

**IRELAND AND THE EU:  
HOW IRELAND’S EVOLVING CONCERNS ABOUT  
SOVEREIGNTY MAY HOLD THE FATE OF THE  
EUROPEAN UNION**

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This comment analyzes the development of the Republic of Ireland’s unique and disproportionate significance concerning the European Union’s constitutional ambitions. It argues that despite Ireland being one of the smallest member states of the European Union, its evolving concerns about sovereignty and unique legal requirements have given Ireland more power than it would otherwise have in determining the success of European Union centralization.

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## INTRODUCTION

“‘God save Ireland!’ said the heroes; ‘God save Ireland!’ said they all: ‘Whether on the scaffold high or on the battle-field we die, Oh, what matter, when for Erin<sup>1</sup> dear we fall!’”<sup>2</sup> So goes the rousing nineteenth century Irish song of rebellion entitled “God Save Ireland.”<sup>3</sup> It was written almost a century and a half ago to memorialize three Fenians<sup>4</sup> who were executed under the authority and direction of the British Government.<sup>5</sup> The purpose of “God Save Ireland” was to inflame Irish concerns about the British infringement upon Ireland’s sovereignty.<sup>6</sup> In its militaristic fashion, “God Save Ireland” exhibits the fiercely loyal and steadfastly proud Irish nationalism of the time period.<sup>7</sup> From a contemporary perspective, the lyrics superficially appear only to offer a glimpse into the politics and social mindset of nineteenth century Ireland and its nearly millennium-old struggle for independence and sovereignty from Great Britain.<sup>8</sup> However, the message behind the rebel song has renewed importance for contemporary Ireland. Despite the numerous events that have quelled the social and political dynamics that spurred the writing of “God Save Ireland,” concerns about sovereignty are still significant to the Irish people. The difference now is that Irish sovereignty concerns play out on the world stage. Ireland’s resistance to

<sup>1</sup> “Erin” is an “archaic or poetic/literary name for Ireland.” NEW OXFORD AMERICAN DICTIONARY 572 (Erin McKean ed., 2d ed. 2005).

<sup>2</sup> GEORGES-DENIS ZIMMERMANN, SONGS OF IRISH REBELLION: POLITICAL STREET BALLADS AND REBEL SONGS 1780–1900, at 266–67 (1967) (the lyrics of “God Save Ireland” are from this book).

<sup>3</sup> *Id.*; EWAN MORRIS, OUR OWN DEVICES: NATIONAL SYMBOLS AND POLITICAL CONFLICT IN TWENTIETH-CENTURY IRELAND 28 (2005) (stating “God Save Ireland” was written in 1867).

<sup>4</sup> *The Irish Republican Brotherhood (IRB)*, BBC, <http://www.bbc.co.uk/history/british/easterising/profiles/po17.shtml> (last visited May 23, 2011) (“Fenians” were Irish revolutionary republicans “committed to the use of force to establish an independent Irish republic.”).

<sup>5</sup> MORRIS, *supra* note 3.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> For example, the struggle between Ireland and the British Empire was described in 1861 as “the miserable history of a half-subdued dependency. Its annals are the weary annals of aggression on the one side, and rebellion on the other.” GOLDWIN SMITH, IRISH HISTORY & IRISH CHARACTER 1 (Parker & Co. 1880) (1861).

British domination over the Irish political process has evolved into political opposition to European Union (EU) usurpation of Irish sovereignty. It is the evolution of the centuries-old Irish concerns about sovereignty and Ireland's unique legal requirements that give the small island nation a disparate amount of influence over the further centralization of the EU.

There is no better example of Ireland's disparate amount of power in the EU than the ratification process of the Treaty of Lisbon in Ireland. Like most foundational treaties,<sup>9</sup> the Treaty of Lisbon had to be ratified by each member state in order for it to go into force.<sup>10</sup> The process in Ireland began in June 2008, when the Irish held a nationwide referendum to determine if Ireland would amend its Constitution to allow ratification of the Treaty.<sup>11</sup> Surprisingly, the Irish voters rejected the Treaty of Lisbon and stalled the EU's ambitious administrative overhaul for over a year.<sup>12</sup> Surveys conducted within weeks of the failed Treaty referendum indicate that the Treaty of Lisbon failed primarily because the Irish people did not know enough about the substance of the Treaty. The surveys also showed that a significant percentage of the people who voted against the Treaty did so because of threats to Irish sovereignty.<sup>13</sup>

<sup>9</sup> This comment uses the term "foundational treaties" to describe the series of eight treaties that either did or attempted to fundamentally change the structure, organization, governance, makeup, or size of the EC and/or EU. The eight foundational treaties are: Treaty of Paris, Treaties of Rome, Single European Act, Treaty of Maastricht, Treaty of Amsterdam, Treaty of Nice, Treaty Establishing a Constitution for Europe, and Treaty of Lisbon.

<sup>10</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities art. 6, Dec. 13, 2007, O.J. (C 306) [hereinafter Treaty of Lisbon].

<sup>11</sup> On June 12, 2008, the Irish voters rejected a constitutional amendment that would have allowed the ratification of the Treaty of Lisbon. While it is difficult to determine the reasoning of a mass electorate, preliminary surveys indicated that the primary reason that people voted against the Treaty of Lisbon was because they did not have enough information about it. Secondly, people voted against ratification "to protect Irish identity." *Post-Referendum Survey in Ireland: Preliminary Results*, FLASH EUROBAROMETER 7 (June 18, 2008), [http://ec.europa.eu/public\\_opinion/flash/fl\\_245\\_en.pdf](http://ec.europa.eu/public_opinion/flash/fl_245_en.pdf); Millward Brown IMS, *Post Lisbon Treaty Referendum Research Findings*, DEPARTMENT OF FOREIGN AFFAIRS (Sept. 2008), <http://www.dfa.ie> (follow "About DFA" hyperlink; then follow "Publications" hyperlink; then follow "Post Lisbon Treaty Referendum Research Findings" hyperlink).

<sup>12</sup> FLASH EUROBAROMETER, *supra* note 11; Millward Brown IMS, *supra* note 11. In the interim, however, EU leaders discarded their original plans and timelines and set out to make the Treaty attractive to the people of Ireland. See Suzanne Kingston, *Ireland's Options After the Lisbon Referendum: Implications, Strategies and Competing Visions of Europe*, 34 EUR. L. REV. 455 (2009).

<sup>13</sup> FLASH EUROBAROMETER, *supra* note 11. In addition to voting against the Treaty "to protect Irish identity," a significant percentage of people that voted against the Treaty did so to protect Irish neutrality. *Id.* Also, the Millward Brown survey indicates that the protection of Irish neutrality and prevention of losing of Irish "power/independence/identity" were significant reasons people

In response to the failed referendum, the heads of the other EU member states conceded to the sovereignty-driven concerns in the form of “legal guarantees.”<sup>14</sup> Over a year later, Ireland held another referendum and voted to ratify the Treaty of Lisbon.<sup>15</sup>

In light of the events surrounding the ratification of the Treaty of Lisbon, it is clear that the Republic of Ireland is in a unique position to affect the EU’s ever-present goal of European unification.<sup>16</sup> This comment analyzes the development of the Republic of Ireland’s unique and disproportionate significance concerning the EU’s constitutional ambitions. It argues that despite Ireland being one of the smallest member states of the EU, its evolving concerns about sovereignty and unique legal requirements have given Ireland more power than it would otherwise have in determining the success of EU centralization. This is not to say that the people of Ireland are exceptional in being proud of their nation or worrying about international infringement upon historically domestic issues. Rather, the Irish Constitution, its common law, and the EU’s response to first Irish referenda have given the Irish a wholly unique forum in EU politics to express their collective will.

Part I of this comment discusses the EU’s constitutional ambitions manifested in the foundational treaties<sup>17</sup> that attempted to bring about a more united Europe. Part II explores the evolution of Irish concerns about sovereignty as the nation went from a being a rebellious member of the British Commonwealth to a surprisingly influential member state of the EU. Part III looks at the Treaty of Lisbon and discusses how Irish concerns about sovereignty acted as a barrier—albeit

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voted against the Treaty. Millward Brown IMS, *supra* note 11. Further, just after the failed referendum, political analysts posited that Irish concerns over sovereignty may have been the reason for the result. See, e.g., James Zogby, *The Irish ‘No’ Vote on Lisbon*, THE NATION (Pakistan), June 15, 2008.

<sup>14</sup> In June 2009, at a summit in Brussels, the leaders of the EU member states negotiated and drafted the *Decision of the Heads of State or Government of the 27 Member States of the EU, meeting within the European Council, on the concerns of the Irish people on the Treaty of Lisbon* [hereinafter Legal Guarantees]. The document clarified specific social, economic, and militaristic issues that the leaders perceived as the reason for the failed referendum. The text of the Legal Guarantees was disseminated through media outlets. *Lisbon Assurances: the Text in Full*, IRISH TIMES, June 16, 2009, at 9, available at <http://www.irishtimes.com/newspaper/world/2009/0616/1224248898546.html>.

<sup>15</sup> Charles Forelle & Quentin Fottrell, *Irish Vote Decisively to Support EU Reform*, WALL ST. J., Oct. 5, 2009, available at <http://online.wsj.com/article/SB125456184521661679.html>.

<sup>16</sup> The website EUROPA provides information on the ratification process of the Treaty of Lisbon in each EU member state. In *Your Country, Treaty of Lisbon*, EUROPA, [http://europa.eu/lisbon\\_treaty/countries/index\\_en.htm](http://europa.eu/lisbon_treaty/countries/index_en.htm) (last visited May 23, 2011).

<sup>17</sup> See *supra* note 9.

a temporary one—to the EU’s constitutional ambitions. Finally, Part IV considers how Ireland may maintain its disparate influence over future EU centralization. Before discussing Ireland’s disparate role in the EU, it is important to understand the evolution of the EU and its numerous attempts to unify the nations of Europe through the foundational treaties.

## I. EU AMBITION AND CONSTITUTIONAL DEVELOPMENT

The EU has a long and varied history of trying to establish cooperation and unity among the nations of Europe.<sup>18</sup> In large part, the current iteration of centralization began as a response to the widespread devastation of World War II.<sup>19</sup> The willingness of European nations to give up aspects of state sovereignty in order to create a supranational organization was a direct result of the war.<sup>20</sup>

Following World War II, a French winemaker had the notion that European economic integration could maintain the fragile post-war peace in Europe.<sup>21</sup> The French Foreign Minister, Robert Schuman, adopted the idea of economic integration and had the ambitious goal of rebuilding the devastated European nations with economies stronger than they had been prior to the war.<sup>22</sup> His idea slowly gained momentum, and the integration that began in the mid-twentieth century has resulted in a step-by-step increase in the substantive and geographic scope of the EU.<sup>23</sup>

Despite the steady momentum of integration over the past half century, at the inception of what is now the EU, it was far from certain that pan-European economic cooperation would become a reality.<sup>24</sup> While the notion of economic unity was not entirely new, the idea gained widespread credibility when Schuman announced his ideas in 1950 in

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<sup>18</sup> See Eleanor E. Zeff & Ellen B. Pirro, *Introduction*, in *THE EUROPEAN UNION AND THE MEMBER STATES* 1–3 (Eleanor E. Zeff & Ellen B. Pirro eds., 2d ed. 2006).

<sup>19</sup> ROY H. GINSBERG, *DEMISTIFYING THE EUROPEAN UNION: THE ENDURING LOGIC OF REGIONAL INTEGRATION* 4–5 (Rowman & Littlefield 2010) (“World War II set in motion a fundamental break with the centuries-old habit of interstate conflict in Europe, given the unprecedented scale of human suffering and the loss of global power sustained by each of the leading European states.”).

<sup>20</sup> Barbara Crutchfield George, Paul L. Frantz & Jutta Birmele, *The Dilemma of the European Union: Balancing the Power of the Supranational EU Entity Against the Sovereignty of Its Independent Member Nations*, 9 *PACE INT’L L. REV.* 111, 112 (1997).

<sup>21</sup> GINSBERG, *supra* note 19, at 4.

<sup>22</sup> *Id.*; see also IAN WARD, *A CRITICAL INTRODUCTION TO EUROPEAN LAW* 10–17 (2d ed. 2003).

<sup>23</sup> Jacqueline Dutheil de la Rochère, *The Lisbon Compromise: A Synthesis Between Community Method and Union Acquis*, 31 *FORDHAM INT’L L.J.* 1143, 1143–44 (2008).

<sup>24</sup> WARD, *supra* note 22, at 15.

what is now commonly referred to as the Schuman Declaration (the “Declaration”).<sup>25</sup> In the Declaration, Schuman declared that a French and German unified coal and steel market, which other European nations could join, would create a sufficient foundation for a peaceful integration of the European nations.<sup>26</sup> The Declaration led to the two nations creating a unified industrial market called the European Coal and Steel Community (ECSC).<sup>27</sup>

The ECSC was officially established by the Treaty of Paris in 1951.<sup>28</sup> Its goals mirrored those in Shuman’s Declaration, as it sought to increase economic and industrial cooperation between France and Germany by creating a single European coal and steel market.<sup>29</sup> As its success became more evident, the ECSC expanded to include four more Western European nations.<sup>30</sup> The ECSC coal and steel market successfully increased European trade in the commodities and the six member states considered further economic and political integration.<sup>31</sup>

While the ECSC was successful, European integration remained uncertain in the early 1950s because the member states were apprehensive about yielding state sovereignty rights to supranational organizations.<sup>32</sup> However, as it became increasingly beneficial for European nations to give up aspects of their state sovereignty to gain access to the burgeoning unified market, more nations were willing to do so.<sup>33</sup>

The success of the ECSC was followed by the six nations of the ECSC signing the Treaties of Rome that established the European Economic Community (EEC) and the European Atomic Energy

<sup>25</sup> Summaries of EU Legislation, *Treaty Establishing the European Coal and Steel Community*, EUROPA (Jan. 31, 2005), [http://europa.eu/legislation\\_summaries/institutional\\_affairs/treaties/treaties\\_ecsc\\_en.htm](http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_ecsc_en.htm) [hereinafter ECSC Treaty].

<sup>26</sup> Europe Day, 9 May, *Declaration of 9 May 1950*, EUROPA, [http://europa.eu/abc/symbols/9-may/decl\\_en.htm](http://europa.eu/abc/symbols/9-may/decl_en.htm) (last visited May 23, 2011).

<sup>27</sup> ECSC Treaty, *supra* note 25; *see also* JOSEPHINE STEINER ET AL., EU LAW 3 (9th ed. 2006).

<sup>28</sup> WARD, *supra* note 22, at 14.

<sup>29</sup> STEINER ET AL., *supra* note 27; *see also* James Dooge, *Foreword* to MAASTRICHT & IRELAND: WHAT THE TREATY MEANS v, v–vi, (Patrick Keatinge ed., 1992); *see* NEAL RIEMER, CREATIVE BREAKTHROUGHS IN POLITICS 120–21 (1996); *see also* Lindsey Amantea, *The Evolution of the European Union*, THE POLITONOMIST, May 19, 2011, <http://www.politonomist.com/the-evolution-of-the-european-union-002465>.

<sup>30</sup> WARD, *supra* note 22, at 14–15.

<sup>31</sup> *See* TOM KENNEDY, LEARNING EUROPEAN LAW 52–53 (1998).

<sup>32</sup> WARD, *supra* note 22, at 14–16.

<sup>33</sup> *See id.*

Community (EURATOM) in 1957.<sup>34</sup> The Communities created by the Treaties of Rome were more far-reaching than the industry-specific market of the ECSC and attempted to “lay the foundations of an ever closer union among the peoples of Europe, resolved to ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe.”<sup>35</sup> The EEC specifically sought to begin the formation of a pan-European common market in commodities other than coal and steel.<sup>36</sup> While still economically motivated, EURATOM’s aims were not as overtly market-driven, as it sought to unify the six member states’ energy policies to enable each state to benefit from nuclear energy without singularly incurring the high research costs.<sup>37</sup>

Despite the continued integration of European economic interests, none of the Communities, the EEC, ECSC, or EURATOM, created a political system that sought to supersede national sovereignty.<sup>38</sup> At this point in European integration, the collective goal of the member states was to protect and strengthen themselves, not to supersede or impinge too greatly on their individual state sovereignty rights.<sup>39</sup> With the limited and economically-motivated goals, the EEC, ECSC, and EURATOM thrived side-by-side as distinct entities.<sup>40</sup> However, the Communities laid the foundations for the ambitious goal of future integration, specifically a pan-European common market and further assimilation of economic policies.<sup>41</sup>

With the economic successes of the three Communities, the subsequent thirty years marked a period of dramatic increase in the

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<sup>34</sup> Treaty Establishing the European Economic Community, Europa: Summaries of EU Legislation (last updated Oct. 7, 2007), [http://europa.eu/legislation\\_summaries/institutional\\_affairs/treaties/treaties\\_eec\\_en.htm](http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_eec_en.htm).

<sup>35</sup> *Id.*

<sup>36</sup> Treaty Establishing the European Community art. 2, Mar. 25, 1957, 298 U.N.T.S. 11 available at <http://www.hri.org/docs/Rome57/Part1.html#Art2> (“The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of member states, to promote throughout the community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it.”).

<sup>37</sup> *Id.*; European Atomic Energy Community Treaty, Mar. 25, 1957, 298 U.N.T.S. 167, available at <http://eur-lex.europa.eu/en/treaties/dat/12006A/12006A.htm> [hereinafter EURATOM] (last visited June 15, 2010).

<sup>38</sup> WARD, *supra* note 22, at 18.

<sup>39</sup> *Id.* at 18.

<sup>40</sup> STEINER ET AL., *supra* note 27, at 4.

<sup>41</sup> *See id.*



number of member states.<sup>42</sup> By 1986, each Community had twelve member states, including Ireland, which joined the Communities in 1973.<sup>43</sup>

Following the period of dramatic expansion, the member states ratified the Single European Act (SEA) in 1987.<sup>44</sup> The SEA amended the previous foundational treaties,<sup>45</sup> formally changed the institutional hierarchy of the Communities, and established the objective of creating a unified European market by the end of 1992.<sup>46</sup> The single market focus of the SEA made it considerably less contentious to the member states that still remained cautious about yielding too much traditional state sovereignty to the supranational Communities.<sup>47</sup>

Building upon the SEA, the member states ratified an arguably more significant unification treaty in 1992 called the Treaty of Maastricht, commonly referred to as the Treaty on European Union (TEU).<sup>48</sup> The TEU endeavored to integrate the political, social, and economic institutions of the Communities by formally creating the EU and incorporated the Communities into EU governance.<sup>49</sup> While the member states had already ceded aspects of their own states' sovereignty to the supranational organization, the TEU dramatically increased the aspects of traditional state sovereignty that the individual member states had to cede to the EU.<sup>50</sup> For example, provisions of the TEU mandated the cooperation of member states in foreign affairs, legislative policy, and judicial matters.<sup>51</sup> To complement the SEA's goal of a single market by 1992, the TEU also declared the new goal of developing a single

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> The Single European Act, 1987 O.J. (L 169).

<sup>45</sup> The three previous foundational treaties were the Treaty of Paris and the two Treaties of Rome. See *generally infra* Part I.

<sup>46</sup> Single European Act, *supra* note 44; see also David Allen, European Union, the Single European Act and the 1992 Programme, in *THE SINGLE EUROPEAN MARKET AND BEYOND* 26, 26–27 (Dennis Swann ed., 1992) (providing an overview of the SEA ratification and objectives).

<sup>47</sup> See Dennis Swann, *The Single Market and Beyond: An Overview*, in *THE SINGLE EUROPEAN MARKET AND BEYOND* 3, 3–5 (Dennis Swann ed., 1992); see also WARD, *supra* note 22, at 15 (discussing the ECSC and its impact on European sovereignty concerns).

<sup>48</sup> CLIVE H. CHURCH & DAVID PHINNEMORE, *Introduction to EUROPEAN UNION AND EUROPEAN COMMUNITY* 1, 1 (1994).

<sup>49</sup> George et al., *supra* note 20, at 113; see also Brigid Laffan, *The Treaty: Structures and Themes*, in *MAASTRICHT AND IRELAND* 12, 12–14 (Patrick Keatinge ed., 1992) (discussing the TEU's creation of the EU and the EU structure).

<sup>50</sup> Laffan, *supra* note 49, at 16–17.

<sup>51</sup> *Id.*



European currency by 1999 in order to increase the efficiency of pan-European economics.<sup>52</sup>

Despite the successes of the TEU, it did have shortcomings. For example, the TEU failed to provide the EU with the “decision-making efficiency” to achieve its future ambitious unification goals.<sup>53</sup> It also failed to anticipate and formulate a feasible structure to accommodate the numerous Eastern European nations’ requests for membership in the EU that came after the collapse of the Soviet Union.<sup>54</sup>

Following the tempered success of the TEU, the member states ratified the Treaty of Amsterdam in 1997.<sup>55</sup> In creating the Treaty of Amsterdam, the drafters took a more imprecise approach than the drafters of the previous treaties.<sup>56</sup> The imprecision was due to the ill-defined goals of the Treaty: to solve the failures of the TEU and prepare the EU for further enlargement.<sup>57</sup> The Treaty of Amsterdam was followed by the Treaty of Nice in 2001.<sup>58</sup> The main goal of the Treaty of Nice was to reform the EU and allow practical and efficient enlargement due to the ex-Soviet nations’ requests for membership.<sup>59</sup> The Treaty of Amsterdam and the Treaty of Nice were both disappointing to the leaders of the member states<sup>60</sup> because they failed to correct the persistent problem of structural incoherence in EU.<sup>61</sup> In fact, the Treaties only added to the incoherence with more ad hoc compromises and half-measures.<sup>62</sup>

The EU’s next attempt at unification was its most ambitious yet: to establish a European Constitution. The EU leadership hoped that the

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<sup>52</sup> FRANKLIN DEHOUSSE, AMSTERDAM: THE MAKING OF A TREATY 3–5 (Kogen Page ed., 1999); Brendan Halligan, *Issues*, in MAASTRICHT AND IRELAND 124, 142–43 (Patrick Keatinge ed., 1992).

<sup>53</sup> Youri Devuyt, *The European Union’s Institutional Balance after the Treaty of Lisbon*, 39 GEO. J. INT’L L. 247, 256 (2008); see also Roland Bieber & Cesla Amarelle, *Simplification of European Law*, 5 COLUM. J. EUR. L. 15, 21–22 (1998) (discussing the complexity of adopting Constitutional changes).

<sup>54</sup> Devuyt, *supra* note 53, at 256.

<sup>55</sup> The Treaty of Amsterdam: Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 7, 1997, 1997 O.J. (C 340) 1, available at <http://www.eurotreaties.com/amsterdamtreaty.pdf>.

<sup>56</sup> *Preface to THE AMSTERDAM TREATY: NATIONAL PREFERENCE FORMATION, INTERSTATE BARGAINING AND OUTCOME* xv (Finn Laursen ed., 2002); DEHOUSSE, *supra* note 52, at 4, 23.

<sup>57</sup> DEHOUSSE, *supra* note 52, at 23.

<sup>58</sup> Devuyt, *supra* note 53, at 256.

<sup>59</sup> Peter Hain, *The Treaty of Nice: Enlargement and the ‘Reunion of Europe’*, in THE TREATY OF NICE EXPLAINED 21, 21–24 (Martyn Bond & Kim Feus eds., 2001).

<sup>60</sup> Devuyt, *supra* note 53, at 256.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

Constitution would finally create a unified Europe with improved transparency, institutional efficiency, and a cohesive institutional structure.<sup>63</sup> The Constitution was to accomplish its goals by repealing, replacing, and consolidating over fifty years' of EU treaty law, including all of the foundational treaties, with a single Constitution.<sup>64</sup> The Treaty Establishing a Constitution for Europe was signed in 2004.<sup>65</sup> However, it never entered into force due to failed referenda in France and the Netherlands.<sup>66</sup>

After the failures in France and the Netherlands, the EU announced a "period of reflection" in which it considered the future of the EU and how to best continue unifying Europe.<sup>67</sup> After the reflection, the European Council<sup>68</sup> adopted a detailed mandate for the drafting of a more tolerable treaty in 2007.<sup>69</sup> The treaty the Council drafted would come to be known as the Treaty of Lisbon.<sup>70</sup>

## II. THE EVOLUTION OF IRELAND'S STRUGGLE FOR SOVEREIGNTY

Nearly a millennium prior to the formation of the EU, the island that would become Ireland was invaded and colonized by its neighbor, England.<sup>71</sup> The period of invasion marks the beginning of the two nations' turbulent relationship, as England quickly became the dominant force in Irish affairs. In fact, from 1199 onward, the Monarch of England was simultaneously the Lord of Ireland.<sup>72</sup> For centuries, the English Monarch commandeered the most fertile Irish land and allowed English and Scottish settlers to colonize it, displacing many of the native Irish to more inhospitable regions on the island.<sup>73</sup>

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<sup>63</sup> A Constitution for Europe, Europa: Summaries of Legislation, [http://europa.eu/scadplus/constitution/introduction\\_en.htm](http://europa.eu/scadplus/constitution/introduction_en.htm) (last visited May 23, 2011).

<sup>64</sup> *See id.*

<sup>65</sup> Devuyt, *supra* note 53, at 258.

<sup>66</sup> *Id.* at 258–59.

<sup>67</sup> *Commission's Contribution to the Period of Reflection and Beyond: Plan-D for Democracy, Dialogue and Debate*, at 1, COM (2005) 494 final (Oct. 13, 2005).

<sup>68</sup> The European Council was integral to EU governance. It is comprised of the leaders of the member states and the President of the Commission. Consolidated Versions of the Treaty on European Union & the Treaty on the Functioning of the European Union, Apr. 30, 2008, 6655/1/08 REV 1 (OR. fr) 29 [hereinafter Treaty on European Union].

<sup>69</sup> Devuyt, *supra* note 53, at 259–60.

<sup>70</sup> *Id.* at 260.

<sup>71</sup> RICHARD ENGLISH, *IRISH FREEDOM: THE HISTORY OF NATIONALISM IN IRELAND* 43 (2006).

<sup>72</sup> *Id.*

<sup>73</sup> *See id.* at 58–65.

Once the English invaded the island, the people in Ireland felt the yoke of English rule, grew discontented, and protested to the English Crown in hopes of gaining sovereignty.<sup>74</sup> For example, a few centuries after the invasions began, Irish clergy argued to King Richard II of England that they should not be bound by English laws because they were not represented in the English Parliament.<sup>75</sup> Less than a century later the subordinate Irish Parliament declared that the land of Ireland was, and always had been, sovereign and only beholden to its own legislators.<sup>76</sup> While symbolically important, the declaration had little effect on the relationship between the two nations.<sup>77</sup>

As the millennium passed, the Irish concerns over sovereignty grew stronger and led to numerous failed rebellions and revolts. In 1641, displaced Irish Catholics violently rose up against the English and Scottish settlers before descending into infighting and civil war.<sup>78</sup> An English invasion almost a decade later quelled the violence.<sup>79</sup>

In the 1790s, an Irish nationalist named Theobald Wolfe Tone aptly summarized the Irish yearning for sovereignty from the British Commonwealth: “[m]y unalterable opinion is that the bane of Irish prosperity is the influence of England.”<sup>80</sup> Wolfe Tone’s ideas culminated in the year 1798 when Irish Catholics rose up in another failed attempt at violent revolution.<sup>81</sup> The English responded in 1801 with the Act of Union that abolished any semblance of Irish sovereignty.<sup>82</sup>

Almost fifty years later, the Great Famine that blighted many years of the Irish potato crop in the 1840s devastated the lives of many Irish people and changed the way the Irish viewed English rule.<sup>83</sup> While subject to some historical debate, many believe that the English-driven thrust to export food from Ireland during the famine exacerbated the

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<sup>74</sup> ERSKINE CHILDERS, *THE FRAMEWORK OF HOME RULE* 15–18 (1911).

<sup>75</sup> ENGLISH, *supra* note 71, at 45.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> MARCUS TANNER, *IRELAND’S HOLY WARS: THE STRUGGLE FOR A NATION’S SOUL 1500–2000*, at 134–40 (2001).

<sup>79</sup> *Id.*

<sup>80</sup> ENGLISH, *supra* note 71, at 106.

<sup>81</sup> *Id.* at 106–10.

<sup>82</sup> See Act of Union, 1800, 40 Geo. 3, c. 38 (Ir.), available at <http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=1473067>.

<sup>83</sup> F.S.L. LYONS, *IRELAND SINCE THE FAMINE* 3–13 (1971).

situation.<sup>84</sup> The discontent of the earlier generations and those who lived through the famine grew throughout the rest of the nineteenth century and into the twentieth century.<sup>85</sup> From the heightened discontent, Ireland finally saw success in rebellion against the English Crown early in the twentieth century.

#### A. IRELAND BECOMES A SOVEREIGN NATION

Ireland achieved complete independence and sovereignty from the British Commonwealth gradually over the first half of the twentieth century. The first significant event of the twentieth century through which Irish people attempted to gain unabridged sovereignty was the 1916 Easter Rising.<sup>86</sup> A relatively small band of Irish nationalists seized parts of Dublin.<sup>87</sup> From the General Post Office steps, one of the rebels, Patrick Pearse, declared “the right of the people of Ireland to the ownership of Ireland and to the unfettered control of Irish destinies, to be sovereign and indefeasible.”<sup>88</sup> While the uprising itself was short-lived and conducted by only a small minority of Irish people, the harshness of the British reactive-decision to execute many of the rebels over the subsequent few weeks furthered the rebel’s sovereign cause throughout Ireland.<sup>89</sup>

Following the Easter Rising, Ireland gained more autonomy when it became the Irish Free State and gained dominion status within the British Commonwealth in 1921.<sup>90</sup> A majority of the nation voted to adopt the Irish Free State Constitution and accepted dominion status within the British Commonwealth.<sup>91</sup> As the Commonwealth Constitution was written through negotiations with Great Britain, it was tempered with pro-British sentiment and failed to achieve the lofty governmental goals of fierce Irish nationalists.<sup>92</sup> The unbending Irish nationalists

<sup>84</sup> PETER DUFFY, *THE KILLING OF MAJOR DENIS MAHON: A MYSTERY OF OLD IRELAND* 297–98 (2007).

<sup>85</sup> See LYONS, *supra* note 83, at 93–138.

<sup>86</sup> ENGLISH, *supra* note 71, at 260–62.

<sup>87</sup> LYONS, *supra* note 83, at 369.

<sup>88</sup> *Id.* at 368–69.

<sup>89</sup> *Id.* at 375–77.

<sup>90</sup> NICHOLAS MANSERGH, *Ireland and the British Commonwealth of Nations: The Dominion Settlement*, in *NATIONALISM AND INDEPENDENCE: SELECTED IRISH PAPERS* 93, 93 (Diana Mansergh ed., 1997).

<sup>91</sup> *Id.* at 94; 3, DÁIL DEB., Debate on Treaty (Jan. 7, 1922), available at <http://historical-debates.oireachtas.ie/D/DT/D.T.192201070002.html> (Ir.).

<sup>92</sup> Michael Gallagher, *The Changing Constitution*, in *POLITICS IN THE REPUBLIC OF IRELAND* 72, 72 (John Coakley & Michael Gallagher eds., Routledge Press 3d ed. 1999).

rebelled against the pragmatic majority, who saw dominion status as a means to achieve complete sovereignty at a later date.<sup>93</sup> Yet Ireland descended into a year-long civil war because the nationalists did not accept Ireland's dominion status within the British Commonwealth.<sup>94</sup>

In 1931, the Parliament of Great Britain passed the Statute of Westminster.<sup>95</sup> The Statute was negotiated by representatives of Great Britain and the dominions at an Imperial Conference in 1926.<sup>96</sup> The measure marked a considerable turning point in Irish-British relations and gave the dominions within the British Empire,<sup>97</sup> including Ireland, nearly complete sovereignty.<sup>98</sup> Importantly, it declared that the British Crown was only a "symbol of the free association of the members of the British Commonwealth of Nations."<sup>99</sup> The Statute allowed dominions within the Commonwealth to ignore British law, repeal British law within their territories, and make laws contrary to British law, if they so chose.<sup>100</sup>

Ireland's push for complete sovereignty from the British Commonwealth of Nations continued in 1937. At that time, Ireland used its newly begotten powers to legislate to ratify a republican-based constitution that did not acknowledge any British authority in Ireland.<sup>101</sup>

<sup>93</sup> For an extensive overview of the Irish Civil War, see generally BILL KISSANE, *THE POLITICS OF THE IRISH CIVIL WAR* (2005).

<sup>94</sup> *Id.*

<sup>95</sup> ROBERT P. MAHAFFY, *THE STATUTE OF WESTMINSTER 1931 WITH AN INTRODUCTION, NOTES AND INDEX 5* (1932).

<sup>96</sup> LYONS, *supra* note 83, at 503–04.

<sup>97</sup> India was notably excepted from the provisions of the Treaty of Westminster and therefore did not gain the benefits of increased sovereignty. MAHAFFY, *supra* note 95, at 5.

<sup>98</sup> The most important provisions of the Treaty of Westminster declare that:

No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule, or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

*Id.* at 7, 11.

<sup>99</sup> *Id.* at 5.

<sup>100</sup> *Id.* at 7, 11.

<sup>101</sup> IR. CONST., 1937, available at <http://www.constitution.ie/reports/ConstitutionofIreland.pdf>; see also MANSERGH, *supra* note 90, at 93. At the time, the British did not acknowledge Ireland's

While it has been amended numerous times, the Irish Constitution is still in force today.<sup>102</sup>

The Irish Constitution is the highest law in Ireland, and it governs the actions of all government officials.<sup>103</sup> The Preamble establishes the sovereign-centric tone that runs throughout the document:

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,

We, the people of Éire,

Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial,

Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation.<sup>104</sup>

Other provisions of the Constitution maintain the focus on sovereignty. For example, Articles 5 and 6 of the Irish Constitution proclaim that Ireland is a “sovereign, independent, democratic state” that derives all of its governmental powers “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*, according to the requirements of the common good.”<sup>105</sup>

World War II marked another significant advancement in Ireland’s struggle for sovereignty from the British Commonwealth of Nations. As a demonstration of sovereignty, Ireland officially remained neutral during World War II.<sup>106</sup> Ireland’s neutrality was a strong and overt symbol to the United Kingdom that it no longer had any influence

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new constitution and still perceived Ireland as being a part of the British Commonwealth of Nations. *Id.* at 109, 114.

<sup>102</sup> Hugh O’Flaherty, *An Introduction to the Relationship Between European Community and National Law in Ireland*, 20 FORDHAM INT’L L.J. 1151, 1151 (1997).

<sup>103</sup> IR. CONST., 1937, art. 6.

<sup>104</sup> *Id.* at pmbl.

<sup>105</sup> *Id.* arts. 5–6 (emphasis added).

<sup>106</sup> Gerda Falkner & Brigid Laffan, *The Europeanization of Austria & Ireland: Small Can be Difficult?*, in THE MEMBER STATES OF THE EUROPEAN UNION 209, 221 (Simon Bulmer & Christian Lequesne eds., 2005); LYONS, *supra* note 83 at 548. World War II is known as “the emergency” in Ireland. *Id.*

in Irish politics.<sup>107</sup> To this day, the neutrality forged as a response to British oppression plays a central role in Irish sovereignty despite having few practical implications.<sup>108</sup>

The last event through which Ireland strove for independence and sovereignty from Great Britain occurred just after World War II with the Republic of Ireland Act of 1948.<sup>109</sup> It came into force in 1949 and created the Republic of Ireland, a completely sovereign and independent republic over which the British Crown and government had absolutely no authority.<sup>110</sup>

### B. IRELAND'S STRUGGLE FOR SOVEREIGNTY WITHIN THE EU

Even though Ireland became a fully sovereign state, independent of the British Commonwealth of Nations, it remained economically beholden to Great Britain.<sup>111</sup> Britain was Ireland's largest customer, and their proximity to one another entwined the Irish economy within the much larger British economy.<sup>112</sup> However, with the push for common markets among the Western European nations in the 1960s and 1970s, Ireland saw an opportunity to export to new markets and gain new export partners while still maintaining its good relationship with the British

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<sup>107</sup> Falkner & Laffan, *supra* note 106, at 222.

<sup>108</sup> *Id.* at 221.

<sup>109</sup> The Republic of Ireland Act 1948, (Act. No. 22/1948) (Ir.), available at <http://www.irishstatutebook.ie/1948/en/act/pub/0022/print.html>.

<sup>110</sup> *Id.*; The Republic of Ireland Act Commencement Order 1948 (S.I. No. 27/1949) (Ir.), available at <http://www.irishstatutebook.ie/1949/en/si/0027.html>. Some fierce Irish nationalists may argue that Ireland never achieved complete sovereignty from Great Britain because of Northern Ireland. This mindset led to violence that lasted well into the 1990s. On April 10, 1998, Northern Ireland and the Republic of Ireland entered into the Belfast Agreement (commonly known as the "Good Friday Agreement") that established a plan for the Republic of Ireland to peacefully coexist with Northern Ireland, which remained a region of Great Britain. See Agreement Reached in the Multi-Party Negotiations [The Good Friday Agreement], 37 I.L.M. 751 (Ir.), available at <http://www.nio.gov.uk/agreement.pdf>. It is still in force today. Further, in 2005, the Provisional IRA officially declared an end to its armed campaign to unite Northern Ireland with the Republic of Ireland and pursue "exclusively peaceful means" to achieve its goals. *IRA Says Armed Campaign Is Over*, BBC NEWS (July 28, 2005), [http://news.bbc.co.uk/2/hi/uk\\_news/northern\\_ireland/4720863.stm](http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/4720863.stm).

<sup>111</sup> LYONS, *supra* note 83, at 574–75.

<sup>112</sup> *Id.* at 588–89.



economy.<sup>113</sup> Still, Ireland was a poor nation that could contribute little, if anything, to the Communities.<sup>114</sup>

Despite their lack of contribution, Ireland joined the European Communities in 1973.<sup>115</sup> The Irish immediately understood that they would have to give up some of their hard-won sovereignty in order to join the Communities.<sup>116</sup> However, at the time a majority of the Irish people were enthusiastic about joining the European Communities.<sup>117</sup> While not static, the trend of Irish support for the EU has continued, as Ireland has been a strong supporter of the EC and EU since it became a member.<sup>118</sup>

A 1996 Irish Government White Paper on Foreign Affairs explained that the “Irish people increasingly see the European Union not simply as an organization to which Ireland belongs, but as an integral part of our future. We see ourselves increasingly as Europeans.”<sup>119</sup> Many Irish recognize that Ireland’s economy significantly benefited from membership in the EU and that it remains a relatively small country in a supranational organization of much larger states.<sup>120</sup> That does not mean that Ireland does not influence the EU “very much” though.<sup>121</sup> Ireland’s influence in the EU is not based on the typical indicia of importance, such as the size of its delegation<sup>122</sup> or the size of its population.<sup>123</sup> It is more subtle, based on Ireland’s evolving struggle for sovereignty, its domestic unwillingness to accept the complete supremacy of EU law,<sup>124</sup>

<sup>113</sup> *Id.* at 619–20, 673; Rory O’Donnell, *The New Ireland in the New Europe*, in EUROPE—THE IRISH EXPERIENCE 3–7 (Rory O’Donnell ed., 2000), available at <http://www.nesc.ie/dynamic/docs/Europe-the%20Irish%20Experience.doc>.

<sup>114</sup> DAVID ARTER, *THE POLITICS OF EUROPEAN INTEGRATION IN THE TWENTIETH CENTURY* 169–70 (Dartmouth Publishing Co. 1993); Falkner & Laffan, *supra* note 106, at 210.

<sup>115</sup> STEINER ET AL., *supra* note 27, at 4.

<sup>116</sup> Brigid Laffan & Etain Tannam, *Ireland: The Rewards of Pragmatism*, in ADAPTING TO EUROPEAN INTEGRATION: SMALL STATES AND THE EUROPEAN UNION 69, 69–71 (Kenneth Hanf & Ben Soetendorp eds., 1998).

<sup>117</sup> ENGLISH, *supra* note 71, at 426.

<sup>118</sup> *Ireland and the European Union*, IRISH DEP’T OF FOREIGN AFFAIRS (Nov. 24, 2002), available at <http://www.foreignaffairs.gov.ie/home/index.aspx?id=28456> (last visited June 15, 2011).

<sup>119</sup> GOV’T OF IR., WHITE PAPER ON FOREIGN POLICY: CHALLENGES AND OPPORTUNITIES ABROAD 59 (1996), reprinted in Brigid Laffan, *Ireland and the European Union*, in IRELAND ON THE WORLD STAGE 83, 85 (William Crotty & David E. Schmitt eds., Pearson Education 2002).

<sup>120</sup> See Richard B. Finnegan, *Ireland: Brussels and the Celtic Tiger*, in THE EUROPEAN UNION AND THE MEMBER STATES 175 (Eleanor E. Zeff & Ellen B. Pirro eds., 2d ed. 2006).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 175.

<sup>124</sup> O’Flaherty, *supra* note 102, at 1151–53.

and its judicially-enforced Constitutional requirement to hold public referenda on all significant EU treaties.<sup>125</sup>

# 1. IRELAND'S CONSTITUTIONAL RELATIONSHIP WITH THE EU

Despite the central role of sovereignty in the Irish Constitution, modernity and changes in international law temper the ever-evolving text.<sup>126</sup> Article 29 of the Constitution governs the relationship between Ireland and international law.<sup>127</sup> Originally, the sovereign powers<sup>128</sup> that the Constitution exclusively granted to the Dáil Éireann<sup>129</sup> and the rest of the legislature were incompatible with membership in the Communities.<sup>130</sup> Therefore, Ireland amended<sup>131</sup> its Constitution to enable membership in the European Communities through a 1972 referendum.<sup>132</sup>

<sup>125</sup> See *Crotty v. An Taoiseach*, [1987] I.R. 713 (H. Ct.) (Ir.).

<sup>126</sup> Compare IR. CONST., 1937, art. 5, with art. 29. Additionally, it is important to note that while it is certainly not easy to amend, the Irish Constitution has been amended twenty-one times in its seventy-plus year history. The All-Party Oireachtas Comm. on the Constitution, *Amending the Constitution*, available at <http://www.constitution.ie/amending-the-constitution/default.asp?UserLang=EN> (last visited June 15, 2011). Most of the amendments involve Ireland's membership in the EU. *Id.*

<sup>127</sup> IR. CONST., 1937, art. 29.

<sup>128</sup> Originally, Article 29 of the Irish Constitution explicitly granted all foreign affairs powers to its own government:

Every international agreement to which the State becomes a party shall be laid before Dáil Éireann.

The State shall not be bound by any international agreement involving a charge upon public funds unless the terms of the agreement shall have been approved by Dáil Éireann.

This section shall not apply to agreements or conventions of a technical and administrative character.

No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.

IR. CONST., 1937, art. 29 (original text, unconsolidated).

<sup>129</sup> The "Dáil Éireann" is the lower house of the Irish Legislative branch. *Houses of Oireachtas*, available at <http://www.oireachtas.ie/ViewDoc.asp?fn=/documents/a-misc/deputy.htm&CatID=107&m=d> (last visited June 15, 2011). The Oireachtas is the Irish legislature that is comprised of two houses: Dáil Éireann and Seanad Éireann, the upper house. *Id.*

<sup>130</sup> See O'Flaherty, *supra* note 102, at 1152.

<sup>131</sup> Article 46 of the Irish Constitution governs the amendment process. It states that "[a]ny provision of this Constitution may be amended, whether by way of variation, addition, or repeal, in the manner provided by this Article." IR. CONST., 1937, art. 46. Therefore, the amendments are integrated into the original text of the Constitution. Further, Article 46 dictates that after the Oireachtas passes a proposed amendment, it must be "submitted by Referendum to the decision of the people in accordance with the law for the time being in force relating to the Referendum." *Id.*

<sup>132</sup> The 1972 amendment to the Constitution added Section 4.3 to Article 29 to allow Ireland's membership within the Communities:

The State may become a member of the European Coal and Steel Community (established by Treaty signed at Paris on the 18th day of April, 1951), the

Subsequently, referenda were held to adopt amendments to the Constitution to allow ratification of the SEA and the TEU.<sup>133</sup> However, the amendments to allow membership in the EC and EU also contained broad language that heightened the role of EC and EU law in Ireland:

[n]o provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of the Communities, or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities or by institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the State.<sup>134</sup>

As Hugh O’Flaherty, a Senior Associate Judge on the Supreme Court of Ireland, stated, “the Irish people by virtue of the constitutional amendment to Article 29, have become subject to a system of Community law, which, where applicable, overrules not only the common and statutory law of Ireland but its Constitution as well.”<sup>135</sup> The amendments create a system in which EU law is implemented by the Irish Courts.<sup>136</sup> Still, the Courts recognize that their implementation of EU law does not diminish its supremacy to Ireland’s domestic laws.<sup>137</sup> Concisely stated, Ireland operates with a “dual constitutional framework.”<sup>138</sup>

Despite the broad language in Article 29 that gives Community law superiority in Ireland, the Irish Constitution limits what Ireland will agree to as a member of the EU. For example, Article 29, Section 4 states that Ireland “shall not adopt a decision taken by the European Council to

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European Economic Community (established by Treaty signed at Rome on the 25th day of March, 1957) and the European Atomic Energy Community (established by Treaty signed at Rome on the 25th day of March, 1957). No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the force of law in the State.

IR. CONST., 1937, art. 29, § 4.3.

<sup>133</sup> O’Flaherty, *supra* note 102, at 1152.

<sup>134</sup> IR. CONST., 1937, art. 29, § 4.10.

<sup>135</sup> O’Flaherty, *supra* note 102, at 1153.

<sup>136</sup> See Meagher v. Minister for Agriculture, [1994] I.R. 329 (Ir.).

<sup>137</sup> *Id.*

<sup>138</sup> Laffan, *supra* note 119, at 85.

establish a common defen[s]e.”<sup>139</sup> Additionally, Article 29, Section 5 states that Ireland will not be bound by an international agreement that taxes public funds unless the terms of the agreement have been approved by the government.<sup>140</sup>

## 2. THE CATALYST FOR RESISTANCE: *CROTTY V. AN TAOISEACH*

While the amendments to the Irish Constitution that allowed the nation’s admittance into the EU made the EU law superior to Irish domestic law in many ways, Ireland’s domestic laws remain significant factors in the EU. Ireland is in a unique position to affect EU policy because the Irish Supreme Court held that the Irish Constitution requires a referendum to amend the Constitution to ratify any EU treaty that fundamentally changes EU governance.<sup>141</sup> The requirement to hold referenda is from a 1987 Irish Supreme Court case: *Crotty v. An Taoiseach*.<sup>142</sup> In the case, Crotty asserted that the SEA was contrary to provisions in the Constitution.<sup>143</sup> While Crotty lost many of his arguments, the Court adopted his argument that the SEA’s dictated foreign policy cooperation violated the Irish Constitution.<sup>144</sup> It reasoned that:

[i]t is not within the competence of the Government . . . to free themselves from the restraints of the Constitution or to transfer their powers to other bodies unless expressly empowered so to do by the Constitution. They are both creatures of the Constitution and are not empowered to act free from the restraints of the Constitution.<sup>145</sup>

The Court further reasoned that the sovereignty of Ireland is implicit from its founding and that it would violate the Constitution if the nation yielded its sovereign powers “to declare war or to participate in a war, to conclude peace, to make treaties, and maintain diplomatic

<sup>139</sup> IR. CONST., 1937, art. 29, § 4. Article 29, Section 4 includes all of the amended language allowing Ireland to be a member of the Communities and, later, the EU.

<sup>140</sup> *Id.* at § 5.

<sup>141</sup> See *Crotty v. An Taoiseach*, [1987] I.R. 713 (H. Ct.) (Ir.)

<sup>142</sup> *Id.* The “Taoiseach” is the Irish Prime Minister. See *Role of the Taoiseach*, DEP’T OF THE TAOISEACH, available at [http://www.taoiseach.gov.ie/eng/Taoiseach\\_and\\_Government/About\\_the\\_Taoiseach/Role\\_of\\_the\\_Taoiseach/Role\\_of\\_the\\_Taoiseach.html](http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/About_the_Taoiseach/Role_of_the_Taoiseach/Role_of_the_Taoiseach.html) (last visited June 15, 2011).

<sup>143</sup> *Crotty*, [1987] I.R. ¶ 18.

<sup>144</sup> *Id.* ¶ 62.

<sup>145</sup> *Id.* ¶ 47.

relations with other states.”<sup>146</sup> Based on its reasoning, the Court held that, “it is the people themselves who are the guardians of the Constitution. *In my view, the assent of the people is a necessary prerequisite to the ratification of so much of the Single European Act.*”<sup>147</sup> This requirement to hold a referendum on all significant EU treaties puts the people of Ireland in a unique position to affect EU policy, as no other country requires a referendum under such broad circumstances.<sup>148</sup>

### 3. IRELAND’S GOVERNMENTAL RELATIONSHIP WITH THE EU

When Ireland joined the Communities in 1973, it was a poor and predominantly rural nation that had little to offer the EU in terms of economic enlargement.<sup>149</sup> However, over the next two decades, the Irish implemented domestic economic policies to compliment EU involvement in Ireland and to grow the Irish economy.<sup>150</sup> Ireland’s acceptance of the EU policies and increase in economic power strengthened Ireland’s position within the EU.

Another governmental strategy that Ireland employed to adapt to EU infringement upon Irish sovereignty was to rapidly “Europeanize” its central institutions.<sup>151</sup> Soon after becoming a member state, most of Ireland’s agencies and ministries adopted a European dimension to deal with EU law in Ireland.<sup>152</sup> In fact, almost all of Ireland’s ministries have permanent staff in Brussels, where the EU is headquartered.<sup>153</sup> This allows for more direct communications and clearer understandings of the relationship between the EU and Ireland.

The most notable governmental change intended to strengthen Ireland’s position as a successful member state of the EU was the creation of the Joint Committee on Secondary Legislation in 1974.<sup>154</sup> The Joint Committee was part of the Irish legislature and oversaw the implementation of EU law in Ireland.<sup>155</sup> While it was not immediately successful and provided only a weak check on Ireland’s implementation of the supranational law, it has since evolved into a significant oversight

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<sup>146</sup> *Id.* ¶ 48.

<sup>147</sup> *Id.* ¶ 62 (emphasis added).

<sup>148</sup> O’Flaherty, *supra* note 102, at 1160; STEINER ET AL., *supra* note 27, at 12.

<sup>149</sup> Falkner & Laffan, *supra* note 106, at 210.

<sup>150</sup> *Id.* at 211.

<sup>151</sup> *Id.* at 214.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 214–15.

<sup>155</sup> *Id.*

entity that ensures that EU and Irish law peacefully coexist.<sup>156</sup> Since procedural changes in 2002, the Committee has more information at its disposal and must follow much more institutionalized processes in managing EU policy in Ireland.<sup>157</sup>

#### 4. THE TREATY OF NICE

As discussed above, the Treaty of Nice was ratified in 2001 and was designed to allow the ex-Soviet nations to become members of the EU.<sup>158</sup> Many believed that the referendum would pass in Ireland without trouble based on “the healthy state of the [Irish] economy and the seemingly innocuous content of the Nice Treaty.”<sup>159</sup> However, that was not the case, as the Irish electorate dealt an embarrassing blow to EU leadership by voting down the treaty.<sup>160</sup>

Subsequent research demonstrates that the Irish people were concerned with yielding too much state sovereignty to the EU in economic matters, specifically in forcing them to raise their beneficial corporate tax rate to be in line with the rest of the EU.<sup>161</sup> Also of great concern was the possibility that Ireland would have to abandon its historic neutrality in order to remain part of the EU.<sup>162</sup> Additionally, Irish people had fears that they would lose their EU subsidies if poorer nations joined.<sup>163</sup> Despite the fears, the Irish accepted the treaty one year later with little more than a clarification of the treaty’s terms.<sup>164</sup>

While the Treaty of Nice referenda and subsequent ratification were held earlier this decade, the EU has undergone significant changes and further enlargement since then.<sup>165</sup> It was these developments that led the EU to attempt a complete overhaul of its governance system by creating a European Constitution.<sup>166</sup> As described earlier, though, the

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<sup>156</sup> *Id.* at 215.

<sup>157</sup> *Id.*

<sup>158</sup> See *supra* Part I; see also Hain, *supra* note 59, at 21.

<sup>159</sup> PETER DOYLE, IRELAND AND THE NICE TREATY 4 (2002), available at [http://aei.pitt.edu/163/1/dp\\_c115\\_doyle.pdf](http://aei.pitt.edu/163/1/dp_c115_doyle.pdf); see also Press Release, Irish Dep’t of Foreign Affairs (Apr. 3, 2001), available at <http://foreignaffairs.gov.ie/home/index.aspx?id=2649>.

<sup>160</sup> DOYLE, *supra* note 159, at 3; STEINER ET AL., *supra* note 27, at 13.

<sup>161</sup> DOYLE, *supra* note 159, at 8.

<sup>162</sup> Falkner & Laffan, *supra* note 106, at 222; see also *Ireland Rejects EU Expansion*, BBC NEWS (June 8, 2001), available at <http://news.bbc.co.uk/2/hi/europe/1376379.stm>.

<sup>163</sup> *Ireland Rejects EU Expansion*, *supra* note 162.

<sup>164</sup> DOYLE, *supra* note 159, at 9.

<sup>165</sup> See *supra* Part I.

<sup>166</sup> See *supra* Part I.

Constitution was never ratified.<sup>167</sup> Following this failure, EU leaders regrouped and began work on the Treaty of Lisbon.<sup>168</sup>

### III. THE TREATY OF LISBON

#### A. THE PURPOSE AND SUBSTANCE OF THE TREATY OF LISBON

In 2007, the European Council<sup>169</sup> announced that “after two years of uncertainty over the Union’s Treaty reform process, the time ha[d] come for the Union to resolve the issue and move on.”<sup>170</sup> The mandate of the Intergovernmental Conference (IGC), the negotiation event where the member states develop institutional changes to EU governance,<sup>171</sup> proclaimed that the “constitutional concept . . . is abandoned.”<sup>172</sup> In its place, the Treaty of Lisbon was developed to implement some of the reforms of the European Constitution and make EU governance more efficient.<sup>173</sup>

With the semi-constitutional goals in mind, the Preamble to the Treaty of Lisbon declares that it seeks “to complete the process started by the Treaty of Amsterdam and by the Treaty of Nice with a view to enhancing the efficiency and democratic legitimacy of the Union and to improving the coherence of its action.”<sup>174</sup> It officially abolishes the European Communities and integrates them into the EU.<sup>175</sup> The European Council and the European Parliament are strengthened and finally given the procedural tools necessary to define the “general political directions and priorities” of the EU.<sup>176</sup>

<sup>167</sup> See *supra* Part I; Phil Syrpis, *The Treaty of Lisbon: Much Ado . . . But About What?*, 37 INDUS. L.J. 219, 219 (2008).

<sup>168</sup> Devuyt, *supra* note 53, at 259.

<sup>169</sup> For a brief explanation of the European Council, see *European Council*, EUROPA: GATEWAY TO THE EU, [http://europa.eu/about-eu/institutions-bodies/european-council/index\\_en.htm](http://europa.eu/about-eu/institutions-bodies/european-council/index_en.htm) (last visited June 15, 2011).

<sup>170</sup> Council of the EU Presidency Conclusions No. 11177/1/07 of 21–22 June 2007, at 2, available at [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/94932.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf) [hereinafter Presidency Conclusions]; Syrpis, *supra* note 167, at 221.

<sup>171</sup> *Intergovernmental Conference (IGC)*, EUROPA GLOSSARY, [http://europa.eu/scadplus/glossary/intergovernmental\\_conference\\_en.htm](http://europa.eu/scadplus/glossary/intergovernmental_conference_en.htm) (last visited June 15, 2011).

<sup>172</sup> Presidency Conclusions, *supra* note 170, at 15; Syrpis, *supra* note 167, at 221.

<sup>173</sup> See de la Rochère, *supra* note 23, at 1143–44; Syrpis, *supra* note 167, at 222; Thomas Ferenczi & Philippe Ricard, *Nouveau Traité*, LE MONDE, June 23, 2007, translated and reprinted in Devuyt, *supra* note 53, at 261.

<sup>174</sup> Treaty of Lisbon, *supra* note 10, at pmbl.

<sup>175</sup> Syrpis, *supra* note 167, at 223.

<sup>176</sup> See *id.*



One of the major clarification reforms that the Treaty of Lisbon makes is whether the member states or the EU have competency over specific legal issues.<sup>177</sup> Specifically, it stresses that any transfer of power from a member state to the EU must be interpreted narrowly with the understanding that any such transfer may be made back to the member state.<sup>178</sup> Importantly, the Treaty of Lisbon states that competence over social policy is shared by the EU and its member states.<sup>179</sup> However, it allows the EU to ensure coordination of social policies among the member states.<sup>180</sup>

Another significant reform that the Treaty of Lisbon makes is increasing the EU's ability to create a common defense and security plan.<sup>181</sup> The language, which was adapted from past treaties,<sup>182</sup> allows the European Council to determine the "Union's strategic interests, [and] determine the objectives of and define general guidelines for the common foreign and security policy."<sup>183</sup>

The final important reform concerns the EU's policy on taxation and economic policy.<sup>184</sup> To ensure the continued success of the unified market, the Treaty of Lisbon allows the EU to enforce uniform market practices, including taxation and selling prices of goods.<sup>185</sup>

## B. THE RATIFICATION PROCESS

Once the Treaty of Lisbon was signed by the member states in December 2007, the ratification process began.<sup>186</sup> According to the terms of the Treaty, it had to be ratified by each member state and would go into force either on January 1, 2009, or the month after the last member state completed the ratification process.<sup>187</sup> Just after it was signed, Hungary was the first nation to ratify the Treaty of Lisbon.<sup>188</sup>

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<sup>177</sup> *Id.* at 225.

<sup>178</sup> de la Rochère, *supra* note 23, at 1145.

<sup>179</sup> Syrpris, *supra* note 167, at 225–26.

<sup>180</sup> *Id.* at 226.

<sup>181</sup> Treaty on European Union, *supra* note 68, art. 6.

<sup>182</sup> Syrpris, *supra* note 167, at 223–24.

<sup>183</sup> Treaty on European Union, *supra* note 68, art. 26, § 1.

<sup>184</sup> Treaty on European Union, *supra* note 68, art. 101, § 1.

<sup>185</sup> *Id.* arts. 102–04.

<sup>186</sup> *Timeline: Road to Lisbon*, BBC NEWS (Nov. 3, 2009, 16:59:08 GMT), <http://news.bbc.co.uk/2/hi/europe/8337791.stm>.

<sup>187</sup> Treaty of Lisbon, *supra* note 10, art. 6, § 2; *Q & A: The Lisbon Treaty*, BBC NEWS (Nov. 24, 2009, 16:47:19 GMT), <http://news.bbc.co.uk/2/hi/europe/6901353.stm>.

<sup>188</sup> *Timeline: The road to Lisbon*, *supra* note 186.

Subsequently, the remaining EU member states began their own individual ratification processes.<sup>189</sup> The ratification processes in the member states went relatively smoothly,<sup>190</sup> that is, until it was Ireland's turn to hold its national referendum on the Treaty in June 2008.<sup>191</sup>

#### 1. JUNE 2008: IRELAND'S FIRST REFERENDUM

In June 2008, Ireland held a referendum to amend the Irish Constitution to allow ratification of the Treaty of Lisbon, as required by *Crotty*.<sup>192</sup> By popular vote, the Irish rejected the amendment to ratify the Treaty.<sup>193</sup> Officially, 53 percent of registered voters cast ballots,<sup>194</sup> and approximately 53.4 percent of them voted against ratification.<sup>195</sup> The European Commission<sup>196</sup> had a Eurobarometer survey conducted immediately following the referendum to determine why the Irish people voted the way they did.<sup>197</sup> The survey found that a majority of people that voted to ratify the Treaty of Lisbon did so because they thought EU membership benefited Ireland.<sup>198</sup>

<sup>189</sup> *Treaty of Lisbon*, EUROPA, [http://europa.eu/lisbon\\_treaty/countries/index\\_en.htm](http://europa.eu/lisbon_treaty/countries/index_en.htm) (last visited June 15, 2011). The Europa website is interactive and allows visitors to determine when and how each EU member state ratified the Treaty of Lisbon.

<sup>190</sup> *See id.*

<sup>191</sup> *Timeline: Road to Lisbon*, *supra* note 186.

<sup>192</sup> Kingston, *supra* note 12, at 457; *see Crotty v. An Taoiseach*, [1987] I.R. 713 (H. Ct.) (Ir.). Among other substantive changes, the amendment would change Article 29 Section 4.10 to state that "[t]he State may ratify the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on the 13th day of December 2007, and may be a member of the European Union established by virtue of that Treaty." Twenty-Eighth Amendment of the Constitution Bill 2008 (No.14/2008) (Ir.), *available at* <http://www.oireachtas.ie/documents/bills28/bills/2008/1408/b1408d.pdf>.

<sup>193</sup> Kingston, *supra* note 12, at 455.

<sup>194</sup> FLASH EUROBAROMETER, *supra* note 11, at 2; *see also* Millward Brown IMS, *supra* note 11, at i.

<sup>195</sup> *Ireland Rejects Lisbon Treaty*, RTE NEWS (June 13, 2008), <http://www.rte.ie/news/2008/0613/eulibon.html>.

<sup>196</sup> According to the Irish Department of Foreign Affairs, the European Commission:  
is an independent body appointed by the Member States to act as the neutral guardian of their shared interests and to promote the general interest of the Union. It monitors the implementation of EU law, proposes legislation and has important executive functions. Commissioners are nominated by Member States, approved by the European Parliament and appointed for a period of five years.

Ir. Dep't of Foreign Affairs, *White Paper: An Explanation of Changes to the Functioning of the European Union Made by the Lisbon Treaty*, at 120 (2009), *available at* <http://www.embassyofireland.ch/home/index.aspx?id=34239> (in the "Related Documents" section click on "Lisbon Treaty 2009 White Paper").

<sup>197</sup> FLASH EUROBAROMETER, *supra* note 11, at 2.

<sup>198</sup> *Id.*; *see also* Millward Brown IMS, *supra* note 11, at i.

The Irish voters that voted against the Treaty had more diverse reasoning, but the top two reasons were: not knowing enough about the substance of the Treaty to be comfortable voting for it, and a desire to protect Irish identity.<sup>199</sup> Furthermore, people cited trying to maintain Irish neutrality, sovereignty over national defense decisions, and Ireland's corporate-friendly tax structure as major reasons for voting not to ratify the Treaty.<sup>200</sup> This is consistent with the government-funded research into why a majority of Irish voters rejected the Treaty of Lisbon.<sup>201</sup>

In a move some scholars argue violates Irish democratic principles,<sup>202</sup> Irish and EU leaders immediately went to work to allay the actual and perceived sovereignty concerns of the Irish electorate and develop some way to hold a second referendum on the Treaty of Lisbon.<sup>203</sup> What resulted were unprecedented and undefined concessions to the Irish in the form of "legal guarantees."<sup>204</sup>

## 2. THE "LEGAL GUARANTEES"

On June 19, 2009, the leaders of the twenty-seven EU member states negotiated and declared what is commonly referred to as the "legal guarantees."<sup>205</sup> They sought to address the Irish people's apprehensions within the negotiated terms of the Treaty of Lisbon.<sup>206</sup> As the European columnist for *The Economist* wrote, "[b]y voting No, the Irish . . . forced the other twenty-six governments to come up with a package of concessions and assurances."<sup>207</sup> The leaders of Ireland named four specific concerns about sovereignty that they saw as the reason for the

<sup>199</sup> FLASH EUROBAROMETER, *supra* note 11, at 8.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 2; Millward Brown IMS, *supra* note 11, at i–iii.

<sup>202</sup> Ingolf Pernice, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, 15 COLUM. J. EUR. L. 349, 361 (2009).

<sup>203</sup> *Id.* at 262.

<sup>204</sup> The "legal guarantees" are "a deliberately ambiguous concept which does not exist as such in EU law." Kingston, *supra* note 12, at 460.

<sup>205</sup> Brussels European Council Presidency Conclusions No. 11225/2/09 of July 10, 2009, available at [http://ec.europa.eu/regional\\_policy/cooperation/danube/documents/council\\_conclusions.pdf](http://ec.europa.eu/regional_policy/cooperation/danube/documents/council_conclusions.pdf). The "legal guarantees" had to conform to the language of the Treaty because if any substantive change was made to the actual treaty text, it would have to be re-ratified by the member states that already ratified it. THE INST. OF INT'L & EUR. AFFAIRS, LISBON: THE IRISH GUARANTEES EXPLAINED 1 (2009), available at <http://www.iiea.com/publications/lisbon-the-irish-guarantees-explained> [hereinafter: INST. OF INT'L & EUR. AFFAIRS].

<sup>206</sup> Brussels European Council Presidency Conclusions, *supra* note 205.

<sup>207</sup> Charlemagne, *Charlemagne's Notebook, Watching the Irish Vote on Lisbon*, ECONOMIST (Oct. 2, 2009, 11:56 AM), [http://www.economist.com/blogs/charlemagne/2009/10/watching\\_the\\_irish\\_vote\\_on\\_lis](http://www.economist.com/blogs/charlemagne/2009/10/watching_the_irish_vote_on_lis).

initial failed referendum: Ireland's abortion laws, Ireland's corporate taxation laws, Ireland's historic neutrality,<sup>208</sup> and Ireland's potential loss of its Commissioner.<sup>209</sup> The legal guarantees addressed each of the concerns explicitly.<sup>210</sup>

The legal guarantees are comprised of both legally binding agreements and political commitments.<sup>211</sup> However, because the leaders of the member states could not make any substantive changes to the terms of the Treaty,<sup>212</sup> the legal guarantees merely elucidate how the Treaty's terms would affect Irish sovereignty and how the other member states would enforce the Treaty's provisions.<sup>213</sup> With no change in substantive rights, though, the legal status of the legal guarantees became a contentious issue in Ireland.<sup>214</sup>

The legal guarantees consist of three parts: 1) a decision by the leaders of the EU member states relating to the issues of the right to life, domestic taxation, and defense; 2) "a Declaration of the European Council relating to workers' rights, social policy, and public services"; and 3) "a declaration by Ireland relating to defen[s]e issues."<sup>215</sup> The first, and most important,<sup>216</sup> section of the "legal guarantees" sought to assuage the sovereignty-driven fears of Irish voters on the four contentious

<sup>208</sup> See Fiona Smith, *Irish Concerns About Abortion, Neutrality May Scupper Lisbon Again*, *DEUTSCHE PRESSE-AGENTUR (Dublin)*, Dec. 11, 2008.

<sup>209</sup> See HUGO BRADLEY, CTR. FOR EUROPEAN REFORM, LAST CHANCE FOR LISBON: IRELAND'S EU REFERENDUM 6 (2009), available at [http://www.cer.org.uk/pdf/bn\\_lisbon\\_22sept09.pdf](http://www.cer.org.uk/pdf/bn_lisbon_22sept09.pdf). Further, the potential loss of Ireland's Commissioner is a concern. See *Lisbon's Last Hope: Troubled Ireland and Europe*, *ECONOMIST*, June 27, 2009.

<sup>210</sup> See Brussels European Council Presidency Conclusions, *supra* note 205.

<sup>211</sup> INST. OF INT'L & EUR. AFFAIRS, *supra* note 205, at 1.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> Juno McEnroe, *Alliance Launches No Campaign Against Lisbon II Referendum*, *IRISH EXAMINER*, Aug. 19, 2009, available at <http://www.irisht Examiner.com/ireland/snidsnidau/rss2/>. For example, an Irish politician stated that the "'guarantees' are nothing more than a series of clarifications of some aspects of the Lisbon Treaty. They do not alter the text of the treaty in any way nor do they change the impact that the treaty will have on Ireland and the EU. Their legal status is irrelevant." *Id.*; see Sean Whelan, *Lisbon Guarantees*, *RTÉ NEWS* (June 17, 2009), <http://www.rte.ie/news/2009/0617/eul Lisbon.html> (stating that while others agreed that the "legal guarantees" simply clarified the Treaty, they argued that the "legal guarantees" are binding international agreements that will protect Irish interests); see generally INST. OF INT'L & EUR. AFFAIRS, *supra* note 205, at 3.

<sup>215</sup> INST. OF INT'L & EUR. AFFAIRS, *supra* note 205, at 3.

<sup>216</sup> The first section is the only binding section of the "legal guarantees." *Id.* at 3–4. The second section of the "legal guarantees," a declaration by the European Council on EU labor law and the third section, a declaration by Ireland on military issues, are less important as they do not have any binding effect. *Id.* The sections merely state the EU's position on labor law and Ireland's neutrality and its prohibition from joining a common EU defense. *Id.*

issues.<sup>217</sup> It states how specific terms of the Treaty of Lisbon will affect the domestic law of Ireland when the Treaty goes into force.<sup>218</sup>

The first legal guarantee concerns the issue of abortion in Ireland. The Irish sought this guarantee because the Treaty of Lisbon gives the previously non-binding Charter of Fundamental Rights of the European Union (“Charter”)<sup>219</sup> legal authority,<sup>220</sup> and Irish abortion laws may violate some of the Charter’s provisions.<sup>221</sup> The Charter states that:

[n]othing in the Treaty of Lisbon attributing legal status to the Charter of Fundamental Rights of the European Union, or in the provisions of that Treaty in the area of Freedom, Security and Justice affects in any way the scope and applicability of the protection of the right to life in . . . the Constitution of Ireland.<sup>222</sup>

Abortion has been illegal in Ireland since the nineteenth century.<sup>223</sup> A 1983 amendment to the Irish Constitution attempted to guarantee protection of Ireland’s anti-abortion stance.<sup>224</sup> However, the centralization of EU law<sup>225</sup> and the potential threat from an upcoming decision from European Court of Human Rights on the Irish abortion laws<sup>226</sup> threaten Ireland’s sovereignty over its moral values.

The second legal guarantee states that “[n]othing in the Treaty of Lisbon makes any change of any kind, for any Member State, to the extent or operation of the competence of the European Union in relation

<sup>217</sup> See *Lisbon’s Last Hope: Troubled Ireland and Europe*, *supra* note 209.

<sup>218</sup> Brussels European Council Presidency Conclusions, *supra* note 205.

<sup>219</sup> Charter of Fundamental Rights of the European Union, Dec. 18, 2000, 2000 O.J. (C 364) 1, available at [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf) [hereinafter Charter]. It was drafted in 2000 to protect inalienable rights not explicitly guaranteed by EU law and did not have any legal precedent until the Treaty of Lisbon was ratified in 2009. In any event, Ireland’s abortion laws have never been found to violate the predecessor of the Charter, the Convention for the Protection of Human Rights and Fundamental Freedoms. See Shannon K. Calt, *A., B. & C. v. Ireland: ‘Europe’s Roe v. Wade’?*, 14 LEWIS & CLARK L. REV. 1190, 1191 (2010); see also Charter, art. 52.

<sup>220</sup> Brussels European Council Presidency Conclusions, *supra* note 205, at 3, 17.

<sup>221</sup> See *id.*

<sup>222</sup> *Id.*

<sup>223</sup> Calt, *supra* note 219, at 1192.

<sup>224</sup> *Id.* at 1194.

<sup>225</sup> See *supra* Part I.

<sup>226</sup> The European Court of Human Rights heard arguments in *A., B. and C. v. Ireland* on December 9, 2009. The case was brought by three Irish women who claim that the Irish abortion laws violate the EU’s long-standing protection of fundamental rights as stated in the Convention for the Protection of Human Rights and Fundamental Freedoms. Calt, *supra* note 219, at 1189.

to taxation.”<sup>227</sup> The Irish leadership sought this assurance because they wanted to ensure Ireland could retain its low corporate tax rate to entice new business.<sup>228</sup> The issue concerned five words from the Treaty of Lisbon that debatably could have allowed the EU to force Ireland to raise its taxes “to avoid distortion of competition.”<sup>229</sup>

The third legal guarantee concerns Ireland’s history of neutrality and the common defense of the EU.<sup>230</sup> After acknowledging the importance of EU security, the guarantee states that:

[t]he Treaty of Lisbon does not affect or prejudice Ireland’s traditional policy of military neutrality.

....

It would be a matter for the Member States, including Ireland, to decide, in accordance with the provisions of the Treaty of Lisbon and with their respective constitutional requirements, whether or not to adopt a common defen[s]e.<sup>231</sup>

With the clarification of the Treaty terms’ applicability to Ireland, the next concession concerned how Ireland, and other small member states, would be represented in the EU.

### 3. THE IRISH MEMBER OF THE EUROPEAN COMMISSION

In addition to the legal guarantees on the right to life, taxation, and neutrality, the EU also assured that Ireland, and the rest of the EU member states, would maintain a Commissioner on the European Commission under the Treaty of Lisbon.<sup>232</sup> Part of the negotiations resulted in the heads of state of the EU member states conceding to Irish leaders’ requests to allow all EU member states to retain their commissioners whom they were going to potentially lose under the Treaty and would definitely lose if the Treaty failed again.<sup>233</sup> The European Council wrote that:

<sup>227</sup> Brussels European Council Presidency Conclusions, *supra* note 205, at 18.

<sup>228</sup> See Jamie Smyth, *Treaty Does Not Threaten Ireland’s Corporate Tax Rate*, IRISH TIMES, Sept. 24, 2009, at 10.

<sup>229</sup> Treaty of Lisbon, *supra* note 10, art. 2, § 79.

<sup>230</sup> Brussels European Council Presidency Conclusions, *supra* note 205, at 18–19.

<sup>231</sup> *Id.*

<sup>232</sup> *The Lisbon Treaty and Ireland*, EUROPA, [http://ec.europa.eu/ireland/lisbon\\_treaty/lisbon\\_treaty\\_progress/index\\_en.htm](http://ec.europa.eu/ireland/lisbon_treaty/lisbon_treaty_progress/index_en.htm) (last visited June 14, 2011); Brussels European Council Presidency Conclusions, *supra* note 205, at 2.

<sup>233</sup> See *Yes Vote ‘Only Guarantee’ of Keeping Commissioner*, IRISH EXAMINER, July 2, 2009.

[h]aving carefully noted the concerns of the Irish people . . . the European Council . . . agreed that, provided the Treaty of Lisbon enters into force, a decision would be taken, in accordance with the necessary legal procedures, to the effect that the [European] Commission shall continue to include one national of each Member State.<sup>234</sup>

Following the legal guarantees that addressed the sovereignty concerns of the Ireland, EU leaders were confident that the Irish people would vote to ratify the Treaty of Lisbon in a second referendum.<sup>235</sup>

#### 4. OCTOBER 2009: IRELAND'S SECOND REFERENDUM AND THE AFTERMATH

Just fifteen months after the failed Treaty of Lisbon referendum in Ireland, the nation went back to the polls to vote on the Treaty of Lisbon.<sup>236</sup> While the conditions in Ireland had changed from June 2008 to October 2009,<sup>237</sup> the language of the Treaty of Lisbon had not changed.<sup>238</sup> Nonetheless, the outcome was different, as 67 percent of the Irish voters voted to ratify the Treaty of Lisbon.<sup>239</sup> Despite the significant economic downturn in Ireland, the turnabout can be attributed to the legal guarantees because the assurances solved the most-cited reason for the June 2008 defeat: uncertainty over the terms of the Treaty.<sup>240</sup>

After the voters of Ireland voted to allow ratification of the Treaty of Lisbon, the EU turned its attention to Poland and the Czech Republic, the only EU member states yet to ratify the Treaty.<sup>241</sup> Poland had not ratified the Treaty because its President refused to sign the

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<sup>234</sup> Brussels European Council Presidency Conclusions, *supra* note 205, at 2.

<sup>235</sup> In a statement following the declaration of the "legal guarantees," José Manuel Durão Barroso, President of the European Commission, stated that "I am now very confident because in fact the Irish government has got everything it was asking from the colleagues, to have the best conditions to ask the Irish people again to express their will regarding the treaty." Press Release, Statement of President Barroso at the European Council Press Conference (June 19, 2009), available at [http://ec.europa.eu/archives/commission\\_2004-2009/president/pdf/speech\\_20090619\\_en.pdf](http://ec.europa.eu/archives/commission_2004-2009/president/pdf/speech_20090619_en.pdf).

<sup>236</sup> Forelle & Fottrell, *supra* note 15.

<sup>237</sup> The most significant change in Ireland between the first referendum and the second was that its economy began a steep decline as part of the global recession. See *Irish EU Treaty Referendum Closes*, BBC NEWS (Oct. 2, 2009, 22:01 GMT), <http://news.bbc.co.uk/2/hi/8285849.stm>.

<sup>238</sup> See INST. OF INT'L & EUR. AFFAIRS, *supra* note 205, at 1–3.

<sup>239</sup> Forelle & Fottrell, *supra* note 15.

<sup>240</sup> See Eric Pfanner, *Irish Yes Sets Stage for New EU Chief; Economic Fears Overcome Skepticism About Union as Voters Back Overhaul*, INT'L HERALD TRIB., Oct. 5, 2009, at 1.

<sup>241</sup> *Irish EU Treaty Referendum Closes*, *supra* note 237.



Treaty prior to the second Irish referendum.<sup>242</sup> After the successful second Irish referendum, Poland ratified the Treaty one week later.<sup>243</sup> Similarly, the President of the Czech Republic had not ratified the Treaty because he had been waiting for the result of the Irish referendum,<sup>244</sup> an internal court ruling on the Treaty's constitutional implications, and an opt-out provision from specific treaty terms.<sup>245</sup> The Czech President ratified the Treaty a little over a month after the second referendum in Ireland.<sup>246</sup> Therefore, by its own terms, the Treaty of Lisbon went into force on December 1, 2009.<sup>247</sup>

### CONCLUSION

Since its inception, what is now the EU has sought cooperation and unity for the nations of Europe.<sup>248</sup> Conversely, Ireland, one of the smaller European nations,<sup>249</sup> has a long history of sovereignty-centric struggles that continue to this day.<sup>250</sup> Inevitably, Ireland's well-developed concerns about its own sovereignty and the EU's goals of European unification have clashed, most notably during the Irish ratification of the Treaty of Lisbon. Ireland's desire to remain sovereign was a principal reason for the Treaty of Lisbon's initial failure and the EU response to acquiesce to Irish concerns over moral, economic, and military issues by issuing the legal guarantees.<sup>251</sup>

With the Treaty of Lisbon and legal guarantees in force for only a few months, it may be premature to look forward to another foundational treaty and further EU integration. Based on the past foundational treaties, another treaty is, at the earliest, a few years away.

<sup>242</sup> Philippa Runner, *Polish President Declines to Sign EU Treaty*, EUOBSERVER.COM (July 1, 2008, 9:26 CET), available at <http://euobserver.com/9/26424/?rk=1>.

<sup>243</sup> Matthew Day, *President of Poland Signs Lisbon Treaty*, TELEGRAPH (Oct. 10, 2010, 1:21 PM), <http://www.telegraph.co.uk/news/worldnews/europe/poland/6290694/President-of-Poland-signs-Lisbon-Treaty.html>.

<sup>244</sup> *Czech President Digs His Heels in Against EU Treaty*, EURACTIV (July 25, 2008), <http://www.euractiv.com/en/future-eu/czech-president-digs-heels-eu-treaty/article-17451>.

<sup>245</sup> *EU Reform Treaty Passes Last Test*, BBC NEWS (Nov. 3, 2009, 18:07 GMT), <http://news.bbc.co.uk/2/hi/europe/8340664.stm>.

<sup>246</sup> *See id.*

<sup>247</sup> *Id.*; *Treaty of Lisbon*, EUROPA, [http://europa.eu/lisbon\\_treaty/index\\_en.htm](http://europa.eu/lisbon_treaty/index_en.htm).

<sup>248</sup> *See supra* Part I.

<sup>249</sup> *See* Press Release, Eurostat, EU27 Population 501 Million at 1 January 2010, 2 (July 27, 2010), available at [http://epp.eurostat.ec.europa.eu/cache/ITY\\_PUBLIC/3-27072010-AP/EN/3-27072010-AP-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-27072010-AP/EN/3-27072010-AP-EN.PDF).

<sup>250</sup> *See supra* Part II.B.

<sup>251</sup> *See supra* Part III.B.

Further, it remains to be seen how the Treaty of Lisbon ratification process has affected the relationship between Ireland and the EU. It seems clear that the Irish will continue to be concerned with institutional infringement upon Ireland's sovereignty,<sup>252</sup> just as the EU will continue pursuing its goal of further European integration.<sup>253</sup> In the midst of a global economic crisis,<sup>254</sup> aging European population,<sup>255</sup> and global warming,<sup>256</sup> the stakes could not be higher for potential conflicting ideals.<sup>257</sup>

In the future, the EU may further rely on legal guarantees because of their demonstrated success in Ireland. A reliance on legal guarantees means that the EU will rely less on other more formal mechanisms in EU law in future attempts to achieve its unification goals. While there are other mechanisms to customize EU law to each member state, such as the "opt-out,"<sup>258</sup> the more nebulous legal guarantee may be used more frequently as EU ambition and Irish sovereignty clash. The undefined legal guarantees offer more flexibility than traditional opt-outs, because they can be used to address fundamental aspects of a treaty while not requiring a new treaty to be binding.<sup>259</sup> However, opt-outs are legally recognized, "clear, [and] legally binding refusals to participate in the selected form of co-operation."<sup>260</sup> Further, opt-outs are standard in EU law and all members accept their legal meaning.<sup>261</sup> The difference is striking when compared to the undefined and legally questionable legal guarantees.

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<sup>252</sup> See Nathan Horst, *Creating an Ever Closer Union: The European Court of Justice and the Threat to Cultural Diversity*, 47 COLUM. J. TRANSNAT'L L. 165, 169–70 (2008).

<sup>253</sup> See *supra* Part I.

<sup>254</sup> Steven Erlanger & Stephen Castle, *Dire Economy Threatens Idea of One Europe*, N.Y. TIMES, Mar. 2, 2009, at A1.

<sup>255</sup> Press Release, Europa, Europe's Population Is Getting Older. How Will This Affect Us and What Should We Do About It? (Mar. 17, 2005), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/322&format=PDF&aged=1&language=EN&guiLanguage=en>.

<sup>256</sup> James Kanter, *Europe Union Proposes Cleaner, More Competitive Energy Market*, N.Y. TIMES, Jan. 11, 2007, at A5.

<sup>257</sup> See DEUTSCHE BANK RESEARCH, POST-LISBON AGENDA 1 (2009), available at [http://www.dbresearch.com/PROD/DBR\\_INTERNET\\_EN-PROD/PROD000000000250332.pdf](http://www.dbresearch.com/PROD/DBR_INTERNET_EN-PROD/PROD000000000250332.pdf).

<sup>258</sup> An "opt-out" is a "derogation from a provision, or provisions, of Treaty law." Kingston, *supra* note 12, at 462.

<sup>259</sup> See *id.* at 462–64.

<sup>260</sup> *Id.* at 464.

<sup>261</sup> See *id.*

Whatever the future has in store for the EU and Ireland, they will have to work together to reach their goals. The EU will have to be more sensitive to Ireland's evolving sovereignty concerns; and the Irish will have to be willing to work within the EU if Ireland is to maintain its disparate power over EU centralization. Their futures are inextricably linked by their opposing ideals. However, while there will inevitably be future conflicts between Irish sovereignty and further EU integration, the Treaty of Lisbon ratification process in Ireland demonstrates that the competing ideals can coexist through negotiation and compromise and evolving mechanisms to customize EU law to the member states.<sup>262</sup> Fittingly, one Irish citizen recently summed up his personal juxtaposition between his understanding of the Republic of Ireland and EU membership:

I'm just happy to be able to say I'm a European. I'll never be European first and Irish second; always Irish first and European second. But whenever I listen to the European anthem, which is "Ode to Joy," from Beethoven, I do get a little sense of excitement. And I do feel European.<sup>263</sup>

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<sup>262</sup> See *supra* Part III.

<sup>263</sup> Stephen McPhilemy, *The European Union in 2009*, TRAVEL WITH RICK STEVES PODCAST (May 9, 2009), at 50:40, <http://www.ricksteves.com/radio/archive.htm#171>.