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Gaining the Consent of the Governed: A Prerequisite to Peace in Northern Ireland

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Abstract

This address asserts that in seeking to resolve the political dilemma of Northern Ireland, the lesson of the U.S. Constitution is particularly relevant. The root of the political conflict in Northern Ireland is that, unlike in America, no consensus exists as to fundamental constitutional principles or the idea that the source of political authority is legitimately derived from the “consent of the governed.” The author argues that there is little hope of accommodation between the unionist and nationalist communities as long as the symbols of sovereignty and the structures of government administration serve or express the partisan agenda of one side only, whether unionist or nationalist. The principle of the consent of the governed, which is central to the U.S. Constitution, is the golden thread which may guide Northern Ireland out of the labyrinth.

ADDRESS

GAINING THE CONSENT OF THE GOVERNED: A PREREQUISITE TO PEACE IN NORTHERN IRELAND

*Dick Spring**

In this distinguished legal forum, it is appropriate to recall the words of Thomas Addis Emmet, a man whose name is illustrious both in Irish history and in the annals of the New York Bar. At the beginning of the last century, Emmet wrote to a friend in Ireland: "America is not what you saw it, not even what your sanguine mind could anticipate. It has shot up in strength and prosperity beyond the most visionary calculation. It has great destinies, and I have no doubt will ameliorate the condition of man throughout the world."¹

In retrospect, it seems inevitable that the United States, with all its human and material resources, was destined to become a great world power. Yet, in Emmet's day, there were many areas of the globe that possessed greater resources and comparable potential. Emmet's prophetic and confident words were written when the United States was less than two generations old. I believe his prophecy came true, not because of some law of nature, but rather because the United States was particularly fortunate in two important respects. First, it had in its Constitution a unique legal framework that all its diverse population could accept and revere as particularly their own. Second, the United States was able to develop political institutions that translated the high principles of the Constitution into reality for successive

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1. DAVID N. DOYLE, *IRELAND, IRISHMEN AND REVOLUTIONARY AMERICA* 226 (1981). After serving four years in a British prison for his involvement in the Irish freedom movement, Emmet (1764-1827) emigrated to the United States, where he became Attorney General of the State of New York. See HELEN LANDRETH, *THE PURSUIT OF ROBERT EMMET* 67-71 (1948) (discussing events leading up to Emmet's arrest in Ireland and his subsequent imprisonment); DOYLE, *supra*, at 214 (stating that Emmet became New York State Attorney General).

waves of immigrants, providing a stable democratic climate in which the country could prosper.

In this latter respect, the contribution of Irish immigrants to the United States was particularly important. The miseries of their own history made the Irish people uniquely qualified to cherish the notion that it was "We the People" who ordained and established the Constitution. They, more than most, knew the true value of the principle that the power to rule was not bestowed by hereditary caste, or won by force, but derived simply and solely from the consent of the governed.

The root of the tragic conflict in Northern Ireland is that no such fundamental consensus exists.² In Northern Ireland, two sets of rights, of perceptions, even of vocabularies, confront each other.³ Two communities, unionist⁴ and nationalist,⁵ regard each other with suspicion and distrust. There is no consensus on fundamental constitutional principles or the legitimate source of political authority. The only area of agreement seems to be the assumption that the politics of Northern Ireland must inevitably be a "zero sum game" of winners and losers. The British connection and the goal of Irish unity are asserted or denied as a critical end-game that will decide which community finally occupies the role of loser. Not surprisingly, these deep divisions mean that there are also no agreed political institutions that might, over time, channel the political energies and talents of both communities into a shared process of accommodation. The consequences of this polarization are, quite literally, lethal. The philosophy of "winner takes all" has made everyone a loser.

It would be facile and quite wrong to blame this problem on some character flaw in the people living in Northern Ireland. On the contrary, the attitudes of both communities are self-evidently rooted in the wider and turbulent history of Anglo-Irish

2. See generally J. BOWYER BELL, *THE IRISH TROUBLES* (1993) (describing modern conflict in Northern Ireland); T.W. MOODY, *THE ULSTER QUESTION: 1603-1973* (1980) (providing history of conflict).

3. See *NEW IRELAND FORUM REPORT 19-22* (available from Government Publications Sales Office, Sun Alliance House, Molesworth St., Dublin 2, Republic of Ireland) (May 2, 1984) (outlining Northern Ireland's two political identities, unionist, and nationalist).

4. See *id.* at 20-22 (defining unionists as those wishing to maintain Northern Ireland's political union with Britain).

5. See *id.* at 19-20 (defining nationalists as those wishing to see Northern Ireland join with Republic of Ireland to form united Ireland).

relations. The unresolved issues of that relationship are being played out as human tragedy on the narrow ground of Northern Ireland. Consequently, the British and Irish governments must assume a central responsibility in addressing and resolving this problem.

The Irish government has made the search for a solution a key element of the Joint Programme.⁶ We have acted resolutely on this commitment since taking office. The problem persists, not because of a lack of determination to resolve it, but because of a genuine perplexity about how best to achieve that daunting task.

We start from the premise that the Northern Irish conflict is one of two sets of rights, and not one of right and wrong. Both the nationalist and unionist identities are equally authentic and sincerely held, and both are fully worthy of respect. Their relationship cannot be one of victor and vanquished, because that would be morally wrong. It would also be futile. The unmistakable lesson of history is that neither the nationalists nor the unionists will accept the role of the vanquished. Each has the critical mass and the undoubted capacity to thwart the other, whether in a Northern Ireland or all-Ireland framework.

There is little hope of accommodation between the two communities for as long as the symbols of sovereignty and the structures of government administration serve or express the partisan agenda of one side only, whether unionist or nationalist. The principle of the consent of the governed, so central to the U.S. Constitution, is, I believe, the golden thread which may guide us out of the labyrinth. Thus, in seeking to resolve the political dilemma of Northern Ireland, the lesson of the U.S. Constitution is particularly relevant.

The principle of consent is crucial to the Joint Declaration⁷

6. See FIANNA FAIL & LABOUR PROGRAMME FOR A PARTNERSHIP GOVERNMENT 1993-1997 20-21 (1993) (available from Government Publications Sales Office, Sun Alliance House, Molesworth St., Dublin 2, Republic of Ireland) (document establishing joint Fianna Fáil/Labour Party program for government listing ways in which Ireland's coalition government will work for peace in Northern Ireland). The Fianna Fáil and Labor parties formed the present Irish government on January 12, 1993. Joe Joyce, *Eire: Labour Joins Fianna Fail in Historic Coalition*, GUARDIAN, Jan. 13, 1993, at 9.

7. JOINT DECLARATION BY AN TAOISEACH, MR. ALBERT REYNOLDS, T.D., & THE BRITISH PRIME MINISTER, THE RT. HON. JOHN MAJOR, M.P. (Dec. 15, 1993) (available from Government Publications Sales Office, Sun Alliance House, Molesworth St., Dublin 2, Republic of Ireland) [hereinafter JOINT DECLARATION].

signed by the British and Irish governments last December. In it, the Irish government declares, in the plainest terms we could find, that it would be wrong to impose a united Ireland in the absence of the freely-given consent of the majority of the people of Northern Ireland.⁸ That pledge is underpinned by the unhesitating support of a great majority of those within the nationalist tradition.

Consent, however, is a coin with two sides. The duty to seek consent is owed not only by the nationalist tradition to the unionist tradition, but also by the British government and the unionists to the nationalists. Nationalists argue that their consent in the governance of Northern Ireland was never sought. Indeed, nationalist aspirations were deliberately ignored at the creation of Northern Ireland and throughout most of Northern Ireland's history. Northern nationalists have never lived under institutions they could consider their own. It would be an act of statesmanship and realism, as well as one of justice, for the unionist leadership to acknowledge that, in this respect, Northern Ireland has failed to embrace the principle of consent.

Advancing the principle of consent requires creating a framework of law and government that no single group "owns" and that honorably reflects the values and identity of all citizens. This framework must also be neutral and equitable in its impact. Such an arrangement can be respected by all.

Nationalists still wait in vain for a sign that unionism acknowledges them as equal partners, rather than a suspect minority to be kept at a distance and under control. No matter what framework we choose in Ireland, the idea that one tradition can have things its own way, leaving the other side to "like it or lump it," is effectively dead. It is high time that unionists and nationalist joined hands to give it a formal funeral.

In the last round of Talks,⁹ the governments and political

8. *Id.* at 5.

9. The Talks were convened under the aegis of the British and Irish governments to discuss the political future of Northern Ireland. Participants in the Talks were the Irish and British Governments, and Northern Ireland's constitutional political parties (i.e., those rejecting the use of violence as a means of advancing political goals). The Talks were convened on a three strand basis to reflect the totality of relationships within the islands of Britain and Ireland. Strand 1 focused on relationships within Northern Ireland and involved the Northern Ireland political parties and the British Government. Strand 2 dealt with relationships within the entire island of Ireland and involved the Irish Government and the parties that took part in Strand 1. Strand 3 concentrated

parties aptly defined their objectives as "achieving a new beginning for relationships."¹⁰ In the interest of a better future for all, the British and Irish governments are seeking ways to boldly strike out for new arrangements, in which both unionist and nationalist traditions can rediscover themselves, and each other. One significant step forward has already been taken in the Joint Declaration. That is, the Joint Declaration has acknowledged the relevance of the core nationalist belief that the future of Ireland is for the Irish people to decide for themselves without any outside impediment.¹¹ It also acknowledges that, within this framework, unionists have important rights as heirs to an authentic Irish tradition and that these rights are entitled to respect as such.¹²

The Joint Declaration remains valid as a statement of principle by the two governments, irrespective of whether or not the paramilitaries avail themselves of the unique opportunity it offers them to drain the poison of violence from our island. The widespread support for the Joint Declaration in both unionist and nationalist communities is also a potential mandate provided that we can fairly and imaginatively build new structures on its foundations. The Joint Declaration is the latest stage in an ever-developing framework of cooperation between the British and Irish governments that is designed to meet the challenge of ending conflict in Northern Ireland. There is now a more mature and more equal relationship between the two countries, and they are cooperating more closely than ever. This fact alone is a cause for hope.

The Northern Ireland problem is rooted in past Anglo-Irish quarrels. On both sides, residue from past conflicts remains. Evidence of this is found in our traditional doctrines which, on

on the relationship between the islands of Ireland and Britain and involved the governments of both countries. Strand 1 began on April 30, 1991. Interview with Dermot Brangan, Press and Information Officer, Consulate General of Ireland, New York (Sept. 9, 1994).

10. Peter Brooke, Member of Parliament and Secretary of State for Northern Ireland, Announcement Before the British House of Commons (Mar. 26, 1991), in BRITISH INFORMATION SERVICES PRESS RELEASE 12/91, Mar. 26, 1991, at 1.

11. See JOINT DECLARATION, *supra* note 7, at 1 ("The Declaration makes it clear that it is for the people of Ireland, North and South, to achieve agreement without outside impediment.").

12. See *id.* at 6 (pledging to seek out ways to eliminate elements in democratic life and organization of Republic of Ireland that constitute real and substantial threat to unionist way of life and ethos).

both sides, assume a consensus in Northern Ireland in favor of simplistic British or Irish options. Historically, neither side has recognized that the lack of such a consensus is the central, inescapable, political reality in Northern Ireland.

In an attempt to redress this historic failure to recognize the need for consent, the Irish government agreed in the Joint Declaration that, "as part of a balanced constitutional accommodation, [it would] put forward and support proposals for change in the Irish Constitution which would fully reflect the principle of consent in Northern Ireland."¹³ Of course, the principle of consent is already compatible with the Irish Constitution. There is, however, an important distinction between something merely being compatible with the Constitution and something being enshrined in the Constitution. In the latter case, consent becomes a determining principle in itself and, as such, engenders its own jurisprudence. Thus, the scope of the proposed change is significant.

Constitutional principles are rarely, if ever, written on a blank page. People interpret them in light of both their historical experience and the prevailing political realities. In Northern Ireland, constitutional issues are notoriously used as a code or symbol for the victory of the unionist agenda over the nationalist, or vice-versa. For that reason, as well as for equity, the notion of balance is crucial. The changes we make must not serve to encourage the delusion of victory or defeat on either side. Instead, they must reassure both sides to the maximum extent possible.

In unionist eyes, Irish nationalism and the notion of Irish unity is bound up with fears of coercion and the extinguishing of their rights and identity. The campaign of violence against unionists by nationalist paramilitaries has powerfully reinforced these atavistic fears, which I accept as very real, although I believe that they are unfounded. Nationalists, on the other hand, believe unionists are interested only in dominating them. They see the unionist denial of nationalists' wider Irish allegiance as being all of a piece with the Stormont government's denial of nationalist rights.¹⁴ Nationalists believe that no advance in terms

13. *Id.* at 7.

14. See JOHN DARBY, *CONFLICT IN NORTHERN IRELAND* 49 (1976) (describing composition and powers of parliament and government of Northern Ireland that convened at

of equal rights was ever volunteered by unionism from within. Sadly, there are elements on the unionist side to convince them, whether through the rhetoric of hate or the obscenity of sectarian murder, that unionism is unreformable and synonymous with a hatred of nationalism. Therefore, nationalists fear that every empowerment of unionism in a Northern Ireland context must result in pressure on nationalists to revert to the role of a subordinate minority, and they are adamant that they will never do so again.

These are the fears that we must lay to rest by vigorously and impartially advancing the principle of consent. We must recognize that, at present, there is no political framework, either within Northern Ireland or within Ireland as a whole, that can command general support across both Irish traditions. A change of political status for Northern Ireland that merely inverts or relocates the problem of political consent is not a solution.

Because unionists and nationalists must live together on the basis of equality and mutual respect, constitutional and institutional change must not vindicate one community at the expense of the other. We must find ways in which the absence of consensus can be managed in a framework that acknowledges the worth, integrity, and rights of both allegiances. We must acknowledge diversity as a value rather than a threat, and we must develop political structures accordingly.

At present, the British and Irish governments are discussing how to chart a path to change that is acceptable to all as an honorable accommodation. Of course, agreement between the two governments does not guarantee agreement between unionists and nationalists in Northern Ireland. Nevertheless, nothing on which the two governments fundamentally disagree can possibly constitute an accommodation. That is an important reason for pressing ahead within the framework of the Joint Declaration. We will use all of our resources to persuade both communities in Northern Ireland to accept new arrangements that are honorable in terms of the past, just and fair in terms of the present, and

Stormont Castle). Nationalists strongly believed that Stormont legislation and policy discriminated against them. *See id.* at 54-58 (detailing inequities and perceived inequities in Stormont policies). The Northern Ireland Constitution Act, abolishing the Stormont parliament, became law on July 18, 1973. *Id.* at xvii.

equally open, in terms of the future, to whatever political model commands consent across the entire spectrum of the Irish people. Through these arrangements, we will seek to encourage cooperation and mutual respect in accordance with the pledge given by the two governments in the Joint Declaration to work for such agreement.

We all know that violent death can come in Northern Ireland like a thief in the night. The savage cycle of paramilitary violence on both sides is the ultimate denial of the consent and the rights of the communities victimized. The violence is so manifestly counter-productive in terms of both the nationalist goal of Irish unity and the unionist goal of union with Britain that it seems improbable that even the perpetrators of the violence can believe that it will advance either of these goals.

The most fervent wish of Irish people of both unionist and nationalist traditions is that violence should cease. The Joint Declaration offers a political alternative for all parties, including the paramilitaries. The task of reconciliation will not be accomplished overnight or by magic while people sleep. It will require persistent effort, courage, and risk taking on all sides. Building consensus is harder work than destruction. The British and Irish governments can do only so much; at some point, the cooperation of both communities in Northern Ireland is indispensable. Unionists and nationalists alike must acknowledge that, whatever the political context, their future cannot be shaped in isolation from one another. An Irish framework will not dissolve the desire of the unionist community to relate to the wider British family any more than a British framework has extinguished the desire of Northern Irish nationalists for a relationship with the wider Irish family. We must help both sides to come to terms with that reality.

We have seen in South Africa and in the Middle East that resolute political leadership can transform even the most intractable conflicts. There should be no refusal to engage in dialogue, even across the deepest political chasms. I believe there is a tide of opinion in Ireland running in favor of the politics of accommodation and magnanimity. This offers an unprecedented opportunity for political leadership on all sides, and for the unionist community in particular. In view of the tragic costs of failure to date, there is both a moral and a political imperative

to seize to the fullest extent this opportunity to provide leadership.

My personal dream is that unionists and nationalists will one day end their unnecessary and outdated conflict. Why should not each community, instead, promote to the other the riches of its own heritage? Each could make available for the common benefit, the economic, social, or cultural advantages of the wider Irish or British worlds to which it relates. Instead of denial, there could be mutual acceptance and enrichment, with both unionists and nationalists acting as forces for understanding and cooperation between the peoples of the two islands. The precise shape of an agreed Ireland could be decided in a contest of benefits rather than one of fears. If we can realize that vision through political dialogue, and win the support of those in the United States who have the welfare of Ireland at heart, we can, in the noble words of the U.S. Constitution, "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."¹⁵

15. U.S. CONST. pmbl.