

1-1-1995

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Recommended Citation

Christopher A. Callanan, *Does Peace Have a Chance? Protection of Individual Rights as the Foundation for Lasting Peace in Northern Ireland*, 15 B.C. Third World L.J. 87 (1995), <http://lawdigitalcommons.bc.edu/twlj/vol15/iss1/5>

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DOES PEACE HAVE A CHANCE? PROTECTION OF INDIVIDUAL RIGHTS AS THE FOUNDATION FOR LASTING PEACE IN NORTHERN IRELAND

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I. INTRODUCTION

She would later tell her story to reporters, identifying herself only as "Sharon."¹ She had spent a Saturday night in her father's bar in Greysteel, Northern Ireland, which at the time probably did not seem in any way out of the ordinary.² Perhaps Sharon noticed only that the Rising Sun was particularly "packed" that night.³ However, it was the night before Halloween, so the crowd of about sixty likely seemed appropriate for the occasion.⁴

Unfortunately, nothing could have prepared Sharon for this particular Saturday night. She would later describe the horror when two masked gunmen entered the Rising Sun:⁵ "One said 'Trick or treat.' Then they shot everyone. . . . There was nothing anyone could do but lie down and hope they weren't hit."⁶ Seven people were killed and eleven others were wounded after the gunmen, bearing automatic weapons, "calmly reload[ed] their weapons . . . [and] sprayed the packed pub before fleeing."⁷ Sharon's grandfather, who was eighty-two, was among those killed.⁸

For too long, Northern Ireland has been plagued by violence.⁹ In addition, the violence has stretched south to the Republic of Ireland and across the sea to Great Britain. This Note argues that the violence

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¹ *Protestants Kill 7 in Ulster Pub*, BOSTON GLOBE, Oct. 31, 1993, at 2.

² *Id.*

³ Jim Campbell, *Ulster Police Vow to Find Gunmen Who Killed 7*, BOSTON GLOBE, Nov. 1, 1993, at 2.

⁴ See *Protestants Kill 7 in Ulster Pub*, *supra* note 1, at 2.

⁵ *Id.*

⁶ *Id.*

⁷ See Campbell, *supra* note 3, at 2.

⁸ See *Protestants Kill 7 in Ulster Pub*, *supra* note 1, at 2. "The Greysteel slaughter horrified a province hardened to violence. People brought flowers to the pub in tribute. One carried a card reading, 'God might forgive them, but we can't.'" Campbell, *supra* note 3, at 2.

⁹ Paul Bew & Gordon Gillespie, NORTHERN IRELAND: A CHRONOLOGY OF THE TROUBLES: 1968-1993, at v (1993).

in Northern Ireland is the catastrophic product of Ireland's failure to protect its minorities. Irish history reveals that those in power have repeatedly abused their power to oppress the minority. This inspires minority groups to rebellion, which when successful leads the formerly dispossessed to exploit those now in the minority. Ireland has yet to establish a society of harmonious diversity.

This Note demonstrates how the protection of minorities is essential to establishing a stable community in Ireland. Part II examines Ireland's past, which is filled with examples of the oppression of minorities and violent rebellion. Part III traces the recent progress in Northern Ireland and demonstrates that despite major progress, Ireland must address its failure to protect minorities to ensure lasting progress. Finally, Part IV attempts to suggest a way for both the majority and minority to bridge the gap which has separated them and to form a unified stable society.

II. THE PAST

A. *Historical Background*

Today, Ireland covers thirty-two thousand square miles and includes five million people.¹⁰ However, the island is divided politically between the twenty-six counties of Ireland and the six northeastern counties which remain part of Great Britain.¹¹ The island's political partition is the modern legacy of an age-old Irish struggle to be free from Great Britain.¹² This historic struggle has left a geographically divided island as well as a deeply divided Irish people.¹³

At its most obvious level, the conflict within Northern Ireland pits more than one million Protestants who prefer to maintain a union with

For a quarter of a century Northern Ireland has been locked in a bitter conflict centered around a constitutional dispute in which the majority of the population wish to remain within the United Kingdom and a minority would prefer that Northern Ireland be incorporated within the Republic of Ireland. Already over 3,000 people have lost their lives due to political violence in a small territory inhabited by only one and a half million people; worse, there is no end in sight.

Id.

¹⁰ *E.g.*, MICHAEL FORDE, CONSTITUTIONAL LAW OF IRELAND 1 (1987).

¹¹ *E.g.*, TIMOTHY P. COOGAN, IRELAND SINCE THE RISING xi (1966) [hereinafter SINCE THE RISING].

¹² *See e.g.*, F.S.L. LYONS, IRELAND SINCE THE FAMINE 3 (1971). Lyons discusses Ireland's "national demand . . . to break the connection with England, the never-failing source of our political evils." *Id.*

¹³ VINCENT J.D. RYAN, IRELAND RESTORED: THE NEW SELF-DETERMINATION 291 (1991).

Great Britain against the one-half million Catholics who prefer some association with Ireland.¹⁴ The one-half million Catholics, who are ethnically Irish, consider themselves part of an independent and united Irish nation unjustly divided by partition.¹⁵ They are called nationalists or republicans because they support the nationalist aim of an all-Irish republic.¹⁶ The million-plus Protestants regard themselves as ethnically British¹⁷ and are called unionists or loyalists because they support a continued union with Great Britain.¹⁸ The intricate relationship between Protestants and Catholics has developed gradually over time and is best understood in its historical context.

Under the Act of Union of 1800, Ireland became part of the United Kingdom of Great Britain and Ireland.¹⁹ The Union resulted in direct rule of Ireland from Westminster and was intended to last forever.²⁰ Under the Act of Union, Ireland lacked a strong voice in the Westminster Parliament, suffered widespread poverty, and endured the human catastrophe of the Great Famine.²¹ Not only did the Famine cost two million lives²² and prompt a mass exodus of Irish people that

¹⁴ *E.g.*, PADRAIG O'MALLEY, *THE UNCIVIL WARS: IRELAND TODAY* 10 (1990). O'Malley terms this the arithmetic of impasse:

The number of Catholics in Northern Ireland is too great for Protestants to impose their will unilaterally within a stable political structure in Northern Ireland, while the number of Protestants in Ireland as a whole is too great for Catholics to impose their will within a stable political framework in Ireland as a whole. Either situation is subject to the tyranny of the minority.

Id.

¹⁵ *E.g.*, *id.* at 9–10.

¹⁶ *E.g.*, *id.*

¹⁷ H.D.S. Greenway, *For Northern Ireland's Protestants, an Identity Crisis*, *BOSTON GLOBE*, Nov. 4, 1993, at 21.

¹⁸ *E.g.*, O'MALLEY, *supra* note 14, at 9. Northern Ireland's Protestant community suffers from a particularly unenviable identity crisis, being neither Irish nor British. An article in the *Boston Globe* explains, "Ian Paisley Jr., the son of the firebreathing [sic] and immoderate Protestant leader, said: 'When I go to London I am just another Paddy'—despite the fact that he is from a separate tradition and culture from the rest of Ireland. 'When I get back home, I am not really British, either.'" Greenway, *supra* note 17, at 21.

¹⁹ *E.g.*, FORDE, *supra* note 10, at 1–2.

²⁰ *E.g.*, *id.* at 2. Article 1 of the Act of Union announced that from "1 January 1801, 'and for ever,' the Kingdom of Ireland and the Kingdom of Great Britain 'shall be . . . united into one kingdom. . . .'" *Id.*

²¹ *E.g.*, COOGAN, *SINCE THE RISING*, *supra* note 11, at 2–3.

²² *E.g.*, *id.* at 3. "The population of Ireland in 1785 is reckoned to have been about 4 million; in 1831 it was 7,767,101; ten years later it had risen to 8,175,124; but by 1851 it had fallen dramatically to 6,200,000. (In 1964, North and South added together, it was 4,243,383.)" *Id.* at 3. Compare these figures with today's population of five million. See FORDE, *supra* note 10, at 1.

continues today,²³ but it also planted the seeds of animosity toward Great Britain in many Irish minds.²⁴

The widespread poverty, human tragedy, and lack of political voice which Ireland suffered under the Act of Union inspired a constitutional movement in Ireland for the Act's repeal.²⁵ The movement sought to free Ireland from British control and to create an independent and united Ireland characterized by uniquely Irish culture and values.²⁶ This was termed the Home Rule movement.²⁷ The Home Rule movement led to the Easter Rising of 1916, a botched revolt led by Irish nationalists who saw an opportunity to free Ireland while the British were preoccupied with Germany.²⁸ The Rising was a secret affair that failed because of a miscue regarding a shipment of arms from Germany, and because of a greatly outnumbered Irish contingent.²⁹ Although the Rising had little popular backing, the public execution of its leaders by the British government galvanized public opinion in widespread support of an independent Ireland.³⁰

²³ *E.g.*, COOGAN, SINCE THE RISING, *supra* note 11, at 3. Coogan credits the Famine with starting the exodus which created the powerful Irish political influence in America. *See id.*

²⁴ *E.g.*, *id.* The Famine "strengthened and embittered with hate for England the radical proponents of Irish nationalism." *Id.*; *see also* LYONS, *supra* note 12, at 4. For Lyons, the "most profound" impact of the Famine on Irish history "lay in its ultimate psychological legacy:

Expressed in its simplest terms, this legacy was that the long-standing and deep-rooted hatred of the English connection was given not only a new intensity, but also dimension [T]his hatred, this bitterness, this resentment were carried overseas, and especially to America, by nearly four million Irish men, women and children who left their homeland, decade by decade and year by year in the half-century after the Famine. The political consequences of this unending exodus of a permanently antagonized population were literally incalculable.

Id.

²⁵ *See e.g.*, TIM PAT COOGAN, THE IRA: A HISTORY 5 (1993) [hereinafter IRA]. *See also* LYONS, *supra* note 12, at 5 (1970).

²⁶ *See e.g.*, COOGAN, SINCE THE RISING, *supra* note 11, at 2-5.

²⁷ *Id.* at 8-21. The 1916 Rising was led principally by Patrick Pearse, Sean MacDermott, James Connolly, Thomas Clarke, Thomas MacDonagh, Eamonn Ceanny, and Joseph Plunkett. The rebels managed to secure several strong points in Dublin including the General Post Office. On the steps of the General Post Office, the rebels issued a proclamation to the people of Ireland announcing the freedom of Ireland (North and South) and calling themselves the Provisional Government. *See generally id.* at 1-21.

²⁸ *Id.* at 14.

²⁹ *Id.* at 15-18. Coogan notes, "The Rising was less a military venture than a blood-sacrifice to the gods of Irish nationalism, unappeased by the ameliorative legislation of recent years and the halting steps toward Home Rule." *Id.* at 16-17.

³⁰ *Id.* at 2, 18-19; *see also* JAMES CASEY, CONSTITUTIONAL LAW IN IRELAND 4 (1992).

It was the immediate aftermath of the Rising which changed the climate of opinion. The execution of the leaders—particularly of James Connolly . . . who had to be propped up in a chair to be shot—shocked and embittered countless Irishmen who,

Popular support led to the Government of Ireland Act of 1920, which provided for two Irish parliaments, one for the north of Ireland and one for the rest of the country.³¹ Each parliament had the power to make laws for “peace, order and good government” of the areas within its jurisdiction.³² In addition, the two parliaments had the option of merging.³³ To nationalist dismay, the parliaments were limited in authority.³⁴ For example, defense and foreign affairs were excluded; the parliaments’ financial powers were limited and the overriding authority of Westminster was reaffirmed.³⁵

Irish nationalists were not satisfied with the devolved government under the 1920 Act, and violence continued until the Truce of July 11, 1921, which spawned the Irish Free State.³⁶ The Irish Free State had “the same constitutional status in the Community of Nations known as the British Empire as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand and the Union of South Africa.”³⁷ In 1921, dominion status was vague, but for Irish nationalists, a self-governing dominion was progress from the devolution of the 1920 Act.³⁸ As a dominion, the Irish Free State had nearly complete control over domestic affairs, but a degree of colonial subordination remained.³⁹

In seeking independence, Irish nationalists never addressed the question of partition, blaming the British for the division of the is-

deploring the Rising, had yet been moved by the courage and patriotic idealism of the insurgents.

COOGAN, *SINCE THE RISING*, *supra* note 11, at 2.

³¹ *See, e.g.*, CASEY, *supra* note 30, at 4–5.

³² *Id.* at 5.

³³ FORDE, *supra* note 10, at 2. The parliament for the six northeastern counties was known as the “Stormont” parliament. *Id.*

³⁴ CASEY, *supra* note 30, at 4–5.

³⁵ *Id.* at 5. The Act provided for each parliament to choose an executive from among its ranks. A Council of Ireland was established to be comprised of members of both parliaments. In addition, both parliaments could establish a single parliament for the entire island thereby abolishing the separate parliaments as well as the Council. *Id.*

³⁶ *Id.* at 5–6.

³⁷ *Id.* at 6. The Act provided that the Irish Free State’s parliament “would have the power ‘to make laws for the peace, order and good government of Ireland.’” *Id.* In addition, the position of the Irish Free State with regard to Westminster was declared analogous to that of Canada. *Id.*

³⁸ *See id.* At this time the specific status of dominions was unclear in international law and foreign affairs. *Id.* at 6–7.

³⁹ *Id.* Most restrictions dealt with Ireland’s sovereignty especially with respect to defense. Ireland’s defense forces were to maintain the same proportion to Ireland’s population as Britain’s. Nor was Ireland able to establish facilities for wireless communication outside of Ireland without British consent. *Id.* at 7.

land.⁴⁰ The developments which led to the Irish Free State also established Northern Ireland as a political entity in its own right.⁴¹ As in the South, the six northeastern counties received their own parliament and control over domestic affairs.⁴² Thus, two identifiable states were created on the island: the six northeastern counties with a local majority of Protestants and the rest of the island with an overwhelming Catholic majority.⁴³ This devolved government of Northern Ireland lasted until March 1972, when Great Britain invoked its authority under the 1920 Act to suspend the Northern Ireland Parliament due to security concerns.⁴⁴ Great Britain took full control of Northern Ireland's affairs as a temporary security measure.⁴⁵ Direct rule from Westminster continues today despite its failure to bring peace and stability to the region.⁴⁶

For the Irish Free State in the South, constitutional law has established a stable community, but has simultaneously widened the gap between North and South. In 1922, the South passed the Constitution of the Irish Free State.⁴⁷ Irish nationalists gained an additional degree of independence through the 1922 Constitution, which recognized Ireland's association with Britain through an oath of allegiance to the

⁴⁰ G.W. Hogan, *Law and Religion: Church-State Relations in Ireland From Independence to the Present Day*, 35 AM. J. COMP. L. 47, 48-49 (1987). The Constitution of 1922 recognizes Ireland as a Catholic nation, ending the Irish Free State and establishing the twenty-six southern counties of Ireland as a separate entity. The 1937 Constitution, which remains in effect today, expresses the same attitude: "We the people of Eire [Ireland], humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial . . ." IR. CONST. pmb. Hogan comments, "The reference to Jesus Christ sustaining 'our fathers through centuries of trial' is a clear reference to the religious persecution suffered by Catholics in Ireland in the seventeenth and eighteenth centuries. One might reasonably infer that non-Catholics did not really belong to 'the people of Eire.'" Hogan, *supra* note 40, at 55 n.17.

⁴¹ O'MALLEY, *supra* note 14, at 4; CASEY, *supra* note 30, at 4-5.

⁴² CASEY, *supra* note 30, at 4-5.

⁴³ E.g., Hogan, *supra* note 40, at 47.

⁴⁴ O'MALLEY, *supra* note 14, at 4. The dissolution of the Stormont government brought British troops to Northern Ireland. The Downing Street Declaration of August 19, 1969 proclaimed: "the British Government have [sic] ultimate responsibility for the protection of those who live in Northern Ireland when, as in the past week, a breakdown of law and order has occurred." Richard J. Harvey, *The Right of the People of the Whole of Ireland to Self-Determination, Unity, Sovereignty and Independence*, 11 N.Y.L. SCH. J. INT'L & COMP. L. 167, 168 n.4 (1990).

⁴⁵ See O'MALLEY, *supra* note 14, at 4. The Downing Street Declaration of 1969 insisted that "troops have been provided on a temporary basis." Harvey, *supra* note 44, at 168 n.4.

⁴⁶ See O'MALLEY, *supra* note 14, at 4. "Direct Rule had come, and though it was conceived of only as a temporary measure, it remains to this day the mode of government, the least acceptable alternative." *Id.*

⁴⁷ E.g. CASEY, *supra* note 30, at 8.

Crown, an Office of Governor General, and the right of appeal from Irish courts to British courts.⁴⁸ In addition, Ireland became associated with Great Britain for foreign affairs and defense purposes, and recognized the British monarch as the head of that association.⁴⁹ Although it was better than the devolved government of 1920, Irish nationalists still felt restrained⁵⁰ under British control and therefore chipped away at the 1922 Constitution's ties to Britain until sixteen amendments had been passed.⁵¹ The 1922 Constitution was eventually replaced in 1937 by the *Bunreacht na h'Eireann* (Constitution of Ireland) which remains in force in the South today.⁵²

The 1937 Constitution, written by Eamon de Valera,⁵³ was approved in June 1937.⁵⁴ De Valera, who participated in the 1916 Rising, rose to power atop the powerful wave of nationalist sentiment that followed the failed Rising.⁵⁵ De Valera and fellow Irish nationalists were dissatisfied with the remaining elements of British control in the 1922 Constitution, particularly with its Commonwealth status.⁵⁶ The principal distinction between the 1922 Constitution and the 1937 Constitution was that the 1937 document made no reference to outside links and provided Ireland with its own head of state to be elected by the Irish people.⁵⁷ By removing the symbolic vestiges of British control, the

⁴⁸ See FORDE, *supra* note 10, at 3.

⁴⁹ CASEY, *supra* note 30, at 15.

⁵⁰ FORDE, *supra* note 10, at 3.

⁵¹ *Id.* at 15; see also FORDE, *supra* note 10, at 3. The amendments altered the mode of election of the Senate, enhanced the Senate's power and status, and introduced a wide reaching public safety act which, when invoked by executive proclamation, restricted many constitutionally guaranteed freedoms. CASEY, *supra* note 30, at 15.

⁵² See CASEY, *supra* note 30, at 20; see also FORDE, *supra* note 10, at 3.

⁵³ J.H. WHYTE, *CHURCH AND STATE IN MODERN IRELAND: 1923-1970*, at 42, 51 (1971). See also T. RYLE DWYER, *DE VALERA: THE MAN & THE MYTHS 196-201* (1991).

⁵⁴ WHYTE, *supra* note 53, at 51-56.

⁵⁵ See COOGAN, *SINCE THE RISING*, *supra* note 11, at xi, 74. See also *supra* note 30 and accompanying text. De Valera was born in New York in 1882 to a Spanish father and an Irish mother. COOGAN, *SINCE THE RISING*, *supra* note 11, at 73. After his father's death, de Valera's mother and maternal uncle returned to Ireland. *Id.* De Valera formed the Fianna Fail party which entered the Irish Parliament in 1927. *Id.* De Valera was a devout Catholic who adhered to the dream of an independent Irish Catholic nation. See *id.* De Valera hated partition and once said that he would consider it a personal failure if partition was not lifted within his lifetime. *Id.* De Valera was the last commandant to surrender in the 1916 Rising. JOHN BOWMAN, *DE VALERA AND THE ULSTER QUESTION: 1917-1973*, at 6 (1982). He wanted nothing more than to see Ireland united, yet his crowning achievement, the 1937 Constitution, remains as a barrier to unity. See *id.* De Valera was spared from execution for his part in the Easter Rising of 1916 only because of the public outrage at the executions of his comrades. DWYER, *supra* note 53, at 17-18.

⁵⁶ LYONS, *supra* note 12, at 531. See also DAVID G. MORGAN, *CONSTITUTIONAL LAW OF IRELAND: THE LAW OF THE EXECUTIVE, LEGISLATURE AND JUDICATURE 23-24* (2d ed. 1990).

⁵⁷ WHYTE, *supra* note 53, at 51.

1937 Constitution realized the nationalist dream of a separate and distinctively Irish nation.⁵⁸ However, some have criticized de Valera's over-reaction to the symbols of the 1922 Constitution. Critics have also blamed the nationalist desire for independence for not merely breaking with Britain, but irreconcilably alienating the six northeastern counties of Northern Ireland.⁵⁹

Despite this criticism, the 1937 Constitution is in effect today and remains one of de Valera's most enduring achievements.⁶⁰ However, it is a remarkably Catholic document, one which reflects the nationalist dream not only to separate from Britain but also to create a separate and Gaelic Ireland.⁶¹ The 1937 Constitution drew heavily from the Catholic *Social Code*, a compendium of Catholic social principles,⁶² and the Constitution espouses Catholic values in its text.⁶³ Article 41 on the family, Article 42 on education, and Article 43 on private property all reflect Catholic influence.⁶⁴

Article 41 provides that: "No law shall be enacted providing for the grant of a dissolution of marriage."⁶⁵ Article 42 limits the State's rights in education: "The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State"⁶⁶ Similarly, Article 43 provides that individual property rights should be "regulated by principles of social justice."⁶⁷ Article 44 on religion explicitly recognizes the superiority of Catholicism.⁶⁸

⁵⁸ COOGAN, *SINCE THE RISING*, *supra* note 11, at xi; *see also* LYONS, *supra* note 12, at 515-16.

⁵⁹ *See* RYAN, *supra* note 13, at 237-38.

⁶⁰ *See* FORDE, *supra* note 10, at 11; *see also* COOGAN, *SINCE THE RISING*, *supra* note 11, at 86.

⁶¹ DWYER, *supra* note 53, at 198; *see also* COOGAN, *SINCE THE RISING*, *supra* note 11, at 86.

⁶² COOGAN, *SINCE THE RISING*, *supra* note 11, at 86. The *Social Code* was a compendium of Catholic social principles compiled by the Malines International Union of Social Stuedes, a group commissioned by Cardinal Mercier in 1920 to study social problems from a Catholic viewpoint. *Id.*

⁶³ WHYTE, *supra* note 53, at 54. In an early draft of the Constitution, de Valera hailed the Catholic church as "a perfect society, having within itself full competence and sovereign authority, in respect of the spiritual good of man." DWYER, *supra* note 53, at 198.

⁶⁴ WHYTE, *supra* note 53, at 52-53.

⁶⁵ IR. CONST. art. 41 § 3 ¶ 2; *see also* WHYTE, *supra* note 53, at 52.

⁶⁶ IR. CONST. art. 42 § 3 ¶ 1; *see also* WHYTE, *supra* note 53, at 53.

⁶⁷ IR. CONST. art. 43 § 2; *see also* WHYTE, *supra* note 53, at 53.

⁶⁸ WHYTE, *supra* note 53, at 53. Although it has since been repealed, Article 44 originally provided:

The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honor religion. The State recognizes the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens. The State also recognizes the Church of Ireland, the Presbyterian Church in

De Valera made no attempt to hide his Catholic agenda in a St. Patrick's Day address to the United States: "Since the coming of St. Patrick 1500 years ago, Ireland has been a Christian and Catholic nation, all the ruthless attempts made down through the centuries to force her from this allegiance have not shaken her faith. She remains a Catholic nation."⁶⁹ Because Catholics comprise roughly three-quarters of the population of the entire island,⁷⁰ there was little resistance to the movement to enshrine Catholic principles as the law of the land.⁷¹ To some, the only surprise was that the 1937 Constitution did not formally establish the Catholic Church as the official religion.⁷²

Although Ireland was and is predominantly Catholic, by enshrining Catholic values into the law of the land, Irish nationalism created a constitution that rewarded the majority by oppressing the minority. The 1937 Constitution's Preamble proclaims, "We, the People of Eire humbly acknowledging our obligations to our Divine Lord, Jesus Christ who sustained our fathers through centuries of trial . . ." ⁷³ Clearly, the "fathers" sustained through "centuries of trial" referred to Irish Catholics.⁷⁴ Acknowledging that Ireland's authority emanates directly from God rather than the British Crown, on one level, celebrates a realization of the historic nationalist dream to achieve independence from Great Britain.⁷⁵ However, on a deeper level, independence from Great Britain on nationalist terms equated being Irish with being Catholic.⁷⁶ Although this is acceptable to Irish nationalists, it is a notion which causes alienation and resentment on behalf of non-Catholic Irish in Ireland today.⁷⁷ As historian G.W. Hogan has observed, de Valera and his followers made the mistake of declaring their idea of Irish independence without creating a climate for unity within the island: "The long oppressed majority was now having its way, and it did not understand the difficulties experienced by members of the minority in ad-

Ireland, the Methodist Church in Ireland, the Religious Society of Friends in Ireland, as well as the Jewish Congregations and the other religious denominations existing in Ireland at the date of the coming into operation of this Constitution.

IR. CONST. art. 44. (repealed) (as cited in WHYTE, *supra* note 53, at 53).

⁶⁹ WHYTE, *supra* note 53, at 48 (quoting radio broadcast).

⁷⁰ See e.g., O'MALLEY, *supra* note 14, at 7.

⁷¹ See WHYTE, *supra* note 53, at 56-57.

⁷² Hogan, *supra* note 40, at 55.

⁷³ IR. CONST. pmb. l.

⁷⁴ WHYTE, *supra* note 53, at 48-49.

⁷⁵ COOGAN, SINCE THE RISING, *supra* note 11, at 86.

⁷⁶ WHYTE, *supra* note 53, at 48; see also Hogan, *supra* note 40, at 49.

⁷⁷ See Greenway, *supra* note 17, at 21.

justing to the new vision of the Catholic, Gaelic Ireland as proclaimed in the Constitution of 1937."⁷⁸

According to de Valera, the purpose of a new Irish Constitution was to complete the national revolution of the twenty-six counties from British control.⁷⁹ Ironically, de Valera's lifetime goal was to unite all thirty-two counties of Ireland.⁸⁰ For de Valera and his fellow Irish nationalists, to assert the complete independence of only twenty-six counties was a thorny issue, because true independence could be declared only after all thirty-two counties had been freed from British control.⁸¹ In drafting the 1937 Constitution, de Valera did not want to abandon the nationalist dream of a united Ireland, but could not afford to accommodate to that position. His compromise was an expedient one which remains a stumbling block to progress even today.⁸² Article 2 of the 1937 Constitution claims for Ireland the territory of the six northeastern counties: "The national territory consists of the whole island of Ireland, its islands and the territorial seas."⁸³ Article 3 asserts Ireland's jurisdiction "over the whole of that territory" although "pending the re-integration of the national territory."⁸⁴ These two provisions persist today despite Great Britain's control over the six northeastern counties of Northern Ireland.

The 1937 Constitution stresses sovereignty and has a republican character; however, nowhere does the word "republic" appear.⁸⁵ This fact underscores both the failure to completely include the six northeastern counties within an independent Ireland, and the inconsistency of declaring a united Ireland without including both Catholic and non-Catholic Irish. As Professor F.S.L. Lyons has suggested, "one reason why the sacred word [republic] did not appear [in the text of the 1937 Constitution] may well have been precisely because it was so sacred . . . de Valera had made it clear that for him the ideal was a republic of thirty-two not twenty-six counties;" therefore, in Articles 2

⁷⁸ Hogan, *supra* note 40, at 55.

⁷⁹ RYAN, *supra* note 13, at 239. "The first, the central and supreme purpose of the entire exercise of the new Irish Constitution was to complete the national revolution as far as the [twenty-six] counties were concerned." *Id.* (quoting newspaper interview with de Valera).

⁸⁰ BOWMAN, *supra* note 55, at 6; LYONS, *supra* note 12, at 515.

⁸¹ LYONS, *supra* note 12, at 515-16.

⁸² *See id.* at 515-16. Northern unionists had shown little sign of wanting to join the South and the declaration of a republic was not likely to make a difference, but the new direction for the South had the effect of "locking and barring a door" which was already difficult to open. *Id.* at 516.

⁸³ IR. CONST. art. 2.

⁸⁴ IR. CONST. art. 3.

⁸⁵ LYONS, *supra* note 12, at 515.

and 3 de Valera claimed the territory, pending re-integration.⁸⁶ More specifically, to give the name "republic" to a truncated Ireland would betray the martyrs of the 1916 Easter Rising who gave their lives for the cause of an independent and Gaelic Ireland.⁸⁷ According to one citizen, "while securing political stability in the South [de Valera] also stabilized the border."⁸⁸

B. *The Minority Problem*

By declaring independence in the 1937 Constitution in spite of partition, the problems in Irish society which made a physical barrier necessary have never been solved. Partition has become not merely an issue of territory but also a more fundamental issue of community diversity.⁸⁹ Partition is a national problem involving the people of Ireland and can be solved on the basis of majority consent alone.⁹⁰ Partition has also created partitionism, which is not tied to territory, but is an issue of different people peacefully coexisting in a stable society.⁹¹

In Ireland, the problem of minority is uniquely complex because there is a "double minority:"⁹² throughout the entire island, Protestants make up one-quarter of the Catholic-dominated population,⁹³ but in the six northeastern counties of Northern Ireland Protestants outnumber Catholics.⁹⁴

As the legacy of partition has grown, religion has taken on a broader connotation than one's belief in God.⁹⁵ Protestants and Catho-

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ RYAN, *supra* note 13, at 242.

⁸⁹ *Id.* at 291.

⁹⁰ *See id.*; *see also* BOWMAN, *supra* note 55, at 11-25 (discussing the significance of the "map symbolism" of partition).

"Map symbolism" is the idea that much of the nationalist's anger with partition is that it truncates the island and stands as a symbol of incompleteness. Too often, the nationalist worries less about creating a climate for unity and more about expressing anger that the British have drawn a line through Ireland and withheld part of it. The issue of partition causes anger in nationalists for many reasons, but it is fundamentally the symbol of Britain restraining the Irish from being free.

Id.

⁹¹ RYAN, *supra* note 13, at 291.

⁹² Claire Palley, *Constitutional Solutions to the Irish Problem*, 33 CURRENT LEGAL PROBS. 121, 127 (1980) [hereinafter *Constitutional Solutions*].

⁹³ *E.g.*, O'MALLEY, *supra* note 14, at 7.

⁹⁴ *E.g.*, COOGAN, IRA, *supra* note 25, at xvi. Although historically two-thirds Protestant to one-third Catholic, Ireland has become fifty-three percent Protestant to forty-one and one-half percent Catholic. *Id.*

⁹⁵ *See* Gerard F. Powers, *Testing the Moral Limits of Self-Determination: Northern Ireland and*

lics in Northern Ireland have become two different communities. The Protestant perspective associates "Catholic" with Irish nationalism and expresses a fear of cultural absorption in a society dominated by Catholic values.⁹⁶ The Catholic perspective regards "Protestant" in a political rather than religious context.⁹⁷ Divisions run so deep in Northern Ireland that even the trivial events of everyday life exacerbate the tension:

The Nationalists' refusal to rise for the toast of "The Queen" or to stand at the playing of *God Save The Queen* is highly offensive to the Unionists To say "Six Counties" instead of "Northern Ireland" makes Unionists flare up, and the converse is true for Nationalists. The term "non-Catholic" is also potentially dangerous . . . while in polite circles, the Protestant emphasis on *Roman* Catholics makes Catholic hackles rise. The Unionists point accusingly to the "priest in politics" whenever a Father So-and-So is seen to be presiding at a Nationalist committee meeting—although curiously Nationalists don't retort the charge when Protestant clergymen are seen walking in [Unionist] processions.⁹⁸

The unionist/Protestant-nationalist/Catholic division has fostered racist attitudes in Northern Ireland.⁹⁹ Some have suggested that, "reduced to its least common denominator . . . the basic problem is racism, where the natives of one country believe themselves as innately as well as culturally superior to the natives of another, with religion being an integral factor in that cultural gap."¹⁰⁰ Northern Protestants fear not only discrimination if forced to exist in a Catholic-dominated

Croatia, FLETCHER F. WORLD AFF. 29, 30-31 (1992); see also DOMINICK J. COYLE, MINORITIES IN REVOLT: POLITICAL VIOLENCE IN IRELAND, ITALY, AND CYPRUS 84 (1983). Coyle explains:

[T]here is an essentially religiopolitical conception of the nature of Ulster politics, which places the conflict in terms of the battle between two religious systems carried on in the field of politics. There is effectively a national-political conception of the nature of the conflict. This postulates the Catholic allegiance to a united Ireland and the Protestant loyalty to Britain as two rival and irreconcilable national aspirations.

Id.

⁹⁶ Powers, *supra* note 95, at 31.

⁹⁷ *Id.*

⁹⁸ COOGAN, SINCE THE RISING, *supra* note 11, at 297.

⁹⁹ See e.g., MARK J. HURLEY, BLOOD ON THE SHAMROCK: AN AMERICAN PONDS NORTHERN IRELAND: 1968-1990, at 290-92 (1990). Author cites English anti-Irish sentiment even in the works of William Shakespeare. See *id.*

¹⁰⁰ *Id.* at 290.

society, but that the “overwhelmingly Catholic ethos of an Irish state would threaten their cultural and religious heritage.”¹⁰¹ Conversely, Northern Catholics suffer economic disadvantages such as unemployment.¹⁰² High unemployment directly relates to the alienation and powerlessness that prompts many Northern Catholics to pursue violence as a means of improving their position.¹⁰³ Some have gone so far as to compare the repressive condition of Catholics in Northern Ireland with the former apartheid regime of South Africa.¹⁰⁴

Clearly, Ireland is “not a well nation,” and suffers from a severe identity crisis.¹⁰⁵ Colonialism is targeted as the root of Ireland’s identity problem: “Everyone in this country is subject in greater or lesser degree to the apathy, helplessness and loss of autonomy born of oppression.”¹⁰⁶ Just as a sense of self-identity is crucial for an individual’s self-realization, it is similarly vital to the self-identity of a nation.¹⁰⁷ To some extent, Ireland continues to struggle to define itself politically because it cannot define itself as a people:

[F]or few peoples was colonisation such a profoundly destructive historical experience as it was for the Irish, obliterating our own civilisation and its institutions, uprooting us from the land and leaving us communicating with each other through the language of the coloniser. . . . Our past as a nation has been so crushing and so painful that we are too inclined to rush blindly ahead and leave it behind us. The fact is, that we cannot go ahead [until we know] where we have been.¹⁰⁸

It is crucial to recognize that this alienation moved the “long oppressed majority” of Irish nationalists to use the “language of the colonizer” in creating a Constitution that claimed to provide for the entire island but asserted the beliefs of Catholics against all other groups in society.¹⁰⁹

Ideally, constitutional law is a means to establish a cohesive society that protects the individual.¹¹⁰ In outlining the structure of the organs

¹⁰¹ Powers, *supra* note 95, at 33.

¹⁰² E.g., Palley, *Constitutional Solutions*, *supra* note 92, at 127–28.

¹⁰³ See Powers, *supra* note 95, at 32–33.

¹⁰⁴ See Harvey, *supra* note 44, at 170.

¹⁰⁵ PEADAR KIRBY, *HAS IRELAND A FUTURE* 44–45 (1988).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See *id.*

¹¹⁰ See MORGAN, *supra* note 56, at 11.

of the state, a constitution establishes the distribution of power within a society.¹¹¹ During this process a kind of majority tyranny can take place when "groups with the greatest force and the will to deploy it . . . [determine] what law can be enforced or remain law and sometimes [decide] what new law will be."¹¹² In a deeply divided society such as Ireland, those groups who have lost in the power struggle to establish the state consider the resulting constitutional arrangements illegitimate and without authority.¹¹³ To non-Catholic Irish, the 1937 Constitution is merely a power map which reflects the triumph of Catholicism.¹¹⁴ When minority groups feel alienated by the law, they consider themselves morally free to disobey the law because it is imposed upon them and does not represent their beliefs.¹¹⁵ Ideally, constitutions can

¹¹¹ *E.g.*, Palley, *Constitutional Solutions*, *supra* note 92, at 124.

¹¹² *Id.* at 125-26.

¹¹³ *See id.* at 125. Palley explains:

In a deeply divided society, such as Northern Ireland, those groups who have lost in the power struggle preceding the establishment or perpetuation of a state see things otherwise. They see the state and its constitutional arrangements as being imposed, illegitimate, and without authority, and themselves as morally free to disobey state commands. They do see the Constitution as a power map, but as a map reflecting in a mirror the outcome of historical power struggles. They also see the constitutional arrangements as devices to maintain the dominance of those who have thus far won the political battle.

When such perceptions are widespread, the state and its constitutional arrangements are threatened and struggles about its continuance are likely.

Id.

¹¹⁴ *See id.*

¹¹⁵ *Id.* Floyd G. Cullop explains how the United States Constitution has avoided such minority alienation:

Seeing that our government operates in the best interests of all the people of the United States is the responsibility of all citizens. We must accept this responsibility to remain a free people and to enjoy the type of government our Constitution enables us to have.

Obviously, even in a democratic republic, everyone cannot be satisfied all the time. Our government is based upon the idea that it should be able to do the most good for the most people most of the time—not that it can always please everybody. Common sense tells us this would be an impossible task.

. . . Unless a candidate is elected by a unanimous [vote], there must be a minority of voters who are not satisfied with the results of the election.

This does not mean that the minority did not have a voice in government. Even though it did not vote for him, the newly elected official is the minority's representative in government, the same as he is the representative of the majority who did vote for him.

A person whose candidate loses must wait until the next election before he may have another chance to try to elect a candidate of his choice to the office. In the meantime, it is his duty as a good citizen to *accept the wishes of the majority of the voters and cooperate with them*. Being a good loser is as important to our democratic republic as being well informed and interested in all activities of government.

prevent such power struggles within a diverse society. Constitutional law can provide conflict avoiding mechanisms by establishing institutions to ensure equality and fair treatment of all citizens.¹¹⁶

III. THE PRESENT

A. *Diplomatic Attempts at a Solution*

In the past two decades, both the Irish and British governments have attempted to solve the problems of Northern Ireland through diplomacy. In 1985, the Anglo-Irish Agreement renewed hope for a solution to the Northern Ireland crisis. The Agreement was signed on November 15, 1985 at Hillsborough, County Down (Northern Ireland) by Garrett FitzGerald, Prime Minister of Ireland and Margaret Thatcher, Prime Minister of Great Britain.¹¹⁷ The most significant development of the Agreement was the establishment of an Intergovernmental Conference between Britain and Ireland through which the Government of Ireland could advance views and proposals on matters of government and administration of Northern Ireland.¹¹⁸ Article 1 of the Agreement reads:

FLOYD G. CULLOP, *THE CONSTITUTION OF THE UNITED STATES: AN INTRODUCTION* 13-14 (Mentor updated ed. 1984) (emphasis added).

¹¹⁶ Palley, *Constitutional Solutions*, *supra* note 92, at 139.

¹¹⁷ TOM HADDEN & KEVIN BOYLE, *THE ANGLO-IRISH AGREEMENT: COMMENTARY, TEXT AND OFFICIAL REVIEW* 1 (1989).

¹¹⁸ *Id.* at 22-24. Article 2 of the Agreement provides:

(a) There is hereby established, within the framework of the Anglo-Irish Intergovernmental Council set up after the meeting between the two Heads of Government on 6 November 1981, an Intergovernmental Conference (hereinafter referred to as "the Conference") concerned with Northern Ireland and with relations between the two parts of the island of Ireland, to deal, as set out in this Agreement, on a regular basis with

- (i) political matters;
- (ii) security and related matters;
- (iii) legal matters, including the administration of justice;
- (iv) the promotion of cross-border co-operation.

(b) The United Kingdom Government accepts that the Irish Government will put forward views and proposals on matters relating to Northern Ireland within the field of activity of the Conference in so far as those matters are not the responsibility of a devolved administration in Northern Ireland. In the interests of promoting peace and stability, determined efforts shall be made through the Conference to resolve any differences. The Conference will be mainly concerned with Northern Ireland; but some of the matters under consideration will involve co-operative action in both parts of Ireland, and possibly also in Great Britain. Some of the proposals considered in respect of Northern Ireland may also be found to have application by the Irish Government. There is no derogation from the sovereignty of either the United Kingdom Government or the Irish Government, and each

The two Governments

(a) affirm that any change in the status of Northern Ireland would only come about with the consent of a majority of the people of Northern Ireland;

(b) recognise that the present wish of a majority of the people of Northern Ireland is for no change in the status of Northern Ireland;

(c) declare that, if in the future a majority of the people of Northern Ireland clearly wish for and formally consent to the establishment of a united Ireland, they will introduce and support in the respective Parliaments legislation to give effect to that wish.¹¹⁹

At the time of its adoption, the 1985 Agreement was the "most significant and carefully prepared development in the relationship between Britain and Ireland since the partition settlement in the 1920s."¹²⁰ Both sides carefully worded the document to avoid dispute over the definition of the status of Northern Ireland:¹²¹ "[I]n part by necessity, surely at times by intention, the document was shaped to be excruciatingly vague, a precise formulation of uncertainties and possibilities as much as a hard-edged blueprint of the future."¹²² Other historians note: "The intention [of the Agreement] was to reassure Unionists that their right to remain in the United Kingdom . . . was formally recognized by the Irish Government, while at the same time assuring Nationalists that if they secured the consent of the Unionists for a united Ireland the British Government would implement it."¹²³

The Agreement was important because it allowed a foreign nation, Ireland, a voice in the internal affairs of a sovereign country.¹²⁴ Some interpreted this as an admission by the British that partition had been a political and social failure.¹²⁵ The real significance of the 1985 Agree-

retains responsibility for the decisions and administration of government within its own jurisdiction.

Id. (reprinting text of agreement). This is the British version; in the Irish version precedence is given to the Irish Government.

¹¹⁹ *Id.* at 18.

¹²⁰ *Id.* at 1.

¹²¹ *Id.* at 18.

¹²² J. BOWYER BELL, *THE IRISH TROUBLES: A GENERATION OF VIOLENCE: 1967-1992*, at 704 (1993).

¹²³ HADDEN & BOYLE, *supra* note 117, at 18.

¹²⁴ Kevin G. Kennelly, Note, *Northern Ireland: Anglo-Irish Treaty of 1985—Protestant Opposition to Political Representation for the Catholic Minority: The Apartheid of the United Kingdom*, 10 *SUFFOLK TRANSNAT'L L.J.* 425, 425 (1986).

¹²⁵ O'MALLEY, *supra* note 14, at 424-25.

ment, however, lay more in spirit than in details.¹²⁶ The Agreement can be credited for enabling more recent progress because it set in motion a process for a constitutional solution to the ethnic conflict.¹²⁷ For the first time, the two Governments sought to transcend the zero-sum negotiation between unionist/Protestant and nationalist/Catholic.¹²⁸ Essentially, the document was aspirational, calling for co-operation without compulsion.¹²⁹

The increased communication between Ireland and Great Britain provided the opportunity for further diplomacy in 1993. On December 15, 1993, Prime Ministers Albert Reynolds of Ireland and John Major of Great Britain announced a joint declaration of principles for peace in Northern Ireland which Major dubbed "The Downing Street Declaration."¹³⁰ The agreement resulted from two years of diplomacy and weeks of intensive negotiations aimed at bringing an end to the violence in Northern Ireland.¹³¹ The Declaration reassures Unionists that no change will take place in Northern Ireland without the support of a majority of its citizens.¹³² It also includes an agreement by Ireland to consider dropping Articles 2 and 3, although only as part of an overall settlement.¹³³ The significant new development of the Declaration is its invitation to Sinn Fein¹³⁴ to participate in negotiations if Sinn Fein's counterpart, the Irish Republican Army (IRA), renounces its violent tactics.¹³⁵

¹²⁶ J.J. LEE, *IRELAND 1912-1985: POLITICS AND SOCIETY* 686 (1989).

¹²⁷ Paul Arthur, *Initiatives for Consensus: Minority Perceptions*, in *CONSENSUS IN IRELAND: APPROACHES AND RECESSIONS* 59-60 (Charles Townshend ed., 1988).

¹²⁸ LEE, *supra* note 126, at 683.

¹²⁹ See BELL, *supra* note 122, at 707-08.

¹³⁰ William Miller, *British-Irish Declaration Offers Step to Ulster Peace*, *BOSTON GLOBE*, Dec. 16, 1993, at 1, 35.

In many areas, the seven-page declaration is a restatement of principles outlined in the 1985 Anglo-Irish Agreement, which gave the Irish government a consultative role in the governing of Northern Ireland in exchange for accepting that Northern Ireland's constitutional status would not change until a majority living there said otherwise.

Kevin Cullen, *Does Accord Have Potential? All Eyes Turn to Republicans*, *BOSTON GLOBE*, Dec. 16, 1993, at 35.

¹³¹ Miller, *supra* note 130, at 1, 35.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Sinn Fein, meaning "ourselves alone," is the radical nationalist political group comprised of Catholics in Northern Ireland. Sinn Fein is well-known for its ties to the Irish Republican Army. For a history of Sinn Fein, see COOGAN, *IRA*, *supra* note 25, at 33-39.

¹³⁵ John Darnton, *British-Irish Pact Gives I.R.A. Allies Terms for Talks*, *N.Y. TIMES*, Dec. 16, 1993, at A1, A8. Clearly, the aim of the declaration is to induce negotiation rather than violence: "[T]he declaration seeks to convince the IRA that it can achieve more at the bargaining table through the democratic process than with the violent campaign that has caused so much hardship

The Declaration advanced the process of peace even closer to a political settlement.¹³⁶ Both the British and the Irish acknowledged their roles and responsibility in effecting the 1985 Agreement's theme of unity by consent.¹³⁷ The British acknowledged that there can be no change in the status of Northern Ireland without the consent of a majority of the citizens of Northern Ireland.¹³⁸ The Irish position emphasized the importance of the consent of the people of Northern Ireland and a willingness to refrain from asserting a claim to territory without the support of the people residing within that territory.¹³⁹

Offering inclusion in the peace process to Sinn Fein, the political wing of the IRA, distinguished the 1993 Declaration.¹⁴⁰ In addition, the Declaration reflected the current reality that Northern Ireland has lost its strategic and economic value to the British.¹⁴¹ This fact gave Prime Minister Major considerable political leverage to create some solution to the problems of Northern Ireland.¹⁴² Nonetheless, the Downing

. . . Both governments believe that if the IRA ceases fire, loyalist paramilitary groups will follow, and dialogue and powersharing could flourish." Cullen, *Does Accord Have Potential? All Eyes Turn to Republicans*, *supra* note 130, at 35.

¹³⁶ Darnton, *supra* note 135, at A9 (quoting excerpts of Joint Declaration issued by Prime Minister John Major of Great Britain and Prime Minister Albert Reynolds of Ireland at Downing Street, London, December 15, 1993).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *See id.*; see also Palley, *Constitutional Solutions*, *supra* note 92, at 122.

The document makes a telling distinction between "them"—all the Irish people—and "us"—the British. To unionists, who cling almost desperately to their British identity, that more than anything signals the long-term intentions of their political masters. No British government has ever gone as far in acknowledging the right of the Irish people to determine their future free from British interference.

Emily O'Reilly, *Now, All Eyes Are on Sinn Fein and the IRA*, BOSTON GLOBE, Dec. 17, 1993, at 27 (editorial).

Although Britain's acknowledgement is a new development, it is one which has gradually become an accepted fact: "[T]he [Downing Street] declaration also reiterated a statement made last year by Northern Ireland Secretary Sir Patrick Mayhew that Britain had no selfish, strategic or economic interest in remaining in Northern Ireland." Cullen, *Does Accord Have Potential? All Eyes Turn to the Republicans*, *supra* note 130, at 35. In addition, Irish Prime Minister Albert Reynolds went as far as to say, "British imperialist interest in Ireland is dead, even if we still have to resolve some of its legacy." Andrew Hill, *Dublin Sees Pact Ending Colonialism*, BOSTON GLOBE, Jan. 11, 1994, at 2.

¹⁴² Thomas Oliphant, *A Wonder in Northern Ireland*, BOSTON GLOBE, Dec. 1, 1993, at 19 (editorial).

It's not hard to understand why [Major wants to forge a resolution in Northern Ireland]. The status quo in Northern Ireland means the indefinite stationing of 17,000 troops there to operate the functional equivalent of a police state; it means \$3 billion every year in costs; and it means a constant siege mentality in the British

Street Declaration is a marked change in policy by Major, who in the past had refused to bargain with any group that used violence.¹⁴³

Unionists feel abandoned by these policy maneuvers and many no longer trust Prime Minister Major,¹⁴⁴ who admitted secret contacts between his government and the IRA after months of denying rumors of such meetings.¹⁴⁵ Northern Protestants contend that Major's policy rewards the IRA for its violent tactics.¹⁴⁶ Hence, there has been a predictable increase in loyalist paramilitary violence and support for such groups, on behalf of those Unionists who feel that violence is the most effective way of protecting one's interests.¹⁴⁷ For the first time, the upper and middle class unionists are beginning to actively support paramilitaries.¹⁴⁸ Unionist paramilitaries are exploiting unionists' sense

Isles as IRA terrorism goes on indefinitely. The words "albatross" and "quagmire" are being heard more and more.

Id.

¹⁴³ See Kevin Cullen, *When Talks Are Taken as Treason*, BOSTON GLOBE, Nov. 30, 1993, at 2. It is important to distinguish that Major's invitation was not a direct one to the IRA, but to Sinn Fein, the political party associated with the violent paramilitary group. Darnton, *supra* note 135, at A1, A8.

¹⁴⁴ See Kevin Helliker, *Troubles Aplenty: In Northern Ireland, The Bloodiest Hands Are Often Protestant*, WALL ST. J., Dec. 16, 1993, at A1, A9. Extreme unionist leader Rev. Ian Paisley was so offended by the revelation of Major's contact with the IRA that his verbal assault on Major charging those involved with "falsehoods and lies" was vicious enough to earn him suspension from the House of Commons. Paisley later denounced the Downing Street Declaration by declaring: "You have sold Ulster to buy off the fiendish Republican scum." *Id.*

¹⁴⁵ William Miller, *Briton, in Parliament, Defends IRA Talks. Calls Peace "Prize Worth Risks,"* BOSTON GLOBE, Nov. 30, 1993 at 2. See also Kevin Cullen, *When Talks are Taken as Treason*, *supra* note 143, at 2.

To most people the notion of the British government secretly talking to its sworn enemy, the Irish Republican Army, to end the bloody stalemate in Northern Ireland would seem logical.

After all, Israel and the PLO talk. Bosnian Serbs and Muslims talk—if for no other reason than to try to halt the killing.

Id.

Moreover, Mr. Major insisted that the channel of communication between his government and the IRA had been "extremely reliable over many years." William Miller, *Major Tells Goals in IRA Link*, BOSTON GLOBE, Dec. 1, 1993, at 2.

¹⁴⁶ Kevin Cullen, *As Some in Ulster Talk of Peace, Others See Abandonment*, BOSTON GLOBE, Dec. 7, 1992, at 12.

While many people in Northern Ireland hope for peace, a sense of abandonment among poor Protestants is fueling the backlash, supplying paramilitaries with recruits and providing financial support from people who, in the past, had wanted nothing to do with violence. . . . The sad reality is people here feel so abandoned that the paramilitaries are able to exploit that, saying, 'Look what the Catholics got by what the IRA has done.'

Id.

¹⁴⁷ Helliker, *supra* note 144, at A9.

¹⁴⁸ See *id.*

of abandonment and powerlessness by citing what the IRA has gained through violence.¹⁴⁹ As the IRA captured the attention of the media for so long, new interest has been sparked in the loyalist paramilitaries, which some predict will further reinforce the belief that violence pays.¹⁵⁰

However, most credit Major's courage to take whatever steps are necessary for peace in the region.¹⁵¹ Major's success is due in some degree to his considerable political leverage in trying to bring about some resolution in Ireland.¹⁵² The recession facing his government would clearly be aided by some solution, which could enable it to cease maintaining an expensive military presence in Northern Ireland and continually repairing damage done by IRA bombs.¹⁵³ In addition, only 1.5 million of Major's sixty million constituents live in Northern Ireland, and the large majority of his constituents care little about the region.¹⁵⁴ Change can only hurt Major with the Unionists of Northern Ireland, a group that lacks political influence, as one observer noted: "there is no downside risk" to change in Northern Ireland.¹⁵⁵

After asking for "clarification" of the Downing Street Declaration,¹⁵⁶ the IRA on August 31, 1994 declared that "it had reached a 'historic crossroads' and called an unconditional cease-fire."¹⁵⁷ Predict-

¹⁴⁹ See Cullen, *As Some in Ulster Talk of Peace, Protestants See Abandonment*, *supra* note 146, at 12.

¹⁵⁰ See Helliker, *supra* note 144, at A9.

¹⁵¹ See *Bridging the Irish Chasm*, BOSTON GLOBE, Nov. 30, 1993, at 18. It is also important to note the degree to which developments in Northern Ireland are due to Prime Minister Major's willingness to find a solution, unlike his predecessor:

Obviously, the principal obstacle has been the IRA's terrorism. It is now clear, however, that another major obstacle was Margaret Thatcher. For more than a decade she hid her Unionist prejudice behind an implacable position that no change in Northern Ireland's status was possible without the assent of a majority of the region's people. By refusing to negotiate in good faith, she ensured that the only choice available was the nonchoice of the extremes: either union with Ireland or continued association with Britain.

John Major is different.

Oliphant, *supra* note 142, at 19.

¹⁵² Helliker, *supra* note 144 at A1, A9.

¹⁵³ *Id.* One IRA bomb which exploded in London's business district caused an estimated \$1.5 billion damage. *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* With such strong incentive for some change in the region, it is also easy to understand why the Unionists fear abandonment. Kevin Cullen, *As Some in Ulster Talk of Peace, Protestants See Abandonment*, note 146, at 12.

¹⁵⁶ Andrew Hill, *Dublin Sees Pact Ending Colonialism*, BOSTON GLOBE, Jan. 11, 1994, at 2.

¹⁵⁷ Kevin Cullen, *N. Ireland at a 'Crossroads: IRA Calls Cease-Fire but Governments are at Odds Over Wording*, BOSTON GLOBE, Sept. 1, 1994, at 1. The following is the IRA's Cease-Fire Statement:

Recognizing the potential of the current situation and in order to enhance the democratic process and underlying our definitive commitment to its success, the

ably, the announcement was greeted with enthusiasm from many, including President Clinton.¹⁵⁸ However, the announcement was more coolly received by Prime Minister Major, who urged the IRA to declare that its cease-fire will be permanent.¹⁵⁹ In keeping with the Downing Street Declaration's promise to bargain with Sinn Fein should the IRA cease its violence, Irish Prime Minister Albert Reynolds has announced that the Irish government will host a "forum on peace and reconciliation" including Sinn Fein.¹⁶⁰ This is a dramatic step which marks the Sinn Fein's "entry into the political mainstream" from which it has historically been excluded due to its ties to the IRA.¹⁶¹

B. *The Stumbling Blocks*

Although current events in Northern Ireland are encouraging, difficult challenges lay ahead. As each diplomatic effort has shown, the two fundamental issues that must be resolved to create a lasting peace are the same issues that were overlooked in 1937: the 1937 Constitution's Articles 2 and 3 claim to the territory of the North, and the

leadership of the IRA have decided that as of midnight Aug. 31, there will be a complete cessation of military operations. All our units have been instructed accordingly.

At this historic crossroads the leadership of the IRA salutes and commends our volunteers, other activists, our supporters and the political prisoners who have sustained the struggle against all odds for the past 25 years.

Your courage, determination and sacrifice have demonstrated that the freedom and the desire for peace based on a just and lasting settlement cannot be crushed. We remember all those who have died for Irish freedom and we reiterate our commitment to our republican objectives.

Our struggle has seen many gains and advances made by nationalists and for the democratic position. We believe that an opportunity to secure a just and lasting settlement has been created.

We are therefore entering into a new situation in a spirit of determination and confidence determined that the injustices which created this conflict will be removed and confident in the strength and justice of our struggle to achieve this. We note that the Downing Street Declaration is not a solution nor was it presented as such by its authors.

A solution will only be found as a result of conclusive negotiations. Others, not least the British government, have a duty to face up to their responsibilities.

In our desire to significantly contribute to the creation of a climate which will encourage this, we urge everybody to approach this new situation with determination and patience.

IRA Cease-Fire Statement, BOSTON GLOBE, Sept. 1, 1994, at 27.

¹⁵⁸ Cullen, *Northern Ireland at 'Crossroads'*, *supra* note 157, at 1.

¹⁵⁹ *Id.*

¹⁶⁰ Kevin Cullen, *3 Leaders of Irish Vow to Bury Past: British, Ulster's Protestants Are Urged to Search for Peace*, BOSTON GLOBE, Sept. 7, 1994 at 1, 15.

¹⁶¹ *See id.* at 15.

commitment by the British to the people of the North that no change will take place until a majority of the people of the North so consent. In many ways, these two stumbling blocks reveal the fundamental tensions which made partition necessary and have perpetuated the conflict for the past twenty-five years.

1. Articles 2 and 3

It is the implicit claim of a right of this twenty-six-county Parliament and Government to exercise jurisdictions over the whole of Ireland, including Northern Ireland, that represents such a stumbling block to progress towards Irish unity because it sticks in the throat of every Northern Unionist and gives power to their more extreme leaders to compete in demagoguery as they rant against this claim.

Statement of Garrett FitzGerald, former Prime Minister of Ireland.¹⁶²

Articles 2 and 3 of the 1937 Constitution provide:

Article 2: The national territory consists of the whole island of Ireland, its islands and the territorial seas.

Article 3: Pending the re-integration of the national territory, and without prejudice to the right of the Parliament and Government established by this Constitution to exercise jurisdiction over the whole of that territory, the laws enacted by that Parliament shall have the like area and extent of application as the laws of Sáorstát Éireann and the like extra-territorial effect.¹⁶³

By claiming the entire island as "the nation," the 1937 document seems to ignore the fact of partition.¹⁶⁴ However, the phrase "pending the re-integration of the national territory" recognizes the existence of partition and articulates the aspiration of the southern community to encompass the northern counties as well.¹⁶⁵ Given the tension between the South breaking away from Britain and in a sense leaving the North behind, Articles 2 and 3 seem paradoxical and contradictory.¹⁶⁶ Yet they reflect the tension de Valera felt in realizing the nationalist goal of

¹⁶² O'MALLEY, *supra* note 14, at 32.

¹⁶³ IR. CONST. arts. 2-3. Sáorstát Éireann is the Irish name for Irish Free State (Ireland before 1922).

¹⁶⁴ *E.g.*, CASEY, *supra* note 30, at 31.

¹⁶⁵ *Id.*

¹⁶⁶ *See* FORDE, *supra* note 10, at 50-53.

establishing an independent and separate unit, without giving up the nationalist claim to later include the Northern counties.¹⁶⁷

It is no accident that Articles 2 and 3 are often cited by both sides of the partition dispute as barriers to compromise. At the time of their implementation, some believed that by drafting the two articles so strongly, de Valera could stir up the entire partition issue and force a resolution.¹⁶⁸ Most feel that Articles 2 and 3 prevent unity—especially Northern unionists, who repeatedly suggest dropping the two articles as a first step toward a potential united Ireland.¹⁶⁹ Nationalists view the articles, however, as a constitutional reinforcement of the historic Irish claim to an independent and united island.¹⁷⁰

Much of the debate over Articles 2 and 3 concerns whether the articles represent a legitimate legal claim by the Irish government or merely articulate a political aspiration. For a time, those who considered Articles 2 and 3 to be political aspiration seemed to possess the controlling interpretation.¹⁷¹ Delivering a lecture on the topic, Irish Supreme Court Justice Kenny cited a 1975 Irish Supreme Court decision interpreting the articles as aspiration without legal significance:

[T]he Constitution . . . expresses not only legal norms but basic doctrines of social and political theory. . . . [T]he Constitution contains more than legal rules: it reflects, in part, aspirations and aims and expresses the political theories on which the people acted when they enacted the Constitution. . . . This national claim to unity exists not in the legal but in the political order. . . .¹⁷²

The Irish Supreme Court rejected this interpretation in the 1990 case of *McGimpsey & McGimpsey v. Ireland*,¹⁷³ which involved the legality of the Anglo-Irish Treaty of 1985.¹⁷⁴ Chief Justice Finlay found the Treaty to be constitutional and interpreted Articles 2 and 3 as claims of legal right and not political aspirations.¹⁷⁵ The plaintiffs were two members of the Official Unionist Party of Northern Ireland.¹⁷⁶ Both

¹⁶⁷ See BOWMAN, *supra* note 55, at 323.

¹⁶⁸ *Id.* at 148.

¹⁶⁹ See O'MALLEY, *supra* note 14, at 32.

¹⁷⁰ See Harvey, *supra* note 44, at 171–72 (arguing that the “Irish nation has always denied the legality of the Anglo-Irish Treaty of 1922, which was imposed upon them by the British threat of ‘immediate and terrible war’”).

¹⁷¹ CASEY, *supra* note 30, at 31.

¹⁷² *Id.* (quoting from Criminal Law (Jurisdiction) Bill 1975, 1977 I.R. 129).

¹⁷³ *McGimpsey v. Ireland* [1990], 1 I.R. 110, 119.

¹⁷⁴ See *id.* at 113.

¹⁷⁵ See *id.* at 119.

¹⁷⁶ *Id.* at 113. As Unionists, the two resented the recognition that Ireland should have a voice

were unhappy with the 1985 Anglo-Irish Treaty because it officially gave the government of Ireland a role in the affairs of Northern Ireland.¹⁷⁷ They attempted to nullify the Treaty by attacking its constitutionality in light of Articles 2 and 3.¹⁷⁸ The plaintiffs argued that the Treaty was unconstitutional because it recognized the validity of partition, therefore directly challenging the constitutional claim to jurisdiction over the entire island.¹⁷⁹ This argument required the Court to decide the status of the Articles. During argument, both parties adopted the interpretation that the two articles represented claims of legal right and that Article 3 provided that the government of the twenty-six counties could enact laws covering Northern Ireland pending the re-integration of the national territory.¹⁸⁰

Chief Justice Finlay decided that despite the fact of partition, the articles convey a valid legal claim.¹⁸¹ The judge explained:

With Articles 2 and 3 of the Constitution should be read the preamble, and I am satisfied that the true interpretation of these constitutional provisions is as follows:

1. The re-integration of the national territory is a constitutional imperative. . . .
2. Article 2 of the Constitution consists of a declaration of the extent of the national territory as a claim of legal right.
3. Article 3 of the Constitution prohibits, pending the re-integration of the national territory, the enactment of laws with any greater area or extent of application or extra-territorial effects than the laws of *Sáorstát Éireann* and this prohibits the enactment of laws applicable in the counties of Northern Ireland.
4. The restriction imposed by Article 3 pending the re-integration of the national territory in no way derogates from the claim as a legal right to the entire territory.¹⁸²

The Articles are central to the Northern Ireland problem because they are de Valera's articulation of the nationalist desire to break away

in the affairs of Northern Ireland. Their resentment was grounded in the fear of oppression of a Catholic moral code which would inevitably destroy Protestant culture and traditions. *Id.* The Official Unionist Party is "the branch of the traditional Unionists in Ireland that . . . is descended from the Party formed during the years of the Union of Britain and Ireland. The group advocates continuance of the British connection with Ireland." RYAN, *supra* note 13, at 400.

¹⁷⁷ See *McGimpsey*, 1 I.R. at 113.

¹⁷⁸ *Id.*

¹⁷⁹ See *id.*

¹⁸⁰ See *id.*; see also HADDEN & BOYLE, *supra* note 117, at 19-20.

¹⁸¹ *McGimpsey*, 1 I.R. at 119.

¹⁸² *Id.* (citation omitted).

from Britain without completely abandoning claims to the North.¹⁸³ However, many Northerners resent this claim because they fear oppression and exploitation in a Catholic-dominated community.¹⁸⁴ Despite the controversy, the Articles remain in the Constitution, with the legal endorsement of the *McGimpsey* decision, as a significant roadblock on the path to a solution of the Northern Ireland problem.

2. Unity by Consent

The real root of the problem is the guarantee, the flat-footed, unremitting guarantee, which the British Government extends to the Unionist section of the population of Northern Ireland I want to, if I can at all, to the British Government and the British public, identify that, isolate that, as the stumbling block, the great, big, immovable object. . . .

Charles Haughey, former Prime Minister of Ireland.¹⁸⁵

Like Articles 2 and 3 of the 1937 Constitution, the concept of unity by consent is a basic issue which is repeatedly raised in discussions of possible resolutions to the Northern Ireland problem.¹⁸⁶ It is the guarantee of the British government to the people of Northern Ireland that no change will take place regarding the status of Northern Ireland (particularly, union with the South) without their consent.¹⁸⁷ Unity by consent was suggested at the time of de Valera and the struggle of the South for independence.¹⁸⁸ For de Valera, however, unity by consent was a concept that conflicted with his nationalist ideals.¹⁸⁹ As a nationalist whose lifetime goal was the union of the entire island, de Valera could not afford the six northern counties the right of unity by consent, because doing so would grant them the corresponding right to opt out of any union.¹⁹⁰ To give the North the right to secede from his nationalist dream of uniting the entire island would have betrayed the historic nationalist dream of an independent and Gaelic Ireland, and would have offended his own personal convictions.¹⁹¹

On a different level, unity by consent is designed to allay Protestant fears of becoming an oppressed minority in a Catholic-dominated

¹⁸³ See LYONS, *supra* note 12, at 515–16.

¹⁸⁴ Powers, *supra* note 95, at 33.

¹⁸⁵ RYAN, *supra* note 13, at 286 (quoting from television interview).

¹⁸⁶ See *id.* at 293.

¹⁸⁷ *Id.*

¹⁸⁸ See *id.*

¹⁸⁹ See *id.*

¹⁹⁰ See *id.*

¹⁹¹ LYONS, *supra* note 12, at 515–16.

society. The need for such minority protection highlights the tenuous situation of Northern Irish Unionists, who have in some ways become neither Irish nor British.¹⁹² While Unionists clearly do not want to be part of a Catholic state, it is not always clear that they are accepted as British.¹⁹³ The admission by Great Britain that it no longer has a strategic interest in Northern Ireland,¹⁹⁴ its conditional invitation to bargain with Sinn Fein,¹⁹⁵ and the mounting expense of maintaining British presence has given Unionists reason to fear being abandoned.¹⁹⁶ Therefore, unity by consent is often used by unionists to stall progress, in order to prevent any change that does not benefit their interests.¹⁹⁷ As nationalists have been blamed for putting Catholic supremacy above a peaceful and united Ireland, so have unionists been accused of abusing unity by consent to impede progress for fear of losing their majority status.¹⁹⁸

Some have gone so far as to argue that the British must withdraw immediately from Northern Ireland and should not remain in Northern Ireland only out of fear of "loyalist backlash."¹⁹⁹ Comparisons have even been made to school desegregation in the United States: "If President Eisenhower hadn't stood up to the bullies in Little Rock, Arkansas, the blacks would still be sitting or standing in the back of America's buses."²⁰⁰ However, it must be remembered that the reason for unity by consent is the fundamental alienation of Northern unionists, who fear oppression by a Catholic Ireland and abandonment by Great Britain.²⁰¹ Therefore, the need for such an assurance must be removed before the assurance itself is no longer necessary.

IV. CONCLUSION

Despite the laudable efforts of both Ireland and Great Britain, the problems of Northern Ireland remain. Articles 2 and 3 of the 1937 Constitution and the concept of unity by consent are continually brought up in diplomacy, yet neither will solve Ireland's problems because they

¹⁹² Greenway, *supra* note 17, at 21.

¹⁹³ O'MALLEY, *supra* note 14, at 138-39.

¹⁹⁴ Darnton, *supra* note 135, at A1, A8.

¹⁹⁵ Helliker, *supra* note 144, at A1, A8.

¹⁹⁶ Kevin Cullen, *As Some in Ulster Talk of Peace, Protestants See Abandonment*, *supra* note 146, at 12.

¹⁹⁷ See BELL, *supra* note 122, at 706.

¹⁹⁸ See Kenneally, *supra* note 124, at 437.

¹⁹⁹ TIM P. COOGAN, *DISILLUSIONED DECADES: IRELAND 1966-1987*, at 241 (1987).

²⁰⁰ BEW & GILLESPIE, *supra* note 9, at 78, 84.

²⁰¹ See O'MALLEY, *supra* note 14, at 138-39.

are both merely the manifestation of Ireland's historical inability to protect minorities. What is needed in Ireland is a constitutional framework which vigorously protects individual rights without regard to religion.

For too long, Ireland has suffered from an historical cycle of oppression. The historic dream of a free and independent Gaelic Ireland can never be realized because it does not apply to all people in Ireland. The 1937 Constitution did not create a united Ireland because it alienated those Irish in the North who are not Catholic. By inflexibly claiming the territory of the North without regard to its people, the 1937 Constitution continues to reinforce Unionists' fears of submergence and oppression within a Catholic society. Articles 2 and 3 must be removed or at least rewritten to recognize that no claim to territory can be made without the consent of the citizens of that territory.

The more difficult obstacle to creating a lasting peace in Northern Ireland is creating a society that Unionists would consent to join. Irish Catholics have enshrined their own values without considering the effects on the minority population in Ireland. Constitutional law is the key for Ireland to create a stable and cohesive society of diverse traditions. By enshrining Catholicism, the 1937 Constitution does more than alienate non-Catholics. It perpetuates the cycle of oppression against the minority. Rather than repeat the mistakes of the past, Ireland must create a new society that recognizes the equal rights of all groups. Constitutional law can achieve this by providing a power structure that treats all groups equally and is not merely a power map reflecting the group that presently wields the most power. Although Article 44 has already been amended to remove the superiority of the Catholic church, Catholic influence remains in Articles 41-44. These are important articles because they define individual rights. The fundamental fear of Unionists is that they will be oppressed in a Catholic Irish society that will not protect their individual rights. Removing Catholic values and aggressively protecting individual rights would finally enable the Irish to break the historical pattern of oppression and create a constitutional framework for a diverse society. In addition, the Irish must vigorously assert individual rights, which would be guaranteed by an equal protection clause, a due process clause, and a clause against government takings of property.

The Irish must realize that the dreams of the past do not apply to today's Ireland. A society must be created with equality for all citizens that reflects the modern diversity of Ireland. The problems of the past will persist until Ireland decides to create its own peaceful future.

