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Foreword

One day in May: democratic pathways to secession

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by Chris McCorkindale*

1.Introduction.

The UK constitution is creaking. It might barely be audible under the din of political scandal in Scotland[1] and Northern Ireland[2], the rise of Reform as a (credible?) party of government and opposition in England[3], Wales[4] and Scotland[5], the ongoing and still unfolding impacts of Brexit on the island of Ireland[6] and the transition of power taking place inside Number 10 Downing Street[7]. But listen in; listen carefully. On May 7 2026 the Scottish Parliament elections produced a fourth successive pro-independence majority and produced a fifth successive pro-independence (Scottish National Party) government[8]. Whilst public opinion on the independence question itself remains on a knife edge[9] š— it is clear that the 2014 Scottish independence referendum did not settle the question for a generation; but it is clear too that the outcome of the 2016 Brexit referendum did not shift public opinion decisively in favour of independence — Scotland's devolved authorities have a now long established pro-independence bent.

On the same day, Senedd elections produced the first pro-independence (Plaid Cymru) government in Wales, ending a continuous period of Labour-led government since the first elections to the (then) National Assembly of Wales in 1999. And, even if that election produced a pro-union Senedd majority that reflects wider public opinion in Wales[10], there are two important caveats. First, the willingness of the people of Wales to elect a pro-independence government — one that that they expect to prioritise independence, despite independence not being a priority of the people themselves — speaks to an evolving Welsh political nationalism. Second, the position of Plaid Cymru as a minority government, with support for independence sitting at around 22%[11], bears striking similarity to the position in which

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[1] Former SNP chief Peter Murrell sentenced to more than five years for embezzling party funds - BBC News, 23 June 2026.

[2] Former DUP leader Jeffrey Donaldson guilty of child sex abuse charges including one count of rape - follow live - BBC News, 22 June 2026.

[3] England council results, BBC News online, available at https://www.bbc.com/news/election/2026/england/results.

[4] Welsh Parliament results, BBC News online, available at https://www.bbc.com/news/election/2026/wales/results.

[5] Scottish Parliament results, BBC News online, Scottish Parliament election results 2026 - BBC News.

[6] *In the matter of an application by Martina Dillon… for Judicial Review (Respondents)* [2026] UKSC 15. See C. McCrudden, *Reading Dillon*, UK-EU Relations Law blog, 7 May 2026, available at Reading Dillon – UK-EU Relations Law.

[7] Keir Starmer announces resignation as prime minister and Labour Party leader - BBC News, 22 June 2026.

[8] The SNP having first come to power in 2007 as a minority government.

[9] For running data see Independence Polling – Ballot Box Scotland.

[10] Where does political opinion stand in Wales, ahead of the 2026 Senedd election?, 29 April 2026.

[11] Ibid.

the SNP found themselves in 2007. Whether Plaud Cymru can similarly establish itself as the party of government in Wales, and whether public opinion about independence will follow a similar path to that taken in Scotland, remains to be seen[12]. Whatever else might be said about these results — whatever the legislative arithmetic within the devolved legislatures or state of public opinion outwith — for the first time all three devolved governments are led by First Ministers whose commitment is to statehood outside of the United Kingdom.

This new political reality presents a significant challenge to those who engage with this journal: recognising that the dissolution of the union is no longer unthinkable even to those opposed to that outcome, how best to accommodate the the democratic right of the people of Scotland, Wales and Northern Ireland to determine their own constitutional futures.

2. Secession referendums and the UK constitution.

For obvious reasons, constitutions rarely signpost the path to secession. A 2019 study by Tom Ginsburg and Mila Versteeg found that, of 190 countries surveyed in 2014, fifty-seven (30%) explicitly or implicitly prohibited secession while 127 (67%) were entirely silent on the matter. Only five (2%) – Ethiopia, Uzbekistan, St Kitts & Nevis, Sudan and Liechtenstein – provided for and defined a democratic pathway to secession[13]. The United Kingdom's constitutional arrangements *are* permissive of secession. In relation to Northern Ireland that is made explicit. The 1998 Good Friday/Belfast Agreement gave *legal* form to principles of self-determination and majority consent that underpin any right to secede. Section 1(1) of the Northern Ireland Act 1998 reaffirms that "Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a [border] poll". Schedule 1 of the Act confers a power on the Secretary of State to "direct the holding" of such a poll at their discretion (para 1) but creates a duty on the Secretary of State to call a poll "if at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland" (para 2). In the event that a majority of those voting do consent to becoming part of a united Ireland, section 1(2) of the 1998 Act creates a duty on the Secretary of State to give effect to that wish by laying the appropriate proposals — as agreed between the governments of Ireland and the United Kingdom — before Parliament.

In relation to Scotland (and by extension in relation to Wales) the position was implicit but put beyond doubt by the 2014 Scottish independence referendum. There the trigger was a combination of political factors: the historic (and, thus far, unique) single party majority achieved by the SNP in 2011; the clear commitment made in the 2011 SNP manifesto to introduce a Referendum Bill[14]; and, the decision by the then Prime Minister, David Cameron, to respond to the SNP's

[12] J. Curtice, N. Mcewen, M. Marsh, R. Ormston, *How the SNP Won*, in J. Curtice and D. Mcrone(eds.), *Revolution or Evolution? The 2007 Scottish Elections*, Edinburgh, Edinburgh University Press, 2009, ch. 6.

[13] T. Ginsburg and M. Versteeg, *From Catalonia to California: Secession in Constitutional Law*, in *Alabama Law Review*, vol. 70, n. 4, 2019, pp. 923-985.

[14] *SNP Manifesto 2011*, p. 28.

"significant victory" with the offer of a "fair, legal and decisive" referendum.[15] What underpinned that referendum was two-fold. First, good faith negotiations between the Scottish and United Kingdom Governments about referendum question, timing, franchise and legal basis. Second, the commitment on both sides to "work together constructively in the light of the outcome, whatever it is, in the best interests of the people of Scotland and the rest of the United Kingdom"[16].
Whilst the political context that gave rise to the 2014 referendum was highly contingent, and whilst the legal basis of the 2014 referendum was specific to that vote, successive UK governments have continued to take a permissive approach to secession in principle even while rejecting specific requests made to hold a second Scottish independence referendum. So, Conservative UK governments rejected calls for a second Scottish independence referendum in 2020, on the basis that insufficient time had passed since the decision taken in 2014, and said "now [was] not the time" in 2017 (in the midst of Brexit negotiations)[17] and in 2022 (whilst "tackling the cost of living, energy security…Russia's invasion of Ukraine and growing the economy")[18] on the basis of prevailing political conditions, but never on the basis that the question had been settled once and for all. Likewise, the Labour Secretary of State for Scotland, Douglas Alexander, said that the UK Government "would take seriously any SNP majority" in the 2026 Scottish Parliament elections but reiterated that the people of Scotland "made [their] choice in 2014" to remain in the United Kingdom[19].

3. Constructive ambiguity and the referendum trigger.
It is clear then that UK's constitutional arrangements are permissive of secession – whether explicitly in relation to Northern Ireland or implicitly in relation to Scotland and Wales. What is less clear are the circumstances in which a referendum would be held. In Northern Ireland the trigger for the Secretary of State's duty to hold a border poll is the likelihood, *in their view*, that a majority of those voting would support unification. However, there is nothing in law, in guidance or otherwise in the public domain about the factors that the Secretary of State might take into account in arriving at that view. Votes cast in elections, seats won in elections, votes held in the Northern Ireland Assembly, opinion poll data all in their own way offer more or less reliable and empirical measures of majority opinion but each has its limitations[20] and each might lead the Minister to a different view. Attempts have been made to compel the Secretary of State to set out the criteria and evidence that they would use to determine whether to call a border poll. The Court of Appeal in Northern Ireland was not convinced. In its view "the constitutional value

[15] *Scotland's constitutional future: A consultation on facilitating a legal, fair and decisive referendum on whether Scotland should leave the United Kingdom*, cm. 8203, January 2012, p. 5.

[16] Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland, Edinburgh, 15 October 2012, para. 30.

[17] Theresa May: 'Now is not the time' for Scotland independence vote - BBC News, 16 March 2017.

[18] Now is not the time to talk about Scottish independence vote -PM Johnson's spokesman | Reuters, 14 June 2022.

[19] Douglas Alexander: UK Gov will 'take seriously' SNP majority | The Herald, 22 October 2025.

[20] K. Hayward, M. Keating, T. Lock and C. McCorkindale, *Democratic pathways to a second Scottish independence referendum: advisers' briefing* prepared for the Constitution, Europe, External Affairs and Culture Committee of the Scottish Parliament, 19 December 2025, pp. 9-14, available at democratic-pathways-to-a-second-scottish-independence-referendum-advisers-briefing.pdf.

of flexibility" in such a complex and highly charged context "requires to be maintained and…would not be maintained by the publication of a policy"[21]. The 1998 Act does not require a policy to be published[22] — rather, it requires the Secretary of State to exercise "an evaluative judgment…essentially a political judgment… that depends on what are the prevailing circumstances at any given time"[23]. However, there were some useful insights both in the judgment (that in the exercise of their judgment the Secretary of State "must act honestly" and "with rigorous impartiality in the context that it is for the people of the island of Ireland alone to exercise their right to self-determination")[24] and in the submissions made by the Secretary of State (that she "may decide to take account of opinion poll evidence and may even decide to commission such evidence" and is likely to be informed by the results of elections and opinion evidence where available and reliable")[25].

Whereas in Northern Ireland the *trigger* for a referendum is clear (the Secretary of State's view that a majority is likely to vote in favour of unification) even if the underlying criteria and evidence base are not, in Scotland and Wales not even that much is clear. There is no duty on the part of the UK Government to call a referendum under any circumstances. Both the decision whether to call a referendum and the criteria and evidence base for that decision are entirely at their discretion. The 2014 referendum was triggered by the SNP winning the Scottish Parliament's first single party majority — but at a time when there was only minority support for independence (around 23%) in opinion polls. Subsequently, the Scottish Government has sought to argue that a second referendum is justified by a "material change in circumstances that prevailed in 2014"[26] (that is to say, by Brexit), by "sustained evidence that independence has become the preferred option of a majority of the Scottish people"[27] and by the democratic mandate conferred by pro-independence majorities returned to Scottish seats in the UK Parliament in 2015, 2017 and 2019 and, more significantly, to the Scottish Parliament in 2016, 2021 and 2026[28]. In its 2025 paper, *Your Right to Decide*, the Scottish Government appealed to "precedent" to shape the exercise of the UK Government's discretion and this in two ways. First, that voters enter the ballot box with an expectation that the precedent of 2011 will be followed — that a pro-independence majority will be met by the governments of Scotland and the United Kingdom taking the steps necessary to deliver a referendum[29]. Second, that the seven year rule set out in the Northern Ireland Act 1997 — that following any referendum there should not be another for a minimum period of seven years[30] — establishes a precedent for the minimum period of time between independence referendums; a period of

[21] *Raymond McCord's Application: Border Poll* [2020] NICA 23, para. 100.
[22] Ibid., para. 81.
[23] Ibid., para. 80.
[24] Ibid., para. 82.
[25] *Raymond McCord's Application: Border Poll* [2020] NICA 23, para. 11.
[26] SNP Manifesto 2016, p. 24; *Scotland's Right to Choose: Putting Scotland's Future in Scotland's Hands*, Edinburgh, Scottish Government, 2019, p.14.
[27] 2016 Manifesto (n. 26), p.24.
[28] Scotland's Right to Choose (n. 26) pp. 13, 16.
[29] *Your Right to Decide*, Edinburgh, Scottish Government, 2025, p. 17.
[30] Northern Ireland Act 1998, Sch. 1, para. 3.

time that has long since passed.[31] Alas, as yet, to no avail. The UK Government's position, simply put, is that we will know the moment has arrived when we have arrived at it. As it was put by the then Secretary of State for Scotland, Alister Jack, to the House of Commons Scottish Affairs Committee:

> *It's the duck test. If it looks like a duck and it sounds like a duck and it waddles like a duck then it's probably a duck. People know when they've reached that point. They knew [in the 2011-2014 period] that they'd reached it. We don't believe we've reached it now.*[32]

Yet this is precisely the problem. As the old optical illusion tells us, one man's duck is another man's rabbit.

4. Destructive ambiguity and the road ahead.

The problem, then, is this: that the UK constitution takes a permissive approach to secession by its constituent parts; that that the power to authorise a referendum rests at the UK level; that the people whose right it is to self-determine are those of the constituent parts; that the UK Government accepts that circumstances might in future arise that would justify a secession referendum in one or more of its constituent parts; that in each of Scotland, Wales and Northern Ireland there are indicators in elections and/or in public opinion polls that the prospect of a secession referendum is real rather than imagined or "merely" academic; but that ambiguity about the pathway from democratic demand for a referendum to its authorisation and delivery creates an anomaly that ought to be corrected.

To be clear, the incentives here do not flow one way. Clarity is not solely to the benefit of nationalist agitators keen for a signpost to guide them and a motivation to their cause — though evidence shows it can have precisely that effect[33]. In their empirical study of secession in constitutional law, Ginsburg and Versteeg showed that ambiguity about the right to secede breeds instability: providing a space in which demand for secession can mobilise but where apex governments and constitutional courts almost always interpret ambiguity in ways that favour the nation-state and that potentially radicalise the secessionist claim. Explicit prohibition, they argue, discourages mobilisation from the outset. In the UK that horse has bolted. An explicit right on the other hand leaves no ambiguity to exploit – reducing the risk of disappointment, radicalisation and instability[34]. The Supreme Court might have definitively ruled on where the power lies to authorise a referendum but this is the beginning and not the end of the question. The question to that should occupy all of our minds – the devolved governments, the UK government, wider civil society and yes, those who take British and Irish constitutionalism seriously on these pages and beyond – is what next; how does constitutionalism respond where legitimate democratic demand is denied a legitimate democratic pathway to its realisation.

[31] Your Right to Decide (n. 29) pp. 14-1.

[32] Alister Jack sets out 'duck test' for second independence referendum | The Herald, 28 November 2022.

[33] Ginsburg & Versteeg (n. 13).

[34] Ibid.