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ARTICLE

CHRISTIAN CONSTITUTIONS: DO THEY PROTECT INTERNATIONALLY RECOGNIZED HUMAN RIGHTS AND MINIMIZE THE POTENTIAL FOR VIOLENCE WITHIN A SOCIETY?

A Comparative Analysis of American and Irish Constitutional Law and Their Religious Elements

*S.I. Strong**

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I. INTRODUCTION

The care of each man's soul, and of the things of heaven, which neither does belong to the commonwealth, nor can be subjected to it, is left entirely to every man's self.

— John Locke, 1689

We are talking about Christianizing America. We are talking about simply spreading the Gospel in a political context.

— Paul Weyrich, 1980

POPULAR MYTHOLOGY has painted the United States as a bastion of religious freedom, a place where religious liberties are and always have been respected. Many outsiders and many citizens perceive those freedoms as stemming from a historic separation of church and state. There are those, however, who believe that religious freedom in the United States should be equated with a benign tolerance of non-Christian faiths while recognizing the fact that the United States is a “Christian nation.”¹ Some persons in this latter group argue that the Constitution does not require or create a purely secular state, and that the strict separationist approach currently practiced by the Supreme Court is the novelty.²

The last ten to fifteen years has witnessed a marked increase in the number and visibility of Americans who believe religion should play a larger role in government.³ For some the goal is simple, explicit, and

¹ *Holy Trinity Church v. United States*, 143 U.S. 457, 465-71 (1892); *see also Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (“We are a religious people whose institutions presuppose a Supreme Being.”).

² *See* STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 86 (1993); RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE* 82 (1986); E. Gregory Wallace, *When Government Speaks Religiously*, 21 FLA. ST. U. L. REV. 1183, 1192 (1994). *But cf.* ANTI-DEFAMATION LEAGUE, *THE RELIGIOUS RIGHT: THE ASSAULT ON TOLERANCE & PLURALISM IN AMERICA* 155-62 (1994); David A.J. Richards, *Comparative Revolutionary Constitutionalism: A Research Agenda for Comparative Law*, 26 N.Y.U. J. INT'L L. & POL. 1, 5 (1993).

³ *See* Richard L. Berke, *For G.O.P. Religious Right Plays Waiting Game in Iowa*, N.Y. TIMES, Apr. 17, 1995, at A1 (estimating one-quarter to one-half of the Republican electorate in Iowa is considered part of the religious conservative movement); William Booth, *Southern Voters Switching Sides: Conservatives Abandoning Democratic Party for GOP*, WASH. POST, Mar. 16, 1995, at A1 (noting the “awesome power of the Christian right in a deeply religious region [the South]”); Gustav Niebuhr, *Public Supports Political Voice For Churches*, N.Y. TIMES, June 25, 1996, at A1 (reporting on the increasing power of evangelical Protestants in the U.S. political arena); *see also*

extreme: to create a nation that conducts itself in accordance with Christian biblical teachings.⁴ Others merely wish to recognize the importance of Judeo-Christian morality in American public life, and to foster traditional or "family" values that are based upon the Judeo-Christian creed. Often this push for family values is justified by its proponents as simply answering the "mandate" of the people.⁵

Over the last several decades, Supreme Court jurisprudence has emphasized the secular nature of the state, and has denied organized religion the ability to assert its interests in governmental affairs.⁶ However, those who oppose a purely secular state are not limiting themselves to a judicial battle; they are also waging war in national, state, and local legislatures. Since religious activism shows no signs of waning, it is likely that the debate over the proper role of religion in American politics and law will only become more heated as time goes on, which leads to the logical questions: is it wise to insert religion into political and legal matters, and is it necessary to do so to protect religious freedoms?⁷

BARRY A. KOSMIN & SEYMOUR P. LACHMAN, *ONE NATION UNDER GOD* 198 (1993) (discussing the future importance of the religious right in national elections and politics).

⁴ See WALTER H. CAPPS, *THE NEW RELIGIOUS RIGHT: PIETY, PATRIOTISM, AND POLITICS* ix (1994); John H. Garvey, *Fundamentalism and American Law*, in *FUNDAMENTALISMS AND THE STATE*: 28, 34-36, 41 (Martin E. Marty & R. Scott Appleby eds., 1993) (noting the fundamentalists' belief that government should enforce rules of personal virtue, that law should reform other people's behavior, and that the public/private distinctions of liberal constitutionalism are mistaken).

⁵ See NEUHAUS, *supra* note 2, at 40 ("A religious community that no longer understands itself as an embattled minority begins to think more about influence than about tolerance."). Interestingly, current political terminology, which emphasizes "mandates from the people," is reminiscent of religious claims that certain events are "signs from God." In either context, the signs or mandates are taken as legitimating the current path and encouraging continued progress.

⁶ See *id.* at 25. Some claim that this strict neutrality has in fact disfavored religion in violation of the Constitution. See Wallace, *supra* note 2, at 1200.

⁷ One reason for minimizing the role of religion in the laws of a pluralist state is the probability that minority human rights will be violated. See Mahnouch H. Arsanjani, *Religion and International Law*, 82 AM. SOC'Y INT'L L. PROC. 195, 208-09 (1988). Another is that the potential for violence and religious extremism increases exponentially when religious forces are allowed to influence government policy. Steve Bruce, *Fundamentalism, Ethnicity, and Enclave*, in *FUNDAMENTALISMS AND THE STATE*, *supra* note 4, at 50, 65 (citing Northern Ireland as an example of what can happen when pluralist societies mix church and state); see also Martin E. Marty & R. Scott Appleby, *Conclusion: Remaking the State: The Limits of the Fundamentalist Imagination*, in *FUNDAMENTALISMS AND THE STATE*, *supra* note 4, at 620, 633 (noting that some experts believe political expediencies will moderate violent tendencies in some secular

One way to answer these questions is to undertake a comparative constitutional analysis to establish the wisdom or fallacy of religio-legal unity.⁸ By looking at an example of a nation which has implemented the desired legal system, one can gauge its effect.

A comparative study is most useful when the countries compared are similar in all respects except for the variable being compared. Because of differences in history, politics, law, and sociology, it is impossible to find a perfect match in the real world; however, as long as the extent and existence of other variables is known, value can be found in an imperfect comparison.

In the context of religio-legal relationships, one of the best countries to compare with the United States is Ireland. Although Ireland is politically and historically different from the United States, it is similar enough in key areas that a comparative study is appropriate. In addition, the Irish Constitution contains certain provisions that are substantially similar to those that religious activists⁹ in the United States want to incorporate into the U.S. Constitution. Ireland also faces pressures associated with being part of a more liberal federal entity (the European Union), just as some states in the United States struggle with being part of a larger federation that sometimes propounds more liberal religio-legal precepts than they would wish.

Section II of this Article studies in greater detail the religio-legal debate currently being waged in American courts and legislatures, including a brief discussion of the religio-legal history of the United States. Section II also describes how the United States resembles and differs from Ireland such that subsequent comparisons will be more accurate.

democracies, but that as frustration levels rise, violence may occur). One commentator has remarked that "Christians who accept the proposition that there can be justifiable violence in warfare should also be able to accept, however reluctantly, the justification of revolutionary violence." NEUHAUS, *supra* note 2, at 70; *cf.* Thomas Aquinas, *The Summa of Theology*, in ST. THOMAS AQUINAS ON POLITICS AND ETHICS 30, 64-65 (Paul E. Sigmund trans. & ed., 1988) (outlining the circumstances of just warfare).

⁸ The inherent value of the comparative law method is discussed in John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545, 545, 554 (1995). Professor Langbein also notes the unfortunate scarcity of comparative legal analyses in American law and scholarship. *Id.* at 547-50.

⁹ In the context of this Article, the term "religious activist" is used to refer to those persons who actively support the inclusion of religious values in the law of the state. It does not refer to politically active persons who have ties to organized religion, but who do not have as their goal the inclusion of religious principles in law. The term "religious right" is used to refer to religious activists who have a conservative religio-political world view.

Section III compares the two constitutions by analyzing the provisions and policies most influenced by religion. First, general principles of sovereignty and constitutional interpretation are reviewed to understand the general constitutional framework of each nation. Second, the manner in which personal rights are treated by each nation's constitution is studied. This section discusses what is often called "family law," including issues of abortion, marriage, divorce, and the rights of women, children, and homosexuals. The use of the term "personal rights" is conscious, and is intended to emphasize the modern focus on the rights of the individual as opposed to the rights of the family unit. The term "personal rights" also recognizes that many of the legal questions that fall under the "family law" rubric have little to do with familial relationships per se, and more to do with individual choice. Third, constitutional provisions regarding education are considered.

Section IV of this Article analyzes the extent to which Irish and American laws comply with international human rights conventions concerning religious rights. Section IV also discusses whether the inclusion of religion in law tends to increase or decrease the potential for violence within and between societies.

Section V discusses where each nation is headed in terms of religion and law, and offers suggestions as to what the United States and Ireland should do to create an optimal religious rights framework.

II. THE CONFLICTING DEMANDS OF RELIGION AND STATE

A. *The United States: Past and Present*

1. Proposals by the American Religious Right

When asked what the biggest challenge to American democracy would be in the 1990s and beyond, a number of legal and political commentators replied "religious fundamentalism," despite the fact that the United States is considered by many to be the model of strict separation of church and state and a bastion of religious freedom.¹⁰ Certainly those conclusions are warranted on the basis of a reading of the text of the U.S. Constitution.¹¹ However, in practice religion has not always been distinct from American government, and there are continuing efforts to

¹⁰ See Martin E. Marty & R. Scott Appleby, *Introduction, in* FUNDAMENTALISMS AND THE STATE, *supra* note 4, at 1, 1.

¹¹ "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I. However, some religious activists believe that because the words "separation of church and state" do not appear in the Constitution, it is not part of our legal system. See ANTI-DEFAMATION LEAGUE, *supra* note 2, at 4-6.

increase the role religion plays in the law. For example, there have been numerous, albeit unsuccessful, attempts over the years to amend the Constitution to reflect Christian "values" or moral precepts.¹² The 1994 election brought both a Republican House of Representatives and a Republican Senate into being, both of which cited a mandate from the people to institute not only economic change, but moral and social change as well.¹³ The 1996 Republican presidential primaries were also heavily influenced by religious and moral factors. There have been numerous discussions regarding the possibility of proposing constitutional amendments or other federal legislation concerning prayer, education, and "moral issues" during the two sessions of Republican control.¹⁴

The last fifteen years have seen a sharp increase in the number of religious activists in the American political arena.¹⁵ The admitted goal of the movement is the national acknowledgement of the Christian nature of

¹² Although the Eighteenth Amendment, which instituted Prohibition, may have been passed due to the combined efforts of religious activists and social conservatives, that Amendment was flouted throughout its fourteen-year term, and was finally repealed in 1933. See U.S. CONST. amend. XVII, *repealed by* U.S. CONST. amend. XXI. This failure to impose biblical or religious legislation on the nation suggests that even if religious and social conservatives prevail in their current efforts, the political process may eventually reverse their reforms, because legislation that contradicts the majority's beliefs cannot survive. See NEUHAUS, *supra* note 2, at 48-49, 52-53 (stating that the current system of secularization contradicts the electorate's morals and will not survive). But see Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 195 (1992) (noting the little "rampant secularization" in modern American society). However, during that time much damage will be done to the concept of religious liberty and the rights of members of minority religions.

¹³ See Laurie Goodstein, *Gingrich Vows to Pursue Christian Coalition Agenda*, WASH. POST, May 18, 1995, at A1 (discussing, inter alia, the Republican view on abortion, school prayer, and public school funding).

¹⁴ One of the more interesting debates that has come out of this increase in religio-political activism is the discussion about whether there can ever be a truly valueless or neutral society. See Steven D. Smith, *The Restoration of Tolerance*, 78 CALIF. L. REV. 305, 313, 327-28 (1990) (arguing that the liberal ideal of neutrality among moral choices has failed). Religious activists often ask why their perspective is considered presumptively invalid while other world views, which are based on different conceptions of the good, are not. See *id.* This is a complex issue, and has been addressed by a number of prominent commentators. See, e.g., *infra* note 290 and accompanying text; see also *infra* notes 316-25 (discussing ways in which religious perspectives can be incorporated into the secular state).

¹⁵ Most experts mark 1980 as the turning point, with political activism among religious groups growing throughout the 1990s. See ANTI-DEFAMATION LEAGUE, *supra* note 2, at 9; KOSMIN & LACHMAN, *supra* note 3, at 157-66, 179; MATTHEW C. MOEN, *THE CHRISTIAN RIGHT AND CONGRESS* 30-31 (1989).

the United States, and the concurrent passage of legislation that will effectuate the moral precepts of Christianity.¹⁶ Some lip service has been paid to the "Judeo-Christian tradition," but many observers believe that the concept is a modern invention created to answer the demands of a pluralist society.¹⁷ And, while some of those within the movement may be unsure of the role of Judaism in a Christian America, the role of other religious faiths is even more suspect.¹⁸

In some regards, the religious right has been very explicit about its political goals. In addition to the recognition that America is a Christian nation, today's religious activists want to see (Christian) prayer in school; tax credits for religious schools; the outlawing of abortion, homosexuality, and euthanasia/assisted suicide; increased burdens on obtaining divorce (perhaps through the repeal of "no-fault divorce"); and the return of the family to its "rightful place" in society.¹⁹ Despite this extremely broad

¹⁶ See CAPPS, *supra* note 4, at ix, 35-39; KOSMIN & LACHMAN, *supra* note 3, at 281; Garvey, *supra* note 4, at 41, 43-44 (citing religious activists as believing that "America should acknowledge its dependence on God and that our law should be based on the Bible").

¹⁷ See Martin E. Marty, *The Virginia Statute Two Hundred Years Later*, in THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES 1, 17 (Merrill D. Peterson & Robert C. Vaughan eds., 1988); see also CARTER, *supra* note 2, at 87; KOSMIN & LACHMAN, *supra* note 3, at 211-12 (reporting that 55.9% of American males and 60.6% of American females describe themselves as Protestant Christians). Approximately 25% of the American population self-affiliates with Catholicism, thus creating a nation that is approximately 80-85% Christian. See *id.* Ireland, on the other hand, is over 90% Catholic. See JOHN ARDAGH, *IRELAND AND THE IRISH: PORTRAIT OF A CHANGING SOCIETY* 158 (1994).

¹⁸ See ANTI-DEFAMATION LEAGUE, *supra* note 2, at 41 (noting that presidential candidate/evangelist Pat Robertson stated that those who were neither Jewish nor Christian were not qualified to be in government); see also *id.* at 70 (quoting Rev. Baily Smith, an influential figure in the religious right, as saying, "God Almighty does not hear the prayer of a Jew"); MOEN, *supra* note 15, at 40.

¹⁹ See MOEN, *supra* note 15, at 87; Dirk Johnson, *Attacking No-Fault Notion, Conservatives Try to Put Blame Back in Divorce*, N.Y. TIMES, Feb. 12, 1996, at 10.

Most religious activists in the United States are Christians claiming to impose a "Judeo-Christian" ethic on the nation. However, the religious necessity of doing so is not as doctrinally clear in Christianity as it is in other faiths. See Maimon Schwarzschild, *Religion and Public Debate in a Liberal Society: Always Oil and Water or Sometimes More Like Rum and Coca-Cola?*, 30 SAN DIEGO L. REV. 903, 907-10 (1992). For example, both Islam and Judaism require their adherents to attempt to create a good society on earth, because their individual redemption depends on such actions. Christians, who have a tradition of "rendering unto Caesar what is Caesar's," see *Mark* 12:17, do not necessarily have such a duty, or at least are not required to do so for individual salvation. However, varying interpretations of religious obligations

social agenda and the fact that many religious activists deny the legitimacy of a public-private distinction when it comes to religion,²⁰ the movement's leaders claim that they do not envision America becoming a theocracy.²¹ However, that claim is suspect in light of the scope of the claims of populist religion to interact with the state, the ease with which religious movements and religious leaders can turn a reform movement into a revolution, and the current social and political climate of the United States.

The current brand of American Christianity is much more politically active, politically effective, and politically comprehensive than almost any that has come before. It combines the elimination of public-private distinctions that were typical of the Puritan tradition²² with an energetic social interventionism more often seen in Latin American liberation theology.²³ The voting strength of the religious right has been demonstrated in virtually every election since 1980, and is predicted to continue to rise through the end of the century.²⁴ Even though some discount the importance of the religious right due to its lack of a political majority, others note that even a small number of politically dedicated voters can bring about a revolution.²⁵ In addition, the religious right's effectiveness is seen not only in its ability to elect its candidates to both national and

exist, and what may not be religiously required may be deemed to be religiously desirable.

²⁰ See NEUHAUS, *supra* note 2, at 18-19; Garvey, *supra* note 4, at 39; CARTER, *supra* note 2, at 160; Laura Underkuffler-Freund, *The Separation of the Religious and Secular: A Foundational Challenge to First Amendment Theory*, 38 WM. & MARY L. REV. 837, 839-41 (1995). A growing number of legal commentators are beginning to arrive at similar conclusions, namely that religious individuals cannot separate their beliefs into those that are private (and may therefore be affected by religion) from those that are public (and therefore may not be affected by religion); for these persons, all beliefs and behaviors are influenced by their religious perspective.

²¹ See CAPPS, *supra* note 4, at 15. The Ayatollah Khomeini also denied his intent to create a theocracy prior to the Islamic revolution in Iran. See MALISE RUTHVEN, *ISLAM IN THE WORLD* 356 (1984).

²² See Garvey, *supra* note 4, at 36.

²³ Conservative religious activists claim that they are modeling themselves on the civil rights activism of liberal theologians in the 1960s. See MOEN, *supra* note 15, at 20.

²⁴ See KOSMIN & LACHMAN, *supra* note 3, at 283.

²⁵ See ANTI-DEFAMATION LEAGUE, *supra* note 2, at 131-33; NEUHAUS, *supra* note 2, at 40. In addition, the electoral college system, in conjunction with "single-issue voting," has made the South, an historically conservative region in terms of both religion and politics, a major player in national elections. See KOSMIN & LACHMAN, *supra* note 3, at 198-99, 281. This is especially true given the increasingly "Southern" feel of populist religion. See also Booth, *supra* note 3.

local office, but also in its ability to bring its issues to the forefront of Congressional debate in record time.²⁶

Currently, the American religio-political arena is populated by a number of engaging and popularly appealing personalities.²⁷ Although some in the religious right hesitate to put all their faith in a single leader,²⁸ one of the hallmarks of the religious right is the ability of a single leader to mobilize followers and to use relatively small voting blocs to swing an election.²⁹ It has been noted that one of the reasons why, after decades of discontent and at least one marginally successful religious revolution in 1906, Islamic fundamentalists in Iran were able to overthrow the secular government in 1979 and institute a theocratic state was because the population was drawn to the personality of Ayatollah Ruh Allah Khomeini.³⁰ Revolution, or at least violent civil protest, is also a continual threat in a country such as the United States, which was created as a result of violent revolution, and which glorifies the myth of the citizen-soldier-martyr as part of its popular culture.³¹

What has brought about this surge in religio-political activism? Certainly Americans have always been among the most devout people in the world. Originally religious extremists who were exiled by force or by choice from their native lands, Americans continued their devotion to God through the 1800s and 1900s.³² Sociologists believe that the current

²⁶ See MOEN, *supra* note 15, at 3, 65, 129 (noting the increasing ability of Christian activists to shape Congressional agenda or alternatives). The corollary effect of the religious right's lobbying activities has been the legitimization of its political agenda; whereas 30 years ago it was considered inappropriate to incorporate religious arguments into a political discussion, it has now become commonplace. See ANTI-DEFAMATION LEAGUE, *supra* note 2, at 60-61 (noting Jerry Falwell's 1965 statement that religious figures should not become involved in politics); NEUHAUS, *supra* note 2, at 42-43.

²⁷ See CAPPS, *supra* note 4, at 185-86 (discussing interviews with major religious figures in the United States). Pat Buchanan's early success in the 1996 Republican Presidential primaries demonstrates the appeal certain charismatic individuals can have beyond their traditional demographic supporters.

²⁸ See Berke, *supra* note 3.

²⁹ See ANTI-DEFAMATION LEAGUE, *supra* note 2, at 31 (stating Christian activists plan to take advantage of the fact that only 6-15% of the eligible voters decide the outcome of any given election); see also NEUHAUS, *supra* note 2, at 15 (discussing "personality cults").

³⁰ See HENRY MUNSON, JR., ISLAM AND REVOLUTION IN THE MIDDLE EAST 131-33 (1988); RUTHVEN, *supra* note 21, at 334-38.

³¹ See Malcolm Gladwell, *At Root of Modern Militias: A Legacy of Revolt*, WASH. POST, May 9, 1995, at A1.

³² See ROGER FINKE & RODNEY STARK, *THE CHURCHING OF AMERICA, 1776-1990*:

renaissance of religious fervor in U.S. culture and politics reflects the distress many Americans feel at the rapid changes that have occurred over the last few decades and the resulting feelings of frustration and helplessness.³³ Analysts of religious and other radical reform or revolutionary movements have noted that these sorts of feelings can often lead to a renewed interest in spiritual concerns, which may be accompanied by anti-government and anti-secular sentiments.³⁴ Wide disparities in social or economic status within the community can also contribute to a lack of identification with the party in power.³⁵ Such disparities can lead to extreme shifts in the political pendulum, or even to violence.³⁶ Although some commentators believe the democratic nature of the U.S. political system will protect the country from violent religious revolution,³⁷ radical changes brought about by political and legislative reform could still occur.

Some people discount the threat posed by religious activists in the United States, believing that "it could never happen here."³⁸ However,

WINNERS AND LOSERS IN OUR RELIGIOUS ECONOMY 15 (1992).

³³ See ANTI-DEFAMATION LEAGUE, *supra* note 2, at 144; KOSMIN & LACHMAN, *supra* note 3, at 281-82.

³⁴ See Marty & Appleby, *supra* note 10, at 10; David C. Rapoport, *Comparing Militant Fundamentalist Movements and Groups*, in FUNDAMENTALISMS AND THE STATE, *supra* note 4, at 429, 429-31, 454-56.

³⁵ See Marty & Appleby, *supra* note 7, at 624. The United States is currently experiencing both social and economic disparities of an almost unprecedented magnitude. See Keith Bradsher, *Gap in Wealth in U.S. Called Widest in West*, N.Y. TIMES, Apr. 17, 1995, at A1; Dale Russakoff, *Grass Roots Rage: Below the Surface, Alienation Simmers in Corner of Mid-America*, WASH. POST, May 5, 1995, at A1.

³⁶ See Timothy Egan, *Federal Uniforms Become Target of Wave of Threats and Violence*, N.Y. TIMES, Apr. 25, 1995, at A1; Faye Ginsburg, *Saving America's Souls*, in FUNDAMENTALISMS AND THE STATE, *supra* note 4, at 557, 563, 574, 579; Russakoff, *supra* note 35. *But cf.* Rapoport, *supra* note 34, at 429-32 (noting that political reform, not violence, is more likely to occur in the United States).

³⁷ See Rapoport, *supra* note 34, at 432. However, historians have noted patterns of political violence in American social movements. See Ginsburg, *supra* note 36, at 574; *see also* Gladwell, *supra* note 31.

Interestingly, the founder of Operation Rescue cited "necessity" as the reason why laws can be disregarded; the same reason was used by the Ayatollah Khomeini to supersede the religious law he had previously held to be immutable. Compare Ginsburg, *supra* note 36, at 564, with Sarvenaz Bahar, *Khomeinism, The Islamic Republic of Iran, and International Law: The Relevance of Islamic Political Ideology*, 33 HARV. INT'L L.J. 145, 159-62 (1992).

³⁸ See NEUHAUS, *supra* note 2, at 41 ("Revolutions . . . are declared impossible before they happen and inevitable after they happen."). Iran is a case in point. Prior to the Islamic revolution of 1979, Iran was well on its way to becoming a modern

despite the fact that the United States is currently perceived as a model of religious toleration,³⁹ its history contains persistent religious persecution by both its citizens and its state and federal governments.⁴⁰ It is also true that change is inevitable; American history is full of examples of rights that once seemed inviolate being eroded over time⁴¹ and principles that once seemed impossibly radical becoming commonplace.⁴² Just

secular society until conservative religious elements of Iranian society banded together with other segments of society to expel the Shah. Once the revolution was underway, the religious elements took over, much to the surprise of the intellectuals and middle class who had initially supported the clerics. In the United States, fiscal conservatives are joining with the religious right in what they believe is a temporary but necessary coalition to gain control of government. It remains to be seen, however, whether moderate conservatives will be able to keep the religious activists in line, or whether, like the Iranian elite, they will have to cede control to populist religious leaders.

³⁹ Although religious toleration may seem to be the proper goal of all nations, the term "toleration" still connotes an attitude of benevolent permission by the ruling class or party. See Daniel J. Boorstein, *The Founding Fathers and the Courage to Doubt*, in JAMES MADISON ON RELIGIOUS LIBERTY 207, 209 (Robert S. Alley ed., 1985); Thomas S. Buckley, *The Political Theology of Thomas Jefferson*, in THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM, *supra* note 17, at 75, 91. It is better to aspire to religious equality, where no belief system (including the lack of belief) is considered superior to any other.

⁴⁰ See KOSMIN & LACHMAN, *supra* note 3, at 34-37; see also Harold J. Berman, *Religion and Law: The First Amendment in Historical Perspective*, 35 EMORY L.J. 777, 779-83 (1986); Underkuffler-Freund, *supra* note 20, at 879-91 (reviewing the history of intolerance and persecution in the United States).

⁴¹ At one time, the right to own other human beings was not only constitutionally protected, but as divinely ordained. See U.S. CONST. art. V, amend. XIII (prohibiting constitutional amendments until 1808, thus protecting the institution of slavery; slavery was not eliminated until the passage of the Thirteenth Amendment in 1865). See KOSMIN & LACHMAN, *supra* note 3, at 37-40; see also Aquinas, *supra* note 7, at 82-83 (discussing the justification of slavery by natural law). Slavery involved not only the conflict between natural rights claimed by both slaves and slave owners, but also various property rights. Over the course of centuries, the "right" to own other human beings has eroded and disappeared in the United States and throughout the Western world. But see *Today's News*, N.Y.L.J., Mar. 17, 1995, at 1 (noting Mississippi's formal abolition of slavery on March 16, 1995, when it finally ratified the Thirteenth Amendment to the U.S. Constitution; "most current legislators" were allegedly unaware that Mississippi had not previously ratified the amendment).

⁴² As recently as the 1910s, women's suffrage was either ridiculed or viewed as a threat to the political system. Today, no one in America could reasonably argue that women should not be able to vote. Over the course of eighty years, the country's beliefs and laws have made a dramatic shift.

One area that may be subject to change over the next several decades is that of same-sex marriages. Today, marriage between two members of the same sex is seen by

because religion and state are separate today does not mean that they will always remain so, especially in light of recent political movements and Supreme Court decisions.

2. Looking to the Past to Define the Present

As legal scholars try to divine the correct meaning and interpretation of the First Amendment and the role of religion in America, many look to the past for assistance. Unfortunately, the past does not provide a conclusive answer.⁴³ Even if it did, that answer might not be appropriate for modern society. Just as tort and criminal laws must evolve to adapt to a changing society, so must constitutional law.

Nevertheless, historical arguments regarding the role of religion in law abound.⁴⁴ The first period analyzed is the colonial period. By looking at the Christian aspirations, invocations, and mandates found in the charters of the original colonies, religious activists believe they can show

some as "counterfeit," unnatural, ungodly, and illegal. See David W. Dunlap, *Some States Trying to Stop Gay Marriages Before They Start*, N.Y. TIMES, Mar. 15, 1995, at A18. Yet as recently as 1967, interracial marriages were seen in exactly the same light. See *id.* However, in that year, the Supreme Court granted constitutional protection to what was once seen as blasphemous. See *Loving v. Virginia*, 388 U.S. 1 (1967); see also *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (discussing the Habitual Criminal Sterilization Act); cf. *Compassion in Dying v. Washington*, 79 F.3d 790, 801, 806 (9th Cir. 1996) (noting the social history of euthanasia and abortion). Religious activists have promised to make same-sex marriage an election year issue, see Adam Nagourney, *Christian Coalition Pushes for Showdown on Same-Sex Marriage*, N.Y. TIMES, May 30, 1996, at A19, despite the Supreme Court's recent ruling prohibiting overt discrimination against homosexuals, see *Romer v. Evans*, 116 S. Ct. 1620 (1996).

⁴³ However, at least some people have recognized the inadequacy of mere historical analysis. Stephen Carter, paraphrasing legal scholar Harold Berman, notes that "the original understanding of [the First Amendment] may no longer bind us because contemporary reality is so sharply discontinuous with the world of the Founders." CARTER, *supra* note 2, at 119; Berman, *supra* note 40, at 778-79. However, this is not to say history is completely irrelevant. Often a nation's historical approach to a certain issue will reflect the boundaries of potential change. Any attempt to exceed the outer limits of culturally tolerable change may result in counter-revolution. For an interesting legal approach that incorporates, but does not exclusively rely upon, historicity, see Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 CALIF. L. REV. 779, 779 (1988).

⁴⁴ See 4 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 21.2 (2d ed. 1992). However, they do not necessarily get it right. See Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 524-25 (1995).

the "Christian nature" of the nation.⁴⁵ However, not only do these charters predate the Constitution, and are thus not legally binding, but the concepts the charters espoused, namely Christianity in government, were ultimately rejected by the Founders.⁴⁶ One purported reason for the failure to include Christianity in the law of the land was a lack of consensus. Apparently, no one could agree about what elements should be included in the Constitution.⁴⁷

The second historical period that comes under close scrutiny is the time of the signing of the Constitution and the adoption of the Bill of Rights. For many, it seems, the key to unraveling the contemporary conflicts between religion and government lies in understanding the Framers' intent.⁴⁸ Although determining legislative intent can be a helpful tool in deciding how to approach certain legal problems, it is not useful here. First, there is no consensus regarding what the Framers intended. Both sides can find support for their arguments in the actions and statements of the Constitutional delegates.⁴⁹ Second, historical ana-

⁴⁵ See ANTI-DEFAMATION LEAGUE, *supra* note 2, at 157. Many of these charters use language similar to that found in the constitutions of sectarian states such as Ireland. Compare *id.* at 157 with IR. CONST. arts. 1-2, cited in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1992); *id.* at preamble.

⁴⁶ See ANTI-DEFAMATION LEAGUE, *supra* note 2, at 157. In this context, "Christianity in government" means the establishment of Christianity as a governmental institution. At first the colonists tried to repeat the conformist approach to religion that they had experienced in Europe, but eventually religious toleration became the norm, either through adoption of Enlightenment theory or through necessity. See Wallace, *supra* note 2, at 1228. By the time the American Revolution occurred, even those who were against religious freedom in theory had to accept it in practice, since no one denomination had a sufficient number of followers to establish itself as the national religion. See FINKE & STARK, *supra* note 32, at 59.

⁴⁷ See KOSMIN & LACHMAN, *supra* note 3, at 23-24. This outcome is predictable if one accepts the position that the need to separate church and state often grows as the population becomes more religiously diverse. See Sarah Lyall, *Schools Stumble Over a Tough Commandment*, N.Y. TIMES, May 2, 1995, at A4 (discussing the problems with implementation of Christian religious instruction in state-supported schools in England because of the religious and cultural diversity of the population); see also Harvard Law Review Association, *Developments in the Law-Religion and State*, 100 HARV. L. REV. 1601, 1613 (1987) [hereinafter *Developments*] (estimating over 1,200 different religious bodies in the United States). One commentator has noted that the privatization of religion evolved in conjunction with pluralism, with England being the only exception to the rule. See Robert E. Rodes, Jr., *Pluralist Establishment: Reflections on the English Experience*, 12 CARDOZO L. REV. 867, 878 (1991).

⁴⁸ See ROTUNDA & NOWAK, *supra* note 44, § 21.2.

⁴⁹ Much of the focus is on Thomas Jefferson and James Madison, the primary

lysts who look at the attitudes of the population during this period and cite to the fact that the majority were Christian Protestants as evidence that the United States was meant to be a Christian nation are invoking faulty logic.⁵⁰ The fact that a religion is shared by a majority of the population does not automatically make it part of a nation's legal structure.

The most compelling reason why a purely historical analysis is inappropriate in this case is that the world is a much different place than it was 200 years ago. What may have been true in the late eighteenth century is not necessarily binding on the nation today.⁵¹ As in other areas of law, one must look at the underlying need for a law before deciding to adopt, reject, or revise it.⁵² The majority of the population at that time belonged to one of the many Protestant denominations, but no denomination claimed to be the national religion.⁵³ Arguably then, the United States became a secular, or at least a disestablished, state at that time.⁵⁴

drafters of the First Amendment. Even their later actions have been scrutinized to shed light on their intentions at the Continental Congress and the subsequent adoption of the Bill of Rights. This type of analysis is highly suspect in a legal sense because the private beliefs of two individuals cannot define the laws of the state.

⁵⁰ See ANTI-DEFAMATION LEAGUE, *supra* note 2, at 157-58. As is often the case with religious debates, people are apt to misquote history. For example, during the period 1761-1800, more than one-third of the first births in New England occurred after less than nine months of marriage, despite the existence of strict laws against fornication. See *id.* at 56; see also FINKE & STARKE, *supra* note 32, at 22. Therefore, the United States was perhaps not as Christian in practice as religious activists now believe.

⁵¹ See Robert S. Alley, *Introduction*, in JAMES MADISON ON RELIGIOUS LIBERTY *supra* note 39, at 13, 15 (stating "[t]his is no game in which each side seeks to uncover old quotes favorable to their cause; it is a confrontation over basic presuppositions, a conflict between democracy and theocracy, both of which have deep roots in our past.").

The dispute between a literal and a figurative reading of the Constitution is very similar to the dispute between a literal and a figurative reading of religious texts. Notably, no one ever wins such disputes.

⁵² However, commentators are split as to whether contemporary public policy necessitates or militates against the incorporation of religion into government.

⁵³ See FINKE & STARK, *supra* note 32, at 59-60.

⁵⁴ One commentator noted that although there were religious fundamentalists during the early days of the nation, they did not attack liberals or deists for their philosophies, nor did they try to impose their own strict moral code on the nation through law. See Henry Steele Commanger, *Take Care of Me When I Am Dead*, in JAMES MADISON ON RELIGIOUS LIBERTY, *supra* note 39, at 331, 334.

Experts differ on the extent of secularization in American government throughout the years. Certainly some early state constitutions recognized the importance of religious beliefs.⁵⁵ Because the religion clauses of the Constitution were initially held only to apply to the federal government (“*Congress shall make no law*”), the states were free to allow religion to play as large a role in government as their electorates desired. Not until 1947, when the religion clauses were held by the Supreme Court to be incorporated by the due process clauses of the Fourteenth Amendment, did disestablishment become law on both the state and federal levels.⁵⁶

The twentieth century has witnessed a tremendous increase in the role of the federal government in all aspects of American life.⁵⁷ Recently, however, there has been a movement toward de-federalization by both Congress and some members of the Supreme Court.⁵⁸ This move toward de-federalization is occurring in all areas of government, from transportation and energy to education and abortion. The claim in the religious arena is that by getting the federal government out of matters of local concern, people can decide for themselves whether they want to live in a Christian (or ostensibly, a Jewish, Islamic, Hindu, secular, etc.) community.⁵⁹ The problem with this theory is that it denies certain property and

⁵⁵ See Berman, *supra* note 40, at 780.

⁵⁶ See *Everson v. Board of Educ.*, 330 U.S. 7, 15 (1947) (applying the establishment clause to states); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (applying the free exercise clause to states). However, many of the states supported the strict separation of religion and government even before they were forced to do so. See, e.g., KOSMIN & LACHMAN, *supra* note 3, at 78 (noting California’s rejection of “sabbath laws” in 1872). Atheism is as much protected as any positive, theistic faith. See *Wallace v. Jaffree*, 472 U.S. 38, 52-53 (1985).

⁵⁷ See CARTER, *supra* note 2, at 138. The granting of tax subsidies and exemptions has allowed the government to exert some power over religious bodies. See *id.* at 146, 150-55. Certainly this is a point to be considered, since the First Amendment limits not only religious influence over government but also government’s influence over religion.

⁵⁸ See Goodstein, *supra* note 13; Linda Greenhouse, *Focus on Federal Power; Close Vote on Term Limit Shows Extent of Court’s Division Over ‘First Principles,’* N.Y. TIMES, May 24, 1995, at A1. However, many in this movement fail to recognize that the Constitution was created to cure the problems associated with excessive state sovereignty. See Flaherty, *supra* note 44, at 547-48 (discussing the perceived failure of republican politics and the need for increased federal protections). In demanding that the states be given a high level of autonomy, these people forget that a federation of virtually independent states was created under the Articles of Confederation — a system that failed miserably and resulted in the current approach.

⁵⁹ See Goodstein, *supra* note 13; Richard C. Reuben, *The New Federalism*, A.B.A. J., Apr. 1995, at 76, 76-80.

First Amendment rights of minority groups.⁶⁰ People are forced to live in ways that conform to others' religious beliefs, despite the fact that religious liberty is a concept that has been expressly removed from the realm of popular electoral power.⁶¹ Because the violation of religious freedoms not only abrogates people's basic human rights but, as shall be seen, also leads inevitably to violence, such freedoms must be protected.⁶²

⁶⁰ One reason why many people do not recognize the dangers and inequities of excessive local control is because they view it from the majority perspective. If, however, a Christian family lived in a heavily Muslim area (something that is becoming increasingly likely given the phenomenal rise of Islam in the United States) and that community decided to implement a strict Islamic code regarding education, morality, and penal law, then under this theory those Christians must abandon one of two rights. They must either move into a community whose values were more to their liking, thus forgoing their right to live in any area they wish, or be required to endure various infringements on their religious and other freedoms. For example, children might be forced to pray or silently bow during school prayers to Allah, and women might be forced to conform to dress codes imposed for the sake of "public order and morality," to borrow a phrase from the Irish constitution, or avoid working in certain fields deemed inappropriate for females. As absurd as this may sound to some, by replacing "Muslim" with "Christian," one can better understand the types of burdens faced by non-Christians in American society. For a discussion of other minority rights under international law, see Section IV, *infra*.

There is a second reason why total local control of such issues should not be permitted. If communities are allowed to impose these sorts of moral codes within their city boundaries, the United States will become a religiously segregated nation. American history proves that racial segregation does not work and results in violence and discontent; Irish history proves that religious segregation has the same effect. Therefore, the United States should not impose upon itself a system guaranteed to splinter the nation into factions.

⁶¹ In the past, it was considered very progressive to permit a person to hold his or her own religious beliefs while still requiring adherence to the public religious rites of the national religion. Today that view has been dismissed as infringing on individual liberties, even in those nations that are closely aligned with a particular religion.

⁶² Certain aspects of this argument have been adopted by religious activists who favor incorporating religion into government. Their position is that when religion is not allowed to influence government, their rights are trampled. However, the separation of church and state does not infringe on a person's belief or his or her own behavior; it only prohibits the government from taking certain action. Laws that are devoid of religion are very different than laws that are anti-religious. The latter type generally includes some affirmative repression, such as that which exists in China or existed in the former Soviet Union. Freedom of religion should be considered a negative right protecting one from interference, rather than a positive right permitting one to affirmatively impose one's values on others.

Various enactments have been used to increase the role of religion in American society. For example, presidential proclamations have contained religious overtones since the time of George Washington.⁶³ More recently, both President Reagan and President Bush recognized the "Judeo-Christian" history of the nation by proclaiming 1983 to be the "Year of the Bible"⁶⁴ and 1990 to be the "International Year of Bible Reading."⁶⁵ Both of these acts were litigated as being in violation of the religion clauses, but were found not to be "laws" and therefore not unconstitutional.⁶⁶

⁶³ See James Madison, *Detached Memoranda*, in JAMES MADISON ON RELIGIOUS LIBERTY, *supra* note 39, at 89, 93; Wallace, *supra* note 2, at 1232. Even then, there were those, including James Madison himself, who disagreed with the practice. Madison, *supra* note 39, at 93 (objecting to presidential proclamations of a religious nature because they "imply and certainly nourish the erroneous idea of a national religion" and because of "the tendency of the practice, to narrow the recommendation to the standard of the predominant sect"); see also Wallace, *supra* note 2, at 1250.

⁶⁴ The Presidential Proclamation contained various historical inaccuracies with respect to the origins of the Constitution and Declaration of Independence. See Proclamation No. 5018, 48 Fed. Reg. 5527 (1983); see also Year of the Bible-Designation, Pub. L. No. 97-280, 96 Stat. 1211 (1982) (stating that "the Bible, the Word of God, has made a unique contribution in shaping the United States as a distinctive and blessed nation and people;" that "Biblical teachings inspired concepts of civil government that are contained in our Declaration of Independence and the Constitution of the United States;" and that "renewing our knowledge of and faith in God through Holy Scripture can strengthen us as a nation and a people"); Robert F. Kane & Fred M. Blum, *The International Year of Bible Reading — The Unconstitutional Use of the Political Process to Endorse Religion*, 8 N.Y.L. SCH. J. HUM. RTS. 333, 343 n.27 (1991).

⁶⁵ Presidential Proclamation 6100, which was issued on February 22, 1990, stated that "our moral tradition has been shaped by the laws and teachings it contains. It was a biblical view of man . . . that inspired the principles upon which the United States is founded." Proclamation No. 6100, 55 Fed. Reg. 6783 (1990); see also Pub. L. No. 101-209, 103 Stat. 1838 (1989) (naming 1990 as the International Year of Bible reading and stating that "the Bible has made a unique contribution in shaping the United States as a distinctive and blessed nation and people"). The Proclamation also said that "[w]hen you have read the Bible you will know that it is the Word of God, because you will have found it the key to your own heart, your own happiness, and your own duty." Proclamation No. 6100, *supra*. President Bush was apparently unaware of any non-Christians who might disagree with his interpretation. See, e.g., *People ex rel. Ring v. Board of Education*, 92 N.E. 251, 255 (Ill. 1910), quoted in *Abington School District v. Schempp*, 374 U.S. 203, 282 n.58 (1963) (stating that "[t]he Bible, in its entirety, is a sectarian book as to the Jew and every believer in any religion other than the Christian religion.").

⁶⁶ See *Zwerling v. Reagan*, 576 F. Supp. 1373, 1376-78 (C.D. Cal. 1983); see Kane & Blum, *supra* note 64, at 343 n.27. Some commentators still believe the Proclamations to be unconstitutional. See *id.* at 343-46.

Republicans are not the only ones invoking God in the name of politics. During the 1992 election, candidates from both parties used a tremendous amount of religious rhetoric.⁶⁷ Jimmy Carter, a Democrat and professed born-again Christian, often mentioned his personal faith, though he did not attempt to implement it through law during his term as President.⁶⁸ In addition, President Clinton has continued the celebration of National Prayer Day by presidential proclamation.⁶⁹ The sole defense of National Prayer Day is its non-sectarian nature; still, it does seem to encourage religion in general and to bring state and religion closer than some would like.⁷⁰

However, presidential proclamations are not the only type of religiously influenced enactments that exist at the federal level. Proposed constitutional amendments promoting freedom of religion and school prayer have been bandied about for several years.⁷¹ In addition, in the past fifteen years an increasing amount of religious legislation has been proposed by Congress.⁷² Although some consider these proposals to be mere attempts by legislators to cozy up to their constituents, others see them as illustrating the success of the religious right in getting its issues to the table, something that is noteworthy in and of itself.⁷³ Not only did the religious lobbyists get their agenda considered in its own right, they also shaped other types of legislation to achieve results more acceptable to them.⁷⁴ Also, once legislators begin to openly consider various religious issues, they become less controversial; the mere fact that the issues are in the public realm dignifies them so that fewer people will question their right to be in the public forum at all.⁷⁵

⁶⁷ See KOSMIN & LACHMAN, *supra* note 3, at 158-66.

⁶⁸ See MOEN, *supra* note 15, at 14.

⁶⁹ See Laurie Goodstein, *U.S. Prayer Day Takes on More Political Tone: Backers Turn Up Heat as School Law Debate Nears*, May 4, 1995, WASH. POST, at A3 (noting that the celebration began in 1952 by a joint resolution of Congress and that over forty state capitals participated at the local level).

⁷⁰ See *id.*; see also *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 603 n.52 (1989) (noting the possible unconstitutionality of a National Day of Prayer in dicta).

⁷¹ See Laurie Goodstein, *Religious Freedom Amendment Pressed*, WASH. POST, June 9, 1995, at A12; Katharine Q. Seelye, *Amendment on Prayers is Introduced*, N.Y. TIMES, Nov. 17, 1995, at A22.

⁷² See MOEN, *supra* note 15, at 108-09, 129, 141-45. The "Contract With the Family" introduced by Speaker of the House Newt Gingrich demonstrated the extent to which the religious right influences Congress. Goodstein, *supra* note 13.

⁷³ See MOEN, *supra* note 15, at 129.

⁷⁴ See *id.* at 65-66.

⁷⁵ See NEUHAUS, *supra* note 2, at 42-43.

Although the scope of this Article prohibits a survey of state and local legislation, there are those who believe the greatest successes of religious activists in the 1990s have been their grassroots campaigns at the state and local level.⁷⁶ Election of religious activists to local legislatures has spawned a variety of morality legislation, and although some of these bills have been thwarted or at least slowed by litigation questioning their constitutionality,⁷⁷ they are again proving the strength of the religious electorate and legitimating the politicization of moral issues.⁷⁸

Much of American constitutional law is found not in the Constitution itself, but in the decisions of the Supreme Court. Despite claims that Article III judges, and Supreme Court justices in particular, are exempt from political and popular control, their decisions are often accurate reflections of their times.⁷⁹ This may be because federal judges and justices are appointed by the President, a political, popularly elected official who often places only those with viewpoints similar to his or her own on the bench.

The Supreme Court has a mixed history in recognizing religious precepts as a part of the legal history of the United States. On the one hand, the Supreme Court has noted that "this is a Christian nation."⁸⁰ On the other hand, it has steadfastly refused to uphold laws which "aid one religion, aid all religions, or prefer one religion over another."⁸¹ The key

⁷⁶ See ANTI-DEFAMATION LEAGUE, *supra* note 2, at 27. For example, 1990 was proclaimed the International Year of Bible Reading in at least thirty-six states. See Kane & Blum, *supra* note 64, at 340 n.19.

⁷⁷ Much of the legislation has centered on limitations to abortion and gay rights.

⁷⁸ The defensive posture now taken by liberal religious organizations and by separationists only strengthens many religious activists' resolve, since they can then target a tangible "enemy" to fight against in what they perceive as a holy war. However, the rhetorical and psychological value of being perceived as an oppressed minority will disappear if and when the religious right becomes an accepted and legitimate influence in American politics.

⁷⁹ The federal judiciary may not be accountable to the public, but they very seldom hand down decisions that are radically different from the public sentiment, especially on highly controversial issues. Of course, there are well-known exceptions to the rule. See, e.g., *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

⁸⁰ *Holy Trinity Church v. United States*, 143 U.S. 457, 471 (1892) (Brewer J.); see also *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) ("We are a religious people whose institutions presuppose a Supreme Being."); *United States v. Macintosh*, 283 U.S. 605, 625 (1931) (noting that "[w]e are a Christian People").

⁸¹ *Everson v. Board of Educ.*, 330 U.S. 7, 15 (1947). There are a variety of judicial tests used to determine whether the state has acted unconstitutionally with regard to religion. One of the most popular under the Establishment Clause is the endorsement test, enunciated by Justice O'Connor in her concurring opinion in *Lynch*

to interpreting these seemingly contradictory decisions is to understand that the Supreme Court, like other public institutions, reflects the cultural tenor of the times; the rhetoric of the Supreme Court changes in accordance with the type of case it is deciding and with the author of the opinion; and the actual decisions of the Court have been moving toward a more liberal, i.e., separationist, position, although that trend may be slowing.

v. Donnelly, 465 U.S. 668, 692 (1984). O'Connor would permit the state to display explicit religious symbols if the larger setting negated any endorsement of the religious content of the symbol. *Id.* at 690-95; see *Allegheny v. ACLU*, 492 U.S. 573, 633-35 (1989) (O'Connor, J., concurring in part and concurring in judgment).

An earlier Establishment Clause test that was highly influential in shaping First Amendment jurisprudence, but which is now dropping out of favor is the *Lemon* test. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The *Lemon* test prohibits government action that (i) has no secular purpose, (ii) has the primary effect of advancing or inhibiting religion, or (iii) fosters an excessive entanglement between the state and religion. See *id.*; see also Wallace, *supra* note 2, at 1207 (noting the test's continuing validity despite criticism by individual justices).

A third Establishment Clause test which has had only limited application is the *Marsh* test. *Marsh v. Chambers*, 463 U.S. 783 (1983). In *Marsh*, the court allowed the practice of beginning a legislative session with prayer to stand based on its historical status. *Id.* at 786. The reasoning in *Marsh* has not generated any following among Supreme Court justices.

The most recent Establishment Clause approach is the coercion test found in *Allegheny v. ACLU*, 492 U.S. 573, 659-62 (1989) (plurality opinion). Essentially, under this test the state may not coerce anyone to support or participate in any religion or give direct benefits to a religion so as to create an established religion. *Id.* at 659.

Free Exercise Clause jurisprudence is equally awkward. See *Underkuffler-Freund*, *supra* note 20, at 851-58. Early tests differentiated between religious beliefs and religious practices. See *Braunfeld v. Brown*, 366 U.S. 599, 603-05 (1961); *Cantwell v. Connecticut*, 310 U.S. 296, 304-05 (1940). Religious beliefs are absolutely protected, while religious actions are only protected if they are (i) required by a central religious belief, (ii) are substantially burdened by state action, and (iii) do not outweigh a compelling governmental interest. See *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989); *Thomas v. Review Bd.*, 450 U.S. 707, 717-19 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972); see also *Underkuffler-Freund*, *supra* note 20, at 851. Over the years, the test has essentially collapsed so that the third prong is solely determinative of the constitutionality of the act. See *id.* at 853. Virtually any state action can and will be found compelling under this test. See *id.* at 854-56; see also *Lyng v. Northwest Indian Cemetery Protective Assoc.*, 485 U.S. 439, 450-51 (1988); *Employment Div. v. Smith*, 494 U.S. 872, 888-90 (1990); *Sullivan*, *supra* note 12, at 216-17. Legislative discontent with the outcome of *Smith* led to the passage of the Religious Freedom Restoration Act. See 42 U.S.C. §§ 2000bb-2000bb-4 (Supp. 1993); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 438 (1994).

B. *An Overview of Irish History*

In order to properly compare Irish and American approaches to law and religion, one must understand something of the Irish history and people. Unlike the United States, Ireland is an ancient land whose history predates Christianity.⁸² Politically, the native Irish were divided into individual kingdoms throughout the first millennium,⁸³ which allowed the Normans to invade in the twelfth century, a move which only increased the political heterogeneity of the island.⁸⁴ However, Christianity, which had long been a part of the political, legal, and social atmosphere of Ireland,⁸⁵ provided a unifying effect in spite of this political fragmentation.⁸⁶ Although the native Irish made various attempts to expel the invaders and unite the island under local rule, they were unsuccessful, and Britain has remained a force in Irish government until the present day, though now limited to Northern Ireland.⁸⁷

Critical to an understanding of the nation is an understanding of government policy toward the faith of the people.⁸⁸ In fact, religion can be said to be the single most important element of Irish history because it often dictated official policies regarding both penal and property law. For years, religion was considered an important but uneventful part of

⁸² See F.J. Byrne, *Early Irish Society*, in *THE COURSE OF IRISH HISTORY* 43, 43 (T.W. Moody & F.X. Martin eds., 1967); Donnchadh Ó Corráin, *Prehistoric and Early Christian Ireland*, in *THE OXFORD HISTORY OF IRELAND* 1, 1 (R.F. Foster ed., 1989).

⁸³ See Brian Ó Cuív, *Ireland in the Eleventh and Twelfth Centuries*, in *THE COURSE OF IRISH HISTORY*, *supra* note 82, at 107, 113. Subsequent battles over the high kingship further divided the country. See *id.* at 121.

⁸⁴ See F.X. Martin, *The Normans: Arrival and Settlement*, in *THE COURSE OF IRISH HISTORY*, *supra* note 82, at 123, 143. One commentator noted that it was the partial conquest of Ireland that has led to its present-day problems. See *id.*

⁸⁵ See Tomás Cardinal Ó Fiaich, *The Beginnings of Christianity (5th and 6th Centuries)*, in *THE COURSE OF IRISH HISTORY*, *supra* note 82, at 61, 61. Although the Christian missionary, St. Patrick, certainly had a tremendous influence on converting the Irish, Christianity in Ireland pre-dates his arrival, and indeed goes back to the fifth century A.D. See *id.* at 61-64.

⁸⁶ See Byrne, *supra* note 82, at 59-60; Cuív, *supra* note 83, at 113.

⁸⁷ See Katherine Simms, *The Norman Invasion and the Gaelic Recovery*, in *THE OXFORD HISTORY OF IRELAND*, *supra* note 82, at 44, 67.

⁸⁸ The struggle over land and religion came to a peak in the sixteenth century, when the rise of nationalism and Protestantism led King Henry VIII to initiate an aggressive policy of imperial expansion into Ireland. See G.A. Hayes-McCoy, *The Tudor Conquest*, in *THE COURSE OF IRISH HISTORY*, *supra* note 82, at 174, 174-75; see also Nicholas Canny, *Early Modern Ireland c. 1500-1700*, in *THE OXFORD HISTORY OF IRELAND*, *supra* note 82, at 88, 103.

Irish life. For example, Ireland remained staunchly Catholic throughout the period of the Continental Reformation. However, trouble began when Protestantism was brought to the island through the policies of Henry VIII and his immediate successors.⁸⁹ At first, Protestantization took the shape of the declaration of the English monarch as head of the Church of Ireland and the closure of the Roman Catholic monasteries.⁹⁰ Britain then attempted to convert the Irish through legislation, but those efforts also failed.⁹¹ The only method that made any impact on the demographic makeup of the island was the policy of plantation, *i.e.*, the dispossession of Catholic landholders and the granting of those lands to Protestant English colonists.⁹² The policy of plantation in the north during the early 1600s changed the religious and social aspects of Ulster so radically that differences remain to this day.⁹³ Political conflict in Ireland became religiously charged early on, as Protestantism became associated with the English conquerors and the ruling classes, while Catholicism became tinged with nationalistic aspirations.⁹⁴

Catholics in Ireland were plagued for the next several hundred years by a number of discriminatory laws that favored Protestants over Catholics.⁹⁵ Over the years, the vicissitudes of politics and governments changed, but eventually barriers to Catholic participation in commerce and

⁸⁹ See Hayes-McCoy, *supra* note 88, at 180-81 (noting that Continental Protestantism had few followers in Ireland at the time of Henry VIII's break with Rome, but English domestic policy required religious conformity within all of Britain). Henry and his daughter Elizabeth I were the most successful of the Tudors in implementing the new Protestantism, but even they were unable to create widespread religious conformity. See *id.* at 181-83.

⁹⁰ See *id.* at 180.

⁹¹ See *id.* at 180-81.

⁹² See *id.* at 183.

⁹³ See RICHARD ROSE, *GOVERNING WITHOUT CONSENSUS: AN IRISH PERSPECTIVE* 247 (1971); see also Aidan Clarke, *The Colonisation of Ulster and the Rebellion of 1641*, in *THE COURSE OF IRISH HISTORY*, *supra* note 82, at 189, 190-93.

⁹⁴ See Hayes-McCoy, *supra* note 88, at 181; see also Clarke, *supra* note 93, at 194 (recognizing the existence of loyalist Catholics in Ireland).

⁹⁵ See, *e.g.*, Maureen Wall, *The Age of the Penal Laws*, in *THE COURSE OF IRISH HISTORY*, *supra* note 82, at 217, 218-19, 231 (noting how the first relaxation in discriminatory laws eventually led to agitation for an Irish Free State). However, the sporadic enforcement of the anti-Catholic laws may have contributed to the continued existence of the faith, while simultaneously bolstering anti-English fervor. See *id.* at 218. It was also unusual that the discriminated-against religious sect constituted a majority of the population. See *id.*

government were swept away.⁹⁶ However, it was the combined energies of religion and nationalism that brought about an independent Ireland.⁹⁷

On December 6, 1921, after years of both political and military agitation, the south of Ireland was granted dominion status within the British empire, and the new Irish Free State was given self-governance of its internal affairs.⁹⁸ In this way, Ireland is similar to the United States in that both gained independence from Britain after somewhat violent revolution. Interestingly, the 1922 Constitution was less religious and more nonsectarian than the current constitution. For example, Article 8 of the 1922 Constitution prohibited the direct or indirect endowment of any religion, any restrictions on the free exercise of religion, and preferences or discrimination on account of religion.⁹⁹ There were no other references to religion in the 1922 Constitution.¹⁰⁰ However, the reality was that the acts of the legislature reflected the overwhelmingly Catholic perspective of the electorate (approximately ninety percent of the population was

⁹⁶ See, e.g., R.B. McDowell, *The Protestant Nation*, in *THE COURSE OF IRISH HISTORY*, *supra* note 82, at 232, 241.

⁹⁷ See David Fitzpatrick, *Ireland Since 1870*, in *THE OXFORD HISTORY OF IRELAND*, *supra* note 82, at 174, 182; G.W. Hogan, *Law and Religion: Church-State Relations in Ireland From Independence to the Present Day*, 35 *AM. J. COMP. L.* 47, 55 (1987); Patrick Lynch, *The Irish Free State and the Republic of Ireland*, in *THE COURSE OF IRISH HISTORY*, *supra* note 82, at 324, 331; Donald McCartney, *From Parnell to Pearse*, in *THE COURSE OF IRISH HISTORY*, *supra* note 82, at 294, 311-12.

⁹⁸ See Lynch, *supra* note 97, at 326. The Irish Free State implemented its first Constitution in 1922.

The six counties which now comprise Northern Ireland were retained as a part of Britain. Historically, the six counties of Ulster were politically, religiously, and in almost all other ways demographically different than the rest of Ireland. See Clarke, *supra* note 93, at 192, 203. However, many of those in the South have adopted an ideology that perceives all persons living in Ireland to be part of the Irish nation, regardless of their religious background. See Hogan, *supra* note 97, at 48. Northern Unionists do not share this belief, and with good reason, since a number of actions taken by the Irish government reinforce the Catholic-Gaelic aspects of the nation at the cost of shared Catholic-Protestant traits. See *id.* The effect is similar to that found in Israel, where the concerns and values of Arab citizens are marginalized to emphasize the Jewish character of the state. See Erik Cohen, *Citizenship, Nationality and Religion in Israel and Thailand*, in *THE ISRAELI STATE AND SOCIETY: BOUNDARIES AND FRONTIERS* 66, 70-74 (Baruch Kimmerling ed., 1989); see also Christopher A. Callanan, Note, *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, 97-98 (1995).

⁹⁹ See Hogan, *supra* note 97, at 50.

¹⁰⁰ See *id.* In contrast, the *Bunreacht na hÉireann* contains a number of explicit references to Christianity and Catholicism.

Catholic) by upholding clerical perspectives on issues of law and morality.¹⁰¹

In 1931, the British empire became an association of self-governing states, which increased Ireland's claims of sovereignty. In 1937, Ireland adopted its present constitution, called the *Bunreacht na hÉireann*, which declared Ireland to be a "sovereign, independent, democratic state."¹⁰² Although this instrument may or may not have taken Ireland out of the commonwealth, Ireland ceased acting as a commonwealth country, and in 1949, the British government officially recognized the Republic of Ireland (hereinafter "Ireland") as an independent nation.¹⁰³

In 1973, Ireland became a member of the European Community (now the European Union).¹⁰⁴ Some feel that the entry into the European Union has had a liberalizing effect on the population and government of the staunchly and conservatively Catholic state.¹⁰⁵ Others note, how-

¹⁰¹ See *id.*

¹⁰² IR. CONST. art. 5. This document was unusual in its explicit acknowledgement of natural law as its foundation. JAMES CASEY, *CONSTITUTIONAL LAW IN IRELAND* vii (1992). The structure of government is similar to that of the United States and of Britain — a division of powers between judicial, legislative, and executive branches of government, where the courts are given the critical role of judicial review of the acts of the other two bodies. See *id.* at 24. Although Ireland has a president, it is a non-political position that is more similar to the role of the monarch in Britain than that of the American president. See ARDAGH, *supra* note 17, at 56-59. The true head of the state in Ireland, as in Britain, is the prime minister.

¹⁰³ See Lynch, *supra* note 97, at 331. Britain retained control and jurisdiction over Northern Ireland.

¹⁰⁴ See J.H. Whyte, *Ireland, 1966-82*, in *THE COURSE OF IRISH HISTORY*, *supra* note 82, at 359, 359. The Constitution Act of 1972, which formalized Ireland's entry into the European Community, included several other amendments, the most important of which revoked 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." CASEY, *supra* note 102, at 23 (quoting IR. CONST. art. 44.1(2) (repealed 1972)). The removal of this provision was required prior to Ireland's entry into the European Community. See *id.*

¹⁰⁵ See Colm Tóibín, *Letter From Ireland: Dublin's Epiphany*, *NEW YORKER*, Apr. 3, 1995, at 45, 48. Ireland is similar to the United States in its struggle to find a religio-political compromise between the demands of a liberal federalist superstructure and the demands of a more conservative local government. In the United States, defederalization is returning power to local bodies, while in the European Union there is a move towards greater unification in many areas. See also Asbjørn Eide, *Minority Situations: In Search of Peaceful and Constructive Solutions*, 66 *NOTRE DAME L. REV.* 1311, 1349 (1991) (referring to Professor Gabriel Moens' statement that the creation of super-national legal systems like the European Union is the best way to protect minorities). The trend in Europe could be analogized to the shift made in the United States

ever, that the Maastricht Treaty, which Ireland signed in 1992, may increase Ireland's ability to legislate in matters of domestic concern.¹⁰⁶

One of the most pressing political concerns now facing Ireland is the possibility of making Northern Ireland part of the Republic. The reunification of Ireland has been a goal of many Irish Catholics for over seventy years and is reflected by Articles 2 and 3 of the constitution which state that "the national territory consists of the whole island" and define the jurisdictional reach of the laws of Ireland "pending the reintegration of the national territory."¹⁰⁷ Both Britain and the Protestant residents of Ulster have resisted unification for years, citing the possibility of discrimination against Protestants under Catholic rule.¹⁰⁸ However, historic negotiations between Britain and Sinn Fein, the Irish nationalist party, have taken place throughout 1995 and 1996, though no agreement is yet in sight.

Today, the vast majority of Irish citizens are Roman Catholics.¹⁰⁹ Although Catholicism no longer holds a "special position" in the constitution or officially in the common law, its presence is nevertheless felt throughout the law and culture of the Republic. This is particularly true in rural areas, which, like rural areas in the United States, are more conservative than urban areas.¹¹⁰ However, the future of the Catholic church in Irish politics remains to be seen, as Ireland struggles not only with the conflicting requirements of the European Union, but also with

towards greater centralization after the Articles of Confederation failed to create a workable union.

¹⁰⁶ See IR. CONST. amend. 11; Paul W. Butler & David L. Gregory, *A Not So Distant Mirror: Federalism and the Role of Natural Law in the United States, the Republic of Ireland, and the European Community*, 25 VAND. J. TRANSNAT'L L. 429, 429, 444 (1992).

¹⁰⁷ IR. CONST. arts. 2-3.

¹⁰⁸ See J.L. McCracken, *Northern Ireland, 1921-66*, in THE COURSE OF IRISH HISTORY, *supra* note 82, at 313, 313.

¹⁰⁹ See Whyte, *supra* note 104, at 342, 354. The author of a 1981 sociological survey noted that "The first impression . . . is that Ireland remains an outstandingly religious country . . . Irish people [are] far more inclined to religion than those of other countries in Europe." CASEY, *supra* note 102, at 553 (quoting Professor Michael Fogarty). In this regard, Ireland is very much like the United States, which has always been described as a very devout nation. Although the population of Northern Ireland is predominantly Protestant, the number of Catholics there is rising. See Whyte, *supra* note 104, at 342-43, 354.

¹¹⁰ See Hogan, *supra* note 97, *passim*. In 1972, the Supreme Court ruled that the Constitutional provision regarding the "special position" of the Catholic church had no juridical significance. See *Quinn's Supermarket Ltd. v. Attorney General* [1972] 1 I.R. 1, 23-24; see also CASEY, *supra* note 102, at 556.

the potential reunification with the Protestant North.¹¹¹ As Ireland faces these important issues, it must reconsider its traditional treatment of law and religion. Like the United States, Ireland is undergoing a religio-legal crisis, but in reverse. Whereas the United States is reconsidering the secular nature of its legal system, Ireland is facing challenges to the religious nature of its legal system. Each nation can learn from the other as it tries to find a solution to a very difficult problem.

III. THE CONSTITUTIONS COMPARED

A. *Sovereignty and Constitutional Interpretation*

The first area of comparative analysis concerns national sovereignty and general constitutional interpretation. It is important to identify the theoretical bases that support a nation's concept of sovereignty because such bases will invariably influence the boundaries of judicial review. For example, Iran considers its national sovereignty to be directly derived from Allah, and relates that belief to its role as an Islamic state.¹¹² It is, therefore, not surprising that the Iranian Constitution requires that all laws, and implicitly the judicial interpretation of those laws, be "in conformity with Islamic criteria."¹¹³

Similarly, the parameters of general constitutional principles, including those of judicial interpretation, are important to any subsequent analysis of specific constitutional provisions. Without understanding the larger legal infrastructure, it is impossible to understand the individual laws and judicial opinions.¹¹⁴

¹¹¹ See generally Thomas W. Lippman, *British, IRA Officials Confer Here: U.S.-Sponsored Meeting Provides Cautious Step Toward Peace*, WASH. POST, May 25, 1995, at A27 (stating the aim of the conference is to promote Northern Ireland as an economic gateway to the European market). Although some commentators believe that the influence of the Catholic church may be waning, see Whyte, *supra* note 104, at 354, others believe that the church's clout remains high, see CASEY, *supra* note 102, at 555-56.

¹¹² See IRAN CONST. preamble, arts. 1-2, 56, cited in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 45.

¹¹³ See, e.g., *id.* arts. 3, 20, 28.

¹¹⁴ Because both Ireland and the United States are common law jurisdictions, judicial decisions are as important as legislatively enacted laws. However, although it was constitutionally permitted since the creation of the new state, American-style judicial review did not really begin to flourish in Ireland until the 1960s. See CASEY, *supra* note 102, at 24.

1. Ireland

Sovereignty, according to Article 6 of the Irish Constitution, is derived “under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy.”¹¹⁵ Some commentators have remarked that Irish constitutional law, as embodied in the Constitution and interpreted by the judiciary, is a leading example of natural law, wherein the purpose of the state is to “move society closer to God’s eternal law through the definition of justice.”¹¹⁶ This approach is consistent with the approach first outlined by Thomas Aquinas in the thirteenth century.¹¹⁷ Although Ireland is considered nominally secular,¹¹⁸ it encompasses a strongly homogenous religious population that does not necessarily support an official separation of church and state.¹¹⁹ Only recently has Ireland distanced itself from an explicit affiliation with the Roman Catholic church.¹²⁰

If the Christian nature of Ireland is not immediately apparent in the nation’s culture, it is in the Constitution, which begins:

In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,

¹¹⁵ IR. CONST. art. 6(1).

¹¹⁶ Butler & Gregory, *supra* note 106, at 446.

¹¹⁷ See *id.*; see also Aquinas, *supra* note 7, at 46-48. The Thomistic approach to law has traditionally been favored by the Catholic church. See BARRIE RUTH STRAUSS, *THE CATHOLIC CHURCH: A CONCISE HISTORY* 79 (1992). Some note that the emergence of a similar approach by the conservative activists of the U.S. Supreme Court. See Butler & Gregory, *supra* note 106, at 436-37. However, the current Bishop of Limerick sees the recent religio-political debate as a battle between the views of Thomas Aquinas and John Stuart Mill. See ARDAGH, *supra* note 17, at 173.

¹¹⁸ See IR. CONST. art. 44(2) (prohibiting the “endowment” of religion).

¹¹⁹ See Butler & Gregory, *supra* note 106, at 432 (describing Irish church-state relations as a “tradition of synergy, rather than separation”); see also CASEY, *supra* note 102, at 555 (quoting Professor Whyte as saying, “[w]hile it would be an exaggeration to call Ireland a theocratic state, the [Catholic] hierarchy had immense influence”).

¹²⁰ See Hogan, *supra* note 97, at 66-67. At one point during the drafting of the *Bunreacht na hÉireann*, some made the suggestion that the Catholic church should receive exclusive recognition in the Constitution. See *id.* at 55. However, the actual document also recognized the rights of other religions in Ireland, including that of “the Jewish congregations,” which was particularly progressive in the Europe of 1937. ARDAGH, *supra* note 17, at 29; see also CASEY, *supra* note 102, at 23 n.80 (quoting original language).

We, the people of Eire,
 Humbly acknowledging all our obligations to our Divine Lord,
 Jesus Christ, Who sustained our fathers through centuries of trial, . . .
 Do hereby adopt, enact, and give to ourselves this Constitution.¹²¹

This recognition of the Christian character of the state, while not limiting the benefits of the state to persons who adhere to Christian beliefs,¹²² demonstrates the intent of the authors of the Constitution to incorporate religion into the legal system.¹²³ One of the leading cases on privacy rights, *Norris v. Attorney General*, notes that:

The preamble to the Constitution proudly asserts the existence of God in the Most Holy Trinity and recites that the people of Ireland humbly acknowledge their obligation to 'our Divine Lord Jesus Christ.' It cannot be doubted that a people . . . were proclaiming a deep religious conviction and faith and an intention to adopt a Constitution consistent with that conviction and faith and with Christian beliefs.¹²⁴

However, the dissent was not swayed by the argument that the Christian nature of the nation should be dispositive.¹²⁵ The dissent also objected to the majority's use of historical analysis in constitutional interpretation.¹²⁶

In accordance with the framers' intent, both the legislature and the judiciary have drawn upon the Catholic heritage of the nation in designing and interpreting the law. For example, in 1965 the Court referred to the 1962 Encyclical Letter of Pope John Paul XXIII in construing Article 40 of the Constitution.¹²⁷ In addition, the Constitution cites God as the ultimate source of governmental legitimacy, echoing Catholic political dogma as defined by St. Augustine.¹²⁸ Although some classical liberals

¹²¹ IR. CONST. preamble. The religious tone of the preamble is more pronounced in the Bunreacht na hÉireann than in the 1922 Constitution. See CASEY, *supra* note 102, at 21.

¹²² See *Quinn's Supermarket Ltd. v. Attorney General* [1972] 1 I.R. 1, 23 (Walsh, J.); see also CASEY, *supra* note 102, at 556.

¹²³ See CASEY, *supra* note 102, at 29, 556.

¹²⁴ *Norris v. Attorney General* [1984] 1 I.R. 36, 64 (O'Higgins, C.J.); see also CASEY, *supra* note 102, at 556.

¹²⁵ See [1984] 1 I.R. at 72 (Henchy, J., dissenting); Hogan, *supra* note 97, at 80.

¹²⁶ [1984] 1 I.R. at 96 (McCarthy, J., dissenting); Hogan, *supra* note 97, at 79, 79 n.84 (noting that the historical approach had earlier been rejected by the Supreme Court); cf. Flaherty, *supra* note 44, at 524-25 (noting a significant use of historical analysis in American constitutional law).

¹²⁷ See *Ryan v. Attorney General* [1965] 1 I.R. 294, 314; Butler & Gregory, *supra* note 106, at 453.

¹²⁸ See IR. CONST. art. 6(1); see also Butler & Gregory, *supra* note 106, at 445

might be uncomfortable with this type of decision-making, such opinions could be constitutionally defended on the grounds that Ireland has the right to develop its legal system "in accordance with its own genius and tradition."¹²⁹

Ireland also refers implicitly to the Catholic culture in its conditional granting of certain rights. For example, citizens may freely express their opinions, but no one may do so to "undermine public order or morality."¹³⁰ Putting conditions on rights that should be virtually absolute is a dangerous business. Many Middle Eastern states have included similar provisions in their constitutions, i.e., requiring rights to be exercised in conformity with Islamic principles, which has resulted in an oppressive political atmosphere that ensures the continuation of the party in power because any dissent can be interpreted as "undermining public order or morality."¹³¹ As long as "public order and morality" require residents to conform to the status quo, change is virtually impossible.¹³²

Other constitutional provisions help support the existing religio-political structure. For example, the Constitution contains prohibitions on blasphemy¹³³ and the publication of "indecent matter."¹³⁴ As is the case in the Middle East, these limitations on speech can be used to

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¹²⁹ IR. CONST. art. 1.

¹³⁰ *Id.* art. 40(6)(1)(i).

¹³¹ Ann Elizabeth Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash With a Construct?*, 15 MICH. J. INT'L L. 307, 317, 341-42 (1994).

¹³² Professor Hogan of Trinity College, Dublin, has asked whether, "if the personal rights contained in Article 40 are those which follow from the Christian and democratic nature of the State, does it follow that conduct which is at variance with Christian teaching cannot fall within the confines of Article 40, and thus be protected against legislative encroachment?" Hogan, *supra* note 97, at 65 (discussing *Ryan v. Attorney General* [1965] 1 I.R. 294, 313-14 (Kenny, J.)). He believed the issue was still in the process of resolution. However, the embeddedness of the Catholic hierarchy in the political and social order virtually guarantees an organized and powerful resistance to any change toward secularism or liberalism.

¹³³ See IR. CONST. art. 40(6)(1)(i). The North American colonies also had fundamental laws prohibiting blasphemy, but those laws have for the most part disappeared. See Berman, *supra* note 40, at 780-81 (citing the conviction for blasphemy in New York in 1811 and in Pennsylvania in 1822).

¹³⁴ IR. CONST. art. 40(6)(1)(i); see also *Roth v. United States*, 354 U.S. 476, 485 (1957) (holding that obscenity is not a constitutionally protected form of speech or press); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (noting that "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words" are not protected by the Constitution); cf. *Miller v. California*, 413 U.S. 15, 23 (1973) (noting that "obscene material is unprotected by the First Amendment").

enforce an ever-increasing code of religious morality. Although Ireland is currently a more open society than most Middle Eastern nations, perhaps due to the liberalizing effects of membership in the European Union, these restrictions were used quite frequently in the early days of the nation to censor books and other informational materials.¹³⁵ Censorship, though declining, still exists in Ireland, and has most recently been aimed at materials regarding the availability of abortion in England.¹³⁶

The general importance of religion in Irish life is found in the provisions of Article 44 of the Constitution, where “[t]he State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion.”¹³⁷ Although freedom of religion is guaranteed under this provision, it is again made subject to “public order and morality,” thus casting doubt on the extent of the freedom.¹³⁸ However, the Constitution prohibits the endowment of any particular religion,¹³⁹ and the Supreme Court has held that the state may not discriminate against or in favor of any religion.¹⁴⁰ Nevertheless, these protections seem somewhat disingenuous in light of the religious homogeneity of the nation and the de facto

¹³⁵ See Hogan, *supra* note 97, at 63-65; Lynch, *supra* note 97, at 338-39; Whyte, *supra* note 104, at 354. Leaving the definition of “indecency” open to subjective interpretation allows for massive abuse should a government bent on censorship come into power.¹³⁵

¹³⁶ See James F. Clarity, *Ireland's Senate Debates Information on Abortion*, N.Y. TIMES, Mar. 13, 1995, at A2; see also Tóibín, *supra* note 105, at 53. Literature regarding other forms of birth control was banned until 1973. See *id.* at 48. The Censorship Board still exists and can ban books for up to twelve years. See ARDAGH, *supra* note 17, at 239-40. Although these measures may seem archaic to some, the abortion services “gag order” imposed by Presidents Reagan and Bush during the 1980s and early 1990s could be considered a similar form of censorship, in that federally supported health care providers were prohibited from providing patients with information about any facility that performed abortions, even if that facility also offered pre-natal care.

¹³⁷ IR. CONST. art. 44(1).

¹³⁸ *Id.* art. 44(2)(1). It is particularly disturbing that a provision guaranteeing freedom of religion would restrict that freedom on the grounds of morality. Such language could be used to legitimize any eventual limitation of non-majority religious practices.

¹³⁹ *Id.* art. 44(2).

¹⁴⁰ See *Quinn's Supermarket Ltd. v. Attorney General* [1972] 1 I.R. 1; see also Hogan, *supra* note 97, at 70-71. The term “religion” apparently includes atheism as well. See *Mulloy v. Minister for Education* [1975] 1 I.R. 88 (construing Article 44(2)(3)); see also CASEY, *supra* note 102, at 568. However, the Constitution mandates a generalized religious test for certain high public officials. See IR. CONST. arts. 12(8), 34(5)(1) (requiring the president and members of the judiciary to take an oath demonstrating religious beliefs of any kind).

influence exerted by the Catholic hierarchy over both the government and the people. However, as will be seen in the discussion on education, the state has made an effort to support both Catholicism and Protestantism with some measure of equity. In addition, the Catholic church's slowly waning power may bode well for minority groups wishing to increase legal protection of their rights under international and European Union law.

2. The United States

Although the American Declaration of Independence is not part of the U.S. Constitution, it has been used both to justify and prohibit the inclusion of Christianity in American government. For example, religious activists point to the line basing the creation of the new sovereign nation on "the Laws of Nature and of Nature's God."¹⁴¹ However, although this phrase may be deist, it is only marginally so and is not in any way Christian. The other well-known reference to a transcendent being comes in the second paragraph of the document, wherein the drafters note that "all Men are created equal, that they are endowed by their Creator with certain unalienable Rights"¹⁴² Again, this phrase, though deist, does not require the conclusion that the founders intended this to be a Christian nation in the same way that the Irish Constitution's founders did. In fact, the express declaration regarding the source of sovereignty is secular, not religious, stating "Governments are instituted among Men, deriving their just Powers from the Consent of the Governed"¹⁴³ This recognition of sovereignty, like the Constitution's "We the People,"¹⁴⁴ demonstrates an intent that the political legitimacy of the nation be based upon a secular foundation.¹⁴⁵

Within the Constitution itself, there are very few references to religion or God.¹⁴⁶ Notably, the Constitution forbids the use of religious

¹⁴¹ THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

¹⁴² *Id.* para. 2. The only other references to a supreme being are found in the final paragraph, where the representatives of the new nation appeal to "the Supreme Judge of the World for the rectitude of our Intentions," and "with a firm reliance on the protection of divine Providence," pledge their support for the document. *Id.* at para. 32.

¹⁴³ *Id.* para. 2.

¹⁴⁴ U.S. CONST. preamble.

¹⁴⁵ See Richards, *supra* note 2, at 36; see also Flaherty, *supra* note 44, at 546-49 (discussing the tension between "liberal" and "republican" views during the founding period).

¹⁴⁶ However, in the 1950s religious activists put forth "a major effort to amend the Constitution to provide that the laws of the United States were subject to the word of God, and to the rule of God's Son Jesus Christ." CARTER, *supra* note 2, at 86.

oaths or tests for high government office.¹⁴⁷ Only in the Bill of Rights is any explicit mention of religion made, and then only fleetingly.¹⁴⁸ However, the American common law is replete with decisions discussing the meaning of the religion clauses. Decisions range from *Holy Trinity*, which recognized the "Christian nature" of the nation (though not necessarily the law),¹⁴⁹ to *Everson v. Board of Education*, which prohibited the government from "aid[ing] one religion, aid[ing] all religions, or prefer[ing] one religion over another."¹⁵⁰ Because religion is not to be part of American legal culture, the underlying philosophy of judicial interpretation is to protect the free exercise of religion while simultaneously prohibiting its establishment. This dual function has led some commentators to remark on the "schizophrenic" nature of American jurisprudence in this area.¹⁵¹

B. Personal Rights

1. Ireland

The area that is most reflective of religious values in a society or legal system is that of personal rights and related issues (often called "family law"). Ireland is no exception to the rule. The Irish Constitution expressly states that:

The State recognizes the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.¹⁵²

Obviously, this effort failed. Note, however, the similarities between the construction of the proposed amendment and the constitutional law of Ireland.

¹⁴⁷ U.S. CONST. arts. II, §9, VI, § 3.

¹⁴⁸ *Id.* amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

¹⁴⁹ *Holy Trinity Church v. United States*, 143 U.S. 457, 471 (1892) (Brewer, J.); accord *United States v. Macintosh*, 283 U.S. 605, 625 (1931) (noting that "[w]e are a Christian People").

¹⁵⁰ *Everson v. Board of Educ.*, 330 U.S. 7, 15 (1947); see *supra* note 81 and accompanying text.

¹⁵¹ See generally *Developments*, *supra* note 47, at 1631-32; Underkuffler-Freund, *supra* note 20, at 838; see also *Walz v. Tax Comm'n*, 397 U.S. 664, 668-69 (1970) (noting that the two religion clauses "are cast in absolute terms, and either, . . . if expanded to a logical extreme, would tend to clash with the other").

¹⁵² IR. CONST. art. 41(1)(1).

The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.¹⁵³

The primacy of the family in the Irish Constitution is consistent with Catholic dogma, which states that “[t]he family is the *original cell of social life*.”¹⁵⁴ The term “family” has been held by the Supreme Court to mean a family based on marriage.¹⁵⁵ Under this construction, unmarried mothers are not of the same “family” as their children,¹⁵⁶ which is again consistent with Catholic belief.¹⁵⁷

Irish women are predominantly defined in the Constitution by their roles as mothers and homemakers. Two different provisions emphasize women’s roles as such. In the first, the State affirmatively “recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.”¹⁵⁸ The second is more protective in nature, noting that the government shall “endeavor to ensure that mothers shall not be obliged by economic necessity to engage in labor to the neglect of their duties in the home.”¹⁵⁹ Although there are no *de jure* prohibitions of women working outside the home, and there are constitutional guarantees that “[a]ll citizens shall, as human persons, be held equal before the law,”¹⁶⁰ it is still possible that women will be discriminated against in the workforce and under legal sanction. First, the provision granting equality of legal status notes that “[t]his shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, both physical and moral, and of social function.”¹⁶¹ When women’s primary constitutional role is that of mother and homemaker, it is only a small step to finding that working outside the home will conflict with women’s “social function.” Second, the state,

¹⁵³ *Id.* art. 41(1)(2).

¹⁵⁴ CATECHISM OF THE CATHOLIC CHURCH ¶ 2207 (First Image Books ed., 1995). “The political community has a duty to honor the family, to assist it, and to ensure . . . especially the freedom to establish a family, have children, and bring them up in keeping with the family’s own moral and religious convictions” *Id.* ¶ 2211.

¹⁵⁵ *Murray v. Attorney General* [1985] 1 I.R. 532; *State (Nicolaou) v. An Bord Uchtála* [1966] 1 I.R. 567; see also *CASEY*, *supra* note 102, at 494.

¹⁵⁶ See *G. v. An Bord Uchtála* [1980] 1 I.R. 32, 554-55 (O’Higgins, C.J., dissenting) (*in dicta*); *CASEY*, *supra* note 102, at 494.

¹⁵⁷ See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 154, ¶ 2202.

¹⁵⁸ IR. CONST. art. 41(2)(1); see John Tagliabue, *John Paul Reaches Out in Holy Rites — Features Women and Non-Catholics*, N.Y. TIMES, Apr. 16, 1995, at A10.

¹⁵⁹ IR. CONST. art. 41(2)(2).

¹⁶⁰ *Id.* art. 40(1).

¹⁶¹ *Id.*

through its health and safety powers, may regulate women's careers to the extent that no one shall be "forced by economic necessity to enter avocations unsuited to their sex, age or strength."¹⁶² This paternalistic attitude is very similar to that advanced by the U.S. Supreme Court in the early 1900s.¹⁶³ Although some commentators believe that the provisions limiting women's roles outside the home do not provide a foundation for legislative restrictions on women's careers,¹⁶⁴ no cases have yet come before the Supreme Court that support that assumption.¹⁶⁵

Irish women are also forbidden the right to control their own bodies. Unsurprisingly, given the Catholic majority, abortion is illegal in Ireland. The Constitution states that "the State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."¹⁶⁶ Although the Constitution acknowledges the government's duty to "defend and vindicate the personal rights of the citizen,"¹⁶⁷ those rights are limited when it comes to abortion. Because Ireland recognizes the "equal right to life of the unborn," there are very few instances where abortion is permitted.¹⁶⁸ The current test for obtaining an abortion in Ireland is "if it is established as a matter of

¹⁶² *Id.* art. 45(4)(2).

¹⁶³ See *Muller v. Oregon*, 208 U.S. 412, 421-23 (1908); see also *Bunting v. Oregon*, 243 U.S. 426 (1916); *Lochner v. New York*, 198 U.S. 45 (1905).

¹⁶⁴ See CASEY, *supra* note 102, at 522. *But cf.* ARDAGH, *supra* note 17, at 205-06 (noting recent legal obstacles to women in the work force, including a law forcing women in civil service to resign upon marriage; such law was repealed in 1977).

¹⁶⁵ The fact that the provisions remain in the Constitution indicates that they could be used to limit women's opportunities. Just because they have not yet been used in that manner does not mean they never will be. As Ireland's own history shows, once a discriminatory law is on the books, enforcement of the provision often depends on the political, social, and cultural whims of the authorities. See Wall, *supra* note 95, at 218.

¹⁶⁶ IR. CONST. art. 40(3)(3); see also Offenses Against the Person Act 1861 §§ 58-59, No. 100 (1861) (making it a crime to administer, procure drugs, or use instruments to procure an abortion); Hogan, *supra* note 97, at 75-76. Abortion has traditionally been prohibited by the Catholic church. See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 154, ¶¶ 2270-75 (dictating that life begins at conception).

¹⁶⁷ IR. CONST. art. 40(3)(1).

¹⁶⁸ There is a wealth of legal commentary on the subject of abortion in Ireland. See, e.g., David Cole, "Going to England": *Irish Abortion Law and the European Community*, 17 HASTINGS INT'L & COMP. L. REV. 113 (1993); Anne M. Hilbert, *The Irish Abortion Debate: Substantive Rights and Affecting Commerce Jurisprudential Models*, 26 VAND. J. TRANSNAT'L L. 1117 (1994); Jeffrey A. Weinstein, Comment, "An Irish Solution to An Irish Problem": *Ireland's Struggle with Abortion Law*, 10 ARIZ. J. INT'L & COMP. L. 165 (1993).

probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy."¹⁶⁹ However, the term "risk" does not require an "inevitable or immediate risk to the life of the mother."¹⁷⁰ Under this test, abortion is illegal even in cases of rape. Long-term effects regarding the health of the mother are also irrelevant.

Although it is very difficult to obtain an abortion in Ireland, women have the right to obtain abortions in other European Union Member States. The landmark case that led to the expansion of the abortion laws to the current level and inspired the passage of the Thirteenth Amendment to the Constitution prohibiting any restrictions on the freedom to travel¹⁷¹ caused an international furor when the state not only required the extradition of an Irish woman traveling abroad to obtain an abortion, but would have required her confinement in the country until she gave birth.¹⁷²

Contraception, which is also contrary to Catholic doctrine,¹⁷³ was originally prohibited in Ireland by statute.¹⁷⁴ In 1974, however, the Irish

¹⁶⁹ Attorney General v. X [1992] 1 I.R. 1 (Finlay, C.J.).

¹⁷⁰ *Id.*

¹⁷¹ See IR. CONST. amend. XIII; see also Gerard Hogan, *Ireland: Chronology 1989-1993*, in *Introduction*, IR. CONST., cited in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 45, at vii-viii. The Fourteenth Amendment gave women the right to obtain information about abortions in other countries, something which had been in doubt for several years. See IR. CONST. amend. XIV.

¹⁷² See Attorney General v. X [1992] 1 I.R. 1. In the case at bar, the defendant, a fourteen year old girl allegedly raped by the father of a friend, threatened suicide if she was not allowed to obtain an abortion. The defendant was granted permission to obtain an abortion, but miscarried prior to medical intervention. See Weinstein, *supra* note 168, at 199.

¹⁷³ See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 154, ¶¶ 2371 (noting that the only legitimate means of birth control in Catholic dogma is the "rhythm" method). The Catholic church has recognized the power of the state to provide "objective and respectful information" regarding procreation, but does not authorize "authoritarian, coercive measures" or "regulation by means contrary to the moral law." *Id.* ¶ 2372. Because parents have the ultimate moral right to educate their children, see *infra*, the government's providing information about or materials for contraception could be considered "contrary to the moral law." That seems to be one of the positions taken by American parents who oppose similar measures. Presumably the Catholic church would also oppose such coercive methods as the introduction of Norplant under court order and perhaps even the withdrawal of federal funding for families with dependent children if more children are added to the family. Even in the United States, these practices are debatable.

¹⁷⁴ See Offenses Against the Person Act 1861 §§ 58-59, No. 100 (1861); see also McGee v. Attorney General [1974] 1 I.R. 284.

Supreme Court took a bold step forward and found that the Constitution, which had previously been held to embrace the concept of bodily integrity in a case not dealing with matters of procreation,¹⁷⁵ also encompassed a right to marital privacy similar to that found in the U. S. Constitution under *Griswold v. Connecticut*.¹⁷⁶ Although the Court in *McGee* acknowledged the Christian nature of the Irish Constitution, it noted the differing viewpoints of various religious denominations concerning contraception, and so allowed contraceptives to be imported and sold in Ireland.¹⁷⁷

As part of its respect for the family, the Irish state "pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack."¹⁷⁸ For many years, divorce was constitutionally prohibited, but in 1995, in a very close referendum, the Irish people voted to permit divorce. The precise law has yet to be drafted.¹⁷⁹

In many countries, including both the United States and Ireland, laws criminalizing homosexual activity have been justified as protecting the

¹⁷⁵ *Ryan v. Attorney General* [1965] 1 I.R. 294.

¹⁷⁶ *McGee* [1974] 1 I.R. 284; cf. *Griswold v. Connecticut*, 381 U.S. 479 (1965); see also *Butler & Gregory*, *supra* note 106, at 455-56.

¹⁷⁷ *McGee* [1974] 1 I.R. at 284. Liberalization of contraceptive policy took several decades, with the final step, availability of condoms from vending machines (as opposed to through clinics and chemists' shops), coming in 1993. See *ARDAGH*, *supra* note 17, at 182-84; see also *Butler & Gregory*, *supra* note 106, at 457.

¹⁷⁸ IR. CONST. art. 41(3)(1).

¹⁷⁹ See *id.* art. 41(3)(2). Under the earlier law, annulments were recognized in Ireland. See *CASEY*, *supra* note 102, at 500-01. Both the ban on divorces and the recognition of annulments were consistent with Catholic tradition. See *CATECHISM OF THE CATHOLIC CHURCH*, *supra* note 154, ¶¶ 1629, 1644, 2384-85.

One reason for permitting divorce in Ireland was to bring Irish law into accordance with the laws of other states of the European Union, and to reverse certain social hypocrisies. For example, Irish divorce law was a tricky matter, in which not all foreign divorces and/or remarriages were considered valid. Those persons having a valid divorce under the laws of another state would sometimes be able to remarry in Ireland, but only if the decree of dissolution was valid under Irish law. See IR. CONST. art. 41(3)(3); see also *CASEY*, *supra* note 102, at 501-03. However, a foreign divorce was valid in Ireland even if it did not comply with Irish law, if one party was domiciled in the foreign state at the time of the divorce. See *Domicile and Recognition of Foreign Divorces Act 1986* § 5(1); see also *CASEY*, *supra* note 102, at 502.

Another issue was the many unofficial dissolutions of marriages that were occurring and the subsequent establishment of long-term, unmarried relationships. There was some concern on the part of the legal community about the rights of the parties involved in these unions, and the rights of the children, if any.

institution of marriage.¹⁸⁰ Initially, homosexual conduct was banned by statute in Ireland, which was found to be constitutional in 1984.¹⁸¹ A primary basis for the Irish High Court's decision was the Christian nature of the state.¹⁸² According to Chief Justice Higgins, who wrote for the majority, the state had a legitimate interest in the community's moral well-being and was entitled to protect certain values it deemed important.¹⁸³

The plaintiff, a well-respected professor at Trinity College, Dublin, took his case to the European Court of Human Rights.¹⁸⁴ The European Court ruled that Ireland had breached the European Convention of Human Rights, to which it was a party.¹⁸⁵ Finally, in July 1993, a bill was passed by the Irish Parliament (the Dáil) decriminalizing homosexuality between consenting adults aged seventeen and over.¹⁸⁶

National laws regarding the care of children are also in accordance with Catholic beliefs.¹⁸⁷ Ante-nuptial agreements, void at common law, are enforceable to permit Catholic women to enforce agreements with non-Catholic fiancés that their children will be raised as Catholics.¹⁸⁸ Both parents are responsible for the upbringing and education of their children, and only in exceptional cases will the state intervene.¹⁸⁹

2. The United States

Over the past two centuries, personal rights in American law have become increasingly secularized, meaning that religious legal traditions concerning personal status have less impact on American courts than they had previously.¹⁹⁰ For example, women have, for many years, been

¹⁸⁰ Compare *Norris v. Attorney General* [1984] 1 I.R. 36 (O'Higgins, C.J.) (noting the decriminalization of homosexuality would have an inimical effect on marriage, an institution the state was constitutionally bound to protect), with *Exchange in House on Marriage Bill*, N.Y. TIMES, May 31, 1996, at A18.

¹⁸¹ See Offenses Against the Person Act 1861 §§ 61-62, No. 100 (1861); Criminal Law Act 1885 Amendment § 11, No. 67 (1885); *Norris v. Attorney General* [1984] 1 I.R. 36; see also ARDAGH, *supra* note 17, 186-88; Hogan, *supra* note 97, at 77-82.

¹⁸² See *Norris* [1984] 1 I.R. at 64.

¹⁸³ See *id.*

¹⁸⁴ See *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) at 4 (1987).

¹⁸⁵ See *id.*; see also ARDAGH, *supra* note 17, at 187.

¹⁸⁶ See ARDAGH, *supra* note 17, at 188.

¹⁸⁷ See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 154, ¶ 2221 (asserting that it is the "duty of parents to educate their children").

¹⁸⁸ See CASEY, *supra* note 102, at 521 (citing *Re Tilson* [1951] 1 I.R. 2).

¹⁸⁹ See IR. CONST. art. 42.

¹⁹⁰ See *Developments*, *supra* note 47, at 1616 n.26.

regarded as full legal persons, are afforded the vote,¹⁹¹ and may ostensibly enter all areas of the workforce.¹⁹² This system of non-discrimination on the basis of gender conflicts with some religiously based opinions regarding women's proper roles in society,¹⁹³ but those men and women who advocate gender-specific roles are still permitted to live in accordance with their principles. If a married couple feels the woman should stay home and raise children, she may do so. The only problem arises when that couple tries to force others to live in accordance with their religious beliefs.

Women's rights in the United States are most clearly illustrated by a woman's legal right to an abortion.¹⁹⁴ When that right was recognized in 1973 in *Roe v. Wade*, religious activism was at a low ebb, and the boundaries drawn by the Supreme Court around the right were very broad.¹⁹⁵ Some state it was *Roe v. Wade* that marked the beginning of religious activism, and it is certain that abortion has been a major rallying point for the movement for over twenty years.¹⁹⁶ The effectiveness of religious activists in getting local anti-abortion legislation passed and in

¹⁹¹ See U.S. CONST. amend. XIX.

¹⁹² Recent studies, however, have shown the continued existence of a "glass ceiling" barring women from upper management. Affirmative action, which was the primary means by which women were able to break into non-traditional areas of the workforce including management, is under attack as conservatives try to dismantle it as either (i) having done its job or (ii) being discriminatory. Compare Lino A. Graglia, *Affirmative Action — Yes: Reverse Discrimination Serves No One*, ABA J., May 1995, at 40, 40, with Kathryn J. Rodgers, *Affirmative Action — No: Look at the Facts, Not Rhetoric*, ABA J., May 1995, at 41, 41. As an official requirement, it has virtually ceased to exist. See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2111 (1995) (stating that all racial classifications must be subject to strict scrutiny); *Hopwood v. Texas*, 78 F.3d 932, 935 (5th Cir. 1996) (concluding that a law school may not use racial considerations as an admissions factor); *Bras v. California Public Utilities Comm'n*, 59 F.3d 869, 874 (9th Cir. 1995) (noting that a statute prescribing goals instead of quotas is not immune from constitutional scrutiny). In addition, as the culture becomes more conservative, the model of the ideal woman is held up to be the stay-at-home wife and mother, despite the fact that very few women can afford that luxury. See Tamar Lewin, *Women Are Becoming Equal Providers*, N.Y. TIMES, May 11, 1995, at A27. Nevertheless, motherhood is often glorified in the same way as it is in Ireland, though not at a constitutional level. See Garvey, *supra* note 4, at 30.

¹⁹³ See Garvey, *supra* note 4, at 30.

¹⁹⁴ Religious activists view abortion as the murder of the unborn, and believe that Christians are called to stop such immoral actions, sometimes to the extent of disobeying the law. See Ginsburg, *supra* note 36, at 563-64.

¹⁹⁵ *Roe v. Wade*, 410 U.S. 113, 164 (1973).

¹⁹⁶ See MOEN, *supra* note 15, at 12. Some see the right-to-life movement as an entry into a larger arena of Christian politics. See Ginsburg, *supra* note 36, at 558.

successfully defending some of the state restrictions¹⁹⁷ demonstrates the power of the movement in implementing its moral agenda.¹⁹⁸

Besides abortion, religious activists focus their energies primarily on limiting the rights of homosexuals. Although there are very few states or local governments that enforce anti-gay legislation (often in the form of penal laws prohibiting sodomy or other “unnatural” acts), the Supreme Court has upheld the constitutionality of such laws.¹⁹⁹ The attitude of state and local governments toward homosexual rights varies widely

¹⁹⁷ See ANTI-DEFAMATION LEAGUE, *supra* note 2, at 49-51. Some activists, finding legal measures too slow or too unwieldy, have resorted to terrorist measures either through stalking and threats, or even outright murder. See Ginsburg, *supra* note 36, at 574. Although some commentators believe that only in abortion cases will religious activism become violent, that has not been the pattern in other countries. Rapoport, *supra* note 34, at 445-46. Violence is always possible when agitators become frustrated with the rate of political change. See Ginsburg, *supra* note 36, at 574. Also, the success of some violent measures may encourage others to use similar methods of attack. For many years, the United States has been immune to terrorist activity from internal or external sources; however, the luxury of peace seems to be coming to an end in this country. See, e.g., Dale Russakoff, *Hate Groups an International Cooperative*, WASH. POST, May 11, 1995, at A31.

¹⁹⁸ See, e.g., *Leavitt v. Jane L.*, 116 S. Ct. 2068 (1996) (possibly permitting Utah to ban all abortions, including those stemming from rape or incest, after the twentieth week of pregnancy); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992) (upholding a twenty-four hour waiting period and the necessity for parental consent prior to a minor obtaining an abortion and striking a spousal consent provision); *Webster v. Reproductive Health Services*, 492 U.S. 470 (1989) (upholding a statutory ban on the use of public employees and facilities to perform or assist with abortions, and passing on the constitutionality of a statutory preamble stating that life begins at conception); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding a statute disallowing Medicaid funds to reimburse patients for abortions, except where the mother's life is in danger). In keeping with their de-federalization attempts, abortion activists have also advocated the total return of abortion issues to the states. This situation is similar to that in Ireland where abortion is prohibited within the boundaries of the state, but is permitted in the European Union, thus creating a situation where abortions are available to those who can afford it. See Weinstein, *supra* note 168. The effect is that safe and legal abortions are available for rich women but not for poor women or teenagers. This raises certain equal protection concerns in the United States under the Fourteenth Amendment. In addition, poor women will continue to obtain abortions, as they have throughout the ages, even though those abortions are illegal, unsafe, and unregulated. Some commentators have noticed that the disdain with which some religious activists view women with unwanted pregnancies and the disinclination to help them with their problems is typical of some types of Protestant moralities, which demonstrate a surprising level of unconcern for many social justice issues. See Garvey, *supra* note 4, at 30.

¹⁹⁹ See *Bowers v. Hardwick*, 478 U.S. 186 (1986).

across the nation. For example, New York City has prohibited employees from discriminating on the basis of sexual orientation for over twenty years,²⁰⁰ while the state of Colorado recently passed a constitutional amendment barring any municipality from enacting any sort of protective legislation.²⁰¹ The city of San Francisco now grants certain legal rights to same-sex unions, and the state of Hawaii is considering doing the same in one of the more controversial issues of the day.²⁰² However, there is movement at both the state and federal level to deny universal recognition of such rights.²⁰³

Because Hawaii may soon give legal recognition to same-sex unions, many people believe that other states would be required to give full faith and credit to such unions pursuant to Article IV of the Constitution. Religious activists adamantly oppose such actions, fearing a deleterious effect on marriage and morals in general.²⁰⁴ However, unlike Ireland, the United States is not subject to a constitutional requirement to protect marriage and/or the family, nor is there any proviso prohibiting the government from passing laws that would cause "great distress" to persons disapproving of homosexual relationships.²⁰⁵ As H.L.A. Hart has argued, general distress at the perceived immorality of others is not sufficient grounds for state action.²⁰⁶

In some ways, the legal status of homosexuals in American society has never looked better. The Supreme Court recently handed down a

²⁰⁰ See N.Y. Admin. Code § 8-107.

²⁰¹ See *Romer v. Evans*, 116 S. Ct. 1620 (1996) (holding unconstitutional a state amendment prohibiting all laws intended to protect homosexual persons from discrimination).

²⁰² See Carey Goldberg, *Virtual Marriages for Same-Sex Couples*, N.Y. TIMES, Mar. 26, 1996, at A12; see also *S.F. Archdiocese Compromises on Domestic Partners Law*, WASH. POST, Feb. 8, 1997, at A3 (noting that the Hawaii Supreme Court has indicated bans against same-sex marriage are unconstitutional if the state is unable to show a compelling reason for discrimination); Cheryl Wetzstein, *Same-sex Unions Top Agendas in 18 States--Hawaii in Vanguard to Change Law*, WASH. TIMES, Jan. 13, 1997, at A4 (stating the same).

²⁰³ See David W. Dunlap, *Fearing a Toehold for Gay Marriages, Conservatives Rush to Bar Door*, N.Y. TIMES, March 6, 1996; see also Nagourney, *supra* note 42 (noting President Clinton's intent to sign a federal bill prohibiting same-sex unions).

²⁰⁴ See Adam Clyner, *Bitter Debate, Then A Vote For Rejecting Same-Sex Marriages*, N.Y. TIMES, May 31, 1996, at A18.

²⁰⁵ Cf. *Norris v. Attorney General* [1984] 1 I.R. 36, 64 (Higgins, C.J.); Hogan, *supra* note 97, at 79.

²⁰⁶ H.L.A. HART, *LAW, LIBERTY, AND MORALITY* 48-52, 79 (1968) (rebutting arguments of Sir James Fitzjames Stephen and Lord Devlin that the use of penal law to enforce morality is appropriate).

surprising six to three decision prohibiting states from enacting legislation that would bar municipalities from enacting anti-discrimination laws.²⁰⁷ Justice Scalia, in his dissent, defended the state law on the grounds that states should be able to wrestle control of the moral climate away from individual communities that are subject to the “geographic concentration and disproportionate political power of homosexuals.”²⁰⁸ Scalia made this argument despite having admitted that homosexuals comprise a minority population which is often reviled by the mainstream. In some ways this is an unusual argument for Scalia, an ardent anti-federalist and advocate for state’s rights, to be making. In contrast to his usual claim that control should be localized as much as possible, Scalia here supported centralized action on the part of a larger governmental entity, i.e., the state. Reading his dissent, however, it seems possible that his opinion may be influenced by an underlying “animus” toward homosexuality, an emotion he says may be legitimately codified in the law of Colorado.²⁰⁹ However, it was precisely this type of populist discrimination against minority groups that classical liberalism intended to eliminate.

There is a universal right to marry and divorce²¹⁰ in the United States despite the traditional restrictions placed on both by a variety of Protestant sects.²¹¹ The traditional nuclear family, though still idealized, is recognized by many to be a thing of the past as single parents, single-sex couples, and grandparents raise children.²¹² Sexual ethics overall have broken through religiously influenced mores as the availability of contraception and acceptance of alternative lifestyles increase.²¹³ Chil-

²⁰⁷ See *Romer v. Evans*, 116 S. Ct. 1620 (1996).

²⁰⁸ *Id.* at 1634 (Scalia, J., dissenting). The same argument could be made of religious activists who constitute a minority of the population but who also wield “disproportionate political power” due in part to “geographic concentration,” especially in the South.

²⁰⁹ See *id.* at 1629-37; see also *id.* at 1636-37 (justifying such laws in an attempt to preserve the majority’s view of sexual morality).

²¹⁰ See *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967); see also *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (noting that marriage and procreation are fundamental rights); Sullivan, *supra* note 12, at 205.

²¹¹ See CAPPS, *supra* note 4, at 104-05 (quoting the head of Bob Jones University as saying marriage between different races is immoral); Garvey, *supra* note 4, at 30.

²¹² See KOSMIN & LACHMAN, *supra* note 3, at 226-28.

²¹³ For example, contraception is now readily available to both married and single people. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (upholding the right to contraception as a marital right of privacy); *Eisenstadt v. Baird*, 405 U.S. 438 (1973) (extending the right of contraception to non-married people). Although the Supreme Court has not recognized a right to engage in homosexual activity, see *Bowers v. Hardwick*, 478 U.S. 186 (1986), it is generally recognized that state sodomy statutes

children, who were alternatively seen as under their father's or mother's control, are increasingly becoming able to break biological bonds and take charge of their own destiny.²¹⁴

However, it is precisely because of the private abandonment of traditional lifestyles that religious activists want to establish a public order that would enforce religious ethics.²¹⁵ The euphemistic cry of "family values" may be in reality an attempt to reinstitute biblical norms.²¹⁶

C. Education

1. Ireland

Education has always been a particularly sensitive subject in the United States. Ireland has managed to avoid many of the problems associated with public education in the United States, perhaps because of Ireland's religious homogeneity and the acceptance of religious education. For example, the Irish Constitution acknowledges that the "primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide . . . for the religious and moral, intellectual, physical and social education of their children."²¹⁷

Parents have the choice of sending their children to state, private, or home schools.²¹⁸ Primary education is state-supported,²¹⁹ as is most secondary education.²²⁰ Both are heavily denominational. Within the last

are not enforced against private individuals. However, official tolerance does not mean that the danger of enforcement has passed; in fact, the laws could be brought back into use at any time. See Goodstein, *supra* note 13.

²¹⁴ See Stacie I. Strong, *Children's Rights in Intercountry Adoption: Towards a New Goal*, 13 B.U. INT'L L. J. 163, 182-86 (1995). For an interesting article concerning the rights of children in the context of religion, see James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CALIF L. REV. 371 (1994).

²¹⁵ See Bruce, *supra* note 7, at 59.

²¹⁶ See Goodstein, *supra* note 13.

²¹⁷ IR. CONST. art. 42(1). Catholic doctrine teaches that parents have both the right and the duty to educate their children. See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 154, ¶ 2221.

²¹⁸ See IR. CONST. art. 42(2). The state may not force parents to send their children to any particular type of school, but can require the parents to ensure "a certain minimum education, moral, intellectual and social," for their children. *Id.* art. 42(3)(2). However, there is very little legislation regarding the minimum standards of education and the administration of schools; instead, the educational community relies on a variety of rules, memoranda and circulars authored by the Minister for Education. See CASEY, *supra* note 102, at 528 (quoting JOHN COOLANHAN, IRISH EDUCATION 159 (1981)).

²¹⁹ See IR. CONST. art. 42(4).

²²⁰ See CASEY, *supra* note 102, at 528 (noting that the constitutional basis for

twenty years, some efforts have been made to establish multi- or non-denominational schools, but those efforts have largely failed due to Catholic opposition.²²¹ Although most Irish schools are state-aided, they are not owned or operated by the government.²²² Instead, the state merely provides funds for communities to use in the creation of schools. Communities often rely on local churches to establish the schools. Because there are so few non-Catholics in Ireland, they are often unable to set up independent school systems, and their children, by default, attend the local Catholic schools. Although the government may be involved somewhat in the selection of teachers, the sponsoring religious organization often has a veto power.²²³ Despite the fact that the vast majority of the population is Catholic, Catholic schools are not given preferential treatment in receiving government funding.²²⁴

State control over the content of education is limited since, for the most part, the implementation of the state-set curriculum, including that of religious instruction, is deemed to be a matter of local concern.²²⁵ Withdrawal from religious instruction in schools is permitted.²²⁶ However, a state decree of 1971 requiring that "religion should permeate the whole school day" is still on the books.²²⁷ Even with the advent of AIDS, the Department of Education has no set policy on sex education, which for years was virtually nonexistent.²²⁸

2. The United States

Because both devout and non-religious parents are very concerned about the upbringing and education of their children, public schools in the United States have become the ultimate battlefield for religious activists.²²⁹ Historically, religion was a part of American public schools until

funding secondary schools is found in article 42.4).

²²¹ See Hogan, *supra* note 97, at 90; see also ARDAGH, *supra* note 17, at 212.

²²² See CASEY, *supra* note 102, at 525.

²²³ See *id.*

²²⁴ See IR. CONST. art. 44(2)(4).

²²⁵ See ARDAGH, *supra* note 17, at 184, 208.

²²⁶ See CASEY, *supra* note 102, at 569.

²²⁷ ARDAGH, *supra* note 17, at 208, 212-13 (citing proposed 1994 White Paper that would decrease the role of religion in education).

²²⁸ *Id.* at 184, 208.

²²⁹ One of the few cases allowing religious interests to influence education is *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which permits Amish parents to keep their children out of public school after the eighth grade on religious grounds. See also *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (holding that the state may not "standardize its children by forcing them to accept instruction from public teachers

1962, when the First Amendment was deemed applicable to the states and school prayer was prohibited.²³⁰ Since that time, the courts have been trying to define what is an infringement of the First Amendment in the context of education. Some cases rely on the Establishment Clause, and focus on whether the state is acting in a way that coerces students or encourages religion. Other cases review whether a student's right to the free exercise of religion has been violated.²³¹ This dichotomy also exists in non-education First Amendment cases.²³²

The courts have decided that public elementary and secondary schools are to be secular in the sense that religion per se cannot be taught.²³³ Students may attend private parochial schools, be taught at home, or be excused from certain classes to accommodate the student's and the parents' religious beliefs.²³⁴ Unlike in Ireland, religious and secular schools are not supported by the state equally, although religious schools are subsidized to the extent that non-religious educational materials (some books, supplies, etc.) may be provided by the state.²³⁵ Howev-

only"). One remaining question is whether an Amish child who wanted to attend a public high school could do so against his or her parents' wishes.

²³⁰ See *Lee v. Weisman*, 505 U.S. 577 (1992); *Engel v. Vitale*, 370 U.S. 421 (1962); *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); see also *Berman*, *supra* note 40, at 782. However, experts disagree about the extent of school prayer prior to the *Engel* decision. See ANTI-DEFAMATION LEAGUE, *supra* note 2, at 160-62.

²³¹ See generally *Wallace*, *supra* note 2, at 1204 n.103.

²³² See generally *Employment Div. v. Smith*, 494 U.S. 872 (1990); *Lyng v. Northwest Indian Cemetery Protective Assoc.*, 485 U.S. 439 (1988). The tension between the two clauses has led to the belief by some that a constitutional amendment is needed to harmonize the two lines of cases.

²³³ See *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963) (prohibiting states and school boards from requiring that passages from the Bible be read or that the Lord's Prayer be recited in class); *Kane & Blum*, *supra* note 64, at 353 n.77. Courses on comparative religions or the Bible as literature are allowed. See *id.*; *Crowley v. Smithsonian Institute*, 636 F.2d 738 (D.C. Cir 1980); *Wallace*, *supra* note 2, at 1199 n.79. Also, creationism is not to be taught as a replacement or as an alternative to evolution theory. See *Edwards v. Aguillard*, 482 U.S. 578 (1987). *But cf. CARTER*, *supra* note 2, at 166 (discussing whether the prohibition on creationism violates the First Amendment). Due to the maturity of college-age students, universities have been considered different from elementary and secondary schools in some First Amendment analyses.

²³⁴ See *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *But cf. Wallace*, *supra* note 2, at 1197 n.73.

²³⁵ See *Meek v. Pittenger*, 421 U.S. 349 (1975); *Board of Educ. v. Allen*, 392 U.S. 236 (1968); *Zorach v. Clauson*, 343 U.S. 306 (1952); *McCullum v. Board of Educ.*, 333 U.S. 203 (1948).

er, no state money may be allotted to the teaching of religion. This particular provision is currently under debate, as religious activists fight to have a system of tax credits instituted to decrease the cost of religious instruction to parents.²³⁶ Religious activists see the voucher system as an enforcement of the First Amendment, because not to do so disadvantages devout parents who wish to send their children to schools that will encourage religion. The argument is that such an approach is more appropriate than the current system, which is perceived as discouraging religion.²³⁷ However, under such an approach, members of minority religions will be disadvantaged, as they are in Ireland, due to their having an insufficient number of members to create entire school systems.²³⁸

The final and most contentious issue is school prayer. Supreme Court cases currently prohibit teacher-led prayer as well as student- or principal-led prayer over public announcement systems.²³⁹ Despite the explicit rulings of the Court on the constitutionality of these practices, many schools continue to disregard the law until they are sued.²⁴⁰ This trend can be interpreted several ways. One is that this is, in fact, a Christian nation, and court decisions cannot change that essential quality of America life. Another is that this is a secular nation, and only a few holdout communities refuse to accept that reality. However, a third position exists. It can be said that this is a religiously devout country that feels very strongly that religion should be protected and respected; however, people differ on how to go about protecting religion, and in practice it is only the majority religion which is afforded respect and protection.²⁴¹ Whenever someone claims the state is violating a First Amendment protection by including religion in the schools or public arena, religious activists believe

²³⁶ See Goodstein, *supra* note 13. However, this argument ignores the fact that everyone benefits from public education, since it is in the nation's best interest that all of its children be taught well. For example, single, elderly, or childless people do not receive any tax reduction based on the fact they do not have children in the public schools. The cost of public education must be shared equally by all taxpayers, just as all taxpayers must share the cost of police and fire departments. To give tax credits to parents who do not use the public schools is the same as giving a tax credit to those people who do not put in a distress call to the police or fire department in any given year, despite the fact that society, as a whole, benefits from the existence of those services.

²³⁷ See CARTER, *supra* note 2, at 198-200.

²³⁸ See KOSMIN & LACHMAN, *supra* note 3, at 67 (noting the clustering of minority religions).

²³⁹ See Wallace, *supra* note 2, at 1204 n.103.

²⁴⁰ See KOSMIN & LACHMAN, *supra* note 3, at 186-88; see also Herdahl v. Pontotoc County School Dist., 887 F. Supp. 902, 905-06 (N.D. Miss. 1995).

²⁴¹ See CARTER, *supra* note 2, *passim*; Sullivan, *supra* note 12, at 207.

that the nation is becoming too secular and abandoning traditional religious values. They do not recognize that Christian prayer in the classroom or at graduation violates a Muslim's First Amendment rights. The state is not denigrating religion by prohibiting these actions; it is respecting and upholding it, despite the fact that it does not allow some believers to speak in some contexts.²⁴²

IV. THE EFFECTS OF INSERTING CHRISTIAN PRINCIPLES INTO CONSTITUTIONAL LAW

A. *The Effect of Religio-Legal Unity on Human Rights*

As set forth above, Ireland currently has, and some factions within the United States wish to have, a legal system in which religious principles are part of the state's constitutional law. That approach has been supported by many esteemed philosophers throughout the centuries, and was once believed to be the only way to handle church-state relations.²⁴³

²⁴² Religious activists should recognize that there are situations in which the state may, and perhaps should, limit the speech of its employees. For example, many religious activists supported the "gag rule" forbidding abortion counseling in state-subsidized family planning or health clinics. *See Rust v. Sullivan*, 500 U.S. 173, 196-198 (1991). The gag rule was so extreme that referrals to clinics that performed abortions, even in addition to other services, were prohibited. *See id.* The employees' right to freedom of speech was irrelevant in this situation because the speech would have taken place in a federal employment setting, and it was determined that the state could limit the speech of its employees during work hours. The state is doing the exact same thing in limiting the speech of its employees regarding religious matters while those people are in their official capacity. No ban has been made on their proselytizing during off-hours; only when they are at work are they limited in what they can say.

²⁴³ For example, St. Augustine (354-430 A.D.) was the first to require a Christian ruler to compel non-believers to come into the fold. His hope was that physical coercion would change people's internal resistance to God, or at least lessen the opportunity for them to influence others. *See THE POLITICAL WRITINGS OF ST. AUGUSTINE* 192-93, 196-99, 202-04 (Henry Paolucci ed., 1962). St. Thomas Aquinas (1224(?) - 1274 A.D.) permitted coercion only of Christians, thus seeming to take a less severe position regarding the official imposition of religion than did Augustine. *See Aquinas, supra* note 7, at 61. Aquinas, however, distinguished between external and internal acts, and required Christians to obey their rulers even when a ruler ordered them to violate God's law, if such violation only concerned an external act. *See id.* at 75-76. Presumably Aquinas would permit a Christian government to require citizens to perform external acts that violated a non-Christian's beliefs, as long as internal matters remained unaffected. For Thomas Hobbes (1588-1679 A.D.), there was no legitimate reason for civil disobedience. Hobbes believed that civil wars resulted from the separation of religion and government, and so would require the unification of spiritual and temporal power in one body. *See THOMAS HOBBS, LEVIATHAN* 371-72 (C.B. MacPherson ed.,

The simplicity of such a system is deceptively attractive, especially in a world that is increasingly complex. Whereas the "state" was simply defined as late as the eighteenth century and made very straightforward demands on its population, the modern welfare state has expanded its power into virtually every corner of its citizens' lives, from the bedroom to the boardroom and beyond.²⁴⁴ Advances in medical technology have challenged traditional notions of life and death, thereby pressuring people to make hard decisions regarding which issues government can legitimately regulate and which issues should remain in the religious realm.²⁴⁵ Some people have adopted the position that religio-legal separation is inconsistent with their individual world view, thereby negating certain aspects of the classical liberal political model.²⁴⁶ When one must give perfect and total allegiance to God, it is impossible also to be fully obedient to the state, which will invariably conflict with certain believers' conceptions of what is right.²⁴⁷ Therefore, religious activists argue, religion should not be artificially separated from the affairs of the state.

Despite the problems associated with a secular state, separation of church and state has become a political ideal for many nations. Separatism's popularity is due, in large part, to advances made in the area of human rights, especially the right to religious liberty. Although some commentators still see no logical inconsistency between the establishment of religion and freedom of religion,²⁴⁸ or with some alternative arrangement wherein religion is given a voice in law and policy,²⁴⁹ others see complete separation as the only method by which religious freedom can be completely enjoyed.²⁵⁰ However, virtually every culture views reli-

1985); *see also id.* at 230, 268, 332-34, 366, 399. If the sovereign then commanded its subjects to violate God's law, the sin was on the ruler's head, not the subjects', whose primary duty was to obey. *See id.* at 405-11, 426-27, 591, 624-25.

²⁴⁴ *See Sullivan, supra* note 12, at 208, 216-17.

²⁴⁵ For an interesting discussion on how to remove some of the distinctions between religious and secular debate in this area, *see generally* RONALD DWORIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (1993).

²⁴⁶ *See, e.g.,* Underkuffler-Freund, *supra* note 20, at 839-40.

²⁴⁷ It should be noted that this conflict between God and government occurs not only in a secular state where religion and law are separated, but also in a theocratic or theonomous state, because people will always disagree about what is and is not doctrinally correct, even within the same religion.

²⁴⁸ *See Hogan, supra* note 97, at 73-74. This approach relies on toleration of the non-established faiths.

²⁴⁹ *See Underkuffler-Freund, supra* note 20, at 961-85.

²⁵⁰ *See, e.g., Sullivan, supra* note 12, at 197-98.

gious rights as important in some way, despite the fact that different nations approach those rights differently.²⁵¹

One way of gauging the growing importance of religious rights is by analyzing the increasing attention given to such rights by the international community. For example, a state's religio-political regime was once considered a subject solely of domestic concern.²⁵² Today, however, there are numerous international conventions that address the subject of religious liberties.²⁵³ In analyzing how the constitutional systems that currently exist in Ireland and the United States measure up to international standards in this area, there are two areas of appropriate inquiry: that of international human rights law regarding religious freedoms, and that of minority group rights theory.

1. International Human Rights Law

The concept of international human rights as a protectable interest was not born until the twentieth century, when the United Nations became the primary catalyst for official recognition of these rights. Although the notion of religious freedom had been supported by political theorists since the eighteenth century, it was very difficult for individuals living under an oppressive regime to enforce their rights until recently. Initially, dissidents had few options other than emigration. Today, internationally binding documents provide for individual relief as well as international sanctions upon violation of those provisions.²⁵⁴ Smaller blocs of nations have also created regional human rights conventions.²⁵⁵

²⁵¹ *But cf.* Mayer, *supra* note 131, at 341-42 (decrying cultural relativism in the area of human rights).

²⁵² See Eric Kolodner, Comment, *Religious Rights in China: A Comparison of International Human Rights Law and Chinese Domestic Legislation*, 12 UCLA PAC. BASIN L.J. 407, 407-09 (1994) (describing the advantages of analyzing a state's practices from an international comparative perspective as opposed to only from a domestic perspective).

²⁵³ See *id.* at 410-14. International law has expressly been made a part of both American and Irish law. See IR. CONST. art. 29(3); *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction"); see also Edward D. Re, *Human Rights, International Law, and Domestic Courts*, 4 CARDOZO J. INT'L & COMP. L. 1, 3 (1996); Jennie Hatfield-Lyon, *Nelson v. Saudi Arabia: An Opportunity for Judicial Enforcement of International Human Rights Standards*, 86 AM. SOC'Y INT'L L. PROC. 331, 337 (1992) ("A court that does not meaningfully consider the international human rights of its government is giving a judicial override to these obligations, thereby violating international law and denying justice.").

²⁵⁴ See Kolodner, *supra* note 252, at 407-08.

²⁵⁵ See, e.g., Cairo Declaration on Human Rights in Islam, *reprinted in* U.N. GAOR,

One of the first instruments promulgated by the United Nations after its creation was the International Bill of Human Rights, which included the Universal Declaration of Human Rights (Universal Declaration).²⁵⁶ The Universal Declaration is a comprehensive document that enumerates a variety of rights and protections, including an explicit protection of the freedom of religious belief.²⁵⁷ Many of these rights are protected under similar language in two other fundamental U.N. documents, the International Covenant on Economic, Social and Cultural Rights (ICESCR)²⁵⁸ and the International Covenant on Civil and Political Rights (ICCPR).²⁵⁹ Similar rights are also found in the European Convention on Human Rights and Fundamental Freedoms (European Convention), which is binding on Ireland.²⁶⁰

The first mention of religion in the Universal Declaration appears in Article 2, which states, "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as . . . religion."²⁶¹ This basic concept, which is also protected by the other three conventions²⁶² and is known as the principle of nondiscrimination, has been described in equal protection terms. These provisions do not explicitly say whether the state only needs to avoid discrimination by

World Conf. on Human Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF, 157/PC/62/Add. 18 (1993); The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 13 U.N.T.S. 221 [hereinafter European Convention] (including subsequent protocols thereto).

²⁵⁶ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

²⁵⁷ Interestingly, the preamble itself notes that the violation of these rights can lead, "as a last resort, to rebellion against tyranny," thus recognizing the causal link between human rights violations and violence within or between societies. *Id.* at pmbl.

²⁵⁸ International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6136 (1966) [hereinafter ICESCR].

²⁵⁹ International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6136 (1966) [hereinafter ICCPR].

²⁶⁰ European Convention, *supra* note 255, arts. 9, 14. The European Convention was designed to permit enforcement of the Universal Declaration between European signatory nations. *Id.* at pmbl.

²⁶¹ Universal Declaration, *supra* note 256, art. 2; *see also id.* art. 7 (stating that "[a]ll people are equal before the law and are entitled without any discrimination to equal protection of the law"). This echoes one of the express purposes of the United Nations as stated in articles 1 and 55 of the U.N. Charter: to "promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to . . . religion." U.N. CHARTER arts. 1, 55 para. 1(c).

²⁶² ICCPR, *supra* note 259, arts. 2(1), 4(1); ICESCR, *supra* note 258, art. 2(2); European Convention, *supra* note 255, art. 14.

public institutions or whether the state must also eliminate private discrimination. Both the United States and Ireland comply with the less stringent reading, since neither has implemented an official system of religious discrimination, despite the fact that both permit certain practices that are de facto discriminatory to continue.²⁶³ However, it is uncertain in this age of anti-affirmative action whether either country would, or even could, adopt a policy to eliminate the sorts of subtle discrimination that exist in the private sphere.²⁶⁴ Certainly such actions would be strongly opposed in Ireland, where the Protestant minority has traditionally been associated with prestige and power, based on its original status as the moneyed and titled class.

The most specific provision regarding religion in the Universal Declaration states that:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.²⁶⁵

This provision is identical to Article 9 in the European Convention.²⁶⁶

These provisions demonstrate concepts which have concerned religious rights activists for years: the principle of nondiscrimination and the protection of internal matters (thought, conscience) and specific external

²⁶³ For example, Professor Kathleen Sullivan has noted that "the [U.S. Supreme] Court wears blinders, so that it cannot see an establishment of mainstream Christianity and cannot see free exercise violations of anything else." See Sullivan, *supra* note 12, at 216. The reason for this is simple: "[m]ajority practices are myopically seen by their own practitioners as uncontroversial." *Id.* at 207. Minority religions are much more likely to be seen as aberrant practices that violate established social mores, and thus may be opposed on grounds other than mere anti-religious fervor.

²⁶⁴ Because Irish law forbids most discrimination either in favor of or against religion, see *Quinn's Supermarket Ltd. v. Attorney General* [1972] 1 I.R. 1 (considering whether law permitting kosher shops to open in derogation of the law establishing normal closing hours was constitutionally permissible and holding that discrimination is permissible if to hold otherwise would make it impossible for a person to practice his or her religion), such affirmative action would be difficult to implement. See also *Everson v. Board of Educ.*, 330 U.S. 7, 15 (1947) (refusing to permit laws which "aid one religion, aid all religions, or prefer one religion over another" to stand).

²⁶⁵ Universal Declaration, *supra* note 256, art. 18. Presumably the protection of belief includes non-belief as well. Both Ireland and the United States recognize atheism equally with positive religions. *Mulloy v. Minister for Education* [1975] 1 I.R. 88; *Wallace v. Jaffree*, 472 U.S. 38, 52-53 (1985).

²⁶⁶ European Convention, *supra* note 255, art. 9(1).

practices directly related to religion (teaching, practice, worship). As a baseline matter, both Ireland and the United States comply with these two basic tenets. However, the more difficult question goes beyond these fundamental rights to the problem of whether states should incorporate or eliminate religious principles in the laws of the state. Few governments (with several notable exceptions, such as China) can or do forbid or restrict religious practices per se or discriminate openly on religious grounds. Many more, however, are willing to impose majority religious values on the population through supposedly secular laws.

As has been noted above, the area of substantive law where religious values have the most influence is that of personal rights. Both the Universal Declaration and the ICCPR contain specific provisions concerning the rights of the family, including the right "to marry and to found a family."²⁶⁷ In language reminiscent of the Irish Constitution, both documents state that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State."²⁶⁸ The European Convention grants a similar right, but limits it by subjecting it "to the national laws governing the exercise of this right."²⁶⁹ While such provisions may seem innocuous on their face and are of the type that religious activists in the United States would like to see incorporated into U.S. constitutional law, in practice they can be more harmful than helpful. For example, Ireland has used similar provisions to define "family" in accordance with majority religious principles. On the other hand, the United States, which has no such constitutional provision, has adopted a much more inclusive definition of what constitutes a family. Some commentators believe that the traditional American focus on the rights of the individual, as compared to the rights of the family, has been the cause of this more expansive definition of "family," at least in some contexts.²⁷⁰ Protection of the family is a laudatory goal for any society; however, a limited definition may transform a provision that is meant to

²⁶⁷ Universal Declaration, *supra* note 256, arts. 16(1), 16(2).

²⁶⁸ *Id.* art. 16(3); *see also* ICESCR, *supra* note 258, art. 10(2).

²⁶⁹ European Convention, *supra* note 255, art. 12; *see also id.* art. 8. By basing the right on national standards, the authors of the European Convention effectively negated the power of the provision. *See Johnson v. Ireland*, 112 Eur. Ct. H.R. (ser. A) at 5 (1986) (reviewing the interconnection between Irish and European law in the context of divorce and illegitimacy and holding the Irish ban on divorce did not violate the European Convention, but legal disabilities attached to illegitimacy did). *But cf. F. v. Switzerland*, 128 Eur. Ct. H.R. (ser. A) at 4 (1987) (noting a provision regarding national law does not permit a state to "restrict or reduce the right in such a way or to such an extent that the very essence is impaired").

²⁷⁰ *See* MARK W. JANIS, ET AL., *EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS* 239 (1990).

be protective into one that is, in effect, punitive. Without the incorporation of an expansive definition of "family," it is perhaps better to delete all references to the family in a constitutional document. It is particularly dangerous to tie protection of "family" to a religious ideal, since those ideals are, by definition, essentially immutable and cannot be adapted to suit the needs of the present era. If references to the family must be made, better language is found in the ICESCR, which grants "[t]he widest possible protection and assistance . . . to the family."²⁷¹

The Universal Declaration states that "[m]otherhood and childhood are entitled to special care and assistance."²⁷² Again, this is a seemingly innocent provision, although it can be interpreted in a paternalistic manner, thus limiting the career options of women. In many ways, it seems odd to establish a distinct right to protect mothers and children, and, to a Westerner, somewhat limiting in that it pigeonholes women into reproductive roles. The need for basic protection, however, may exist in other parts of the world, where women are held in such universal disregard that recognition of their importance as mothers is a step forward, not backward. Nevertheless, a better formulation is one that encourages similar protections while recognizing that "working mothers should be accorded paid leave or leave with adequate social security benefits."²⁷³ This provision recognizes the universal need of most women to both work and care for their families.²⁷⁴

All four documents reflect the importance of education. For example, the Universal Declaration, the ICESCR, and the European Convention all recognize a personal right to education as well as a parental right to choose the form of a child's education.²⁷⁵ The right of parents to "ensure the religious and moral education of their children in conformity

²⁷¹ ICESCR, *supra* note 258, art. 10(1). The European Convention does not protect the family per se, but does state that "[e]veryone has the right to respect for his private and family life." European Convention, *supra* note 255, art. 8(1). This right, which is relatively broad and which apparently creates a right to privacy that would overcome many religious restrictions regarding what constitutes a proper family, is subject to an express limitation that conditions the exercise of the right, when necessary, to prevent "disorder or crime" or to protect "health or morals." ICESCR, *supra* note 258, art. 8(2). This limitation could easily be used to insert religiously-influenced prejudices into a rights analysis, and has, in fact, been used in precisely that manner. See JANIS, *supra* note 270, at 269-70.

²⁷² Universal Declaration, *supra* note 256, art. 10(2).

²⁷³ ICESCR, *supra* note 258, art. 10(2).

²⁷⁴ The only way to improve such a provision would be to grant similar protections to fathers for paternity leave.

²⁷⁵ ICESCR, *supra* note 258, art. 13; European Convention, *supra* note 255, First Protocol art. 2; Universal Declaration, *supra* note 256, art. 26.

with their own convictions” is expressly recognized.²⁷⁶ Unfortunately, this clause could create problems, especially in situations where the parents belong to break-away religious communities or extreme religious sects. For example, the parents’ right to instill their children with their own values could clash with the child’s right to education. Some children might experience irreparable harm due to premature limitations on their educational opportunities.²⁷⁷ Others might experience psychological damage due to the anti-social or intolerant teachings of their parents (as in the case of white supremacist groups espousing “Christian Identity”). However, the more extreme the religion, the more likely it is that it will offend majority values and thus become the subject of discriminatory court or legislative action. Such religions require heightened protection due to their disfavored minority status. The situation is, indeed, difficult to resolve on a theoretical basis and probably requires a careful case-by-case analysis.

The ICESCR attempts to address this problem in its provisions concerning education. On the one hand, it states that “education shall enable all persons to participate in a free society, [and] promote understanding, tolerance and friendship among all . . . religious groups.”²⁷⁸ At the same time, it permits parents to “ensure the religious and moral education of their children in conformity with their own convictions.”²⁷⁹ Although some parents’ religious rights could be somewhat curtailed under this provision, at least to the extent that their religion advocated hatred and intolerance, this approach seems to strike an appropriate balance between the demands of a free and peaceful society and the need for religious liberty. It is far superior to a limitation loosely based on societal “morals,” which could be used to restrict any minority religion, even one that advocated positive, pro-social goals.

In looking at the two nations under review, it appears as if Ireland’s system of publicly supported sectarian schools promotes the second provision of the ICESCR while possibly violating the first by creating a society in which religious differences are emphasized rather than mini-

²⁷⁶ ICCPR, *supra* note 259, art. 18(4); *accord* European Convention, *supra* note 255, First Protocol art. 2. *But see* Dwyer, *supra* note 214, at 1405-46 (arguing that these types of parental rights are anomalous in American jurisprudence).

²⁷⁷ The U.S. Supreme Court has recognized the right of Amish parents to remove their children from public schools after the eighth grade, a move which could severely curtail the career options of Amish children who do not wish to remain in the Amish community. *See Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972); *see also* *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

²⁷⁸ ICESCR, *supra* note 258, art. 13(1).

²⁷⁹ *Id.* art. 13(3).

mized. Many believe "understanding, tolerance and friendship" are better taught in an integrated educational framework.²⁸⁰ In the United States, the segregation of races proved to perpetuate racial inequality and racial distinctions. Although integration in U.S. public schools has been difficult at times, it has undoubtedly succeeded in creating a more equitable society.²⁸¹ Therefore, based on their own experience as well as the experience of the Irish, Americans should be wary of increasing the religious or sectarian nature of education through tax vouchers or any other means.

The most surprising point about the above-cited rights is the fact that all of them are merely conditional. For example, the Universal Declaration states that "in the exercise of his rights and freedoms, everyone shall be subject . . . [to] the just requirements of morality"²⁸² The ICCPR also subjects "one's religion or beliefs . . . to such limitations as . . . are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."²⁸³ Such conditional rights are often illusory, and permit the state to justify otherwise illegitimate acts merely to support the status quo.²⁸⁴ For example, the Irish High Court construed provisions similar to these to permit laws outlawing homosexual behavior to stand. Such laws were later found by the European Court of Human Rights to violate the European Convention, and were struck down.²⁸⁵

Any limitation on a religious liberty is immediately suspect. The fact that the exercise of religion can be limited by the morals of others opens the door for well-established or majority religions to proscribe the practices of new or minority religions just because they are different. In the United States, minority religions are often the subject of invisible discrim-

²⁸⁰ See James F. Clarity, *At Lunch, Belfast Women Talk of a Hunger for Peace*, N.Y. TIMES, Mar. 11, 1996, at A10 (noting that nonsectarian schools might create a more cohesive society in Northern Ireland).

²⁸¹ In South Africa, integrated education has also been hailed as the key to achieving racial equality. See Suzanne Daley, *South African School Battle Now a War of Nerves*, N.Y. TIMES, Feb. 23, 1996, at A1.

²⁸² Universal Declaration, *supra* note 256, art. 29(2).

²⁸³ ICCPR, *supra* note 259, art. 18(3); see also *id.* art. 19 (granting the freedom of expression but limiting it under a "public health or morals" clause); see also European Convention, *supra* note 255, arts. 8(2), 9(2), 10(2).

²⁸⁴ See Mayer, *supra* note 131, at 317. They also could arguably be said to constitute ex post facto laws due to the inability of defendants to ascertain prior to acting whether something was *contra bonos mores et decorum*. See HART, *supra* note 206, at 6-12.

²⁸⁵ See *supra* notes 180-86 and accompanying text; Hogan, *supra* note 97, at 64, 79; see also Ryan v. Attorney General [1965] 1 I.R. 294, 312 (Kenny, J.) (invoking the "Christian and democratic nature of the State").

ination, and many practices are prohibited that would be upheld if they were part of the majority culture.²⁸⁶ This sort of limitation could also be used to curtail religious speech under the guise of public safety concerns, as was the case in the United States, where an Islamic cleric was imprisoned for sedition based on his calls for *jihad* (holy war).²⁸⁷ Where religion is politically tinged, such provisions can easily be used to suppress non-majority religions even if they do not truly rise to levels threatening public health or morals.²⁸⁸

There are situations where such limitations are warranted, however. For example, some religious practices do, in fact, pose a threat to public safety or, perhaps more commonly, to the fundamental freedoms of other persons.²⁸⁹ The inclusion of religious or religiously influenced provisions in constitutional or other laws of the state might fall under this latter category, at least to the extent that such laws compel non-believers to conform their behavior to religious standards adopted by the majority

²⁸⁶ For example, the use of peyote during Native American religious services could be penalized, *see* *Employment Div. v. Smith*, 494 U.S. 872 (1990), while the use of alcohol during Christian and Jewish religious services was permitted by exception during the Prohibition era, *see* Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. CAL. L. REV. 589, 739, 739 n.623 (1996). Both practices are traditional; both practices require participants to ingest otherwise illegal drugs. The difference is that Christianity is the majority religion in the United States while Native American religions exist well outside the mainstream.

Another well-known example is the criminalization of polygamy, a practice that was permitted by the Church of Jesus Christ of Latter-Day Saints (Mormons) in the late 1800s. Such anti-Mormon laws were upheld by the Supreme Court. *Reynolds v. United States*, 98 U.S. 145 (1878); *see* CARTER, *supra* note 2, at 29 (noting that the Supreme Court's determination that polygamy was "subversive of good order" may have been based on the Court's finding that "hatred of Mormons caused other people to act disorderly").

²⁸⁷ *See* *United States v. Rahman*, 854 F. Supp 254 (S.D.N.Y. 1994); Joseph Grinstein, Note, *Jihad and the Constitution: The First Amendment Implications of Combating Religiously Motivated Terrorism*, 105 YALE L.J. 1347, 1350 (1996); *see also* ICCPR, *supra* note 259, art. 20 (limiting "any advocacy of . . . religious hatred that constitutes incitement to discrimination, hostility or violence").

²⁸⁸ *See* Mayer, *supra* note 131, at 317.

²⁸⁹ Among the few practices that would not be permitted for public safety reasons is human sacrifice. Animal sacrifice, when conducted in a humane manner, has been permitted. *See* *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 527-29 (1993). The prohibition on infringement of others' fundamental freedoms affects a wider range of activities, including marriage and divorce, founding a family, the right to work, the right to control one's body, etc. Some religio-political hate groups that encourage interracial violence could also be regulated through this second provision, since some of their practices violate, *inter alia*, others' right to life.

without a non-religious justification.²⁹⁰ For example, a law that required one type of prayer in school would violate the rights of atheist children or those who pray differently. Laws barring same-sex marriages or adoption by same-sex couples would violate a person's right to found a family. Laws "protecting" women from working in certain fields "unsuited to their health or capacity" would violate freedoms based on equal rights between the genders.²⁹¹ If one reads the religious rights clauses of these conventions as requiring an analysis of how the recognition of certain religious rights affects the fundamental freedoms of other persons, then both the United States and Ireland must reconsider some of their policies, because both currently curtail some citizens' fundamental freedoms to give effect to the majority's religious principles.

The most recent U.N. resolution regarding religious rights is the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Declaration on Discrimination).²⁹² Intended to complement, rather than usurp, earlier conventions concerning religious liberties,²⁹³ the Declaration on Discrimination reinforces common elements such as the freedom of religion.²⁹⁴

²⁹⁰ See Sullivan, *supra* note 12, at 197, 197 n.9. A large number of legal commentators have written about the wisdom and necessity of permitting religious concerns to affect laws enacted by the state. John Rawls posits that because society cannot agree about what constitutes "the good life," political discourse must apply "the method of avoidance" in order to minimize disputes and achieve societal consensus about the law. John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 4 (1987); see also David Hollenbach, *Contexts of the Political Role of Religion: Civil Society and Culture*, 30 SAN DIEGO L. REV. 877, 879 (1993). This method requires the abolition of religious and moral views (both positive and negative) from the political sphere. See Hollenbach, *supra*, at 879; Rawls, *supra*, at 4; see also JOHN RAWLS, A THEORY OF JUSTICE 212 (1971) (explaining that the government has neither the right nor the duty to do what it or a majority wants to do in questions of morals and religion); Kent Greenawalt, *The Limits of Rationality and the Place of Religious Conviction: Protecting Animals and the Environment*, 27 WM. & MARY L. REV. 1011, 1012-20 (1986) (discussing theories of Rawls, Henkin, and Ackerman as proponents of a separatist approach). Not everyone views this approach as universally necessary, however, or even as attainable in a practical sense. See Hollenbach, *supra*, at 880; Greenawalt, *supra*, at 1060-64.

²⁹¹ ICCPR, *supra* note 259, arts. 16, 26; see ICESCR, *supra* note 258, arts. 3, 6, 7.

²⁹² Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36155, U.N. GAOR, 36th Sess., Supp. No. 51, at 171, U.N. Doc. A/36/55 (1981) [hereinafter Declaration on Discrimination].

²⁹³ *Id.* art. 8.

²⁹⁴ *Id.* art. 1.

However, the protections stated herein are more specific than they are elsewhere.²⁹⁵ For example, discrimination based on religion is specifically prohibited and defined in Article 2.²⁹⁶ Unfortunately, these rights are subject to a limitation based on public safety and morals, as they are elsewhere.²⁹⁷ Nevertheless, “[a]ll states” are admonished to “take effective measures to prevent and eliminate discrimination on the grounds of religion or belief,” and, significantly, are instructed to “enact or rescind legislation where necessary.”²⁹⁸ This affirmative duty to act is unique among the religious rights documents, but has not resulted in widespread change. Parents have the right to raise their children in accordance with their religious beliefs, although the practices of that religion or belief must not be injurious” to the child’s “physical or mental health.”²⁹⁹ To some extent, this lessens the concerns discussed earlier about possible irreparable harm to children who oppose their parents’ religious views. However, nowhere in the Declaration on Discrimination are children of any age given the right to choose their own religion or to reject that of their parents.³⁰⁰

Some of the most interesting language in the Declaration on Discrimination is found not in the body of the text, but in the preamble. There the link between violations of religious rights and societal violence is explicitly made. For example, the Declaration notes that “disregard and infringement of . . . the right to freedom of . . . religion or whatever belief, have brought, directly or indirectly, wars and great suffering to mankind.”³⁰¹ Conversely, “freedom of religion or belief should also contribute to the attainment of the goals of world peace.”³⁰² The Declaration also notes that “manifestations of intolerance and . . . discrimination in matters of religion or belief [are] still in evidence in some areas of the world,” and considers it

essential to promote understanding, tolerance and respect in matters relating to freedom of religion or belief and to ensure that the use of

²⁹⁵ *Id.* art. 6 (elaborating on specific protections).

²⁹⁶ *Id.* art. 2 (“[I]ntolerance and discrimination based on religion or belief” means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.”).

²⁹⁷ *Id.* art. 1(3).

²⁹⁸ *Id.* art. 4.

²⁹⁹ *Id.* art. 5.

³⁰⁰ See Strong, *supra* note 214, at 186-89 (arguing for the children’s right to self-determination); see also Dwyer, *supra* note 214, at 1423 (same).

³⁰¹ Declaration on Discrimination, *supra* note 292, at pmb1.

³⁰² *Id.*

religion or belief for ends inconsistent with the charter, other relevant instruments of the United Nations and the purposes and principles of the present Declaration is inadmissible.³⁰³

While both the United States and Ireland have complied with the more technical aspects of the Declaration on Discrimination and other U.N. documents, neither nation has completely eliminated those provisions which have "as [their] purpose or as [their] effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis."³⁰⁴ Both nations have demonstrated occasional violations of both aspects of this edict. For example, in the United States, the prohibition on servicemen wearing religious headgear while in military uniform impairs an Orthodox Jewish serviceman's ability to practice his religion, thus violating a religious right, and effectively bars him from joining the U.S. military, thus infringing on his economic right to enter any field of employment free from discrimination on the basis of religion.³⁰⁵ This case demonstrates how non-Christians' religious and other rights can be limited in a state that may not intend to nullify or impair the practice of a minority religion, but that does not recognize the extent to which majority religious values are embedded in the laws of the state. Although minorities' religious rights are always at risk, those violations are in many ways easier to identify than infringements on minorities' non-religious rights. Both types of rights are, however, equally important, and should be equally protected.

Ireland's religio-legal system also works to discriminate against minority religious beliefs, though with less opposition, due to Ireland's culture and religio-legal history. Although non-Catholics in Ireland find fewer obstacles to the practice of religion than do non-Christians in the United States (due perhaps to the fact that Ireland is almost completely populated by Christians, while the United States has a much more diverse religious blend), the high degree of influence asserted by the Catholic hierarchy on the government over the years has resulted in a religio-legal approach that heavily burdens the non-religious rights of many Irish citizens. For example, the virtual ban on abortion discriminates against women who do not adopt the Catholic view that life begins at conception, while the Catholic-style definition of "family" affects those who have adopted a more expansive view of family.

³⁰³ *Id.*

³⁰⁴ *Id.* art. 2.

³⁰⁵ See *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986); see also *id.* at 524 (Brennan, J., dissenting) (noting the painful and unnecessary dilemma facing Orthodox Jewish males). The effect of this case was later overturned by statute. See Robin-Vergeer, *supra* note 286, at 612 n.91, 677 n.358.

2. Minority Group Rights Theory

Recently, the field of international human rights has seen a theoretical shift regarding the concept of collective rights. Prior to World War II, rights theory focused on the recognition of protections owed by the state to minority groups or cultures within the state.³⁰⁶ With the creation of the United Nations, the emphasis shifted from minority groups to individuals,³⁰⁷ resulting in the express rejection of group rights in the Universal Declaration.³⁰⁸ Recently, however, the United Nations has shifted its position and has again begun to recognize certain rights regarding minority cultures.³⁰⁹

Group rights theorists recognize that the critical inquiry regarding the interplay between law and religion is not whether the state recognizes the free practice of religion,³¹⁰ since most nations already protect that basic freedom. Instead, the key issue concerns protection of religious sub-cultures within the state and their right to avoid domination by the majority religio-political culture.³¹¹

The analysis is difficult. If minorities are given a special right to protect their culture, then religio-political differences may become permanently etched into the national legal structure.³¹² At the same time, a state that ignores such sub-cultures may be trampling upon individuals' legitimate rights. In addition, by accepting the idea that a minority religious culture should be sustained, society gives credence to religious majorities' view that they can legitimately structure their society in accordance with their religious beliefs. The problem raised in the context of the current discussion is not so much the question of whether minority

³⁰⁶ See Eide, *supra* note 105, at 1319; Kolodner, *supra* note 252, at 409-10. *But cf.* Will Kymlicka, *Introduction*, in *THE RIGHTS OF MINORITY CULTURES* 1, 4 (Will Kymlicka ed., 1995); *see also* Vernon Van Dyke, *The Individual, the State, and Ethnic Communities in Political Theory*, in *THE RIGHTS OF MINORITY CULTURES*, *supra*, at 31, 31-56.

³⁰⁷ See U.N. CHARTER arts. 1, 55 (emphasizing rights "for all").

³⁰⁸ See Kymlicka, *supra* note 306, at 18.

³⁰⁹ See generally FRANCESCO CAPOTORTI, *STUDY ON THE RIGHTS OF PERSONS BELONGING TO NATIONAL OR ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES*, U.N. Sales No. E.91.XIV.2 (1991) (commenting by a special rapporteur of the sub-commission on the prevention of discrimination and the protection of minorities); *see also* ICCPR, *supra* note 259, art. 27.

³¹⁰ See Nathan Glazer, *Individual Rights Against Group Rights*, in *THE RIGHTS OF MINORITY CULTURES*, *supra* note 306, at 123, 126.

³¹¹ See *id.*

³¹² See *id.* at 137.

groups have the right to assert their cultural identities, but whether majority groups, i.e., Catholics in Ireland and Protestant Christians in the United States, have the right to force others to live in conformity with their religio-political ideals.³¹³

The argument made by religious activists relies on two justifications, the first of which harkens back to the ideal of classical political liberalism. Religious activists point out that both Ireland and the United States utilize a democratic political model that is based on the right of the majority to impose its will on the nation. According to the activists, this model specifically grants the majority the right to decide what is socially appropriate for the nation, and to enact laws that will further those social ends.³¹⁴ As long as the laws created by the majority do not violate certain pre-established rights of the minority (i.e., to hold any religious belief; to practice a religion within certain boundaries created by the majority to protect public health, safety, and morals; and to be free from any overt discrimination on the basis of religion), then, proponents argue, the laws are valid.

There are at least two problems with this philosophy. The first is that it ignores the explicit limitations discussed above, i.e., that religious rights cannot be exercised in contravention of others' fundamental freedoms.³¹⁵ There is a more basic problem with the religious activists' approach, however, which goes to the root of democratic political theory.

Modern democracies are based on the notion that the majority may only act in appropriate circumstances and within appropriate boundaries. For example, the majority cannot force every citizen to run three miles each day, even if it is for the person's "own good" or because it builds a better, stronger, healthier nation.³¹⁶ That sort of law exceeds the state's ability to act.³¹⁷ Similarly, the majority cannot force citizens to conform

³¹³ Some modern Catholic commentators have argued that Catholicism does not consider the sovereignty of the individual as the basis of democracy, but instead sees the strength of collective institutions as democracy's most important element. See Hollenbach, *supra* note 290, at 882. This may explain, in part, the acceptance by the Irish of the power of the Catholic church, an intermediary institution, in state affairs.

³¹⁴ H.L.A. Hart called this concept "moral populism." HART, *supra* note 206, at 79.

³¹⁵ See Declaration on Discrimination, *supra* note 292, arts. 2, 7; ICCPR, *supra* note 259, art. 18(3); see also Sullivan, *supra* note 12, at 198 (discussing the limits of religious rights).

³¹⁶ See JOHN STUART MILL, ON LIBERTY, 68-69 (1859) (Gertrude Himmelfarb ed., 1985) (opposing the legitimacy of state or private coercion for citizens' "own good").

³¹⁷ Because the health of the population could be said to affect both national safety (i.e., healthy citizens are needed when it becomes necessary to defend the nation) and the economy (i.e., healthy citizens cost the state and the insurance industry less in

to its moral ideal, since the benefits of one particular moral system over another are less clear-cut than the benefits of an athletic lifestyle versus a sedentary lifestyle. In addition, there are few costs to the state if religiously inspired laws are repealed.³¹⁸ Notably, religious activists cannot claim that the laws are legitimate because devout persons will be harmed by knowing that others are acting in an immoral manner. As Professor Hart has noted, mere distress that others are acting in a manner of which one disapproves is not actionable.³¹⁹ To permit such distress to form the sole basis of the nation's laws would absolutely negate the idea that individual liberty is a value to be protected.³²⁰ Some additional reason must exist for such "distress" to be remediable by law.

Some religious activists argue that they should be able to vote their conscience, and that to force them to justify their actions on purely secular grounds is unreasonable, given that they do not separate their lives into public and private realms,³²¹ is a violation of their right to practice a religion which requires an expansive world view. These activists misunderstand the proposal, however. Private citizens should be allowed to vote their conscience, since it is unreasonable and illegitimate to ask them to do otherwise.³²² Public figures should also be able to act individually as religious persons, if they wish. They should be able to oppose capital punishment because it usurps God's power over life and death, for example, instead of basing their actions on the fact that litigating capital punishment cases costs the nation millions of dollars each year, or that capital punishment has not been proven to be an effective deterrent. They cannot, however, propose or enact laws which have no legitimate secular purpose or which impermissibly infringe on religious or

health care), this type of law could be said to affect public, and not purely private, concerns.

³¹⁸ For example, if the United States truly is a "Christian nation," as religious activists believe, then abortions will not rise dramatically if they are available on demand, because most of the population is Christian and therefore does not believe abortion is moral. Nor will the number of homosexuals rise, because Christianity condemns homosexuals or at least homosexual practices. When put into these terms, it becomes apparent that the purpose of these sorts of laws is not to "reflect" the moral nature or quality of the state; it is to force non-believers to conform to the majority (if there is, in fact, such a majority) religious beliefs without secular justification. Those who believe in the majority religion will act in accordance with the religious code by choice.

³¹⁹ See HART, *supra* note 206, at 46-47.

³²⁰ See *id.*

³²¹ See CARTER, *supra* note 2, at 136-45; Underkuffler-Freund, *supra* note 20, at 839.

³²² See Sullivan, *supra* note 12, at 197.

non-religious rights because they are based on religious principles.³²³ To do so exceeds the proper bounds of legitimate state action. By defining the analysis in terms of what is a legitimate exercise of state power, one avoids the more difficult question of whether religious lawmakers should be forced to choose between their faith and their profession.³²⁴ To present religious lawmakers with this either/or proposition would parallel the either/or proposition given to Orthodox Jewish males who want to serve in the armed forces.³²⁵ That approach, it was argued, violated both religious and economic rights.

The second argument used by religious activists to permit the majority to structure society in accordance with its religious beliefs is based on a combination of minority and religious rights theories. The claim is that because people must be allowed to practice their religious beliefs, they must be allowed to impose certain strictures on society at large, if their religion requires them to do so. Although this duty is more clearly enunciated in religions such as Islam or Judaism, Christian theology arguably supports similar ideals. Certainly both Catholicism and Protestantism require believers to dedicate their entire lives, both public and private, to their faith. In addition, Catholics are taught that they are not only morally responsible for their own behavior, but for the behavior of others as well.³²⁶ They also have a duty to guard against evil in whatever form, and may refuse to obey political authority if necessary.³²⁷ Many Protestant groups claim a similar duty. Basing their acts on biblical rather than papal edicts, they attempt to impose their concept of social justice on the world.³²⁸ Although they do not believe their own salvation is at risk if they do not act in this manner, they consider it their religious duty to improve society.

Activists who raise this argument view any attempt to limit the political effectiveness of religious activism as an infringement of their religious rights. If minority groups are permitted to build and protect communities that adhere to their religious beliefs, majority religions should be allowed to do the same.

³²³ Professor Sullivan supports the notion that the proper analysis of such laws focuses not on legislators' motives, but on the "post hoc secular rationale" of such laws. See Sullivan, *supra* note 12, at 197 n.9. This does, in fact, seem to be the proper approach.

³²⁴ See HART, *supra* note 206, at 79.

³²⁵ See *supra* note 305 and accompanying text.

³²⁶ See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 154, ¶¶ 1789, 1865-68, 1896, 1917.

³²⁷ See *id.* ¶¶ 1782, 1868, 1902-1903.

³²⁸ See Garvey, *supra* note 4, at 36-38.

However, this line of reasoning again must fail. Minority groups are expressly protected because they are minorities. To grant the same protection to the majority would negate the minority's corresponding rights to be free of majority influence. In addition, minority rights theory contemplates the creation of a society (be it a neighborhood, as in Israel's Hasidic districts, or a community, as in the Amish farmlands) where a distinct subculture can flourish and, more importantly, from which dissenting members of the minority can escape.³²⁹ Majorities cannot exercise the same right to create a homogenous religious society because there is no corresponding opportunity for dissenters to exit, as the entire nation will embody the majority norm. Any attempt to recognize both majority and minority rights of a religious culture would subdivide the nation into discrete religious territories, creating a completely segregated society. As proven by the United States, South Africa, and even Northern Ireland, segregated societies are inherently unstable and invariably result in violence.³³⁰

At the end of the day, this theory cannot be justified even on religious grounds. Religious rights should be viewed as a negative right forbidding interference by state or private actors except on rational and necessary grounds. They are not positive rights that permit the imposition of certain behaviors on others. Just as explicit acts of religious coercion by the state cannot be condoned,³³¹ neither should implicit acts of coercion.³³² Although minorities may arguably have the right to create micro-communities which require all residents to conform to religious strictures, majorities cannot co-opt that right to impose their religious ideals on others. Those persons who are sufficiently dedicated to a religious lifestyle may create those communities by choice, not by law.

³²⁹ See Sullivan, *supra* note 12, at 214 n.84; see also Leslie Green, *Internal Minorities and Their Rights*, in *THE RIGHTS OF MINORITY CULTURES*, *supra* note 306, at 257, 264.

³³⁰ Cf. Michael Walzer, *Pluralism: A Political Perspective*, in *THE RIGHTS OF MINORITY CULTURES*, *supra* note 306, at 139, 148-53 (discussing problems of identifying ethnic or other privileged groups).

³³¹ Explicit coercion might consist of forcing persons to attend religious services or swear allegiance to a particular deity.

³³² Implicit coercion might consist of refusing to grant health care benefits to same-sex or long-term unmarried couples, based on traditional religious prejudices.

B. The Intersection of Law and Religion and Its Effect on Societal Violence

As has been suggested by the Declaration on Discrimination,³³³ the combination of law and religion can ultimately result in violence. Traditionally, that violence took the form of repressed minorities rebelling against state oppression.³³⁴ Today however, religious activists rebel not against religious repression, at least not religious repression in the classic sense, but against religio-political separatism.³³⁵ Many conflicts are resolved through the political process, but some are not, especially when activists view the state and particularly the judiciary (which is beyond political influence), as promoting anti-religious ideals.³³⁶ In such situations, religious activists often resort to violence.³³⁷

To some extent, legitimizing religious values in the law of the state leads to an express or implied legitimization of religiously based violence. When politics adopt a religious tinge, people become willing to die or to kill over issues which, in other societies, could be accepted as mere political differences. By inserting religion into the debate, however, states unknowingly permit those who would answer to a "higher power" to resist those laws they feel to be immoral or unjust. Compromise becomes impossible as difficult questions are swept away as something that must be accepted on faith.

The link between violence on the one hand and religio-legal unity on the other is obvious. First, religious principles must be taken on faith. There is no room for debate or discussion, since a religious position is grounded in unique spiritual truths. Religious doctrines are, by definition, immutable, and incapable of compromise.

When religion is combined with law, political debates and compromise become impossible, since changing policy is equated with changing religious beliefs. Although wars over what is the "one true" religion are for the most part a thing of the past, people are still willing to fight to protect their right to live in accordance with their beliefs. Violence is common enough when it is a political ideology at stake; how much more common it will become when it is linked with eternal truths and salvation can only be surmised.

³³³ Declaration on Discrimination, *supra* note 292, at pmb1.

³³⁴ This was the concern of many Enlightenment philosophers. See Schwarzschild, *supra* note 20, at 905.

³³⁵ See Underkuffler-Freund, *supra* note 20, at 839.

³³⁶ See Ginsburg, *supra* note 36, at 558-63.

³³⁷ See Rapoport, *supra* note 34, at 432. Many such activists claim to be restoring social harmony, but that is seldom the result. See *id.* at 440.

When religious activists and their opponents recognize that compromise is impossible, two types of violence occur. The first is religious revolution, such as that which occurred in Iran in 1979. There clerics banded with the middle class and the intellectual elite to push the Shah from power, and then wrestled control from the more moderate elements to form an Islamic republic.³³⁸ A similar phenomenon took place in Ireland in 1937. The moderates who drafted the 1922 Constitution were replaced by more vocal republican elements who, while not handing over the reins of government to the Catholic hierarchy, created a much more religiously oriented constitution than had been seen previously.³³⁹ The United States could now be facing a similar situation. Over the last few years the United States has experienced not only a rise in religio-political activism, but the creation of coalitions between religious activists and conservative elements of the Republican party. It is apparent that the religious faction is gaining more and more of a voice in Republican policies and in government overall, with no end in sight. Though some believe the unique aspects of American politics will forestall a violent revolution, the possibility of a legislative revolution looms large.³⁴⁰

The second type of violence that appears in the religio-political context can broadly be labeled as issue-oriented terrorism.³⁴¹ Perhaps inspired by the eco-terrorism of certain radical ecological groups in the 1970s, or by the longstanding religious tradition of martyrdom in the face of state repression, these religious activists believe violence is justified to thwart certain improper government actions.³⁴² The most well-known religious terrorists are those who oppose abortion. These people have resorted to bombing, stalking, and murdering to stop what they perceive as the murder of unborn children.³⁴³ Answering to a "higher power," these activists justify their actions on the grounds that any action is permissible to stop a greater harm from being accomplished.³⁴⁴ Violence is also used to combat governmental actions that are merely perceived as illegitimate, as opposed to ungodly. A growing number of separatist groups in the United States oppose federal taxes and other actions based on their "god-given" right to own certain lands and live as they

³³⁸ See RUTHVEN, *supra* note 21, at 337-38.

³³⁹ See Lynch, *supra* note 97, at 329.

³⁴⁰ See Rapoport, *supra* note 34, at 455.

³⁴¹ This label distinguishes it from the more general international terrorism that peaked in the 1970s and early 1980s.

³⁴² See Rapoport, *supra* note 34, at 446-47 (noting that the type of violence used often has religious overtones).

³⁴³ See Ginsburg, *supra* note 36, at 561-63.

³⁴⁴ See *id.* at 562.

please.³⁴⁵ Although many outsiders see these actions as purely political, the participants themselves use religious concepts and language to justify their acts.

Some may say that violent factions exist in any society, and that there is little or nothing that can be done. It is interesting, however, that the incidence of religious violence in the United States only began to rise when religious activism began to take the national stage.³⁴⁶ One explanation for this coincidence is that both movements arose out of a similar cause, i.e., excessive secularization in an inherently religious society. It is also possible that those who practice violence saw their agendas (if not their methods) legitimized by the role religion began to play in American law in the 1980s, and felt that their actions were only a more extreme (or more devout) method of expressing what was already occurring in the political mainstream. Interestingly, U.S. activists are turning to violence just as the Sinn Fein party (which is the political arm of the terrorist Irish Republican Army) is beginning to disavow it. Nevertheless, by continuing to allow religion to affect the laws of the nation, states become susceptible to reinforcing religious terrorists' perception of what is permissible and/or attainable and what is not.

V. CONCLUSION

As Ireland and the United States move into the twenty-first century, they face the possibility of radical change to their existing religio-legal systems, although in opposite directions. In both cases, reform is being fueled by majoritarian demands rather than by a reasoned human rights analysis, despite the fact that religious rights are, or should be, considered beyond populist control. This sort of approach to law and religion can result in numerous jurisprudential inconsistencies as well as human rights violations. In addition, such systems can encourage religio-political violence, as those who answer to a "higher authority" see their ends legitimized by mainstream society.

The best way to address the problems faced by both Ireland and the United States is to adopt an explicit and internally consistent approach to religious rights. International human rights law, which is not subject to the vagaries of the common law, is beginning to formulate just such a system. Traditionally, the international community has required only that states apply the principles of nondiscrimination on the basis of religion, freedom of internal belief, and freedom of external religious practices to

³⁴⁵ See, e.g., Laurie Goodstein, *Freemen's Theological Agenda: Group Embraces Racist 'Christian Identity,'* WASH. POST, Apr. 9, 1996, at A3.

³⁴⁶ See Ginsburg, *supra* note 36, at 562.

the extent that such practices are inherent parts of all religions (i.e., worship, teaching, etc.). Under this analysis, both Ireland and the United States do relatively well. However, the concept of religious rights has now expanded to include not only the three traditional rights, but a recognition of the proper scope of religious rights as well. According to the Declaration on Discrimination, states may not make any distinction or restriction based on religion or belief which has "as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms."³⁴⁷ If properly enforced, this provision will effectively limit the ability of the majority to enact religiously based laws that infringe upon any sort of established right or freedom. This minor limitation on the "right" of the majority to impose its religious views on others seems an appropriate balance to strike in light of the modern belief that all religions should be treated equally.

Neither Ireland nor the United States has explicitly adopted this new approach, preferring to limit themselves to the traditional rights analysis under the guise of existing national standards.³⁴⁸ As a result, both nations engage in certain improper practices. For example, the Irish law's definition of "family," which is based on majority religious beliefs, has resulted in the infringement of certain people's right to found a family. In the United States, education is considered a fundamental right, yet in many areas the majority insists on its "right" to include religion in the curriculum despite the fact that such practices not only infringe upon minorities' religious rights, but upon their right to an education as well.

Although some Irish and American citizens are willing to adopt this expanded version of religious rights, including limitations on the ability of the majority to affect others' fundamental freedoms, many are not. Those who oppose this new vision of religious rights can find support for their position in the constitutional laws of both nations.

One of the most important factors militating against any expansion of religious rights in Ireland is the religiosity of the Constitution, especially the preamble. The specific inclusion of Christianity in the state's foundational legal document is the most difficult barrier for reformers to overcome because it influences all substantive areas of the law by defining the appropriate interpretive principles. Certainly Irish courts have relied on this provision in the past.³⁴⁹ However, this sort of clause is

³⁴⁷ Declaration on Discrimination, *supra* note 292, art. 2.

³⁴⁸ Under these standards, Ireland may expressly adopt certain religiously influenced laws based on the language found in the preamble of the Constitution, while the United States may continue to discriminate against non-mainstream religions while claiming to enact religiously neutral laws.

³⁴⁹ See *supra* notes 123-29 and accompanying text.

only permissible from a human rights perspective as long as the whole society shares the view that inclusion of religious values in the secular law is legally permissible.³⁵⁰ Once a portion of the population rejects that basic principle, the continued unification of law and religion becomes suspect, thus requiring some sort of rights analysis. Ireland, though once an extremely homogenous nation, is not the cultural isolationist it once was. Increased contact with Europe and the rest of the world has brought about significant change in the belief and behavior patterns of the Irish. With change comes diversity, and it is to be expected that there will be increasing demands to remove religious elements from Irish law. The first steps have been taken through the legalization of divorce, the decriminalization of sodomy, and the loosening of restrictions on abortion. To some extent, these changes reflect a recognition that the state may not burden certain people's fundamental freedoms to uphold others' religious views.

It remains to be seen, however, whether Ireland's move toward secularization will be done at a moderate enough pace so as to avoid violence, or whether change will be so abrupt as to cause an unacceptably high amount of societal tension. Ireland has a history of violent religio-political conflict, but further violence may be avoided if change is seen as coming from within, as opposed to being imposed from without. It will also be helpful if the Irish see certain secularizing changes as the price they must pay to participate in the European Union and world economies; in such situations, people are often willing to sacrifice certain rights or privileges to obtain benefits that are of greater value to them.³⁵¹ In addition, Ireland may benefit from being one of the last nations in the Western world to secularize. By the time Ireland eventually incorporates certain notions into its laws, those principles will have been firmly established elsewhere and will no longer be seen as highly controversial.³⁵²

³⁵⁰ If the whole society agrees that religion should be part of the nation's law, and the society can agree sufficiently as to the form of that defining religion, then even the most devout adherent of Rawlsian political theory must agree that such laws are legitimate. See *supra* note 290 (discussing political theories of John Rawls). The problem is that societies are seldom as homogenous as religious activists would like to admit.

³⁵¹ Traditional Irish may also be able to support these measures by recognizing that the fabric of society need not change just because the laws have; those behaviors that were an honest reflection of Irish culture and values will still exist, although now they will be exercised by choice rather than required by the state.

³⁵² Abortion and divorce are cases in point. Ireland resisted change on both subjects for as long as possible, but when change came the debate was vocal but not violent. The tone of the debate also focused on whether these measures were consistent with Irish culture, not whether they were legitimate rights in the abstract. Those theoretical

To accommodate this anticipated change, Irish courts may adopt the reasoning of *McGee*.³⁵³ Essentially, the argument is that because different religious denominations take different viewpoints on certain controversial issues, the state should take a neutral or non-interventionist position. In a way, the *McGee* Court was enunciating a Rawlsian concept of political theory, recognizing that where religio-legal consensus does not exist, the law must refrain from acting on religious motives.

The United States faces different obstacles to an adoption of the expanded version of religious rights, the most obvious being the current electoral strength of religious conservatives who want to impose their values on society and who believe it is permissible for them to do so. However, the principles of the U.S. Constitution are much more in line with the principles of the expanded rights framework than are those of the Irish Constitution, thus making it relatively easy to adopt the framework once the political mood has shifted to a more liberal approach.

If and when Americans decide to implement the expanded vision of religious rights, it is possible to do so without fundamentally altering existing law. For example, basic First Amendment notions concerning the free exercise of religion and the prohibition on the establishment of religion are mirrors of the three traditional rights recognized by the international community. The problem is that neither of the two First Amendment concepts adequately protects the rights of minority religious practices that are not specifically linked to worship.³⁵⁴ By adopting the express freedoms and limitations in the proposed rights analysis, American courts will avoid some of the unnecessarily strained analyses that have marked past First Amendment jurisprudence. For example, the proposed religious rights framework draws a proper and more easily identifiable line between competing interests by focusing on the effect of one person's actions on another. If such actions nullify or infringe upon religious or other fundamental freedoms, then they cannot be permitted. Certainly this approach is much more coherent than the current tests.³⁵⁵ It also has the additional benefit of focusing exclusively on the protection of citizens' fundamental freedoms as opposed to the protection of the state's administrative practices.³⁵⁶

debates had already been, for the most part, concluded in other nations.

³⁵³ *McGee v. Attorney General* [1974] 1 I.R. 284; see *supra* note 177 and accompanying text.

³⁵⁴ One example of such an infringement is the judicial prohibition of wearing religious headgear while in military uniform. See *supra* note 305.

³⁵⁵ See *supra* note 81, particularly the discussion of Free Exercise jurisprudence; see also *Underkuffler-Freund*, *supra* note 20, at 851-58.

³⁵⁶ See *Employment Div. v. Smith*, 494 U.S. 872, 894, 902 (1990) (O'Connor, J.,

This framework makes sense as a practical matter as well. First, the framework adequately protects those rights that are recognized under current American law. Second and more importantly (at least to the question of whether the American public will embrace the new approach), the proposed framework expressly addresses the key claim made by religious activists, namely that they have a democratic right to shape society in accordance with their wishes. By focusing the analysis on the effect of the intended action on others' fundamental freedoms, religious activists may be forced to recognize how their actions affect others. Because few people oppose the proposition that everyone's religion should be respected equally, religious activists might eventually agree to withdraw from the political realm, at least to the extent that they advocate the enactment of purely religious legislation.³⁵⁷ The fact that most religious activists attempt to justify their involvement in the political arena on political, rather than purely religious, grounds means that this proposal might eventually become an acceptable compromise for all. For those religious activists who believe that they must insert religious values into secular law because it is their religious duty to do so, such compromise, indeed any compromise, is impossible. For this latter group, total victory and total defeat are the only alternatives available.³⁵⁸

concurring in judgment) (recognizing the need to occasionally burden the free exercise of religion, but disagreeing with the majority, which "suggests that the disfavoring of minority religions is an 'unavoidable consequence' under our system of government and that accommodation of such religions must be left to the political process"); see also *Bowen v. Roy*, 476 U.S. 693, 699-701 (1986) (holding that the state's interest in requiring recipients of government benefits to be identified by a Social Security number outweighed a Native American's admittedly sincere claim that such practice violated his religious beliefs).

³⁵⁷ Again, religious activists would still be allowed to campaign for or against certain legislation on the grounds that it violated religious principles, as long as there were legitimate, secular reasons for the legislation to be proposed in the first place. See *supra* notes 322-24 and accompanying text.

³⁵⁸ It is this latter group that is most responsible for the religio-political violence in society. Although these persons will still be able to justify their actions by resorting to a "higher authority," their political ends, *i.e.*, a religiously ordered society, will no longer be legitimated by the majority culture. Therefore, it is possible that they will recognize that their means are equally impermissible. It will also be easier to identify those behaviors that should be curtailed and penalized because the emphasis will be on the effect such actions have on others rather than the religious sincerity or recognizability of such acts. However, it is also possible that these persons may see this type of framework as obviating all possibility of political change in their favor. When this type of fatalism sets in, people become more likely to resort to violence as the only available method of political change. However, given the history and culture of the United States, it seems that the first outcome is the more likely of the two.

As has been evident throughout this Article, any debate over the proper role of religion in law is extremely complex. For every right that is considered absolute there are possible exceptions, and for every argument there are counter arguments. However, the only way to progress in this area is to recognize what the purpose and the effect of religiously influenced laws are, and to decide whether society is willing and able to accept the costs associated with those laws. There are drawbacks to both a unified and a separationist approach, but the question each society must answer for itself is which drawbacks are most acceptable to it. This Article suggests that it is possible, and in fact preferable, to create a secular society in which all persons' religious rights are respected and protected. Although there will be some minor limitations placed on the outer boundaries of those rights, those limits are necessary to protect other persons' religious rights and fundamental freedoms. Because it is impossible for all persons to exercise all their rights simultaneously, this Article supports the idea that it is better to create some small limitations on all persons' rights than to impose large limitations on certain minority groups. As John Stuart Mill said, "There is a limit to the legitimate interference of collective opinion with individual independence; and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs as protection against political despotism."³⁵⁹

³⁵⁹ MILL, *supra* note 316, at 63.

