scotland Rejects Independence from Britain*, N.Y. TIMES, Sept. 19, 2014, at A1.

2. *Id.*

3. *Id.*

4. Serge Schmemmann, *A Peaceful Decision in Scotland, but Misery Elsewhere*, N.Y. TIMES, Sept. 21, 2014, at SR2.

5. Erlanger & Cowell, *supra* note 1.

6. Glen Anderson, *Secession in International Law and Relations: What Are We Talking About?*, 35 LOY. L.A. INT'L & COMP. L. REV. 343, 343 (2013).

7. The sources of international law include international treaties, customary international law, the general principles of law of civilized nations, and the judicial decisions of highly qualified publicists. Rüdiger Wolfrum, *Sources of International Law*, in THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (R. Wolfrum ed., 2014). Customary international law consists of the repeated behavior of states and the belief that such behavior depends on a legal obligation. Tullio Treves, *Customary International Law*, in THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (R. Wolfrum ed., 2014).

8. Christopher Connolly, *Independence in Europe: Secession, Sovereignty, and the European Union*, 24 DUKE J. COMP. & INT'L L. 51, 67 n.95 (2013).

mechanisms and scenarios make a unified analysis of secession difficult.<sup>9</sup>

While “secession” remains difficult to define, this Note will proceed from the broad definition advanced by Glen Anderson, who posits that secession is “[t]he withdrawal of territory (colonial or non-colonial) from part of an existing state to create a new state.”<sup>10</sup> Though secessions occur through a variety of mechanisms, from negotiation to force,<sup>11</sup> democratic secessions raise some of the thorniest issues.<sup>12</sup> Democratic secessions employ the political form of the independence referendum, which is a “direct vote by the electorate of a country” that decides group claims concerning “the right to separate [secede] from the existing state of which the group concerned is a part, and to set up a new independent state.”<sup>13</sup> By using the form of independence referendums, within or outside the bounds of domestic constitutional frameworks,<sup>14</sup> democratic secessions cannot be dismissed for

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9. Anderson, *supra* note 6, at 343.

10. *Id.* Anderson notes that “[e]xactly what the concept of secession entails” remains a matter of debate, and contrasts his own unified analysis with those of other prominent secession scholars, such as James Crawford and Peter Radan (citing JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* (2006); PETER RADAN, *CREATING NEW STATES: THEORY AND PRACTICE OF SECESSION* (2007)).

11. For a discussion of mechanisms of secession and the contexts in which such mechanisms are deployed, see *id.* at 349–54. “Consensual” secessions occur with the consent of the parent country either by constitutional procedure or political negotiation. *Id.* “Unilateral” secessions occur without the consent of the parent country and may implicate the use of force. *Id.*

12. See Zoran Oklopčič, *Independence Referendums and Democratic Theory in Quebec and Montenegro*, 18 *NATIONALISM & ETHNIC POL.* 22 (2012). Democratic secessions implicate questions about the proper electorate, requisite majority, new national boundaries, and permitted degree of external involvement.

13. Yves Beigbeder, *Referendum*, in *THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* ¶¶ 1, 5 (Rüdiger Wolfrum ed., 2014).

14. Anderson, *supra* note 6, at 350–52 (citing independence referendums in Quebec in 1995 and Montenegro in 2003 as examples of constitutional secession, and the 1905 Norwegian independence referendum as an example of a politically negotiated secession).

lack of legitimacy, as might secessions by force.<sup>15</sup> Nor can democratic secessions be understood within the framework of decolonization.<sup>16</sup>

In parent nations<sup>17</sup> that espouse the principles of self-determination, democratic secession illustrates the inherent tension in international law between permitting self-determination and preserving sovereignty and territorial integrity.<sup>18</sup> This tension is evident in the case of the United Kingdom, which faced the prospect of Scotland's separation by independence referendum in 2014.<sup>19</sup> Scotland joined Britain in 1707, secured a Scottish parliament through a devolution<sup>20</sup> referendum in 1997, and attained a Nationalist Party majority in Scottish Parliament in

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15. Glen Anderson, *Unilateral Non-Colonial Secession and the Use of Force: Effect on Claims to Statehood in International Law*, 28 CONN. J. INT'L L. 197, 199, 216 (2013). The use of force in non-colonial secessions is a violation of peremptory norms against the use of force, unless the right of self-determination is implicated by extreme human rights abuses. By contrast, using force in a colonial secession is legal if the colony uses force to defend its pursuit of sovereign independence.

16. *Id.* at 217 (citing Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, U.N. Doc. A/RES/1514 (Dec. 14, 1960)). Decolonization is unique because international law supports a customary right to colonial secession. This customary right is evinced by the United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples in 1960, and various nonbinding instruments drafted thereafter. *See, e.g.*, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. Doc. A/RES/2625 (Oct. 24, 1970); Definition of Aggression, G. A. Res. 3314, U.N. Doc. A/RES/3314 (Dec. 14, 1974); Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, G.A. Res. 50/6, U.N. Doc. A/RES/50/6 (Oct. 24, 1995)).

17. As used in this Note, the term *parent* refers to an existing, predecessor state from which a territory aims to secede.

18. Peter Radan, *Secessionist Referenda in International and Domestic Law*, 18 NATIONALISM & ETHNIC POL. 8, 9 (2012). In international law, the central issue concerning the legality of the independence referendum is "whether the guarantee of the territorial integrity of states set out in Article 2(4) of the Charter of the United Nations is absolute" or instead subject to the customary right of peoples to self-determination (as illustrated by the United Nations General Assembly Declaration on Friendly Relations). *Id.*

19. Erlanger & Cowell, *supra* note 1.

20. Glen Anderson proposes, "Devolution is the voluntary grant of certain legislative powers to a lower level of government and without a transfer of sovereignty." Anderson, *supra* note 6, at 388.

2011.<sup>21</sup> Once the Nationalist Party attained a parliamentary majority, it advocated for an independence referendum, and ultimately the governments of Scotland and the United Kingdom agreed in 2012 that the Scots would vote on their independence in two years.<sup>22</sup> Polling a week before the independence referendum of September 18, 2014 indicated that the secessionists, narrowly behind the unionists in the polls, had gained momentum.<sup>23</sup> In accordance with negotiations between the Scottish and English governments, the vote was poised to sever the United Kingdom.<sup>24</sup>

Scotland, the secessionary territory, was not across an ocean from its parent, but directly within its borders.<sup>25</sup> Independence referendums occurring in contiguous states can physically divide the parent state, threatening territorial integrity and sovereignty in a manner that the secession of former overseas colonies did not.<sup>26</sup> Yet, the U.K. government, though desperate to retain Scotland and promising to further devolve government functions to Scotland if it chose to remain in the union, would have respected the referendum and worked to implement it if approved.<sup>27</sup>

The Scottish independence referendum thus indicates an important trajectory in international law. By further developing referendums that preceded it, the Scottish independence referendum has set forth an important precedent. Scotland was able to decide, with international legal legitimacy, the historic matter of its independence by (i) obtaining the consent of the parent state to initiate an independence referendum, (ii) advancing a

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21. Stephen Tierney, *Legal Issues Surrounding the Referendum on Independence for Scotland*, 9 EUR. CONST. L. REV. 359, 360 (2013).

22. James Crawford, *Opinion: Referendum on the Independence of Scotland—International Law Aspects, Annex A* to SCOTLAND OFFICE ET AL., SCOTLAND ANALYSIS: DEVOLUTION AND THE IMPLICATIONS OF SCOTTISH INDEPENDENCE 69 para. 8, Cm. 8554 (2013), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/79417/Scotland\\_analysis\\_Devolution\\_and\\_the\\_implications\\_of\\_Scottish\\_Independan...\\_1\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79417/Scotland_analysis_Devolution_and_the_implications_of_Scottish_Independan..._1_.pdf).

23. Steven Erlanger, *Britain Pledges More Self-Rule for Scots if They Reject Scottish Independence*, N.Y. TIMES, Sep. 7, 2014, at A4.

24. *Id.*

25. Connolly notes that the secession of overseas colonies did not “threaten the sovereignty or alter the borders of the parent state.” Connolly, *supra* note 8, at 71.

26. *Id.*

27. Erlanger & Cowell, *supra* note 1.

direct and unambiguous question concerning independence on the ballot, and (iii) deciding the matter on the basis of a simple majority. These principles constitute meaningful precedent to which subsequent secessionists must adhere.

This Note will examine the implications of Scotland's independence referendum by assessing the history of independence referendums and the present scope of relevant international law. Part I illustrates the historical development of independence referendums, from the first referendums at the outset of the American Civil War to the independence referendums in the Soviet Union and Yugoslavia. Part II analyzes the implications of the 1995 independence referendum in Quebec. Part III situates the Scottish independence referendum in the context of evolving law and state practice, and suggests that Scotland held a precedential independence referendum. Part IV describes how the Scottish experience can ultimately serve as a powerful rubric for future attempts at secession by independence referendum.

## I. THE HISTORICAL DEVELOPMENT OF INDEPENDENCE REFERENDUMS

The independence referendum has developed over time, and the Scottish independence referendum has consequently drawn upon the principles of preceding independence referendums. Cumulatively, these historic referendums set forth the requirements of formal legislative process, legal basis, majority approval, and standing. The following sections detail the growth of these principles between two periods of conflict, the American Civil War and the dissolution of the Soviet Union.

### *A. The First Independence Referendums — the Confederate States, 1861*

In the prelude to the American Civil War, the Confederate states attempting to secede from the United States held the first independence referendums.<sup>28</sup> American states had historically conducted referendums to decide different important matters of governance and did so when the matter of secession arose.<sup>29</sup> Indeed, accustomed to the practice of referendums, the experience

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28. Matt Qvortrup, *Referendums on Independence, 1860–2011*, 85 POL. Q. 57, 57 (2014).

29. Matt Qvortrup, *The History of Ethno-National Referendums 1791–2011*, 18 NATIONALISM & ETHNIC POL. 129, 135 (2012). Qvortrup notes that the history

of the seceding Confederate states illustrates important aspects of the independence referendum. Each of the independence referendums relied upon formal legislative process, legal basis, and required the approval of withdrawal from the United States by a strong majority.

### 1. Texas

In November 1860, Texans faced the election of Abraham Lincoln, who was perceived to threaten the institution of slavery.<sup>30</sup> Many in Texas, a state where slavery was legal and considered central to the state's economy and growth, became inspired by South Carolina, which responded to Lincoln's election by calling a secession convention and declaring secession from the United States in December 1860. After the calling of secession conventions in five other slaveholding and cotton-growing southern states, secessionists in Texas agitated for their state to secede from the United States.<sup>31</sup> Texas secessionists increasingly pressured their legislature for a secession convention and vowed to do so in opposition to Governor Houston, who refused to call a special session of the legislature to approve a secession convention in 1861.<sup>32</sup> The governor relented, and the legislature approved a convention.<sup>33</sup> The convention approved secession but included a referendum provision.<sup>34</sup> Governor Houston and Unionists advocated for the referendum provided for in the secession convention, thinking it necessary to clearly resolve the issue of secession from the United States.<sup>35</sup> The Ordinance of Secession required a simple majority to "repeal[] and annul[]" the state's ratification of the U.S. Constitution on the grounds that

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of referendums on other matters related to sovereignty, including unification of territories or integration into other states, precedes the American Civil War. *Id.*

30. Ralph A. Wooster, *Civil War*, HANDBOOK OF TEX. ONLINE, <https://www.tshaonline.org/handbook/online/articles/qdc02> (last updated Dec. 3, 2015).

31. *Id.*

32. Walter L. Buenger, *Secession*, HANDBOOK OF TEX. ONLINE, <http://www.tshaonline.org/handbook/online/articles/mgs02> (last updated Mar. 8, 2011).

33. *Id.*

34. Walter L. Buenger, *Secession Convention*, HANDBOOK OF TEX. ONLINE, <http://www.tshaonline.org/handbook/online/articles/mjs01> (last updated Mar. 8, 2011).

35. *Id.*

the actions of the northern states and the federal government were “violative of the compact between the states and the guarantees of the Constitution.”<sup>36</sup> The voters of Texas approved the Ordinance on February 23, 1861.<sup>37</sup>

## 2. Virginia

That same month, Virginia’s legislature approved a secession convention and determined that any Ordinance of Secession would need to be submitted to the people of Virginia in the form of a referendum.<sup>38</sup> The first referendum was forestalled, and the second failed by a margin of two to one.<sup>39</sup> The intervening attack on Fort Sumter<sup>40</sup> precipitated a third vote, which approved secession by four to one.<sup>41</sup> Virginia reserved the right to secede in its ratification of the Virginia constitution and invoked this right in its Ordinance of Secession, asking a simple majority of voters to “repeal[] and abrogate[]” the convention that ratified the U.S. Constitution in 1788.<sup>42</sup> Unionists in West Virginia then seceded from Virginia, and applied for and received admittance to the Union.<sup>43</sup> When Virginia was readmitted to the Union, it explicitly surrendered the right of secession.<sup>44</sup>

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36. *An Ordinance to Dissolve the Union Between the State of Texas and the Other States in a Compact Styled “The Constitution of the United States of America,”* Feb. 2, 1861 (Tex.), reprinted in ORDINANCES OF SECESSION AND OTHER DOCUMENTS, 1860–1861 (A. B. Hart & E. Channing eds., 1893).

37. Wooster, *supra* note 30.

38. Nelson D. Lankford, *Virginia Convention of 1861*, ENCYCLOPEDIA VA. (June 20, 2014), [http://www.EncyclopediaVirginia.org/Virginia\\_Constitutional\\_Convention\\_of\\_1861](http://www.EncyclopediaVirginia.org/Virginia_Constitutional_Convention_of_1861).

39. *Id.*

40. Fort Sumter, in the harbor of Charleston, South Carolina, remained one of the last southern federal garrisons after the secession of South Carolina, Mississippi, Florida, Alabama, Georgia, Louisiana, and Texas. The Confederate bombardment of Fort Sumter on April 12, 1861, led President Lincoln to call for volunteers to suppress the Confederate rebellion. *Id.*

41. *Id.*

42. *An Ordinance to Repeal the Ratification of the Constitution of the United States of America, by the State of Virginia, and to Resume All the Rights and Powers Granted Under Said Constitution*, Apr. 17, 1861 (Va.), reprinted in ORDINANCES OF SECESSION AND OTHER DOCUMENTS, 1860–1861 (A. B. Hart & E. Channing eds., 1893); VA. CONST. of 1851, BILL OF RIGHTS arts. 2, 3.

43. RICHARD OWENS, ROGUE STATE: THE UNCONSTITUTIONAL PROCESS OF ESTABLISHING WEST VIRGINIA STATEHOOD 44 (2013).

44. The Virginia Constitution of 1851, in force prior to Virginia’s secession, provided that a “majority of the community hath an indubitable, inalienable,



### 3. Tennessee

The citizens of Tennessee voted to hold a secession convention in February 1861 and then rejected the measure in a close vote.<sup>45</sup> The events of Fort Sumter led the governor to call a secret session of the legislature that voted to secede from the Union, subject to approval by the voters of Tennessee in a referendum on secession.<sup>46</sup> The Tennessee Ordinance of Secession “waiv[ed] an expression of opinion as to the abstract doctrine of secession” but “assert[ed] the right as a free and independent people, to alter, reform, or abolish our form of government,” asking voters to “abrogate[] and annul[]” the “laws and ordinances by which the State of Tennessee became a member of the . . . Union.”<sup>47</sup> As in the case of Virginia, strong Unionist sentiment persisted in eastern Tennessee after the referendum, where voters had rejected the Ordinance of Secession.<sup>48</sup>

### 4. The Impact of the Confederate Independence Referendums

The legality of the Confederate secessions by independence referendum was adjudicated in *Texas v. White* by the U.S. Supreme Court.<sup>49</sup> *Texas v. White* is understood to stand for the proposition that the unilateral secessions, including those by ref-

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and infeasible right to reform, alter, or abolish” the government. VA. CONST. of 1851, art. I, § 3. However, the Virginia Constitution of 1870 was ratified as a condition of readmission pursuant to the Reconstruction Acts, which required the Confederate States to ratify a constitution “in conformity with the Constitution of the United States in all respects.” 14 Stat. 428 (1867). This revised state constitution expressly set forth that “all attempts . . . to dissolve [the] Union or to sever [the] nation, are unauthorized and ought to be resisted with the whole power of the state.” VA. CONST. of 1870, art. I, § 2.

45. Derek W. Frisby, *The Vortex of Secession: West Tennesseans and the Rush to War*, in *SISTER STATES, ENEMY STATES: THE CIVIL WAR IN KENTUCKY AND TENNESSEE* 47, 53 (Kent Dollar et al. eds., 2011).

46. *Id.* at 61.

47. May 7, 1861 Declaration of Independence and Ordinance Dissolving the Federal Relations Between the State of Tennessee and the United States of America, *republished in* AM. HIST. LEAFLETS: COLONIAL & CONST., Nov. 1893, at 19–20.

48. Robert Tracy McKenzie, *An Unconditional, Straight-out Union Man: Parson Brownlow and the Secession Crisis in East Tennessee*, in *SISTER STATES, ENEMY STATES: THE CIVIL WAR IN KENTUCKY AND TENNESSEE* 72, 76 (Kent Dollar et al. eds., 2011).

49. *Texas v. White*, 4 U.S. 700 (1868).

erendum, were illegal, yet some scholars assert that those secessions occurring with the consent of the populace in the form of a referendum might be legal.<sup>50</sup> Peter Radan, analyzing the legal reasoning underlying *Texas v. White*, argued that it “does not support the proposition that unilateral secession from the United States is illegal and unconstitutional.”<sup>51</sup> *Texas v. White*, Radan notes, contemplates secession by consent.<sup>52</sup> In such a scenario, a national independence referendum on independence could arguably command legitimacy and result in legal secession.<sup>53</sup>

Though the Confederate secessions were ultimately found illegal, they established important points of reference for future independence referendums. Each of the Confederate independence referendums proceeded through a formal legislative process, invoked a legal ground for holding a referendum, formulated a question to the voters, and commanded strong majorities for secession. Although the independence referendums after the American Civil War occurred for different reasons that included demands for foreign affairs powers, economic control, and national sovereignty, these principles would figure in the independence referendums that followed.

### *B. Independence Referendums After the American Civil War, 1905-1944*

While the period of American Civil War established important requirements for independence referendums, the subsequent period refined the process and illustrated the increased importance of the principle of standing. The following sections will consequently discuss and analyze the independence referendums held between the American Civil War and World War II.

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50. Peter Radan, *Secessionist Referenda in International and Domestic Law*, 18 NATIONALISM & ETHNIC POL. 8, 18 (2012). Glen Anderson notes, contrary to Radan and Akhil Amar, that *White* is typically understood to preclude the constitutionality of secession. Anderson, *supra* note 6, at 351 (citing Akhil Reed Amar, *The David C. Baum Lecture: Abraham Lincoln and the American Union*, 2001 U. ILL. L. REV. 1109, 1115 (2001)).

51. Peter Radan, ‘An Indestructible Union of Indestructible States’: *The Supreme Court of the United States and Secession*, 10 LEGAL HIST. 187, 201 (2006).

52. *Id.* at 194–95.

53. *Id.*

## 1. Norway

The next independence referendum followed Norway's efforts to secede from Sweden.<sup>54</sup> In 1814, the Kingdom of Norway attempted to secure complete sovereignty after being ceded to Sweden by Denmark, yet ultimately accepted a joint monarch and diplomatic service with Sweden.<sup>55</sup> Conflicts between Norway and Sweden arose throughout the 1890s, and when Norway sought and failed to attain sovereign foreign affairs powers coequal with Sweden's in 1905, the Norwegian ministers resigned their positions.<sup>56</sup> Norway's legislature then seceded from Sweden unilaterally in 1905 in protest of the King's failure to reconstitute the government.<sup>57</sup> Though the Swedish legislature decried the move as illegal, it approved conditions for the dissolution of the union that included a referendum and ongoing negotiations as to the implementation of Norway's independence.<sup>58</sup> The referendum asked Norwegians if they "agree[d] to the dissolution that has taken place."<sup>59</sup> The Norwegian electorate approved independence in its referendum and negotiated the necessary requirements.<sup>60</sup> The overwhelming approval was a relief to Norway, which had undertaken a massive campaign to attain a "Yes" majority.<sup>61</sup>

## 2. Western Australia

During the same period, Western Australia, a mineral-rich region within the British colony of Australia, declined to affirm a Commonwealth Constitution in referendums held in 1898 and 1899 that would create a largely independent Australian Federation.<sup>62</sup> Ultimately, after the bill was ratified in the Imperial

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54. Qvortrup, *supra* note 28, at 57.

55. Øystein Sørensen, *1905—A Peaceful Separation*, NORWAY, SWED. & UNION, [http://www.nb.no/baser/1905/tema\\_soren\\_e.html](http://www.nb.no/baser/1905/tema_soren_e.html) (last visited Jan. 16, 2016).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Circular of Instructions from the Department of Justice to the Registration Officers and Board of Education, July 29, 1905*, in SARAH WAMBAUGH, A MONOGRAPH ON PLEBISCITES: WITH A COLLECTION OF OFFICIAL DOCUMENTS (1920).

60. Sørensen, *supra* note 55.

61. *The Referendums in 1905*, NORWAY, SWEDEN & UNION, [http://www.nb.no/baser/1905/tema\\_folk\\_e.html](http://www.nb.no/baser/1905/tema_folk_e.html) (last visited Dec. 29, 2015).

62. Qvortrup, *supra* note 29, at 138, 141.

Parliament of the United Kingdom, the voters of Western Australia approved the bill.<sup>63</sup> Australian politicians, spurred by the American example felt the need to win the support of Western Australia's population.<sup>64</sup> In 1906, frustrated with its inability to set its own customs and tariff policy, the Legislature of Western Australia drafted legislation that called for a referendum on withdrawing from the Australian Federation.<sup>65</sup>

By the late 1930s, with the onset of the Great Depression and continued high tariff policies, support for Western Australia's secession from the Australian Federation had surged.<sup>66</sup> Pursuant to acts of the Western Australian legislature, a referendum asked voters if they were "in favour of the State of Western Australia withdrawing from the federal Commonwealth established under the Commonwealth of Australia Constitution Act (Imperial)?"<sup>67</sup> When the voters approved the referendum two to one, the secessionists had to decide whether to attempt to secede unilaterally, seek internal amendment of the Australian constitution, or petition the Imperial Parliament to amend the Commonwealth of Australia Constitution Act to permit Western Australia's secession.<sup>68</sup>

In turn, the newly elected Premier struggled with the tension between the new Federation of Australia and his party's dedication to the principles of referendums.<sup>69</sup> Yet, he vowed to give the referendum effect, and the secessionists made a petition to the Imperial Parliament of the British Empire.<sup>70</sup> When Western Australia chose this latter option, the Imperial Parliament declined to recognize the Western Australian delegation's standing, and dismissed the petition.<sup>71</sup>

The Imperial Parliament refused to accept the petition for a lack of standing.<sup>72</sup> The Joint Select Committee, comprised of members from the House of Lords and the House of Commons,

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63. *Id.* at 138.

64. *Id.* at 137.

65. Thomas Musgrave, *The Western Australian Secessionist Movement*, 3 MACQUARIE L.J. 95, 100 (2003).

66. *Id.* at 105.

67. *Id.* at 106.

68. *Id.* at 107.

69. *Id.*

70. *Id.* at 107, 108.

71. *Id.* at 122.

72. *Id.*

refused the petition because the parliament of Western Australia submitted its petition as a substate actor.<sup>73</sup> Only the Commonwealth of Australia could submit the petition, and because it had not, the Imperial Parliament refused to give the petition effect.<sup>74</sup>

### 3. Iceland

Few independence referendums immediately followed Western Australia's in 1933.<sup>75</sup> Fifty independence referendums occurred between Western Australia's and Scotland's, but only one occurred between 1933 and the Second World War.<sup>76</sup> Iceland seceded from Denmark at the height of the Second World War on entirely different terms than did Western Australia.

Icelandic nationalists had been agitating for increased sovereignty from Denmark since 1848, and accomplished a revival of their legislature, the *Althing*, in 1874.<sup>77</sup> Demands for secession escalated in 1913, when Denmark confiscated an Icelandic flag in Reykjavik's harbor.<sup>78</sup> These demands resulted in Denmark forming the Danish Committee, which "enacted a new Union treaty which established an independent state with the Danish monarch at its head."<sup>79</sup> Consequently, unlike the formerly colonial Western Australia, which entered the Australian Federation as a colonial territory, but similar to Norway, which had sovereignty over domestic affairs when it held its referendum, Iceland had domestic sovereignty when it held a 1918 referendum approving the Act of Union that joined the kingdoms of Iceland and Denmark.<sup>80</sup> This Act of Union provided for review and revision in 1940, and revocation three years thereafter if both parties could not agree on renewing the Act of Union.<sup>81</sup> When

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73. *Id.*

74. *Id.*

75. Qvortrup, *supra* note 28, at 58.

76. *Id.*

77. CREATING NEW STATES: THEORY AND PRACTICE OF SECESSION 39–40 (Aleksandar Pavkovic & Peter Radan eds., 2013).

78. *Id.*

79. Aleksandar Pavkovic, *Peaceful Secessions: Norway, Iceland and Slovakia*, in CREATING NEW STATES: THEORY AND PRACTICE OF SECESSION 515, 516 (Aleksandar Pavkovic & Peter Radan eds., 2013).

80. Robert Young, *How Do Peaceful Secessions Happen?*, 27 CAN. J. POL. SCI. 773, 788 (1994).

81. Ágúst Þór Árnason, *Colonial Past and Constitutional Momentum: The Case of Iceland*, 8 ICE. E-JOURNAL NORDIC & MEDITERRANEAN STUD., no. 2, 2013,

Iceland terminated the Act of Union in 1940, the constitutional secession process remarkably proceeded without incident, despite the occupation of Denmark, and Icelandic voters overwhelmingly approved independence.<sup>82</sup>

#### 4. Early Twentieth Century Independence Referendums and the Issue of Standing

The early twentieth century independence referendums both applied and developed the principles of the Confederate independence referendums by proceeding through legislative or parliamentary measures, posing direct questions, and achieving significant majorities. However, these subsequent independence referendums illustrate an additional aspect of the process. Norway and Iceland achieved secession because they initially entered accords with their parent states as complete sovereigns, and were thus better positioned to constitutionally reclaim such sovereignty later by independence referendum.<sup>83</sup> Western Australia, by contrast, was a federal state within a former colony, and lacked the standing required to negotiate the implementation of its independence referendum with the United Kingdom.<sup>84</sup> Thus, the secessions of Norway, Western Australia, and Iceland illustrate the importance of legal standing to call an independence referendum and negotiate its implementation.

#### *C. Independence Referendums in the Postwar Period*

Some independence referendums after the Second World War occurred during conflict, some during the dissolution of states, and many implicated concerns for a fair and free electorate.<sup>85</sup> By

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at 1, 3–4, <http://nome.unak.is/nm-marzo-2012/vol-8-no-2-2013/58-conference-paper/425-colonial-past-and-constitutional-momentum-the-case-of-iceland?tmpl=component&format=pdf>.

82. Young, *supra* note 80, at 788.

83. *Id.* at 787–88.

84. Musgrave, *supra* note 65, at 122.

85. Matt Qvortrup, *New Development: The Comparative Study of Secession Referendums*, 34 PUB. MONEY & MGMT. 153, 156 (2014). Many of the postwar independence referendums occurred during the breakup of the Soviet Union and the Balkans conflict. The majority of independence referendums occur in nondemocratic countries, which “might explain the high success rate.” *Id.*

at least one scholar's measure, only one independence referendum in a democratic state has resulted in secession, in Montenegro in 2006.<sup>86</sup>

In the postwar period, secessionists held thirteen independence referendums across the world, which were employed in a number of contexts.<sup>87</sup> Though the majority of colonies that achieved independence in the postwar period did not submit the matter to the electorate, the breakup of several colonies was achieved by independence referendum.<sup>88</sup> The collapse of the French Empire provides an example. In 1958, eleven colonies voted to retain ties with France, while only one, Guinea, rejected the proposition and consequently gained its independence.<sup>89</sup>

Apart from these French referendums, however, independence referendums in the context of decolonization remained relatively rare.<sup>90</sup> Though these early referendums occurred in contexts that included decolonization, it is "difficult to find a general pattern of when referendums were held after the Second World War."<sup>91</sup>

Despite the absence of such a general pattern, these postwar referendums cumulatively developed the principles and form of the modern independence referendum.<sup>92</sup> Each referendum struggled for legitimacy and grappled with difficult procedural questions about enfranchisement, the referendum question, and the required majority.<sup>93</sup> Ultimately, by the time the Soviet Union fell, "independence referendums became something approaching an international norm before secession could take

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86. *Id.*

87. *Id.* at 154.

88. Qvortrup, *supra* note 28, at 58.

89. *Id.* Qvortrup notes that while Guinea, under the leadership of the nationalist Ahmed Sékou Touré, rejected association with France, the eleven states that voted to remain in Charles de Gaulle's *Communauté française* all became independent states within two years. *Id.* None of these states held independence referendums. *Id.*

90. Qvortrup, *supra* note 29, at 145.

91. Qvortrup, *supra* note 28, at 59.

92. *Id.* at 63–64. Despite the variety of historical contexts, independence referendums continued to implicate the same issues and trends in procedural and legal approaches to referendums.

93. *Id.*

place.”<sup>94</sup> Indeed, after the collapse of the Soviet Union, the majority of new emerging states held independence referendums.<sup>95</sup> These included countries seceding from Communist rule, but also countries unable to hold referendums because the United States and the Soviet Union exerted influence over their domestic governance.<sup>96</sup>

After the collapse of the Soviet Union, independence referendums were held at an unprecedented rate.<sup>97</sup> Former Soviet States voted on their independence, and the resultant new states in turn faced independence referendums from substate separatists.<sup>98</sup> At the same time, a handful of voters in western democracies conducted independence referendums, including those in Quebec.<sup>99</sup>

## II. QUEBEC AND THE MODERN INDEPENDENCE REFERENDUM

Building upon the independence referendums that preceded it, the 1995 independence referendum in Quebec constitutes a critical precedent, which directly influenced and framed the Scottish independence referendum. The following sections will discuss the 1995 independence referendum, the subsequent adjudication of the referendum by the Supreme Court of Canada, subsequent legislation concerning the referendum, and the application of the Quebec precedent in the modern era.

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94. *Id.* at 60.

95. STEPHEN TIERNEY, *THE REFERENDUM IN MULTI-LEVEL STATES: FRACTURING OR FOSTERING FEDERAL MODELS OF GOVERNMENT?* 5 (2014).

96. Qvortrup, *supra* note 29, at 147. East Timor was able to hold an independence referendum in 1999, only after the end of the Cold War. *Id.* The United States had previously supported the incumbent Suharto regime against the Soviet Union. *Id.*

97. Qvortrup, *supra* note 85, 154. The majority of postwar independence referendums occurred after the fall of the Soviet Union, driven in part by the dissolution of the Soviet Union and Yugoslavia. *Id.*

98. *Id.* For example, Georgia seceded from the Soviet Union after a referendum in 1991 only to face subsequent independence referendums from South Ossetia and Abkhazia thereafter.

99. *Id.* at 155. Other than Quebec, the island of Nevis in the state of St. Kitts and Nevis attempted secession by referendum pursuant to constitutional provision in 1998, and Montenegro achieved secession from the state of Serbia by independence referendum in 2005. See discussion *infra* Part II.D.



### A. The Referendums

The 1995 independence referendum in Quebec was a critical event in the development of international law on secession and referendums.<sup>100</sup> Before the 1995 referendum, however, Quebec first attempted near independence in 1980 with a referendum on whether Quebec should attain sovereignty while retaining some economic association with Canada.<sup>101</sup> Under such an agreement, Quebec, “though nominally independent, would retain some form of political and economic partnership with the rest of Canada.”<sup>102</sup>

The 1980 referendum was defeated, and Quebec put full independence to a vote in 1995.<sup>103</sup> The 1995 referendum failed by an exceedingly small margin.<sup>104</sup> Though the referendum narrowly failed, debates persisted throughout the secession campaign as to the required majority to approve independence.<sup>105</sup> Further, the wording of the exact question was a matter of disagreement.<sup>106</sup> Thereafter, Canada would address these disputes about Quebec’s referendums through adjudication in the Supreme Court, the case of the Secession Reference (“Secession Reference”), and legislation in Parliament, the “Clarity Act.”

### B. Secession Reference

In the wake of the secessionists’ narrow loss in 1995, a host of domestic legislative and judicial law considered and refined the principles of the independence referendum.<sup>107</sup> The constitutionality of the referendum and its comportment with international

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100. Radan, *supra* note 50, at 16.

101. Beigbeder, *supra* note 13, ¶ 43.

102. Christopher K. Connolly, *Scottish Independence Insta-Symposium: “Devolution Max” and the Question of Referendum Questions*, OPINIO JURIS (Sept. 17, 2014, 3:30 PM), <http://opiniojuris.org/2014/09/17/scottish-independence-insta-symposium-devolution-max-question-referendum-questions>.

103. *Id.*

104. Beigbeder, *supra* note 13, ¶ 43.

105. Oklopcic, *supra* note 112, at 26–27.

106. Peter Lynch, *Scottish Independence, The Quebec Model of Secession and the Political Future of the Scottish National Party*, 11 NATIONALISM & ETHNIC POL. 503, 507 (2005). The 1995 referendum asked whether Quebec should become sovereign after “a formal offer to Canada for a new economic and political partnership,” in part due to nationalist requests for a compromise question. *Id.* (citing Jean Crête, *The Quebec 1995 Constitutional Referendum*, 6 REGIONAL & FED. STUD., no. 3, 1996, at 81).

107. *Id.*

law was adjudicated by Supreme Court of Canada in Reference re Secession of Quebec.<sup>108</sup> This important decision represents the first meaningful adjudication of an independence referendum and attempted secession since *Texas v. White*.<sup>109</sup>

The Court held that Quebec had no unilateral right of secession under international law, but also concluded that international law did not expressly preclude such a right.<sup>110</sup> Secession implicates the principle of territorial integrity, enshrined in the Charter of the United Nations.<sup>111</sup> However, the Court noted that in the absence of a specific prohibition of secession, the principle of self-determination, evidenced by the Charter of the United Nations and affirmed by the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and other international instruments, requires that people are entitled to pursue political, economic, and social development.<sup>112</sup>

While the principle of self-determination is typically recognized through internal self-determination, pursued “within the framework of an existing state,” external self-determination, or a unilateral right to secession, could be available under specific, delineated circumstances that did not apply to Quebec.<sup>113</sup> Under the Secession Reference, unilateral “secession is only authorized in exceptional circumstances, namely where a community within a State is subject to oppression.”<sup>114</sup> Absent such circumstances, a clear referendum result alone has no legal effect, nor can it displace the rule of law or the principles of federalism.<sup>115</sup> The Canadian Supreme Court recognized that this principle requires secessionists to negotiate both the act of secession and the terms of such secession with the federal government.<sup>116</sup>

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108. Reference re Secession of Quebec [1998] 2 S.C.R. 217 (Can.).

109. See *supra* Part I.A.4.

110. Beigbeder, *supra* note 13, ¶ 43.

111. [1998] 2 S.C.R. 217, 278 (Can.); U.N. Charter art. 2(4).

112. [1998] 2 S.C.R. 217, 278–80 (Can.) (citing International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI) (Dec. 16, 1966); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI) (Dec. 16, 1966); and Final Act of the Conference on Security and Co-operation in Europe, 14 I.L.M. 1292 (1975)).

113. Tierney, *supra* note 21, at 375.

114. *Id.*

115. [1998] 2 S.C.R. 217, 221 (Can.).

116. *Id.*

Thus, the Court held that secession could be possible only if “facilitated by a negotiated constitutional amendment.”<sup>117</sup> An amendment was required, because secession could only be effected by respecting the rights and interests of Canadians outside of Quebec in the Canadian Constitution.<sup>118</sup> Such an amendment would have to begin with “a clear expression of the people of Quebec of their will to secede from Canada” in the form of an independence referendum.<sup>119</sup>

Though the secessionists asserted that a simple majority could approve an independence referendum, the Court’s opinion is interpreted to require more than a simple majority.<sup>120</sup> However, the Secession Reference did not fully establish what constituted a “clear expression” with regards to the referendum question or the specifically required majority.<sup>121</sup> The ambiguous majority requirement and unclear referendum question are often identified as reasons why the margin of loss on the 1995 vote was so narrow.<sup>122</sup> These issues were then legislated to provide greater guidance on the matter.

### C. Clarity Act of 2000

The Parliament of Canada responded with a definitive statement on the issues posed by the independence referendum to foreclose further debate.<sup>123</sup> It passed the Clarity Act, which set forth a procedure for evaluating referendum questions.<sup>124</sup> The House of Commons was tasked with determining whether any referendum majority constituted a “clear” majority for purposes of the Secession Reference.<sup>125</sup> “Majority” is assessed based on several factors, including the size of the majority and the number of eligible voters.<sup>126</sup> Critically, the Clarity Act precluded any proposals on sovereignty and association, requiring “a referendum that sets forth a stark choice between either full separation

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117. Radan, *supra* note 50, at 16.

118. [1998] 2 S.C.R. 217, 221 (Can.).

119. *Id.* at 221.

120. Radan, *supra* note 50, at 17.

121. Connolly, *supra* note 8, at 74.

122. *Id.* at 75.

123. *Id.*

124. *Id.*

125. Clarity Act, R.S.C. 2000, c. 26 (Can.).

126. *Id.*

or continued inclusion in the Canadian state.”<sup>127</sup> In response, the National Assembly of Quebec passed legislation, “Bill 99,” a rebuke and alternative to the Clarity Act that reasserted the right of the people of Quebec to express their political will on their own terms.<sup>128</sup>

Because the Clarity Act was passed to apply the Supreme Court’s holding in the Secession Reference, it represents an enactment of Canada’s judicial assessment of independence referendums under the international legal principles of territorial integrity and self-determination evinced by the Charter of the United Nations and the International Covenant on Civil and Political Rights. The Clarity Act also represents an assessment of the process and requirements of independence referendums, providing a potential model for future independence referendums.<sup>129</sup>

#### *D. Application of Quebec Referendum Principles in the Modern Referendum*

In the new millennium, the European Union applied the principles of the Secession Reference when the European Commission for Democracy through Law advised Montenegro on its referendum on independence from Serbia.<sup>130</sup> The Constitution Charter of the State Union of Serbia and Montenegro explicitly provided for secession after approval by independence referendum.<sup>131</sup> However, the Commission for Democracy through Law

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127. Connolly, *supra* note 8, at 74.

128. An Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Québec People and the Québec State, R.S.Q. 2000, c. E-20.2 (Can.).

129. See Lynch, *supra* note 106. Lynch, writing in advance of the Scottish independence referendum, recognized that certain principles of the independence referendum process used in Quebec could apply to Scotland, though he ultimately argued that political and constitutional constraints prevent its application in Scotland. *Id.*

130. Oklopčić, *supra* note 12, at 24–25. (“The Canadian Supreme Court’s ruling in the Secession Reference was used in the Montenegrin context by the European Commission for Democracy through Law (Venice Commission) to argue that Montenegro’s referendum must feature ‘a clear question’ and yield ‘a clear majority’ in favor of secession.”) For a discussion of the Venice Commission’s opinion on the compatibility of the existing legislation in Montenegro concerning the organization of referendums with applicable international standards, see Karsten Friis, *The Referendum in Montenegro: The EU’s Post-modern Diplomacy*, 12 EUR. FOREIGN AFF. REV. 67, sec. V (2007).

131. Radan, *supra* note 50, at 16.

proposed the enfranchisement and majority requirements that ultimately structured the referendum.<sup>132</sup> Only Montenegrin-resident citizens could vote, more than half of the eligible electorate had to vote, and over 55 percent of the voting electorate had to approve the referendum.<sup>133</sup> Thus, Montenegro engaged with the issue of the “clear majority” requirement that the Secession Reference left ambiguous, concluding that a special-majority requirement was required by the circumstances.<sup>134</sup> Montenegro’s achievement of independence shows the successful application of the lessons learned from Quebec and signaled that international law had begun to consider possible frameworks for secession by independence referendum.<sup>135</sup>

### III. SCOTLAND’S INDEPENDENCE REFERENDUM AND NEW PRECEDENT

The governments of the United Kingdom and Scotland further refined the principles of the independence referendum. Long agitating for autonomy and independence from the United Kingdom, the Scottish National Party helped secure their autonomy, in part, with a 1998 referendum on the devolution of power to Scotland.<sup>136</sup> The referendum on devolution victory led to the passage of the Scotland Act and the establishment of Scottish Parliament.<sup>137</sup> In 2011, the Scottish National Party attained a commanding majority of the Scottish Parliament, and thereafter its

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132. Oklopcic, *supra* note 12, at 27.

133. *Id.*

134. Qvortrup, *supra* note 28, at 61. Though special majority requirements are often employed towards obstructionist aims, they have been used in limited circumstances in a constitutional context. The federation of St. Kitts and Nevis provided for secession on approval by two-thirds of the eligible electorate; however, a 1998 referendum failed to obtain the necessary special majority. *Id.*

135. Radan, *supra* note 50, at 15–16. Quebec and Montenegro provide different constitutional examples of an implicit and explicit right to secession, respectively.

136. Connolly, *supra* note 8, at 61.

137. See Scotland Act, 1998, c. 46 (U.K.). In a referendum held on September 9, 1998, 74 percent of voters approved a Scottish Parliament and the reservation of basic income tax determinations to the Parliament of England. Cabinet Office & Scotland Office, *Devolution Settlement: Scotland*, GOV.UK (Feb. 20, 2013), <https://www.gov.uk/guidance/devolution-settlement-scotland>.

leader and the First Minister of Scotland, Alex Salmond, proclaimed there would be a referendum on independence from the United Kingdom.<sup>138</sup>

Despite its stated opposition, the United Kingdom reached an agreement to hold a fair, decisive, legal, legitimate, and respectable referendum (the “Edinburgh Agreement”).<sup>139</sup> The two governments were able to agree to the broad principles of the independence referendum,<sup>140</sup> and the Scottish Parliament dutifully legislated a detailed, exhaustively considered process by which it could practicably, legally, and legitimately sever its centuries-long ties with the United Kingdom.<sup>141</sup>

### *A. Consent and the Edinburgh Agreement*

The Scottish independence referendum was preceded by historic negotiations between the U.K. and Scottish governments, resulting in the consent of the United Kingdom to a referendum and an agreement on the principles of the referendum. The following section will analyze the devolution of powers to Scotland that ultimately enabled negotiations between Scotland and the United Kingdom, as well as the agreement that followed thereafter.

#### 1. Scottish Devolution

Scotland was able to secure an agreement with the United Kingdom to hold an independence referendum and implement its result in part because the United Kingdom had devolved cer-

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138. *Salmond Calls for Independence Referendum in 2014*, BBC (Jan. 10, 2012, 10:14PM), <http://www.bbc.co.uk/news/uk-scotland-16478121>.

139. *Agreement Between the United Kingdom Government and the Scottish Government on a Referendum on Independence for Scotland*, SCOTTISH GOV'T (Oct. 15, 2012) [hereinafter *Edinburgh Agreement*], <http://www.scotland.gov.uk/About/Government/concordats/Referendum-on-independence>.

140. The Edinburgh Agreement provided the following:

The governments are agreed that the referendum should: have a clear legal base; be legislated for by the Scottish Parliament; be conducted so as to command the confidence of parliaments, governments and people; deliver a fair test and a decisive expression of the views of people in Scotland and a result that everyone will respect.

*Id.*

141. Scottish Independence Referendum Act 2013, (ASP 14).

tain governmental functions to the Scottish government that enabled Scotland to later push for secession.<sup>142</sup> The 1997 referendum on devolution established the Scottish Parliament and the position of First Minister.<sup>143</sup>

When the Scottish National Party took control of the Scottish Parliament in 2011, Scottish Parliament initially considered passing legislation for the independence referendum.<sup>144</sup> The legality of such legislation was debated, but ultimately the pressure exerted by Scottish Parliament resulted in negotiations and eventual agreement between Scotland and England.<sup>145</sup> Devolution, while recognized to lower “the institutional barriers to independence,” was also feared to create legislative obstacles to attaining full independence.<sup>146</sup> Yet Scotland, uniquely, was able to engage the U.K. government and obtain its consent to a dispositive independence referendum.<sup>147</sup>

## 2. The Edinburgh Agreement

The U.K. and Scottish governments reached a historic accord, the Edinburgh Agreement on October 15, 2012.<sup>148</sup> The Edinburgh Agreement established the basic parameters for the independence referendum, requiring the referendum to have Scottish implementing legislation, a clear legal base, legitimate procedures, and to “deliver a fair test” and “decisive expression” that would be respected legally and politically.<sup>149</sup> An important facet of the Edinburgh Agreement was the explicit devolution of authority by the United Kingdom to Scotland to legislate an independence referendum, resolving the dispute over whether such legislation properly fell under the ambit of the Scotland Act.<sup>150</sup>

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142. See Lynch, *supra* note 106, at 514 (noting that devolution conferred both advantages and systematic constraints on Scottish Nationalists seeking independence through referendum).

143. Scotland Act 1998, c.46, §§ 1, 45 (UK).

144. Tierney, *supra* note 21, at 360.

145. *Id.* at 361–62.

146. See Lynch, *supra* note 106, at 504–05.

147. Christopher Borgen, *Will There be a Scottish Precedent?*, OPINIO JURIS (Sept. 18, 2014, 3:58 AM), <http://opiniojuris.org/2014/09/18/will-scottish-precedent>.

148. Edinburgh Agreement, *supra* note 139.

149. *Id.*

150. *Id.*

The consent of the U.K. government to the Scottish independence referendum showed a “level of acquiescence which is . . . unprecedented” in the EU.<sup>151</sup> Scotland’s independence could not comport with international law if it was unilateral in character.<sup>152</sup> Indeed, James Crawford, writing a legal opinion at the request of the United Kingdom, concluded that the only legal basis for Scotland’s separation would be the consent of the United Kingdom.<sup>153</sup> The commitment of the United Kingdom to honor and implement the results of the referendum suggested that an approval of independence would facilitate a transition to independence, international recognition, and membership in the United Nations.<sup>154</sup> Because parent states are the principal objectors to attempted secessions by independence referendums, the consent of the United Kingdom obviated the debate about the legality of Scotland’s secession under international law and could have assisted Scotland in attaining international recognition.<sup>155</sup>

If Scotland failed to obtain the consent of the United Kingdom before the independence referendum, it may have ultimately failed to obtain recognition by the international community and membership in international organizations, even subsequent to a successful independence referendum.<sup>156</sup> Though Scotland would meet the customary criteria for conferring recognition on a state,<sup>157</sup> which is not constitutive of statehood,<sup>158</sup> in such a sce-

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151. Tierney, *supra* note 21, at 360.

152. Connolly, *supra* note 8, at 77.

153. Crawford, *supra* note 22, at 67, paras. 1 & 22.3. Crawford concludes that the principle of self-determination as delineated in the Secession Reference does not confer a right to secede on Scotland, as it is a non-colonial state. *Id.*

154. Stephen Tierney, *Scottish Independence Insta-Symposium: ‘Negotiated Independence’—Scottish Independence and a New Path to Statehood?*, OPINIO JURIS (Sept. 16, 2014, 9:00 AM), <http://opiniojuris.org/2014/09/16/scottish-independence-insta-symposium-negotiated-independence-scottish-independence-new-path-statehood>.

155. Tierney, *supra* note 21, at 378; Milena Sterio, *International Law Should Matter—Thoughts on the Proposed Scottish Secession*, OPINIO JURIS (Sept. 17, 2014, 10:30 AM), <http://opiniojuris.org/2014/09/17/scottish-independence-insta-symposium-international-law-matter-thoughts-proposed-scottish-secession>.

156. Tierney, *supra* note 154.

157. Montevideo Convention on the Rights and Duties of States, art. 1, Dec. 26, 1933, 165 L.N.T.S. 19.

158. Reference re Secession of Quebec [1998] 2 S.C.R. 217, para. 143 (Can.).



nario states could still withhold recognition. A state may withhold recognition of Scotland, a free and democratic country bound to the United Kingdom, because a unilateral secession would violate the principles of self-determination in a constitutional context as understood by that state.<sup>159</sup> Further, if Scotland failed to negotiate a constitutional process for an independence referendum and proceeded in spite of that fact, states may withhold recognition because an independence referendum violated U.K. law.<sup>160</sup>

### *B. The Scotland Referendum Act*

The Edinburgh Agreement both conferred the authority to legislate the referendum on Scottish Parliament and required it to so legislate.<sup>161</sup> Scotland took the referendum requirements enunciated by the Edinburgh Agreement and implemented legislation in the form of the Scottish Independence Referendum (Franchise) Act ("Franchise Act") and the Scottish Independence Referendum Act.<sup>162</sup> Taken with the Edinburgh Agreement, these Acts structured the Scottish referendum as a model independence referendum.

#### 1. Framing the Question of Secession

The Scottish independence referendum asked voters "Should Scotland be an independent country?"<sup>163</sup> The question is a template of clarity, in contradistinction, for example, to the vague questions about sovereignty found in referendums like those in Quebec.<sup>164</sup> The question, as always, was the source of great debate; initially the question read, "Do you agree that Scotland

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159. The Prime Minister of Spain has refused to recognize the Catalanian independence referendum, discussed at greater length below, rejecting attempts to amend the Constitution to permit independence referendums. Borgen, *supra* note 147.

160. Tierney, *supra* note 154.

161. Edinburgh Agreement, *supra* note 139.

162. Scottish Independence Referendum Act 2013, (ASP 14); Scottish Independence Referendum (Franchise) Act 2013, (ASP 13) §§ 1–2.

163. Scottish Independence Referendum Act 2013 § 1.

164. Connolly, *supra* note 102. By Quebec referendum's standards, "the Scottish referendum question could not be more clear and straightforward." *Id.* The Quebec question perplexingly asked voters, "Do you agree that Quebec should become sovereign, after having made a formal offer to Canada for a new economic and political partnership, within the scope of the Bill Respecting the Future of Quebec, and of the agreement signed on June 12, 1995?"

should be an independent country?”, which was perceived as potentially prejudicial phrasing.<sup>165</sup>

Yet the clear question that would appear on the referendum ballot ultimately emerged from the Edinburgh Agreement, which required that the referendum question be an unequivocal vote on separation from the United Kingdom.<sup>166</sup> Though Scotland could have attempted to negotiate a referendum that posed the alternative question of devolution,<sup>167</sup> the binary question posed instead comports exactly with the “clear question” requirement as explicated by the Clarity Act.<sup>168</sup>

## 2. Majority

Scotland established a simple majority requirement to approve the independence referendum.<sup>169</sup> Thus, Scotland engaged with the “clear majority” requirement of the Secession Reference, arriving at a different conclusion than did Montenegro.<sup>170</sup> The independence referendums in Montenegro and elsewhere required special majorities, and the propriety of such special majorities remains debated.<sup>171</sup> Indeed, Scotland wished to foreclose the possibility of another defeat due to a special majority requirement; a 1979 Scottish referendum on devolution that was approved by a majority of voters had no effect due to a special turnout requirement.<sup>172</sup> Scotland’s decision comports with the majority of state practice in this regard, and cannot be said to conflict with international norms.<sup>173</sup>

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165. Tierney, *supra* note 21, at 365.

166. Edinburgh Agreement, *supra* note 139.

167. Connolly, *supra* note 102.

168. Clarity Act, R.S.C. 2000, c. 26 (Can.). The Clarity Act required that referendum choices envisage no other possibilities than secession. *Id.* at art. 1(4).

169. SCOTTISH GOV’T, YOUR SCOTLAND, YOUR REFERENDUM 13, para. 1.21 (2012), <http://www.gov.scot/Resource/0038/00386122.pdf>.

170. *Id.* at 13, para. 1.22. This whitepaper issued by the Scottish Government details how the simple majority requirement comports with both U.K. practice and European state practice. The whitepaper distinguishes the case of Montenegro, which had a special majority requirement, from Scotland, noting that “in 2006 the Venice Commission published a voluntary Code of Good Practice for Referendums” that rejected both special majority and special turnout requirements. *Id.*

171. Qvortrup, *supra* note 28, at 64. Special majority requirements remain rare and often are employed with obstructionist aims.

172. *Id.* at 61.

173. *Id.* at 62.

### 3. Enfranchisement

After the Edinburgh Agreement, Scotland quickly passed the Franchise Act to enable voter registration.<sup>174</sup> The independence referendum was only open to Scottish residents, as was the case in Montenegro.<sup>175</sup> Though voter eligibility in independence referendums continues to be an issue of great dispute,<sup>176</sup> Scotland's decision remained largely uncontroversial.<sup>177</sup>

Yet Scotland's decision to enfranchise voters aged sixteen and over, however, was an important departure from British law.<sup>178</sup> Further, as the voter qualifications were the same as those for Scottish Parliament, the election permitted EU and Commonwealth citizens residing in Scotland to vote in the election.<sup>179</sup> In so doing, Scotland successfully permitted those most directly affected by the independence referendum to vote. Scotland thus negotiated competing notions of an eligible electorate, balancing the "consent-autonomy" principle, embracing those who would consent to a new state, and the "all-affected-interests" principle, embracing all affected parties, including potentially nonresidents.<sup>180</sup>

### 4. Procedure

Scotland legislated important points of procedure in the Referendum Act. The Referendum Act places limitations on funding and spending that substantially reduce the ability of all special interest groups, including those outside Scotland, to affect the referendum outcome.<sup>181</sup> The Act also empowers an Electoral Commission, tasked in part with attaining the largest possible

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174. Tierney, *supra* note 21, at 363.

175. Oklopcic *supra* note 12, at 25, 27. In Montenegro's, the enfranchisement of nonresident citizens was a contentious issue; the referendum was restricted to resident citizens. *Id.*

176. Qvortrup, *supra* note 28, at 63. In contrast to the 2014 Scottish and 2005 Montenegrin independence referendums, which both excluded nonresidents, Eritrea and East Timor included nonresidents in 1993 and 1999, respectively. *Id.* Qvortrup notes that the existence of a displaced diaspora could potentially justify this inclusion. *Id.*

177. *Id.*

178. Tierney, *supra* note 21, at 364.

179. *Id.* at 363–64. By contrast, the Netherlands disallowed resident EU citizens from voting in its 2006 constitutional referendum. *Id.*

180. Oklopcic, *supra* note 12, at 34–37.

181. Scottish Independence Referendum Act 2013, (ASP 14), §§ 12–14.

voter turnout.<sup>182</sup> The efforts were a success, with 85 percent of eligible voters casting their ballots.<sup>183</sup> Scotland thus demonstrated a free, fair, and motivated referendum.

#### IV. IMPLICATIONS OF THE SCOTTISH INDEPENDENCE REFERENDUM FOR THE FUTURE

The Scottish independence referendum establishes critical precedent for future independence referendums. The example of the Scottish referendum militates for secessionists to obtain the consent of the parent state before proceeding with a referendum on independence. Further, the Scottish referendum requires subsequent independence referendums to follow the Scottish example in requiring a simple majority to approve a clear and unambiguous question. These principles, central to Scotland's independence referendum, can ground future independence referendums in international law and provide conclusive determinations of popular support for secession among an electorate.

##### *A. Consent of the Parent State*

Scotland's independence referendum illustrates how fundamental the consent of the parent state remains to the political possibility and legality of independence referendums. Though Scotland did not attain independence, the governments of Scotland and the United Kingdom broadly agreed to determine the matter of independence by referendum, and from that agreement flowed enacting legislation in the legislatures of both governments.<sup>184</sup> Ultimately, the referendum was held. If the United Kingdom had withheld this vital consent, the Scottish referendum would not have been able to proceed on any legal basis.<sup>185</sup>

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182. *Id.* § 26.

183. Steven Erlanger, *A Kingdom Still Whole, But Far From United*, N.Y. TIMES, Sept. 19, 2014, at A1.

184. The U.K. government enabled the Scottish Parliament to legislate the matter of the independence referendum, *see* The Scotland Act 1998 (Modification of Schedule 5) Order 2013, SI 2013/242 (UK), and the Scottish government passed the Scottish Independence Referendum Act 2013, (ASP 14), in compliance with the terms of the Edinburgh Agreement.

185. Crawford's analysis of the Scottish independence referendum proceeds on the assumption that the appropriate legal basis for Scotland's secession is the consent of the United Kingdom. Crawford, *supra* note 22, at 67, para. 1.

This conclusion is borne out by the case of Catalonia, an autonomous region of Spain. The Catalans, like the Scots, had obtained devolved powers from the government of Spain.<sup>186</sup> Indeed, the powers of the Catalan government exceed that of Scotland, as Catalonia has the powers to control domestic benefit spending as well as dictate certain domestic policies pertaining to taxation, justice, policing, health, and education.<sup>187</sup>

However, Catalonia's devolved powers conferred no advantage that could overcome the lack of consent to an independence referendum from Spain. Catalonia had long sought independence from Spain, and in 2014 Catalan nationalists attempted to legislate an independence referendum, which the Spanish legislature rejected.<sup>188</sup> The central government refused to entertain further discussion, and the matter came to a head when secessionists defiantly vowed to hold the referendum.<sup>189</sup> The High Court of Spain adjudicated the issue, found no legal basis for the referendum, and agreed with the Prime Minister that it was an illegal political maneuver.<sup>190</sup> Yet the secessionists pressed on, holding a nonbinding referendum staffed by volunteers.<sup>191</sup> Though less than half of the electorate participated in the vote, 80 percent of those voting approved independence.<sup>192</sup> Nationalists were dealt another blow in December 2015, when, after attaining a majority of seats in the Catalan legislature and passing a resolution vowing to proceed with an independence referendum, the Constitutional Court of Spain ruled the resolution unconstitutional.<sup>193</sup>

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186. George Arnett, *How do Scotland's Tax and Spending Powers Compare with Catalonia?*, GUARDIAN (Dec. 5, 2014, 9:55 PM), <http://www.theguardian.com/news/datablog/2014/dec/05/how-do-scotlands-tax-and-spending-powers-compare-with-catalonia>.

187. *Id.*

188. *Spain's Parliament Rejects Catalan Independence Bid*, TELEGRAPH (Apr. 9, 2014, 12:58 AM), <http://www.telegraph.co.uk/news/worldnews/europe/spain/10753934/Spains-parliament-rejects-Catalan-independence-bid.html>.

189. Raphael Minder, *Catalonia Overwhelmingly Votes for Independence From Spain in Straw Poll*, N.Y. TIMES, Nov. 10, 2014, at A4.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Catalonia to Pursue Split from Spain Despite Court Block, Mas Says*, REUTERS (Dec. 3, 2015, 5:03 PM), <http://in.reuters.com/article/spain-catalonia-idINKBN0TM1A420151203>.

By contrast, the island of New Caledonia is proceeding with negotiations concerning a referendum on its independence from France to occur by the end of 2017.<sup>194</sup> New Caledonia is engaging in such negotiations because it executed a 1998 agreement with France, the Noumea Accord, which required a referendum on independence to finally and fully resolve whether the electorate of New Caledonia wished to remain an overseas territory of France.<sup>195</sup> Prime Minister Françoise Hollande, in the first official visit by a French Prime Minister to New Caledonia, pledged to hold the vote by 2017 and implement its results.<sup>196</sup> As New Caledonia has the consent of its parent state, it can determine the timing of the independence referendum.<sup>197</sup>

Thus, the Scottish experience establishes the centrality of the principle of consent to the process of an independence referendum. Indeed, as noted in the Secession Reference, a unilateral secession pursuant to an independence referendum is only permissible in limited circumstances, including colonization or domination by a foreign power.<sup>198</sup> Consequently, unless secessionists are victims of colonization or domination, consent is the sole basis for holding an independence referendum. If a parent state withholds such consent, secessionists are unlikely to achieve secession by independence referendum, or obtain state recognition. Where such consent is conferred, states may negotiate with the parent state, as did Scotland, pursue independence referendums with the consent of the parent state, and obtain state recognition without the opposition of the parent state.

### *B. Requirement of a Clear and Polar Question*

Scotland's independence referendum question, "Should Scotland be an independent country?" was a model of simplicity and clarity. Such a question invites no alternatives, a critical point to formulating debate. The question was carefully considered,

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194. *New Caledonia Referendum a Must*, RADIO N.Z. (Nov. 18, 2014, 9:52 AM), <http://www.radionz.co.nz/international/pacific-news/259613/new-caledonia-referendum-a-must>.

195. *Noumea Accord*, reprinted in 7 AUSTL. INDIGENOUS L. REP. 88, para. 5 (2002) [hereinafter *Noumea Accord*], available at <http://www.worldlii.org/au/journals/AILR/2002/17.html>.

196. *New Caledonia Referendum a Must*, *supra* note 194.

197. *Id.*

198. Reference re Secession of Quebec [1998] 2 S.C.R. 217, 295 (Can.).

and determined to have no bias implicit in its phrasing.<sup>199</sup> Initially the question read, "Do you agree that Scotland should be an independent country," which some thought to be prejudicial phrasing; the final phrasing was agreed to be a less prejudicial formulation.<sup>200</sup> Each of these qualities directly resolves issues posed by previous independence referendum questions.

The importance of a clear and polar question is demonstrated by the experience of Catalonia in its nonbinding referendum. In its recent referendum, Catalonia failed to follow the model of Scotland, posing a multipolar question and thus diminishing the possibilities of achieving independence even further.<sup>201</sup> The non-binding Catalan independence referendum asked voters if they "want[ed] Catalonia to be a state" and if so, if they "want[ed] that state to be independent," and such language deprived the result of clarity.<sup>202</sup> Of those eligible voters casting ballots in the non-binding Catalonian independence referendum, 10 percent wished for statehood but not independence, and 5 percent rejected statehood and independence.<sup>203</sup> The multipolar quality of the referendum thus reduced the margin of approval substantially and undercut the finality of the referendum by inviting comparison of three competing options.

Indeed, the U.K. government foresaw this very issue with respect to the Scottish independence referendum when it insisted on a single question concerning independence only, maintaining that only a clear vote on the question of Scottish independence would "put the matter to bed."<sup>204</sup> In this spirit, the Noumea Accord envisions a simple question embracing only full sovereignty and independence of New Caledonia.<sup>205</sup> Again, the Scottish example proves instructive. Unclear, multipolar independence ref-

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199. Tierney, *supra* note 21, at 365.

200. *Id.* Further, a survey of positive and negative language use in independence referendum questions indicated that questions' inflection may not effect referendum responses. Qvortrup, *supra* note 28, at 62.

201. Benjamin Fox, *Breaking up is Hard to Do*, EU OBSERVER (Dec. 29, 2014, 8:24 AM), <https://euobserver.com/review-2014/126470>.

202. *Id.*

203. *Id.*

204. Katrin Bennhold, *On Road to Scotland's Decision, Gambles and Fateful Step*, N.Y. TIMES, Sept. 19, 2014, at A12.

205. *Noumea Accord*, *supra* note 195, art. 5. The Noumea Accord envisions a vote on full sovereignty and provides for two subsequent rounds of voting if the electorate rejects full sovereignty in the first vote.

erendum questions do not produce final and unambiguous decisions on independence. Instead, clear, polar questions produce definite and reliable conclusions.

### *C. Requirement of a Simple Majority*

Scotland required only a simple majority and employed no special majority requirements whatsoever, including those relating to voter turnout.<sup>206</sup> A simple majority eliminates concerns about legitimacy and reduces claims by either party of obstructionism.<sup>207</sup> In the case of Scotland, a simple majority requirement was entirely sufficient to resolve the issue of independence.

Scotland extended the vote to all residents aged sixteen and over, and achieved a remarkable voter turnout.<sup>208</sup> Though the Scottish National Party is already making statements about the possibility of another referendum,<sup>209</sup> the United Kingdom will be devolving greater ability to legislate Scottish taxation and spending policies.<sup>210</sup> This devolution, coupled with the defeat of the referendum, led Prime Minister David Cameron to declare that the issue was “settled for a generation.”<sup>211</sup>

The requirement of a simple majority enhances the transparency and legitimacy of an independence referendum, and secures the basis of that referendum in international law. New Caledonia will enjoy these advantages when it employs a simple majority requirement in its independence referendum.<sup>212</sup>

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206. SCOTTISH GOV'T, note 169, at 13, para. 1.21.

207. Qvortrup, *supra* note 28, at 62.

208. Andy McSmith, *Scottish Referendum Results: Huge Turnout Bolsters Case for Voting at 16*, INDEPENDENT (Sept. 19, 2014), <http://www.independent.co.uk/news/uk/scottish-independence/scottish-referendum-results-huge-turnout-bolsters-case-for-voting-at-16-9745081.html>.

209. *Salmond Believes He Will Get 'Second Chance' at Independence*, STV (Dec. 20, 2014, 11:16 AM), <http://news.stv.tv/scotland-decides/news/304227-salmond-believes-he-will-get-second-chance-at-independence-referendum/>.

210. Haroon Siddique, *New Powers for Scotland: Key Points from the Smith Commission*, GUARDIAN (Nov. 27, 2014, 6:03 AM), <http://www.theguardian.com/politics/2014/nov/27/scottish-devolution-smith-commission-key-points>.

211. Andrew Osborn, *Cameron Says Scottish Independence Issue Settled 'for a Generation'*, REUTERS (Sept. 19, 2014, 9:04 AM), <http://uk.reuters.com/article/2014/09/19/uk-independence-scotland-cameron-idUK-KBN0HE0IN20140919>.

212. *Noumea Accord*, *supra* note 195, art. 5.



Though debates remain as to the proper electorate to enfranchise, the vote is likely to be restricted to residents of New Caledonia.<sup>213</sup> Here, as in the case of Scotland, a simple majority of resident voters will establish a clear referendum result.

## CONCLUSION

While the unionists ultimately prevailed on September 19, 2014, the Scottish independence referendum set a true course for future referendums and indicates an important trajectory in international law. Applying the principles of consent, clarity and majority, it was “a landmark political event” affording “a rare opportunity for a fair, lawful process validated by the assent of both Governments.”<sup>214</sup> The Scottish independence referendum established new and meaningful political precedent for aspiring states to democratically secede, from which “a new norm of customary international law will begin to emerge.”<sup>215</sup> Scotland’s referendum is thus an example of state practice that may require examination of “a positive right of secession under international law.”<sup>216</sup>

The Scottish referendum is poised to affect the progress of other contemporary independence movements as well. Historically, independence referendums “have come in waves.”<sup>217</sup> Catalonians invoked the Scottish example in the nonbinding referen-

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213. *Kanak Group Boycotts Paris Talks on Noumea Accord*, RADIO N.Z. (Sept. 30, 2014) [hereinafter *Kanak Group Boycott*] <http://www.radionz.co.nz/international/programmes/datelinepacific/audio/20151620/kanak-group-boycotts-paris-talks-on-noumea-accord>. The Noumea Accord requires an independence referendum between 2014 and 2018, but disputes about voter eligibility remain an obstacle to implementation negotiations.

214. Tierney, *supra* note 21, at 390.

215. Tom Sparks, *The International Legal Significance of the Scottish Independence Referendum—A Long View*, OPINIO JURIS (Sept. 17, 2014, 8:00 AM), <http://opiniojuris.org/2014/09/17/scottish-independence-insta-symposium-international-legal-significance-scottish-independence-referendum-long-view>.

216. Milena Sterio, *International Law Should Matter—Thoughts on the Proposed Scottish Secession*, OPINIO JURIS (Sept. 17, 2014, 10:30 AM), <http://opiniojuris.org/2014/09/17/scottish-independence-insta-symposium-international-law-matter-thoughts-proposed-scottish-secession>. Others maintain that Scotland’s referendum constitutes no more than persuasive political precedent. Borgen, *supra* note 147.

217. Matt Qvortrup, *The ‘Neverendum’? A History of Referendums and Independence*, POL. STUD. ASS’N (June 24, 2013), <http://www.psa.ac.uk/print/757>.

dum of November 2014, where supporters of independence conducted a referendum despite the Spanish government's pledge to deny the vote any effect.<sup>218</sup> It will be tested this year or the next in New Caledonia, which is in current negotiations to determine the details of an independence referendum.<sup>219</sup> Nationalists also hope to test it in Flemish Belgium.<sup>220</sup> Even Quebec secessionists, despite their previous failures, regard the Scottish referendum as establishing powerful new precedent.<sup>221</sup> If the voters in these and future referendums achieve independence, they will do so based on Scotland's new framework for democratic secession.

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218. Minder, *supra* note 189.

219. *Kanak Group Boycotts*, *supra* note 213.

220. See Katrin Bennhold, *From Kurdistan to Texas, Scots Spur Separatists*, N.Y. TIMES, Sept. 11, 2014, at A1.

221. See Chris Hall, *Scotland Referendum No Vote Holds Lessons for Canada*, CBC NEWS (Sept. 9, 2014, 10:39 AM), <http://www.cbc.ca/news/politics/scotland-referendum-no-vote-holds-lessons-for-canada-1.2771520>. Former Bloc Quebecois MP Jean Dorian regards the simple majority and clear question requirements of the Scottish Referendum as new and relevant precedent. *Id.*

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