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## **“EQUAL TREATMENT FOR THE IDENTITY”: THE INEQUALITY OF IRISH AND BRITISH CITIZENSHIP IN POST-BREXIT NORTHERN IRELAND**

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### ABSTRACT

*Since its inception, sectarian violence between Protestant unionists, loyal to the United Kingdom, and Catholic nationalists, fighting for a united Ireland, has plagued Northern Ireland. In 1998, the governments of the United Kingdom and the Republic of Ireland concluded a peace accord, the Good Friday Agreement, which instilled a fragile peace in the region by legitimizing the aspirations of both communities and ensuring equal treatment for all citizens. Specifically, the Agreement grants all Northern Irish citizens an equal choice between Irish or British citizenship, or both, and ensures equal economic opportunities for all citizens. This equality is now threatened by the United Kingdom’s decision to leave the European Union, commonly referred to as “Brexit.” Brexit will undermine the equal status of Northern Irish citizens because those who choose only British nationality will no longer have access to the rights and economic opportunities associated with European Union membership. In creating this new inequality, the United Kingdom will be violating its legal obligations under the Good Friday Agreement. Proposed solutions for the United Kingdom include: (1) maintaining the Common Travel Area between the United Kingdom and Ireland; (2) joining the Schengen Area; (3) allowing Northern Ireland to remain in the European Union; and, (4) reversing Brexit in its entirety. All of these solutions would help minimize the unequal status between British and Irish nationals in Northern Ireland post-Brexit. However, only solutions that continue full European Union rights for all citizens of Northern Ireland, such as allowing Northern Ireland to remain in the European Union or reversing Brexit, will stop the United Kingdom from breaching the Good Friday Agreement.*

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## I. INTRODUCTION

The imminent departure of the United Kingdom (the “U.K.”) from the European Union (the “EU”), also known as Brexit, has produced numerous economic and political uncertainties throughout the globe.<sup>1</sup> One of the most significant problems unearthed by the historic decision is Brexit’s potential impact on the citizens of Northern Ireland.<sup>2</sup> Northern Ireland, one of the four countries that make up the

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<sup>1</sup> See, e.g., Wiktor Szary & Jason Douglas, *Brexit Uncertainty Slows U.K. Business Investment, Immigration From EU*, WALL ST. J. (Aug. 24, 2017, 7:37 AM), <https://www.wsj.com/articles/u-k-business-investment-slows-significantly-as-brexit-fuels-uncertainty-1503564640> [<https://perma.cc/52A6-5YUN>] (discussing the slowdown in immigration to Britain and the low level of business investment in the British economy since Brexit); Alasdair R. Young, *The U.K. is in Brexit Trouble. It Can't Decide Whether to be Closer to the E.U. or to the U.S.*, WASH. POST (Dec. 7, 2017), [https://www.washingtonpost.com/news/monkey-cage/wp/2017/12/07/the-u-k-is-in-brexit-trouble-it-cant-decide-whether-to-be-closer-to-the-e-u-or-to-the-u-s/?utm\\_term=.3b9ae14c9cd2](https://www.washingtonpost.com/news/monkey-cage/wp/2017/12/07/the-u-k-is-in-brexit-trouble-it-cant-decide-whether-to-be-closer-to-the-e-u-or-to-the-u-s/?utm_term=.3b9ae14c9cd2) [<https://perma.cc/L4XM-3AY2>] (proposing a possible shift in the global political relationship between the U.K. and the United States after Brexit); Ben Kentsh, *UK Human Rights 'Put at Risk' by Brexit Bill, Warns Senior Academic*, INDEP. (Sept. 14, 2017, 10:54 PM), <http://www.independent.co.uk/news/uk/politics/uk-human-rights-brexit-bill-risk-leave-eu-courts-laws-tobias-lock-university-of-edinburgh-a7947451.html> [<https://perma.cc/Z522-KJDJ>] (reporting concerns on the status of human rights protections in the U.K. post-Brexit); Stephen Castle, *U.K.'s Next Brexit Agony: What Sort of Trade Deal?*, N.Y. TIMES (Dec. 17, 2017), <https://www.nytimes.com/2017/12/17/world/europe/uk-brexit-trade-deal-eu.html> [<https://perma.cc/RZ7A-5G3V>] (considering the hurdles to a satisfactory trade deal between the EU and the U.K.).

<sup>2</sup> See *Brexit Risks Destabilising Ireland's Fragile Peace*, FIN. TIMES (Nov. 8,

U.K., voted against Brexit with almost fifty-six percent of citizens voting to remain in the EU.<sup>3</sup> Despite Northern Ireland's opposition, Brexit now specifically threatens the region because it implicates the survival of the Good Friday Agreement ("the Agreement"), also known as the Belfast Agreement, which has engendered a fragile peace in Northern Ireland after decades of sectarian violence.<sup>4</sup>

Both the U.K. and the EU have made the survival of the Good Friday Agreement a centerpiece of Brexit negotiations.<sup>5</sup> The Agreement, a 1998 bilateral treaty between the U.K. and the Republic of Ireland ("Ireland"), is binding international law.<sup>6</sup> It ended decades of violence between unionists, who wanted to remain U.K. subjects, and nationalists, who fought against British control in Northern Ireland.<sup>7</sup> The Agreement established a power-sharing system of government that crucially promoted the equality of the unionists' and nationalists' identities and recognized "just and equal treatment for the identit[ies] . . . of both communities."<sup>8</sup>

As a way to cement the equality between these identities, Northern Irish citizens are allowed to choose their own nationality.<sup>9</sup> The Agreement permits all persons born in Northern Ireland to "identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British

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2017), <https://www.ft.com/content/046ce872-c30a-11e7-b2bb-322b2cb39656> [https://perma.cc/YBC4-W69F].

<sup>3</sup> *EU Referendum Results*, BBC, [http://www.bbc.com/news/politics/eu\\_referendum/results](http://www.bbc.com/news/politics/eu_referendum/results) [https://perma.cc/F47G-VEXC] (last visited Sept. 11, 2018).

<sup>4</sup> *Id.*

<sup>5</sup> *Joint Report from the Negotiators of the European Union and the United Kingdom Government on Progress During Phase 1 of Negotiations under Article 50 TEU on the United Kingdom's Orderly Withdrawal from the European Union*, at 7, TF50 (2017) 19 (Dec. 8, 2017), [https://ec.europa.eu/commission/sites/beta-political/files/joint\\_report.pdf](https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf) [https://perma.cc/YNJ3-C74B][hereinafter *Joint Report on U.K.'s Orderly Withdrawal from the European Union*].

<sup>6</sup> Jonathan Tonge, *The Impact and Consequences of Brexit for Northern Ireland*, at 5, PE 583 116 (2017), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/583116/IPOL\\_BRI\(2017\)583116\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/583116/IPOL_BRI(2017)583116_EN.pdf) [https://perma.cc/6H7M-QTJF]. See Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, Ir.-U.K., Apr. 10, 1998, 2114 U.N.T.S. 473 [hereinafter Good Friday Agreement].

<sup>7</sup> KRISTIN ARCHICK, CONG. RESEARCH SERV., RS21333, NORTHERN IRELAND: CURRENT ISSUES AND ONGOING CHALLENGES IN THE PEACE PROCESS 1 (2017).

<sup>8</sup> Good Friday Agreement, *supra* note 6, art. 1 (v).

<sup>9</sup> *Id.* Constitutional Issues ¶ 1 (vi).

and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.”<sup>10</sup> The Agreement also promotes economic equality for all citizens by declaring “the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity.”<sup>11</sup> These provisions were adopted with the understanding that both the U.K. and Ireland were, and would remain, members of the EU.<sup>12</sup>

Now that the U.K. intends to leave the EU, current and future citizens of Northern Ireland who choose Irish citizenship will be entitled to political rights and economic opportunities that those who identify as British will not enjoy because Ireland will remain an EU member state.<sup>13</sup> This new disparity undermines the Agreement’s promise to treat citizens equally regardless of whether they identify as Irish or British.<sup>14</sup> Any Brexit proposal that purports to uphold the Good Friday Agreement will need to eliminate this new imbalance in rights and opportunities between British and Irish citizenship.

While there are numerous proposals that aim to address this inequality, it is unlikely that the U.K. can adopt any proposal that will maintain the current equality of political and economic rights. The approach most protective of the Agreement would be to allow British nationals in Northern Ireland to remain citizens of the EU. The U.K. will be violating the Agreement if any Brexit agreement falls short of full EU citizenship for all citizens of Northern Ireland. However, it is a legal impossibility for British Northern Irish to retain EU rights and citizenship if the U.K. as a whole leaves the EU because EU law ties EU citizenship to member state nationality.<sup>15</sup> Thus, after leaving the

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* Rights, Safeguards and Equality of Opportunity.

<sup>12</sup> Brendan O’Leary, *The Nature of the Agreement*, 22 *FORDHAM INT’L L.J.* 1628, 1643-44 (1998); Vincent Boland, *Brexit Britain Will Need to Amend Good Friday Agreement, Says Blair*, *FIN. TIMES* (May 12, 2017), <https://www.ft.com/content/46cf672e-3716-11e7-bce4-9023f8c0fd2e?mhq5j=e7> [<https://perma.cc/4EFC-L2SC>] (quoting a former U.K. prime minister and one of the Agreement’s lead drafters); Tonge, *supra* note 6 (“The Agreement assumes continuing EU membership for both the U.K. and Ireland *but binds neither* explicitly to maintaining that membership.”) (emphasis in original).

<sup>13</sup> See Consolidated Version of the Treaty on the Functioning of the European Union art. 20, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter Treaty on the Functioning of the European Union].

<sup>14</sup> Good Friday Agreement, *supra* note 6, Constitutional Issues ¶ 1 (i), (vi).

<sup>15</sup> Treaty on the Functioning of the European Union, *supra* note 13, art. 20, ¶1 (“Citizenship of the Union is hereby established. Every person holding the nationality of a [m]ember [s]tate shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.”).

EU, the U.K. would no longer have member state status to support EU citizenship in Northern Ireland.<sup>16</sup> Therefore, this solution would only be legally effective if the U.K., as an entity, remained in the EU while its constituent parts, except for Northern Ireland, were exempted from EU membership, thereby maintaining sufficient U.K. ties to the EU to support EU citizenship in Northern Ireland.<sup>17</sup> This solution, while most protective of the Agreement, is unlikely to succeed because of the legal and political complications it poses within the U.K. and the EU.

Short of full EU citizenship, there are options that could diminish the impact of Brexit on economic opportunities. First, the U.K. could pass legislation maintaining the Common Travel Area ("CTA"), which allows for the free movement of Irish and British nationals within the U.K. and Ireland.<sup>18</sup> This solution would reduce the economic burdens associated with the loss of EU citizenship to British-identifying citizens who travel across the Northern Irish border into Ireland for work. Second, the U.K. could join the Schengen Area of the EU. This arrangement allows people to move between countries that join the Schengen Area with limited restrictions, helping British citizens in Northern Ireland to remain a part of the European community and access employment opportunities in Europe.<sup>19</sup> Finally, there is a growing call for the U.K. to reverse its decision to withdraw from the EU.<sup>20</sup> This final option would return Northern Ireland to its status quo and ensure that the Agreement, and the rights and privileges enshrined in it, are not put in jeopardy. Without a Brexit deal that equates British and Irish nationality in Northern Ireland, the U.K. could

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<sup>16</sup> *Id.*

<sup>17</sup> David Phinnemore, *Northern Ireland and Brexit: Limits and Opportunities for a New Relationship with the EU*, in N. IR. ASSEMB. KNOWLEDGE EXCHANGE SEMINAR SERIES, at 6, <https://www.qub.ac.uk/brexit/Brexitfilestore/Filetoupload,728117,en.pdf> [<https://perma.cc/2LHB-2RSM>].

<sup>18</sup> N. IR. OFFICE & DEPT. FOR EXITING THE EUROPEAN UNION, NORTHERN IRELAND AND IRELAND: POSITION PAPER 7 (Aug. 16, 2017) (U.K.), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/638135/6.3703\\_DEXEU\\_Northern\\_Ireland\\_and\\_Ireland\\_INTERACTIVE.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/638135/6.3703_DEXEU_Northern_Ireland_and_Ireland_INTERACTIVE.pdf) [<https://perma.cc/DHD3-GVDH>].

<sup>19</sup> Directorate-General for Migration and Home Affairs of the European Commission, *Europe Without Borders: The Schengen Area*, at 2-4, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/docs/schengen\\_brochure/schengen\\_brochure\\_dr3111126\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/docs/schengen_brochure/schengen_brochure_dr3111126_en.pdf) [<https://perma.cc/5HW2-F6AD>].

<sup>20</sup> See Svenja O'Donnell, *Britons Can Still Reverse Brexit, Article 50 Architect Says*, BLOOMBERG (Nov. 9, 2017, 5:30 PM), <https://www.bloomberg.com/news/articles/2017-11-09/britons-can-still-reverse-brexit-article-50-architect-says> [<https://perma.cc/GP9P-BP9C>].

undermine the peace process by resurrecting inequality between the communities that has plagued Northern Ireland since its inception.

## II. HISTORY OF THE CONFLICT IN NORTHERN IRELAND

Brexit's impact on Northern Ireland cannot be understood without recognizing the nation's unique and troubled history. The strict division between the two communities in Northern Ireland, the Protestant unionists and the Catholic nationalists, generated violent paramilitary groups on both sides of the divide.<sup>21</sup> One element of this division is rooted in institutional discrimination against Catholics in Northern Ireland who faced both social and political inequality since Northern Ireland's founding.<sup>22</sup> At times, these inequalities rose to the level of human rights abuses.<sup>23</sup> This discriminatory history informed the Agreement's language and underlined the need to ensure an equal status between the two communities to maintain peace.

Northern Ireland, a collection of six counties on the Irish island, was partitioned in the wake of the Irish Revolution.<sup>24</sup> From roughly 1912 to 1923, Irish republicans fought to end English rule over the entire island of Ireland.<sup>25</sup> The Revolution formally ended in 1921 with the adoption of the Anglo-Irish Treaty.<sup>26</sup> The Treaty allowed for Irish home rule over all thirty-two counties, but maintained a provision for northern counties to opt out of home rule.<sup>27</sup> In 1922, the north-eastern counties of Antrim, Armagh, Down, Fermanagh, Londonderry, and Tyrone opted out of home rule and chose to remain subjects of the U.K.<sup>28</sup>

After the partition of the six counties, Northern Ireland found itself divided by "national, cultural, and religious identities."<sup>29</sup> Northern

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<sup>21</sup> Daniel F. Mulvihill, *The Legality of the Pardoning of Paramilitaries Under the Early Release Provisions of Northern Ireland's Good Friday Agreement*, 34 CORNELL INT'L L.J. 227, 228 n.5 (2001).

<sup>22</sup> See Christopher McCrudden, *Mainstreaming Equality in the Governance of Northern Ireland*, 22 FORDHAM INT'L L.J. 1696, 1704-06 (1998).

<sup>23</sup> See, e.g., *Ireland v. United Kingdom*, App. No. 5310/71, 25 Eur. Ct. H.R. (ser. A) (1978).

<sup>24</sup> Niall Whelehan, *The Irish Revolution, 1912-23*, in THE OXFORD HANDBOOK OF MODERN IRISH HISTORY 621, 621 (Alvin Jackson ed. 2014).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 632; see Articles of Agreement for a Treaty between Great Britain & Ireland, Ir.-U.K., Dec. 6, 1921, 114 B.S.P. 1 [hereinafter Anglo-Irish Treaty].

<sup>27</sup> Anglo-Irish Treaty, *supra* note 26, art. 12; Whelehan, *supra* note 24, at 632.

<sup>28</sup> *Why is Northern Ireland Part of the United Kingdom*, ECONOMIST (Nov. 7, 2013), <https://www.economist.com/blogs/economist-explains/2013/11/economist-explains-4> [<https://perma.cc/4D2Z-Y2SY>].

<sup>29</sup> ARCHICK, *supra* note 7, at 1.

Ireland's division erupted along religious lines between the majority Protestants who identified as British ("unionists") and the minority Catholics who viewed themselves as Irish and pursued a united Irish nation ("nationalists").<sup>30</sup> Disputes between unionists and nationalists led to violent outbreaks among either side's paramilitary groups, such as the nationalists' Irish Republican Army ("IRA") or the unionists' Ulster Volunteer Force ("UVF").<sup>31</sup> This thirty-year period, from roughly 1969 to 1999, was referred to as "the Troubles" and resulted in the death of almost 3,500 people.<sup>32</sup>

The Troubles sprang from questions of cultural and political affiliation, and more specifically, the disparate treatment of those affiliations.<sup>33</sup> At the heart of the Troubles was the unequal treatment of Irish Catholics who faced political and social discrimination in Northern Ireland.<sup>34</sup> Discrimination toward Irish Catholics was not a new phenomenon in Northern Ireland and it was recognized in some of its founding documents.<sup>35</sup> For example, the Anglo-Irish Treaty of 1921 reflected concerns regarding discrimination toward Irish Catholics by including a provision that prohibited the Irish Free State or the Parliament of Northern Ireland from making "any law so as to either directly or indirectly to endow any religion or prohibit or restrict the free exercise thereof or give any preference or impose any disability on account of religious belief or religious status . . . ."<sup>36</sup> This protection was immediately ignored after the partition when Protestant unionists controlled the Northern Ireland Parliament, known as Stormont, and implemented housing, voting, and employment policies that discriminated against Catholics.<sup>37</sup>

Forty years later in 1969, a Commission established by the

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<sup>30</sup> *Id.*

<sup>31</sup> Mulvihill, *supra* note 21.

<sup>32</sup> ARCHICK, *supra* note 7, at 1. About 2% of the population of Northern Ireland have been killed or injured as a result of political violence. BRENDAN O'LEARY & JOHN MCGARRY, *THE POLITICS OF ANTAGONISM: UNDERSTANDING NORTHERN IRELAND* 12-13 (3d ed. 2016). Further, a 2015 report concluded that about half of all mental health issues in Northern Ireland, including post-traumatic stress disorder, were attributable to the Troubles. *Troubles 'Linked to Half Mental Health Cases in Northern Ireland,'* BBC (Mar. 5, 2015), <http://www.bbc.com/news/uk-northern-ireland-31736737> [<https://perma.cc/MMU8-Y3SM>].

<sup>33</sup> Lynn Wartchow, *Civil and Human Rights Violations in Northern Ireland: Effects and Shortcomings of the Good Friday Agreement in Guaranteeing Protections*, 3 *NW. J. INT'L HUM. RTS.* 1, 2-3 (2005).

<sup>34</sup> ARCHICK, *supra* note 7, at 1; Wartchow, *supra* note 33, at 1-3.

<sup>35</sup> Anglo-Irish Treaty, *supra* note 26, art. 16.

<sup>36</sup> *Id.*

<sup>37</sup> Wartchow, *supra* note 33.

government of Northern Ireland was appointed to investigate the source of civil disturbances in the region.<sup>38</sup> The Commission's report, known as the Cameron Report, confirmed that discriminatory policies towards Catholics inflamed much of the conflicts:

[Complaints] on issues of local franchise, the drawing of administrative boundaries, investigation into methods of housing allocation, and machinery for dealing with grievances against local authorities . . . all provide material support for the inference that the evidence of political or social-political grievance which was presented to us from so many quarters, in such detail, and with such frequency, had substantial foundation in fact.<sup>39</sup>

Catholics responded to these discriminatory policies with peaceful civil rights protests as well as separate violent opposition often led by the IRA.<sup>40</sup> The British government did not generally distinguish between the peaceful civilian protests and violent IRA actions.<sup>41</sup> The British government's blurred approach toward peaceful protests and violence was on display in the 1972 deaths of thirteen civilian demonstrators at the hands of British soldiers, later referred to as "Bloody Sunday."<sup>42</sup> After Bloody Sunday, the Stormont Parliament was replaced by direct rule from the British Westminster Parliament, which responded with emergency legislation including limitations on protections in criminal proceedings.<sup>43</sup> This move disproportionately affected Catholics.<sup>44</sup> The increased pressure on Catholic civil and political rights led to "a cycle of violence . . . in which Catholics and Protestants each turned to extreme paramilitary groups to further their political goals and retaliated against violence with the use of more violence."<sup>45</sup>

As conflict increased throughout Northern Irish communities in the early 1970s, British authorities used emergency powers to subject Catholics to human rights abuses.<sup>46</sup> *Ireland v. United Kingdom*, tried

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<sup>38</sup> COMMISSION APPOINTED BY THE GOVERNOR OF NORTHERN IRELAND, REPORT ON THE DISTURBANCES IN NORTHERN IRELAND ¶ 1, 1969. The three members of the Commission were Lord Cameron, Sir John Biggart, and James Campbell. *Id.* Warrant of Appointment.

<sup>39</sup> *Id.* ¶ 7.

<sup>40</sup> Wartchow, *supra* note 33, at 3.

<sup>41</sup> *Id.*

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

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

<sup>44</sup> *Id.* at 3-4.

<sup>45</sup> *Id.* at 4.

<sup>46</sup> See, e.g., *Ireland v. United Kingdom*, *supra* note 23.



before the European Court of Human Rights ("ECHR") in 1978, captures this history. The ECHR reviewed the "scope and the operation in practice of those [emergency powers] as well as the alleged ill-treatment of persons thereby deprived of their liberty."<sup>47</sup> Between 1971 and 1975, authorities exercised "extrajudicial powers of arrest, detention and internment."<sup>48</sup> During this time, local authorities had broad discretion under the emergency powers to effect extrajudicial deprivations of liberty by arresting persons for interrogation, detaining persons for further interrogation, and preventative detention.<sup>49</sup> Detention was disproportionately directed towards IRA members and nationalists.<sup>50</sup> While detained, the British Army or local authorities subjected detainees to such interrogation techniques as sleep deprivation, deprivation of food and drink, hooding detainees with a darkly colored bag, and stress positions.<sup>51</sup> The ECHR concluded that the interrogation techniques amounted to inhuman and degrading treatment in violation of Article 3 of the European Convention on Human Rights.<sup>52</sup>

The decision in *Ireland v. United Kingdom* exemplifies the level of inequality and abuse that Catholics faced in Northern Ireland. This pattern of systemic abuse continued for another two decades.<sup>53</sup> Eradicating this discrimination was a cornerstone of the peace

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<sup>47</sup> *Id.* ¶ 11. See also *id.* ¶ 78.

<sup>48</sup> *Id.* ¶ 11.

<sup>49</sup> *Id.* ¶ 78.

<sup>50</sup> *Id.* ¶ 69; While Loyalists were not immune from the extrajudicial powers of state authorities, as they were also interned beginning in 1973, the IRA and nationalists Catholics were detained in far greater number. See *id.* ¶¶ 66, 69 ("Between 1 February 1973 and 31 October 1974, interim custody orders were served on 99 Protestants and 626 Catholics; at all times many more Catholics than Protestants were actually held.").

<sup>51</sup> *Id.* ¶ 96.

<sup>52</sup> *Id.* ¶ 168. There have been calls for Ireland to petition the ECHR to reopen the case based on the discovery of new evidence suggesting that the U.K. withheld crucial evidence from the Court that would show that the British government knew the effects of these techniques were long-lasting, and therefore would have amounted to torture rather than the lesser classification of "inhuman and degrading treatment." *UK/Ireland: Landmark 'Hooded Men' Torture Case Should Be Re-Opened*, AMNESTY INT'L (Nov. 24, 2014), <https://www.amnesty.org/en/latest/news/2014/11/ukireland-landmark-hooded-men-torture-case-should-be-re-opened/> [<https://perma.cc/WL72-SV3G>].

<sup>53</sup> See, e.g., McCrudden, *supra* note 22, at 1706 (discussing employment discrimination aimed at Catholics in Northern Ireland); Wartchow, *supra* note 33, at 4 ("The legacy of Bloody Sunday ushered in the most deadly era of the Troubles, lasting until the Good Friday Agreement twenty-six years later.").

agreement reached in 1998.<sup>54</sup>

### III. THE GOOD FRIDAY AGREEMENT

The Good Friday Agreement was the result of two years of multi-lateral negotiations.<sup>55</sup> The Agreement encompasses two separate agreements.<sup>56</sup> The first is a Multi-Party Agreement between various political parties in Northern Ireland.<sup>57</sup> The second, the British-Irish Agreement, is an intergovernmental agreement between the Irish and U.K. governments.<sup>58</sup> The British-Irish Agreement is a binding international bilateral treaty, registered at the United Nations, which requires the respective governments to support and implement the provisions of the Multi-Party Agreement.<sup>59</sup> The Agreement was eventually adopted by a referendum of citizens in both Ireland and Northern Ireland on May 22, 1998.<sup>60</sup>

The Agreement was not so much a solution to all of Northern Ireland's problems, but rather a framework to create a stable process through which future changes could be adopted.<sup>61</sup> The Agreement laid out a structure for a consent-based power-sharing system of government and addressed issues such as human rights protections, the disarmament of paramilitary groups, police reforms, and social and economic issues.<sup>62</sup> Efforts to fully implement the Agreement in Northern Ireland have been met with significant challenges.<sup>63</sup>

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<sup>54</sup> Wartchow, *supra* note 33, at 11 (discussing the Agreement's efforts to equalize "the historic legacy of discrimination against the Catholic minority population in education, housing, and employment").

<sup>55</sup> See generally George J. Mitchell, *Toward Peace in Northern Ireland*, 22 FORDHAM INT'L L.J. 1136 (1998).

<sup>56</sup> Tonge, *supra* note 6.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Bertie Ahern, *The Good Friday Agreement: An Overview*, 22 FORDHAM INT'L L. J. 1196, 1196 (1998).

<sup>61</sup> ARCHICK, *supra* note 7, at 3.

<sup>62</sup> See Good Friday Agreement, *supra* note 6, Strand One, Rights Safeguards and Equality of Opportunity, Decommissioning, Policing and Justice.

<sup>63</sup> Seamus Dunn & Jacqueline Nolan-Haley, *Conflict in Northern Ireland After the Good Friday Agreement*, 22 FORDHAM INT'L L. REV. 1372, 1373 (1998); ARCHICK, *supra* note 7, at 3 ("Sporadic violence from dissident republican and loyalist paramilitary groups that refused to accept the peace process and sectarian strife between Protestants and Catholics also helped to feed ongoing mistrust between the unionists and nationalists communities."). Police reforms, parading, emblems, and reckoning with the history of past violence remain some of the most contentious issues hindering full implementation of the Agreement. *Id.* at 13-14.

However, the structure provided for in the Agreement continues to push the peace process forward in Northern Ireland today.<sup>64</sup>

The opening of the Agreement first acknowledges the difficult and violent history of Northern Ireland that necessitated the treaty. It reads:

The tragedies of the past have left a deep and profoundly regrettable legacy of suffering. We must never forget those who have died or been injured, and their families. But we can best honour them through a fresh start, in which we firmly dedicate ourselves to the achievement of reconciliation, tolerance, and mutual trust, and to the protection and vindication of the human rights of all.<sup>65</sup>

In order to "achieve reconciliation" and protect and vindicate "the human rights of all" the Agreement recognized the need to "acknowledge the substantial differences between [the unionists' and nationalists'] continuing, and equally legitimate, political aspirations."<sup>66</sup> Equal treatment among the factions in Northern Ireland was therefore a key aspect of the Agreement and the basis for many of its provisions.<sup>67</sup> Because of Brexit, the U.K. is in danger of violating two of these vital protections. First, if the U.K. ceases to be an EU member, the ability of Northern Irish citizens to choose equally between Irish or British citizenship will be diluted because citizens who identify as only British will no longer be able to claim EU citizenship. Second, Brexit will undermine the Agreement's protections for economic equality among all its citizens because only Irish-identifying citizens will have access to the larger economic opportunities embedded in EU citizenship.

#### A. *Equal Choice of Citizenship*

To promote peace in Northern Ireland, the Agreement pushed the parties to move beyond a strict British or Irish classification.<sup>68</sup> The Agreement recognizes "the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both

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<sup>64</sup> *The Good Friday Agreement and Today*, N.IR. DEP'T OF FOREIGN AFF. & TRADE, <https://www.dfa.ie/our-role-policies/northern-ireland/the-good-friday-agreement-and-today/> [<https://perma.cc/W9A7-HN5S>] (last visited Oct. 22, 2018).

<sup>65</sup> Good Friday Agreement, *supra* note 6, Declaration of Support ¶ 2.

<sup>66</sup> *Id.* Declaration of Support ¶ 5.

<sup>67</sup> See *id.* Human Rights ¶ 1, Human Rights ¶ 5 (creating a new statutory Equality Commission), Policing and Justice ¶ 1, Constitutional Issues ¶ 1 (v).

<sup>68</sup> O'Leary, *supra* note 12, at 1639.

Governments.<sup>69</sup> The Agreement gave legitimacy to both identities by allowing each citizen the right to choose the nationality that best fit their own cultural affiliation.<sup>70</sup> This provision created a unique arrangement where the community was no longer simply Irish or British, but rather a new entity that encompassed more than one nation.<sup>71</sup>

Ireland and the U.K.'s membership within the EU also greatly helped to elevate the parties' identities beyond the most local and divisive categories.<sup>72</sup> The EU "undergird[ed] the peace process by providing a common European identity for both unionists and nationalists in Northern Ireland."<sup>73</sup> As EU members, both Irish and British citizens had overlapping rights and protections that were guaranteed to all European citizens.<sup>74</sup> Therefore, these rights could be equally enjoyed regardless of one's cultural identity.<sup>75</sup> Membership in the EU, and the higher level of inclusiveness engendered by European citizenship, was understood at the time to be a lasting piece of the Agreement's solution for Northern Ireland.<sup>76</sup>

Citizenship under the Agreement is understood both as a "birth right" and "fundamentally a matter of individual choice."<sup>77</sup> Choosing one's citizenship as "a matter of personal identity and cultural membership" was a critical aspect of the Agreement's ability to engender peace.<sup>78</sup> By allowing citizens the equal choice between British or Irish citizenship, the provision confronts the history of discrimination towards one community by signifying that both identities are legitimate and of equal status.

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<sup>69</sup> Good Friday Agreement, *supra* note 6, art. 1 (vi).

<sup>70</sup> See O'Leary, *supra* note 12, at 1639.

<sup>71</sup> *Id.* ("The worst illusion of parties to the conflict . . . was the belief that Northern Ireland could be stable and democratic while being either British or Irish. The Agreement makes Northern Ireland bi-national . . .").

<sup>72</sup> ARCHICK, *supra* note 7, at 20-21.

<sup>73</sup> *Id.* at 21.

<sup>74</sup> Treaty on the Functioning of the European Union, *supra* note 13, art. 20.

<sup>75</sup> *Id.*

<sup>76</sup> Tonge, *supra* note 6; Boland, *supra* note 12.

<sup>77</sup> Brian Ó Caoidealbháin, *Irish Citizenship Law and Northern Ireland* 15 (Inst. For British-Irish Studies, Working Paper No. 68, 2006), <https://www.qub.ac.uk/research-centres/CentreforInternationalBordersResearch/Publications/WorkingPapers/MappingFrontiersworkingpapers/Fileupload,175417,en.pdf> [https://perma.cc/JW5X-FLAB].

<sup>78</sup> *Id.*

## B. *Equal Economic Opportunity*

The Agreement's work to engender equal political identities also extended to the economic opportunities available to each community.<sup>79</sup> The success of "peace depends on education, employment, equality of opportunity, and other socioeconomic factors."<sup>80</sup> For this reason, the Agreement also ensured that equality extended to social, cultural, and "other dimensions that differentiate groups and individuals in Northern Ireland, such as religion, race, ethnic affiliation, sex, and sexuality."<sup>81</sup> The equal opportunity provision of the Agreement guarantees "the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity."<sup>82</sup> While the choice of either British or Irish citizenship is not explicitly listed among these factors, this identification can be implied given the incredibly close link between religious affiliation and national identity in Northern Ireland.<sup>83</sup>

The equal economic opportunity provision dealt directly with the historically disadvantaged economic status of Catholics and nationalists in Northern Ireland during the Troubles.<sup>84</sup> When the Agreement was adopted, George Mitchell, the United States Senator who chaired the negotiations, argued that while "[t]he conflict in Northern Ireland is obviously not exclusively or even primarily economic, . . . [the Agreement] creates the possibility that economic prosperity will flow from and contribute to lasting peace."<sup>85</sup> The Agreement treated "economic, social and cultural issues . . . as closely interlinked" and focused on "the problems of a divided society and social cohesion in urban, rural and border areas . . ."<sup>86</sup> Equal

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<sup>79</sup> Good Friday Agreement, *supra* note 6, Human Rights ¶ 1.

<sup>80</sup> Kathleen P. Lundy, *Lasting Peace in Northern Ireland: An Economic Resolution to a Political and Religious Conflict*, 15 NOTRE DAME J. OF L., ETHICS & PUB. POL'Y 699, 699 (2014).

<sup>81</sup> O'Leary, *supra* note 12, at 1639.

<sup>82</sup> Good Friday Agreement, *supra* note 6, Human Rights ¶ 1.

<sup>83</sup> Anne Smith, Monica McWilliams & Priyamvada Yarnell, *Does Every Cloud Have a Silver Lining?: Brexit, Repeal of the Human Rights Act and the Northern Ireland Bill of Rights*, 40 FORDHAM INT'L L.J. 79, 84 (2016) (defining the Northern Ireland conflict as not one based on religion but "rather one where religion acts principally as the marker for two distinct ethno national identities").

<sup>84</sup> See, e.g., R.D. Osborne & R.J. Cormack, *Unemployment and Religion in Northern Ireland*, 17 ECON. AND SOC. REV. 215, 215-16 (1986) (concluding that Catholics were economically disadvantaged and unemployed in higher numbers than Protestants in Northern Ireland).

<sup>85</sup> Mitchell, *supra* note 55, at 1142-43.

<sup>86</sup> EUR. PARLIAMENT, DIRECTORATE GENERAL INTERNAL POLICIES, POLICY

economic opportunity was therefore viewed as a way to move the country forward and keep people in Northern Ireland from “turn[ing] to the past” and “inheriting their political and religious views from prior generations.”<sup>87</sup>

### C. *Protections Within the Agreement*

The Agreement included significant protections for its new equal rights to ensure they would remain despite any political changes in Northern Ireland.<sup>88</sup> The Agreement was “designed to withstand major demographic and electoral change . . . [with] equivalent protections of rights, collective and individual, on both sides of the present border.”<sup>89</sup> The citizenship provision further ensured that the option to choose one’s nationality will “not be affected by any future change in the status of Northern Ireland.”<sup>90</sup> This provision would suggest that no matter the domestic problems or complications that may occur in the U.K., the right to choose one’s national identity will be upheld. Further, the Agreement contemplates “that it would be wrong to make any change in the status of Northern Ireland save with the consent of a majority of its people.”<sup>91</sup>

However, it is possible that the guarantee of dual citizenship may not be as strong as the text suggests. In 2017, the U.K. Supreme Court interpreted the same language, “any change in the status of Northern Ireland,” to be limited to whether or not Northern Ireland remains a member of the U.K.<sup>92</sup> The Court held that this protective language did not extend to a contemplation of Northern Ireland’s status within the EU.<sup>93</sup> Therefore, it could be argued that the right to

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DEPARTMENT FOR CITIZENS’ RIGHTS AND CONSTITUTIONAL AFFAIRS, UK WITHDRAWAL (‘BREXIT’) AND THE GOOD FRIDAY AGREEMENT, at 17, PE 596.826 (Nov. 2017) [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596826/IPOL\\_STU\(2017\)596826\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596826/IPOL_STU(2017)596826_EN.pdf) [<https://perma.cc/HSF4-MYEEY>].

<sup>87</sup> Lundy, *supra* note 80, at 700.

<sup>88</sup> Good Friday Agreement, *supra* note 6, Constitutional Issues ¶ 1 (vi).

<sup>89</sup> Brendan O’Leary, *The Belfast Agreement and the British-Irish Agreement: Consociation, Confederal Institutions, A Federacy, and A Peace Process*, in *THE ARCHITECTURE OF DEMOCRACY: CONSTITUTIONAL DESIGN, CONFLICT MANAGEMENT, AND DEMOCRACY* 293, 336 (Andrew Reynolds ed., 2002).

<sup>90</sup> Good Friday Agreement, *supra* note 6, art. 1 (vi).

<sup>91</sup> *Id.* art. 1 (iii) (considering any changes in Northern Ireland’s status as a U.K. member or a petition to join Ireland subject to the consent of the people).

<sup>92</sup> See, e.g., *R (on the application of Miller and another) v. Secretary of State for Exiting the European Union* [2017] UKSC 5 (appeal taken from N. Ir.).

<sup>93</sup> *Id.* ¶ 135 (“[The Agreement] neither regulated any other change in the constitutional status of Northern Ireland nor required the consent of a majority of the

choose one's nationality will be protected only if Northern Ireland remains a part of the U.K. or joins Ireland.<sup>94</sup> This conclusion would suggest that one's choice of citizenship would not be protected if either the U.K. or Ireland were to leave the EU.<sup>95</sup> Yet this narrower view is not the view of the U.K. government.<sup>96</sup> In 2017, the U.K.'s Northern Ireland Office and the Department for Exiting the European Union released a position paper on Northern Ireland which concluded that the Agreement "confirmed the *permanent* birthright of all the people of Northern Ireland to hold both UK and Irish citizenship."<sup>97</sup> The U.K.'s concession on the permanent nature of the Agreement's rights foreshadows the threat Brexit poses to these rights.

#### IV. BREXIT'S IMPACT ON THE AGREEMENT

Brexit will destabilize both the provision that ensures equality between British and Irish nationalities and the provision that guarantees equal economic opportunities for all citizens. By leaving the EU, the U.K. will be placing some citizens at a political and economic disadvantage. This will impact those citizens who most closely align with the British and Protestant identities, rather than the previously disadvantaged Irish Catholics.<sup>98</sup> Because British citizens will lose EU rights that Irish citizens will retain as citizens of a member state, the U.K.'s exit from the EU will create an imbalance in the civil and political rights of Northern Ireland's inhabitants.<sup>99</sup> Additionally, the new status of the two nationalities will also limit the ability of those who identify as British to benefit from the economic opportunities that come with EU membership.<sup>100</sup>

British-identifying Northern Irish could avoid this disparity by applying for both Irish and British citizenship, an option recognized in the Agreement.<sup>101</sup> In fact, there has been an increase in Irish citizenship applications since Brexit.<sup>102</sup> However, requiring all

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people of Northern Ireland to the withdrawal of the United Kingdom from the European Union.").

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

<sup>95</sup> *Id.*

<sup>96</sup> NORTHERN IRELAND AND IRELAND: POSITION PAPER, *supra* note 18, at 3.

<sup>97</sup> *Id.* (emphasis added).

<sup>98</sup> See McCrudden, *supra* note 22, at 1704-06.

<sup>99</sup> *Joint Report on U.K.'s Orderly Withdrawal from the European Union*, *supra* note 5, ¶ 52.

<sup>100</sup> See Treaty on the Functioning of the European Union, *supra* note 13, art. 45.

<sup>101</sup> Good Friday Agreement, *supra* note 6, art. 1 (vi).

<sup>102</sup> Good Friday Agreement, *supra* note 6, Constitutional Issues ¶ 1 (vi); Henry McDonald & Pamela Duncan, *Huge Rise in Britons Applying for Irish Citizenship after*

Northern Irish citizens to identify with and claim Irish nationality in order to have equal rights does not uphold the spirit of the Agreement, which cemented the inherent equality of each individual's affiliation with either Britain or Ireland.<sup>103</sup> A reliance on dual citizenship to fix these problems would require Northern Irish citizens to select their nationality based on practical benefits, rather than as "a matter of personal identity and cultural membership."<sup>104</sup>

#### A. *Equal Choice of Citizenship*

Equating British and Irish national identities legitimized the national, cultural, and social identity of both communities in Northern Ireland.<sup>105</sup> After Brexit, choosing to be British or Irish will no longer be an equal choice because the citizens who chose Irish nationality will have access to the rights and privileges associated with EU membership, while British-identifying Northern Irish will not.<sup>106</sup> This change creates an imbalance that undermines the equality promoted throughout the Agreement.<sup>107</sup> A new imbalance could resuscitate feelings of resentment among the unionists in Northern Ireland and threaten the Agreement's work towards cooperation and collaboration in the region.<sup>108</sup>

Both the U.K. and Ireland were members of the EU when the Agreement was enacted in 1998, and both countries expected to remain so into the future.<sup>109</sup> A citizen of an EU member state also automatically becomes an EU citizen.<sup>110</sup> Therefore, at the time of the Agreement's ratification, choosing either British or Irish citizenship did not affect one's ability to fully access the rights and privileges associated with EU membership.

The Treaty on the Functioning of the European Union ("TFEU") details many of the rights of EU citizenship.<sup>111</sup> The TFEU is one of the

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*Brexit Vote*, GUARDIAN (Oct. 13, 2016, 12:25 AM), <https://www.theguardian.com/world/2016/oct/13/huge-rise-in-britons-applying-for-irish-citizenship-after-brexit-vote> [<https://perma.cc/3UZX-7HYH>].

<sup>103</sup> Ó Caoidealbháin, *supra* note 77, at 15.

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

<sup>105</sup> O'Leary, *supra* note 12, at 1638 ("[T]he Agreement completes the equalization of both major communities as national communities.").

<sup>106</sup> *Joint Report on U.K.'s Orderly Withdrawal from the European Union*, *supra* note 5, ¶ 52.

<sup>107</sup> See generally Good Friday Agreement, *supra* note 6.

<sup>108</sup> ARCHICK, *supra* note 7, at 8.

<sup>109</sup> Boland, *supra* note 12.

<sup>110</sup> Treaty on the Functioning of the European Union, *supra* note 13, art. 20.

<sup>111</sup> *Id.*



two treaties that make up the Lisbon Treaty, which reformed the treaties that form the constitutional basis of the EU.<sup>112</sup> Some of the key rights and protections associated with EU membership include the right to petition the European Parliament, the right to move and reside freely within the EU, and the protection of the diplomatic and consular authorities of any other EU country.<sup>113</sup> EU citizenship also includes a guarantee of non-discrimination based on nationality where the EU treaty applies, as well as, access to the employment opportunities of the EU Civil Service.<sup>114</sup>

Because the U.K. has invoked Article 50 of the Lisbon Treaty, which outlines the procedure for exiting the EU, it will also be leaving the TFEU and British nationals will therefore lose the rights enshrined in the treaty.<sup>115</sup> If British nationals in Northern Ireland lose these protections, the equality that once existed between the choice to be a British or Irish national will evaporate. Neighbors who select Irish citizenship will maintain EU rights and privileges as long as Ireland remains in the EU while those who select British citizenship will not.<sup>116</sup> When the discrepancies in political and civil rights afforded to each nationality are considered, the Agreement's commitment to the "equality of, civil, political, social and cultural rights . . . and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities" is violated.<sup>117</sup>

#### B. *Equal Economic Opportunity*

The disparity that will result in the choice between Irish or British nationality also affects the equality of economic opportunities among all citizens in Northern Ireland. Equal economic opportunity for all citizens was a vital aspect of the Agreement included in order to acknowledge, and attempt to reverse, decades of economic inequality

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<sup>112</sup> See generally *id.*; The Lisbon Treaty, *Introduction*, <http://www.lisbon-treaty.org/wcm/the-lisbon-treaty.html> [<https://perma.cc/X335-4Y5G>] (summarizing the history and structure of the treaty).

<sup>113</sup> Treaty on the Functioning of the European Union, *supra* note 13, arts. 23, 24, 45.

<sup>114</sup> *Id.* art. 18; European Commission, *EU Citizenship*, [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/eu-citizenship/eu-citizenship\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/eu-citizenship/eu-citizenship_en) [<https://perma.cc/XX4T-ET8Y>].

<sup>115</sup> *Brexit: Article 50 Has Been Triggered – What Now?*, BBC (Mar. 29, 2017), <http://www.bbc.com/news/uk-politics-39143978> [<https://perma.cc/LR7Y-E75R>].

<sup>116</sup> *Joint Report on U.K.'s Orderly Withdrawal from the European Union*, *supra* note 5, ¶ 52.

<sup>117</sup> Good Friday Agreement, *supra* note 6, Constitutional Issues ¶ 1 (v).

and employment discrimination towards Catholic nationalists.<sup>118</sup> This goal is also threatened by the loss of EU rights by British-identifying citizens because they will face more challenges in accessing economic opportunities, such as education and employment, in Ireland and within the EU that will be more easily accessed by Irish nationals in Northern Ireland.<sup>119</sup>

Despite the central focus on the cultural and religious aspects of the conflict in Northern Ireland, the Agreement also recognized that addressing the conflict's economic dimension was equally important to fostering peace.<sup>120</sup> The Agreement solidified economic cooperation in cross-border organizations to promote trade and innovation.<sup>121</sup> Further, economic development and stability in the region are closely tied because "[t]he two communities must come to share economic benefits, as well as hardships, otherwise 'there will be no respect, no accommodation, little investment, and no commitment to the state.'"<sup>122</sup> Limiting dissident groups' ability to recruit new members can also contribute to a lasting peace and ensuring "equal opportunity for Catholics and Protestants" can help reduce recruitment.<sup>123</sup>

Not only could renewed economic disparity between the two communities revive distrust and historical resentments, but Northern Ireland's economy as a whole could also suffer as it is already particularly vulnerable to Brexit. Northern Ireland is already dealing with lower wages and higher unemployment and poverty rates than the rest of the U.K.<sup>124</sup> Further, Northern Ireland is particularly dependent on foreign labor and the EU market for its exports.<sup>125</sup> A House of Lords Report stated that "any economic downturn as a result of Brexit would hit Northern Ireland the hardest," with experts warning

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<sup>118</sup> See, e.g., Osborne & Cormack, *supra* note 84.

<sup>119</sup> *Joint Report on U.K.'s Orderly Withdrawal from the European Union*, *supra* note 5, ¶ 52.

<sup>120</sup> Lundy, *supra* note 80 ("The potential for peace depends on education, employment, equality of opportunity, and other socioeconomic factors . . . there will not be total peace in Northern Ireland until its people 'can satisfy their own emotional need for productive work, for self-respect, for meaning in their lives.'").

<sup>121</sup> Claire Nauwelaers, Karen Maguire, & Giulia Ajmone Marsan, *The Case of Ireland-Northern Ireland (United Kingdom) - Regions and Innovation: Collaborating Across Borders*, 6 (Org. for Econ. Cooperation and Dev. Regional Development, Working Papers No. 2013/20, 2013), [http://www.oecd.org/cfe/regional-policy/the\\_case\\_of\\_ireland-northern-ireland.pdf](http://www.oecd.org/cfe/regional-policy/the_case_of_ireland-northern-ireland.pdf) [<https://perma.cc/A7RV-MNHV>].

<sup>122</sup> Lundy, *supra* note 80, at 723.

<sup>123</sup> ARCHICK, *supra* note 7, at 19.

<sup>124</sup> EUROPEAN UNION COMMITTEE, BREXIT: UK-IRISH RELATIONS, 2016-17, HL 76, at 13 (UK).

<sup>125</sup> *Id.* at 13-14.

that "any restrictions to the free movement of labour to Northern Ireland following Brexit could affect the economy's 'ability to stand still, never mind grow.'"<sup>126</sup>

The loss of EU citizenship will adversely affect British Northern Irish workers' ability to travel to the EU for employment.<sup>127</sup> The right to move freely among EU states is a significant right of EU membership that directly affects the economic opportunities of citizens in Northern Ireland.<sup>128</sup> As of 2010, 660,000 people lived in one EU country and worked in another.<sup>129</sup> Access to foreign employment is one advantage of EU membership that British Northern Irish workers will not be able to take advantage of as easily as their Irish-identifying neighbors post-Brexit.<sup>130</sup> More importantly, withdrawal of the free movement protections of EU citizenship for British Northern Irish could impact their ability to work in and travel to not only the European continent, but also within the island of Ireland itself.<sup>131</sup>

As of this writing, the future of the border between Ireland and Northern Ireland is still undecided.<sup>132</sup> Regardless of the final disposition of the border, the simple fact that British nationals in Northern Ireland could find their movement restricted by border or customs checks when traveling to Ireland could have a negative impact on the ability of these citizens to travel and work in Ireland.<sup>133</sup> Estimates suggest that every day up to 30,000 people cross the

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Treaty on the Functioning of the European Union, *supra* note 13, art. 45.

<sup>129</sup> JOE SHIELDS & ANNMARIE O'KANE, CENTRE FOR CROSS BORDER STUDIES, MEASURING MOBILITY IN A CHANGING ISLAND 8 (2010), [http://borderpeople.info/wp-content/uploads/2014/10/measuring\\_mobility\\_in\\_a\\_changing\\_island\\_-\\_ccbs\\_for\\_eures\\_2010.pdf](http://borderpeople.info/wp-content/uploads/2014/10/measuring_mobility_in_a_changing_island_-_ccbs_for_eures_2010.pdf) [<https://perma.cc/WW57-ASMC>].

<sup>130</sup> See *Joint Report on U.K.'s Orderly Withdrawal from the European Union*, *supra* note 5, ¶ 52.

<sup>131</sup> See Tonge, *supra* note 6, at 8.

<sup>132</sup> George Parker & Alex Barker, *British Ministers Clash over Border's Future After Brexit*, IRISH TIMES (Feb. 8, 2018, 8:49 AM), <https://www.irishtimes.com/news/ireland/irish-news/british-ministers-clash-over-border-s-future-after-brexit-1.3384600> [<https://perma.cc/HM5R-K3DB>] (discussing the debate over a "hard" or "soft" border).

<sup>133</sup> HM TREASURY, HM REVENUE & CUSTOMS, DEPT. FOR EXITING THE EUROPEAN UNION, FUTURE CUSTOMS ARRANGEMENTS: A FUTURE PARTNERSHIP PAPER (Aug. 15, 2017), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/637748/Future\\_customs\\_arrangements\\_-\\_a\\_future\\_partnership\\_paper.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/637748/Future_customs_arrangements_-_a_future_partnership_paper.pdf) [<https://perma.cc/YPQ6-DED2>].

border between Ireland and Northern Ireland for work.<sup>134</sup> Beyond border controls, current employment or visa requirements set by Ireland could be extended to British nationals in Northern Ireland that wish to work over the border.<sup>135</sup> This would create an additional economic burden on British Northern Irish that Irish citizens who retain EU rights would not face.<sup>136</sup>

The numerous problems and uncertainties presented by cross-border employment into Ireland, and the EU more generally, threaten the economic opportunities of British citizens. This disregard for the equality promoted in the Agreement undermines its ability to maintain peace.

## V. PROPOSED SOLUTIONS

In order to uphold the Agreement, any Brexit deal must ensure that both political rights and economic opportunities remain equal between British and Irish nationals in Northern Ireland. As of this writing, the U.K. and the EU have released a draft agreement to implement Brexit, including a Protocol disusing Northern Ireland in particular.<sup>137</sup> This Protocol provides a minimal framework to temporarily address issues in Ireland and Northern Ireland and anticipates a permanent and more expansive agreement to be adopted by the parties by December 31, 2020.<sup>138</sup> The Protocol affirms that any final arrangement for Northern

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<sup>134</sup> ANNMARIE O'KANE, THE REFERENDUM ON UK MEMBERSHIPS OF THE EU: FREEDOM OF MOVEMENT OF PEOPLE, Centre for Cross Border Studies (May 2016), <http://borderpeople.info/site/wp-content/uploads/Briefing-5-revision15June2016.pdf> [<https://perma.cc/RHY7-BMG4>].

<sup>135</sup> See generally Employment Permits Act, 2014 (Act No. 26/2014) (Ir).

<sup>136</sup> *Joint Report on U.K.'s Orderly Withdrawal from the European Union*, *supra* note 5, ¶ 52.

<sup>137</sup> See *Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as Agreed at Negotiators' Level on 14 November 2018*, TF50 (2018) 55 (Nov. 14, 2018), [https://ec.europa.eu/commission/sites/beta-political/files/draft\\_withdrawal\\_agreement\\_0.pdf](https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement_0.pdf) [<https://perma.cc/8XSA-Q23U>] [hereinafter *Draft Agreement on the Withdrawal*]. As of this writing, the fate of this draft agreement is precarious because while it has received support in the EU, it also needs to be approved by the U.K. Parliament, which is not guaranteed in the current U.K. political climate. See Stephen Castle & Steven Erlanger, *U.K. and E.U. Leaders Clinch Brexit Divorce Terms*, N.Y. TIMES (Nov. 25, 2018), <https://www.nytimes.com/2018/11/25/world/europe/brexit-uk-eu-agreement.html?action=click&module=Top%20Stories&pgtype=Homepage> [<https://perma.cc/VX8X-CPQH>].

<sup>138</sup> *Draft Agreement on the Withdrawal*, *supra* note 137, Protocol on Ireland/Northern Ireland, art. 2.

Ireland will ensure that the Agreement is "protected in all its parts."<sup>139</sup> However, the current Protocol does not include any way for British nationals in Northern Ireland to maintain their EU rights, therefore, it currently fails to fully uphold the equality of the Agreement.<sup>140</sup> If the EU and the U.K. are going to protect the Agreement in its entirety, the anticipated final agreement will need to eliminate the inevitable political and economic disparity between British and Irish citizens in Northern Ireland.

Towards this goal, the U.K. could adopt two paths, namely maintaining the Common Travel Area and joining the Schengen Area. These solutions would reduce the unequal economic opportunities that British citizens in Northern Ireland will face. However, there are only two other possibilities, allowing Northern Ireland to remain in the EU thereby ensuring EU rights for all Northern Irish citizens or reversing the Brexit withdrawal process altogether, that will ensure that Brexit does not violate the Agreement. In following the latter paths, both the political and social rights and the economic opportunities of both communities would remain equal.

#### A. *Common Travel Area*

One possible solution to enforce the guarantees of the Agreement after Brexit is to retain the Common Travel Area ("CTA"), the arrangement between the U.K. and Ireland that allows freedom of movement between the two countries.<sup>141</sup> Solidifying and maintaining the CTA through enacting legislation would help allay some of the unequal economic opportunities Brexit presents by facilitating free movement between the U.K. and Ireland.<sup>142</sup> However, this plan would not be sufficient to reaffirm political equality between the communities because the CTA has no impact on the ability of British-identifying Northern Irish to maintain EU citizenship.<sup>143</sup>

Before either the U.K. or Ireland joined the EU, the two governments agreed to largely unrestricted movement between the two countries.<sup>144</sup> The CTA, established with the creation of the Irish Free

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<sup>139</sup> *Id.* Protocol on Ireland/Northern Ireland.

<sup>140</sup> *Id.*

<sup>141</sup> See NORTHERN IRELAND AND IRELAND: POSITION PAPER, *supra* note 18, at 1; TERRY MCGUINNESS & MELANIE GOWER, THE COMMON TRAVEL AREA, AND THE SPECIAL STATUS OF IRISH NATIONALS IN UK LAW, 2017, UKHC CBP-7661, at 3 (UK).

<sup>142</sup> THE COMMON TRAVEL AREA, AND THE SPECIAL STATUS OF IRISH NATIONALS IN UK LAW, *supra* note 141.

<sup>143</sup> *Id.* at 13, 19.

<sup>144</sup> *Id.* at 3.

State in 1922 and reestablished in 1952, reduced immigration controls between the U.K. and Ireland.<sup>145</sup> In return for the ease of travel between the two nations, Ireland helped enforce the U.K.'s immigration controls.<sup>146</sup> Despite the long history of the CTA, its existence was rarely discussed publicly – in fact, both British and Irish officials viewed the CTA as an informal arrangement.<sup>147</sup> However, the CTA was officially identified in the Treaty of Amsterdam, a 1997 revision of the treaties establishing the European Union.<sup>148</sup> While the Treaty of Amsterdam recognized the CTA, the CTA is neither an “international treaty” nor a “concrete” piece of legislation.<sup>149</sup> Rather, it is “a collection of legal provisions” that “enable UK and Irish nationals to be treated almost identically within both states.”<sup>150</sup> The Agreement does not mention the CTA, but the CTA is nevertheless “part of the context of the Agreement” because free and easy travel between Ireland and the U.K. at Northern Ireland’s border is a critical aspect of promoting equality among its citizens and respecting each community’s ties with either the U.K. or Ireland.<sup>151</sup>

While the Irish and U.K. governments have expressed a desire to maintain the CTA, practical complications have left some wondering

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<sup>145</sup> Bernard Ryan, *The Common Travel Area Between Britain and Ireland*, 64 MOD. L. REV. 855, 856-57 (2001).

<sup>146</sup> *Id.* (“The new arrangements provided that each state would enforce the other’s conditions of landing for aliens; that the British suspect index and circulars relating to aliens would be provided to the Irish authorities; that aliens who moved between the two states would be subject to at most minimal registration requirements; and, that each state would enforce the other’s deportation decisions.”).

<sup>147</sup> *Id.* at 858-59 (“The Irish officials involved in the negotiations informed their Home Office counterparts that ‘since the proposed arrangements would be entirely informal, it would be undesirable that any publicity be given.’”).

<sup>148</sup> Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Protocol B art. 2, Oct. 2, 1997, C 340 O.J. 1 [hereinafter Treaty of Amsterdam].

<sup>149</sup> Sylvia de Mars, et al., *The Common Travel Area: Prospects After Brexit 2-3* (Working Paper, 2017), [http://crossborder.ie/site2015/wp-content/uploads/2017/01/The\\_Common\\_Travel\\_Area\\_Prospects\\_After\\_Brexit\\_Jan2017.pdf](http://crossborder.ie/site2015/wp-content/uploads/2017/01/The_Common_Travel_Area_Prospects_After_Brexit_Jan2017.pdf) [https://perma.cc/H6GW-KSN9].

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

<sup>151</sup> Imelda Maher, *The Common Travel Area: More Than Just Travel 4* (A Royal Irish Academy – British Academy Brexit Policy Discussion Paper, 2017), [https://www.britac.ac.uk/sites/default/files/TheCommonTravelAreaMoreThanJustTravel\\_0.pdf](https://www.britac.ac.uk/sites/default/files/TheCommonTravelAreaMoreThanJustTravel_0.pdf) [https://perma.cc/7SU7-TLV7] (discussing the importance of the CTA in “the context of the Good Friday Agreement and the importance it gives to respect for the rights, opportunities and identity for the people of Northern Ireland who choose to assert their right to Irish citizenship”).

whether the protections can be maintained.<sup>152</sup> Continuing the CTA after Brexit would leave an external border of the EU open at the Irish border, therefore any attempt for Ireland to maintain the CTA could be limited by EU law.<sup>153</sup> There are also concerns regarding the permanent nature of the CTA and the rights of Irish nationals the arrangement currently protects.<sup>154</sup> The flexibility of the informal CTA may be an asset in continuing the CTA after Brexit because it is not tied to any specific arrangement between the U.K. and the EU and therefore it could be more easily adapted to changing circumstances.<sup>155</sup> However, others have argued that in order to maintain the rights afforded by the CTA arrangement, the U.K. and Ireland should pass legislation to cement these protections in a more formal agreement.<sup>156</sup>

Assuming any practical hurdles to upholding the CTA are overcome, the CTA could successfully maintain freedom of movement on the island of Ireland for both Irish nationals and British-identifying citizens in Northern Ireland.<sup>157</sup> This arrangement would significantly reduce any Brexit-related gap in economic opportunities with respect to employment in Ireland and the U.K. Under the CTA, British nationals could still access employment opportunities in Ireland and the U.K. with unrestricted travel to and from work across the border without passport or strict border controls.<sup>158</sup> The CTA also allows U.K. and Irish nationals to study and work in both countries without a requirement to obtain permission, eliminating the administrative burdens of residence and employment in a foreign nation.<sup>159</sup>

However, the CTA would not address any unequal economic opportunities with respect to work in the EU.<sup>160</sup> Irish nationals in

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<sup>152</sup> THE COMMON TRAVEL AREA, AND THE SPECIAL STATUS OF IRISH NATIONALS IN UK LAW, *supra* note 141, at 3.

<sup>153</sup> *Id.* at 14-16.

<sup>154</sup> *Id.* at 19-20.

<sup>155</sup> Maher, *supra* note 151, at 5.

<sup>156</sup> THE COMMON TRAVEL AREA, AND THE SPECIAL STATUS OF IRISH NATIONALS IN UK LAW, *supra* note 141, at 19-20 ("At most, [the CTA] now reflects a political understanding within the United Kingdom, which may make a difference to the content of other legislation. The Lords EU Committee noted that the Secretary of State for Exiting the European Union felt unable, when pressed, to give it a specific guarantee that the existing rights of Irish citizens in the UK would be maintained post-Brexit.").

<sup>157</sup> NORTHERN IRELAND AND IRELAND: POSITION PAPER, *supra* note 18, at 8.

<sup>158</sup> *Id.* at 8.

<sup>159</sup> *Id.*

<sup>160</sup> THE COMMON TRAVEL AREA, AND THE SPECIAL STATUS OF IRISH NATIONALS IN UK LAW, *supra* note 141, at 16-17.

Northern Ireland, as EU citizens, would still have easier access to employment in other countries within the EU.<sup>161</sup> Thus, while the CTA would discount Brexit's threat to economic equality within Ireland, it fails to fully protect the equality of Northern Irish citizens. British-identifying citizens would also still lack the political and social rights associated with EU citizenship and the economic opportunities that flow from those rights.<sup>162</sup> Therefore, maintaining the CTA can only address one of the breaches of the Agreement, guaranteeing equal economic opportunities—and would do so only in the limited application between the U.K. and Ireland.

### B. *The Schengen Area*

The problem of the limited reach of the CTA to only the U.K. and Ireland, could be remedied if the U.K. joined the Schengen Area after Brexit. If the U.K. joined the Schengen Area as a non-EU party, it would be easier for British Northern Irish to travel and work in other European countries.<sup>163</sup> This solution would reduce the economic opportunity burdens that British nationals in Northern Ireland would face, but Irish nationals would not.<sup>164</sup> However, this solution still would not guarantee political and social rights affiliated with full EU citizenship, and thus does not fully address Brexit's breach of the Agreement.

The Schengen Area allows unrestricted travel between twenty-six countries in Europe.<sup>165</sup> The Schengen Area was first created in 1985

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<sup>161</sup> See Treaty on the Functioning of the Europe Union, *supra* note 13, art. 45 (“Freedom of movement for workers shall be secured within the Union.”); European Commission, *Impact of EU Membership on Ireland*, [https://ec.europa.eu/ireland/about-us/impact-of-EU-membership-on-Ireland\\_en](https://ec.europa.eu/ireland/about-us/impact-of-EU-membership-on-Ireland_en) [<https://perma.cc/ZN7U-JVMP>] (last visited Sept. 25, 1018) (“Irish citizens choosing to work or study abroad can have their Irish qualifications recognised throughout the European Union . . .”).

<sup>162</sup> THE COMMON TRAVEL AREA, AND THE SPECIAL STATUS OF IRISH NATIONALS IN UK LAW, *supra* note 141, at 13, 16-17; *Joint Report on U.K.'s Orderly Withdrawal from the European Union*, *supra* note 5, ¶ 52.

<sup>163</sup> See *Europe Without Borders: The Schengen Area*, *supra* note 19, at 4, 8.

<sup>164</sup> *Joint Report on U.K.'s Orderly Withdrawal from the European Union*, *supra* note 5, ¶ 52.

<sup>165</sup> *Europe Without Borders: The Schengen Area*, *supra* note 19, at 2-4. The Schengen Area consists of 22 EU states (Belgium, Czech Republic, Denmark, Germany, Estonia, Greece, Spain, France, Italy, Latvia, Lithuania, Luxembourg, Hungary, Malta, Netherlands, Austria, Poland, Portugal, Slovenia, Slovakia, Finland, and Sweden) and 4 non-EU states (Norway, Switzerland, Iceland, and Liechtenstein). *Id.* at 2, 4. Currently, the United Kingdom, Ireland, Bulgaria, Croatia, Cyprus and Romania are the only EU member states that are not a member of the Schengen



and later incorporated into EU laws through the Amsterdam Treaty.<sup>166</sup> Unlike an EU citizen's automatic right of free movement within EU member countries, the Schengen Area extends a portion of this privilege to non-EU nationals whose countries have joined the Schengen Area.<sup>167</sup> Within the Schengen Area, both EU citizens and non-EU nationals can freely travel without being subject to internal border controls, although non-EU nationals are sometimes required to show valid travel documents, visas, or residence permits.<sup>168</sup> In order to join the Schengen Area, states must show that they can take responsibility for the outer borders of the Schengen Area, cooperate with other states to maintain security, follow Schengen rules regarding land, sea and air controls, and use a common information sharing system.<sup>169</sup>

Ireland and the U.K. have remained outside of the Schengen Area and instead maintained their own immigration arrangements under the CTA.<sup>170</sup> While there have been calls for Ireland to join the Schengen Area post-Brexit, it is likely that Ireland will stay outside of the Schengen Area in order to continue the CTA and keep an open border with the U.K.<sup>171</sup> The shared border will almost certainly keep both Ireland and the U.K. from joining the Schengen Area because they would likely be required to abandon their own arrangement and conform to the security and immigration requirements of the Schengen Area.<sup>172</sup> Additionally, because the U.K. was not a member of the Schengen Area when it was an EU member this suggests that it would not be likely to join now when it is making a concerted effort to retreat from the European continent.<sup>173</sup> Moreover, the longevity of the Schengen Area has been called into question because many member countries have recently implemented border restrictions in response to the increase of migrants to the EU.<sup>174</sup> However, if the U.K.

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Area. *Id.* at 4.

<sup>166</sup> Treaty of Amsterdam, *supra* note 148, Protocol B; Maher, *supra* note 151, at 4.

<sup>167</sup> *Europe Without Borders: The Schengen Area*, *supra* note 19, at 4.

<sup>168</sup> *Id.* at 4, 9.

<sup>169</sup> *Id.* at 5.

<sup>170</sup> Maher, *supra* note 151, at 4.

<sup>171</sup> *Id.*; Nigel Morris, *Jean-Claude Juncker: Add Irish Republic to the Schengen Area*, iNEWS (Sept. 13, 2017), <https://inews.co.uk/news/jean-claude-juncker-add-irish-republic-schengen-area/> [<https://perma.cc/9CWJ-DL3C>].

<sup>172</sup> Maher, *supra* note 151, at 4; *Europe Without Borders: The Schengen Area*, *supra* note 19, at 4-5.

<sup>173</sup> *Europe Without Borders: The Schengen Area*, *supra* note 19, at 4.

<sup>174</sup> Kaela McCabe, *Schengen Acquis: The Development of the Right to Free*

did join, British nationals would be able to travel more freely within the Schengen Area and thereby preserve similar economic opportunities for British nationals in Northern Ireland to live and work within EU countries.<sup>175</sup>

Nonetheless, the Schengen Area still fails to fully address the political and social inequality at the heart of the Agreement. While freedom of movement between countries in the Schengen Area is an aspect of EU citizenship that this solution could provide, other civil and political rights and benefits associated with EU membership, such as voting rights or equal treatment protections, do not flow from this arrangement.<sup>176</sup> Therefore, British Northern Irish would still not be fully equal to their Irish counterparts.

### C. *Maintain EU Citizenship for All Citizens of Northern Ireland*

In order to fully protect the promises of the Agreement, all citizens born in Northern Ireland – whether they chose to identify as Irish, British, or both – should be allowed to maintain their EU citizenship. This is the only way to ensure that all citizens have equal political and civil rights as well as equal economic opportunities. However, in order for Northern Ireland, as an entity of the U.K., to retain EU citizenship the U.K. as a whole cannot leave the EU because EU citizenship is tied to member state nationality.<sup>177</sup> Instead, this solution would require the U.K. as a whole to technically remain a part of the EU, thereby permitting British nationals in Northern Ireland to hold EU citizenship, while allowing the other individual U.K. countries to separate from the EU and be exempt from EU obligations.<sup>178</sup> Given the legal and political complications of this approach, it is unlikely to succeed.

The Protocol included in the November 2018 draft agreement between the U.K. and the EU recognized that Irish citizens in Northern

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*Movement of Persons within the European Union Legal Framework and the Necessary Reforms to Adapt to Evolving Security Threats in the Region*, 7 CREIGHTON INT'L & COMP. L. J. 107, 131-32 (2016) (“Several [m]ember [s]tates have re-imposed border controls in response to the influx of migrants . . . bring[ing] into question whether the [m]ember [s]tates continue to abide by the Schengen acquis. The actions of Hungary, Germany, Austria, and France have been the most influential in the chain reaction of [m]ember [s]tates closing borders.”).

<sup>175</sup> See *Europe Without Borders: The Schengen Area*, *supra* note 19, at 4.

<sup>176</sup> European Commission Migration and Home Affairs, *Schengen Area*, [https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen_en) [<https://perma.cc/WC4R-PM6F>] (last updated Jan. 7, 2013); see Treaty on the Functioning of the European Union, *supra* note 13, arts. 23, 24, 45.

<sup>177</sup> Treaty on the Functioning of the European Union, *supra* note 13, art. 20.

<sup>178</sup> Phinnemore, *supra* note 17, at 6.

Ireland will continue to "enjoy, exercise and have access to rights, opportunities and benefits" of EU citizenship regardless of any changes resulting from Brexit.<sup>179</sup> This assurance protects Irish citizens in Northern Ireland, but it does nothing to address the new unequal status of British-identifying citizens. Therefore, the Agreement's promise of equality among the two communities remains unfulfilled.

Achieving full equality in the wake of Brexit can only be accomplished by maintaining the status quo as closely as possible. In theory, the most effective way to uphold the Agreement would be for British-identifying Northern Irish to maintain their EU rights.<sup>180</sup> However, if the U.K. as whole leaves the EU, it would be legally impossible for British nationals, including those in Northern Ireland, to continue to hold EU citizenship because citizenship is dependent on EU member state nationality.<sup>181</sup> In order for British nationals in Northern Ireland to retain EU rights, Northern Ireland itself would need to remain a part of the EU while the other constituent parts of the U.K. exited the EU.<sup>182</sup>

There is a precedent for this proposal, which has been referred to as the "reverse-Greenland approach," in reference to Greenland's exit from the European Economic Community ("EEC") in 1985.<sup>183</sup> Greenland is a territory of Denmark, an EU member state.<sup>184</sup> Through the Greenland Treaty, which all EU member states signed, Greenland was exempted from EU membership and classified among "Overseas Countries and Territories with constitutional links to a member state."<sup>185</sup> This territorial exemption allowed Denmark to remain an EU member state and Greenland to leave the EU without splitting from

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<sup>179</sup> *Draft Agreement on the Withdrawal*, *supra* note 137, Protocol on Ireland/Northern Ireland.

<sup>180</sup> Phinnemore, *supra* note 17, at 6.

<sup>181</sup> See Treaty on the Functioning of the European Union, *supra* note 13, art. 20.

<sup>182</sup> Phinnemore, *supra* note 17, at 6.

<sup>183</sup> *Id.*; see generally Treaty Amending, with regard to Greenland, the Treaties Establishing the European Communities, Mar. 13, 1984, 29 O.J. 1 [hereinafter Greenland Treaty]. The EEC was renamed the EU in 1993. European Union, *The EU in Brief*, [https://europa.eu/european-union/about-eu/eu-in-brief\\_en](https://europa.eu/european-union/about-eu/eu-in-brief_en) [<https://perma.cc/UYN9-5C9B>] (last visited Sept. 11, 2018).

<sup>184</sup> Greenland Treaty, *supra* note 183; Ulrik Pram Gad, *Could a 'Reverse Greenland' Arrangement Keep Scotland and Northern Ireland in the EU?*, The London School of Economics and Political Science, <http://blogs.lse.ac.uk/euoppblog/2016/07/07/reverse-greenland-arrangement/> [<https://perma.cc/U8ET-7GE3>].

<sup>185</sup> Gad, *supra* note 184.

Denmark.<sup>186</sup>

Applying this approach to Northern Ireland, the U.K. would technically remain an EU member state, preserving EU citizenship for all Northern Irish citizens, while the other constituent states – England, Wales, and Scotland – would become territorial exemptions that would be “exempted from the obligations of membership.”<sup>187</sup> This plan would also reduce the remaining EU voting powers of Northern Ireland according to the new active population.<sup>188</sup> This solution is not a perfect fit for the U.K.’s scenario because it is usually small minority territories, rather than a member state’s main entities, like England, that become territorial exemptions.<sup>189</sup> Moreover, this solution leaves open significant questions about the type of relationship the exempted territories might have with the EU, which would need to be negotiated in a new treaty between the U.K. and the EU.<sup>190</sup> However, a reverse-Greenland approach that allows Northern Ireland to access EU citizenship would allow all Northern Irish citizens to retain EU rights whether they identify as Irish or British.<sup>191</sup>

Beyond lingering uncertainties surrounding the application of a reverse-Greenland solution to the U.K., this proposal is also unlikely to emerge out of the Brexit negotiations given its potential for political backlash within the U.K. itself.<sup>192</sup> The path towards Brexit was adopted by a slim majority and many voters in the U.K. were opposed to the result.<sup>193</sup> The millions of voters who voted to remain in the EU would inevitably question why those in Northern Ireland are entitled to a special dispensation to remain in the EU while other areas are forced to leave.<sup>194</sup> Governments from areas in the U.K. have already requested similar treatment for any special trade arrangements provided to Northern Ireland.<sup>195</sup> Scotland has also already demanded

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<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> Phinnemore, *supra* note 17, at 6.

<sup>189</sup> Gad, *supra* note 184.

<sup>190</sup> *Id.*; CAOILFHIONN GALLAGHER & KATIE O’BYRNE, REPORT ON HOW DESIGNATED SPECIAL STATUS FOR NORTHERN IRELAND WITHIN THE EU CAN BE DELIVERED 59 (2017), [http://www.guengl.eu/uploads/publications-documents/NI\\_Special\\_status\\_report\\_161017\\_FINAL\\_crops.pdf](http://www.guengl.eu/uploads/publications-documents/NI_Special_status_report_161017_FINAL_crops.pdf) [<https://perma.cc/8SRN-3DWY>].

<sup>191</sup> Phinnemore, *supra* note 17, at 6.

<sup>192</sup> See GALLAGHER & O’BYRNE, *supra* note 190, at 55.

<sup>193</sup> *EU Referendum Results*, *supra* note 3.

<sup>194</sup> *Id.* In England 46.6% of voters wanted to remain in the EU, compared to 62% in Scotland and 47.5% of Welsh voters. *Id.*

<sup>195</sup> Elisabeth O’Leary & David Milliken, *Scotland, Wales and London Want*

a referendum to leave the U.K. at the conclusion of Brexit negotiations.<sup>196</sup> The U.K. risks creating a constitutional crisis by trying to uphold its Agreement obligations to Northern Ireland through this type of arrangement.

Given the unique legal challenges and the current political environment within the U.K., Brexit negotiators are unlikely to adopt this solution. Yet, it is a solution that fully protects the Agreement by ensuring full political, social, and economic equality between both communities.

#### D. *Reverse Brexit*

The surest way to protect the Agreement's equality guarantees is to keep things as they are. There is a growing call for the U.K. to reverse Brexit by revoking its invocation of Article 50, the withdrawal notification of the Lisbon Treaty, and holding a new referendum in order to stop Brexit. This unprecedented solution would most thoroughly protect the Agreement and the equal rights and economic opportunities currently encouraging harmony in Northern Ireland.

Article 50 itself is silent on the question of revocation of the notice to withdraw.<sup>197</sup> Thus, some argue that under EU law "Article 50 cannot authoritatively be interpreted as to allow or prohibit the right to revoke a withdrawal notification."<sup>198</sup> While much of the Brexit debate has been governed by political calculations, legal analysis has largely framed the discussions about withdrawal.<sup>199</sup> The U.K. Supreme Court considered revocability of Article 50 within a legal challenge to Brexit itself.<sup>200</sup> In *R (on the application of Miller and another) v. Secretary of*

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*Special Brexit Deal if Northern Ireland Gets One*, REUTERS (Dec. 4, 2017, 11:22 AM), <https://www.reuters.com/article/us-britain-eu-deals/scotland-wales-and-london-want-special-brexit-deal-if-northern-ireland-gets-one-idUSKBN1DY24L>

[<https://perma.cc/E3DH-7RDY>] (referencing politicians in Scotland, Wales, and London that have all requested a similar special trade status as Northern Ireland within the EU market).

<sup>196</sup> Stephen Castle, *Scotland Votes to Demand a Post-'Brexit' Independence Referendum*, N.Y. TIMES (Mar. 28, 2017), <https://www.nytimes.com/2017/03/28/world/europe/scotland-britain-brexit-european-union.html> [<https://perma.cc/5W39-73XW>].

<sup>197</sup> EUR. PARLIAMENT, DIRECTORATE GENERAL FOR INTERNAL POLICIES, THE (IR-)REVOCABILITY OF THE WITHDRAWAL NOTIFICATION UNDER ARTICLE 50 TEU, 7 (2018), [http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/596820/IPOL\\_IDA\(2018\)596820\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/596820/IPOL_IDA(2018)596820_EN.pdf), [<https://perma.cc/BB9Z-PNFL>].

<sup>198</sup> *Id.* at 27.

<sup>199</sup> *Id.*

<sup>200</sup> See *R (on the application of Miller and another)*, *supra* note 92, ¶ 26.

*State for Exiting the European Union*, the Court acknowledged this issue was unrelated to the outcome of the current proceedings, but affirmed an understanding that it was “common ground that notice under [article] 50(2) . . . cannot be given in qualified or conditional terms and that, once given, it cannot be withdrawn.”<sup>201</sup> The U.K. Court did not seek a clarification on the revocability of Article 50 from the Court of Justice of the European Union (“CJEU”).<sup>202</sup> This issue also arose in the Irish courts, but the challenge was abandoned when the Irish High Court declined to refer the case to the CJEU.<sup>203</sup> The U.K. government has also reportedly requested clarification on the revocability of Article 50 and there is an open legal challenge requesting Prime Minister Theresa May to disclose any legal advice the U.K. government has accessed on the Article 50 matter.<sup>204</sup>

The European Parliament has also issued a report on Article 50 that examines this issue under both public international law and EU law.<sup>205</sup> The report concludes that withdrawal is not governed by international law principles, but rather by EU law.<sup>206</sup> Further, the report recommends that such a “hypothetical right of revocation could be only examined and confirmed or infirmed by the EU institution competent to this purpose, namely the CJEU.”<sup>207</sup> The report acknowledges another possible interpretation, that the member states themselves could decide the issue of revocation with an understanding that “[m]ember [s]tates are the masters of the treaties.”<sup>208</sup> However, the report disapproves of such an approach because “such mastery should take place within the legal framework

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<sup>201</sup> THE (IR-)REVOCAILITY OF THE WITHDRAWAL NOTIFICATION UNDER ARTICLE 50 TEU, *supra* note 197, at 17-19; R (on the application of Miller and another), *supra* note 92, ¶ 26.

<sup>202</sup> THE (IR-)REVOCAILITY OF THE WITHDRAWAL NOTIFICATION UNDER ARTICLE 50 TEU, *supra* note 197, at 18. The Court of Justice of the European Union has the “exclusive right to interpret the Treaty [on the European Union].” *Id.* at 27.

<sup>203</sup> *Id.* at 18; Vincent Boland, *Legal Challenge to Brexit in Irish Courts Abandoned*, IRISH TIMES (May 29, 2017), <https://www.ft.com/content/6100aa8e-4483-11e7-8519-9f94ee97d996> [<https://perma.cc/SW6H-TV9Q>].

<sup>204</sup> THE (IR-)REVOCAILITY OF THE WITHDRAWAL NOTIFICATION UNDER ARTICLE 50 TEU, *supra* note 197, at 18-19; Jessica Simor, *Why It's Not Too Late to Step Back from the Brexit Brink*, GUARDIAN (Oct. 7, 2017, 2:29 PM), <https://www.theguardian.com/commentisfree/2017/oct/07/why-its-not-too-late-to-step-back-from-brexit> [<https://perma.cc/LN2G-QM5V>].

<sup>205</sup> See generally THE (IR-)REVOCAILITY OF THE WITHDRAWAL NOTIFICATION UNDER ARTICLE 50 TEU, *supra* note 197.

<sup>206</sup> *Id.* at 12.

<sup>207</sup> *Id.* at 28.

<sup>208</sup> *Id.* at 27.

established by the treaties," which grants the CJEU exclusive authority to interpret the treaty.<sup>209</sup>

Given the uncertainty surrounding the ability of a member state to revoke its notification to withdraw from the EU, many were hoping the CJEU would clarify this issue.<sup>210</sup> However, the CJEU rarely hears hypothetical cases or issues advisory opinions, so it was assumed that it might be necessary for the U.K. to actually attempt to revoke its Article 50 notification in order to allow the CJEU to consider the issue.<sup>211</sup> However, on December 4, 2018 Advocate General Manuel Campos Sánchez-Bordona of the CJEU released a report in which he stated that the revocation argument was a genuine dispute and therefore a decision on this issue would not merely be an advisory opinion.<sup>212</sup> The report then declared that the U.K. is free to unilaterally withdraw its Article 50 notice of its intent to leave the EU without approval from the other EU member states.<sup>213</sup> While this development suggests that the U.K. would have an easier time reversing course, Prime Minister May has already publicly rejected this option as a way to abandon Brexit.<sup>214</sup>

The U.K. would be taking a significant step if it were to revoke its Article 50 withdrawal notification, but this would be the most effective way for the U.K. to comply with the Agreement. Reversing Brexit would ensure the spirit of the Agreement and its promise of full equality between both communities remains intact.

## VI. CONCLUSION

Brexit poses the first international threat to the twenty-year-old Agreement that has stabilized Northern Ireland. Examining the history of Northern Ireland's Troubles and the Agreement's overall emphasis

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<sup>209</sup> *Id.* at 27-28.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 18 n.62. ("[T]he Court's function is preliminary in the administration of justice in the [m]ember [s]tates and not to deliver advisory opinions on general or hypothetical questions . . .") (quoting Case C-197/10, *Unió de Pagesos de Catalunya v. Administración del Estado* Case, 2011 E.C.R. I-849, ¶18).

<sup>212</sup> Court of Justice of the European Union, Press Release 187/18, Advocate General Campos Sánchez-Bordona Proposes that the Court of Justice Should Declare that Article 50 TEU Allows the Unilateral Revocation of the Notification of the Intention to Withdraw from the EU (Dec. 4, 2018).

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

<sup>214</sup> Severin Carrell, *Brexit: May Rules Out Revoking Article 50 After ECJ Ruling*, GUARDIAN (Dec. 10, 2018 12:24 AM), <https://www.theguardian.com/politics/2018/dec/10/uk-can-unilaterally-stop-brexit-process-eu-court-rules> [<https://perma.cc/L9B6-R6GJ>].

on social, political, and economic equality, it is clear that any dilution of rights for either British or Irish citizens undermines the Agreement and violates international law.<sup>215</sup>

Brexit directly implicates two critical provisions of the Agreement: the citizenship provision and the provision protecting equal economic opportunities for all citizens.<sup>216</sup> By threatening the EU citizenship of British nationals in Northern Ireland, the U.K.'s withdrawal from the EU will jeopardize the presumed equality between the two competing national identities. The resulting inequality will breach the U.K.'s commitment to "equal treatment for the identity, ethos, and aspirations of both communities."<sup>217</sup> As a direct result of British nationals' loss of EU rights, the U.K. would also violate the Agreement's promise of equal economic opportunity. Without the guaranteed right of free movement among the EU countries, British nationals in Northern Ireland would be at an economic disadvantage to compete for and access employment in Ireland and other EU countries.<sup>218</sup>

There are four possible solutions to reduce the resulting burden that could be placed on British nationals in Northern Ireland. In order to reduce the economic burden on British nationals, thereby bringing economic opportunities in line, the U.K. could try to maintain the CTA or join the Schengen Area.<sup>219</sup> These two possibilities however, do not address the political inequality that Brexit poses. In order to uphold the Agreement in its entirety, Northern Ireland would need to remain a part of the EU, thereby ensuring EU rights are granted to all Northern Irish citizens, or the U.K. would need to reverse Brexit in its entirety by revoking its intent to withdraw from the EU.<sup>220</sup>

Each of these solutions pose their own legal and political problems for the U.K.<sup>221</sup> However, if the U.K. wants to honor its binding international legal commitment to promote peace in Northern Ireland, it must produce a final Brexit agreement that ensures complete parity

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<sup>215</sup> See generally Good Friday Agreement, *supra* note 6.

<sup>216</sup> *Id.* art. 1 (vi), Human Rights ¶ 1.

<sup>217</sup> *Id.* art. 1 (v).

<sup>218</sup> Tonge, *supra* note 6, at 8.

<sup>219</sup> See THE COMMON TRAVEL AREA, AND THE SPECIAL STATUS OF IRISH NATIONALS IN UK LAW, *supra* note 141, at 3; *Europe Without Borders: The Schengen Area*, *supra* note 19, at 4.

<sup>220</sup> Phinnemore, *supra* note 17, at 6; THE (IR-)REVOCABILITY OF THE WITHDRAWAL NOTIFICATION UNDER ARTICLE 50 TEU, *supra* note 197, at 5-6.

<sup>221</sup> See THE COMMON TRAVEL AREA, AND THE SPECIAL STATUS OF IRISH NATIONALS IN UK LAW, *supra* note 141, at 3; McCabe, *supra* note 174, at 131-32; Castle, *supra* note 196; THE (IR-)REVOCABILITY OF THE WITHDRAWAL NOTIFICATION UNDER ARTICLE 50 TEU, *supra* note 197, at 27.



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between the two communities in terms of both political rights and economic opportunities. If this is not feasible, the only way for the U.K. to uphold its obligations in Northern Ireland is to renounce Brexit altogether.