

# Introduction: ‘The Constitutional Legacies of Empire’

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## Introduction

In his review of Thomas Poole’s *Reason of State*,<sup>1</sup> published in 2015, Mark Walters noted that the book was, in the first place, a contribution to the literature on constitutional theory, with the ‘main actors’ in the story being political theorists, to whom judges and lawyers played ‘at best’ a supporting role.<sup>2</sup> Walters noted that:

... [t]here was a time, not very long ago, when leading scholars and jurists in Britain wrote about the law of empire as if it mattered to the British constitution ... Although scholarly work on the imperial dimensions of constitutional law has continued in former colonies, especially in places where the legacy of colonialism still informs legal responses to claims by indigenous peoples to lands or rights of self-determination ... this kind of scholarship has all but disappeared in Britain itself.<sup>3</sup>

By the time I first read this, I had come to a similar conclusion. My entry into this world of the imperial dimension of constitutional law, a world that had been mostly ignored by the key texts of my education in constitutional law, had come via the doctrine of Crown Act of State, on which I published in these same pages in 2015.<sup>4</sup> The doctrine, discussed in this special edition by Jane Rooney, was for most of its history – as I put it at the time – ‘little more than an extrapolation from a small number of disparate and unusual cases, some of them barely reasoned and most of which belong to a very different constitutional era’.<sup>5</sup>

The truth, though, is that the cases in question – while they may well have been disparate and unusual – had something very obvious in common: they arose, almost all of them, out of the murky depths of the history of the British Empire. Take, for example, *Walker v Baird*,<sup>6</sup> an appeal from the decision of the Supreme Court of Newfoundland regarding the seizure of a lobster factory by the captain of *HMS Emerald*,

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1 Thomas Poole, *Reason of State: Law, Prerogative and Empire* (Cambridge University Press 2015).

2 (2017) 80 Modern Law Review 164.

3 Ibid 165.

4 ‘The vanishing law of Crown act of state’ (2015) 66 Northern Ireland Legal Quarterly 367.

5 Ibid 165.

6 *Walker v Baird* [1892] AC 491.

in accordance with an agreement between the British and French governments. Or the more well-known case of *Buron v Denman*,<sup>7</sup> arising from events when chattel slavery had been abolished in the British Empire, and the British navy had found itself enforcing bilateral prohibitions on slavery outside that empire. Then there were the disputes arising out of dealings of the British government (or its proxy, the East India Company) with Indian princely states, many of which – wrested from their historical context – are barely comprehensible to the modern reader.<sup>8</sup> The ‘different constitutional era’ to which I made reference lasted much longer than that phrasing might suggest and, crucially, came to an end much more recently than a student of the contemporary UK constitution might realise. Chasing this case law back through time led to a range of material on law of and in the Empire. Alongside this, I came to realise that there was happening in the disciplines of international law and legal history a turn to empire that had at that point mostly failed to penetrate the discipline of constitutional law, though has begun to do so in some style in recent years.<sup>9</sup>

Some of this, no doubt, reflects my own failings, but not – or so I would at least like to think – all of it. Domestic constitutional scholarship had, it seems, mostly forgotten that the constitution of the UK once overlapped with and was, in some ways simultaneously, the constitution of the British Empire. The names of the leading scholars of the Imperial Constitution – Arthur Berriedale Keith,<sup>10</sup> most importantly, and others such as Kenneth Wheare,<sup>11</sup> – do not often feature in contemporary constitutional scholarship, though the discipline is generally not averse to the reification of the writings of certain of its historical exponents. Only the involvement of Ivor Jennings, who wrote on the constitutional law of the Empire and was the first Vice-Chancellor of the University of Ceylon, is usually remembered.<sup>12</sup> Even there, however, there is a clear divide between those contributions of Jennings which are cited by those working domestically and those cited by scholars working on or in the former empire.<sup>13</sup>

Constitutional scholarship in the former Dominions has no choice but to address the question of dominion status – how it came about, and how it came to an end<sup>14</sup> – as well as the links that did or still do exist, via the Crown or the Judicial Committee of the Privy Council, with the metropole. Part of the privilege of imperial might, on the other hand,

7 *Buron v Denman* (1848) 2 Ex 167. On the case, see Charles Mitchell and Leslie Turano, ‘*Buron v Denman* (1848)’ in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Tort* (Hart Publishing 2010).

8 E.g. *Secretary of State for India v Kamachee Boye Sababa* (1859) 13 Moo PCC 22.

9 See, especially, the work of Dylan Lino: ‘Albert Venn Dicey and the constitutional theory of empire’ (2016) *Oxford Journal of Legal Studies* 751 and ‘The rule of law and the rule of empire: A V Dicey in imperial context’ (2018) 81 *Modern Law Review* 739.

10 1879–1944: Regius Professor of Sanskrit and Lecturer in Constitutional History in the University of Edinburgh. Keith’s works include *The Constitutional History of the First British Empire* (Clarendon Press 1930), *The Constitutional Law of the British Dominions* (Macmillan & Co 1933), *The Governments of the British Empire* (Macmillan & Co 1935), *The King and the Imperial Crown* (Longmans & Co 1936). On Keith’s life and work, see Ridgeway F Shinn, *Arthur Berriedale Keith, 1879–1944: The Chief Ornament of Scottish Learning* (Aberdeen University Press 1990).

11 1907–1979: Gladstone Professor of Government at All Souls College, Oxford, and later Rector of Exeter College, Oxford. Weare’s publications in this area include *The Statute of Westminster, 1931* (Clarendon Press 1933), *The Statute of Westminster and Dominion Status* (five editions, Clarendon Press 1938–1953).

12 1903–1965: Jennings wrote *Constitutional Laws of the British Empire* (Clarendon Press 1938) (in later editions, *Constitutional Laws of the Commonwealth*).

13 The relationship between the different phases of Jennings’ career is considered in Mara Malagodi, ‘Ivor Jennings’s constitutional legacy beyond the occidental–oriental divide’ (2015) 42 *Journal of Law and Society* 102. See also the discussion of Jennings’ work in the article by Martin Clark in the present volume.

14 On which see the symposium in (2019) 17 *International Journal of Constitutional Law*.

lies in the ability to ignore, or even to forget, one's (former) imperial possessions. Not only, however, has the decline of the empire resulted in the forgetting of the links between the UK's constitutional order and Britain's imperial deeds and misdeeds. Alongside it there have been forgotten also those elements of the UK's constitutional order which were forged in an empire and so bear to this day its mark or which, in fact, are not merely the legacies of empire but proof – perhaps – of its ongoing imperial status. The various Overseas Territories which exist are mostly not addressed within contemporary public law scholarship, making an appearance only where they become immediately salient to the domestic doctrine, as did – for example – the prerogative power to govern overseas possessions in the context of the *Bancoult* litigation.<sup>15</sup> Nor does the Commonwealth feature heavily in the contemporary constitutional imagination, notwithstanding frequent attempts by certain political actors to increase its prominence and significance.<sup>16</sup>

Few constitutional lawyers would disagree with the contention that to understand the present requires a knowledge of the past. What has been lost, however, or so it seemed to me, was the awareness of the extent to which that past was one of empire. If that was true – and again, the fault is likely to have been much more on my part than that of the discipline in which I work – then one possible explanation is the rather partial historiography which prevails within constitutional law. Oftentimes, contemporary historical accounts jump directly from the great constitutional disputes of the seventeenth century to those of the early twentieth century, as though little of great constitutional import took place in the eighteenth or nineteenth centuries – the disputes over the freedom of the press in the 1760s, perhaps, and the expansion of the franchise which progressed in fits and starts after 1832.<sup>17</sup> The period thus skipped over, therefore, is the period at which British imperial power was at its height, in which the nexus between domestic doctrine and imperial endeavour must have been most palpable. But, of course, the causation is complex. It is not, or not only, that we underestimate the significance of empire because we pay less attention to the eighteenth century than the seventeenth, but that we pay that less attention because we have come – been able to come – to think of Britain's constitutional order as a largely discrete and self-regarding object of study.

The idea, then, was to seek to begin more fully and more systematically to incorporate the British Empire into the study of the UK's constitution. A workshop, generously funded by the Society of Legal Scholars and the University of Glasgow, took place in Glasgow in May of 2019. It is from that workshop that the papers in this special edition emerged. They were not the entirety of the contribution, however. Additional papers were given by Tanzil Chowdhury ('The royal prerogative, colonial-era and post-colonial military deployments: continuity or rupture?'), by Ian Patel and Bronwen Manby ('A

15 *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Bancoult* (No 2) [2008] UKHL 61.

16 A project which seems, judging by the work of Philip Murphy, doomed to failure: Philip Murphy, *The Empire's New Clothes: The Myth of the Commonwealth* (Oxford University Press 2018).

17 See Martin Loughlin, 'Towards a republican revival?' (2006) 26 *Oxford Journal of Legal Studies* 425, reviewing Adam Tomkins, *Our Republican Constitution* (Hart Publishing 2005), and criticising (at 431) Tomkins' focus upon events of the seventeenth century to the exclusion of those of subsequent centuries: 'Less exciting though they may be, the 18th and 19th centuries were just as significant to the formation of the British constitution. It was during this period that the practices of parliamentary government, constitutional monarchy and the cabinet system were settled, when the role of political parties within the framework of government was established, and when parliamentary sovereignty was clearly formulated as a legal doctrine. And it was during this period that Britain itself was transformed from an insular society with a largely agricultural economy into an industrial and commercial nation underpinned by a fiscal–military state of considerable imperial might.'

transnational genealogy of patriality: citizenship, immigration, and race”) and by Colm O’Cinneide (‘Northern Ireland – a constitutional fragment of empire’). Alongside the keynote talk by Devyani Prabhat, a second keynote talk – not published here – was given by Ed Cavanagh (‘The imperial crown: the constitutional history of an idea, 1660–1938’). My thanks to all of these contributors, as well as to Vidya Kumar, who contributed so much to the discussions at the workshop. Particular thanks go to Mark Flear who, as editor of the *Northern Ireland Legal Quarterly*, has been exceptionally supportive of this project from the very beginning, and endlessly patient too.

This collection, I hope, demonstrates the value of the imperial perspective on the British constitution and those it has influenced. It demonstrates, perhaps above all, the range of questions to which the British Empire might be relevant. Some of those are historical in nature, others contemporary. Some relate to the UK itself, others to the various jurisdictions whose constitutional orders, like so much else, bear the marks of empire. I hope further, therefore, that at least some of those who read these papers are encouraged to join me in the project of attempting to understand the British constitution in this imperial light.

### The papers

The doctrines of Crown and foreign act of state have both in recent years been the subject of major Supreme Court judgments. Each is considered in a paper here. First, Jane Rooney reviews the contemporary use to which the doctrine of Crown act of state has been put, and in particular its application to detention in Afghanistan. She suggests that the doctrine is the vehicle through which the colonial mindset – and the associated ‘ambivalence towards the extraterritorial’ – which is one legacy of empire, manifests itself. Looking at Foreign act of state, Courtney Grafton reviews the history of the ‘judicial restraint’ limb of foreign act of state, calling into question the historical pedigree of that limb. Crucial here is the imperial context of many of the historical cases said to ground the doctrine, which cannot for that reason be read over into the relationship between sovereign states as a matter of international law. That is, case law developed to address the exigencies of the relationship between centre and periphery in the imperial context has been applied, misleadingly, in a context which is – at least at a formal level – without the hierarchy that is embedded in the very notion of empire.

There is a synergy here with the paper by Martin Clark, in which he considers the relationship between domestic and international law via a consideration of a mostly forgotten body of work by Ivor Jennings. Jennings, a leading thinker of the domestic constitution, would go on to be a leading practitioner, as it were, of imperial constitutionalism in its dying phase. He assisted, for example, in the drafting of the Constitution of Ceylon when it achieved dominion status. Clark shows how Jennings’ contributions focused first on the interaction of an existing body of imperial constitutional law with an expanding corpus of international law. As international law developed, Jennings argued for an understanding of the ‘rule of law’ equivalent to that which prevailed in the domestic order. Both of these strands of thought, Clark shows, were evident in the post-war work undertaken by Jennings.

Devyani Prabhat in her paper considers the conceptual commonalities of subjecthood and citizenship, arguing that the move from the latter to the former in the process of decolonisation masks substantial continuities between the two legal categories. In making this case, she draws on the issues of – first – the so-called ‘hostile environment’, in which individuals present in Britain are forced to prove their legal status in order to carry out everyday activities, and – second – the question of the deprivation of citizenship, used

ever-more frequently as a tool of national security in the last decade. Donal Coffey's contribution addresses the influence of empire on the study of constitutional law in the UK in the interwar period. Surveying the key constitutional texts of the period, Coffey is able to show the growing if uneven influence of imperial law, in particular in the domains of liberty – the writ of *habeas corpus* – and of citizenship. He offers a detailed reading of how imperial precedents came to be accommodated into the treatment of the doctrine of parliamentary sovereignty. His argument here is that to talk of an orthodox account of that doctrine is misleading, for Dicey – the alleged purveyor of that orthodoxy – came to accommodate in his writings the primary challenge to it: the so-called 'manner and form' argument.

In their paper, T T Arvind and Daithí Mac Síthigh address the question of constitutionalism in the 'periphery'. Focusing on India and Ireland, they assess how those who were subjects of – and subject to – the British Empire experienced it, and how that experience fed into the terms in which arguments for self-rule were made in those jurisdictions. They demonstrate the use in both countries of a civic republican rhetoric which has been more usually associated with transatlantic political theory, but which diverged in important ways, reflecting the status of the periphery in relation to the centre. They show too how that borrowing rebounded back on the centre, so that developments in the periphery worked over time to influence constitutional thought in the UK. Though not focused on constitutional doctrine, they therefore offer a compelling account of the complexities of borrowing and influence, which suggests the need to consider the question of legacy not in terms of one-off events but rather as a process of interplay unfolding over time, notwithstanding the imbalances in power which are inherent in empire. Lindsay Stirton and Martin Lodge look elsewhere in the periphery, to Jamaica, in order to demonstrate the continuity between the pathologies of imperial governance and the difficulties which Jamaica has experienced as an independent state. The continuity they identify is not a simplistic structural or institutional one. Rather, it is the continuity of a more subtle set of unresolved ambiguities as to the relationship between political and administrative elites, between whom there existed an atmosphere of 'mutual suspicion' which set the stage for post-independence conflicts in Jamaica.

In my own contribution, I consider the residue of the British Empire, the 14 Overseas Territories and how they are governed from the centre via first of all the Westminster Parliament – though they are not part of the UK – and, more often, by the Privy Council, in which legislation applying to the territories is often made and the Judicial Committee of which resolves disputes as to the law which applies there. My aim, however, is not merely to assert the ongoing imperial nature of the state, but to show how that imperial nature is hidden from view by that same Privy Council. Influenced by Daniel Immerwahr's work on American empire,<sup>18</sup> I argue that the Privy Council creates a formal divide where there is substantive continuity. The effect is to hide the residue of empire from the domestic constitution and, in turn, permit a reliance on legal and constitutional practices which would not be permitted within that domestic constitution. Following on from this, Roger Masterman in his contribution casts a sceptical eye over the oft-made claim that the work of the UK's Supreme Court is enriched by the work done by the same individuals in the guise of the Judicial Committee of the Privy Council in relation to various overseas jurisdictions. Though this latter work has had an obviously constitutional dimension for much longer than has the work of the UK courts, Masterman shows that the reliance on it by the Supreme Court has been sporadic and *ad hoc*. Only in a few specific areas has there been any sustained reliance on Privy Council jurisprudence, and

18 Daniel Immerwahr, *How to Hide an Empire: A History of the Greater United States* (Bodley Head 2019).

even that has diminished over time as a body of domestic case law has grown. Masterman explores the possible explanations for, and significance of, the Supreme Court's hesitation, even unwillingness, to strengthen the link between the two institutions.

Two analysis pieces address particular issues around the ongoing doctrinal legacies of empire. First, Gail Lythgoe examines the opinion of the International Court of Justice as to the legal consequences of the separation of the Chagos Islands – now, in official terms, the British Indian Ocean Territory – from Mauritius. The domestic legal implications of that separation have, as discussed in my own contribution, been the subject of a vast quantity of litigation. The discussion here shows the strengths and weaknesses of international law: able to condemn in clear terms that which the domestic legal system ultimately, if hesitantly, endorsed, but unable to enforce the prohibition of colonialism with any vigour. The paradox of empire is that those states powerful enough to retain colonies are likely to be those best able to resist attempts to use the law to bring to an end, once and for all, their imperial phase. Tim Sayer returns us to the domestic legal order, considering the litigation which has been brought relating to end of empire struggles in various jurisdictions, and the way in which the common law can (and cannot) be used to seek vindication for wrongful acts done during these conflicts. This he takes to be an example of the 'Diceyan dialectic', whereby a single constitutional outlook – so influential in our constitution – oscillates between parliamentary sovereignty and common law rights protection, and so can be used to justify both strong and weak review, as the situation demands.

Finally, and by way of conclusion, I review Nadine El-Enany's recent book, *(B)ordering Britain: Law, Race and Empire*,<sup>19</sup> which addresses citizenship, immigration and asylum law in their imperial context, and which considers more directly than do any of the papers in the special edition the racial (and racist) dimensions of the modern Britain constitution. That country – the argument goes – first enriched itself on a massive scale via rampant exploitation of its colonial possessions. As that empire diminished, it then sought, through a series of transparently discriminatory reforms of citizenship and immigration law, to exclude from the country (and so in turn the enjoyment of that stolen wealth) those who resided in or hailed from those colonies. Where the various papers included herein treat the imperial dimension of Britain's past as one perspective amongst many – illuminating, to be sure, but not the only lens through which the topic might be studied – the argument of El-Enany's book challenges constitutional scholarship in the UK at a more fundamental level. It suggests, in effect, that the central organising logic of those aspects of modern law which are the book's subject is the logic of empire. As the review of the book explores, this case is compellingly made. It works, in turn, to prompt the question of whether a constitutional scholarship that is grounded in the rules, methods and concepts of the domestic constitutional order – that excludes from consideration, that is, the imperial context of the contemporary UK – can ever hope to understand the manner in which that constitutional order has developed. Are there, to put the point another way, 'constitutional legacies' of empire, as the title of this project suggests, or is it rather the case that the constitutional order itself is in the first place a legacy of empire?

### Avenues for future research?

A single special edition of a journal could not begin to cover the full range of questions within UK constitutional law – present or past – which would benefit from consideration, or further consideration, via the lens of empire. Here, I suggest some avenues for future

19 Nadine El-Enany, *(B)ordering Britain: Law, Race and Empire* (Manchester University Press 2020).

research along these lines. One is theoretical: there would seem to be significant scope for incorporating the many insights of recent work on the political theory of empire into the mainstream of British constitutional theory. Another is devolution. Colin Kidd, for example, has shown that attitudes towards 'Home Rule' in Scotland – what became in time devolution – were associated in perhaps surprising ways with views on the British Empire, so that for some the empowerment of Scotland was desirable in large part because it would allow Scotland to play a more assertive role in the empire to which its citizens contributed so much.<sup>20</sup> Though there are of course limits to what might be said about the relationship between Scotland and Wales on one hand and the (British) Empire on the other – only the former was an independent state in the age of modern empires, and only for a short period – other lines of enquiry seem more promising.

A paper given at the workshop from which these papers originate by Colm O'Cinneide addressed the possibility that Northern Ireland is itself in some sense a constitutional legacy – a 'fragment' – of the British Empire. That possibility is an important one in a context in which the reunification of Ireland appears significantly more likely than at any time for the last century but is potentially illuminating even outside of that context. Northern Ireland has a modern constitutional history that is much better developed than those of Scotland and Wales, and yet is (even) more weakly integrated into the mainstream study of constitutional law than are either of those. One can largely manage to discuss Scotland and Wales, that is, without researching back before 1998 and without having to engage with those difficult issues which are particular to Northern Irish society. Considering Northern Ireland through the lens of the legacies of empire – or, conversely, rejecting the possibility of doing so – offers an opportunity to incorporate it more fully into a constitutional law that is truly of the UK, and not simply that of England with occasional nods to the nations and regions.

Another topic which might speak to the question of empire is, perhaps, conspicuous by its absence in this collection. It has become common to analyse the UK's decision to leave the EU, taken in 2016 and completed in 2020, in terms of empire and imperialism. It represents, it has been suggested, a nostalgia for empire on the part of the British public,<sup>21</sup> perhaps a desire to restore Britain's place in the world under the banner of Global Britain,<sup>22</sup> or even to restore (consensually, this time, one would hope) a smaller (and – it must be noted – whiter) alternative to the lost British Empire under the label of CANZUK.<sup>23</sup> The absence of a paper herein on the imperial roots (or, indeed, imperial

20 See Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500–2000* (Cambridge University Press 2010) 275–281.

21 See, for example, Danny Dorling and Sally Tomlinson, *Rule Britannia: Brexit and the End of Empire* (Biteback Publishing 2019) and, in broader perspective, Robert Gildea, *Empires of the Mind: The Colonial Past and the Politics of the Present* (Cambridge University Press 2019).

22 Oliver Turner, 'Global Britain and the narrative of empire' (2019) 90 *Political Quarterly* 727, arguing that 'Global Britain' is 'an autobiographical narrative about what Britain is and what it envisions the world and its actors to be', but that this narrative is unhelpful in a number of ways, not least because events in recent years have 'a broad and highly problematic mismatch between [Britain's] sense of self and the assessments of the international partners it requires to succeed'.

23 See Duncan Bell and Srdjan Vucetic, 'Brexit, CANZUK, and the legacy of empire' (2019) 21 *British Journal of Politics and International Relations* 367, arguing, at 379, that although the concept 'has (re)emerged in the wake of Brexit, its conceptual roots, and many of its animating concerns and ideas, can be traced to the imperial debates of the late 19th and early 20th century' and 'serves as a window into the assumptions, interests, and dreams, of some of those seeking to maintain Britain's – or the "English-speaking peoples" – position as a major global power'. The anglosphere is considered in its wider historical perspective also in Michael Kenny and Nick Pearce, *Shadows of Empire: The Anglosphere in British Politics* (Polity Press 2018).

consequences) of Brexit is not to be taken as indicating that there is nothing to be said on the topic. Quite the opposite.

One distinctive feature of the Brexit discourse is the marginal status of arguments based upon the costs and benefits of the UK's membership of the EU (and, in turn, of its decision to leave that union). Even allowing for the incommensurability of many of the values at stake in such a calculation, it seems clear to this author that there could only have been one outcome of such a process of reasoning, and it was not that which in fact was endorsed by the British electorate in 2016.<sup>24</sup> What it would mean to think in such terms, though, is less important than the fact that it does not – did not – tend to happen within the mainstream political discourse: either for or against membership of the EU. One motive for that, one might suggest, is that a cost–benefit analysis involves seeing the UK as one country amongst many, which – like any other – might (even must) choose to give up one thing in order to gain some other thing within a community of nations. Many do not, perhaps cannot, see the UK in that way, and while it would not be right to unthinkingly attribute that unwillingness to Britain's imperial past, that past would certainly be a part of any plausible explanation.

It is also true that much of the political discourse since the 2016 referendum has betrayed the influence of the imperial past and suggested – whether or not deliberately – a desire to reconstruct that influence, its modes and its forms. Think, for example, of the (re)convening of the Board of Trade under the Presidency of Liam Fox as Secretary of State for International Trade. The Board, the government claimed at the time, would 'help boost exports, attract inward investors and ensure the benefits of free trade are spread equally across the country'.<sup>25</sup> The endeavour collapsed quickly into farce. The Board being a committee of the Privy Council, membership of it was limited to Privy Counsellors, and so the various business figures – sourced in suitable proportions from the UK's various regions and nations – could not sit on it, but merely advise it. Fox was, therefore, not only the President of the Board but its sole member.<sup>26</sup> The episode turns out to have been trivial but might not have been had Fox been less predictably hapless. And the relevance to empire is clear to any historically minded observer. Though the body which was (re)convened in 2017, the Board of Trade, used the name by which that body had indeed been known at the time of its lapse, the history of that body is much older and tied up in imperial governance. The Board was not always, that is, the Board of Trade,

24 Here we must note, in keeping with the theme of empire and its legacies in the contemporary UK, that the referendum franchise – being based upon that used for general elections – permitted nationals of Commonwealth states resident in the UK (or Gibraltar) to vote but not EU nationals (unless Irish) similarly resident: European Union Referendum Act 2015, s 2.

25 Department for International Trade, 'International Trade Secretary Dr Liam Fox convenes a new Board of Trade to ensure the benefits of free trade are spread throughout the UK' (12 October 2017).

26 Jessica Elgot, 'Liam Fox ridiculed for being only member of new UK Board of Trade' *The Guardian* (London, 12 October 2017).



but rather the Board of Trade and Plantations, neatly encapsulating the relationship between English mercantilism and the country's imperial endeavours.<sup>27</sup>

But this was, in the end, mere rhetoric, and there has been little sign yet that the legacy of the British Empire in this domain is more substantial than a sort of inchoate exceptionalism. Certainly, if 'Global Britain' is a post- or even neo-imperial construct – and it may well be – then the apparent failure of that slogan to amount to anything of substance (thus far, at least) might indicate that imperial rhetoric is just that. Brexit, then, is not an inherently neo-imperial project. It is, though, one which could only have taken the form which it did in the context of a state, like the UK, which has not yet come to terms with its post-imperial character. The speed with which arguments for it – and for what it permits the UK to do – lapse into an imperial register demonstrates that the connection is not a trivial one. In parallel with that conclusion, the argument which emerges out of this special issue is not that the constitutional order of the UK is a creation of empire, but rather that the legacies of empire are distributed widely within it, and that, if we seek to understand both the development and the current reality of that order, the lens of empire is one that we cannot afford to overlook.

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27 The Board was constituted by William III in 1695 under the title of 'the Lords Commissioners for promoting the Trade of our Kingdom, and for inspecting and improving our Plantations in America and elsewhere', replacing the permanent administrative body known as the Lords of Trade and Plantations set up in 1675. The Board was reconstituted around a century later by William Pitt and reformed by an Order in Council of 1786. The Harbours and Passing Tolls, &c Act 1861, s 65, provides that the 'Lords of the Committee of Privy Council appointed for the consideration of matters relating to trade and foreign plantations may be described in all Acts of Parliament, deeds, contracts, and other instruments, by the official title of "the Board of Trade" without expressing their names'. The history of the Board is found written only in a series of scattered studies, many of very restricted focus: see, on the early operation of the Board, Mary Patterson Clarke, 'The Board of Trade at Work' (1911) 17 *American Historical Review* 17, 42: 'the Board of Trade stood between the King in Council on the one hand, and the outlying portions of the empire on the other. As a result of this position it could, and did many times, give advice and submit policies, but at all times it furnished information ... By close connection with colonists and merchants the Board kept its finger, so to speak, on the colonial and commercial pulse, and helped to diagnose disorders for treatment by a higher power.'

