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ABSTRACT
This article examines the contrasting norms of sovereignty that underpin the political discourse and policy choices of the UK and Scottish governments in the context of Brexit. Using the lens of contested sovereignty, it explores the meanings attached to sovereignty in both the Brexit process and the response to it within Scotland. It then considers the implications of these contested sovereignties for Scottish self-government, in the context of both devolution and independence. That analysis distinguishes between the locus of sovereignty (parliamentary versus popular) and the form of sovereignty (nation-state versus shared). Both governments have drawn upon popular sovereignty norms, but who makes up the people is contested. The UK's Brexit policy, in relation to both negotiations with the European Union and its domestic preparations, is underpinned by a nation-state sovereignty norm. By contrast, Scottish nationalism is associated with conceptions of shared sovereignty that have become even more pronounced since the European Union referendum. The difficulty in reconciling these sovereignty norms has destabilized the UK's territorial constitution and created new challenges for advocates of independence.

KEYWORDS
sovereignty; Brexit; self-government; Scotland; European Union (EU)

INTRODUCTION

Sovereignty claims are in vogue in the United Kingdom (UK). The 2016 Brexit Referendum saw 52% of voters across the UK vote to leave the European Union (EU), responding to calls from Leave campaigners to 'take back control' of the UK's laws, borders and trade relations. The call to reclaim state sovereignty was embraced by subsequent UK governments, as they pledged to honour the will of the people. But the multiple dimensions of Brexit – the decision to leave the EU; the domestic process of negotiating and preparing for departure; and the form that Brexit has assumed – have reignited competing sovereignty claims, especially within Scotland. The Scottish National Party (SNP), the party of Scottish government since 2007 and overwhelmingly the dominant party in Scotland, has made repeated demands for a new independence referendum since the Brexit vote to enable the people of Scotland to determine their future. Scotland, after all, did not vote for Brexit: 62% of Scots backed Remain in the referendum. As First

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Minister Nicola Sturgeon put it, this meant Scotland was 'taken out of the EU against our will' (Sturgeon, 2020). That perceived injustice provided the catalyst for renewed nationalist mobilization.

These debates have shone a light on the competing conceptions of sovereignty in contemporary UK politics. The claim that Brexit represented the will of the people rests upon assumptions of a singular British people that sits uneasily alongside conceptions of the UK as a union state made up of distinctive peoples and nations. In Scotland, the prevalent view sees the UK as composed of nations that have consented to live together in political union, retaining elements of sovereign authority and ultimately the right to determine an alternative constitutional future (McCrone & Keating, 2021). That view of the UK and Scotland's place within it was reinforced by the introduction of devolution in 1999, following a referendum to test the will of the Scottish people on whether there should be a Scottish Parliament. It was reaffirmed in the 2014 independence referendum, when the UK government conceded the principle and facilitated the process that saw Scots determine their future, consenting to remain in the UK by rejecting the independence alternative.

Yet, outside of Scotland, and especially within Westminster and Whitehall, this narrative, or teleology (Keating, 2022), of the UK was never fully accepted. Devolution did not result in wholesale reform of the UK constitution. It left the central institutions of power largely untouched, even if their policy and law-making functions applied only to England in areas of devolved competence. Whereas EU membership and the supremacy of EU law had constrained the authority of the UK state in areas of EU competence, the devolution statutes explicitly restated the authority of the UK parliament to continue to make laws for the devolved territories. There have always been practical and political constraints on the Westminster parliament's sovereignty (Loughlin & Tierney, 2018) and these were evident in the case of devolution too. But despite devolution, an 'Anglo-British imagery' (Wincott et al., 2021) depicting the UK as a unitary state, with absolute legal sovereignty centralized in the Crown-in-Parliament, remained prevalent.

As Keating (2022) points out in the introduction to this special issue, the ambiguities and contradictions resulting from these competing conceptions of the demos and teleology of the UK state were masked by the UK's EU membership. The constituent territories of the UK were all part of a polity where sovereignty was shared in areas of EU competence, including in those policy fields that correlated with devolved competences. All governments and legislatures within the UK had to operate within the framework of EU law, thus limiting the centrifugal effects that might otherwise have resulted from distributing political authority internally across multiple centres of power. Leaving the EU has brought these contradictions and contestations to the fore, not only exposing contrasting sovereignty visions, but revealing their irreconcilability in constitutional and political practice.

Using the lens of contested sovereignty, this article examines articulations of sovereignty in both the Brexit process and the response to it within Scotland, and considers their implications for Scotland's constitutional status as a devolved territory of the UK and, potentially, an independent state, should that be the alternative future Scots choose. These contested sovereignties are explored conceptually in the first section and empirically in the second section. Here, the article draws upon the interventions of key protagonists in the UK Conservative government-led Brexit process and by those articulating sovereignty claims in Scotland, focusing on the SNP Scottish government's response to Brexit. These contributions came from two key sources: the UKPol political speech archive and the collection of First Minister's speeches collated by the Scottish government. This produced a dataset of 89 speeches: 48 speeches or statements from UK government representatives and 41 from Scottish leaders.[1] These were searched and analysed qualitatively, using NVivo software and sovereignty-related search criteria, with close reading of key extracts within their speech context.[2] This generated analytical categories and content that

captured both the territorial limits of sovereignty (nation-state sovereignty or shared sovereignty) and the source of internal sovereignty (popular or parliamentary sovereignty).

The analysis confirms that the conception of sovereignty driving Brexit is at odds with that which has predominantly driven Scottish self-government demands. Conceptions of sovereignty are not just a matter of political discourse, but carry the potential to profoundly shape the constitutional future of the UK. A discourse of nation-state sovereignty shaped the political choices that led to the EU–UK Withdrawal Agreement and the Trade and Cooperation Agreement, and account for the centralizing thrust of Brexit-related domestic legislation, such as the United Kingdom Internal Market Act. These reflect a desire to assert the UK's political authority internationally as well as the ability of state-level institutions to exert regulatory control over domestic territory and borders, restricting the regulatory authority of the devolved institutions. The subsequent sections of the article reveal how these developments have generated new challenges for Scotland's status as a devolved nation within the UK. The article also explores the new dilemmas facing would-be architects of Scottish independence seeking to regain, and at the same time share, Scotland's sovereignty as an independent member state of the EU.

CONCEPTIONS OF SOVEREIGNTY

Sovereignty concerns the source and exercise of ultimate political authority. The sovereignty norm that dominated much of the 20th century was associated with the emergence of the modern nation-state, implying final authority internally within a particular territory, and independence from the authority of external others (Agnew, 2005; Philpot, 1995; Sheehan, 2006). The modern concept of sovereignty has both legal and political dimensions. The doctrine of parliamentary sovereignty, widely regarded as the cornerstone of the UK constitution, is 'purely legal' (Loughlin & Tierney, 2018, p. 12), and denotes the supreme law-making authority of the UK parliament. But it rests on what Loughlin and Tierney described as the 'power-generational' dimension of sovereignty, giving institutional expression to the will of the 'people' or 'nation' (Loughlin and Tierney, 2018, p. 12).

These distinctive dimensions of sovereignty met in the politics of nationalism (Grimm, 2015; Tierney, 2005; Yack, 2001). Appeals to the shared identity and mutual belonging that underpin and reinforce nationhood supported claims to internal domestic sovereignty exercised through governing and law-making institutions, as well as independence from outside forces. Nationalism thus became the key political device that reinforced the relationship between the sovereign 'people', the territory, and the constitutional order of the state (Tierney, 2005, p. 167). This 20th-century 'Westphalian' model of nation-state sovereignty remains a powerful norm in the international system, even if it bears little resemblance to the treaty assumed to be its origins (Osiander, 2001), and may never have been an accurate description of how authority was actually exercised (Krasner, 1999, p. 17; Werner & De Wilde, 2001). Nonetheless, sovereignty claims that rest upon assumptions of shared nationhood can run into difficulties in states with multiple nations. This is especially the case when combined with the conviction that political and legal authority must be maintained in centralized institutions, as was the case in the Diceyian doctrine of parliamentary sovereignty in the UK (Loughlin & Tierney, 2018; Wincott et al., 2021).

But new sovereignty norms emerged against a backdrop of global interdependence, supranational governance and the rise of international human rights norms (Philpot, 1995; MacFarlane & Sabanadze, 2013). Walker suggested that sovereignty as 'legal frame' and 'political claim' was unsettled by the diminished significance of the state within the global matrix of legal and political authority (Walker, 2013, p. 19; see also Loughlin & Tierney, 2018). MacCormick (1999) developed the idea that European integration, in particular, had generated a shared 'post-sovereignty' norm. The supremacy of Community law and the authority of EU institutions means that EU

member states do not possess unconstrained sovereignty, legally or politically, but nor has the EU acquired sovereignty independent of its member states, or a right to self-determination (Grimm, 2015, p. 113). MacCormick saw these developments as beneficial, enhancing the authority of the member states when they act in concert in their interactions with the rest of the world (MacCormick, 1999, p. 133).

These ideas of 'post-sovereignty', 'pooled sovereignty' and 'late sovereignty' (Loughlin, 2003; Tierney, 2004; Walker, 2003) supported territorial management in pluri-national states. Many substate nationalist movements sought to share sovereignty and authority within the existing boundaries of the state, made easier by states' willingness to pool their sovereign authority externally. Tierney suggested that sharing sovereignty internally posed a bigger challenge to the dominant state sovereignty norm than 'full-blooded secessionism' (Tierney, 2005, pp. 180–182). Secessionists don't challenge Westphalian sovereignty so much as seek to redraw the territorial boundaries in which state sovereignty is exercised (Mayall, 1999). By contrast, distributing political authority amongst territories within the state, through constitutional reforms such as devolution or federalism, diminishes the decision-making authority of central state actors.

However, secessionist claims to statehood are also often associated with shared sovereignty norms, including models of sovereignty partnership or associated statehood. For example, the 'pactist' independence sought by nationalists in Puerto Rico, Catalonia, Quebec and Scotland has portrayed the state sovereignty they seek as 'embedded' within a wider set of economic, institutional and political relationships (Lluch, 2014; McEwen & Brown Swan, 2021). This includes membership of supranational and international organizations such as the EU, NATO or transnational trading blocs, as well as continued association with the 'parent' state.

Proposals for an embedded form of independence, and those for a maximum form of devolution or autonomy within the existing state, have in common the rejection of both a separatist form of 'statehood' and being part of a unitary state with a single source of unconstrained sovereignty (Keating, 2012, p. 11). Yet, while these sovereignty claims may be similar with respect to the internal dimension of sovereignty, the biggest sovereignty gain for new independent states would derive from their external sovereignty. This includes equality of status (despite other inequalities) among the world's states, with certain rights and obligations in international law, and opportunities for direct access to, and representation within, bodies such as the European Council, NATO or the United Nations. The proto-diplomatic activities in which many powerful stateless nations engage can provide some access and influence, but these are limited and notably fewer than those afforded to independent states of a similar size (Cornago, 2017; Criekemans, 2010).

But ideas of shared sovereignty have been challenged more recently by a resurgence of territorially bounded sovereignty claims. The demand to 'take back control', most clearly associated with the Brexit Referendum but voiced in a variety of discursive forms elsewhere, has driven the reactions of populist and nationalist movements against European integration, globalization and transnational migration. Claims to the reterritorialization of authority also point towards a performative dimension of state sovereignty, demonstrated especially at the border, where physical, legal and symbolic boundaries protect 'the people' from outsiders (Blü & Butzlaff, 2019; Kallis, 2018).

The reassertion of a territorially bounded and centralizing nation-state sovereignty driving Brexit is difficult to reconcile with the continued prevalence of shared sovereignty norms in the politics of self-government in Scotland, both in the context of devolution within the UK and the aspirations to independent statehood. The next section will examine the way sovereignty has been framed within the Brexit process and the political choices this has generated, before considering the implications this has for Scottish self-government.

BREXIT AND THE REASSERTION OF NATION-STATE SOVEREIGNTY

Both Remain and Leave campaigns were accused of 'fetishizing sovereignty' (Pencheva & Maronitis, 2018) in the Brexit Referendum, with the Leave campaign in particular approaching 'something tantamount to sovereignty hysteria' (Gordon, 2016, p. 334). An 'outsider tradition' has long been evident among many UK leaders who regarded deepening European integration as an existential threat to the UK's sovereignty (Daddow, 2019; George, 1998). But the simplicity of the 'take back control' message reinforced the view that EU membership impinged upon the UK's national sovereignty, especially the ability to control who and what crosses the state's borders (Gamble, 2018). The loss of sovereignty over border control in the face of the perceived threat of mass migration was a central feature of the Leave campaign, and one that resonated strongly among those who voted Leave (Hobolt, 2016). Leave campaigners emphasized that EU membership had constrained the UK's ability to control its borders, its security and its economy, captured in posters proclaiming: 'We want our country back' (Beasley et al., 2021, p. 4).

The idea that Brexit would lead the UK to reclaim national sovereignty was articulated in leader speeches throughout the process of negotiating Brexit, often in reference to this being what people had voted for in the referendum. For example, in a speech in Berlin in 2017, the Brexit Secretary, David Davis, insisted that 'the British people voted to have greater control. Greater control over our borders. Greater control over our laws. And a greater say over the United Kingdom's destiny in the world' (Davis, 2017). Similarly, Theresa May frequently referred to the Brexit vote as 'a vote to take control of our borders, laws and money' (May, 2018). Her Lancaster House speech, which first set out her government's negotiating priorities, similarly emphasized the need to 'take back control of our laws and bring an end to the jurisdiction of the European Court of Justice in Britain' (May, 2017a). Updating parliament on progress in exit negotiations following a meeting of the European Council, she said: 'Before any decision, I ask: how do I best deliver the Brexit that the British people voted for? How do I best take back control of our money, borders and laws?' (House of Commons Debates, 22 October 2018, col. 48).

The May administration, however, also placed a rather greater emphasis than her successor on those areas where the UK and the EU may agree things together in 'partnership', albeit without reference to this as a sharing of sovereignty. In her 2017 conference speech, May spoke of offering the EU a 'deep and special partnership' that can foster continued cooperation whilst ensuring that 'the United Kingdom is a sovereign nation once again' (May, 2017). The Lancaster House speech referred to a partnership with the EU – alongside the adjectives 'new', 'constructive' or 'strategic' and 'equal' – 16 times, while her keynote speech delivered later that year in Florence made 29 references to a new partnership, depicted as being between 'a sovereign United Kingdom and a confident European Union, both free to chart their own course'. Partnership was most commonly associated in leader speeches with security relationships and steps to facilitate frictionless trade, especially to overcome the border challenges that Brexit presented for Northern Ireland. Davis's Berlin speech, for example, noted 'countless issues', from mass migration to terrorism, that 'pose challenges to our shared European interests and values that we can only solve in partnership' (Davis, 2017). But May's Florence speech also suggested a deliberate departure from the shared sovereignty ideals of European integration:

> The profound pooling of sovereignty that is a crucial feature of the European Union permits unprecedentedly deep cooperation. … But it also means that when countries are in the minority they must sometimes accept decisions they do not want. … So the British electorate made a choice. They chose the power of domestic democratic control over pooling that control. (May, 2017b)

The reassertion of national sovereignty and 'independence' became an even more central feature of the Boris Johnson administration's Brexit discourse. Speaking a few days after the UK's formal exit from the EU, the prime minister declared that 'we have settled a long-running question of sovereign authority', noting that, at the end of the transition period, 'We will restore full sovereign control over our borders and immigration, competition and subsidy rules, procurement and data protection' (Johnson, 2020a). Gone were the references to partnership, replaced by a recurring theme of 'a future relationship based on friendly cooperation between sovereign equals' (Johnson, 2020b). The Foreign Secretary, Dominic Raab, asserted that, after EU exit, 'we are now free to determine our own future as masters of our own destiny', noting that by the end of 2020, 'we will fully and with absolute certainty regain complete economic and political independence', and 'a new relationship with the EU, as sovereign equals' (HC Debates, 3 February 2020, c25). Announcing the EU–UK Trade and Cooperation Agreement, the prime minister claimed it had made the UK 'a newly and truly independent nation' that had 'taken back control of laws and our destiny … taken back control of every jot and tittle of our regulation'. From January 2021, he declared, 'British laws will be made solely by the British Parliament' (Johnson, 2020d).

In the UK's constitutional framework, legal sovereignty is rooted in the Crown-in-Parliament. Indeed, it has been suggested that Westminster parliamentary sovereignty is the UK's only constitutional principle, emasculating all others (Eeckhout, 2020, p. 166). Yet, references to parliamentary sovereignty in leaders' speeches on Brexit were less frequent than political claims to national sovereignty, especially under Johnson's premiership. In setting out her vision of a Brexit where the UK would remain broadly aligned to EU rules, May reminded us that 'of course, Parliament would remain ultimately sovereign. It could decide not to accept these rules, but with consequences for our membership of the relevant agency and linked market access rights' (May, 2018). After repeated failures to secure parliamentary support for her withdrawal agreement, May sought to reassure MPs that parliament would have the authority to approve negotiating objectives and treaties relating to the future relationship. She appealed for their support so that 'we can get out of the EU political structures – the Parliament, the Commission, the Council of Ministers that are remote from our lives – and put our own Parliament back in sovereign control of our destiny' (May, 2019). Johnson's less frequent references to the authority of parliament were couched in more overtly nationalist terms: 'British laws will be made solely by the British Parliament. Interpreted by UK judges sitting in UK courts. And the jurisdiction of the European Court of Justice will come to an end' (Johnson, 2020d). But for Johnson, the authority of parliament was rooted in the people. He lauded his Brexit deal for 'fulfilling the sovereign wish of the British people to live under their own laws, made by their own elected Parliament' (Johnson, 2020e). His emphasis on the 'power-generational' dimension of sovereignty over the legal doctrine (Loughlin & Tierney, 2018), as well as reflecting a commitment to British self-determination, may also have been facilitated by his 80-seat majority, strengthening the authority of the government vis-à-vis parliament.

This discourse was reflected in the calculated decisions taken to protect sovereignty, externally and internally, and to reject the outcomes that would have required sharing sovereignty with European partners. David Frost, the prime minister's chief Brexit negotiator from January 2020 until his resignation in December 2021, put it thus: 'while some argue that sovereignty is a meaningless construct in the modern world, that what matters is sharing it to gain more influence over others', for the UK government, 'sovereignty is meaningful and what it enables us to do is to set our rules for our own benefit' (Frost, 2020). This approach shaped the political choices that ensured options for a softer Brexit gave way to the hard Brexit of, first, the Withdrawal Agreement, then the Trade and Cooperation Agreement. The desire to reclaim sovereign legal authority, regulatory autonomy and control over the UK's borders was seen in early commitments to end free movement, end the jurisdiction of the European Court of Justice and

leave the EU single market and customs union (Martill, 2021). The economic and political interests underlying many of the negotiating 'red lines', alongside some of the 'ideational factors' that drove the UK's hard bargaining strategy, was perhaps always going to set the UK on course towards a basic free trade agreement, centred on zero tariffs and quotas on goods (Hix, 2018; Martill & Staiger, 2020). Unlike his predecessor, a customs and regulatory border between Great Britain and Northern Ireland was the price the Johnson administration appeared willing to pay (Hayward, 2021). The reification of nation-state sovereignty may yet confront the reality that control is rarely, if ever, a zero-sum game (Agnew, 2020). The Trade and Cooperation Agreement marked the start of a new relationship that will evolve. How it does so may have a profound effect, not just on UK–EU relations, but on the sovereignty claims associated with Scottish self-government.

SOVEREIGNTY AND SELF-GOVERNMENT AFTER BREXIT

The UK government contested parliament's authority in Brexit negotiations, conceding its minimal role to consent to formal Brexit negotiations and outcome agreements only after the Supreme Court's Miller judgment (Eeckhout, 2020; Elliott et al., 2018). The Miller case also shone a light on the contested conceptions of sovereignty and authority between the UK parliament and the devolved institutions. The Scottish home rule movement has long embraced the shibboleth of popular sovereignty, dismissing the notion of Westminster parliamentary sovereignty as a peculiarly English phenomenon (Jackson, 2020; Mitchell, 1992). This was most clearly articulated in the *Claim of Right for Scotland*, the declaration that underpinned the pro-devolution Scottish Constitutional Convention: 'We, gathered as the Scottish Constitutional Convention, do hereby acknowledge the sovereign right of the Scottish people to determine the form of Government best suited to their needs' (Mitchell, 2014, pp. 234–240). Notwithstanding the celebrated 1953 case, *MacCormick v Lord Advocate*, in which Lord Cooper, the Lord President of the Court of Session, agreed with the petitioners that the 'principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law' (Little, 2010),[3] these claims to popular sovereignty are principally political rather than legal. The establishment of the Scottish parliament, following the 1997 referendum, was an expression of the will of the Scottish people, but the legal doctrine of Westminster parliamentary sovereignty was preserved in the devolution statutes. The political authority to govern Scotland, however – the 'power-generational' dimension of sovereignty (Loughlin & Tierney, 2018) – was now shared with the devolved institutions.

The authority of the devolved institutions was recognized by the voluntary constraint that parliament placed upon itself, in the form of the Sewel convention, to refrain from exercising its sovereign legal authority to legislate on devolved matters, without 'normally' securing the consent of the devolved legislatures. But 'the Anglo-British imaginary' (Douglas-Scott, 2016; Wincott et al., 2021) that underpins UK constitutional law remained prevalent, and the fragility of the Sewel convention has been exposed by the Brexit process. In the Miller case, the law officers representing the devolved governments argued that, if EU exit required statutory authorization in Westminster, its implications for the devolution statutes meant that withdrawal legislation would also require the consent of the devolved legislatures. By refusing to be drawn on the scope of the Sewel convention on the basis that, as a convention, it had no legal effect, the Supreme Court implicitly handed a de facto victory to the UK government (McHarg, 2018; see also Elliott, 2017). Subsequent legislation did engage the Sewel convention in relation to the clauses that affected devolution, but the EU (Withdrawal) Act 2018 was passed without the consent of the Scottish Parliament, and the EU (Withdrawal Agreement) Act 2020 was enacted despite all three devolved legislatures withholding their consent (Douglas-Scott, 2019; McEwen, 2020; Mullen, 2019).

On the other hand, the soft power of the devolved institutions, railing against a perceived 'power grab', did result in the UK government departing from its initial inclination to retain authority over all competences repatriated from the EU, even where these aligned with devolved competences (McEwen, 2020). Instead, the governments worked together to explore whether and how to develop UK frameworks to replace EU frameworks to limit the risk that regulatory divergence may create new barriers to trade and mobility within the UK. Respect for the devolution settlements was one of the founding principles of the frameworks programme, and each stage of framework development has been co-determined by the four administrations.

While the cooperative nature of the frameworks programme may be indicative of a shared sovereignty approach, with respect to the political dimension of sovereignty, it contrasts with other developments that have strained relationships between the UK's territories and governments. The territorial divergence in Brexit preferences, and especially the Remain vote in Scotland, ensured that defence of the 'precious union' was high on the UK government's agenda from the outset (Cetrà & Brown Swan, 2021). But early commitments that Article 50 would not be triggered until the UK government and the devolved administrations had agreed a 'common approach' to Brexit failed to result in meaningful influence, as the May administration became crippled by its inability to reconcile competing factions within its own ranks (Martill, 2021; McEwen & Murphy, 2021).

The marginalization of the devolved governments in Brexit negotiations was mirrored in the domestic Brexit process once Boris Johnson assumed power. This was exemplified by the United Kingdom Internal Market Act. The legislation was motivated by the same issue that underpinned the frameworks programme: how to ensure that EU exit avoids creating new barriers for business and professionals trading within the UK's domestic market. But in place of a cooperative, co-owned process that respected the authority of devolved governments, the Act was driven by the UK government alone, and represented 'much harder edged centralized control' (Wincott et al., 2021). The intent was to use 'the armature of our law' to preserve the UK's internal market, which the prime minister insisted on introducing the Bill 'should be welcomed by everyone who cares about the sovereignty and integrity of our United Kingdom' (Johnson, 2020d, HC Debates, c41, 2020c).

The Act risks undermining the authority of the devolved institutions by limiting their regulatory reach, forcing them to accept goods and services whose standards may be lower. The market access principles of mutual recognition and non-discrimination at the heart of the legislation also limit the capacity to use market interventions in pursuit of social, environmental or health objectives; such regulations would not apply to goods or services coming into that territory from another part of the UK. Although these provisions, in principle, constrain the regulatory reach of all UK administrations, the sovereign legal authority of the UK parliament, alongside the dominance of the English market vis-à-vis the other domestic markets, suggest that regulations set in England, including as a result of trade deals, are likely to apply by default throughout the UK (Dougan et al., 2022). As with other Brexit legislation, the UK Internal Market Act was passed despite the withholding of consent by the devolved legislatures. In contrast to the other laws, however, the UK Internal Market Act had as its primary purpose setting limits on the authority and regulatory reach of the devolved institutions.

Brexit, and the consequential departure from the external regulatory structures prompted by the form it has assumed, has exposed some of the ambiguities of the UK's territorial constitution, especially vis-à-vis the governance of Scotland, Wales and perhaps especially Northern Ireland (Hayward, 2020; Keating, 2021; Murphy, 2021). In speeches coinciding with the 20th anniversary of devolution, Scottish government ministers claimed that the decision to leave the EU without Scotland's consent, and the Brexit process that followed, represented a direct threat to devolution that undermined Scottish sovereignty, often invoking the 1989 Claim of Right:

Do we believe, as the UK Government does, that Westminster should have the ultimate right to determine our future – regardless of what people in Scotland want. Or do we believe, as the Claim of Right says, that people of Scotland have the sovereign right to determine the form of Government best suited to their needs? (Sturgeon, 2019a; see also Russell, 2018)

That perceived 'sovereign right' has been used to justify the call for a new independence referendum, a call strengthened by the re-election of the SNP to government in May 2021.

SCOTTISH INDEPENDENCE AND SOVEREIGNTY

The idea that in Scotland sovereignty lies with the people and is distinct from the 'English' doctrine of Westminster parliamentary sovereignty has long been part of nationalist mythology (Jackson, 2020; Mitchell, 2014). It comes to the fore, in particular when political choices across the UK as a whole are out of step with majority preferences within Scotland. The Brexit Referendum was one such instance, where the First Minister frequently claimed that it meant Scotland faced 'being taken out of the EU against our will' (Sturgeon, 2016).

Ideas of shared sovereignty have also influenced discourse on Scottish independence. Since its opposition in the 1975 referendum, the SNP gradually shifted towards a more favourable view of EU membership and, from 1988, 'independence in Europe' was its central territorial objective. Although this was its clearest expression, a 'diffusionist' tendency (Jackson, 2020, p. 145) that conceived of independence as being embedded within transnational frameworks of Empire, Commonwealth or Europe had been evident for most of the SNP's history, albeit periodically generating internal debates (Finlay, 1992; McEwen & Brown Swan, 2021). The embrace of EU membership was also in response to developments in European integration, its increasing importance to Scottish local government and regional development, and, in a case of warming to 'my enemy's enemy', to counter the increasing Euroscepticism of the Conservative government (Mitchell, 2014). The EU provided an external economic and political framework that diminished the risks associated with independence, as well as providing opportunities for what would be a small state to pool its sovereignty with others and thereby enhance its influence internationally.

These shared sovereignty ideas were reflected in speeches and documents produced by the SNP in government ahead of the 2014 independence referendum. The 2007 document *Choosing Scotland's Future* provided little detail but underlined that 21st-century independence for Scotland 'would reflect the reality of existing and growing interdependence: partnership in these Islands and more widely across Europe' (Scottish Government, 2007, p. 24). The white paper *Scotland's Future* combined a vision of independence embedded within the EU alongside a new 'partnership of equals' with the rest of the UK. Although it made frequent references to sovereignty, this was always to emphasize that independence would vest sovereignty in the people of Scotland as 'the final authority and all state power and authority would be accountable to them' (Scottish Government, 2013, p. 548).

Yet, it also painted a picture of shared sovereignty in which the international legal authority afforded by independence would sit alongside an acceptance and desirability of sharing control over key functions of statehood. Throughout the document, there was an emphasis upon 'the realities of an increasingly inter-dependent world', and an ease with the prospect of working in partnership with the rest of the UK and other countries to confront policy challenges (Scottish Government, 2013 , p. 215), a point emphasized in campaign speeches (Salmond, 2014b; Sturgeon, 2013). Explaining his vision of independence to an audience in Bruges ahead of the vote, the then First Minister, Alex Salmond, noted 'our independence movement embraces interdependence. We seek sovereignty, knowing that we will then choose to share that sovereignty' (Salmond, 2014a). Similarly, Sturgeon, then Deputy First Minister, insisted that independence

would transfer national sovereignty to Scotland but 'we will choose, on certain issues, to pool and share our sovereignty with other countries … bilaterally with the rest of the UK and multilaterally with the EU' (Sturgeon, 2014).

This discourse informed the independence prospectus set out in the white paper. This included continued EU membership, close trading links between Scotland and the rest of the UK (rUK), and common regulatory structures within which business, consumers and public bodies would operate. Many of these had been shaped by EU law and it was assumed that the free movement of people, goods, services and capital across the Anglo-Scottish border would continue to be facilitated by common membership of the European single market. But core elements of the *acquis communautaire* – the body of EU law that new members are expected to adopt – were shunned in favour of continued interdependence with the rest of the UK in a 'renewed partnership of the Isles' (Sturgeon, 2013). Instead of joining the European Schengen area, it was expected that an independent Scotland would remain part of the Common Travel Area (CTA), 'meaning there will be no need for passports, exchanges or border checks' (Scottish Government, 2013, p. 215). Instead of committing to the euro, the white paper proposed a formal sterling currency union with the rUK. A strategic energy partnership would, it was hoped, see Scotland and the rUK continue to pool consumer subsidies to support renewable energy, and a continued cross-border remit was envisaged for a host of public bodies. Whatever challenges these proposals might have encountered in the harsh light of independence negotiations between these 'partners', Scotland and the rUK as co-members of the EU would have been equally embedded within a structure of EU regulatory governance. Under that scenario, independence posed few barriers to pooling and sharing sovereignty across the British Isles *and* with European partners.

But Brexit has shifted the dial on independence. The SNP leadership remains firmly committed to independence within the EU. Much as the SNP's embrace of popular sovereignty is used as a mark of distinction vis-à-vis Westminster parliamentary sovereignty, so the reassertion of nation-state sovereignty in UK Brexit discourses has engendered a more pronounced counter-narrative of shared sovereignty. For example, in a speech to the European Policy Centre, the First Minister noted that the Scottish government was comfortable with 'the idea that independence, in the modern world, involves recognizing and embracing our interdependence … I believe very strongly that our sovereignty will be amplified, not diminished, by membership of the EU' (Sturgeon, 2020; see also Sturgeon, 2017, 2019b). In addition, Scotland's European identity was given more emphasis in the context of Brexit. Sturgeon claimed that 'EU membership has become a very important part of Scotland's identity. It speaks to our sense of who we are' (Sturgeon, 2017). The SNP's leader in Westminster, Ian Blackford, described Scotland as 'at heart a European nation', and 'forcing' it to leave the EU meant 'losing a precious part of who we are' (Blackford, 2020).

Yet, Brexit, and in particular the form it has assumed, poses new practical challenges that make it more difficult to reconcile these conflicting sovereignty visions within the same island. Assuming an independent Scotland could navigate the EU accession process, this would make the border between Scotland and England a new external border of the EU. This challenge has rarely been discussed thus far among nationalist leaders. Presenting the Scottish government's compromise offer in the wake of the Brexit Referendum, which including a proposition for Scotland to remain in the internal market (but not the customs union) if the UK decided to leave, Sturgeon insisted that: 'Talk of a hard border for Scotland has always rung hollow – and will continue to do so' (Sturgeon, 2016). But under the terms of the Trade and Cooperation Agreement, a system of border management would be required to oversee the entry and exit of goods and services at all of the EU–UK borders, to ensure compliance with the rules and regulations of the EU internal market, and to prevent smuggling (Hayward, 2019; Marshall, 2021). The experience of goods' trade at the existing Great Britain–EU borders, as well as the Great

Britain–Northern Ireland border, suggests that such a system might entail customs declarations, checks on sanitary and phytosanitary documentation, safety and security declarations, customs duties or proof of rules of origin. Some of this could be eased by 'behind the border' checks and streamlined processes already being developed for UK–EU trade (Hayward & McEwen, 2022; Marshall, 2021). But any system of border management in the wake of Scottish independence is likely to imply increased trade friction at the Anglo-Scottish border.

As well as making independence a harder sell to the electorate, this bordering process could also make it considerably more difficult to pool and share sovereignty with the rest of the UK, as was envisaged in 2014 for a range of services, service delivery and policy challenges. To the (variable) extent that they fall within EU competence, such policies and services in Scotland would, following EU accession, be regulated according to EU law. If UK law diverges significantly from EU regulations, the efficiency gains that were anticipated by sharing the management and delivery of services across the border are likely to diminish.

There is more to borders than geography and bureaucracy. 'Borders in the mind' matter too (Gormley-Heenan & Aughey, 2017). Brexit has imposed a border between Scotland and Europe that independence could reopen. But the prospect of trade border barriers across the Anglo-Scottish border sits uneasily alongside the emphasis upon the shared cultural identity – which Salmond referred to as the 'social union' – in the 2014 referendum debate (see Salmond, 2013), and may be unsettling for the many Scots who retain a British identity alongside a sense of belonging to Scotland. Conversely, the border between Scotland and England is already recognized symbolically, as well as with respect to law, regulations and service provision. Scotland as an imagined political community in its own right has been reinforced by devolution. If the nationalist narrative that Scotland's parliament is threatened by the reassertion of a centralizing nation-state sovereignty on the part of the Conservative government resonates, the border of the mind may become yet stronger. If Britain after Brexit is willing to see standards reduced on goods or products, including on imports that may flow from new trade deals, the impotence of the devolved parliament to prevent such products trading freely across the UK's internal market may convince some that the border can become a necessary means of preserving Scotland's policy choices. Brexit is a dynamic process, and the UK–EU relationship will evolve. If some form of regulatory alignment was deemed necessary to mitigate the barriers being faced at the UK–EU border and, in particular, between Great Britain and Northern Ireland, the Anglo-Scottish border may loom less large in the event of independence.

CONCLUSIONS

Brexit was always going to pose challenges to Scottish self-government. The territorial divergences in attitudes and preferences exposed by the Brexit Referendum outcome have tested the idea of the UK as a pluri-national state. As discussed in the introduction to this special issue (Keating, 2022, in this issue), EU membership had provided a discursive frame within which the plurality of territorial identities across the UK could be expressed. It also provided a regulatory umbrella that made it easier to share sovereignty, in its political and legal sense, both with EU partners and across the governments and legislatures of the UK. Within the EU, the UK and devolved governments could plough their own furrows, but the framework of EU law limited the distance between them. Many of these regulations may survive in retained EU law, or find equivalence in other domestic law. But the nature of the Trade and Cooperation Agreement has reinforced the authority of the UK government and parliament to diverge from EU rules and regulations (outside of Northern Ireland) should they choose. In addition, the Internal Market Act has enabled them to shore up political authority within the UK, minimizing the reach and significance of devolved regulations when these diverge from those set centrally.

That these choices have been made in the face of fierce opposition from the devolved institutions has contributed to the strained relationships between the UK's constituent territories and the uncertainties that now surround the UK's own political union.

The analysis of political discourse in this article underlines the divergent conceptions of sovereignty that have been driving the territorial ambitions of the UK and Scottish governments. This is especially evident in the form that sovereignty assumes. The distinction between the nation-state sovereignty discourse driving Brexit choices and the shared sovereignty norms that underpin Scottish self-government claims have become even more pronounced since the 2016 referendum. There is more similarity in understandings of the source of sovereignty; Westminster parliamentary sovereignty may remain a potent legal doctrine, but the referendum was an expression of popular sovereignty and honouring the voters' decision to leave the EU has appeared frequently in the discourse of UK government ministers. Thus, UK and Scottish territorial objectives are similarly fuelled by recourse to the people's will. The problem is in defining who makes up 'the people', and where to set the boundaries for the expression of the popular will. Assuming a single demos in a pluri-national state has generated claims by Scottish nationalist leaders that the people of Scotland have been forced the leave the EU 'against our will'.

Brexit is a process, not an event. The call to take back control and the reification of a territorially based nation-state sovereignty may yet confront the reality that all sovereignty regimes inevitably involve degrees of cooperation and collaboration with others. The compromises made in the Withdrawal Agreement to avoid a hard border on the island of Ireland were testament to that; it has meant compromising the UK's political authority over part of its domestic territory. Although at time of writing, full application of the Ireland/Northern Ireland Protocol is being resisted by some in the UK government and among Northern Ireland's unionists, pragmatism may yet cut through sovereignty discourses.

Brexit may have terminated the UK's EU membership, but the UK–EU relationship will continue to evolve and will be a key focus of the UK government's external relations policy, whoever leads it. Future UK leaders, like some UK leaders of the past, may take a rather different view of that relationship and seek closer regulatory alignment or perhaps even renewed membership. Or the UK may continue to drift from its European neighbours, charting its own distinctive regulatory course.

The relationship between the UK and the EU has profound implications for Scotland's constitutional status, whether that entails self-government within the UK or independence from it. The version of independence offered to Scots in the 2014 referendum was one that was framed within continued membership of the EU, not just for Scotland but also for the rest of the UK. Divergent Brexit preferences north and south of the border have presented a political opportunity to advocates of independence, affirming their view that Scotland's democratic 'will' cannot be respected within the confines of the UK. But the UK's exit from the EU, and the territorially bounded, nation-state form of sovereignty it has assumed, have also generated new challenges and complexities for the independence movement, questioning many of the assumptions upon which its shared sovereignty, 'independence-lite' prospectus relied. Put simply, the closer the alignment between the UK and the EU, the more feasible it will be to combine Scottish independence within the EU with intimate relations and fluid borders with its closest neighbour. Conversely, prolonged detachment in the UK–EU relationship raises difficult challenges and choices for advocates of Scottish self-government and independence, and for the wider electorate who may be faced with the choice over Scotland's future once again. The question of whether Scotland should be an independent country may become a proxy for determining a choice, not so much between national sovereignty or shared sovereignty, as between two alternative economic and political unions with whom to pool and share their sovereignty.

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1.   Where possible, where speeches are cited directly, the original reference was sourced rather than the archive.
2.   Search terms were (variations of): nation; border; independence; interdependence; parliament; partnership; pooling; self-determination; sharing; and sovereignty.
3.   This opinion was expressed in an *obiter dicta* and so not legally binding. The case at the heart of the appeal, which focused on the legitimacy of Queen Elizabeth's adoption of the title 'the 2nd', was dismissed.

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