The Impact of Federalism on Secession Referendums: Comparing Scotland and Québec

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Abstract

The secessionist experience in Québec looms large in Scotland. Comparisons made between the two jurisdictions are justified and important. Nevertheless, a significant difference between the two systems is underemphasised. Canada is a federal country. The United Kingdom is not. This constitutionally protected autonomy for Québec –Québec was not required to ask permission from Ottawa to hold referendums in 1980 and 1995– makes a material difference to the case for internal self-determination in the two jurisdictions. The case for internal self-determination, and so for holding unilateral secession referendums, is stronger and different in Scotland than it is in Canada. This is not to say that arguments for unilateral Scottish secession referendums may or must succeed either politically or legally. It is only to say that the Supreme Court of the United Kingdom was too quick in the *Lord Advocate's Reference* to say that arguments about self-determination referendums have 'equal force' in both jurisdictions.

1. Introduction

The secessionist experience in Québec looms large over Scotland.[1] Comparisons between the two jurisdictions are justified. Both secession movements seek to secede from liberal democratic states, not from colonial powers[2] or the Soviet Union.[3] Both Québec and Scotland

[1] Three pieces which helpfully articulate the legal influence of the Québec experience in Scotland, particularly regarding claims about European and International Law, are Christine Bell, 'International Law, the Independence Debate, and Political Settlement in the UK' in Aileen McHarg and others (eds), *The Scottish Independence Referendum: Constitutional and Political Implications* (OUP 2016). 200, 202; Sionaidh Douglas-Scott, 'Scotland, Secession, and the European Union' in Aileen McHarg and others (eds), *The Scottish Independence Referendum: Constitutional and Political Implications* (OUP 2016). 184-185; and Lea Raible, 'Self-Determination at the UK Supreme Court and the Failure of International Law' (2023) 27 Edinburgh Law Review 219. 221

[2] This is not to suggest the Scots and the French were never oppressed by the English. Only to say that, in international law, the question of colonial context makes a difference in establishing a right to self-determination. This is seen even with respect to the United Kingdom in the *Chagoan Islanders Advisory Opinion* of the International Court of Justice which concluded that 'the process of decolonization of Mauritius was not lawfully completed when that country acceded to independence in 1968, following the separation of the Chagos Archipelago…[therefore] the United Kingdom is under an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible.' *LEGAL CONSEQUENCES OF THE SEPARATION OF THE CHAGOS ARCHIPELAGO FROM MAURITIUS IN 1965* [2019] International Court of Justice 1164.

[3] The collapse of the Soviet Union being the other significant source of referendums on self-determination in the 20th century. As Qvortrup says, 'There ha[d] been more than 50 independence referendums since the middle of the 19th Century when Texas, Virginia and Tennessee—albeit unsuccessfully—voted to leave the USA. A

are central to the constitutional identities of the United Kingdom and Canada, in the Act of Union of 1707 and the Québec Act of the Westminster Parliament in 1774. The differences between these two movements, however, are significant as well. Language is existential in Quebec,[4] peripheral in Scotland.[5] Québec is a much larger percentage of the Canadian population than Scotland is of the United Kingdom. Québec is 23%[6] of the Canadian population,[7] Scotland is around 8%.[8] The most significant difference of all, however, is that Canada is a federal system. The United Kingdom is not. This means that in Canada, power is constitutionally divided between Ottawa and the provinces.[9] The United Kingdom, by contrast, has a devolved system of government. This means that power is leant from the central authority outward, and the power of the devolved legislatures may be removed if the Westminster Parliament legislates to that effect.[10]

This paper argues that this difference between federal and devolved systems is essential to comparing the secession referendum experiences in these two jurisdictions. The structure of the Canadian constitution is such that the constitutional place of Québec in Canada is not analogous to that of Scotland in the United Kingdom. Scotland does not have the constitutionally entrenched autonomy that Québec does. This distinction makes a difference in law and regarding the right to hold future secession referendums. The similarities between the legal status of Québec and Scotland were central to the *Lord Advocate's Reference* which asked if the Scottish Parliament unilaterally legislating for a

handful of plebiscites were held in each decade after 1945, but most independence referendums were held after the break-down of communism. Most have resulted in majorities for independence.' Matt Qvortrup, 'Referendums on Independence, 1860–2011' (2014) 85 The Political Quarterly 57. 57

[4] 'Francophone Quebecers have always looked to Québec as an essential bulwark of the French fact in North America.' Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Hart 2021). 44

[5] '[Scotland]…is a paradigmatic case of "civic" rather than "ethnic" nationalism, insofar as conventional cultural features of language and religion do not mark Scotland out as particularly distinctive from England.' David McCrone and Lindsay Paterson, 'The Conundrum of Scottish Independence' 40 (2002) Scottish Affairs 54. 57

[6] Statistics Canada, 'Census Profile - 2021' <https://www12.statcan.gc.ca/census-recensement/2021/dp-pd/prof/details/page.cfm?Lang=E&GENDERlist=1&STATISTIClist=1&HEADERlist=0&DGUIDlist=2021A00052423027&SearchText=quebec> accessed 26 June 2023.

[7] Although, as a percentage of the Canadian population as a whole, the population of Québec is declining. Patrick Dumberry, 'The Secession Question in Québec' in Jure Vidmar, Sarah McGibbon and Lea Raible (eds), *Research Handbook on Secession* (Edward Elgar 2022).v148. This decline is significant as it speaks to the (arguable) waning influence of Québec in confederation, because the economic and population centres of Canada are moving west to Calgary and Vancouver.

[8] Neil Park, 'Population Estimates for the UK, England, Wales, Scotland and Northern Ireland: Mid-2021' <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/annualmidyearpopulationestimates/mid2021#the-uk-population-at-mid-2021> accessed 26 June 2023.

[9] Although there are three territories in Canada – Yukon, Northwest Territories and Nunavut – which are self-governing to different degrees, but do not have the level of autonomy that the provinces do. These territories are not included in the constitutional amending formula. For a helpful explanation of the difference this makes in practise, see Legislative Assembly of the Northwest Territories, 'Differences from Provincial Governments' (2014) <https://www.ntassembly.ca/visitors/what-consensus/differences-provincial-governments> accessed 26 June 2023.

[10] This is a complex and contested claim which will be explained in Section Four below. As Mark Elliott rightly says, though, (whatever the legal disagreements) clearly the case that there have always been significant moral political limits on the way in which the Westminster Parliament can legislate in relation to the devolved regions. He says: 'The reality of the contemporary UK constitution is that Parliament's legislative authority falls to be exercised within a normatively rich constitutional order and in the light of the restraining influences of multi-layered and common-law constitutionalism.' Mark Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, OUP 2015). 57

legally non-binding referendum 'relates'[11] to matters reserved for the Westminster Parliament such as the Parliament of the United Kingdom[12] and the Union of the Kingdom's of Scotland and England.[13] If such legislation did 'relate' to reserved matters, then it was beyond the competence of the Scottish Parliament. Put simply, the case asked: 'Can the Scottish Parliament, without the consent of Westminster, decide to hold a non-binding referendum on the question of secession?' This is exactly what Québec did in 1980 and 1995.

The United Kingdom Supreme Court (UKSC) held that Scotland could not unilaterally legislate to hold a non-binding referendum. Interestingly, one of the reasons the UKSC came to this conclusion was because arguments about the applicability of self-determination have 'equal force' in Scotland as in Canada,[14] as demonstrated by the Supreme Court of Canada's (SCC's) *Secession Reference*.[15] This paper challenges that conclusion. Scotland does not have the same kinds of constitutional protection as Québec does in Canada, including the right to hold a referendum in the first place. This is not to say that Scotland's case for secession, or the legal right to hold a unilateral secession referendum, will or must succeed. It is only to say that there are different constitutional principles in play in Canada than in the United Kingdom, and so arguments about self-determination referendums in both jurisdictions have different premises. Federalism was at the heart of the SCC's findings in the *Secession Reference* along with three other constitutional principles: democracy, the rule of law, and protection for minorities. Demonstrating that the requirements of self-determination are satisfied in the United Kingdom means drawing on the other three constitutional principles mentioned in the *Secession Reference*, but not mentioned in in the *Lord Advocate's Reference*. While it is conceptually possible for a devolved system, to satisfy the internal requirements of self-determination by providing a form of constitutionally recognised autonomy, practices around the current settlement in the United Kingdom may not.

This paper has five parts. It begins with an overview of the secessionist movement in Québec.[16] The second part breaks down the influential Canadian *Secession Reference* decision, which has been cited both by the UKSC and around the world. Most notably, it explains the centrality of federalism to the *Secession Reference* case, as well as the other principles identified in the judgment: democracy, the rule of law, and protection of minorities. This part also explains the different types of self-determination established in international law and why the question of federalism is fundamental to this distinction. The third part explains what the UKSC said about the relationship between self-determination and referendums in the *Lord Advocate's Reference* on a post-2014 Scottish referendum. It unpacks the UKSC's claim that arguments apply with equal force in both jurisdictions and why this is misleading. The fourth part explains what changes in the approach to the devolution settlement would need to happen in the United Kingdom such that the arguments made in both contexts would approach analogy. The fifth and final section of the paper anticipates

[11] In determining what counts as 'relates' to reserved matters, s 29(3) of the Scotland Act 1998 says that 'the question of whether a provision of the Scottish Parliament relates to a reserved matter is to be determined…by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.' This will be discussed in greater detail in section 4 below.

[12] The Scotland Act, Schedule 5 1b

[13] ibid. Schedule 5 1c

[14] *REFERENCE by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998* [2022] UKSC 31 [89]

[15] Although note, as explained below, the question in the Secession Reference case about the unilateral right to secede itself, the capacity to hold a referendum on the question was not challenged. ibid [88]

[16] Which goes by several other names in Canada such as the sovereigntist movement. In the context of Québec, this paper will use the terms separatist, sovereigntist, and secessionist interchangeably.

some counterarguments both to the interpretation of constitutions and the proposals for reform advocated in this paper.

2. The Sovereigntist Movement in Québec

The interplay between French and English is at the heart of the Canadian Constitution.[17] This section has three aims, with each section supporting the overall objective of sketching the dynamic between French and English in the Canadian constitution. The section first very briefly lays out the history of the secessionist movement in Québec, flagging similarities and differences to the Scottish experience. The second part of this section explains the process of the patriation of the Canadian constitution, and debates about protections for French minorities in and outside Québec. The third and final part of this section offers a cursory overview of the contemporary Canadian constitution and secessionist landscape, flagging the role of referendums in Canada in general. The key points to take away from this section are these: (i) protections for Québec and the French language are deeply entrenched in the Canadian constitution, (ii) as in Scotland, the secessionists movement in Québec has ebbed and flowed depending on other legal, economic, and political developments, and (iii) in Canada, as the United Kingdom, referendums currently are not (and have never previously been) required as part of the constitutional amending formula.[18] In both Québec and in Scotland, however, it is practically unthinkable that secession would occur without a referendum. The question at the heart of the dynamic between French and English is, and has always been, to what degree is Québec a distinct society within Canada?

2.1 The French in Canada: A Distinct Society?

In the early days of European settlement of North America, it was the French rather than the English who held much of what is now Canada.[19] After a series of significant military losses by the French to the English, culminating in 1760, France ceded New France to the English in the Treaty of Paris in 1763. Despite this military defeat, the French stayed put. This demographic fact still has had enormous constitutional significance in Canada today. Jeremy Webber helpfully captures the importance of French settlements in 17th century Québec to Canada today when he says that after the Treaty of Paris:

> …The settlement of the St Lawrence valley remained overwhelmingly French-speaking and Roman Catholic. That fact lies at the root of the long interaction between French and English that has, in very large measure, characterized Canadian constitutional history.'[20]

[17] One of the most infamous expressions of this dynamic was made by Lord Durham, who was appointed by the British to understand the causes of rebellions by the French in Lower Canada. He famously concluded in a report in 1839 that he found in the French and English in Canada 'two nations warring in the bosom of a single state.' The Report of the Earl of Durham in Janet Ajzenstat (eds) *The Political Thought of Lord Durham* (McGill-Queen's University Press 1988) 8-9

[18] Although the devolution acts enshrine a role for referendums in the United Kingdom, there is no general statute requiring referendums for constitutional change,

[19] 'From 1608-1760, France was by far the dominant European power in the territory that would become Canada.' Webber (n 4).10

[20] ibid. 12

As Webber rightly says, the relationship between French and English is key to the Canadian experience and constitution. This linguistic fact is connected to a geographic reality. Canada is an enormous country, and Québec (the largest of the Canadian provinces) is itself enormous.[21] Because of the persistence of the French in Québec, and the sheer size and diversity of the country of Canada, federalism has been essential to Canadian constitutional law[22] from the 'beginning.'[23]

Even before the British North America Act 1867 which 'established' what is now Canada, protections were in place for French language, religion, and governance. The Québec Act of the Westminster Parliament 1764 took essential steps in this direction. Among its most important actions were to (i) ensure freedom of religion for Roman Catholics, and (ii) establish a mixed legal system combining elements of French private law and English public law which still operates today.[24] Then, s 133 of the British North America Act enshrined further protections for the French language at both the provincial and federal level. While French is not exclusively spoken in Québec, there is also a significant Acadian community in what is now the province of New Brunswick, the province of Québec and the French language have been and remain closely connected. In 2016, about 80% of Québecers identified French as their first language, in contrast to about 20% of the population of Canada as a whole.[25] This has created the ongoing question of whether, and to what degree, Québec is a 'distinct society' within Canada.[26] Québec was recognized this way in a Parliamentary Motion passed by the Federal Parliament in 2006,[27] and contemporaneously Québec was included as part of the Canadian Delegation at the United Nations' Economic Social and Cultural organization in Paris.[28] It has been a long road to achieve Québec's current degree of independence and integration in Canada. The road has been winding, and it has by no means reached its end. One of the most challenging periods on the road to balancing integration and independence was in the patriation of the Canadian constitution. At that moment, the question of whether Québec was a distinct society reached a breaking point.

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[21] Or three times the size of France 1,667,441square kilometres. Government du Québec, https://www.sqrc.gouv.qc.ca/representation-quebec-canada/le-quebec/donnees-en.asp#:~:text=Located%20in%20northeastern%20North%20America,times%20the%20size%20of%20France accessed 26 June 2023

[22] As demonstrated in sections 91 and 92 of the British North America Act 1867 which delineate the powers of the provincial and federal governments. These sections continue to define the relationship between the federal government and the provinces today.

[23] Although in Canada it is always essential to be clear that this 'beginning' is the latest iteration of governance in the region. Self-government in (what is now called Canada) by indigenous peoples goes back thousands of years. It also continues to this day in the self-governing treaty communities which operate across parts of what is now Canada. Government of Canada, 'Self-Government' (2020) <https://www.rcaanc-cirnac.gc.ca/eng/1100100032275/1529354547314> accessed 27 June 2023.

[24] Webber (n 4). 13

[25] For a full and helpful breakdown of these statistics see ibid. 197-198

[26] This debate was very controversial in the Meech Lake accord in 1987, which sought *inter alia* to amend the Canadian constitution in a way that would include Québec. Debates about Québec as a distinct society arguably led to the failure of the accord Dumberry (n 7). 149

[27] Although Québec does not see this act as going far enough. The province maintains to this day that this question is an unresolved issue. See Government du Québec, 'Recognition of the Québec Nation' <https://www.sqrc.gouv.qc.ca/relations-canadiennes/institutions-constitution/statut-qc/reconnaisance-nation-en.asp> accessed 27 June 2023.

[28] Government du Québec, 'Agreement Between the Government of Canada and Québec Concerning the United Nations Educational, Scientific and Cultural Organisation (UNESCO)' <https://www.mrif.gouv.qc.ca/content/documents/en/accord-unesco.pdf> accessed 27 June 2023.

2.2 Patriation of the Canadian Constitution

While the history of secession in Québec could fill many books, there are a few key flashpoints. It would be perverse not to flag those extremist elements of the Québecois separatist movement who began terrorist acts of bombing in 1963 and kidnapped two officials –a British diplomat and a cabinet minister from Québec –in the 1970 October Crisis.[29] The cabinet minister from Québec, Pierre Laporte, was murdered. It would be perverse as well to attribute this approach to the sovereigntist movement. This was obviously one of the very low points in relations between Québec and Ottawa. As in Scotland, the case for separation in Québec has risen and fallen across decades depending on demographics,[30] as well as other economic, social, and political factors.[31] Despite these deep disagreements, however, neither the first referendum on Québec independence in 1980,[32] nor the 1995[33] referendum, sought to sever the relationship with Canada altogether. The ballot questions in both referendums concerned sovereignty-association, proposals for new economic and political partnerships, although it remains unclear what these partnerships would have meant both for Québec and the rest of Canada.[34] In 1980 the referendum proposition was rejected by 59.56% of Québecers. As in the Scottish 2014 referendum, a major factor in the 'no' vote in the 1980 Québec referendum was Prime Minister Trudeau saying that a 'no' vote would be a mandate to revise the Canadian constitution.[35] In 1980, the British Parliament was still the final authority on the Canadian Constitution, which was obviously a major source of dissatisfaction for French Canadians. Prime Minister Trudeau sought to 'repatriate' the constitution, meaning 'bring it home' and this process was completed in 1982. This patriation was the background to the second, and much closer 1995 referendum.

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[29] For a helpful overview of these acts of terrorism see D'Arcy Jenish, *The Making of the October Crisis: Canada's Long Nightmare of Terrorism at the Hands of the FLQ* (Doubleday 2018).

[30] Infamously, and very controversially, after losing the 1995 referendum, the leader of the Parti Québecois Jacques Parizeau attributed the loss to 'ethnic votes' (as well as money).

[31]Jacobs first presented these ideas in the prestigious CBC Massey Lectures at Massey College of the University of Toronto. They were influential in debates about sovereignty-association in Canada. Jane Jacobs offers account of how these economic, social and political factors intersect with geography in Jane Jacobs, *The Question of Separatism: Quebec and the Struggle over Sovereignty* (Independent Publishers Group 2012). 53

[32] 'The Government of Quebec has made public its proposal to negotiate a new agreement with the rest of Canada, based on the equality of nations; this agreement would enable Quebec to acquire the exclusive power to make its laws, levy its taxes and establish relations abroad - in other words, sovereignty - and at the same time to maintain with Canada an economic association including a common currency; any change in political status resulting from these negotiations will only be implemented with popular approval through another referendum; on these terms, do you give the Government of Quebec the mandate to negotiate the proposed agreement between Quebec and Canada?' Quebec-Canada: A New Deal. The Québec Government Proposal for a New Partnership Between Equals: Sovereignty Association 1979

[33] '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?' Bill 1: An Act Respecting the Future of Quebec, National Assembly of Québec 1995

[34] Particularly controversial, particularly in the west, was the question of to what extent Québec would take a share of the national debt. An absence of reckoning with these questions contributed to a sense of western alienation, and a rise of populism in western Canada. See Djamila Mones, 'Representations of Québec in the Political Imaginary of Western Canadian Politics' [2022] Journal of Eastern Township Studies 91.

[35] Although, in the case of Québec, the commitment was to 'renew federalism' Webber (n 4). 40 rather than to expand devolution as in Scotland. Jim Gallagher, 'Where Next for Scotland and the United Kingdom?' in David Bailey and Leslie Budd (eds), *Devolution and the UK Economy* (Rowman and Littlefield 2016). 30

The challenge of the patriation of the constitution, and a major factor leading up to the 1995 referendum, was both the way in which Trudeau patriated the constitution and the content of the new Constitution. The new constitution was approved without the agreement of Québec, although every other province in Canada agreed to it.[36] One of the most controversial provisions for Québec in the patriated constitution was that it enshrined rights to minority language education. This meant a right to be educated in English in Québec, and a right to be educated in French in the rest of Canada. Previously, the right to be educated in English in Québec was only held by those who had English parents. In addition to potentially undermining the status of French in Québec, as a matter of principle by taking this approach the federal government was overruling the National Assembly in Québec. For this, and other reasons,[37] a much closer referendum was held in 1995 with 50.24% voting to remain in Canada. The razor thin outcome of the 1995 referendum, combined with the lack of clarity in the question, sent shockwaves through Canada.[38] The ballot question had asked for authorisation to begin a process of seeking negotiation to achieve sovereignty association, and it was unclear how far that mandate extended.[39] It led to the passing in 2000 of the controversial Federal Clarity Act, which established the requirements for a mandate for secession.[40] It also led to the Government of Canada referring questions about secession to the Supreme Court, leading to the crucial *Secession Reference* case, seeking to establish whether Québec could legally make a unilateral declaration of self-determination.

2.3 Referendums in Canada's Contemporary Constitution

Québec was not required seek permission from Canada to hold a referendum either in 1980, before patriation, or after. Referendums are not a part of any of Canada's constitutional amending formulas.[41] As in the United Kingdom, however, the reasons to hold referendums are not exclusively legal. Indeed, the requirements of a constitutional convention to hold a referendum may have been satisfied in the United Kingdom.[42] Similarly, there have been public commitments in Canada that further constitutional changes made by Ottawa would not

[36] 'All provinces except Quebec came to agreement with Ottawa, the final package being determined in informal, late-night negotiations from Quebec was excluded. this because, in sovereigntist memory the "night of the long knives."' Webber (n 4). 40

[37] Chantal Hébert and Jean Lapierre, 'The Morning After: The 1995 Quebec Referendum and the Day That Almost Was' (Knopf Canada 2014). xvii-xx

[38]' On October 30, 1995, the Canadian federation came within 54, 288 votes of having to grapple with the issue of its continued existence.' ibid. xiii

[39] This is a question of course familiar in a British context after the referendum on the United Kingdom's membership of the European Union in 2016.

[40] Of particular importance is s 2(2) which holds that 'In considering whether there has been a clear expression of a will by a clear majority of the population of a province that the province cease to be a part of Canada, the House of Commons shall take into account (a) the size of the majority…(b)the percentage of eligible voters… (c) any other matters or circumstances it considers relevant.' An Act to give effect to the requirement for clarity, Parliament of Canada 2000

[41] The post-1982 amending formula in Canada is complex, and the formula is different depending on the question. Unanimity of the Senate, House of Commons, and provinces is required for some questions, most notably the use of both English and French in Federal institutions. The most familiar amending formula requires assent by the House of Commons and the Senate, but only 2/3 of the provinces (which is seven) amounting to at least 50% of the population.

[42] Gavin Phillipson, 'Brexit, Prerogative and the Courts: Why Did Political Constitutionalists Support the Government Side in Miller?' [2018] University of Queensland Law Journal <http://www8.austlii.edu.au/cgi-bin/viewdoc/au/journals/UQLawJl//2018/8.html> accessed 4 April 2019. 17

be held without a referendum.[43] In the British North America (or Constitution) Act 1867, s 91 and s 92 lay out the powers reserved for the federal and provincial governments. Referendums are not implicated by either of those sections. Of course, and as the third section of this paper will explore, that Canada is established as a federal system means that the federal government cannot act within, or remove, provincial responsibilities.[44]

At the time of writing, there is some polling to suggest that support for secession is the highest it has been in decades, between 20-30% over the past decades (perhaps) rising now to almost 40%[45] A challenge in this polling for sovereigntists is that it suggests that support is weakest among the youngest. Whatever the reasons, and whatever the future holds, for intersecting reasons of history, language, and geography, federalism is essential to the Canadian experience. It appears that Canada will remain among the most decentralised countries in the world.[46] The United Kingdom, by contrast, is among the most centralised.[47] Given this fundamental difference in approach to internal governance, it is interesting that the UKSC drew so heavily on the *Secession Reference*. It is less surprising, however, given the enormous significance of the decision internationally.[48]

3. The *Secession Reference*

After the close-run 1995 referendum, the federal government of Canada needed to take the possibility a unilateral declaration of secession by Québec seriously. It referred the possibility of a unilateral declaration of self-determination by Québec to the Canadian Supreme Court. As in the *Lord Advocate's Reference*, discussed in Section Four below, the questions of jurisdiction were both material and arguable in this case. The province of Québec refused to participate in the case, and so an *amicus curiae* was appointed to represent them. This section has three parts. It first explains the legal arguments made in this case. It then turns to emphasizing two features of the judgment which have salience for Scotland. First, the four principles emphasised by the judgment: federalism, the rule of law, and protection for minorities. Second, the relationship between internal and external self-determination, and the impact this distinction has on the case for secession referendums. The core message of the Secession Reference was that the Canadian constitution is 'not a straightjacket.'[49] The

[43] Further, some provinces have introduced statutes requiring referendums as a provincial level before the legislature assents as part of the amending formula Webber (n 4). 49

[44] Although of course these categories are not easily severable, and this can create constitutional challenges. It is possible for the Federal Parliament to legislate on provincial matters if the 'Peace, Order and Good Government' clause of the Constitution is satisfied demonstrating that the question in Canada is of 'national concern.' A powerful recent example of this is concerns Climate Change. The SCC concluded that even though natural resources were a provincial responsibility, Climate Change did satisfy the requirements of a national concern such that a backstop system of carbon pricing was constitutional. *Reference re Greenhouse Gas Pollution Pricing Act 2021* SCC [2021] SCC 11. [211]

[45] Phillipe Fournier, '338Canada: Why Quebec Sovereigntists Are Looking Up' *Politico* (3 October 2023) <https://www.politico.com/news/2023/03/10/quebec-sovereignty-polling-00086428> accessed 20 April 2023.

[46] 'It is the territorial diversity of the country, primarily but not exclusively nationalism in Québec…that fundamentally accounts for why Canada has not centralised like so many other federations.' André Lecours, 'Dynamic De/Centralization in Canada: 1867-2010' 49 Publius: The Journal of Federalism 57. 57

[47]'OECD Fiscal Decentralisation Database' <https://www.oecd.org/tax/federalism/fiscal-decentralisation-database/>.

[48]Giacomo Delledonne and Giuseppe Martinco (eds), *The Canadian Contribution to a Comparative Law of Succession: Legacies of the Quebec Secession Reference* (Palgrave MacMillan 2019).

[49] *Reference re Secession of Quebec* [1996] Supreme Court of Canada CS-26. [150]

demanding task for the SCC in this case was to establish how confederation would respond if some of its participants sought to leave it.

3.1 Conclusions in the *Secession Reference*

As in the *Lord Advocate's Reference*, there were contestable questions of jurisdiction and justiciability in play in the *Secession Reference*.[50] Nevertheless, the SCC concluded that they did have jurisdiction and the question was a political one and therefore justiciable. The jurisdiction questions argued, *inter alia*, that the SCC was not a court of International Law. The Court held that it was not purporting to 'act' as an international tribunal.[51] On the justiciability point, the Court concluded that while of course the question had political dimensions, it also had 'severable' legal elements which the court was able to consider on its own terms.[52] In addition to these jurisdictional and justiciability questions, there were three substantive questions at stake in this case. First, under the Constitution of Canada, can the National Assembly, or Government of Québec, act to secede from Canada unilaterally? The answer the SCC gave to that question is no, for reasons that will be explained below. The second question was: is there a right to self-determination in international law which would give Québec the right to secede unilaterally? The Court concluded that there may be a right to secede unilaterally in international law, but this arguable does not apply to Québec. This is the same move the UKSC takes in the *Lord Advocate's Reference*. The third question was not answered, given the two conclusions noted above, but asked: if Canadian domestic law conflicts with international law on the question of unilateral secession, which prevails?

The first substantive legal question the Court considered was whether as a matter of Canadian domestic, Constitutional law, Québec could secede unilaterally from Canada. The court concluded that legally it could not. The constitution of Canada makes no provision for secession processes.[53] So, by implication, it was held that a unilateral declaration of succession would be an attempt to change the constitution outside the amending formulas. Therefore, a unilateral declaration of independence would not be lawful.[54] That is not to say, though, that the SCC held that a unilateral secession referendum would have no legal effect. The Court relied heavily on the constitutional principle of democracy. The SCC said that the principle of democracy demands that 'considerable weight be given to a clear expression by the people of Quebec of their will to secede from Canada.'[55] The Court added caveats, however, which were particularly important given some of the contextual factors around the 1995 referendum.

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[50] ibid. [4]
[51] ibid. [20]
[52] ibid [28]
[53] A leading voice against this approach, who writes mostly in French is Daniel Turp. Daniel Turp, 'Quebec's Democratic Right to Self-Determination: A Critical and Legal Reflection' in SH Hartt (ed), *Tangled Web: Legal Aspects of Deconfederation* (CD Howe Institute 1992). 97
[54] Webber helpfully walks through which limb of the amending formula might apply to secession in Jeremy Webber, 'The Legality of a Unilateral Declaration of Independence under Canadian Law' (1997) 42 McGill Law Journal 281. 287
[55] *Reference re Secession of Quebec* (n 49). [87]

The SCC held that for the principle of democracy to be satisfied an expression of unilateral self-determination required both a clear majority,[56] and the question itself must be clear,[57] but did not explain what amounted to clarity on either count. While such a referendum would not have legal effect, it would have enormous political significance and could not be ignored. As the court put it 'legal consequences may flow from political facts.'[58] As will be seen below, this conclusion by the SCC is like that drawn by the UKSC in the *Lord Advocate's Reference.* A referendum has enormous political significance, even if it had no automatic legal effect.[59] The SCC goes farther than the UKSC, however, in concluding that a clear majority on a clear question results in a 'duty' of the rest of Canada to negotiate with Québec, and a duty on Québec to negotiate with the rest of Canada.[60] The court grounds this 'reciprocal obligation' in the concept of federalism.[61] So, the Court holds that a clear expression of political will on a clear question gives rise to duties to cut both ways.[62] Interestingly, the Court also flags that participants in such negotiations would not be confined to Québec and to Ottawa, but also to other participants in federalism such as other provinces and indigenous peoples.[63] These negotiations are not simply about the mechanics of secession, but about finding a way forward that is in the best interests of all Canadians, both inside and outside Québec.[64] This requirement to think about the best interests of all provinces and people was, again, grounded in the principle of federalism.[65]

On the second question of whether a right to secession exists in international law, the SCC held that Quebec did not have such a right. While the right of peoples to self-determination is a general principle of international law,[66] it did not follow that Québec had such a right[67] In understanding the applicability of the principle of self-determination, the court draws on the distinction between external and internal self-determination. The right to external self-determination exists 'where a people is subject to alien subjugation, domination

[56] ibid.[154]
[57] ibid.
[58] ibid. [142]
[59] 'A lawful referendum on the question envisaged by the Bill would undoubtedly be an important legal event, even if its outcome at no immediate legal consequences.' [81]
[60] *Reference re Secession of Quebec* (n 49). [150]
[61]The Court concludes that 'the democratic vote, by however strong the majority, would have no legal effect on its own and could not displace the principles of federalism and the rule of law and protection of minorities, or the operation of democracy.' ibid. [151]
[62] Dumberry offers a helpful account of the literature and debates about the meaning of this duty in Dumberry (n 7). 153
[63] *Reference re Secession of Quebec* (n 49). [139]
[64] ibid. [151]
[65] As well as the other three constitutional principles the court identifies ibid. [152]
[66] As is presumption in favour of the territorial integrity of states. This balancing act is seen, for instance, in The UN General Assembly' s *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations,* emphasised by the Supreme court of Canada in the *Secession Reference.* This declaration held that the UN would 'Continue to reaffirm the right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and recognise the right of peoples to take legitimate action in accordance with the Charter of the United Nations to realise their inalienable right of self-determination. This shall not be construed as authorising or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducing themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.' *Reference re Secession of Quebec* (n 49). [128]
[67]'The right of colonial peoples to exercise their right to self-determination is now undisputed, but it is irrelevant to this Reference.' *Reference re Secession of Quebec* (n 49). [132]

or exploitation.'[68] The Court held that such circumstances were not present. On the second category of internal self-determination, this was of greater relevance to Québec but still did not apply. It did not apply because:

> The population of Quebec cannot plausibly be said to be denied access to government. Quebecers occupy prominent positions within the government of Canada. Residents of the province freely make political choices and pursue economic, social and cultural development within Quebec…The population of Quebec is equitably represented in legislative, executive, and judicial decisions.[69]

This was true, the SCC held, even though Québec had not agreed to the patriated version of the constitution.[70] The SCC was not sympathetic to the argument that Québec had not access to internal self-determination, emphasising at length the breadth and depth of participation by Québecers in confederation.[71] Canada sought to represent, based on the principle of equal rights, 'the whole people belonging to the territory without distinction.'[72] The principles which govern the Canadian constitution did a huge amount of legal work in coming to this conclusion, as the next section explains.

3.2 Constitutional Principles Emphasised in the Judgment

The SCC begins the Secession Reference by stressing that a constitution is far more than a written text. The Court concluded that the questions in this case require a 'profound' investigation of the principles 'animating' the whole of the constitution: federalism, democracy, constitutionalism and the rule of law, and respect for minorities.[73] Federalism, the SCC says, is a legal response to linguistic and geographical realities stretching back to confederation.'[74] It was the political mechanism by which democratic participation is facilitated by distributing power[75] so that 'diversity could be reconciled with unity.'[76] This is not only a legal principle, but a political one as 'federalism runs through the political and legal systems of Canada.'[77]

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[68] ibid. [135]
[69] ibid. [136]
[70] ibid. [137]
[71] This is worth quoting at length because it demonstrates a feeling in other parts of Canada, particularly Western Canada which itself now has a (less developed) secession movement, that Québec was *overrepresented*, rather than excluded in Canadian democracy. 'For close to 40 of the last 50 years, the Prime Minister of Canada has been a Quebecer. During this period, Quebecers have held from time to time all the most important positions in the federal Cabinet. During the 8 years prior to June 1997, the Prime Minster, and the Leader of the Official Opposition in the House of Commons were both Quebecers. At present, the Prime Minister, the Right Honourable Chief Justice and two other members of the Court, the Chief of Staff to the Canadian Armed Forces and the Canadian Ambassador to the United States, not to mention the Deputy Sectary-General of the United Nations, are all Quebecers.' ibid. [135]
[72] ibid. [136]
[73] ibid. [49]
[74] ibid. [43]
[75] ibid. [58]
[76] ibid. [43]
[77] Citing the *Patriation Reference* ibid. [47]

Federalism was one of four constitutional principles emphasised in the judgment. The others were respect for minorities and the rule of law, and democracy. In stressing the importance of the rule of law and rights for minorities, the SCC took a clear line on a counter-majoritarian principle of democracy. Principles such as democracy must be understood in 'conjunction' with other principles such as the rule of law.[78] This conclusion is not drawn in the text of the constitution itself, and indeed the Constitution Act 1867 does not mention democracy. Rather than arguing that the absence of the term democracy from the constitution undermines the importance of democracy, the court concludes that it strengthens it. The SCC says it would have been 'silly' or 'redundant' because 'the democracy principle can best be understood as a sort of baseline against which the framers of our constitution, and subsequently our elected representatives under it, have always operated.'[79]

In coming to its conclusion in the *Secession Reference*, the SCC looked beyond the text of the constitution to understand the dynamics and commitments of confederation. In its conclusions, it established a network of duties to consider the best interests of all Canadians in and outside Québec, both at the provincial level and other essential actors such as indigenous peoples. While the *Lord Advocate's Reference* emphasises the importance of democracy as well, the requirements of the principle of democracy play out differently in the United Kingdom.

4. The Lord Advocate's Reference

The Lord Advocate's Reference was a case brought by the Lord Advocate, the chief legal officer in Scotland, to answer the question of whether Scotland could unilaterally hold a secession referendum. This was not at issue in Québec, because of the federal structure of the country, the starting points for the Secession Reference is fundamentally different than the Lord Advocate's Reference, because of the principles of federalism. S 2(2) of the Scottish Independence Referendum Bill held that the next Scottish independence referendum question would be: 'Should Scotland be an independent country?' The reference to the Supreme Court asked if putting this question to a referendum relates to any of the reserved matters identified in Schedule 5 of the Scotland Act 1998, namely the Parliament of the United Kingdom (1c) and the Union of the Kingdoms of Scotland and England (1b). The Court held that holding such a referendum did 'relate' to reserved matters and so was beyond the competence of the Scottish Parliament.

Central to the question of whether a non-binding referendum 'relates' to reserved matters was the significance of the non-bindingness proposed referendum. If there is no automatic legal impact of the referendum, the Scottish Government argued, then the outcome cannot affect reserved matters.[80] The UKSC did not accept this argument, for similar reasons to that outlined in the *Secession Reference.* Both courts held that a referendum can still have legal impact, but interestingly the UKSC also drew on the principle of democracy. The court puts this point a number of ways in the judgment, but in its most ambitious framing, the

[78] ibid. [76]
[79] ibid. [62]
[80] *Lord Advocate's Reference* (n 14) [115]

UKSC held that 'A clear outcome, whichever way the question was answered, would possess the authority, in a constitution and political culture founded upon democracy, of a democratic expression of the view of the Scottish electorate.'[81] It is not clear what authority means in this paragraph, and the UKSC did not go so far as to say that this authority gives rise to the kinds of reciprocal duties that the SCC did. The UKSC only says that the political consequences would be important.[82]

Additionally, the Scottish National Party (SNP_ as an intervener made a further argument about the principle of self-determination. They argued that given self-determination is a principle of international law, and that the United Kingdom is party to the relevant international treaties to that effect, the Scotland Act must be interpreted in line with the principle of self-determination. This required a reading of the Scotland Act, insofar as possible, which was in line with international law. Where one reading of the Act is compatible with a right to self-determination, and another was not, there was an interpretative presumption that the rights-compliant interpretation would prevail.[83] This is where the comparisons to Canada are introduced.

The UKSC holds that the principle of self-determination is 'simply not in play here.'[84] They say that, as the SCC said, provided 'a state…represents the whole of the people or peoples resident within its territory on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, [it] is entitled to maintain territorial integrity in international law.'[85] The UKSC then concludes that 'these observations apply with equal force to the position of Scotland and to the position of Scotland within the United Kingdom.'[86] With respect to the impact of self-determination on the Scotland Act, the UKSC concludes that 'no reading of the subsection, whether wide or narrow, could result in a breach of self-determination in international law.'[87] The court then comes to the most important point of comparison with Canada. They say, and it is worth quoting at length:

> The Scotland Act allocates powers between the United Kingdom and Scotland as part of a constitutional settlement. It establishes a carefully calibrated scheme of devolution powers. Nothing in the allocation of powers, however widely or narrowly interpreted, infringes any principle of self-determination.[88]

There is much that is puzzling about the UKSC's account of self-determination in the *Lord Advocate's Reference.* It is puzzling that they conclude that the principle is 'simply not in play.' What the Court must mean is something like 'the internal requirements of internal self-determination are not satisfied. The principle of self-determination admits of both legal and

[81] ibid. [81]
[82] ibid. [81]
[83] ibid. [85]
[84] ibid. [88]
[85] [88] Citing the SCC at [154]
[86] ibid. [89]
[87] ibid. [90]
[88] ibid. [90]

political elements, as the Court itself says, so the blanket exclusion of the idea is not applicable. The question of whether self-determination is in play is not just a question for the UKSC. Further, there is a key difference between the internal governance established by the Scotland Act 1998 and that established by the British North America Act 1867. While doubtless it is true that as a matter of practise, the UK satisfies the requirements of internal self-determination – representing the whole of a people equally and without discrimination – the legal reality of Parliamentary Sovereignty being such that Parliament can legislate to remove that power at any time gives those arrangements a different salience. Since Brexit in particular, the conventions around respecting the autonomy of the Scottish Parliament have weakened in a way that is not constitutionally possible in Canada. This is all to say: while the requirements of internal self-determination are satisfied in both Canada and the UK, those requirements are much sturdier in Canada then the UK. Democracy under devolution means something different than it does under federalism.

5. Devolution and Self-Determination

The United Kingdom is, of course, a devolved system. Not a federal one. The uncodified constitution of the United Kingdom does not lay out constitutionally distinct jurisdictions, and courts have been unequivocal in holding that it is not a federal system. In the *Scottish Continuity Bill* case, the question at issue was the continuity of EU law in Scotland after Brexit. The Scottish Parliament withheld legislative consent to the EU Withdrawal Act 2018 and passed its own parallel legislation. The question for the UKSC was: did the Scottish Parliament act within its powers in enacting the Scottish Continuity Bill? This question arose particularly because section 17 of the Continuity Bill held that subordinate UK legislation, to the extent it contained devolved provisions, was 'of no effect unless the consent of the Scottish Ministers was obtained before it was made, confirmed or approved.'[89] The UKSC held that the Scottish Parliament did not have the authority enact section 17. This was because passing section 17 would have meant impliedly modifying the Scotland Act 1998, which is not within the legislative competence of the Scottish Parliament.[90] The UKSC stressed that, to conclude otherwise, would be contrary to the principles of devolution. The Court found that:

> …Notwithstanding the conferral of legislative authority on the Scottish Parliament, the UK Parliament remains sovereign, and its legislative power in relation to Scotland is undiminished. *It reflects the essence of devolution: in contrast to a federal model,* a devolved system preserves the power of the central legislature of the state in relation to all matters, whether devolved or reserved.[91]

This emphatic commitment to devolution is not only found in the *Continuity Bill* case. In the *UN Convention Rights of the Child* case (*UNCRC*), Mark Elliott and Nicolas Kilford argue that a later case affirms the earlier *Continuity Bill* findings. They argue that this line of cases

[89] *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64 [40]

[90] 'The effect of section 17 would be to make the legal effect of such subordinate legislation conditional upon the consent of the Scottish Ministers. The imposition of this condition would be inconsistent with the recognition in section 28(7) of the Scotland Act that the UK Parliament has unqualified legislative power in Scotland. It would therefore have to be treated as impliedly amending (and thus modifying) section 28(7) of the Scotland Act.' ibid. [52]

[91] ibid [41]

treats parliamentary sovereignty as 'unqualified' power.[92] Elliott and Kilford are not overstating the point. This is because the UKSC could have invoked the kinds of principles that the SCC did in the secession reference to constrain Parliamentary sovereignty in the name of protecting and respecting the autonomy of the Scottish Parliament. The Court decided not to constrain parliamentary sovereignty, however, and to assert that power in the United Kingdom flows from the centre down. This kind of approach is antithetical to the ethos of self-determination. While it is true that today the requirements of internal self-determination are satisfied in both jurisdictions today, this idea of Parliamentary Sovereignty as 'unqualified' power is the opposite of the approach taken in the *Secession Reference*. This is not to say that devolution is incompatible with self-determination. It is only to say that devolution must be buttressed by other constitutional principles. While as the UKSC says, the Scotland Act is a 'carefully calibrated scheme of powers' it is fragile in a way that the Canadian framework is not, and that must have some bearing on the question of whether the requirements of internal self-determination are satisfied.

The ultimate lessons to draw from Québec are for Westminster as much as Scotland. The key takeaways are these: political and legal unions create rights and duties across those jurisdictions. That includes duties to respect divisions of responsibility, even when it is inconvenient. Paradoxically, greater political and legal entrenchment of Scottish autonomy, including with respect to holding referendums and for the Scottish Parliament, makes the case for unilateral Scottish secessions referendums weaker.[93] The top-down view of parliamentary sovereignty adopted by the UKSC is, at a minimum, in tension with the bottom-up principle of self-determination.

6. Disputing this Approach to Democracy and Devolution

There are at least two directions from which a reader might object to the arguments made here. The first is for according too much legal weight to the principle of democracy. The second approach is to argue that this paper does not take democracy seriously enough. Take the first argument first, the claim is that referendums have wrongly been conflated with the exercise of self-determination.[94] While as a matter of politics, it might be argued, referendums may be perceived as exercises if self-determination, it does not follow that they should be understood this way as a matter of law, or indeed of politics.[95] This is particularly given the capacity of referendums to undermine the other principles identified by the SCC: democracy, the rule of law, and the protection of minorities.

To clarify, the claim here is not that unilateral secession referendums should have legal effect because of their democratic force. It is also true that referendums have been used to

[92]Mark Elliott and Nicholas Kilford: https://ukconstitutionallaw.org/2021/10/15/mark-elliott-and-nicholas-kilford-devolution-in-the-supreme-court-legislative-supremacy-parliaments-unqualified-power-and-modifying-the-scotland-act/

[93] Raible also argues that the hurdle is set too high by the Westminster Parliament in denying Scotland the capacity to hold a referendum. Raible (n 1). 224

[94]'Self-determination has long been associated with majority rule plebiscites and referendums and not because the principle itself possess an inherent democratic virtue.' Russell Miller, 'Self-Determination in International Law and the Demise of Democracy' (2003) 41 Columbia Journal of Transnational Law 601. 609

[95] I myself make this claim elsewhere: Leah Trueblood, 'Are Referendums Directly Democratic?' (2020) 40 Oxford Journal of Legal Studies 425.

undermine representative democracy.[96] The argument instead goes like this: the principle of democracy is a part of the constitution of the United Kingdom and, given that it is a populous and diverse country, a division of responsibility is required between different levels of government. For this commitment to democracy and division of responsibility to be meaningful, it cannot hold only when it is politically convenient for the central authority. Without constitutionally entrenched autonomy, the case for self-determination may not be absolute, but it is stronger both politically and legally.

Consider now the concern from the other direction. One approach to secession around the world is to emphasise the primacy of the principle of self-determination.[97] It takes the opposing political philosophy to the one advocated in the previous paragraph. Whilst the first approach argued that referendums could undermine other principles of representative democracy, this second approach argues that referendums *are* democracy. The thought is that referendums = self-determination = democracy. Any constitution which does not take this view, so the argument goes, is not taking democracy seriously. This second approach goes too far the other way. The two approaches outlined here relate to the much deeper question of to what degree constituent power may be constrained by constitutional orders. This profound question of philosophy need not be solved to strike a middle ground. The middle ground is just this: a unilateral secession referendum is a significant act, and legal consequences may flow from political facts.[98]

One final worry is that this paper is too cautious or sceptical about secession in a liberal democratic context. It has paid too little heed to the example of Norway peacefully ceding from Sweden, which had some influence in the Canadian context.[99] It may be that secession should be seen as a success story. Making smaller states from bigger ones is potentially positive, depending on the underlying challenges. In the Canadian context, Jacobs thinks the sheer geographical size of Canada makes federalism untenable, and that secession of Norway from Sweden had benefited both countries politically and economically.[100] Norway and Sweden offer a helpful reminder of the positive possibilities of secession, despite potential challenges in the short term. This paper has sought to remain agnostic about the case for secession both in Scotland and in Québec. It has only argued that despite the facial similarities, there are structural democratic differences which bear on the question of whether the internal requirements of self-determination are satisfied.

7. Conclusion

Secession is not a settled question in either Québec or in Scotland. It is unlikely ever to be settled completely, as these jurisdictions try to balance diversity and unity through their political and legal arrangements. The best that can be hoped for is that these tensions lead to productive celebrations of diversity rather than antagonism. As referendums have become closely tied to the project of self-determination in the 20th century, the prospect of further referendums continues to loom large as well. While of course there are crucial similarities between the jurisdictions of Scotland and Québec, this paper has argued that it is equally

[96] John Haskell, *Direct Democracy or Representative Government? Dispelling the Populist Myth* (Perseus 2000).
[97] David Miller, *Is Self-Determination a Dangerous Illusion?* (Polity 2020).
[98] *Reference re Secession of Quebec* (n 49). [142] and *Lord Advocate's Reference* (n 14) [80]
[99] Jacobs (n 31). 29
[100] ibid. 50

important to emphasise the differences. The fact that Canada is a federal system means that some arguments about self-determination are of limited transferability from one jurisdiction to another. Québec has constitutionally entrenched protections, including the very right to hold a referendum. This is not the case in Scotland. While federalism is not transferable, however, the other three constitutional principles emphasised in the *Secession Reference* –democracy, the rule of law, and respect for minorities– are. While these principles will have a different salience, they are still clearly present in the United Kingdom. A devolved system will require greater reliance on political rather than legal checks, as well as other constitutional principles, to give effect to the principles of internal self-determination. That these checks are political rather than legal does not make such effect impossible. The direction of trajectory in decisions of the UKSC in characterising parliamentary sovereignty as 'unqualified' power, however, does not support the development of these principles and so the requirements of internal self-determination. Paradoxically, constitutionally protected autonomy – including the capacity to hold referendums – may make the holding of such referendums less likely. Whether it makes such referendums less likely, the key lesson for Scotland from Canada is for Westminster. It is this: the capacity to hold unilateral self-determination referendums makes the case for using them less persuasive.