

# Neither full independence, nor perfect union: Constitutionalism as a Third Way for the future of Scotland

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*With Scotland now to seek a second independence referendum, the debate is framed around two extreme options: independence or union. [Stefan Theil](#) writes that a third option is available if both sides are prepared to make concessions. He explains how constitutionalism, paired with a federal settlement, could come to offer a viable long-term solution for Scotland.*



Nicola Sturgeon made it [official last week](#): in light of the pronouncements from Westminster that the government will seek a 'hard Brexit' in [upcoming negotiations](#) – an exit from the single market and severing most other areas of cooperation – the Scottish Government will in turn follow up on the SNP's [manifesto pledge](#). The Scottish government will seek to hold a second referendum on Scottish independence before the exit from the European Union (EU) becomes final, a demand that was [turned down](#) by the Prime Minister. Leaving the [legal issues](#) surrounding the referendum aside for the moment, the political debate has once again returned to the familiar dichotomy: union versus independence.

But a Third Way could satisfy the preferences of unionists and supporters of independence to a significant degree, if painful concessions from both sides are made. This Third Way would seek the middle ground: it would formalize Scottish statehood (in terms of international law) and independence through a Scottish Constitution while retaining the current Union through a concurrent federal settlement between Holyrood and Westminster.

Several parties have in the past mooted federalism, a policy now officially supported by the [Scottish Labour Party](#). Even though recent legislative efforts such as the [Wales Act 2017](#) and opinion [surveys in England](#) indicate a certain inclination towards further devolution, there is currently no clear support amongst major political parties for implementing full federalism across the UK.

A Scottish Constitution, coupled with a negotiated, federal settlement with the UK, could actually achieve two seemingly mutually exclusive goals: Scottish independence and a continuation of the Union with England. Notably, the Third Way would go significantly beyond other previously floated suggestions like [devolution-max](#) – the idea of full fiscal autonomy for Scotland.

In the spirit of Bruce Ackerman's [seminal work](#) on constitutionalism, Scotland would have its defining, *constitutional moment*. In a first step, the people of Scotland would draft a Scottish Constitution with the following key elements, common to such documents: establishment of basic institutions and departments; distributing and delineating powers and obligations among those institutions; as well as codifying fundamental principles and values, including human rights.

Given the complexities and peculiarities in the relationship with Westminster, the Constitution would include a further crucial element: a requirement to negotiate a federal settlement that delineates the powers that are transferred to the UK government, as well as the terms and conditions for their exercise. A look to existing legislation that transferred power from Westminster, such as the [Scotland Act 1998](#), and its subsequent amendments from [2012](#) and [2016](#) would be a useful starting point.

Upon the conclusion of the drafting process and negotiations, Scotland would, for a virtual (legal) second, leave the United Kingdom and re-join on the basis of the Scottish Constitution and the federal settlement. This model would have several advantages over the status quo and can satisfy at least some of the goals of supporters of independence and unionists.



### **Scottish statehood and self-determination**

Under a Scottish Constitution, Scotland and its constitutional entities would be the representatives of an independent state in their own right. Ultimately, the decision to remain in the Union would unequivocally lie with the Scottish people. Should they find the federal settlement disagreeable in the future, it could be altered through negotiations with the UK, and – as a last resort – the Scottish Constitution could be amended to terminate the federal settlement entirely. This has the distinct advantage that the People of Scotland could determine whether membership in the UK continues to serve their interests without the need to seek permission for a referendum.

### **Limited powers**

The Constitution and the federal settlement would formalize, expand, and define the powers of the Scottish government and delineate the scope and content of the powers transferred to Westminster. Save for the powers expressly transferred, Scotland would exercise all powers conventionally attributed to states – crucially for independence supporters, this could include powers of taxation and fiscal autonomy. Conversely, Holyrood may have good reasons to rely on the existing infrastructure of the UK in monetary, foreign, trade, and defence policy, perhaps in exchange for proportional contributions to the (federal) budget of the UK and hosting military bases, such as those of the Trident nuclear deterrent.

Inevitable cases of conflict over the interpretation of the federal settlement could be bindingly adjudicated by an independent judicial body. This task might be fulfilled by the Judicial Committee of the Privy Council, or a specially created body comprised of judges appointed by Holyrood and Westminster: a miniature federal court that deals exclusively with matters regarding the interpretation of the federal settlement.

Even though this would in some respects break new constitutional ground in the UK, there are good reasons to believe that such litigation will pose no extraordinary difficulties beyond those already encountered in statutory interpretation and controversial constitutional litigation. Most recently, the case of [R \(Miller\) v Secretary of State for Exiting the European Union](#) exemplified the rich legal discourse of judges, lawyers and scholars that has served the British Constitution well.

### **European Union Membership**

Despite this potential, it is important not to overstate the case: constitutionalism and a federal settlement cannot

address the concerns over EU membership, which has become a major factor in the calls for a second referendum. While certain provisions might be made to benefit Scotland, it is difficult to conceive of a coherent federal settlement if one part of the UK remains a member of the EU while the others do not. In that sense, the Third Way might well be unacceptable for many Scottish voters. However, it is worth recalling that leaving the EU is a probable outcome even in the event of a successful second Scottish referendum – it is by no means clear that Scotland would be permitted to join as a member state immediately following independence, especially considering possible [reservations from Spain and France](#).

## Conclusion

Many will dismiss the Third Way as a rotten compromise. Undeniably, it is neither full independence nor perfect union, and is wrought with complex negotiations. In an age of [increasing political polarisation](#), incremental improvements and compromise seem to be falling out of fashion, often replaced by a desire for strong leadership and the promise of decisive, sweeping action, as propagated by [right wing populists in Europe](#).

However, if concessions prove politically bearable and viable, then the Third Way promises a stable settlement designed to outlast the ebb and flow of popular opinion. Constitutionalism, paired with a federal settlement, might well represent an attractive long-term alternative for Scotland: a path that rejects the ‘all or nothing’ options currently on the table.

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## About the Author

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