Brexit, the Misrepresentation of Democracy, and the Rock of Gibraltar

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ABSTRACT

This short essay makes three points regarding Brexit that have not been widely considered in public or academic debate.

First, Brexit advocates (Leavers) successfully misrepresented the referendum of June 2016 as a definitive expression of democratic will. ("The people have spoken.") The slim majority result was less than such an expression, particularly because it ignored intercommunal and intergenerational democratic values—most profoundly, overriding clear majorities in Scotland and Northern Ireland which had voted to remain in the EU.

Second, even though within a year of that referendum, a majority of Britons (Remainers) had come to oppose Brexit, political leadership among the Remainers was woefully ineffective. Some, like Prime Minister Theresa May, simply changed sides, wrongheadedly accepting the people-have-spoken rhetoric. Other Remainers continued to make their case, but did not effectively argue that people had not spoken. Perhaps, most crucially, the British "first past the post" electoral system provided no viable remain option in the December 2019 Parliamentary elections. Put simply, in the December 2019 Parliamentary elections, Remainers had no one to vote for.

Third, hopes that the UK could easily rejoin the European Union (encouraged in part by remarks of EU leaders) are false. Article 49 of the Treaty on European Union (TEU) requires that a state which has left the EU should go through a rigorous admission process. Since Article 49 requires unanimity among EU member states, any member with an objection to Britain rejoining could block readmission. Most troubling for Britain could be Spain's long-standing claim for the return of Gibraltar to which the UK would be loathe to accede and from which Spain would be loathe to retreat.

KEYWORDS

Brexit; Referendum; European Union (EU); Gibraltar; United Kingdom (UK)

TABLE OF CONTENTS

INTRODUCTION

Brexit advocates successfully misrepresented the referendum of June 2016 as a binding expression of democratic will — ignoring its lack of inter-communal and intergenerational democracy. This misrepresentation has fostered a violation of the internationally recognized right of self-determination of the Scots as well as of the Irish.[1] Furthermore, the referendum of 2016 merely proved that, on a single day in June, a transient bare majority (51.9%) of that day's voters purported a desire to leave the European Union (EU),[2] failing to speak for two generations of Britons who had constructed profound ties with the Union or for future generations of Britons who would not enjoy those ties.

Brexit threatens political morality and economic well-being. It is a bad thing. Regrettably, it will be hard to undo.

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[1] The global community has recognized *self-determination* as a binding rule of international law at least since the entry-into-force in 1976 of the United Nations Covenant on Civil and Political Rights. The very first substantive sentence of that important and universal treaty reads, "All peoples have the right of self-determination." International Covenant on Civil and Political Rights art. 1, ¶ 1, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]. The development of the principle of self-determination probably traces its modern state practice to Woodrow Wilson's conception of a post-colonial world order after World War I. The American and French Revolutions of the late 18th Century and their declaratory documents implicitly sowed the seeds of the doctrine. The rule was probably customary law well prior to its legislation into treaty law in 1976 by the ICCPR. The UN Charter references it in Article 1 as supporting the "purposes" of the United Nations. U.N. Charter art 1, ¶ 2. While jurists, statespeople, and scholars have debated the parameters of self-determination (see the Canadian Supreme Court's excellent analysis in the *Quebec* Opinion), it seems undeniable that the Scots are a distinct "people" and that Scotland being yanked out of the EU against its will would seem to deny that right. The *Quebec* opinion persuasively concludes that a people enjoying internal self-determination within a larger state (such as the Québequois in Canada) are not entitled under international law to seek external self-determination, that is, separation from the larger state. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, ¶¶ 135–37 (Can.). However, if self-determination within the larger state is denied, then external self-determination would be appropriate. *Id.* at ¶ 138. Being forced to leave the European Union against the will of the majority of Scots would seem to fit in the latter category.

[2] *See e.g.,* EU Referendum: Results, BBC, https://www.bbc.com/news/politics/eu_referendum/results .

1. INTERCOMMUNAL DEMOCRACY

Four nations constitute the United Kingdom (UK) — England, Scotland, Wales and Northern Ireland.[3] Two of those four, Scotland and Northern Ireland, voted against Brexit.[4] But England is more populous than the other three combined.[5] So, on that one June day in 2016, the English vote was sufficient to create the slim UK majority for leaving Europe. The wishes of Scotland and Northern Ireland counted for naught. Such a summary procedure dominated by one nationality does not serve deeper democracy in a multinational state like the UK, particularly when faced with a fundamental constitutional change.[6] The whim of a one-time popular vote should not alter the complex structure and balance of a modern representative democracy.

For Scotland, Brexit once again raises the question of independence. Britain's exit from Europe may be followed by Scotland's exit from Britain. In the 2014 Scottish referendum, 45% of Scots favored independence.[7] The Sottish National Party holds Scotland's largest Parliamentary block.[8] With the will of the Scots to remain in the EU overridden by the English vote to *leave*, that 45% could easily swell above 50%.[9] British Prime Minister Johnson (if still in office) could find himself the head of government of a much smaller state.

For Northern Ireland, Brexit's result may be even more traumatic.

It is "the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British or both . . .".[10] Thus, the Good Friday (Belfast)

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[3] *See e.g.,* Nicholas A. Barr et al., *United Kingdom*, in ENCYCLOPAEDIA BRITANNICA, https://www.britannica.com/place/United-Kingdom/The-lowland-zone.

[4] *See* EU Referendum: Results, *supra* note 2. Gibraltar, discussed below, overwhelmingly voted *Remain* as well. *Cf. EU Referendum: Local Results*, BBC, https://www.bbc.com/news/politics/eu_referendum/results/local/g. Supporters of Brexit came to be known as *Leavers* whereas opponents of Brexit came to be known as *Remainers.* Similarly, the press, politicians, and public came to speak of the *remain* vote and the *leave* vote.

[5] *See e.g.,* Population Estimates for the UK, England and Wales, Scotland and Northern Ireland: mid-2018, OFFICE FOR NATIONAL STATISTICS , https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/annualmidyearpopulationestimates/mid2018#englands-population-continued-to-grow-at-a-faster-rate-than-the-rest-of-the-uk-in-mid-2018.

[6] In contrast, for the United States to alter its constitution (a fundamental change approximate to a Brexit), an amendment must pass both houses of Congress, then be ratified by the legislatures of three-quarters of the states. *See* U.S. Const. art. V.

[7] *See e.g.,* Scotland Decides: Results, BBC, https://www.bbc.com/news/events/scotland-decides/results .

[8] *See e.g.,* Current State of the Parties, THE SCOTTISH PARLIAMENT, https://www.Parliament.scot/msps/12450.aspx.

[9] Ironically, Spain, often at odds with Britain over the last half millennium or so, might support the UK in opposing independent Scottish entry into the EU, because of Catalonia. *See* Eddy Wax, *Spain Fires Diplomat in Scotland over EU Membership Letter*, Politico (Jun. 8, 2019), https://www.politico.eu/article/spain-fires-diplomat-in-scotland-over-eu-membership-letter/.   If Scotland may break away from Britain by referendum, why not Catalonia from Spain? Northern Ireland would be a less threatening case to Spain, since Northern Ireland would not enter as an independent break-away state, but as a region of an already existing EU member — Ireland.

[10] The Belfast Agreement art. 1.6, U.K.- Ir, Apr. 10, 1998, https://www.gov.uk/government/publications/the-belfast-agreement.

Agreement in 1998 marked the end of "The Troubles" — two decades of intercommunal violence —[11] with the recognition that national identity need not be exclusive and competitive. The agreement among the United Kingdom, the Republic of Ireland, and both the Protestant and Catholic communities of Northern Ireland, declared peace after thirty years of market bombs, rubber bullets (and lead ones), assassinations, and interments without trial — the Troubles.[12] The European Union played a part in enabling such peace. Its chief contribution was not as a mediator, but as a re-constructor of identity — not by any particular acts of Brussels Eurocrats, but by the EU's very existence as a supra-national political, social and economic space. Young people, particularly, had begun to think of themselves as European as well as French or German or Dutch. Development of such multilayered identities — European, as well as "Irish or British or both" — fostered a mentality of shared and variable belonging that contributed to the Good Friday peace, a monumental political achievement for the two great, but sometimes distrustful, island neighbors of Britain and Ireland.

Brexit screws this up — re-emphasizing exclusive and competitive identities and ignoring the wishes of Northern Ireland which voted to remain. Leaving the EU reimposes a border in the interior of the island of Ireland or else a border in the Irish Sea partitioning Ulster[13] from the rest of the UK. Either the Catholic community will feel wronged being separated from the Irish Republic or the Protestant community will feel wronged being separated from Britain. Or both. The renewed ascendancy of *difference*, other-blaming and rekindled violence could follow. Brexit brings back the us-and-them mentality that the Good Friday Agreement had wisely finessed, as that accord turned a page away from the violent Troubles. Brexit, in contrast, highlights the differences between Catholics and Protestants[14] in Ireland and roils the peace.

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[11] Actually, the violence was more complicated than merely intercommunal, Protestant against Catholic. Militias from each community warred at times with British troops sent to Ulster to keep the peace, and even on occasion, fought with each other for dominance within the Catholic or Protestant camp. *See generally* PAUL DIXON, NORTHERN IRELAND: THE POLITICS OF WAR AND PEACE (2001); JOHN COAKLEY, CHANGING SHADES OF ORANGE AND GREEN (2002); ROGER MACGINTY & JOHN DARBY, GUNS AND GOVERNMENT: THE MANAGEMENT OF THE NORTHERN IRELAND PEACE PROCESS (2002).

[12] Jeff Wallenfeldt, *The Troubles*, in ENCYCLOPAEDIA BRITANNICA (May 14, 2019), https://www.britannica.com/event/The-Troubles-Northern-Ireland-history.

[13] Ulster is the historic geographical region now made of the six counties of Northern Ireland. Within this essay, the two names for this territory are used interchangeably, although some experts might find different cultural or political connotations for each. For example, after the Good Friday Agreement and resulting joint commission recommendations, the name of the regional police force was changed from The Royal Ulster Constabulary (RUC) to the Northern Ireland Police Service (NIPS), the former sounding more British imperial and the latter more neutral. *See e.g.,* Clive Walker, *The Patten Report and Post-Sovereignty Policing in Northern Ireland*, in ASPECTS OF THE BELFAST AGREEMENT 142, 155–56 (Wilford ed., 2001).

[14] Differences between Protestants and Catholics in Northern Ireland are not so much religious as political and national. Protestants, mostly of Scottish and English heritage, see themselves as British and mostly want to maintain their region's place within The United Kingdom. Catholics see themselves as Irish and tend to want

Two additional factors reinforce Brexit's tendency to detach Northern Ireland from the UK and join it to the Irish Republic.

First, the recent unprecedented plurality victory of Sinn Fein in Irish elections gives power to a party (whose genesis was the political wing of the Irish Republican Army)[15] which is likely to be more demanding of immediate reunification of Ireland than have been the duopolist Fine Gael and Fianna Fail centrist parties.[16]

Second, demographics have shifted substantially. Catholics are probably now a plurality in Northern Ireland, outnumbering Protestants for the first time.[17] When Ulster was split from the newly independent Irish Free State (precursor to the Republic) in 1921, Protestants in the northern six counties had a two-to-one majority.[18] By the time of the Good Friday Agreement, Catholics made up about 40% of the population.[19] Recent estimates now give Catholics the demographic edge.[20]

These three factors taken together — Brexit, Sinn Fein and demographics — portend a future united Ireland and a shrunken UK.[21] Probably not a result sought by Boris Johnson and the Brexiteers.

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their region to unite with the Republic of Ireland. They also see themselves as historically discriminated against by the Protestants who have dominated Northern Ireland politically and economically for centuries.

[15] *Is Sinn Fein Now a Normal Political Party?*, Economist (Mar. 5, 2020), https://www.economist.com/europe/202 0/03/05/is-sinn-fein-now-a-normal-political-party (last visited Apr. 15, 2020); *see also* Paul Arthur & Kimberly Cowell-Meyers, *Sinn Fein*, in Encyclopaedia Britannica (Feb. 14, 2020), https://www.britannica.co m/topic/Sinn-Fein.

[16] These two centrist parties have alternated power in the Republic ever since the 1930s, with their differences less found in policy than in the mists of history — related to the civil war fought in the South over acceptance or rejection of the treaty with Britain that divided Ireland and created the Irish Free State. Sinn Fein today occupies a political space to the left of both. All three purport to want a united Ireland, but Sinn Fein is the only one likely to push the issue hard. *Irish Unification is Becoming Likelier*, Economist (Feb. 13, 2020), https://www.economist.com/leaders/2020/02/13/irish-unification-is-becoming-likelier.

[17] *Is Some Revelation at Hand? Brexit and Sinn Fein's Success Boost Talk of Irish Unification*, Economist (Feb. 13, 2020), https://www.economist.com/briefing/2020/02/13/brexit-and-sinn-feins-success-boost-talk-of-irish-unification [hereinafter *Is Some Revelation at Hand?*].

[18] Wallenfeldt, *supra* note 12.

[19] In comparison, Protestants numbered closer to 45% of the population in the 2001 Northern Ireland census; *see, e.g.*, *Religion KS07c (NI)*, Northern Ireland Statistics and Research Agency, https://www.ninis2.nisra.gov.uk/public/Theme.aspx?themeNumber=135&themeName=Census+2001. (In the Subset field, select "Ethnicity, Identity, Language and Religion"; in the Geography field, select "NI"; in the Year field, select "2001"; click Apply) (last visited Apr. 5, 2020).

[20] Gareth Gordon, *Catholic Majority Possible*, in *NI by 2021*, BBC (Apr. 19, 2018), https://www.bbc.com/news/uk-northern-ireland-43823506.

[21] *Is Some Revelation at Hand?*, *supra* note 17.

2. INTERGENERATIONAL DEMOCRACY

The referendum of 2016 proved only that on a single day in June, a transient bare majority (51.9%) of that day's voters wanted to leave the European Union. Maybe it proved even less than that. Because (rather than caring about severing ties with Brussels) some of that 52%, in fact, may have been protesting about immigration, or economic woes, or the displacement of beer culture by wine culture among the London elite, etc.[22] Furthermore, false campaign claims and Russian meddling likely swelled the "Leave" vote.[23] In any event, a very bare majority at most, on that single day in June. But this thin and transient majority has undone the will and work of generations.

Millions of British citizens have contributed many millions of hours and energy and Pounds Sterling over the last half-century in the complex process of integrating the UK into the European Union. Laws were changed, industrial and commercial standards were harmonized, people were schooled in the arcane processes and institutions of Europe.[24]

But the benefits of EU membership more than repaid such effort. Barrier-free access to the largest economy in the world.[25] Free movement of British labor and capital *into* a market of 400 million people, as well as free access to needed workers and small entrepreneurs *from* that market (better food in London bistros).[26] A major share in the powerful voice of the EU in world affairs, particularly economic matters. A foundation

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[22] *See* George Friedman & John Mauldin, *3 Reasons Brits Voted for Brexit*, Forbes (July 5, 2016), https://www.forbes.com/sites/johnmauldin/2016/07/05/3-reasons-brits-voted-for-brexit/#3cf3a33e1f9d.

[23] Jane Mayer, *New Evidence Emerges of Steve Bannon and Cambridge Analytica's Role in Brexit*, New Yorker (Nov. 18, 2018), https://www.newyorker.com/news/news-desk/new-evidence-emerges-of-steve-bannon-and-cambridge-analyticas-role-in-brexit; Mark Townsend & Carol Cadwalladr, *Emails Reveal Arron Banks' Links to Steve Bannon in Quest for Campaign Cash*, Guardian (Nov. 17, 2018), https://www.theguardian.com/uk-news/2018/nov/17/arron-banks-emails-steve-bannon-brexit-campaign-funds; Manuel Roig-Franzia et al., *How the 'Bad Boys of Brexit' Forged Ties with Russia and the Trump Campaign — And Came Under Investigators' Scrutiny*, Wash. Post (Jun. 28, 2018), https://www.washingtonpost.com/politics/how-the-bad-boys-of-brexit-forged-ties-with-russia-and-the-trump-campaign–and-came-under-investigators-scrutiny/2018/06/28/6e3a5e9c-7656-11e8-b4b7-308400242c2e_story.html.

[24] *More than 50,000 EU laws introduced in the UK over last 25 years highlights scale of challenge facing lawmakers following 'Brexit'*, Thomson Reuters (Mar. 27, 2017), https://www.thomsonreuters.com/en/press-releases/2017/march/eu-laws-introduced-in-the-uk-highlights-scale-of-challenge-facing-lawmakers-following-brexit.html.

[25] *See* Ottavio Marzocchi, *Free Movement of Persons*, European Parliament: Fact Sheets on the European Union (Feb. 2020), https://www.europarl.europa.eu/factsheets/en/sheet/147/free-movement-of-persons ("While the Schengen area is widely regarded as one of the primary achievements of the European Union, it has recently been placed under considerable strain by the unprecedented influx of refugees and migrants into the EU."); *see also EU Position in World Trade*, European Commission (Feb. 18, 2019), https://ec.europa.eu/trade/policy/eu-position-in-world-trade/.

[26] *See UK and Non-UK People in the Labour Market: February 2020*, Office for Nat'l Statistics (Feb. 18, 2020), https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/ukandnonukpeopleinthelabourmarket/february2020; *see generally* Susanna Kraatz, *Free Movement of Workers*, European Parliament (Dec. 23, 2016), https://www.europarl.europa.eu/factsheets/en/sheet/41/free-movement-of-workers.

upon which London's expertise in finance and other professional services enables the UK to "punch above its weight" globally.[27]   And a shared identity with other Europeans, particularly appreciated by young peripatetic Brits. Future generations of Britons should be heirs to all these advantages, but they will not be as Brexit goes forward. A transient bare majority on a single day undoes the work of two generations past and the rightful expectations of generations to come. Democracy should not merely reflect the moment. It should reflect the interests of past and future stakeholders as well.

Most young people voted to remain.[28] Those younger than the voting age would likely share this sentiment. While living in Spain in the 1990s, I was struck by the *Europeanness* of young people in the EU's Erasmus student exchange program,[29] including Britons.   They reveled in their cosmopolitan and mobile life — a pan-continental moveable feast of young Dutch, French, Irish, Italians, Spaniards, English, Scots, etc. Brexit denies to future young Britons the chance to fully partake of this feast — both its cultural joys and its economic opportunities.[30] Such denial surely goes against their will.

3. A CORRUPT AND XENOPHOBIC REFERENDUM

This essay principally deals with the *constitutional* deficiencies of the June 2016 referendum and the mischaracterization of its result to thwart long-term shared democracy. However, we should note the referendum's internal weaknesses. Such flaws reinforce the unwisdom of allowing that single vote to rule British national policy for generations.

Other writers and investigators have documented both the procedural anti-democratic flaws in the June 2016 vote (chief among them, Russian meddling), as well as the substantive flaws (chief of those, xenophobic rhetoric bordering on hate speech).[31] Such problems support my constitutional argument, but are not necessary to it. Even a good referendum (with such a slim majority) should not be the principal basis of sweeping international and intergenerational change — less so, a bad referendum.

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[27] *See* MARK YEANDLE & MARK WARDLE, THE GLOBAL FINANCIAL CENTRES INDEX 26 (2019).

[28] *EU Referendum: The Results in Maps and Charts*, BBC (June 24, 2016), https://www.bbc.com/news/uk-politics-36616028.

[29] *Erasmus* is the EU's program to support education, training, youth and sport in Europe. University-age students from one member state may study in another EU state with the EU financially supporting the exchange. *See What is Erasmus+?*, Eur. Comm.: Erasmus+, https://ec.europa.eu/programmes/erasmus-plus/about_en.

[30] *Id.*

[31] ICCPR, *supra* note 1, at art. 20; Norwood v. United Kingdom (No. 23131/03), 2004-XI Eur. Ct. H.R. 730.

3.1. CORRUPTED PROCESS — DARK MONEY AND RUSSIAN INFLUENCE

Putin's Russia stood to benefit from a vote for Brexit, just as it did from the election of Donald Trump. Both weakened the Western Alliance, a goal dear to Putin's global strategy. Cambridge Analytica, Steve Bannon, the Giuliani law firm, and related actors had their fingers in both pies. The largest individual bankroller of the "Leave" campaign, Arron Banks, met with Russian operatives on a number of occasions in 2015–16. He reportedly also met with Trump's staff at Trump Towers during this period.[32] Press, government and academic reports provide extensive further examples of Russian-initiated corruptive efforts during the Brexit campaign.[33]

3.2. CORRUPTED SUBSTANCE — XENOPHOBIA, ANTI-IMMIGRANT PROPAGANDA

Undertones of xenophobia have for decades pervaded British populist criticism of the European Union.[34] However, such close-to-racist noise grew louder during the Brexit campaign of 2015–16, reaching a crescendo in the final weeks before the June 2016 vote.[35] Brexiteers made a conscious decision to play on the alienation and anxieties within the middle and working classes, to blame the Other for their (often otherwise legitimate) economic and social grievances, and to blame the EU for the perceived

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[32] Roig-Franzia et al., *supra* note 23; Carol Cadwalladr & Peter Jukes, *Revealed: Leave.EU Campaign Met Russian Officials as Many as 11 Times*, GUARDIAN (July 8, 2018), https://www.theguardian.com/uk-news/2018/jul/08/revealed-leaveeu-campaign-met-russian-officials-as-many-as-11-times;
Dan Sabbagh, *Arron Banks Tells MPs: I Have No Business Interests in Russia*, GUARDIAN (June 12, 2018), https://www.theguardian.com/politics/2018/jun/12/arron-banks-tells-mps-i-have-no-business-interests-in-russia; *Email Trail Shows How Arron Banks and Andy Wigmore Were Cultivated*, SUNDAY TIMES (June. 10, 2018), https://www.thetimes.co.uk/edition/news/the-email-trail-how-arron-banks-and-andy-wigmore-were-cultivated-fg7tjd87l.

[33] Staff of S. Comm. on Foreign Relations, 115th Cong., Putin's Asymmetric Assault on Democracy in Russia and Europe: Implications for U.S. National Security 115–21 (Comm. Print 2018);
See also David D. Kirkpatrick, *Signs of Russian Meddling in Brexit Referendum*, N.Y. Times (Nov. 15, 2017), https://www.nytimes.com/2017/11/15/world/europe/russia-brexit-twitter-facebook.html. Notably, Boris Johnson refused to release the UK's report prior to the Parliamentary elections. Despite authorizing the report's release in December 2019, it has yet to be published. Daniel Kraemer, *Russia Report: When Can We Expect It to be Published?*, BBC (Feb. 7, 2020), https://www.bbc.com/news/uk-politics-51417880.

[34] *See* Rob Merrick, *Ukip: A Timeline of the Party's Turbulent History*, INDEPENDENT (Sept. 29, 2017, 5:07 PM), https://www.independent.co.uk/news/uk/politics/ukip-timeline-party-westminster-alan-sked-nigel-farage-conference-key-events-brexit-leadership-a7974606.html; David Wearing, *Racism and xenophobia are resurgent in the UK, and the centre-left is partly to blame*, openDEMOCRACY (July 11, 2016), https://www.opendemocracy.net/en/opendemocracyuk/racism-and-xenophobia-are-resurgent-in-uk-and-centre-left-is-partly-to-blame/; Zack Beauchamp, *Brexit isn't about economics. It's about xenophobia*, Vox (Jun. 24, 2016, 7:53 AM), https://www.vox.com/2016/6/23/12005814/brexit-eu-referendum-immigrants.

[35] *See* Adam Taylor, *The Uncomfortable Question: Was the Brexit Vote Based on Racism?*, WASH. POST (Jun. 25, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/06/25/the-uncomfortable-question-was-the-brexit-vote-based-on-racism/.

intrusion of the Other. No matter that many such immigrants contributed heavily and healthily to British society and that many other immigrants (particularly the undocumented, often un-white) would be unaffected by the breaking of EU bonds.

However, these internal flaws of the June 2016 Referendum do not form the heart of this article. Journalists and researchers have already documented these flaws in detail, beyond the scope of the present essay. This essay merely references such flaws to reinforce the folly of accepting the referendum as the voice of the people.

4. VOTE AGAIN

By 2017–18, an argument for a second referendum seemed strong. A majority in the UK had come to oppose Brexit by that time. Those flaws of foreign meddling and xenophobia factually particular to the 2016 Brexit referendum, as well as the profound structural deficits, at the heart of this essay, regarding intercommunal and intergenerational democracy, further supported a new poll. Polls also reflected the increasing concern regarding the real economic consequences of Brexit. Some of those who had voted for Brexit now realized the toll that such a departure from Europe would take on their pocketbooks.[36] However, in a flourish of political jujitsu, Boris Johnson delivered an election which he *styled* as a second referendum on Brexit, but which clearly was not. Such a slight-of-hand was the Parliamentary vote in December 2019.[37]

The December 2019 vote did not provide a fair chance to revisit Brexit. It was not the second referendum that Boris Johnson claimed it to be. His get-it-done-already sloganeering[38] posed it as such. That Parliamentary election did not give voters the means to use such an electoral poll as a new plebiscite on Brexit. This failure of the

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[36] *See* Jen Kirby, *Brexit will hurt the UK's economy no matter what — says the government's own analysis*, Vox (Nov. 28, 2018, 7:50 PM), https://www.vox.com/2018/11/28/18116763/brexit-economy-bad-deal-no-deal; Iain Begg & Fabian Mushövel, *The economic impact of Brexit: jobs, growth and the public finances*, LSE Eur. Inst. (2016), https://www.lse.ac.uk/europeanInstitute/LSE-Commission/Hearing-11—The-impact-of-Brexit-on-jobs-and-economic-growth-sumary.pdf (last visited Apr. 17, 2020).

[37] *See, e.g.*, William James & Andrew MacAskill, *Factbox: How Does UK PM Johnson Call an Early Election?*, Reuters (Oct. 24, 2019),https://www.reuters.com/article/us-britain-eu-election-factbox/factbox-how-does-uk-pm-johnson-call-an-early-election-idUSKBN1X32BL; Jason Douglas, *Why Boris Johnson Might Call an Election, and How He Could Get There*, Wall St. J. (Sept. 3, 2019),https://www.wsj.com/articles/why-boris-johnson-might-call-an-election-and-how-he-could-get-there-11567515347.

[38] *See generally* Karla Adam, *'Get Brexit done': Boris Johnson's Effective but Misleading Slogan in the British Election*, Wash. Post (Dec. 12, 2019), https://www.washingtonpost.com/world/europe/get-brexit-done-boris-johnsons-effective-but-misleading-slogan-in-the-uk-election/2019/12/12/ec926baa-1c62-11ea-977a-15a6710ed6da_story.html.

Parliamentary vote to be a true second Brexit referendum was due to the nature of the British Parliamentary electoral system and to the nature of British politics.

The December voters had no real *remain* option available because neither of the two major parties — Conservative or Labour — offered such an option. And of the two minor parties, both anti-Brexit, one (the Liberals) was not viable because of Britain's first-past-the-post electoral system,[39] and one, the *pro-remain* Scottish National Party (SNP) only campaigned regionally for about 9% of Parliamentary seats — almost all of which it won (validating the Scots' self-determination argument made above).

The Brexit referendum in June 2016 revealed splits in both major UK parties. Divided factions in each of the Conservative (Tory) and Labour parties supported and opposed Brexit. 58% of Tories and 37% of Labour party members voted for Brexit in that referendum.[40] Thus, the traditional divide between Labour voters on the left and Tory voters on the right broke down with the Brexit referendum in 2016. There seemed to be more of a populist-versus-cosmopolitan split, akin to the 2016 US presidential election, which a few months later would put Donald Trump in office. On the other hand, among Liberal Party members, the *Remain* vote dominated substantially.[41] That was also the case among voters loyal to the regional parties in Scotland and Northern Ireland.[42] Probably a majority of Tory Members of Parliament (MPs) sitting as of June 2016 opposed Brexit, in contrast to their constituents.[43] However, a number of circumstances caused the anti-Brexit Conservative majority to disappear. After Prime Minister Cameron resigned in the wake of his ill-called Brexit referendum (which he had initiated with the expectation that his anti-Brexit sentiments would be vindicated), Theresa May took the helm of the Tory party. Thus, without a new general election, May became Prime Minister, as leader of the Parliamentary majority. Although she had originally opposed Brexit, once in power as head of the Conservatives, she changed position and supported it. Her expressed reason for the change was that "the people had spoken." [44] It is hard to

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[39] A first-past-the-post parliamentary system awards a seat in each district to that candidate with a plurality of the vote. This contrasts to a proportional representation system, where a party receives a number of seats corresponding to its national percentage of the popular vote. It also contrasts to that variant of a district-by-district system, where a run-off election is held when there is not a 50%-plus-one majority for any candidate in that district. A first-past-the-post system favors two dominant parties and disfavors third parties.

[40] *See* Statista Research Department, *Brexit Votes in the United Kingdom by Political Affiliation 2016*, STATISTA (Jun. 24, 2016), https://www.statista.com/statistics/518474/eu-referendum-voting-intention-by-political-affiliation/.

[41] *Id.*

[42] *See id.*

[43] *See, e.g., EU vote: Where the cabinet and other MPs stand*, BBC (Jun. 22, 2016), https://www.bbc.com/news/uk-politics-eu-referendum-35616946 (showing 185 Conservative MPs declared a *remain* stance, compared to 138 declaring a *leave* stance).

[44] BBC News, *Theresa May (FULL) interview Andrew Marr (02/10/2016) - BBC News*, YOUTUBE (Oct. 2, 2016), https://www.youtube.com/watch?v=4b0kULuS5o8 ("The British people have determined that we will leave the European Union . . . . The people have spoken, we will deliver on that.").

know whether she sincerely believed this, or whether she felt her new stance on Brexit to be politically expedient. For reasons discussed above, and central to this essay, that position was philosophically wrong-headed. The people had *not* spoken. At least not clearly and fully on the question of separating from Europe. Only some of them had spoken for leaving Europe, on one day in June, in a corrupted poll. And with Scots and Irish dissenting.

Nonetheless, May pushed Brexit but soon realized that Parliament opposed her — including substantial elements of her own House of Commons majority. She therefore called a Parliamentary election in April 2017,[45] hoping to bolster her majority and get Brexit through the legislature. She was mistaken in that tactic. The Conservatives lost seats in that election. In order to form a governing majority in Parliament, she had to ally herself with the Democratic Unionist Party (DUP) MPs representing Northern Ireland. The DUP is a Protestant-dominated party dedicated to a continued union between Ulster and Britain and vehemently against unification with the Irish Republic. Such an alliance made May's task of pushing Brexit through the legislature harder still, since the DUP was adamantly opposed to any tariff and customs checks between Britain and Northern Ireland. However, the DUP's position in that regard left only a possibility, if Brexit was to go forward, of re-establishing customs checks between the Irish Republic (an EU state) and Ulster. The re-establishment of a hard border within the island of Ireland was totally unacceptable to the Republic of Ireland and to the EU of which it was a member.

Economists and financial experts broadly agreed that for Britain to leave the European Union without truly dire consequences to business, workers and citizens, an exit deal needed to be negotiated with The EU. However, a number of sticking points made such a deal difficult. First, what would Britain pay the EU to leave, reflecting obligations for future European projects and programs that Britain had already committed to as a member. Second, what would the nature of the trade relationship between the UK and the EU look like after Brexit? Britain wanted it to look pretty much the same from the point of view of tariffs on goods and trade in services. EU members did not want Britain to have its cake and eat it too — that is, leave the Union and its obligations thereto, but still enjoy the advantages of a free trade zone. Third, and most problematic, was the question of the Irish border. The Conservative government could not agree to customs checks between Northern Ireland and the rest of Britain, particularly because of its dependence on DUP votes in the House of Commons.

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[45] *See General Election 2017: Why did Theresa May Call an Election?*, BBC (Jun. 9, 2017), https://www.bbc.com/news/election-2017-40210957.

On the other hand, European Union negotiators were firm in their resistance to any customs checks between Northern Ireland and the Republic of Ireland. To be out of the European Union certainly meant border checks for the passage of goods in one of those two locations. While May's negotiators tried to finesse this last issue in the draft agreements for exiting the EU, Parliament was unconvinced, suspicious that she was agreeing to a customs border within the UK between the islands of Britain and Northern Ireland.[46]

After losing three votes in Parliament on her exit plan negotiated with the EU, May resigned. Boris Johnson took over as leader of the Conservative Party (and therefore as Prime Minister without any popular vote). When it became clear that, like Mrs. May, Johnson would not be able to push Brexit through Parliament with his bare Tory plurality, only governing with the participation of the DUP, he called elections for December 2019. In the process of consolidating his power among the Tories he successfully purged the party of most of the MPs who still opposed Brexit — either by kicking them out or convincing them to accept Brexit. By the time of the December 2019 Parliamentary election, the Conservative Party, which had been divided regarding Brexit, campaigned as a unified *Leave* party.

In contrast, in the election of 2019, the Labour Party was still split over Brexit (as it had been in the 2016 referendum), led by the unpopular Jeremy Corbyn, riddled with the charges of antisemitism[47] and obfuscational[48] in its stance toward a new referendum on Brexit. The London progressives in the party were mostly *Remainers*, while the Rust Belt northern workers were mostly pro-Brexit. Corbyn pleased neither. He lost worker constituencies in the North to the Conservative Party for the first time in recent history. They defected to the Tories, reversing decades of animosity of working people toward the Conservative Party. Populist Johnson, though a Tory, at least (in their minds) showed respect (lacking in Corbyn) for their 2016 vote to leave Europe, by which they blamed the continent for immigration, unemployment and other real and imagined wrongs — for which Europe was not really responsible.

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[46] *See, e.g., Irish Backstop*, Institute for Government, https://www.instituteforgovernment.org.uk/explainers/irish-backstop (last updated Feb. 24, 2020); John Campbell, *Brexit: What are the Backstop Options?*, BBC (Oct. 16, 2019), https://www.bbc.com/news/uk-northern-ireland-politics-44615404; Richard Pérez-Peña, *What is the Irish Backstop, and Why is it Holding Up Brexit?*, N.Y. Times (Jan. 30, 2019), https://www.nytimes.com/2019/01/30/world/europe/irish-backstop-brexit.html.

[47] *See generally* Jerusalem Post (Apr. 6, 2020).

[48] During the campaign leading up to the December 2019 Parliamentary elections, Corbyn refused to be pinned down on whether he favored a new referendum on Brexit, undoubtedly knowing that his base was divided on the issue. He tried to deflect the debate to charges that the Tories were intent on gutting the National Health Service. Obviously, such a tactic of deflection did not work. Labour suffered its worst defeat in decades.

In any event, by the December 2019 Parliamentary vote, the Labour Party was neither a remain party nor a leave party. It therefore presented no electoral option for those Britons who wanted to stay in the EU.

The Liberal Party would have seemed to have represented a true *remain* alternative in December 2019 to the then Brexit-converted Conservative party and the obfuscational and Brexit-non-committal Labour Party. For decades, the Liberal Party has been the only Britain-wide third party alternative to Labour and the Tories. It campaigned in 2019 on an explicit platform for staying in the EU. Unfortunately for *Remainers*, it was not an option that could possibly lead to either electoral victory or to staying within Europe. Britain's first-past-the-post electoral system made this impossible. For decades the Liberals have collected between 10% and 20% of the popular vote in British elections but generally only claimed a much smaller percentage of Parliamentary seats. Rather than having proportional representation as many Parliamentary democracies do, Britain has a system under which in any given district the candidate with the plurality goes to Parliament. So British voters knew that even though the Liberals offered a *remain* option, they did not offer a viable electoral choice. Hence, even though probably more than half of the voters in the UK supported remaining in Europe, in the December 2019 Parliamentary elections they had no one to vote for (except in Scotland). Therefore, those elections were *not*, as Boris Johnson claimed them to be, a second referendum on Brexit, one which according to Johnson confirmed the results of the 2016 Brexit vote.

Put simply, in the December 2019 Parliamentary elections, *Remainers* (although probably a majority) had no one to vote for.[49]

In the only location within the UK where a party with viable electability campaigned on a *remain* platform — Scotland — the *Remain* party, that is the SNP, won overwhelmingly, collecting almost all Scottish seats in the Westminster Parliament.

Tory opponents of Brexit had disappeared. Labour was split, ill-led and obfuscational. Liberals were impeded by first-past-the-post (and a nice, but inexperienced and uncharismatic leader). There was no electorally viable *remain* party. Thus, the December 2019 Parliamentary vote was not a second referendum on Brexit and could not have been such.

In seeking a second referendum, opponents of Brexit did not effectively argue the democratic defects in the June 2016 referendum, identified above, but seemed cowed by

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[49] The author spent Parliamentary election week, December 9–15, 2019, in Britain. Many conversations with Britons that week, as well as local exposure to UK news media during the days prior to and after the vote, have contributed to his conclusions in this essay.

the "people have spoken" rhetoric of the "*Leavers*." Some, like Theresa May, not only were cowed by such rhetoric, but switched sides, becoming *Leavers* themselves.

5. COME AGAIN? (REENTRY AND "THE ROCK")

Some *Remainers* might continue to underestimate the tragedy of the misrepresented June 2016 referendum and assume that re-entry into the European Union can occur easily, in the hope that Britons continue to sour their attitude toward Brexit and a new government eventually comes into power. They are profoundly mistaken.

Article 49 of the Treaty on European Union, as amended by the Treaty of Lisbon, governs the admission of new states to the EU.[50] Article 50 of the Treaty of the European Union, first introduced by the Lisbon Treaty, makes clear that any UK re-entry would be subject to the demanding process of Article 49.[51] Confusingly, statements from other EU officials blithely held out a false promise of easy re-entry.[52]

It would *not* be easy. First, law and regulation that will have fallen out of sync with European rules would have to be re-promulgated by Parliament or the British executive, as jurisdiction (not always clear) dictates.[53] Second, the return to certain favorable arrangements, such as the large EU budget rebate to Britain, might not be

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[50] Consolidated Version of the Treaty on European Union art. 49, June 7, 2016, 2016 O.J. (C 202) 44 [hereinafter TEU].

> The applicant State shall address its application to the Council, which shall act *unanimously* after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account. The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements (emphasis added) .

   See also Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. 1(57), Dec. 13, 2007, 2007 O.J. (C 306) 40.

[51] *See, e.g.*, TEU, *supra* note 50, art. 50(5).

[52] Notably, Frans Timmermans, Executive Vice-President of the European Commission, penned a "love letter" to Britain stating that the UK "will always be welcome to come back" to the EU, suggesting re-entry to the UK may be easy. *See also* Frans Timmermans, *My love letter to Britain: family ties can never really be severed*, GUARDIAN (Dec. 26, 2019, 1:00 PM), https://www.theguardian.com/commentisfree/2019/dec/26/my-love-letter-to-britain-family-ties.

[53] *See* Anthony Salamone, *Membership 2.0: what the UK rejoining the EU would involve*, LSE BLOGS (Jan. 23, 2020), https://blogs.lse.ac.uk/brexit/2020/01/23/membership-2-0-what-the-uk-rejoining-the-eu-would-involve/.

available were the UK to seek readmission, hat-in-hand. A multi-billion Euro penalty to the prodigal state.[54]

Third (and most profoundly), EU law requires *unanimous* consent of all its member states for admission of a new member.[55] And, presumably, readmission.[56] That's twenty seven "yea" votes.[57] And no "nays".

Any EU member state with a gripe against Britain would have significant leverage to wrangle large concessions or to block reentry. Greece wants the Elgin Marbles back. It has demanded them for decades to deaf British ears.[58] It prevented progress on Macedonia pursuing EU and NATO membership until Macedonia changed its very name (to *North Macedonia*). So, it knows how to use a veto to apply the brakes in unanimity-based fora.

Perhaps Britain might be willing to return some Greek statues to get back into the EU. But Spain wants Gibraltar back.[59] A rock considerably more massive and strategic than the Parthenon marbles pilfered by Lord Elgin from the Acropolis.[60] One historian writes,

> The concessions of territory made in 1713 were painful ones. Gibraltar had
> been captured in August 1704 by an Anglo-Dutch expeditionary force, and its
> loss was a bitter pill that the Spanish government always refused to accept,
> for it wounded national dignity . . . . On the other hand the British had spent
> effort and lives in capturing the town and later in resisting the various sieges
> that took place during the war . . . . Gibraltar became a symbol of victory that
> no British government would contemplate relinquishing.[61]

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[54] The UK rebate (or UK correction) was a financial mechanism that reduced the UK's contribution to the EU budget in effect since 1985. It was a complex calculation which equated to a reduction of approximately 66% of the UK's net contribution — the amount paid by the UK into the EU budget less receipts from the EU budget. *See generally* Iain Begg, *What if Britain rejoined the EU? Breaking up may be less hard than making up*, LSE Blogs (Sept. 25, 2018), https://blogs.lse.ac.uk/brexit/2018/09/25/what-if-britain-rejoined-the-eu-breaking-up-may-be-less-hard-than-making-up/.

[55] *See, e.g.*, TEU, *supra* note 50, art. 49; *see also Unanimity*, Council of the EU (last reviewed Jan. 28, 2020), https://www.consilium.europa.eu/en/council-eu/voting-system/unanimity/.

[56] *See, e.g.*, TEU, *supra* note 50, art. 50.

[57] *Countries*, European Union: About the EU, https://europa.eu/european-union/about-eu/countries_en.

[58] The Parthenon Marbles, also known as the Elgin Marbles, are a collection of Classical Greek marble sculptures made by the architect and sculptor Phidias and his assistants. They were originally part of the temple of the Parthenon. They were acquired by Lord Elgin in the early 19th Century. *See Elgin Marbles*, Encycl. Britannica (Feb. 19, 2019), https://www.britannica.com/topic/Elgin-Marbles (last visited Apr. 3, 2020).

[59] After the War of Spanish Succession, Spain ceded Gibraltar to Britain in 1713 under the Treaty of Utrecht. *See* T.W., *Why is Gibraltar a British Territory?*, Economist (Aug. 8, 2013), https://www.economist.com/the-economist-explains/2013/08/07/why-is-gibraltar-a-british-territory.

[60] Gibraltar is colloquially referred to as "The Rock" — got its nickname before the wrestler.

[61] Henry Kamen, Empire: How Spain Became a World Power 1492-1763, at 447 (2003).

Beyond the substantial loss to the British military[62] and the insult to the British ego, such a territorial cession would raise yet another self-determination issue. The people of Gibraltar do not want to be part of the Spanish realm.[63] Their overwhelming *remain* vote (even more lopsided than the Scottish rejection of Brexit in the same 2016 referendum) partly reflected this preference. Just as Brexit would re-invigorate nationalism in English, Scots and Irish, so it might with the Spaniards, reminding them that a tip of their peninsula, a thousand miles from London, but only a hundred from Sevilla was still in English hands. Again, as with Scotland and Ireland, the mitigating European commonality would be gone. All this scared Gibraltar's voters. So, Gibraltar's popular claims to self-determination[64] would bump heads with Spanish arguments for Iberian territorial sovereignty — oh, the aggravation Brexit hath wrought.

5.1. SOVEREIGNTY OVER GIBRALTAR AND INTERNATIONAL LAW

The international law arguments concerning Gibraltar leave us with equivocal conclusions. On the one hand, the UK and Gibraltar itself (to the extent it is a separate international entity) have treaty law and the principle of self-determination on their side. The Treaty of Utrecht of 1715 clearly cedes Gibraltar from Spain to Britain, confirming the British occupation of the Peninsula in 1704. Treaties in 1729 Seville and 1783 Paris — the same treaty that recognized the independence of the United States — confirmed such British sovereignty over Gibraltar. Furthermore, in more recent times, the people of Gibraltar have voted twice overwhelmingly in 1967 and 2002 not to subject themselves to Spanish rule. So Britain and the Gibraltarians argue that any return of the territory to Spain without the consent of its residents would violate the law of self-determination. These arguments would seem to be quite weighty. Explicit treaty law such as Utrecht trumps all other sources of law except perhaps *jus cogens* and specific provisions of the UN Charter. The only *jus cogens* applicable here would seem to be

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[62] For centuries, the fortress of Gibraltar has enabled British naval dominance at the strategic narrow straight between the Atlantic Ocean and the Mediterranean Sea. *See generally* Vincente Rodriguez, *Gibraltar,* in Encyclopaedia Britannica (2019).

[63]   A referendum in Gibraltar in 1967 gave residents a choice of opting either for Spanish sovereignty or for continued close association with Britain; the result was an overwhelmingly pro-British vote (12,138 votes to 44).... The status of Gibraltar has remained a source of friction between the Spanish and British governments. In a nonbinding referendum in 2002 recognized by neither government, 99[%] of Gibraltar's voters rejected joint British-Spanish sovereignty.

See generally id.

[64] Ironically, Britain used its EU (then EC) veto leverage in 1985 to force Spain to lift its land blockade of Gibraltar, in exchange for Spain's admission to the EC.

Gibraltarians' claim for self-determination supporting not competing with British sovereignty under the Utrecht grant.

However, Spain puts forth arguments that are far from trivial. It claims that Gibraltar is a colony and that its occupation by the United Kingdom violates the legal principle of territorial sovereignty also found in the UN Charter along with that of self-determination. It argues further that the Gibraltarians are not a people entitled to self-determination but colonial settlers. United Nations General Assembly resolutions tend to support the Spanish position.

From a legal point of view, Britain would seem to have the better of the arguments. Treaty law certainly trumps General Assembly resolutions, which do not have the status of binding law but only of recommendations. While General Assembly resolutions may be considered as evidence of state practice or of *opinio juris* for the purpose of establishing international customary law, again treaty law is a superior source of international law when in conflict with custom. Spain's argument that the Gibraltarians are settlers and not people entitled to self-determination seems weak given temporal considerations. They are the descendants of people that have been on the Peninsula for centuries. If they are not entitled to self-determination because their distant ancestors were originally settlers then neither are Australians, Brazilians, Canadians, Americans, or many others entitled to that basic human right. An unlikely conclusion. On the other hand, the tendency of political bodies on the international stage to support claims against the legal validity of even very old European conquests would cut in Spain's favor (ironically, given its own colonial history and its continued occupation of its North African enclaves of Melia and Ceuta).

Thus, though Britain probably has the stronger argument in international law, Spain's argument is not frivolous. Spain could demand the return of Gibraltar without appearing to flout the law. The unanimity required for an Article 49 admission gives Spain the power to make this demand.

England will not both keep Gibraltar and re-enter the EU. And by that time (of attempted re-entry) we may indeed only be able to speak of *England*, not *Britain* — let alone the *United Kingdom.*