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Citation for final published version:

Murray, C. R. G. and Wincott, Daniel 2020. Partition by degrees: routine exceptions in border and immigration practice between the UK and Ireland, 1921-1972. *Journal of Law and Society* 47 (S1) , S145-S163.  
10.1111/jols.12246 file

Publishers page: <https://doi.org/10.1111/jols.12246>  
<<https://doi.org/10.1111/jols.12246>>

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## **Partition by Degrees: Routine exceptions in border and immigration practice between the UK and Ireland, 1921-1972**

C.R.G. Murray and Daniel Wincott\*

Abstract:

Using archival materials we reflect on the legal process of creating (and mitigating) a border in Ireland after partition in 1922 and interactions between those laws and the people they affected. After 1922 superficially durable exceptions developed to the territorial state's distinctions between citizens and foreign nationals under the aegis of the Common Travel Area. They survived the 1930s UK-Ireland "Economic War", were sustained (if in a restricted form) during the Second World War and rebuilt in its aftermath. These arrangements proved beneficial for both countries, providing an outlet for surplus labour for Ireland and a resource for the UK economy. We nonetheless explore how far practice reflected this overarching cooperative framework, particularly given the complications introduced by the policies of Northern Ireland's institutions.

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## INTRODUCTION

Within their territorial boundaries liberal democracies present themselves as treating their citizens with a measure of equality, restraining officials from arbitrary exercise of powers and limiting the use of force by their agents. Borders, and the imagined national communities they bound, circumscribe these rights and protections. In recent decades scholars have reassessed these supposed hallmarks of western states, particularly in their responses to the 9/11 attacks. The ‘War on Terror’ has arguably made ‘the exception’ a ubiquitous feature of western governance. Accounts of the exception as brief – consisting of time-limited responses addressing a particular crisis – are giving way to more dynamic analyses of illiberal aspects of democracies and their legal orders.<sup>1</sup> Rick Abel’s magisterial *Law’s Wars* and *Law’s Trials* showcased the significance of the exception in the legal discourse of the United States.<sup>2</sup> Comfortable assumptions about the nature of legal systems in liberal democracies, and a sharp distinction of law from politics, have become increasingly difficult to sustain, and prompted a renewed attention upon how some exceptions have become deep-seated.

Alongside illiberal legalities we also need to consider liberal exceptions to standard assumptions about ‘domestic law’. In this article we interrogate the exceptions which emerged in the rule of law and deployment of political power in the decades which followed Ireland breaking away from the United Kingdom (UK). Territory – particularly in relationship to identity – is a neglected aspect of the exception. Conventional national-state accounts assume that national socio-political identities and state institutions share territorial boundaries.<sup>3</sup> Anglo-Britain’s imperial history is a poor fit with these accounts, and its influence on the UK’s borders and governance is therefore little understood. In particular, the twin process of Ireland’s independence and partition have produced complex, even paradoxical patterns of exceptionalism.

For the half-century after partition, Northern Ireland’s governance order and legal system maintained systematically illiberal features, and its authorities often treated its minority Catholic community as an existential threat. Similar, if less extreme, criticisms can be levelled at Ireland in the same period. Despite this tension, the UK and Ireland permitted each others’ citizens to engage in various practices usually reserved for ‘home’ citizens, including voting in general elections and claiming social benefits. Although it has become commonplace to hear populist politicians talk of an ‘assault on

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<sup>1</sup> D. King, *In the Name of Liberalism* (2003) on illiberalism in social policy.

<sup>2</sup> R. Abel, *Law’s Wars: The Fate of the Rule of Law in the US “War on Terror”* (2018), *Law’s Trials: The Performance of Legal Institutions in the US “War on Terror”* (2018).

<sup>3</sup> D. Chernilo, *A Social Theory of the Nation-State: The Political Forms of Modernity Beyond Methodological Nationalism* (2007), C. Jeffery and D. Wincott, “The Challenge of Territorial Politics: Beyond Methodological Nationalism” in C. Hay (ed), *New Directions in Political Science: Responding to the Challenges of an Interdependent World* (2010) at 167.

borders' by supra-national entities,<sup>4</sup> the history of partition offers considerable evidence of sovereign states' willingness to make expedient departures from 'pure' conceptions of their borders. Centralised UK institutions found themselves obliged to adopt a complex 'policy of adjustment'<sup>5</sup> towards both Ireland and Northern Ireland after 1921.<sup>6</sup> These exceptional arrangements were sustained despite intermittent violence and popular prejudices, and many persisted even after the collapse of Northern Ireland's autonomous institutions amidst worsening conflict in 1972.

Northern Ireland's illiberal democracy rarely intruded into an Anglo-British imaginary in which England is viewed as the UK's core territory, an 'English centre' that expanded its control over other parts of the North Atlantic Archipelago. Anglo-Britain's peerless (sic) history of gradual, peaceful legal and democratic evolution pervades contemporary legal and political discourse. The resultant state is envisioned as an exemplary 'ancient democracy',<sup>7</sup> which has no need for standard liberal democratic structures and protections. Anglo-Britain is thus paradoxical: an exceptional, unexceptional state. From legality to democracy, its fundamental constitutional principles often rested on little more than ingrained Podsnappery.<sup>8</sup> This narrative rubs uncomfortably against the complex political realities of relationships among government authorities and socio-economic networks of peoples across the North Atlantic Archipelago.

The period we analyse runs from Northern Ireland's creation to the imposition of direct rule from Westminster in 1972. Large parts of its 100-year history appear obviously exceptional: the conflict of the latter part of the twentieth century; the repeated crises of post-Good Friday/Belfast Agreement power-sharing; the Brexit-induced re-examination of its constitutional status. We, however, interrogate a period in which most Westminster policy-makers reckoned the "Irish Question" had been solved.<sup>9</sup> We explore the establishment and operation of the border between Northern Ireland and Ireland. Mundane tensions between law and executive authority play the key role, not a dramatic state of emergency marked by sharp law/exception distinction. After outlining the background to partition, our core analysis is of the border in practice. The

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<sup>4</sup> See the writings of Dutch Forum for Democracy leader Thierry Baudet; T. Baudet, *The Significance of Borders: Why Representative Government and the Rule of Law Require Nation States* (2012) at 79-87.

<sup>5</sup> P. Arthur, *Special Relationships: Britain, Ireland and the Northern Ireland Problem* (2000) at 94.

<sup>6</sup> The earlier imperial order also required accommodations – L. Benton and L. Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800–1850* (2016) at 122-188.

<sup>7</sup> BBC News, 'In full: David Cameron statement on the UK's future' (2014) <https://www.bbc.co.uk/news/uk-politics-29271765>.

<sup>8</sup> As satirized by Dickens; J. Morison and S. Livingstone, *Reshaping Public Power: Northern Ireland and the British Constitutional Crisis* (1995) at 4-5.

<sup>9</sup> H. Calvert, *Constitutional Law in Northern Ireland: A Study in Regional Government* (1968) at 11.

performance of roles at or across the border, from ‘border guard’ to ‘frontier worker’, helped to construct this reality. Shifting relations between Dublin, London and Belfast affected these border actors. Using primary archival sources we trace the complex social relations playing out in the shadow of contentious politics and state authority. We thus combine an account of state border management and a focus on the individuals affected by those measures. They might be ‘projections of territorial power’, but ‘people will ignore borders whenever it suits them’, if they are able to do so.<sup>10</sup>

### **BORDER BY BRICOLAGE**

The consequences of partition for the UK and Ireland test our understanding of states of exception and how they relate to the rule of law. Often presented as a dramatic fracture in 1921, the constitutional de-coupling of the two states was, instead, a protracted process which embedded the exception. The 1921 settlement sought to halt two years of escalating conflict. It partitioned Ireland into two polities on the basis of ethno-nationalist population preponderances. In the twenty-six counties that became the Irish Free State an overwhelming majority of the population favoured independence from the UK. The Government of Ireland Act 1920 had provided for a Northern Ireland Parliament, and the 1921 settlement permitted it to withdraw from the Irish Free State.<sup>11</sup> Its decision to opt-out in December 1922 reflected the majority preference in Northern Ireland to remain within the Union. The fault line between the new polities was thus grafted onto existing county boundaries, even though these provided a poor proxy for the ethno-nationalist population distribution.<sup>12</sup> As a state border it made little sense, meandering between geographical features and transected by hundreds of major and minor crossings.<sup>13</sup>

In partition’s early days many assumed that this dividing line would be temporary. With a Boundary Commission at work, and the potential for major changes to the border, there was marked reluctance to do much about border infrastructure. Ireland’s new Provisional Government, embroiled in a civil war, was in no position to enforce a new land border customs regime or

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<sup>10</sup> M. Baud and W. van Schendel, ‘Toward a Comparative History of Borderlands’ (1997) *J. of World History* 211 at 211. For recent accounts of the social impact of Ireland’s partition, see C. Moore, *Birth of the Border: The Impact of Partition in Ireland* (2019) and O. Ozseker, *Forging the Border: Donegal and Derry in times of revolution* (2019).

<sup>11</sup> *Final text of the Articles of Agreement for a Treaty between Great Britain and Ireland as signed* (London, 6 December 1921) Article 12 and the Irish Free State (Agreement) Act 1922, s.1(1). The UK Government pointedly refused to label these arrangements a treaty, preferring the term “Articles of Agreement”, thereby denying the Free State’s statehood; H. Harrison, *Ireland and the British Empire, 1937: Conflict or Collaboration?* (1937) at 83.

<sup>12</sup> A. Carty, *Was Ireland Conquered? International Law and the Irish Question* (1996) at 135-140.

<sup>13</sup> G. Denton and T. Fahy, *The Northern Ireland Land Boundary 1923–1992* (1993) at 4.

develop its own trade policy.<sup>14</sup> The new customs border between Ireland and the UK was thus delayed until a new financial year, eventually entering force on a quiet Sunday, 1 April 1923.<sup>15</sup> Transportation of goods across the land border became subject to customs checks. Goods had to cross by rail or on one of fifteen approved roads (increased to twenty by the 1960s).<sup>16</sup>

Ireland thus belatedly joined the post-First World War wave of border creation, which had already seen Keynes wistfully recall how, before 1914, '[t]he interference of frontiers and of tariffs was reduced to a minimum ... within the three empires of Russia, Germany, and Austria-Hungary.'<sup>17</sup> As with these imperial states, the UK's break-up fractured an existing customs union.<sup>18</sup> By 1925 the work of the Boundary Commission had come to nothing, leaving 'all of the border's worst glitches unresolved',<sup>19</sup> and customs posts took on an air of permanence. Intermittent attacks on these posts between the 1920s and 1950s became an expression of violent opposition to partition.

Even with the customs border in place, Ireland remained a Dominion within the British Empire.<sup>20</sup> Alongside the other Dominions, it was nonetheless on a fast-track towards full independence, joining the League of Nations in 1923. The Imperial Conferences of 1926 and 1930 recognised that the Westminster Parliament should no longer be able to legislate for the Dominions,<sup>21</sup> a power formally removed in the Statute of Westminster 1931. Thereafter, the Privy Council described this Act as necessary 'to confer independence and Sovereignty on the six Dominions therein mentioned'.<sup>22</sup> Although the External

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<sup>14</sup> General administrative functions of government, other than customs and excise, were formally transferred to the Provisional Government on 1 April 1922, under the Provisional Government (Transfer of Functions) Order 1922 (SI 1922/315) (UK). Authority over customs and excise was not formally transferred until 6 December 1922, when the Irish Free State Constitution Act 1922 (UK), entered force.

<sup>15</sup> Irish Free State Constitution Act 1922 (UK), s.2(1).

<sup>16</sup> Land Boundary Regulations 1923 (SI 1923/342) (UK) and the Customs (Land Frontier) Regulations 1923 (SI 11/1923) (Ireland). C. Nash, L. Dennis and B. Graham, 'Putting the border in place: Customs regulation in the making of the Irish border, 1921–1945' (2010) 36 *J. of Historical Geography* 421.

<sup>17</sup> J.M. Keynes, *The Economic Consequences of the Peace* (1920) at 13.

<sup>18</sup> Act of Union 1800 (UK), Article VI. N. Wolf, M.-S. Schulze, and H.-C. Heinemeyer, 'On the Economic Consequences of the Peace: Trade and Borders After Versailles' (2011) 71 *J. of Economic History* 915.

<sup>19</sup> P. Leary, *Unapproved Routes: Histories of the Irish Border 1922–1972* (2016) at 197. Also Carty op. cit. n.12, at 140-148.

<sup>20</sup> *Articles of Agreement* op. cit. n.11, Article 1.

<sup>21</sup> T. Mohr, 'The Statute of Westminster, 1931: An Irish Perspective' (2013) 31 *Law and History Rev.* 749.

<sup>22</sup> *Madzimbamuto v Lardner-Burke* (1969) 1 AC 645, 722. The 1931 Act can alternately be read as recognising Westminster's inability to enforce its edicts upon the Dominions; see D. Coffey, *Constitutionalism in Ireland, 1932–1938: National, Commonwealth, and International Perspectives* (2018) at 19-27.

Relations Act 1936 and 1937 Constitution removed the remaining vestiges of the UK's substantive role in Ireland's governance order, until Ireland declared itself a Republic in 1949 the people of Ireland retained their 'British subject' status under Imperial law.<sup>23</sup>

Like Ireland's independence, the border between Ireland and the UK was thus a phased creation; it did not manifest overnight upon partition. Even as the legislative framework for the border was established, moreover, novel steps were taken to mitigate some of its practical effects, and these differed for movement between Ireland and 1) Great Britain and 2) Northern Ireland.

## ENFORCING THE BORDER(S)

### 1. Goods

The customs border initially had limited impact. In the early 1920s, the UK remained an ideologically free-trade country. Some of Ireland's early deviations from the UK's tariffs, including ending the punitive tariff on German imports, were aimed at enhancing free trade and, in any event, had little impact at the land border. Both countries initially exempted agricultural products from tariffs, facilitating a large amount of cross-border traffic.<sup>24</sup>

Other efforts to "de-dramatise" the border's imposition included tariff exemptions for domestic products, even including small quantities of alcohol and tobacco for use whilst travelling.<sup>25</sup> In the early days, light touch border-checks were encouraged. Just weeks before its introduction the Great North Railway was informed of reciprocal arrangements for customs officers on either side of the border to accept official manifests of goods being imported; therefore 'the examination of dutiable goods, if any, will be of the slightest'.<sup>26</sup> Guinness enjoyed special "trusted trader" arrangements; its goods could pre-clear border checks.<sup>27</sup> The Railway Company itself benefited from exemptions that enabled it to run tea cars on cross-border services.<sup>28</sup>

In Northern Ireland, land border controls required a new body of customs officials. It was assembled at short notice and drew on a pool of suitable labour, provided by numerous 'ex-members of the Royal Irish Constabulary' who sought refuge in Northern Ireland after the War of Independence.<sup>29</sup> Many

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<sup>23</sup> British Nationality Act 1948 (UK), s.2. R.F.V. Heuston, 'British Nationality and Irish Citizenship' (1950) 26 *International Affairs* 77.

<sup>24</sup> Denton and Fahy op. cit. n.13, at 21-22.

<sup>25</sup> Leary op. cit. n.**Error! Bookmark not defined.**, at 126.

<sup>26</sup> UK National Archives (UKNA), CUST 49/647, W. Young (Commissioner for the Customs and Excise, Belfast) 'Note of Interview' (6 March 1923) at para.7.

<sup>27</sup> UKNA, CUST 49/647, Great Northern Railway Company (Ireland): Special Circular to Staff (31 March 1923) at 2.

<sup>28</sup> UKNA, CUST 49/979, J.D. Large (Collector of Customs and Excise, Belfast) to W. Bailie (Traffic Manager, Great Northern Railway Company (Ireland)) (11 November 1927) at 1.

<sup>29</sup> UKNA, CUST 49/1298, J. Millar (Collector of Customs and Excise, Belfast) to W. Christian (Assistant Secretary, Customs House, London) (20 February 1922) at 1.

of those offered employment as Land Preventative Men found their postings along the border difficult, having become exiles on their own island. The customs authorities, however, gave their complaints short shrift; one senior Belfast-based official groused that 'some of these ex R.I.C. men are hard to please'.<sup>30</sup>

Ireland's control over its customs border was conceded late in the December 1921 Agreement negotiations, adding to the delays over its implementation.<sup>31</sup> Ahead of the Agreement, senior members of Lloyd George's administration had refused to give Ireland control over trade arrangements. Under the Government of Ireland Act 1920, trade was firmly retained by Westminster and was not to be devolved to Northern Ireland's institutions.<sup>32</sup> Even amid UK Cabinet discussions over a ceasefire in 1921, the doubters' main concern remained that giving Ireland Dominion status would allow it to 'levy a tariff against British goods'.<sup>33</sup> For Michael Collins, the UK Government's concession on trade was the key to allowing Ireland to build an independent economic policy.<sup>34</sup> The Cabinet controversy over trade notwithstanding, UK policymakers generally assumed that the UK economy's comparative strength would always allow them to deal with Ireland from a position of advantage. Decades earlier, during the first Home Rule Crisis, A.V. Dicey had been confident that the threat of a UK 'hostile tariff' would keep Ireland in line if it ever became independent.<sup>35</sup>

Despite efforts to "de-dramatise" the customs border, and "day-one alignment", a clash between Ireland's ability to assert its independence and the UK Government's confidence that the Free State could be controlled by punitive tariffs was inevitable. When Eamon De Valera's newly-elected Irish Government renounced Ireland's ongoing payments to the UK to cover late-nineteenth century land purchase schemes the 1932-38 "Economic War" was sparked.<sup>36</sup> The history of the Economic War has been recounted many times.<sup>37</sup>

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<sup>30</sup> UKNA, HO 267/49, J. Millar (Collector of Customs and Excise, Belfast) to S. Tallent (Imperial Secretary for Northern Ireland) (25 January 1924) at 1.

<sup>31</sup> The Irish Free State Constitution Act 1922 (UK), s.2(2), permitted shared customs arrangements to continue; once the Constitution of the Irish Free State (Saorstát Eireann) Act 1922 (Ireland) was promulgated, Article 74 indicated to Belfast customs authorities that 'the Irish Government has every intention of making a clean cut from the United Kingdom in Customs and Excise matters'; UKNA, CUST 49/1298, W. Young (Commissioner of Customs and Excise, Belfast) to A.P. Waterfield (UK Treasury) (15 December 1922) at 1.

<sup>32</sup> Government of Ireland Act 1920 (UK), s.4(7); '[T]hey shall not have power to made laws in respect of ... Trade with any place out of the part of Ireland within their jurisdiction'.

<sup>33</sup> W. Churchill, *The Aftermath: The World Crisis, 1918-1928* (1929) at 306.

<sup>34</sup> P.S. Béaslaí, *Michael Collins: Soldier and Statesman* (1926) at 322.

<sup>35</sup> A.V. Dicey, *England's Case Against Home Rule* (1973 [1886]) at 153.

<sup>36</sup> These payments were required under the *Articles of Agreement* op. cit. n.11, Article 5.



The UK imposed retaliatory tariffs in response to de Valera's refusal to remit the 1932 land annuities payment; de Valera responded with his own raft of protectionist tariffs. With a European war looming the resolution of this tussle became bound up in Neville Chamberlain's efforts to normalise relations with Ireland.<sup>38</sup> Before this resolution, however, the Economic War exposed how ineffectively UK customs-and-excise law dealt with the land border. The final barriers to internal UK trade lapsed as differential duty rates on alcohol ended in the 1850s. By the early twentieth century customs-and-excise law assumed smuggling would be intercepted at ports of entry (or, at least, in circumstances providing clear evidence of possession of goods and intention to evade duties).<sup>39</sup> Following the imposition of punitive and protectionist tariffs across a wide range of goods from 1932 onwards,<sup>40</sup> Customs officials found themselves unable to determine whether a wagonload of root vegetables intercepted somewhere near the border had actually been smuggled via an unapproved route.<sup>41</sup>

The Northern Ireland courts would not adopt a flexible approach to the legislation's requirements, insisting that customs officials must establish importation.<sup>42</sup> Under the Finance Act 1934 the UK Treasury's solution was draconian; within a 'prescribed area' (which would eventually extend up to 40 miles from the border) customs officials could require people to prove that they had not imported dutiable goods found in their possession.<sup>43</sup> This reverse burden of proof overrode ordinary conceptions of fairness in criminal proceedings:

'Perhaps it is the drastic character of these provisions which is responsible for the pleasure felt by an ordinary man when a customs case is decided in favour of the subject. He tends to forget that the operation of the provisions is directed against the professional smuggler and would remember the unhappy position of the innocent man who cannot furnish proof ...'<sup>44</sup>

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<sup>37</sup> T. Pusova, 'Irish Economic Policy in the 1930s and the Authority of Eamon de Valera' (2019) 48 *J. of European Economic History* 9.

<sup>38</sup> R.J. Raymond, 'Irish Neutrality and Anglo-Irish Relations: 1921-1941' (1987) 9 *International History Rev.* 456.

<sup>39</sup> Customs Consolidation Act 1876 (UK), s.186.

<sup>40</sup> Tariffs of up to 100 percent of livestock and agricultural produce value were imposed under the Irish Free State (Special Duties) Act 1932 (UK).

<sup>41</sup> Denton and Fahy op. cit. n.13, at 54-55.

<sup>42</sup> For example, *R (McBirney & Henry) v Armagh Justices* (1934) NI 212 and *R (Magee) v Down Justices* (1935) NI 51. The former decision was cited in Parliament as the UK Government's reason for amending the law: L. Hore-Belisha, HC Deb., vol.290, col.709 (4 June 1934).

<sup>43</sup> Finance Act 1934 (UK), s.16.

<sup>44</sup> R.H. Conahan, 'Customs Proceedings' (1948) 8 *Northern Ireland LegalQ.* 39 at 51.

These measures enabled the police and customs officials to harry individuals over much of Northern Ireland's territory.<sup>45</sup> The Northern Ireland Government amplified their effect; police officers who prevented evasions of the Land Boundary Regulations were paid bonuses.<sup>46</sup> The informal economy generated by the Economic War, and official responses to it, became 'hard to dislodge' even after trade normalization; the border remained a factor in day-to-day life for communities living along it.<sup>47</sup>

Despite trade policy being explicitly reserved to Westminster, the Northern Ireland Government found other novel ways of participating in the Economic War.<sup>48</sup> Its introduction of special regulations governing milk sales, for example, had the stated purpose of protecting public health, but its practical effect was to shield Northern Ireland's farmers from external competition.<sup>49</sup> Denied licences to sell dairy products in Northern Ireland under this legislation, farms and dairies in the Free State were excluded from their established markets. When they challenged the measure in *Gallagher v Lynn*, however, the House of Lords accepted that it had not been adopted to restrain trade. Since the 'pith and substance' of the enactment was a matter of public health, an area of law-making within the Northern Ireland Parliament's competences, the Court refused to intervene because the measure had incidental effects upon trade.<sup>50</sup> Under this hands-off approach only a direct prohibition on trade would be incompatible with the 1920 Act, encouraging legislation which 'seemed to run very near to protectionism in its effect'.<sup>51</sup>

The legislation also prevented milk supply into Northern Ireland from elsewhere in the UK. The Law Lords might have been more alive to the implications of this barrier to the movement of goods within the UK had a less perishable commodity than milk been at issue. Their acceptance of this regulatory divergence nonetheless illustrates the limited historical protections

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<sup>45</sup> The case of *Fitzharris v Strain* (1953) NI 70 illustrates police creativity in attempting (unsuccessfully) to have a motor vehicle, allegedly used to smuggle goods, treated as 'goods' for Customs (Land Boundary) Regulations 1933 (UK), Reg.12(2) purposes.

<sup>46</sup> B. Evans, *Ireland during the Second World War: Farewell to Plato's Cave* (2014) at 92.

<sup>47</sup> G. McCann, 'Protectionism and the "Economic War" in Interwar Ireland' (2014) 43 *J. of European Economic History* 39 at 63.

<sup>48</sup> D.S. Johnson, 'Northern Ireland as a problem in the economic war 1932-1938' (1980) 22 *Irish Historical Studies* 144.

<sup>49</sup> Milk and Milk Products Act (Northern Ireland) 1934, which in some respects built upon legislation like the Marketing of Eggs Acts (Northern Ireland) 1924 and Agricultural Marketing Act (Northern Ireland) 1933, which reformed agricultural products regulation, differentiating Northern Ireland from Ireland.

<sup>50</sup> *Gallagher v Lynn* [1937] AC 863, 870 (Lord Atkin).

<sup>51</sup> Calvert op. cit. n.9, at 128.

for what some now call the UK's 'internal market' under domestic law.<sup>52</sup> If avoiding tariffs during the Economic War supercharged cross-border smuggling, shortages of particular goods sustained this activity through the Second World War, illustrated by tales of the (in)famous Bundoran 'sugar train'.<sup>53</sup> During the conflict maintaining trade in goods between Britain and Ireland became bound up with concerns over resource security and demands for labour in the UK's wartime economy, providing a useful juncture to consider the management of population movements under partition.

## 2. People

From the Free State's foundation each country has allowed the other's citizens to practice most rights as if they were a home citizen. Such reciprocal access to citizenship-type rights is often said to fall under the disarmingly prosaic umbrella of the Common Travel Area (CTA). But if the two governments long privately considered these rights to be "CTA-connected", only Brexit caused the link to become explicit.<sup>54</sup> These arrangements had twin origins. First, decisions about openness of travel were taken shortly after the Free State's creation, in a 1922 decision to enforce the UK Government's list of excluded foreign nationals which provided an (informal) common immigration policy.<sup>55</sup> Neither country required passports travel between them, a 'pragmatic' response given difficulties in establishing 'an effective immigration frontier at the Irish border'.<sup>56</sup> Second, large populations of (now) Irish nationals resided in the UK. As long as the Irish Free State remained a Crown dominion, the UK regarded all Irish nationals as British subjects. At the time, British subjects who moved into the UK faced no restrictions on residence or democratic participation. Ireland partially reciprocated these arrangements by not imposing (extensive) residency restrictions on people from the UK.<sup>57</sup>

Despite its pragmatic foundations, the CTA's first iteration was never particularly stable. Disquiet with it first emerged over UK social policy. In April 1929, the UK Cabinet debated 'deportation of persons of Irish Free State origin who become charged to public funds in this country'.<sup>58</sup> Canada and

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<sup>52</sup> The 'pith and substance' test was applied to the UK's current devolution arrangements in *Martin v Lord Advocate* [2010] UKSC 10; 2010 SLT 412, [13]-[15] (Lord Hope).

<sup>53</sup> B. Barton, *Northern Ireland in the Second World War* (1995) at 9.

<sup>54</sup> *Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland concerning the Common Travel Area and associated Reciprocal Rights and Privileges* (8 May 2019) at para.5 and 14.

<sup>55</sup> Aliens Order 1925 (SI 2/1925) (Ireland), Aliens Order 1923 (SI 326/1923) (UK) and Aliens Order 1925 (SI 760/1925) (UK).

<sup>56</sup> B. Ryan, 'The Common Travel Area between Britain and Ireland' (2001) 64 *MLRev.* 855 at 874.

<sup>57</sup> Aliens (Exemption) Order 1935 (SI 80/1935) (Ireland).

<sup>58</sup> UKNA, DO 117/140, Extract from Conclusions of Cabinet 18(29) (24 April 1929) Conclusion 10.

Australia had enacted similar measures, even for British subjects.<sup>59</sup> These special movement and residency arrangements were, in short, contingent on their perceived net value.<sup>60</sup> A travel border was subsequently imposed between Britain and Ireland during the Second World War, amid early-war concerns over spies infiltrating Great Britain from Ireland. The land border's unsecured nature meant restrictions were also applied to travel from Northern Ireland.<sup>61</sup> Demands for labour in Great Britain's economy, under the impact of conscription, led to the UK government actively recruiting labour from Ireland, but entry into Great Britain required a travel permit, a work permit and identification documents.<sup>62</sup> This movement was curtailed after France fell in 1940 and between March and August 1944 to maintain security around the D-Day landings.<sup>63</sup> Throughout, and after, the war, both Governments downplayed these labour movements, with Ireland being concerned to preserve a formal image of neutrality.<sup>64</sup>

Restrictions remained in place after the end of hostilities, with both countries maintaining distinct immigration policies amid acrimony over Ireland's wartime neutrality. Ireland moved first to restore the *status quo ante*, removing many restrictions on travellers from the UK in December 1946.<sup>65</sup> The UK, by administrative action, subsequently relaxed travel restrictions on Irish nationals, retaining what one minister called 'these annoying travel cards',<sup>66</sup> but limiting the range of cases which required special permissions.<sup>67</sup> In 1949, however, Ireland became a Republic and left the Commonwealth.<sup>68</sup> Irish citizens thus ceased to be British subjects.<sup>69</sup> As a consequence, the UK rethought its relationship with Ireland. The Ireland Act

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<sup>59</sup> The Empire Settlement Act 1922 (UK) encouraged emigration to these Dominions; but these British subjects could be deported if they required public assistance (Immigration Act 1906 (Canada), s.26) B. Roberts, *Whence They Came: Deportation from Canada, 1900–1935* (1988) at 112-119.

<sup>60</sup> In 1932 the UK Home Office revived proposals for restricting immigration from the Irish Free State as a potential means of pressuring de Valera; E. Delaney, "Almost a class of helots in an alien land": The British state and Irish immigration, 1921–45' (1999) 18 *Immigrants & Minorities* 240 at 248-249.

<sup>61</sup> The Aliens Order 1939 (SI 994/1939) (UK), Passenger Traffic Order 1939 (SI 1163/1939) (UK) and Passenger Traffic Order 1940 (SI 933/1940) (UK).

<sup>62</sup> E. Delaney, 'Irish Migration to Britain, 1939–1945' (2001) 28 *Irish Economic and Social History* 47 at 47.

<sup>63</sup> Movement into the UK continued, but restrictions were imposed on exit permits; UKNA, LAB 8/974, Minutes of Meeting on Irish Travel (2 February 1944) at 5.

<sup>64</sup> Delaney op. cit. n.60, at 258-259.

<sup>65</sup> Aliens Order 1946 (SI 395/1946) (Ireland), Art.5.

<sup>66</sup> G. de Freitas, MP, HC Debs, vol.478, col.848 (28 July 1950).

<sup>67</sup> UKNA, HO 213/1316, W.R. Perks (HM Chief Inspector of Immigration) Circular to Immigration Officers (10 January 1947) at 1. Ryan op. cit. n.56 at 858.

<sup>68</sup> Republic of Ireland Act 1948 (Ireland), s.2.

<sup>69</sup> J. Megaw, 'British Subjects and Éire Citizens' (1949) 8 *Northern Ireland Legal Q.* 129.

1949 provided the UK's new statutory position by which Ireland was not regarded as foreign.<sup>70</sup> The alternative, Clement Attlee warned Parliament, 'would have involved a great expenditure of men and money and a great extension of control of aliens'.<sup>71</sup> It was legislation which aimed to maintain as much of the prior relationship as possible.

Building on this base, in 1952 a new administrative arrangement formalised a CTA which covered the UK, Ireland the Channel Islands and the Isle of Man. Free movement between the islands was reinstated. Irish citizens were permitted unrestricted residence and work in Great Britain (and vice versa).<sup>72</sup> Ireland quietly reinstated its policy of tracking UK immigration rules. The status of Irish citizens in UK law was subtly transformed. No longer one sub-category of British subject, they became a distinct category in UK nationality law: neither home citizens nor foreign nationals. The "reciprocal" rights and obligations which came to be associated with the CTA might have facilitated the free flow of people and ideas between the countries,<sup>73</sup> but they were never trumpeted. The CTA arrangements were not incorporated into any inter-state treaty, nor even published. Three decades after violent separation, concerns about what these arrangements implied about Ireland's independence conditioned their low-key implementation.<sup>74</sup>

This new dispensation had important caveats. During the war, the Northern Ireland Government secured a system of official work permits for individuals not ordinarily resident in Northern Ireland.<sup>75</sup> Although the provisions covered those moving for work from elsewhere in the UK, as well as Irish nationals, Unionist ministers made great show of applying the rules most stringently to applicants from Ireland.<sup>76</sup> After the war, amid Unionist concerns that new social legislation might attract immigration from Ireland, the Northern Ireland Government married work permits with restricted access to welfare provisions for migrants.<sup>77</sup> These restrictions persisted well into the 1970s, with some remnants remaining until 1981. The UK Government defended the regime to the last.<sup>78</sup>

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<sup>70</sup> Ireland Act 1949 (UK), s.2(1).

<sup>71</sup> C. Atlee, MP, HC Debs, vol.464, col.1855 (11 May 1949).

<sup>72</sup> Aliens (No 2) Order 1952 (SI 636/1952) (Ireland) and Aliens Order 1953 (SI 1671/1953) (UK).

<sup>73</sup> B. Chubb, 'Britain and Irish Constitutional Development', in P.J. Drudy (ed.), *Ireland and Britain since 1922* (1986) 21 at 22.

<sup>74</sup> E. Meehan, *Free Movement between Ireland and the UK: From the 'Common Travel Area' to the Common Travel Area* (2000) at 29.

<sup>75</sup> Residence in Northern Ireland (Restriction) Order 1942 (SI 2501/1942) (UK).

<sup>76</sup> Despite this measure, historians have noted that labour movement from Ireland into Northern Ireland continued; P. Bew, P. Gibbon and H. Patterson, *The State in Northern Ireland, 1921-72: Political Forces and Social Classes* (1979) at 111-114.

<sup>77</sup> Safeguarding of Employment (Northern Ireland) Act 1947.

<sup>78</sup> G. Howe, MP, HC Debs, vol.835, col.1476 (25 April 1972).

For all the CTA's superficial openness, its application to the land border was highly restrictive in practice. Customs posts on approved routes operated strict hours for the border's first few decades. 'Vehicles with merchandise' could only lawfully use these routes between 9am to 5pm (with some local variations).<sup>79</sup> Motor vehicles required concession permits to cross the border at any of 187 unapproved routes.<sup>80</sup> These permits developed from an informal practice by which clergy, doctors and veterinarians were allowed to use unapproved routes.<sup>81</sup> For others, the rules meant long detours, and brushes with petty officialdom. The Irish authorities refused a school master permission to transit the border by motorbike on an unapproved route in the 1920s.<sup>82</sup> Requests for passes were frequently refused by UK customs officials without reason in an effort to avert 'acrimonious exchanges with N.I. MPs'.<sup>83</sup> The grant of a pass by one side's officials, moreover, did not guarantee that the same treatment by their counterparts.<sup>84</sup>

The CTA's effect was thus limited at the land border. People could walk across it without impediment provided they were not carrying dutiable goods; other crossings required dealings with officialdom or risked breaking the law. Constraints on the use of unapproved routes began to give way to 'enlightened' cooperation between the customs authorities only in early 1967.<sup>85</sup> Even then senior Northern Ireland-based officials sought to restrict the extended grant of permits to the 'needy schoolteacher and/or church-goer'.<sup>86</sup> Gratuitous applications of the rules persisted.<sup>87</sup> In August 1969, a car was stopped by UK customs officials on an unapproved road between Clady (in Northern Ireland) and Doneyloop Church (in Ireland). One passenger, who had no concession pass, was required to leave the car, walk across the

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<sup>79</sup> UKNA, CUST 49/881, J.D. Large (Collector of Customs and Excise, Belfast) to E.S. Birt (Assistant Secretary, Customs House, London) (3 August 1926) at 1. Until 1967 all crossings and returns by motor vehicles were subject to Temporary Importation Permits; vehicles themselves could be a good being exported; Leary op. cit. n.19, at 178.

<sup>80</sup> Customs and Excise Act 1952 (UK), s.18.

<sup>81</sup> UKNA, CUST 49/881, J.D. Large (Collector of Customs and Excise, Belfast) to E.S. Birt (Assistant Secretary, Customs House, London) (26 March 1926) at 2.

<sup>82</sup> *id.*, at 2.

<sup>83</sup> UKNA, CUST 49/5839, Letter to Mr Gill (26 April 1967) at 2.

<sup>84</sup> Customs officials on both sides agreed to coordinate their approach only in the late 1960s, as the pass system was extended; UKNA, CUST 49/5839, P.J. Reilly (Inspector General of Waterguard, Dublin) to J. Bell (Collector of Customs and Excise, Belfast) (17 May 1967) at 1.

<sup>85</sup> UKNA, CUST 49/5839, Office of the Inspector General of Waterguard, to C.H. Veale (HM Customs and Excise, London) (13 June 1966) at 1.

<sup>86</sup> UKNA, CUST 49/5839, Collector of Customs and Excise, Belfast to C.H. Veale (HM Customs and Excise, London) (13 June 1966) at 1.

<sup>87</sup> One particularly mean-spirited HM customs instruction insisted: '[u]se of the Concession Pass for social purposes is strictly forbidden and Passes will be withdrawn where such misuse is discovered'; UKNA, CUST 49/5839, Draft Circular to Chief Preventative Officers (1967) at 1.

border, and be picked up again. For officials responding to a complaint that reached Northern Ireland's Home Secretary, the incident was simply a literal enforcement of the rules with 'no question of any malice or discrimination'.<sup>88</sup> Both states' local agents had considerable scope for arbitrary exercises of their powers, with little evidence of the rule of law in operation.

### THE THREE-WAY RELATIONSHIP

After the Second World War, Ireland-UK relations urgently needed to be reset. Travel restrictions, as we have seen, were one pressing concern, but so too were social security arrangements for Irish ex-service personnel.<sup>89</sup> Both countries also explored improving trade terms, culminating in the 1948 Trade Agreement. This Agreement was so advantageous for Ireland's agricultural exports, that the UK Government had to plead that any gloating by Irish ministers during Dáil debates would be 'most embarrassing'<sup>90</sup> for the UK's recently-adopted most-favoured-nation commitments under the GATT.<sup>91</sup> Mutual self-interest helped to sustain UK-Ireland relations after the Second World War, and Brendan O'Leary regards this deep cooperative behaviour as a more significant feature of Ireland-UK relations than both countries joining the European Economic Community (EEC) in 1973.<sup>92</sup> Northern Ireland, however, remained the greatest complication in any account of Ireland-UK relations.

From the earliest days of partition, the existence of Northern Ireland impaired efforts to rebuild connections between the UK and Ireland. In 1922 the Free State Government encouraged a boycott of goods from Northern Ireland amid anti-Catholic violence in Belfast. The UK Government, seized with the knowledge that Northern Ireland was ungovernable without Unionist support, turned a blind eye to what Nicholas Mansergh charitably described as 'a lack of the magnanimity that is becoming to those entrenched in power'.<sup>93</sup> When parliamentarians tried to raise issues relating to the operation of devolution in Northern Ireland in 1923, the Speaker ruled such questions out of order, because they 'must be asked of Ministers in Northern Ireland, and not in this House'.<sup>94</sup> With Westminster and Whitehall happy to be done with the Irish Question, and Ireland and Northern Ireland's Governments refusing to deal

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<sup>88</sup> UKNA, CUST 49/5839, C.H. Blake, Letter regarding Edward Lafferty (11 September 1969) at 2.

<sup>89</sup> Unemployment Insurance (Eire Volunteers) Act 1946 (UK). B. Kelly, "England owes something to these people": The Anglo-Irish Unemployment Insurance Agreement, 1946' (2012) 38 *Irish Historical Studies* 269.

<sup>90</sup> UKNA, BT 64/2400, Draft Telegram relating to forthcoming debate in Dail on UK/Eire Trade Agreement (31 July 1948).

<sup>91</sup> *General Agreement on Tariffs and Trade* (30 October 1947) 55 UNTS 187, Art.1.

<sup>92</sup> B. O'Leary, *A Treatise on Northern Ireland: Volume 3 Consociation and Confederation* (2019) at 292-293.

<sup>93</sup> N. Mansergh, *The Unresolved Question: The Anglo-Irish Settlement and Its Undoing 1912-72* (1991) at 343.

<sup>94</sup> HC Deb., vol. 163, col.1624-1625 (3 May 1923). See I. Gibbons, *Drawing the Line: The Irish Border in British Politics* (2018) at 10.

with each other, recourse to the customs-coordination arrangements envisaged in the 1921 Treaty became impossible.<sup>95</sup> Although Northern Ireland Government enthusiastically supported Westminster's efforts during the Economic War of 1932-1938, it thereafter extracted expensive concessions from the UK Government for acquiescing to improved UK-Ireland trading relations in 1938 and 1948.<sup>96</sup>

The land border came to mark divergent modes of governance, and helped to reinforce 'authoritarian and homogenizing instincts' of successive administrations in Ireland and Northern Ireland.<sup>97</sup> Early ethnographers have been critiqued for promulgating 'a reversed mirror image of [the author's] own ethnocultural ideal'.<sup>98</sup> Official narratives of partition followed this form; both Governments presented themselves as protecting their peoples from the evils practiced over the border. Examples include the regulation of imports, such as the restrictions on contraceptives imposed in Ireland<sup>99</sup> and crude caricatures of life across the border.<sup>100</sup> In 1960, the Earl of Longford recounted a vanishingly small list of 'attributes which overrun' the border; 'Banking and Rugby football — and ... a common aversion to *Lady Chatterley's Lover*'.<sup>101</sup>

In the 1921 negotiations Northern Ireland provided 'the decoy ... which secured the voluntary membership of the Irish Free State in the British Empire'.<sup>102</sup> In 1932, de Valera still baulked at severing these connections, hoping to end partition. Ireland's 1937 Constitution contained de Valera's indirect offer to Unionists; it neither mentioned, nor ended, Ireland's Commonwealth membership and hinted at a federal model if Ireland reunified.<sup>103</sup> The 1937 Constitution's island-wide territorial claims, however, represented an explicit challenge to Northern Ireland's existence.<sup>104</sup> A decade later, de Valera's successors in office essentially accepted partition as reality,

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<sup>95</sup> *Articles of Agreement* op. cit. n.11, Article 15.

<sup>96</sup> D. McMahon, *Republicans and Imperialists: Anglo-Irish Relations in the 1930s* (1984) at 278-279.

<sup>97</sup> Leary op. cit. n.19, at 124.

<sup>98</sup> A.J. Vidich and S.M. Lyman, 'Qualitative methods: Their history in sociology and anthropology' in N.K. Denzin and Y.S. Lincoln (eds.), *Handbook of Qualitative Research* (1994) 23, at 26.

<sup>99</sup> E. Cloatre, and M. Enright, 'On the perimeter of the lawful: Enduring illegality in the Irish Family Planning Movement, 1972-1985' (2017) 44 *J. of Law and Society* 471.

<sup>100</sup> S. de Mars, C. Murray, A. O'Donoghue and B. Warwick, *Bordering Two Unions: Northern Ireland and Brexit* (2018) at 14.

<sup>101</sup> HL Debs, vol.227, col.505 (14 December 1960).

<sup>102</sup> E. Strauss, *Irish Nationalism and British Democracy* (1951) at 268.

<sup>103</sup> External Relations Act 1936 (Ireland), s.3 and Constitution of Ireland 1937, Article 15.2.2. He made the offer explicit in a famous October 1938 *London Evening Standard* interview; D. Harkness, *Ireland in the Twentieth Century* (1996) at 64.

<sup>104</sup> Arthur op. cit. n.5, at 91.



declaring Ireland a Republic and withdrawing from the Commonwealth. As we began to explore above the UK's response, through the Ireland Act 1949, has proven to be an enduring legislative development.

Notwithstanding Ireland's changed status, the 1949 Act maintained that it is 'not a foreign country for the purposes of any law in force in any part of the United Kingdom'.<sup>105</sup> Although it is now often presented as an immigration/nationality measure, treating Ireland (and its people) as if it 'remained' within the Commonwealth<sup>106</sup>, in practice this far-reaching provision gave Ireland a distinct status, which would prove important when the UK moved to restrict Commonwealth immigration.<sup>107</sup> The legislation's phrasing makes little sense in this context; "not foreign" is an anomalous term within UK immigration law.<sup>108</sup> This provision is, however, better regarded as a quick fix for the general legislative mess following Ireland's Commonwealth exit. Large parts of the statute book, from regulation of films,<sup>109</sup> to companies,<sup>110</sup> to copyright,<sup>111</sup> applied a distinct set of rules to Commonwealth countries. All of these laws would suddenly operate differently, or not at all, after Ireland became a Republic.

By treating Ireland and its citizens as "not foreign", the 1949 Act performed much the same function as "retained" of EU law after Brexit.<sup>112</sup> It preserved these existing statutory arrangements, avoiding a chaotic scramble to update the statute book, but permitted Ireland's special status to be eroded by later legislation. These arrangements, however, continue to matter for Irish nationals. They retain the special status, noted by Clement Atlee in introducing the 1949 Act, of being outside 'the category of foreigners'.<sup>113</sup> Although it was conceived as 'clearing up one or two small points',<sup>114</sup> the Ireland Act has become constitutionally significant, in providing the domestic law basis for Irish nationals being a special category of non-citizens. To override this special status, a subsequent UK statute would arguably have to make an express exception to the 1949 Act.<sup>115</sup>

The 1948 trade deal, Ireland Act 1949 and 1952 resumption of undocumented travel transformed relations between Ireland and the UK as a whole, but they did little to improve North-South relations. Northern Ireland's Government

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<sup>105</sup> Ireland Act 1949 (UK), s.2(1).

<sup>106</sup> Arthur *op. cit.* n.5, at 93.

<sup>107</sup> Ryan, *op. cit.* n. 68 at 860-861 discusses the machinations of protecting travel from Ireland from the Commonwealth Immigrants Act 1962 (UK).

<sup>108</sup> S. Cox, *Brexit and Irish citizens in the UK: How to safeguard the rights of Irish citizens in an uncertain future* (2017) at 10.

<sup>109</sup> Companies Act 1948 (UK), ss.119-123.

<sup>110</sup> Copyright Act 1911 (UK), s.35.

<sup>111</sup> Cinematograph Films Act 1938 (UK), s.25.

<sup>112</sup> European Union (Withdrawal) Act 2018 (UK), ss.2-5.

<sup>113</sup> C. Atlee, HC Debs, vol.458, col.1414 (25 November 1948).

<sup>114</sup> *id.* at col.1419.

<sup>115</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195, [60] (Laws LJ).

used the scrambled response to Ireland's Commonwealth withdrawal to extract constitutional guarantees about Northern Ireland's status within the UK being dependent on majority will in its autonomous Parliament.<sup>116</sup> The concession of a "constitutional guarantee" might have drawn predictable protests from Dublin,<sup>117</sup> but was largely symbolic. As internal UK Government briefings on the legislation noted, this provision had 'in strictness, no legal effect'; a future UK Parliament possessing the sovereign power to legislate could ignore this requirement.<sup>118</sup>

Decades passed without high-level contact between the governments of Northern Ireland and Ireland, a situation taken to absurdity when they jointly nationalised the failing Great Northern Railway (Ireland) in 1953 (although this arrangement unsurprisingly ended in 1958).<sup>119</sup> Taoiseach Seán Lemass and Northern Ireland's Prime Minister Terence O'Neill met in 1965, the same year the UK and Irish Governments concluded their landmark Free Trade Agreement. Their brief discussions neither arrested growing pressure for change within Northern Ireland nor increased the tiny value of trade which crossed the land border.<sup>120</sup> If the first half century of partition saw the UK and Ireland, two sovereign states, develop an exceptionally interdependent relationship, Northern Ireland provided a host of exceptions to this exception.

Our study ends 1972. In late January that year, the UK and Ireland together signed the EEC Treaty and the events of Bloody Sunday seemingly propelled Northern Ireland towards civil war. Both arms of this 'temporal crossroads'<sup>121</sup> would profoundly reshape a land border at which 'effective revenue control' was already breaking down,<sup>122</sup> but in very different ways. Within months, Stormont was suspended, bringing an end to half a century of a 'half-way house between union and complete separation'.<sup>123</sup> Inter-governmental manoeuvrings to mitigate the border had run out of road; they would give way to a boundary reshaped by security measures and the operation of European law.

## CONCLUSION

An imaginary of Anglo-Britain continues to dominate UK constitutional discourse, but its depiction of the state as stable, peaceful and unvanquished, demands heroic feats of forgetfulness. This Anglo-British imaginary privileges

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<sup>116</sup> Ireland Act 1949 (UK), s.1. Calvert, op. cit. n.9, at 11-14.

<sup>117</sup> Mansergh op. cit. n.93 at 340.

<sup>118</sup> UKNA, CAB 124/1107, Ireland Bill: Notes on Clauses (1948), Clause 1.

<sup>119</sup> E. Patterson, *The Great Northern Railway of Ireland* (1962) at 150.

<sup>120</sup> By the late 1950s cross-border trade was only 4 percent, by value, of Northern Ireland exports; Lord Rathcavan, HL Debs, vol.227, col.491 (14 December 1960).

<sup>121</sup> Leary op. cit. n.19 at 166-167.

<sup>122</sup> UKNA, CUST 49/5839, Waterguard Superintendent to Collector of Customs and Excise, Belfast (4 December 1969) at 2.

<sup>123</sup> P. Buckland, *The Factory of Grievances: Devolved Government in Northern Ireland 1921-39* (1979) at 280.

England as the UK's 'core' and thereby hides territoriality in plain sight. Brexit's focus on Northern Ireland's border might have brought territory to the fore, in contradictory and paradoxical ways, but the lens of Anglo-Britain allowed Boris Johnson to continue to describe the implications of Northern Ireland's distinct constitutional arrangements as the 'tail wagging the dog'.<sup>124</sup>

For fifty years after partition, Ireland and the UK struggled to make sense of their relationship. Policymakers piled exception upon exception to their borders' operation, with the aim of facilitating day-to-day life. Few other countries have maintain such intense interconnections for so long. Even after both joined the European project, they continued to afford each others' citizens more extensive rights than those of other European partners, even if no one could point to any overarching legal obligation for doing so. Shared participation in the European project nonetheless dramatically changed the relations between these orders. EU law provided the legal basis for nationality-based anti-discrimination protections, ultimately ending Northern Ireland's discriminatory employment permit systems.<sup>125</sup> In the Northern Ireland conflict's darkest days, European institutions provided a valuable forum for partnership between Ireland and the UK.<sup>126</sup> The Single European Market's binding precepts<sup>127</sup> provided the basis for 'the 'progressive erasure of the significance of the land border across Ireland,<sup>128</sup> and subsequently for operationalising cross-border co-operation under the Belfast/Good Friday Agreement.<sup>129</sup> Even low-key changes under EU law, including the abolition of mobile phone roaming charges, have facilitated daily cross-border movement.<sup>130</sup>

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<sup>124</sup> See F. O'Connor, 'State Agencies beef up staff numbers to meet Brexit threat' *Irish Independent* (17 June 2018).

<sup>125</sup> S. de Mars, C. Murray, A. O'Donoghue and B. Warwick, *Discussion Paper on the Common Travel Area* (Joint Committee of the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission, 2018) at 27.

<sup>126</sup> P. Hainsworth, 'Northern Ireland: A European Role?' (1981) 20 *JCMS* 1 at 7.

<sup>127</sup> The Customs and Excise (Single Market etc.) Regulations 1992 (SI 3095/1992) (UK).

<sup>128</sup> O'Leary, *op. cit.* n.92, at 291.

<sup>129</sup> *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes)* (10 April 1998) 2114 UNTS 473, Strand 2. The UK and EU Commission mapped some 142 areas of Strand 2 co-operation connected to EU law; EU Commission, 'Communication from the Commission to the European Council (Article 50) on the state of progress of the negotiations with the United Kingdom under Article 50 of the Treaty on European Union', COM (2017) 847 (8 December 2017) at 9, P. McLoughlin, *John Hume and the Revision of Irish Nationalism* (2010) at 198.

<sup>130</sup> EU Regulation 2017/920 of the European Parliament and of the Council of 17 May 2017 amending Regulation (EU) No 531/2012 as regards rules for wholesale roaming markets (9 June 2017) OJ L 147, at 1–8. See Northern Ireland Affairs Committee, *The Northern Ireland Backstop and the Border: Interim Report* (2019) HC 1850 at para.35.

Brexit destabilised these relationships. We offer no “lessons learned” from an earlier era, in which some of partition’s negative effects were partially mitigated without the intervention of any supra-national authority. Post-Brexit dynamics differ radically from those that followed partition. Ireland, no longer an isolated former colony, retains its membership of a powerful trading bloc. Whereas the European Union had become an effective tool for resolving intractable issues in UK-Ireland relations, the has become a fourth player in an emerging London-Dublin-Belfast-Brussels axis. And far from circumstances in which partition came to constrain ‘cross-border life’ a cross-border economy has flourished since the 1990s and rights available on either side of the border are increasing aligned. In these circumstances, if Brexit impacts on Northern Ireland negatively, or the application of Westminster’s sovereignty fails to take adequate account of Northern Ireland’s special circumstances, the 1998 settlement affirms that its people enjoy the constituent power to change their relationship with the Union(s).<sup>131</sup>

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<sup>131</sup> Northern Ireland Act 1998 (UK), s.1.