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# **DIVIDED KINGDOM: HOW BREXIT IS REMAKING THE UK'S CONSTITUTIONAL ORDER**

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## **EXECUTIVE SUMMARY**

In June 2016, British voters decided in a referendum to leave the European Union, though clear majorities in Northern Ireland and Scotland preferred to remain. Amid the myriad complexities surrounding the terms of the EU-U.K. divorce, the decision has strained the U.K.'s constitutional arrangements. For example, will Scotland become independent? How would the return of a hard border on the island of Ireland affect the precarious peace there? And could Brexit affect the U.K.'s policymaking abilities and projection of unity on the international stage, given fights over where and how competences returned from the EU will be exercised in the U.K.? Although these debates can look like British navel gazing, they have practical consequences for the United States and Europe.

This paper argues that Brexit will alter not one but two unions: the European Union and the United Kingdom. It begins with an overview of the U.K.'s constitutional arrangements, outlining how power has been devolved to the country's nations and regions. It then discusses how Brexit has challenged these structures, with a focus on Northern Ireland and Scotland. Next, it considers how political dynamics in London, Dublin, Edinburgh, and Belfast are complicating efforts to resolve these tensions. Finally, it details how Brexit will affect Northern Ireland and Scotland in political and socio-economic terms, and force U.K.-wide debates about unresolved identity issues and the nature of devolved governance.

## INTRODUCTION

“You will have noticed that we missed our landing given the fog.” I had dozed off during the short flight from Edinburgh to Belfast. Awakened by the flight attendant’s announcement, I looked out the window. The plane was clearly descending, but only the Irish Sea was visible. “We’ll see what the pilot does,” she added ambiguously. The cloudy and anxious landing was an apt analogy for the uncertainty I felt while traversing the United Kingdom in the time of Brexit.

In June 2016, British voters decided in a referendum to leave the European Union (EU) after over 40 years of membership. However, clear majorities in Northern Ireland and Scotland preferred to remain. Amid the myriad complexities surrounding the terms of divorce, the decision has strained the U.K.’s constitutional arrangements. For example, will Scotland become independent? How would the return of a hard border on the island of Ireland affect the precarious peace there? And could Brexit affect the U.K.’s policymaking abilities and projection of unity on the international stage, given fights over where and how competences returned from the EU will be exercised in the U.K.?

This paper seeks to provide context for understanding these questions. It begins with an overview of the U.K.’s constitutional arrangements, outlining how power has been devolved to the country’s nations and regions since the late 1990s. It then discusses how Brexit has challenged these structures, particularly in Northern Ireland and Scotland. Next, the report considers how political dynamics in the concerned capitals are complicating efforts to resolve these tensions. Finally, it details how Brexit will affect Northern Ireland and Scotland in political and socio-economic terms, and force adjustments to the U.K.’s domestic governance. It draws from interviews conducted in early May 2018 with more than 65 people (from government, political parties, think tanks, media, business, and civil society) in London, Dublin, Edinburgh, and Belfast.<sup>1</sup>

The paper concludes that Brexit will affect not one but two unions: the European Union and the United Kingdom. As a study by the House of Lords’ Europe Committee in July 2017 found, “The impact of U.K. withdrawal from the EU on the U.K.’s devolution settlements is one of the most technically complex and politically contentious elements of the Brexit debate.”<sup>2</sup> The elimination of EU laws that helped bind the country together, compounded by the current political climate, means that Brexit “presents fundamental constitutional challenges to the United Kingdom as a whole” and requires “the consent of all the nations of the U.K.” for a durable solution. In the year since that study was published, the challenges have only grown.

## THE U.K.’S ASYMMETRIC DEVOLUTION ARRANGEMENTS

The United Kingdom of Great Britain and Northern Ireland is composed of four constituent parts: England, Wales, Scotland, and Northern Ireland. Their relationship with the U.K. government has evolved over time. Constitutional reforms in the late 1990s began a process of asymmetric devolution of power,<sup>3</sup> while Brexit has created a new inflection point by re-opening unresolved identity and governance issues.

### *Northern Ireland*

The island of Ireland was divided in 1921: the Republic of Ireland gained independence from the U.K., while the six northern counties comprising Northern Ireland remained part of the union. The region’s constitutional status has been contested between

the Protestant and predominantly unionist community, and the Catholic and largely nationalist community. This dispute led to decades of political turmoil and violence, often known as the Troubles, which cost over 3,600 lives.<sup>4</sup>

The April 1998 signing of the Good Friday Agreement/Belfast Agreement<sup>5</sup>—an international agreement between the British and Irish governments and a multi-party agreement in Northern Ireland—provided a comprehensive approach to governance and civil rights. It took constitutional debates off the table by declaring that Northern Ireland will remain part of the U.K. unless there is “the consent of a majority of the people of Northern Ireland voting in a poll.”<sup>6</sup> On the security side, the U.K. government reduced its military presence (including dismantling army posts, watchtowers, and checkpoints) and paramilitary groups decommissioned their weapons. The agreement created a 108-member assembly with a power-sharing executive to ensure representation of both unionist and nationalist communities in policymaking. It has full legislative and executive authority over “transferred matters,” which include all areas not retained by the U.K.<sup>7</sup>

Following the agreement, Northern Ireland slowly began moving in the right direction. Its new assembly focused on routine issues of governance, notwithstanding periodic disagreements and trust deficits that stalled the formation of an executive and temporarily suspended the legislature.<sup>8</sup> There was an influx of foreign investors, with Invest Northern Ireland counting nearly 900 international companies employing around 100,000 people.<sup>9</sup> Relations also improved between the U.K. and Ireland, aided by the Agreement’s creation of “north-south” institutions on the island and “east-west” (British-Irish) institutions that enabled cross-border coordination of policies (such as on agriculture and the environment). The EU membership of both the U.K. and Ireland made this fragile peace more viable by enabling connections and removing physical, economic, and psychological barriers. The EU’s single market coupled with the peace process permitted the gradual dismantling of customs posts and military checkpoints along the border; most travelers were unaware they had crossed an international border until they saw Gaelic street signs, metric speed limits, and prices in euros.

## **Scotland**

Scotland and England joined crowns in 1603. The 1707 Treaty of Union dissolved the Scottish and English Parliaments and created a new parliament. It allowed for the continuation of Scotland’s “Holy Trinity” of institutions: Scots law (based on Roman Dutch civil law and partly on common law, with a distinctive system of criminal law), the Church of Scotland (Calvinist Presbyterian rather than Episcopalian), and the Scottish education system.<sup>10</sup> Throughout the 20th century, there were periodic calls for greater decisionmaking authority—including in the wake of Irish independence and during 18 years of unpopular Conservative Party rule (fueled by Prime Minister Margaret Thatcher’s free market economics and her ill-judged “poll tax”) in the 1980s and 1990s.<sup>11</sup>

Following the May 1997 election of New Labour, Prime Minister Tony Blair fulfilled his campaign pledge to introduce constitutional reform across the U.K.<sup>12</sup> After a September 1997 referendum,<sup>13</sup> the Scottish Parliament was established by legislation in November 1998, held elections in May 1999, and was opened by Queen Elizabeth two months later. The Scotland Act devolved everything to Edinburgh, except for matters that are specifically reserved to the U.K. Parliament at Westminster. The 129-member Holyrood Parliament has primary legislative authority over most domestic policies, as well as



responsibility for implementing European directives in devolved areas (including fisheries, agriculture, and the environment). Although European affairs are reserved to the U.K., over half the parliament's workload has originated in the EU.<sup>14</sup> Devolution has been an ongoing process, with two major transfers of additional powers in 2012 and 2016.

As the parliament became a settled part of the political landscape, the pro-independence Scottish National Party (SNP) became the nation's largest party by 2007 and led a majority government in 2011. Per its long-standing campaign pledge, the nationalist government held a referendum in September 2014 on whether Scotland should become an independent country. Notably, this vote was held with the consent of the U.K. government after the signing of the Edinburgh Agreement.<sup>15</sup> The heated campaign divided family and friends. With turnout over 84 percent, Scots opted by a margin of 55.3 to 44.7 percent to remain in the U.K.<sup>16</sup>

**TABLE 1: DEVOLUTION ARRANGEMENTS ACROSS THE U.K.<sup>17</sup>**

Area	Type of devolution	Population (millions)
<b>England</b>	Limited "devolution deals" <sup>18</sup>	54.3
<b>London</b>	Directly elected mayor and Greater London Assembly	8.6
<b>Scotland</b>	Government and directly elected parliament	5.3
<b>Wales</b>	Government and directly elected assembly	3.1
<b>Northern Ireland</b>	Power-sharing executive and directly elected assembly	1.8

### *Other nations*

Although this report focuses on Northern Ireland and Scotland, a brief word on Wales and England provides useful context for understanding the asymmetric nature of British political arrangements. The Laws in Wales Act 1535 annexed Wales to England, extending English law and requiring the English language for official purposes. Wales narrowly supported devolution in a 1997 referendum, leading to the establishment of a 60-member National Assembly with little authority in 1998. It gained limited lawmaking ability in 20 broad policy areas with the Government of Wales Act 2006, which created a separate legislature (National Assembly for Wales) and executive (Welsh government). After a March 2011 referendum, the assembly acquired primary lawmaking powers in these devolved areas.<sup>19</sup>

Devolution in England has been limited, as voters remain skeptical of localized decisionmaking. As part of Blair's constitutional reforms, he passed the Greater London Authority Act 1999; a successful referendum led to the establishment of the London Assembly and a directly elected mayor. The Local Government Act 2000 reformed municipal government in England and Wales, including enabling cities to hold referenda on elected mayors; in the few cities that held polls, turnout was low and most voters were opposed. Proposals for an elected regional assembly in northeastern England

were scrapped after 78 percent of voters rejected the plan in a November 2004 postal ballot.<sup>20</sup> When the Conservative Party was elected in May 2015, it sought to give more power to English cities and regions through “devolution deals” modeled on the London arrangements.<sup>21</sup> Although these proposals received lukewarm support, some elected mayors (such as in Manchester and Birmingham) are gaining powers and influence. It also resolved the “West Lothian Question”—the long-standing English frustration that members of parliament (MPs) from Scotland, Wales, and Northern Ireland could vote on laws that apply only in England—by introducing parliamentary procedures known as “English votes for English laws.”<sup>22</sup>

## BREXIT THREATENS THE U.K.’S CONSTITUTIONAL STRUCTURES

Alongside its cautious domestic devolution of power, the U.K. has been an ambivalent participant in Europe’s supranational project. It opted out of early membership, belatedly joined the European Economic Community in 1973 (nearly 15 years after the establishment of the European Coal and Steel Community), and negotiated opt-outs from several major policies (including the single currency and Schengen travel area as well as Thatcher’s budget rebate).<sup>23</sup>

In a June 2016 referendum, British voters chose to leave the EU by a narrow margin of 51.9 to 48.1 percent.<sup>24</sup> Attitudes varied across the country, with solid majorities in Northern Ireland and Scotland as well as London wishing to remain. The U.K. government formally notified the EU of its intent to withdraw by invoking Article 50 of the EU’s Lisbon Treaty on March 29, 2017.<sup>25</sup> The two sides have been entangled in messy negotiations since June 2017 about the terms of separation, which will take effect on March 29, 2019. This will be followed by a 21-month transition period to address the future relationship.

**TABLE 2: BREXIT VOTE TOTALS ACROSS THE U.K.**<sup>26</sup>

	Leave (%)	Remain (%)	Turnout (%)
<b>U.K.</b>	51.9	48.1	72.2
<b>England</b>	53.4	46.6	73.0
<b>London</b>	40.1	59.9	69.6
<b>Scotland</b>	38.0	62.0	67.2
<b>Wales</b>	52.5	47.5	71.7
<b>Northern Ireland</b>	44.2	55.8	62.7

### *Scotland*

Scotland emerged as an early challenge. First Minister Nicola Sturgeon quickly indicated her nationalist government’s plans to call for a second independence referendum, citing the “significant and material change in circumstances” that her party’s 2016 election manifesto said could trigger demands for another vote.<sup>27</sup> The issue was no longer Scotland leaving the U.K. but rather being abandoned by its southern neighbor. She argued it was “democratically unacceptable” for Scotland to be forced to leave the EU, as 62 percent of those in Scotland (including majorities in all districts) had voted to remain.<sup>28</sup> Sturgeon met EU Commission President Jean-Claude Juncker and other

European leaders on the margins of an EU summit in June 2016 to discuss the union's response to Brexit (with the U.K. government notably absent). Although sympathetic to her nation's plight, they did not want to negotiate with Scotland separately from the U.K. government.<sup>29</sup> Given the previous aversion of leaders to engage with Sturgeon, a Scottish journalist suggested these meetings enabled the EU to use Scotland as early leverage with the U.K. in the hopes of achieving a softer Brexit. Sturgeon's campaign to keep Scotland in the EU's single market<sup>30</sup>—which achieved cross-party support in a 92-0 parliamentary vote (with Conservatives abstaining) in the Holyrood Parliament a week after the Brexit referendum—was rejected by the U.K. when it launched withdrawal negotiations.

After the initial shock of Brexit subsided, opinion polls did not show a significant increase in support for independence.<sup>31</sup> When Sturgeon called for a new referendum in March 2017, the three main Scottish opposition parties were unsupportive and British Prime Minister Theresa May objected. In snap U.K. general elections three months later, the SNP lost numerous seats to May's party. Sturgeon said she would reconsider vote timing in fall 2018, after there is clarity on Brexit arrangements. As referenda fatigue and confusion set in, Edinburgh's concerns faded and attention shifted to Belfast.

### ***Northern Ireland***

Northern Ireland has become the most vexing issue in Brexit negotiations, and the challenge of satisfactorily meeting the requirements of its unique circumstances could preclude a final deal. The U.K. is currently part of the EU's customs union and single market. After Brexit, it will leave both: this will raise the status of the Irish border to that of a customs border, with associated checks and controls. In addition to creating practical and economic challenges, this is politically and psychologically unimaginable for many who live there.

Problems quickly became apparent during the U.K.'s negotiations with the EU on the draft withdrawal agreement. At the December 2017 European Council meeting, the U.K. and EU agreed on a joint report in which the U.K. pledged to avoid a hard border with Northern Ireland.<sup>32</sup> Given the lack of formal British proposals for achieving this aim and uncertainty about whether it could be addressed within the future U.K.-EU relationship, Brussels insisted on a "backstop" provision to protect Northern Ireland. If London is unable to devise alternative arrangements, the backstop says that Northern Ireland will remain in the EU customs union and in "full regulatory alignment" (at least for goods) with the single market. This essentially eliminates the need for checks and controls at the Irish land border, pushing them to sea and air entry points to the island of Ireland.<sup>33</sup> Amid unionist objections to the creation of an economic frontier between Great Britain and Northern Ireland, London added a clause preventing "new regulatory barriers" to trade within the U.K. Two months later, the EU legally codified this political agreement in a Protocol on Ireland/Northern Ireland in the draft withdrawal agreement.<sup>34</sup> This prompted protests from the U.K. government, which continued to argue that any deal for Northern Ireland must apply to the entire country and the U.K. would retain flexibility on regulatory issues.<sup>35</sup>

The British government's stated aims—leaving the EU single market and customs union, preventing a hard border with Ireland, and ensuring a countrywide approach to Brexit—have proven impossible to reconcile. They were not resolved before the June 2018 European Council meeting, where leaders expressed "concern that no substantial

progress has yet been achieved on agreeing a backstop solution” and called for “intensified efforts” given pending deadlines.<sup>36</sup> Most observers believe May wants to recreate something like a customs union with the EU while maintaining an independent trade policy. Closer ties with the EU would make it easier to manage the Irish border yet harder to achieve the autonomy that motivated Brexit.

May is running out of time in this high-stakes standoff, and the U.K. could crash out of the EU with no deal. This would mean no trade arrangement with the EU, a return to World Trade Organization (WTO) rules, and the imposition of a hard border with Ireland. The aim has long been to conclude negotiations at the European Council meeting in mid-October 2018, as the U.K. Parliament and European Parliament need time to ratify the withdrawal agreement and the political declaration on the future of the relationship before they take effect in March 2019. As this paper goes to press, it looks unlikely that deadline will be met.

## DOMESTIC POLITICS IMPEDE SOLUTIONS

Brexit has raised thorny questions, with complex political dynamics in capitals—including cabinet infighting and coalition politics in London, angst in Dublin, a suspended assembly in Belfast, and nationalist leadership in Edinburgh—creating the perfect storm that has hindered efforts to find answers.

### *The U.K.*

Theresa May became U.K. prime minister in June 2016 after Conservative Party leader David Cameron resigned following his defeat in the Brexit referendum. She previously served as home secretary and supported staying in the EU. Her cabinet is divided between “Brexiters” and “Remainers,” which requires a delicate balancing act. In an effort to strengthen her negotiating legitimacy, she held a snap election a year later. She had a disastrous result, falling eight seats short of a parliamentary majority less than two weeks before EU talks began.<sup>37</sup> In a dramatic twist, May became reliant on 10 MPs from Northern Ireland’s hardline Democratic Unionist Party (DUP) for a “confidence and supply” agreement (the DUP supports the government on budget and confidence motions but is not bound by a policy platform).<sup>38</sup> May was also saved by the resurgence of Scottish Conservatives, who lost all of their seats in the 1997 elections and had held only one seat since the 2001 elections. Although the SNP won a remarkable 56 of 59 Scottish seats in the 2015 Westminster elections following the independence poll, the party lost 21 seats in the snap election, with the Conservatives doubling their vote share and reclaiming 12 seats. Jeremy Corbyn, the democratic socialist leader of the opposition Labour Party and long-time euro-skeptic, has given lukewarm support to continued EU membership.<sup>39</sup> Adding further complexity is the House of Lords, whose independent-minded members have forced the government to accept multiple amendments to Brexit legislation.<sup>40</sup>

May boxed herself in politically with a “trilemma” of three incompatible goals: an exit from the EU single market and customs union, no hard border with Ireland, and an all-U.K. approach to Brexit.<sup>41</sup> If she reneges on the first, she could lose the support of Brexiters who would argue this undermines the will of the people as expressed in the referendum. If she wavers on the second, Ireland (and the EU) may reject the deal and the U.K. could crash out of the EU. If she caves on the third, the DUP could bring down her government.<sup>42</sup> British officials have explored various options for handling the



border,<sup>43</sup> including the collection of customs tariffs and use of advanced technology to monitor crossings, but the U.K. and EU have failed to agree on viable alternatives to the backstop.<sup>44</sup>

Brexit fatigue is palpable in London, with most arguing that May simply needs to make a decision or, as an English journalist quipped, choose “who to play chicken with.” During a cabinet meeting at Chequers in July 2018,<sup>45</sup> May achieved agreement on plans for the future U.K.-EU relationship—including measures that she argued removed the need for the Irish backstop as part of the withdrawal agreement. This was quickly undermined by the resignations of Brexit Secretary David Davis and Foreign Secretary Boris Johnson.<sup>46</sup> The EU’s initial response to these proposals was “polite, but negative.”<sup>47</sup> At the September 2018 Salzburg Summit, EU leaders told May they were unworkable.<sup>48</sup> The challenge remains lack of agreement on how to handle the Irish border.<sup>49</sup>

## ***Ireland***

Leo Varadkar—the young, gay son of an Indian immigrant—has served as Ireland’s Taoiseach (Gaelic for prime minister) since winning a party leadership contest in June 2017. He replaced Enda Kenny, who stepped down after six years as leader amid growing internal pressure.<sup>50</sup> Since inconclusive February 2016 elections, Fine Gael has led a minority government facilitated by a “confidence and supply” arrangement with Fianna Fáil.<sup>51</sup> Although there are few policy differences between the parties, historical rivalry dating back to the Irish civil war precluded a grand coalition.<sup>52</sup> Sinn Féin surpassed the Labour Party in those elections to become the third-largest party. Some observers expect Varadkar to call elections in fall 2018, as the current parliamentary arrangement expires after the budget is passed in early October 2018; others argue this is a risky proposition during the fluid Brexit process.

All parties support the government’s stance in Brexit negotiations: they seek an orderly U.K. exit that protects Ireland’s fundamental interests, including trade and a strong bilateral relationship with the U.K. The challenge, according to an Irish official, “is how to achieve the first without damaging the second.” The EU has thus far backed Ireland, a small member state for which this dispute raises existential challenges.<sup>53</sup> Yet Dublin has long feared it will be forced to make concessions in order to finalize the withdrawal agreement at the European Council meeting in October 2018. Former Taoiseach Bertie Ahern described this nightmare scenario as “a Halloween party,”<sup>54</sup> with EU leaders twisting Varadkar’s arm at 2 a.m. to conclude a deal. Several analysts warned that Dublin could overplay its hand, as the U.K. crashing out of the EU with no deal would present an even bigger nightmare for Ireland.

## ***Northern Ireland***

Following May 2016 elections, the Stormont Assembly was led by First Minister Arlene Foster of the DUP and Deputy First Minister Martin McGuinness of Sinn Féin. Despite being on opposite sides of the Brexit debate, they sent a joint letter to May with shared concerns about its impact on Northern Ireland given its unique circumstances.<sup>55</sup> Amid a scandal over Foster’s alleged mismanagement of a renewable heat scheme, McGuinness resigned in January 2017 (dying two months later) and the executive collapsed.<sup>56</sup> New elections were held in March 2017, but yearlong talks punctuated by Brexit and Sinn Féin calls for an Irish language act (seen as provocative by the DUP) failed to revive the executive.

While London would normally assume direct rule, this is politically sensitive given the DUP's role in the U.K. government, and Brexit is an all-consuming headache for May.<sup>57</sup> Practically speaking, there is currently no government in Belfast: civil servants keep the lights on,<sup>58</sup> the U.K. secretary of state for Northern Ireland has nominal oversight, and Westminster passed a budget to keep the region solvent.<sup>59</sup> In early September 2018, the U.K. government announced plans for legislation to transfer some decisionmaking powers to Northern Ireland civil servants.<sup>60</sup>

## Scotland

After the creation of the Scottish Parliament in 1999, the government in Edinburgh was led by a Labour-Liberal Democrat coalition. Since 2007, the pro-independence SNP has won successive elections and led either a minority or majority government. Nicola Sturgeon has served as first minister since 2014. The Conservative Party has been resurgent since the Brexit referendum. It regained 12 seats from the SNP in the 2017 snap general elections, including in northeastern fishing and farming constituencies that supported Brexit and opposed independence. Yet the party's popular leader, Ruth Davidson, is in a precarious situation. "She is trying to ride two horses at the same time," said a Scottish academic, "by defending Scotland in U.K. debates yet attacking the SNP government in opposition." As an ardent Remainer, she also faces the challenge of defending Brexit policy. The historically popular Labour Party is now Scotland's third party in both Holyrood and Westminster; it is hobbled by questions about its wobbly stance on Brexit, its controversial U.K. leader, and its unpopular Scottish leader.

## BREXIT'S IMPLICATIONS FOR NORTHERN IRELAND

Whether and how these Brexit-related issues are resolved will reverberate for years across the United Kingdom. This paper will now consider the implications of Brexit for Northern Ireland, Scotland, and the U.K.'s constitutional order.<sup>61</sup>

The very idea of Brexit has destabilized politics in Northern Ireland by forcing people to choose sides between the British and Irish governments. The Good Friday Agreement, which celebrated its 20-year anniversary in April 2018, did not fully resolve past tensions. There were no peace commissions or reconciliation efforts, nor has there been a durable answer to the constitutional question. Less than 7 percent of children attend integrated schools, with former First Minister Peter Robinson describing the segregated system as a "benign form of apartheid which is fundamentally damaging to our society."<sup>62</sup> Localized violence remains high, with punishment beatings by paramilitary organizations increasing 60 percent in the last four years.<sup>63</sup> There are more "peace walls" (separation barriers between predominantly unionist and nationalist neighborhoods) now than in 1998,<sup>64</sup> with the International Fund for Ireland reporting nearly 70 percent of Troubles-related murders took place within 500 yards of these walls.

Yet the clever compromise at the heart of the Agreement enabled people to take a break from identity politics: unionists remained part of the U.K. and felt reassured that the province's status could only be changed at the ballot box, while nationalists felt Irish and had a greater say in local affairs. A representative of the cross-community Alliance Party described the Agreement as "a constitutional document for today," with Brexit "throwing the constitution back on the table." Nearly all Belfast interviewees said Brexit has brought back the old polarization between "orange" (unionists) and "green" (nationalists). The resurgence of these issues has made it virtually impossible to

reconstitute the assembly before Brexit is resolved, leaving Northern Ireland without a voice in talks about its future.<sup>65</sup> A Northern Irish journalist noted the “non-trivial odds” the U.K. could crash out of the EU with no deal, citing the suspended government at Stormont as proof that “accidents can happen.”

Many unionists supported Brexit.<sup>66</sup> A DUP representative rejected claims that voters did not understand the terms of the debate, arguing that the Leave campaign had a more compelling message and that nationalist turnout was low. The party rejects borders with Great Britain as well as Ireland, decrying the backstop proposal that would give the region a “special status” (preferring to acknowledge its “special circumstances”). Yet Northern Ireland has always been treated differently. It is heavily subsidized by the British state. It is the only part of the U.K. where gay marriage and abortion remain illegal; it is even distinct from Ireland, which recently voted to legalize both measures. At the same time, the island’s economy has become heavily integrated, especially in the agri-food sector.<sup>67</sup>

In contrast, the overwhelming majority of nationalists voted to remain in the EU.<sup>68</sup> They view a hardening border as a political defeat given progress on demilitarization, a single economic market, and free movement. Sinn Féin has renewed calls for a “border poll” to determine whether Northern Ireland should remain part of the U.K. or join Ireland. As a result of the chaotic and contentious Brexit debate, a May 2018 survey found increasing support for the EU in Northern Ireland, with 69 percent backing Remain (compared to 56 percent in the referendum).<sup>69</sup> Brexit has also increased Catholic support for Irish unification: while only 28 percent would vote for a united Ireland if the U.K. remained in the EU, 53 percent would support unification if the U.K. left the customs union and single market in a hard Brexit.<sup>70</sup> One observer warned, “Brexit is unionism restricting its own life expectancy by not being pragmatic.”

Interviewees across Northern Ireland were careful not to overstate the risk of violence. They do not expect a return to the Troubles, particularly given the lack of appetite for conflict on either side. At the same time, they fear any customs-related infrastructure on the border would be attacked. The chief constable of the Northern Ireland Police Service (PSNI), George Hamilton, warned customs posts would re-emphasize “the context and causes of the conflict,” be seen as “fair game” by dissident republicans, and require 24-hour police protection.<sup>71</sup> He also chided Westminster politicians who see the Irish border as peripheral: “There’s a feeling that as regards the Troubles and the conflict, Northern Ireland is sorted and we don’t need to worry about it, when actually we’re working flat out 24/7 to keep a lid on it.”<sup>72</sup> Three former Irish leaders shared his concern, with Bertie Ahern explaining: “You wouldn’t have to wait for violence—the communities on both sides of the border, with their bare hands, would pull down anything that was put up.”<sup>73</sup>

Apart from questions of political identity and constitutional status, a hard Brexit will affect daily life in Northern Ireland in many practical ways.

- **Agriculture:** The agriculture sector comprises 35 percent of Northern Ireland’s exports, with nearly a quarter going to Ireland (versus less than 2 percent moving the other direction).<sup>74</sup> As the sector operates on an all-island basis, U.K. withdrawal from the EU’s single market will affect supply chains, processing, and exports.<sup>75</sup> There will also be labor challenges given heavy reliance on migrant workers, who have already decreased amid Brexit ambiguities.

- **Business:** A special status for Northern Ireland could give businesses a unique advantage, enabling them to operate as part of the U.K. yet within the EU's single market. Neither nationalists nor unionists are advocating this approach, as it does not fit their political narratives. Industry representatives lament that they are “only talking to themselves,” as they have struggled to deliver a coherent message on an issue dividing communities (and consumers). There are concerns about the potential departure of multinational companies, as well as uncertainty about future access to markets, delays at the border, supply chain disruption, and more paperwork.<sup>76</sup>
- **Citizens' rights:** Brexit will adversely affect numerous rights, including EU-backed rights (e.g., equality rights enshrined in the Good Friday Agreement), fundamental rights deriving from EU membership (e.g., the EU Charter of Fundamental Rights), and labor and employment rights deriving from EU law.<sup>77</sup> The most prominent example is the provision of the Good Friday Agreement that allows those born in Northern Ireland to hold British passports, Irish passports, or both. While pending U.K. legislation reasserts this right, it is unclear what this means in principle or how such rights will be enforced.
- **European Arrest Warrant:** The European Arrest Warrant simplified extradition, an often politically sensitive process during the Troubles.<sup>78</sup> According to PSNI Chief Constable Hamilton, Northern Ireland police used the EU procedure over the last five years to extradite 352 criminal suspects to other EU countries, including Ireland, while 54 were returned to Northern Ireland. He called on the British and Irish governments to draft replacement legislation: “Unlike issues like trade or immigration where different agendas are running it is hard to envisage how anyone would not be up for being able to exchange evidence and information as well as moving detained persons between jurisdictions.”<sup>79</sup>
- **Health:** Although health is not an EU competence, it could be affected by decisions about the Irish border.<sup>80</sup> Given high cost and limited demand, there has been a growth in all-island healthcare since the Good Friday Agreement. For example, the closure of children's heart surgery services at a Belfast hospital in 2015 led to the creation of an all-island pediatric cardiology service in Dublin. The British Medical Association has called for continued access to specialist medical services, free movement of doctors, and mutual recognition of professional qualifications.<sup>81</sup>

In addition, Brexit has soured Dublin's relations with London. There is frustration with the lack of clarity on the U.K. government's negotiating stance, due in part to what an Irish journalist described as “psycho-drama in the Tory party.” An Irish analyst said the British are making the border an Irish problem when “they should worry about the chaos on their own territory.” Memories of the Troubles have faded in England, despite decades of deadly terrorist bombings there. English politicians have caused outrage with comments revealing their ignorance of Northern Ireland sensitivities. For example, three MPs suggested the Good Friday Agreement “had outlived its usefulness” and was “not sustainable in the long term,”<sup>82</sup> while leading Brexiteer Jacob Rees-Mogg argued that the U.K. government would be able to “have people inspected” at the border “as we had during the Troubles.”<sup>83</sup> Interviewees also bemoaned British television hosts who caricatured Irish politics and engaged in “paddywhackery.” An Irish civil society representative said: “Brexit triggered a historical muscle memory switch,” with tensions previously confined to the rugby pitch now spilling into daily life.



Irish diplomats are quick to reject suggestions that Brexit may lead to “Irexit,” as they recognize EU membership gave a small and peripheral island an enhanced role on the world stage.<sup>84</sup> (They did lament the future lack of contact in Brussels with their British counterparts, noting the need to find new ways to structure engagement and discuss shared policy interests.) The Irish public shares this sentiment, with opinion polls showing over 90 percent support for remaining in the EU.<sup>85</sup>

## BREXIT'S IMPLICATIONS FOR SCOTLAND

While Scotland received initial attention after the Brexit vote, political actors there describe feeling ignored amid the intense focus on Northern Ireland. Scots are watching those negotiations closely, as they will want to take advantage of any exceptions. In the meantime, Brexit is already creating challenges for Edinburgh.

The overarching question remains whether Brexit makes Scottish independence more likely at some stage. There was an initial spike in support for a second referendum immediately after the Brexit vote, but it quickly waned.<sup>86</sup> Scottish analysts provided several explanations: 1) Scots are tired of casting ballots; 2) Brexit negotiations are demonstrating the messiness of political divorce, with Scottish separation likely to be similarly complex; 3) referenda do not resolve political issues decisively, as the public remains divided on both independence and Brexit; and 4) the Northern Ireland border debate has shown an independent Scotland in the EU would require a hard border with post-Brexit England.

A central argument of pro-independence campaigners was the prospect of Scotland remaining in the EU. However, it was unlikely that this would have happened automatically.<sup>87</sup> In 2012, then-European Commission President José Manuel Barroso said an independent Scotland would have to reapply for membership; two years later, in advance of the Scottish referendum, he said membership would be “difficult, if not impossible.” EU officials reiterated this position immediately after the Brexit vote,<sup>88</sup> although Sturgeon argued the unique situation means “there are no rules,” and EU attitudes have since hardened. Given the need for unanimous agreement by all member states, Scotland’s admission would not be guaranteed given concerns from countries like Spain about setting a precedent for their own separatist movements.<sup>89</sup> Several interviewees suggested an independent Scotland would be better served by joining the European Economic Area (EEA) like Norway, as it provides some benefits of EU membership while preserving independence on sensitive national industries like agriculture and fisheries.<sup>90</sup>

In the meantime, the Scottish government is shoring up its international presence by opening offices (on U.K. embassy platforms) in Dublin, Brussels, Washington, and Beijing, with officials citing plans for Paris, Berlin, Ottawa, and Toronto.<sup>91</sup>

As in Northern Ireland, Brexit will create numerous practical challenges for Scotland:

- **Trade:** Goods comprise the bulk of Scottish-EU trade, with Scotland particularly affected in the drinks industry (its second most important sector versus 19th for the U.K.) and fisheries (its third most important sector but outside the U.K.’s top 20).<sup>92</sup> There will be repercussions from non-tariff barriers to trade, including the potential loss of Protected Geographic Indication status for Scottish products,<sup>93</sup> supply chain issues, and regulatory changes. New obstacles could emerge as the

U.K. negotiates trade deals, a task handled primarily by the EU in recent decades, amid debates over whether the Scottish Parliament will have a say on agreements that affect devolved matters.<sup>94</sup> The financial services industry is also important in Scotland, with concerns about the loss of passporting rights (which allow U.K. firms to access customers and financial markets in the EU).

- **Migration:** Scottish industry is reliant on migrant labor—ranging from undesirable manual jobs (such as soft-fruit picking) to specialist positions in short supply (e.g., nurses, veterinarians in abattoirs)—that will be curtailed by Brexit.<sup>95</sup> This challenge is exacerbated by negative population growth,<sup>96</sup> which hurts the tax base, public services, and the viability of some rural communities. Scottish political parties have a shared understanding of the problem, while civil servants describe a more positive political and civic discourse than in England, given local economic needs. Migration policy is reserved to the U.K., though many in Scotland would like greater control. There are different policy prescriptions, with Sturgeon repeatedly calling—to no avail—for immigration powers to be devolved.<sup>97</sup>
- **Agriculture:** As 79 percent of Scotland's land mass is dedicated to agriculture, it will be greatly affected by the U.K.'s withdrawal from the EU's Common Agricultural Policy (CAP).<sup>98</sup> The elimination of EU subsidies will make some Scottish farms unprofitable, with no decisions on what will replace them. Scottish farmers could be further disadvantaged, depending on how U.K. subsidies are structured. Scots currently receive 17 percent of the U.K.'s CAP budget, but they would only receive 8 percent if there were to be a population-based system. While CAP provided a common framework for the U.K.'s agricultural policy, the U.K. must decide whether to retain a single approach. Brexit will also lead to rule changes, including WTO constraints, the likely repeal of some EU-imposed regulations, and possible tariffs to access the European single market.<sup>99</sup>
- **Fisheries:** Fisheries has long been a politically sensitive issue. As the industry felt sold out when the U.K. joined the European Economic Community in 1975, it is not surprising that a pre-Brexit survey found over 90 percent of British fishermen supported leaving the EU.<sup>100</sup> The issue is particularly acute in Scotland, which controls over 60 percent of U.K. waters (with divisions between larger commercial businesses in the east and smaller local operations in the west). Some fishermen are angry that the U.K. will not regain control of fisheries policy and quotas when Brexit takes effect in March 2019, as promised during the referendum campaign; May's government accepted EU demands in early 2018 to retain access to U.K. waters on existing terms until the end of the transition period.<sup>101</sup> As fisheries policy has been the exclusive competence of the EU, the U.K. government will need to decide whether to retain a uniform countrywide approach or allow the Scottish government to develop separate rules.<sup>102</sup>

## BREXIT'S IMPLICATIONS FOR THE U.K.'S CONSTITUTION

Apart from well-publicized concerns about the Northern Irish border and Scottish independence, Brexit has raised questions about constitutional arrangements in the U.K.—most notably the internal distribution of powers returned from the EU, which a Scottish academic described as “the constitutional weapon of Brexit.” The historic hesitance of U.K. governments to cede power to the EU mirrors their reluctance to devolve power domestically, with both hindered by England's constitutional tradition of absolute

parliamentary sovereignty.<sup>103</sup> Former Prime Minister Tony Blair emphasized this theme at the Labour Party's 1998 conference, noting: "It is no coincidence that debates on devolution and Europe are happening together."<sup>104</sup> It is similarly no coincidence that Brexit is raising questions about the U.K.'s constitutional order, particularly how devolution will work absent the EU context.

These issues came to a head in legislation required for Brexit. In July 2017, the U.K. government introduced the European Union (Withdrawal) Bill.<sup>105</sup> It took existing EU regulations on the statute books and transferred them to U.K. law (known as "lift and shift"), enabling them to remain in force as domestic legislation unless they are amended or repealed.<sup>106</sup> The bill, which became the main vehicle for heated parliamentary debate about Brexit modalities (including 15 amendments from the House of Lords and SNP MPs walking out in protest), was adopted in June 2018.

One of the key areas of contention involved the return of EU powers to the U.K., addressed in Clause 11 of the bill. The U.K. government, arguing that devolution could not have foreseen Brexit, said some devolved issues<sup>107</sup> should be integrated into countrywide framework agreements<sup>108</sup> to protect the internal market (e.g., food labeling and hygiene, chemical regulation, animal health) and to ensure coordination as London pursues new international agreements. It wanted to retain certain powers until it decided which issues required a U.K.-wide structure. It also suggested devolved administrations could amend legislation but could not introduce changes that were "inconsistent" with U.K. measures, thereby limiting their ability to remain in alignment with the EU if London took a different approach.

The devolved administrations strongly objected to London's position. The Scottish government argued that the Scotland Act devolves everything to Edinburgh except matters that are specifically reserved to Westminster.<sup>109</sup> Michael Russell, the Scottish minister for U.K. negotiations on Scotland's place in Europe, described the draft withdrawal bill as a "blatant power grab."<sup>110</sup> He suggested the U.K. government was trying to "get its way on whatever subject it chooses," which is "not how devolution was designed."<sup>111</sup> Mark Drakeford, the Welsh finance minister (with responsibility for Brexit), acknowledged the need for the U.K. to recreate some single market arrangements but called for a collective response on devolved competences: "It is a matter of us coming to that table voluntarily to do those things rather than the U.K. Government thinking that they can grab these competencies as we leave the European Union and then impose a set of arrangements on the rest of us."<sup>112</sup>

The Scottish Parliament refused to give consent to the U.K. bill, with lone opposition from Conservative members.<sup>113</sup> It passed its own "continuity bill" in May 2018—to transfer existing EU regulations to Scottish statute books in the event of an impasse on the U.K. bill—with cross-party support (Conservatives and one Liberal Democrat opposed).<sup>114</sup> It contains provisions not found in the U.K. bill, including the retention of the EU's Charter of Fundamental Rights and the provision of powers for Scottish ministers to identify areas where Scotland would "keep pace" with post-Brexit EU rules to preserve standards and market access. The Welsh Assembly passed a similar bill in June 2018.

Theresa May argued the U.K. government does not need the consent of the devolved administrations to finalize plans for Brexit. However, she agreed to give them direct control over most policy areas currently controlled by the EU, but said Westminster would retain 24 areas to establish U.K.-wide frameworks. She also amended the U.K. withdrawal bill to ensure any changes to powers held in Westminster would receive the consent of the devolved legislatures and be held for no more than seven years.

Cardiff accepted the compromise, withdrew its bill, and gave consent to the U.K. legislation.<sup>115</sup> Edinburgh remained opposed. The U.K. Supreme Court held hearings in July 2018 on the Scottish continuity bill, marking the first time since devolution that the U.K. has challenged the constitutionality of Scottish legislation.<sup>116</sup> The Scottish case was backed by Wales and Northern Ireland, showing that this issue remains of broader concern and is not a gambit by Edinburgh's nationalist government.<sup>117</sup> A verdict is expected in fall 2018. A win for the U.K. could prevent legal uncertainty, but it will likely fuel anger in Scotland about its exclusion from the policy process.

The next major fight will concern funding, as the U.K. will lose access to the EU's Common Agriculture Policy, Common Fisheries Policy, and structural funds among other resources after Brexit. If the U.K. government allocates money on a pan-U.K. basis according to population share, Scotland (as well as Wales and Northern Ireland) would see a reduction in available funds. The devolved administrations have a vested interest in how such decisions are made, with a Northern Irish official warning that variable subsidies in one part of the U.K. could depress prices in another.

These disputes highlight the unfinished constitutional journey of the U.K. These issues are currently in abeyance given fatigue and the overwhelming nature of Brexit, but they have created political limbo amid concerns that London either does not understand devolution arrangements or is choosing to ignore them. Although these questions are far too weedy for most citizens to care, they are a ticking time bomb. Opinion polls in August 2018 showed that nearly two-thirds of Scottish voters surveyed believed the U.K. government was ignoring their Brexit-related concerns.<sup>118</sup>

When devolution was first introduced in the late 1990s, Whitehall officials understood the system. However, awareness of early plans has faded, changes in party leadership across capitals has complicated relations, and trust has been broken as the Scottish independence referendum and Brexit raised concerns about information sharing. Scottish officials report London viewing their relationship as "stakeholder management" since the Brexit vote, asking what is interesting to the devolved administrations rather than engaging them more broadly. They also cited "centralizing tendencies in Whitehall as London wants to speak with one voice." U.K. officials acknowledged occasional challenges engaging the SNP government given its ultimate objective. Meanwhile, the prolonged suspension of the Northern Ireland Assembly leaves its voice largely absent from these discussions. As one Irish analyst observed: "every time you think you've solved the Irish question, the Irish question changes; this time the Brits have changed the question."

"Constitutional illiteracy is at the heart of the problem," concluded a retired EU judge. Given London's habit of intergovernmental decisionmaking, many Brits never fully understood the implications of devolution (as a move toward a more federal system that allocates powers) or the EU (with its binding laws). A Scottish official echoed this sentiment, noting that the system was not fully federal so the parts were not equal: the U.K. represents England as well as the country as a whole. Other officials warned Whitehall could rein in devolution arrangements any time, as "the EU is no longer a moderating factor for devolved administrations." The House of Commons' Public Administration and Constitutional Affairs Committee recognized these concerns in its July 2018 report on the effect of Brexit on devolution. It found that devolution has altered notions of sovereignty and views of where sovereignty lies, while "preparations for leaving the EU have exposed inconsistencies in the U.K. Government's conceptualisation of the devolution settlements."<sup>119</sup>



Hopes are not high for the resolution of these issues. A Scottish official said: “it looks likely to be a classic U.K. fudge.” A Northern Irish academic observed that the U.K. “usually kicks problems down the road;” Brexit is proving particularly challenging, as “timelines are not part of the U.K.’s normal negotiating process.”

## CONCLUSION

Over 20 years ago, the Dublin-based Institute for European Affairs published a study of how Ireland was affected by what it called Britain’s European question. It described the U.K. government’s historic aversion to devolution and European integration as a “double constitutional problem” rooted in sovereignty concerns. The answer, the project leaders wrote, “lies in the debate about Britain, rather than the debate about Europe. The solution to the first is the precondition for the solution to the second.”<sup>120</sup> As Brexit has answered the second debate, now may be the time to resolve the first one.

“The U.K. is reconstituting the state,” concluded an English journalist, “which isn’t what people voted for.” Most voted in the Brexit referendum on gut instinct, identity issues (including a desire to curtail immigration), or economic concerns (as Brexiteers argued EU payments could be redirected to domestic services), rather than on complicated constitutional ones.<sup>121</sup> Interviewees frequently repeated this perspective, viewing Brexit as the cry of English nationalism. Whereas English and British identities are often seen as synonymous, many in Northern Ireland and Scotland have long juggled their national identities with a sense of “Britishness” (or “Irishness” for nationalists) and more easily accepted a third European layer.<sup>122</sup>

Brexit is not the cause of this identity crisis, but it has surfaced long-simmering tensions that are contributing to the constitutional crisis. The referendum illustrated a continued divergence in attitudes across the country, with England remaining the most skeptical of the European project; there is a parallel lack of enthusiasm for devolution. An earlier debate on true federalism, including the introduction of looser constitutional arrangements, may have helped address some of these problems. Relatedly, then-Prime Minister Cameron could have included a third option on the Brexit ballot for Norway-style membership in the European Economic Area (EEA) or European Free Trade Association (EFTA), which may be a better fit for a British electorate ambivalent about the EU.

**Limited American engagement:** The United States has been largely absent from Brexit debates. Then-President Barack Obama visited London two months before the 2016 referendum to support “a strong U.K. in a strong EU.” President Donald Trump is skeptical of the EU, called Brexit a “great thing,” and criticized May’s negotiations in a press interview during his July 2018 London visit.

Trump has focused on achieving an advantageous free trade agreement. However, resulting regulatory divergence would hinder the U.K.’s ability to trade with the EU. Some elements of a deal with the United States would be controversial in the U.K., including the desire of many Brits to retain the EU’s strict regulations on genetically modified food (as well as the oft-cited aversion to American chlorine-washed chicken).

There is no clear U.S. policy on Brexit. Diplomats quietly delivered demarches to encourage progress before key EU Council meetings. Without taking sides, the State Department assessed it was in the U.S. interest to have a constructive deal rather than a geo-economically damaging crash. Yet despite past engagement in Northern Ireland, the United States has refrained from helping resolve what it views as a domestic matter.

These disputes can look like British navel gazing, but they have real consequences for the United States and the rest of Europe. Resolving the Northern Ireland border question is clearly of broad interest, as underscored by the EU's steadfast support for the Irish position in Brexit negotiations. The United States also has a stake in its success, particularly given its active engagement in the 1990s with former Senate Majority Leader George Mitchell shepherding the Good Friday Agreement. A botched Brexit could return Northern Ireland to the top of the British and Irish governments' list of problems, which would be a disappointing step backward after two decades of steady progress. A relapse in the peace process would occur as Europe is focusing its diplomatic energy on resolving remaining frozen conflicts (e.g., Cyprus, Macedonian name issue, Kosovo-Serbia standoff). Depending on how Brexit plays out, there could be increasing calls for a referendum on Irish reunification to allow the entire island of Ireland to remain in the EU.

If Scotland votes for independence in a post-Brexit referendum, the U.K. would be consumed with more messy separation negotiations and diminished as an international actor. The EU would be forced to consider Edinburgh's application to (re)join the club, with member states more likely to be supportive if independence occurred within a constitutional process. More broadly, ongoing challenges to the U.K.'s constitutional arrangements could adversely affect Theresa May's desire for an efficient and effective "Global Britain." As the U.K. prepares to reclaim control of formerly EU-held policies, the Scottish legal case highlights the looming challenge of reaching agreement among devolved governments and ensuring equitable implementation across the country while projecting unity on the world stage.

Various experts have already proposed some ways to begin addressing these problems. The U.K. government would be wise to heed recommendations from the House of Commons' Public Administration and Constitutional Affairs Committee, which proposed a "devolution policy for the Union" in its Brexit report. It called for consultation with devolved authorities on all legislation that affects their areas of competence, development of common frameworks for the harmonization of legislation, measures to address the constitutional architecture of England, training for officials on devolution, and improvements in mechanisms for intergovernmental decisionmaking.<sup>123</sup>

The fog of Brexit hangs heavy over the Irish Sea, Hadrian's Wall, and the English Channel. But it remains thickest in Whitehall. If England's union with Scotland, Wales, and Northern Ireland is to survive and thrive after Brexit, it will require workable and sustainable, devolved governance across the country. There must also be a reckoning with the English question. While asymmetric devolution emerged in the context of the U.K.'s membership in the European Union, a more symmetric federal model may be required post-Brexit. London will also need to develop mechanisms that facilitate constructive cooperation with Dublin, Brussels, and other European capitals, as well as with Washington.

## ENDNOTES

- 1 Anonymous or unattributed quotes throughout the paper draw from these interviews.
- 2 “Brexit: devolution, European Union Committee, 4th Report of Session 2017-19,” U.K. Parliament, July 19, 2017, <https://publications.parliament.uk/pa/ld201719/ldselect/ldcom/9/902.htm>.
- 3 The Constitution Unit at University College London has analyzed devolution over the last 20 years. The Institute for Government has begun studying how Brexit will affect devolution. Similarly, the U.K. in a Changing Europe has considered Brexit’s effect on devolved and local governments. See Anand Menon, ed., “Brexit: Local and Devolved Government,” (London: The U.K. in a Changing Europe, March 8, 2018), <http://ukandeu.ac.uk/wp-content/uploads/2018/03/Brexit-and-local-and-devolved-government-.pdf>.
- 4 Seamus Kelters, “Violence in the Troubles,” *BBC*, February 2013, [http://www.bbc.co.uk/history/topics/troubles\\_violence](http://www.bbc.co.uk/history/topics/troubles_violence).
- 5 “The Belfast Agreement,” U.K. Government, April 10, 1998, <https://www.gov.uk/government/publications/the-belfast-agreement>.
- 6 The agreement empowers the secretary of state for Northern Ireland to call a border poll “if at any time it appears likely to him that a majority of those voting would express a wish” for changed political arrangements. The last referendum was held on March 9, 1973 with 57 percent of the electorate voting to retain links with the U.K. As the Catholic community boycotted the poll (with less than 1 percent voting), turnout was only 59 percent. See “On This Day: 9 March – 1973: Northern Ireland votes for union,” *BBC*, March 9, 1973, [http://news.bbc.co.uk/onthisday/hi/dates/stories/march/9/newsid\\_2516000/2516477.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/march/9/newsid_2516000/2516477.stm).
- 7 Unlike Scotland and Wales, Northern Ireland government powers are divided into three categories: transferred (areas not explicitly retained by the U.K.), reserved (powers could be transferred in the future with cross-community support, such as prisons), and excepted (powers requiring primary legislation from Westminster, such as international relations and defense).
- 8 The longest suspension occurred during the assembly’s second term, from October 14, 2002 until May 7, 2007. During this period, the Northern Ireland Office assumed the assembly’s legislative authority. Negotiations led to the St. Andrews Agreement in November 2006. After elections in March 2007, full power was restored to the assembly on May 8, 2007.
- 9 “Track record,” Invest Northern Ireland, <https://www.investni.com/invest-in-northern-ireland/track-record.html>.
- 10 Despite political union with its southern neighbor, Scotland has long maintained ties with the European continent. These links date to the “auld alliance” with France in 1295, which provided mutual assurances in the event of an English attack on either country, and later to close ties with the Baltic countries and the Netherlands. Scotland’s political parties have capitalized on this perceived internationalism, particularly when the parliament was created. Winnie Ewing, a former member of the European Parliament (MEP) for the Scottish National Party (SNP), explained: “We are an internationalist people, who look outwards to the rest of the world – in contrast to the insular, little Englander mentality at Westminster” (Scottish National Party, “Yes We Can Win the Best for Scotland: The SNP General Election Manifesto 1997,” [Edinburgh: Scottish National Party, 1997], <http://www.politicsresources.net/area/uk/ge97/man/snp97.pdf>, 6). The Liberal Democrats said “Scotland has a strong tradition of internationalism, and a proud history of diplomatic and trading links around the world” (Scottish Liberal Democrat Party, “Raising the Standard: Scottish Parliament Manifesto 1999,” [Edinburgh: Scottish Liberal Democrats, 1999], [http://news.bbc.co.uk/hi/english/static/events/scotland\\_99/manifestos/libdems/scotuk.htm](http://news.bbc.co.uk/hi/english/static/events/scotland_99/manifestos/libdems/scotuk.htm), 32). Even the Scottish Conservatives adopted the rhetoric: “Scotland, over the years of the present Union, has maintained and developed an impressive international identity” (Scottish Conservative and Unionist Party, “Scotland First,” [Edinburgh: Scottish Conservative and Unionist Party, 1999], <http://www.scottishconservatives.com/wordpress/wp-content/uploads/2012/11/Scottish-Parliament-1999.pdf>).
- 11 In 1979, the Scottish electorate voted on a proposal for a devolved Scottish Assembly. Although a narrow majority backed the measure, it failed to meet the requirement that the total number of supporters exceed 40 percent of the total electorate.

12 This was the height of enthusiasm for a “Europe of the Regions.” The Maastricht Treaty (1992) established the Committee of the Regions, a 222-member body that advises the EU’s Council and Commission on issues such as education, training, public health, and structural funds. It allowed ministers of subnational governments to participate in Council meetings if they had authority to bind the member state. It also endorsed the principle of subsidiarity, which called for decisions to be taken at the most appropriate level. The Amsterdam Treaty (1997) increased the Committee’s powers by enlarging the areas of obligatory consultation and enabling it to be consulted by the European Parliament. In academic circles, the idea of multilevel governance gained popularity. Gary Marks argued that both supranational and national approaches to institution-building missed “a crucial element in the whole picture, namely, the increasing importance of subnational levels of decision-making and their myriad connections with other levels” (Gary Marks, “Structural Policy and Multilevel Governance in the EC,” in *The State of the European Community: The Maastricht Debates and Beyond*, Vol. 2, eds., Alan W. Cafruny and Glenda G. Rosenthal [Essex: Lynne Rienner, 1993]). Proponents challenged the view held by state-centric theorists that national governments are the central players in European policymaking, as their sovereignty is diluted by collective decisionmaking and they are less able to manage domestic involvement in international relations (see Liesbet Hooghe, “Subnational Mobilisation in the European Union,” *West European Politics* 18, no. 3 [July 1995]: 175–98).

13 In the 1997 referendum, the Scottish electorate voted on two questions: whether a parliament should be established and whether it should be able to vary income tax by plus or minus 3 pence per pound. With a 60.4 percent turnout, over 74 percent supported the first question and 63 percent the second.

14 For an overview of the European aspects of the Scottish Parliament at its creation, see Amanda Sloat, *Scotland in Europe: A Study of Multi-Level Governance* (Bern: Peter Lang, 2002).

15 Signed by Prime Minister David Cameron and Scotland’s First Minister Alex Salmond, the Edinburgh Agreement said that the governments would work together to ensure that a referendum on Scottish independence would have a clear legal basis, be legislated for by the Scottish Parliament, have the confidence of governments and people, and deliver a fair and decisive result that would be respected (“Agreement between the United Kingdom Government and the Scottish Government on a referendum for independence for Scotland,” U.K. Government, October 15, 2012 <http://webarchive.nationalarchives.gov.uk/20130102230945/http://www.number10.gov.uk/wp-content/uploads/2012/10/Agreement-final-for-signing.pdf>).

16 “Scotland Decides: Results,” *BBC*, <https://www.bbc.com/news/events/scotland-decides/results>.

17 House of Lords Select Committee on the Constitution, “The Union and Devolution,” (London: House of Lords, May 25, 2016), <https://publications.parliament.uk/pa/ld201516/ldselect/ldconst/149/149.pdf>.

18 Mark Sandford, “Devolution to local government in England,” (London: House of Commons, May 9, 2018), <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN07029#fullreport>.

19 “Devolution settlement: Wales,” U.K. Government, February 20, 2013, <https://www.gov.uk/guidance/devolution-settlement-wales>. For more detailed analysis of Brexit’s effect on Wales, see the work of academics at Cardiff University’s Wales Governance Center. On the government side, see “How is the Welsh Government preparing for Brexit?” (Cardiff: National Assembly for Wales External Affairs and Additional Legislation Committee, February 2018), <http://www.assembly.wales/laid%20documents/cr-ld11403/cr-ld11403-e.pdf>.

20 “North East votes ‘no’ to assembly,” *BBC*, November 5, 2004, [http://news.bbc.co.uk/2/hi/uk\\_news/politics/3984387.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/3984387.stm).

21 Mark Sandford, “Devolution to local government in England.”

22 “A guide to devolution in the UK,” *BBC*, September 18, 2016, <https://www.bbc.com/news/uk-politics-35559447>.

23 Successive U.K. governments opted out of early membership in the European Community, preferring intergovernmental decisionmaking and a free trade area that would preserve economic ties to the Commonwealth. French President Charles de Gaulle, who questioned the U.K.’s commitment to European ideals and cited its attachment to the United States, vetoed British applications in the 1960s. After his resignation, the path was cleared



for its entry in 1973. The eventual decision to join was motivated partly by the perceived benefits of free trade and a fear of exclusion.

24 “EU Referendum: Results,” BBC, [https://www.bbc.com/news/politics/eu\\_referendum/results](https://www.bbc.com/news/politics/eu_referendum/results) and “EU referendum: The result in maps and charts,” BBC, June 24, 2016, <https://www.bbc.com/news/uk-politics-36616028>.

25 Article 50 of the Lisbon Treaty (2009) enables any member state “to withdraw from the Union in accordance with its own constitutional requirements.” It sets out the procedural requirements for negotiating the terms of departure, noting that EU treaties will cease to apply on the date when the withdrawal agreement takes effect or, failing that, two years after the notification was made. For details on this process, see Eva-Maria Poptcheva, “Article 50 TEU: Withdrawal of a Member State from the EU,” (Brussels: European Parliament Research Service, February 2016), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS\\_BRI\(2016\)577971\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI(2016)577971_EN.pdf).

26 “EU Referendum: Results,” BBC.

27 “Scotland votes to stay in the EU—but is dragged out by England,” *The Economist*, June 24, 2016, <https://www.economist.com/britain/2016/06/24/scotland-votes-to-stay-in-the-eu-but-is-dragged-out-by-england>.

28 See Elisabeth O’Leary, “New Scotland independence referendum ‘highly likely’: Sturgeon,” *Reuters*, June 24, 2016, <https://www.reuters.com/article/us-britain-eu-scotland-idUSKCN0ZA0S2>. The SNP was not always supportive of EU membership, expressing opposition in the 1970s due to concerns in its fishing constituencies and aversion to exchanging one union for another. This position shifted in 1988, when the party sought to address public anxiety about perceived isolation by launching its “Independence in Europe” strategy. The SNP argued that Scotland would be situated within the larger European framework, thus maintaining external security and trade options. See Allan Macartney, “Independence in Europe” in *Scottish Government Yearbook*, eds., Alice Brown and Richard Parry, (Edinburgh: Scottish Government, 1990); Andrew Marr, *The Battle for Scotland* (Harmondsworth: Penguin, 1992); and Scottish National Party, “Independence in Europe: Make it Happen Now, General Election Manifesto, 1992,” (Edinburgh: Scottish National Party, 1992).

29 Jennifer Rankin, Severin Carrell, and Philip Oltermann, “Nicola Sturgeon’s plea to EU leaders meets with sympathy but little hope,” *The Guardian*, June 29, 2016, <https://www.theguardian.com/politics/2016/jun/29/nicola-sturgeon-scotland-plea-eu-leaders-sympathy-little-hope>.

30 Sturgeon created a Standing Council on Europe in July 2016 to advise ministers on how best to secure Scotland’s interests during Brexit. See “Standing Council on Europe,” Scottish Government, <https://beta.gov.scot/groups/standing-council-on-europe/>. In December 2016, the Scottish government laid out its positions on Brexit and called for continued Scottish membership in the European Single Market “even if the rest of the U.K. decides to leave.” See “Scotland’s Place in Europe,” (Edinburgh: Scottish Government, December 20, 2016), <https://www.gov.scot/Publications/2016/12/9234>.

31 In the two years since the Brexit vote, polls show little change in Scottish attitudes toward independence. See “How would you vote in a Scottish independence referendum if held now? (asked after the EU referendum),” What Scotland Thinks, <http://whatscotlandthinks.org/questions/how-would-you-vote-in-the-in-a-scottish-independence-referendum-if-held-now-ask#line>.

32 According to paragraph 49 of the joint report: “the United Kingdom remains committed to protecting North-South cooperation and to its guarantee of avoiding a hard border. Any future arrangements must be compatible with these overarching requirements. The United Kingdom’s intention is to achieve these objectives through the overall EU-U.K. relationship. Should this not be possible, the United Kingdom will propose specific solutions to address the unique circumstances of the island of Ireland. In the absence of agreed solutions, the United Kingdom will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement.” See “Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom’s orderly withdrawal from the European Union,” (Brussels: European Commission, December 8, 2017), [https://ec.europa.eu/commission/sites/beta-political/files/joint\\_report.pdf](https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf).

33 Nikos Skoutaris has argued for a special designated status for Northern Ireland with bespoke arrangements, including a legal route to reintegrate Northern Ireland into the EU, protection of the all-island economy by allowing for its participation in the single market and/or customs union, and preservation of British-Irish institutions. Nikos Skoutaris, “Report on a Special Designated Status for Northern Ireland Post-Brexit: An Independent Opinion Commissioned by the European United Left/Nordic Green Left (GUE/NGL) Group of the European Parliament,” (Brussels: GUE/NGL Group of the European Parliament, April 13, 2018), <https://ssrn.com/abstract=3161311>.

34 “Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community,” (Brussels: European Commission, March 19, 2018), [https://ec.europa.eu/commission/sites/beta-political/files/draft\\_agreement\\_coloured.pdf](https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf), 108-115.

35 Anushka Asthana and Lisa O’Carroll, “David Davis: Northern Ireland plan would apply to whole UK,” *The Guardian*, December 5, 2017, <https://www.theguardian.com/politics/2017/dec/05/david-davis-northern-ireland-plan-apply-whole-uk-brexit-dup>.

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37 Steven Erlanger and Stephen Castle, “Theresa May Loses Overall Majority in UK Parliament,” *The New York Times*, June 8, 2017, <https://www.nytimes.com/2017/06/08/world/europe/theresa-may-britain-election-conservatives-parliament.html>.

38 Alex Hunt, “Theresa May and the DUP deal: What you need to know,” *BBC*, June 26, 2017, <https://www.bbc.com/news/election-2017-40245514>. Sinn Féin, the largest nationalist party in Northern Ireland, won seven seats. However, it will not sit in Westminster given its refusal to swear allegiance to the Queen and recognize the U.K.’s jurisdiction over Northern Ireland.

39 Corbyn voted against U.K. membership in 1975, the Maastricht Treaty in 1993, and the Lisbon Treaty in 2008.

40 See “EU Withdrawal Bill: amendments and debates,” Institute for Government, <https://www.instituteforgovernment.org.uk/explainers/eu-withdrawal-bill-amendments-and-debates>. Over 75 percent of lords (up from the usual 60 percent) participated in votes on amendments to ensure the rights of EU citizens living in the U.K. and to give parliament a final veto over the result of negotiations with the EU (with the latter receiving the most votes in the chamber’s history). “Why Britain’s House of Lords sought to amend the Brexit bill,” *The Economist*, March 15, 2017, <https://www.economist.com/graphic-detail/2017/03/15/why-britains-house-of-lords-sought-to-amend-the-brexit-bill>.

41 John Springford, “Theresa May’s Irish Trilemma,” *Centre for European Reform*, March 7, 2018, <https://www.cer.eu/insights/theresa-mays-irish-trilemma>.

42 The Fixed-term Parliaments Act 2011, which introduced fixed-term elections to the Westminster parliament every five years, would still require a vote of no confidence in the government or a two-thirds majority vote in the House of Commons to trigger new elections.

43 “Theresa May splits cabinet to consider customs options,” *BBC*, May 11, 2018, <https://www.bbc.com/news/education-44077847>.

44 Amid inconclusive cabinet debates in spring 2018, May tasked officials in the new Department for Exiting the EU (DexEU) with fleshing out proposals for two competing options. One is a customs partnership: a McKinsey-prepared plan whereby the U.K. collects tariffs on the EU’s behalf for goods intended for the EU’s customs union, then refunds traders if there is a difference. The other is a highly streamlined customs arrangement (or maximum facilitation, “max fac” for short), which seeks to minimize border checks on goods by using technology and “trusted trader” schemes. The EU deemed both ideas unworkable. For a summary of border options, see Katy Hayward, “The Brexit Border in 4 key slides,” *Queen’s University Belfast*, March 7, 2018, <http://qppl.qub.ac.uk/brexit-border-4-key-slides/>.

45 For reporting on the cabinet meeting at Chequers (the prime minister's country estate), see "At-a-glance: The new UK Brexit plan agreed at Chequers," *BBC*, July 7, 2018, <https://www.bbc.com/news/uk-politics-44749993>. The U.K. government fleshed out the Chequers agreements in a white paper. It proposed an association agreement, including a free trade area for goods that the paper argued would protect integrated supply chains and avoid customs procedures at the Irish border; this would necessitate common rules for manufactured goods and agri-food as well as require continued U.K. participation in some EU agencies. See "The future relationship between the United Kingdom and the European Union," (London: U.K. Government, July 12, 2018), <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union>.

46 Johnson was the most prominent Conservative Party supporter of the Leave campaign and is now a leading proponent of a harder Brexit. This camp of the Conservative Party has produced policy recommendations through a research support group for MPs, the European Research Group (ERG), chaired by Jacob Rees-Mogg MP. (See Heather Stewart, "'We're the opposition': Rees-Mogg and his European Research Group," *The Guardian*, July 20, 2018, <https://www.theguardian.com/politics/2018/jul/20/opposition-jacob-rees-mogg-european-research-group-profile>.) The ERG published a paper on the Irish border ("The Border between Northern Ireland and the Republic of Ireland post-Brexit," [London: European Research Group, September 12, 2018], <https://www.scribd.com/document/388422435/European-Research-Group-plans-for-Irish-border-and-Brexit>.) Its findings were similar to U.K. government proposals, relying on checks away from the border, mutual recognition of standards, electronic customs declarations, "trusted trader" status for big business, and exemptions for small businesses. (See Lisa O'Carroll, "Euro-sceptic group paper on Irish border offers no breakthrough ideas," *The Guardian*, September 12, 2018, <https://www.theguardian.com/politics/2018/sep/12/euro-sceptic-group-paper-on-irish-border-offers-no-breakthrough-ideas-erg>.)

47 Charles Grant, "Europe's response to May's plan could cost her more ministers," *The Guardian*, July 10, 2018, <https://www.theguardian.com/commentisfree/2018/jul/10/eu-europe-theresa-may-brexit-red-lines-ministers>.

48 "Brexit: May humiliated by Salzburg ambush as she fights to save Chequers," *The Guardian*, September 21, 2018, <https://www.theguardian.com/politics/2018/sep/20/may-in-fight-to-save-chequers-brexit-plan-after-salzburg-ambush>.

49 See Sam Lowe and John Springford, "After Salzburg: How to salvage the Brexit negotiations," *Centre for European Reform*, September 24, 2018, <https://cer.eu/insights/after-salzburg-how-salvage-brexit-negotiations>, for ways to manage the backstop, including 'de-dramatisation' of customs checks, conditional provisions, and a long-term customs union.

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majority that urged all parties to remain committed to the peace process and to avoid a hard border. ("European Parliament resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union," European Parliament, April 5, 2017, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0102+0+DOC+XML+V0//EN>.)

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- 114 "UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill," Scottish Parliament, <http://www.parliament.scot/parliamentarybusiness/Bills/107725.aspx>.
- 115 See James Williams, "Welsh and UK governments agree Brexit bill deal," *BBC*, April 24, 2018, <https://www.bbc.com/news/uk-wales-politics-43880270>.
- 116 The U.K. Supreme Court has already addressed a Brexit-related question that could have bearing on this case. In January 2017, the court ruled in support of campaigner Gina Miller, whose case against the U.K. government argued that the Westminster Parliament should have a vote on launching Brexit negotiations (triggering Article 50). Of relevance here, the court ruled that the government did not need to consult devolved administrations on this issue. Will Martin, "Supreme Court rules parliament must vote on Article 50 before Britain leaves the EU," *Business Insider*, January 24, 2017, <https://www.businessinsider.com/supreme-court-brexite-article-50-case-verdict-gina-miller-theresa-may-mp-vote-2017>. Analysts have examined the broader constitutional implications of these decisions; see Mark Elliott, Jack Williams, and Alison L. Young, eds., *The UK Constitution After Miller: Brexit and Beyond* (Oxford: Hart Publishing, 2018).
- 117 U.K. government lawyers argued that the Scottish measure is inconsistent with the U.K. bill and undermines its aim to create a "single cohesive body" of EU legislation after Brexit. Scottish government lawyers countered that it does not cut across EU or U.K. laws, noting that it was passed several months before the U.K. withdrawal bill and was not intended to modify it. As the U.K. has competence for international relations and management of withdrawal from the EU, the U.K.'s written argument stated: "The effect of what the Scottish bill does is to make provision for the future relationship with the EU and EU law when that relationship is under negotiation. That could serve to undermine the credibility of the UK's negotiating and implementation strategy in the eyes of the EU." Supreme Court of the United Kingdom, Case No. UKSC 2018/0080, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/728147/Applicants\\_Written\\_Case.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728147/Applicants_Written_Case.pdf).
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- 122 For more information on public attitudes in Scotland, What Scotland Thinks, led by Professor John Curtice, is an excellent resource: <http://www.whatscotlandthinks.org/>. The Centre on Constitutional Change also has a team of researchers analyzing changing constitutional relationships: <https://www.centreonconstitutionalchange.ac.uk/centre>.
- 123 "Devolution and Exiting the EU: reconciling differences and building strong relationships," U.K. Parliament, July 31, 2018, <https://publications.parliament.uk/pa/cm201719/cmselect/cmpubadm/1485/148502.htm>.

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