# Constitutional Rights in the Irish Home Rule Bill of 1893

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**Abstract**

In 1893, Prime Minister Gladstone introduced the second Irish home rule bill in parliament. The bill broke with tradition in Britain and the empire, as it included provisions from the bill of rights of the United States. Its significance was clear at the time: it was debated for nine days in the committee stage and, with one minor amendment, it remained part of the bill that passed the commons. However, the bill was defeated in the lords and, at least in the United Kingdom, bills of rights were dismissed as unnecessary or detrimental to sound governance until well after world war two. This article therefore tries to understand how this early bill of rights was regarded at the time. Who suggested, or demanded, its inclusion? How did they expect it to be applied? And how did the debate reflect and influence thinking about constitutional law in Britain and the empire?

## I INTRODUCTION

The historic opposition of the United Kingdom's governments to constitutional bills of rights, both at home and in the colonies, is well-known. Until the 1960s, British governments maintained that bills of rights would either fail to protect rights, or interfere with stable governance, or both.[1] Before then, rights only appeared in constitutions that were drafted

[1] Charles O.H. Parkinson, *Bills of Rights and Decolonization*, Oxford, 2009; A.W.B. Simpson, *Human Rights and the End of Empire*, Oxford, 2004, 1-54; Ivor Jennings, *The Approach to Self Government*, Cambridge, 1958, 98-110.

locally[2] or where the British sought to gain support from groups with specific interests.[3] It is therefore quite striking that the first two bills introduced for home rule for Ireland, the Government of Ireland Bill 1886 and the Government of Ireland Bill 1893, both included bills of rights. To be sure, they were not as broad as modern bills of rights, and they only applied in respect of laws enacted by the Irish legislature. Nevertheless, the government presented them as integral elements of the constitutional proposals. Indeed, the Liberal prime minister, William Gladstone, described them as part of new 'Magna Charta' for Ireland.[4]

The relevant clause of the 1886 bill included guarantees of access to education, prohibitions on discrimination on the basis of religion, and protection for bodies incorporated outside Ireland. The 1886 bill was defeated in the commons on second reading, and hence before a full debate on the clause. The Liberals lost the general election that followed, and home rule did not come back to parliament until they returned to power after the 1892 election. The 1893 bill kept the 1886 provisions, and added a more general right of greater significance. In its original form, clause 4(5) of the 1893 bill provided that the Irish legislature could not enact laws 'Whereby any person may be deprived of life, liberty or

[2] The main examples are the constitution of India, 1947, the constitution of Ireland, 1937 and Irish Free State Constitution Act 1922, 13 Geo. V, sess. 2, c. 1 (enacting the Constitution of the Irish Free State (Saorstát Éireann) Act 1922 of the Irish constituent assembly, which is considered the authoritative source of the constitution under Irish law); see Parkinson, *Bills of Rights*, 42-50.

[3] For example, the Government of Ireland Act 1920 and the Government of India Act 1935 contained rights to property, but these rights were not expected to have any real impact on the legislatures and were included as concessions to landowning classes: see Tom Allen, *The Right to Property in Commonwealth Constitutions*, Cambridge, 2000, 41-46.

[4] *Parliamentary Debates*, series 4, vol. 13, col. 1087, 15 June 1893 (House of Commons).

property without due process of law, or may be denied the equal protection of the laws, or whereby private property may be taken without just compensation'.[5] The clause was borrowed from the fifth and fourteenth amendments to the constitution of the United States.[6] The rights were not entirely foreign to Britain: it was widely believed that the framers of the

[5] One amendment was accepted in committee, so that the final version of clause prohibited laws 'Whereby any person may be deprived of life, liberty or property without due process of law *in accordance with the settled principles and precedents*, or may be denied the equal protection of the laws, or whereby private property may be taken without just compensation'. (emphasis added). See below, text accompanying n. **Error! Bookmark not defined.**.

[6] United States constitution, 5th amendment: 'No person shall … be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.' 14th amendment, para (1) '. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws'.

constitution took them from the common law constitution.[7] However, nothing similar to clause 4(5) had previously been incorporated in any colonial constitution.[8]

Plainly, the clause could have set constitutional thinking in a different direction if the bill had passed into law. The bill did pass the house of commons, but it was defeated by an overwhelming majority in the house of lords. However, it is largely missing from accounts of historians of Irish home rule and of human rights.[9] There are several explanations for this, as

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[7] See David Schneiderman, 'A. V. Dicey, Lord Watson, and the Law of the Canadian Constitution in the Late Nineteenth Century', 16 *Law and History Review* (1998), 495, 504ff, for a review of the views of American and British constitutionalists; one example given by Schneiderman is Henry Sumner Maine, *Popular Government: Four Essays*, London, 1885, 208: 'the Constitution of the United States is coloured throughout by political ideas of British origin, and that it is in reality a version of the British Constitution, as it must have presented itself to an observer in the second half of the last century'.

[8] There were provisions on specific aspects of religious discrimination, such as section 93 of the British North America Act 1867, 30 Vict., c. 3.

[9] For example, John Kendle, *Ireland and the Federal Solution: The Debate over the United Kingdom Constitution, 1870-1921*, Kingston and Montreal, 1989, 75-76, states that the 1893 bill 'differed in seven significant ways from the 1886 bill on which it was modelled', but does not mention the rights added by clause 4(5); similar treatment can be seen in Alan O'Day, *Irish Home Rule 1867-1921*, Manchester, 1998; Alvin Jackson, *Home Rule, an Irish History 1800–2000*, Oxford, 2003, 67-106; James Loughlin, *Gladstone, Home Rule and the Ulster question, 1882-93*, Dublin, 1986; Alan J. Ward, 'Models of Government and Anglo-Irish Relations', 20 *Albion* (1988), 19; Thomas Murray, 'Socio-Economic Rights Versus Social Revolution? Constitution Making in Germany, Mexico and Ireland, 1917–1923', 24

this paper will show. First, the clause did not figure in the bargaining that led up to the 1893 bill. The government added the rights clauses for tactical purposes: it hoped that it might weaken the resistance to home rule amongst the unionists and landowners, and their sympathizers in Britain. However, there is no evidence that the unionists or landowners demanded the clause, or indeed that its inclusion in the bill increased support for home rule.[10] Moreover, the debate on a constitutional bill of rights was always subordinate to the question of home rule. The question of home rule was seen as important to the empire, but the question of constitutional bills of rights was not treated as a distinct question.[11] As it had no obvious influence on subsequent developments, it has largely been overlooked by legal historians.[12]

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*Social & Legal Studies* (2015), 1; Thomas Murray, *Contesting Economic and Social Rights in Ireland: Constitution, State and Society, 1848-2016*, Cambridge, 2016.

[10] This was not the case with the fourth home rule bill: the earl of Wicklow proposed the amendment that would become the right to property in the Government of Ireland Act 1920, and the government agreed to the amendment after initial doubts: *Parliamentary Debates*, series 5, vol. 43, cols. 44-48, 13 Dec. 1920 (House of Lords).

[11] On the imperial aspects, see: Eugenio Biagini, *British Democracy and Irish Nationalism, 1876–1906*, Cambridge, 2007; Paul A. Townend, *The Road to Home Rule: Anti-imperialism and the Irish National Movement*, Madison, Wisconsin, 2016; Kendle, *Ireland*, 57-58.

[12] Exceptions are Christopher McCrudden, 'Using Comparative Constitutionalism in Human Rights Discourse: Ireland's Past and Scotland's Future', 17 *Edinburgh Law Review* (2013), 314, 319-326; Joseph Jaconelli, 'Human Rights Guarantees and Irish Home Rule', 25-27 *Irish Jurist N.S.* (1990-91) 181; Ronan Keane, 'Fundamental Rights in Irish Law: A Note on the Historical Background' in James O'Reilly, ed., *Human Rights and Constitutional Law: Essays in Honour of Brian Walsh*, Round Hall Press, 1992, 25-35.

A second explanation is simply that the clause never caught the imagination of the legal profession and scholars. This was partly because the 1893 bill was never enacted: if it had come into force, there would have been a steady stream of case law for lawyers to analyse and discuss, and undoubtedly this would have led to further examination of the origins of the clause. Of course, home rule did not disappear from British politics. It came back into parliament with the Government of Ireland Act 1914,[13] the Government of Ireland Act 1920,[14] the Anglo-Irish treaty of 1921[15] and Irish Free State Constitution Act 1922,[16] but none of these reveal any influence from the 1893 bill.[17] Neither did anything similar to the clause appear in constitutions elsewhere in the empire until after world war two. Even so, one might have thought that the debates, on their own, would have provoked a continuing debate amongst legal and constitutional scholars.

The clause may therefore appear unworthy of study, but the amount of time devoted to it in the parliamentary debates suggests that the scholarship has not given due weight to the views of many contemporary politicians. At the committee stage, the house of commons debated the clause for nine days before the government moved to closure. Even the corresponding commons debate on the entire Human Rights Bill 1998 was completed in four

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[13] 4 & 5 Geo. V, c. 90.

[14] 10 & 11 Geo. V, c. 67.

[15] Irish Free State (Agreement) Act 1922 12 & 13 Geo. V, c. 4.

[16] Irish Free State Constitution Act 1922, 13 Geo. V sess. 2, c. 1; enacting the Constitution of the Irish Free State (Saorstát Éireann) Act 1922 of the Irish constituent assembly. Under Irish law, the latter is considered the authoritative source of the constitution.

[17] The Government of Ireland Act 1920 did include the right to just compensation: see Allen, *Right to Property*, 41-43.

days.[18] Decades later, in the debates on the Government of Ireland Bill, 1920, the lord chancellor remarked that 'this particular proposal was singled out for more vehement attack than almost anything in the Bill', and he was only speaking of the guarantees respecting property rather than the full clause.[19]

This article therefore tries to understand how this early bill of rights was regarded at the time. Why did the government add it to the home rule bill, given that no group demanded its inclusion? How did the debate reflect and influence thinking about constitutional law in Britain and the empire? And why did it become a point where history failed to turn? To answer these questions, the article begins with a brief description of the place of bills of rights in the imperial system of the nineteenth century, before turning to the inclusion of the rights clause in the home rule bills. It traces the origins of the clause to the resolutions of the Home Government Association, founded in 1870, where it appears that the inspiration was taken from the Catholic Relief Act 1793 and American constitutional provisions. It then considers the parliamentary debates on the clause, to get a better sense of how it was understood at the time. The opposition attacked the clause as a hollow promise, lacking in any real safeguards and certain to be mishandled by the judiciary. Behind its attacks, and the government's responses, lay assumptions about the nature of individual rights in the unwritten constitution. In the final sections, it considers the debate on more fundamental questions about judicial review, constitutional interpretation and the protection of minorities

[18] The committee stage debates in the commons can be found at*: Parliamentary Debates*, series 6, vol. 313, cols. 388-475, 3 June 1998 (House of Commons); *Parliamentary Debates*, series 6, vol. 314, cols. 391-434, 17 June 1998 and cols. 1054-1143, 24 June 1998 (House of Commons); *Parliamentary Debates*, series 6, vol. 315, cols. 534-575, 2 July 1998 (House of Commons).

[19] *Parliamentary Debates*, series 5, vol. 43, col. 46, 13 Dec. 1920 (House of Lords).

in a democratic state. From this, it discusses the legacy of the Home Rule Bill 1893 on the subsequent history of constitutional rights in the empire and commonwealth.

## II. RIGHTS IN THE EMPIRE BEFORE THE HOME RULE BILLS

The inclusion of the rights clauses in the 1886 bill, and especially the 1893 bill, went against constitutional practice in Britain and the empire regarding the judicial review of legislation. This was demonstrated by the Colonial Laws Validity Act 1865, which was enacted to limit the scope of judicial review.[20] It followed an opinion given in 1863 by the colonial secretary, who confirmed that the courts could declare colonial legislation void for repugnancy to the fundamental law of England.[21] Fundamental law included 'those essential principles of what may be called natural jurisprudence, which, as modified by the ideas and institutions of Christianity, have been adopted as the foundation of the existing law of England'.[22] The colonial secretary's opinion included advice from the law officers, who stated that colonial legislation would only conflict with fundamental law in exceptional cases. A law would not,

[20] 28 & 29 Vict., c. 63.

[21] The leading contemporary treatise was Alpheus Todd, *Parliamentary Government in the British Colonies*, Boston, 1880, 137-161. See also D.B. Swinfen, *Imperial Control of Colonial Legislation*, 1813-1865, Oxford, 1970; Robert Leckey, *Bills of Rights in the Common Law*, Cambridge, 2015, 56-59; Anne Twomey, 'Fundamental Common Law Principles as Limitations upon Legislative Power', 9 *Oxford University Commonwealth Law Journal* (2009), 47, 57-60.

[22] 'South Australia', *House of Commons Parliamentary Papers* (1862) (3048) xxxvii 113, 180. **I eventually found this and have inserted a full reference. I think too your quote is at p.181. Do check and see if that is so.**

for example, violate fundamental law solely because it abolished grand juries, or altered the rules of evidence, or introduced 'modes of transferring real property unknown to British law'.[23] The opinion and advice were intended to narrow the scope of judicial review, as there were signs that colonial judges might make extensive use of the repugnancy doctrine.[24] Even so, it was too broad for parliament. The 1865 Act limited judicial review to laws that were inconsistent with imperial legislation; repugnancy to fundamental law, however narrowly defined, was no longer a ground for review.

The 1865 Act did not leave colonial legislatures with unlimited power over individuals, as colonial governors and the privy council were able to delay or deny effect to laws that appeared to conflict with constitutional values.[25] Both before and after the 1886 bill, British governments preferred to rely on these executive mechanisms for controlling colonial legislatures. Indeed, the British North America Act 1867 did not incorporate a general bill of rights, but it did give the Canadian government the powers of disallowance and reservation

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[23] Ibid. The law officers also stated that a rule of English law would not be fundamental unless it applied to 'all Her Majesty's Christian subjects in every part of the British dominions'.

[24] The opinion and advice responded to a petition from the South Australian legislature for the removal of Justice Benjamin Boothby of the supreme court of South Australia, who had refused to apply a number of South Australian Acts on the basis that they conflicted with fundamental law. The papers relating to the Boothby case are found in 'South Australia. Correspondence between the Governor of South Australia and the Secretary of State, relative to Mr. Justice Boothby', *House of Commons Parliamentary Papers* (1862) (3048) xxxvii 113. See also Todd, *Parliamentary Government*, 846-854; Enid Campbell, 'Colonial Legislation and the Laws of England', 2 *University of Tasmania Law Review* (1965), 148.

[25] See the authorities cited above, n. 21.

over provincial laws.[26] Sir John A. Macdonald, Canada's first prime minister, stated that Canada would act against provincial laws that were unconstitutional, by which he meant laws that were contrary to the fundamental law of England.[27] The view therefore seemed to be that the imperial system did incorporate a fundamental law, which probably included individual rights of some description, but that it would be realized through executive channels rather than the courts.

By the time of the first home rule bill, fears over the impact of the expansion of the franchise and the redistribution of parliamentary seats led to increased interest in the American constitutional model. If nothing else, it suggested that greater democracy need not lead to socialism or disorder. Several writers identified the constitutional protection of individual rights as a significant moderating factor in American politics. Sir Henry Sumner Maine stated that there was 'no more important provision' in the constitution of the United States than the contracts clause, because 'it is the bulwark of American individualism against democratic impatience and Socialistic fantasy'.[28] Furthermore, the clause made it practically

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[26] British North America Act 1867, 30 & 31 Vict. c.3, ss. 55-57, 90; note that there were specific restrictions in respect of legislation affecting education (s. 93) and language (s. 133).

[27] Referred to by E.A. Forsey, 'Disallowance of Provincial Acts, Reservation of Provincial Bills, and Refusal of Assent by Lieutenant-Governors since 1867', 4 *Canadian Journal of Economics and Political Science* (1938), 47, 49; see also *Webb* v *Outrim* [1907] AC 81, pp. 88-89, where the earl of Halsbury expressed a similar view of 'unconstitutional' and 'ultra vires' legislation.

[28] Maine, *Popular Government*, 247. The contracts clause is found in USA constitution, article I, section 10: 'No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts'.

impossible for 'certain communistic schemes of American origin' to be realised in the United States.[29] In 1886, in respect of the contracts clause, A.V. Dicey claimed that

> If any principle of the like kind had been recognised in England as legally binding on the Courts, the Irish Land Act would have been unconstitutional and void; the Irish Church Act, 1869, would, in great part at least, have been from a legal point of view so much waste paper, and there would have been great difficulty in legislating in the way in which the English Parliament has legislated for the reform of the Universities.[30]

There was therefore a view that judicial review for the protection of individual rights could act as a check on radical legislation.[31] Of course, it was a separate question whether constitutional supremacy would be preferable to parliamentary supremacy or executive review. Dicey, in particular, argued the American emphasis on constitutional supremacy and federalism would weaken the United Kingdom.[32] The colonial practice followed a similar

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[29] Ibid., 248.

[30] A.V. Dicey, 'Federal Government', 1 *Law Quarterly Review* (1885), 80, 97; see also A.V. Dicey, *Lectures Introductory to the Study of the Law of the Constitution*, 1st ed., London, 1885, 160. The Irish Church Act 1869, 32 & 33 Vict., c. 42, disestablished the Irish church and abolished the remaining tithes, with compensation for the affected clergy.

[31] Edmund Robertson, a Liberal MP, raised the importance of the extension of the bills of rights to the states by the fourteenth amendment. He observed that state laws that were struck down under the contracts and due process clauses bore 'a strong likeness to measures now before Parliament or already passed into law': Edmund Robertson, *American Home Rule: A Sketch of the Political System of the United States*, Edinburgh, 1887, 82.

[32] Alfred Venn Dicey, *A Fool's Paradise: Being a Constitutionalist's Criticism on the Home Rule Bill of 1912*, London, 1913, 95-97.

line, as United Kingdom governments became increasingly reluctant to exercise their review powers for colonial legislatures with responsible government. In effect, it was assumed that the dominions would progress to a version of parliamentary supremacy.[33]

## III THE ORIGINS OF THE IRISH RIGHTS CLAUSES

The immediate movement to the first home rule bill began in December 1885, when Gladstone's son told a journalist that his father had been 'converted' to home rule.[34] Prior to this, neither the Conservatives nor the Liberals had indicated any support for home rule. The question had, of course, been part of public discussion in Ireland and across the United Kingdom and the wider empire for many decades. Positions ranged from campaigns for complete independence, to the repeal of the Act of Union 1800 and the restoration of an independent Irish parliament, to home rule under some form of federal association within the United Kingdom, to the devolution of some aspects of public administration but without a separate legislature. When Gladstone's son made his announcement, neither Salisbury's Conservatives nor the Liberals commanded a majority and Charles Parnell's Irish Parliamentary Party (IPP) held the balance of power. The IPP had initially supported

[33] In 1907, James Bryce, now ambassador to the United States, told an American audience that colonial legislation was 'scarcely ever' vetoed, and only 'in those extremely few cases in which some law passed by the colony may conflict with the interests of some other part of the British empire, or where it would conflict with some international obligation under taken by treaty'. James Bryce, 'Some Difficulties in Colonial Government Encountered by Great Britain and How They Have Been Met', ~~(1907)~~ 30 *American Colonial Policy and Administration* (1907), 16, 17-18.

[34] O'Day, *Irish Home Rule*, 92-121; Loughlin, *Gladstone*, 35-52.

Salisbury, but they joined the Liberals in defeating the government on a vote of confidence in January 1886. Gladstone quickly formed a new government and began work on a home rule bill.

The origins of the clause can be traced to Isaac Butt and the Home Government Association, which he founded in 1870. Under Butt's leadership, the association approached home rule as a conservative project. It was largely driven by the Protestant professional and commercial elite that believed that it had been abandoned by the disestablishment of the Irish church, and that it could manage issues relating to land tenure, education, religion and unlawful protest far better than the United Kingdom Parliament.[35] Butt, and other members of the association, recognized that many Protestants believed that home rule posed a greater risk to them than the Act of Union. There was, for example, a concern that a Catholic majority would challenge the confiscations of Catholic property that followed the civil war. The association sought to assure the public that these concerns were unfounded: in an open letter to 'the People of Ireland', published September 17th, 1870, it stated that 'We cannot too

[35] Church of Ireland Act 1869, 32 & 33 Vict., c. 42, which took effect in 1871. See J.J. Golden, 'The Protestant Influence on the Origins of Irish Home Rule, 1861–1871', 128 (535) *English Historical Review* (2013), 1483; Colin Reid, 'An Experiment in Constructive Unionism: Isaac Butt, Home Rule and Federalist Political Thought during the 1870s', 129 (537) *English Historical Review* (2014), 332; Lawrence J. McCaffrey, 'Isaac Butt and the Home Rule Movement: A Study in Conservative Nationalism', 22 *The Review of Politics* (1960), 72. See also Rev. Thadeus O'Malley, *Home Rule on the Basis of Federalism*, London, 1873, 92: O'Malley was a Catholic priest and a member of the association; he acknowledged that some Catholics saw home rule as a Protestant Tory movement, and said 'For my part, I rejoice especially at the prospect of this movement quickly embracing the great bulk of the Conservative party in Ireland'.

strongly or too emphatically disclaim any purpose or object of any religious ascendancy or any attack upon the property or rights of any one'.[36] The association deliberately did not go into detail of a proposed constitution, but it did say that it was open to specific guarantees: 'We invite any of our countrymen who may have the most remote apprehension of danger from the Irish parliament to their religion, their liberty, or their property, to suggest any guarantees, to be made an inviolable part of the constitution which we seek'.[37] As suggestions, it stated that its members would assent to guarantees similar to the American constitutional guarantees that 'religious equality shall forever be preserved', or, closer to home, to 'the provision so often inserted in the oaths imposed on the Irish people that the existing settlement of property should never be disturbed'.[38] The second suggestion recalled the Catholic Relief Act 1793, which allowed Catholics to vote if they held land to the value of forty shillings, and if they swore to 'defend to the utmost of my power the settlement and arrangement of property in this country, as established by the laws now in being'.[39] The

[36] 'Address of the Home Government Association. To the People of Ireland.' *Dublin Weekly Nation*. 17 Sept. 1870, 71.

[37] Ibid.

[38] Ibid.

[39] Home Rule League, *Proceedings of the Home Rule Conference held at the Rotunda, Dublin, on the 18th, 19th, 20th and 21st November, 1873*, Dublin, 1874, 33-34 (Isaac Butt). The Catholic Relief Act 1829, 10 Geo. IV. c. 7, s. 2, continued the requirement of the oath, including the commitment not to challenge the settlement of property. The Parliamentary Oaths Act 1866, 29 & 30 Vict., c. 19, s. 1 abolished the separate Catholic oath in favour single oath of allegiance.

reference in the oath to the 'settlement and arrangement of property' was a response to Protestant fears of a reversal of the confiscations of property following the civil war.[40]

The association left these questions open for suggestion and discussion. In Butt's own pamphlet, *Home Government for Ireland: Irish Federalism! Its Meaning, Its Objects, and Its Hopes*, first published in 1870, he suggested that Protestant objections might be overcome if an Irish parliament were denied the power to legislate for the 'the establishment of any religious ascendancy, or any alteration of the Act which settled Irish property in the reign of Charles II'.[41] John George MacCarthy, in his *A Plea for the Home Government of Ireland*, stated that 'If deemed desirable, however, it might be arranged that the establishment of any religious ascendency, or the alteration of the Acts which settled Irish property in the reign of Charles II, should be placed beyond its jurisdiction'.[42] Similarly, Thaddeus O'Malley, a Catholic priest who joined the association, cited the 'noble general assuring clauses' of the

[40] See Greg Taylor, 'Two Refusals of Royal Assent in Victoria', 29 *Sydney Law Review* (2007), 85, 89-92, referring to the debates on the Parliamentary Oaths Act 1866, where Rickard Deasy, a Liberal MP who would later join the Irish court of appeal, explained that the clause was introduced in 1793 'obviously with the intention of guarding against the danger of Roman Catholics proposing a repeal of the Act of Settlement, which was passed in the reign of Charles II, and which regulated the distribution of landed property after the convulsion of the civil war. Everyone knew that, at that time, there was a real danger of such a proposition. … the Protestant Legislature, in 1793, thought it necessary to enact a special security against a renewal of it': 21 *Parliamentary Debates*, series 3, vol. 145, col. 1763, 15 June 1857 (House of Commons).

[41] Isaac Butt, *Home Government for Ireland: Irish Federalism! Its Meaning, Its Objects, and Its Hopes*, 3rd ed., Dublin, 1871, 53.

[42] John George MacCarthy, *A Plea for the Home Government of Ireland*, London, 1871, 14.

bill of rights and stated that 'Twill be the simplest thing in the world to transfer into our great Federal act almost every one of these sundry provisions'.[43] No decision was taken at this point but, crucially, the debate was already framed as one of tactics: there was no suggestion from Butt, O'Malley or the association in its open letter that constitutional guarantees should lie at the heart of a home rule scheme, or that they would be needed to restrain the Catholic majority. They were only valued as concessions that might help win over a group that would have resisted constitutional change.[44] This emphasis on tactics, as subsequent developments would show, set the debate through the first two home rule bills and even the third bill of 1912.

In 1873, the association convened the Home Rule Conference, from which the Home Rule League was formed. The conference adopted a set of principles that largely followed the Home Government Association's resolutions, with guarantees now incorporated as Resolution VIII:

> That while we believe that in an Irish parliament the rights and liberties of all classes of our countrymen would find their best and surest protection, we are willing that there should be incorporated in the federal constitution articles supplying the amplest guarantees that no change shall be made by parliament in the present settlement of property in Ireland, and that no legislation shall be adopted to establish any religious

[43] O'Malley, *Home Rule*, 80; O'Malley's suggestion went as far as including the restrictions on an imperial parliament, in the same way that the Bill of Rights restrained congress.

[44] See A.M. Sullivan, *New Ireland*, Philadelphia, 1878, 466-467, for the resolutions of the Home Government Association.

> ascendancy in Ireland or to subject any person to disabilities on account of his religious opinions.[45]

In his opening speech to the conference, Butt reprised the open letter by tracing the clause back to the oath required by the Catholic Relief Act 1793. Butt acknowledged that it was 'almost childish' to think that restraints on a Catholic majority would be needed more than two centuries after the Act of Settlement: not only would the Irish parliament be constituted so as to favour propertied interests, but Catholics were no longer disabled from holding land and therefore had a stake in maintaining the existing order.[46] Nevertheless,

> prejudices remain long after the cause that excited them has passed away, and if there be a person in Ireland who fears that an Irish parliament would pass, with the assent of the House of Lords and the Sovereign, an act interfering, on any pretence, with the title to his estate, I see no objection to the insertion of such a guarantee.[47]

To any objections that such guarantees would be ignored, Butt replied that the Irish legislature would need the consent of the imperial parliament to override the restrictions.[48]

The conference ultimately passed the resolution, but it was clear that it was seen as a purely tactical measure and was evaluated on that basis. For example, William Archer Redmond argued that it would 'take away from their enemies and opponents any excuse for

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[45] 'Resolutions of National Conference', in Home Rule League, *Proceedings*, 202; see generally, David Thornley, *Isaac Butt and Home Rule*, London, 1964, 160-169.

[46] Home Rule League, *Proceedings*, 34. Note O'Malley's recognition of the value of winning over the Protestant Tories: 'The vast preponderance of the wealth of the country, and of its cultivated intelligence, and its manufacturing and commercial industry, is Protestant and Conservative; to win all that to the popular cause, what a gain!' O'Malley, *Home Rule*, 93.

[47] Home Rule League, *Proceedings*, 34.

[48] Ibid., 35.

relying upon the false grounds upon which their opposition had hitherto been based, so that they might meet them face to face upon the real merits of the case'.[49] He also considered voters and politicians outside Ireland: once they saw that the home rulers had no designs on property or religious freedom, they would give it their support.[50] Others were more grudging in their support, as the connection with the Catholic oaths seemed to give legitimacy to the prejudices of the Protestant community. J. Martin said the resolution left him 'feeling humiliation for his countrymen, for the Irish nation, and with a bitter feeling of humiliation for himself as a Protestant and a member of the Protestant community'.[51] Nevertheless, he backed it

> because it seems to be required by a great number of my Protestant fellow-countrymen – because it is expected that our fellow-countrymen will have all their fears removed when such a guarantee as this is offered them – a guarantee the strength of which they cannot doubt, seeing that the whole power of England, the whole power of the English empire, will be arrayed against Ireland if Ireland attempts to violate it.[52]

Some delegates rejected the resolution entirely. Canon McDermott attacked it as 'degrading' and 'self-accusing'. Tactically, it was unwise, because 'a guarantee against mere visionary fears' would not swing any of their opponents to their side.[53] If anything, it would justify opposition to home rule, as it would be seen as proof that an Irish parliament 'could sink so low as to become a den of thieves and a conclave of robbers.'

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[49] Ibid., 141.

[50] Ibid., 143.

[51] Ibid., 161.

[52] Ibid., 43.

[53] Ibid., 156.

It was clear that Butt had made a serious tactical error in linking the resolution back to the Catholic oaths. The separate oath had only been abolished in 1866;[54] to suggest that a substitute might be needed to keep the Irish in check alienated potential supporters amongst the Catholic population. Indeed, Charles Gavan Duffy, the founder of the Tenant Right League and later premier of Victoria, said in 1857 that he 'had felt his face grow hot with very shame — to make a declaration that he would not commit a crime of the greatest magnitude' as a condition of taking a seat in the Victoria legislature.[55] It seemed possible that McDermott's speech would lead to the defeat of the resolution, but Butt managed to recover the situation. He went back to the second potential source of guarantees that were mentioned by the Home Government Association in its open letter of 1870.[56] Butt told the conference that the resolution was suggested to him 'some time ago' by a 'Protestant gentleman' who was 'earnestly devoted to the cause of Home Rule'. The gentleman, whom he did not identify, referred him to the American provisions. This persuaded Butt to support the resolution:

> he found in the American constitution a similar provision, though not exactly in the same words; and the constitution of several of the American States gave more stringent provisions against any act of the legislature adverse to religious liberty or the

[54] Parliamentary Oaths Act 1866, 29 & 30 Vict., c. 19, s. 1. See generally Mark Anthony Frassetto, 'Catholic Emancipation: 1760-1829', <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2198549> accessed 28 March 2018.

[55] Printed in Taylor, 'Two Refusals', 94 n. 36.

[56] Above, n. 36.

> rights of property; and what Washington, and Henry, and Jefferson had assented to, he (Mr. Butt) did not think could be held to humiliate the Conference.[57]

Finally, the resolution could be defended as a matter of principle. It represented a lasting commitment to freedom: he told the conference that 'they were not now legislating … for to-day, or to-morrow, or for ten or twenty years. They were endeavouring to frame a constitution that would be perpetual'; [58] this provision would ensure that the Irish legislators would not depart from freedom, unlike England and the Irish Protestants. At the same time, it incorporated flexibility, as the Irish and imperial parliaments could abrogate the provision by agreement.

Ultimately, the conference adopted the resolution. However, under Charles Parnell, the IPP shifted away from Butt's conservativism, and his *Proposed Constitution* of October 1885 did not include a rights clause.[59] It seems that he was persuaded by McDermott's argument: the suggestion that Catholics could not be trusted might cost the IPP more amongst its Catholic supporters than it would ever gain amongst Protestant unionists or the electorate outside Ireland. In the debates on the 1893 bill, none of the IPP members spoke in favour of the clause, as they saw the legislature as the guarantor of individual freedoms.[60] The dominant view was expressed by Duffy in an article in the *Contemporary Review* stating that 'a perfect, and perhaps the only perfect, guarantee' for minorities would be the conferral of

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[57] Home Rule League, *Proceedings of the Home Rule Conference*, 165; Butt did not identify the 'similar provision'.

[58] Ibid.

[59] Printed in J.L. Hammond, *Gladstone and the Irish Nation*, London, 1938, 422.

[60] See e.g. Clancy, *Parliamentary Debates*, series 4, vol. 13, cols. 1213-15, 16 June 1893 (House of Commons); Sexton, *Parliamentary Debates*, series 4, vol. 13, cols. 1216-18, 16 June 1893 (House of Commons).

power on an Irish legislature and executive as extensive as the power held by the Canadian and Australian legislatures.[61] He was in favour of special safeguards, but in the form of representation: 'I am for guarantees which will make the Parliament of Ireland a fair image of the whole people; not of this or that section, but of all'.[62] He also argued that the withholding of royal assent would also provide an important check on rash legislation, although he did not discuss the grounds on which assent should be withheld.[63] Hence, he was in favour of constructing the legislative and executive power in a way that protected individual rights, but without recommending justiciable rights on the American model.[64] To be sure, there were still some home rulers who saw some value in guarantees: in a memorandum written for

[61] C. Gavan Duffy, 'A Fair Constitution for Ireland', 52 *The Contemporary Review* (1887), 301, 305-306.

[62] C. Gavan Duffy, 'Mr. Gladstone's Irish Constitution', 49 *The Contemporary Review* (1886), 609, 618.

[63] Duffy, 'A Fair Constitution', 315-316. In both articles, Duffy said that the provisions for the protection of minorities under the United States constitution were effective, but preferred safeguards that concentrated on legislative and executive controls. For example, in 'A Fair Constitution', at 318-319, he discussed the American provisions on religion, but recommending adapting the provision of the 'Canadian Constitution' requiring legislation affecting religion to be laid before parliament (the provision was first enacted as section 42 of the Constitutional Act of the Province of Lower Canada, 1791, 31 Geo. III, c. 31, but was not carried forward to the British North America Act 1867).

[64] Duffy argued for 'guarantees', but did not see them as individual rights protected by judicial review; his examples of guarantees related to a common sovereign, 'complete religious equality', an independent court to resolve constitutional issues, and guarantees for compensation of MPs: see 'A Fair Constitution', 318-320.

Gladstone in 1885, James Bryce, the regius professor of civil law at Oxford and a Liberal member of parliament,[65] said that Michael Davitt, a prominent home rule campaigner,[66] had suggested that clauses for the protection of property and religious minorities could make home rule palatable to some of its opponents.[67] Nevertheless, Bryce reported that Davitt still saw it purely as a gesture to the Protestants, rather than a matter of higher constitutional principle. Moreover, Bryce said that the unionists that he spoke with dismissed the idea out of hand. As McDermott had predicted, guarantees would mean little to those who were implacably opposed to home rule in any form.[68] In any case, by the 1893 debates in parliament, the IPP members were firmly of Duffy's view: legislative power would provide a safeguard for minorities, rather than a threat to them.[69] Ultimately, for the IPP, the protection of individual rights never moved beyond a concession that should only be made if necessary to gain enough support to secure home rule.

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[65] John T. Seaman, *A Citizen of the World: The Life of James Bryce*, London, New York, 2006.

[66] D. George Boyce, 'Davitt, Michael (1846–1906)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, May 2008; <http://www.oxforddnb.com/view/article/32747>, accessed 8 April 2017.

[67] James Bryce, 'Irish Opinion on the Irish Problem: Memorandum', 11 Dec. 1885, Gladstone Papers, British Library, Add MS 44770, 5-14.

[68] Indeed, as explained below, Bryce himself rejected guarantees in an article he wrote in 1886: see text accompanying n. 96. He did not express his reservations in his memorandum to Gladstone.

[69] See e.g. Clancy, *Parliamentary Debates*, series 4, vol. 13, cols. 1213-15, 16 June 1893 (House of Commons); Sexton, *Parliamentary Debates*, series 4, vol. 13, cols. 1216-18, 16 June 1893 (House of Commons).

## IV GLADSTONE AND THE DRAFTING OF THE BILLS

Gladstone drafted the 1886 home rule bill in secrecy, but he would have known about the discussions of the Home Government Association meetings and the Home Rule Conference, as well as Bryce's description of Davitt's views. He was aware of the divisions within his own party, and would have hoped that he could reduce the number of defections that might follow its introduction. It is speculation but, like William Archer Redmond, Gladstone may have hoped that a rights clause would sway opinion amongst voters outside Ireland. When he introduced the bill in parliament, Gladstone stated that the provision of 'safeguards for the minority' was one of its five 'essential conditions'.[70] Gladstone identified three groups that would need protection under home rule: the first was 'the class immediately connected with the land' (the landlords, rather than the tenants or labourers); the second 'relates to the Civil Service and the offices of the Executive Government in Ireland'; and the third the 'Protestant minority', especially in Ulster.[71] Several clauses specifically protected the second group;[72] for the first and third, the safeguards were distributed across the bill. For the landlords, they were found mainly in provisions regarding the franchise and composition of the legislature. The

[70] The other conditions on home rule were: 'first, that it must be consistent with Imperial unity; secondly, that it must be founded upon the political equality of the three nations; thirdly, that there must be an equitable distribution of Imperial burdens; fourthly, that there should be safeguards for the minority; and, fifthly, that it should be in the nature of a settlement, and not of a mere provocation to the revival of fresh demands.' *Parliamentary Debates*, series 3, vol. 304, col. 1536, 13 April 1886 (House of Commons); see also *Parliamentary Debates*, series 3, vol. 304 cols. 1051-52, 8 April 1886 (House of Commons).

[71] *Parliamentary Debates*, series 3, vol. 304, col. 1052, 8 April 1886 (House of Commons).

[72] Clauses 27-30.

legislature would be unicameral, but comprised of two 'orders'.[73] The first would include the twenty-eight Irish representative peers and a further seventy members to be elected by a restricted franchise; the second would comprise over two hundred members elected by a wider franchise. [74] The two orders could vote separately on a bill; if they disagreed, the bill did not pass. However, after three years, the legislature could pass it by simple majority.[75] As a final safeguard, the bill allowed the imperial parliament to enact laws that were beyond the powers of the Irish legislature, or to specifically override Irish legislation.[76] The lord lieutenant would also have the power to veto specific legislation.[77]

For the third category, the bill included a number of restrictions on the legislature, in clause 4:

> 4. The Irish Legislature shall not make any law —
>
> (1.) Respecting the establishment or endowment of religion, or prohibiting the free exercise thereof; or
>
> (2.) Imposing any disability, or conferring any privilege, on account of religious belief; or
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> (3.) Abrogating or derogating from the right to establish or maintain any place of denominational education or any denominational institution or charity; or

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[73] Clauses 9-11.

[74] Clauses 9-11.

[75] Clauses 9(2) and 23.

[76] Clause 39; see also clause 37; controversially, under clause 24, the Irish MPs would lose their seats in the 'ordinary' parliament.

[77] Clause 7(2); see Jaconelli, 'Human Rights', 185-188 and McCrudden, 'Using Comparative Constitutionalism', 322-323 on these political safeguards.

(4.) Prejudicially affecting the right of any child to attend a school receiving public money without attending the religious instruction at that school; or

(5.) Impairing, without either the leave of Her Majesty in Council first obtained on an address presented by the Legislative Body of Ireland, or the consent of the corporation interested, the rights, property, or privileges of any existing corporation incorporated by royal charter or local and general Act of Parliament.

Paragraphs (1) to (4) of clause 4 addressed fears that an Irish legislature would act against Protestant interests. They were not novel: the 'conscience clause' had been part of education policies from the 1830s, and would be part of the later home rule bills and the Irish constitutions of 1922 and 1937.[78] Paragraph (5) served two purposes. In respect of public utilities and municipal corporations, it assured lenders in England and elsewhere that the new legislature would not enact laws to extinguish a corporation's debts. In respect of Trinity College Dublin and Protestant religious corporations, it protected their assets from new legislature.[79]

As the bill was defeated before committee stage, the consideration of the clause was limited. By this time, Joseph Chamberlain and Sir George Otto Trevelyan had resigned from Gladstone's cabinet and formed the Liberal Unionist party. Ultimately, over ninety former

[78] Rory O'Connell, 'Theories of Religious Education in Ireland', 14 *American Journal of Law and Religion* (1999-2000), 433, 461-62. These guarantees were carried forward to the third and fourth home rule bills, and into Article 8 of the 1922 constitution and article 44.2 of the 1937 constitution.

[79] See the explanations given in the debates on the corresponding clauses of the 1893 bill: *Parliamentary Debates*, series 4, vol. 13, cols. 1585-1623, 21 June 1893 (House of Commons); *Parliamentary Debates*, series 4, vol. 13, cols. 1686-1722, 22 June 1893 (House of Commons).

Liberal MPs would vote with the Conservatives to defeat the bill on second reading.[80] Despite the truncated nature of the debate, there is some indication of the main objections of the opposition. They agreed that the minorities in Ireland did need safeguards, but that only parliament could provide them; as Salisbury put it, the real issue was 'whether the minority in Ireland is treated fairly or not, whether the elementary rights of property are observed, whether contracts are upheld, or whether a new and sinister ascendancy is established. Those things depend entirely on whether you reserve power in the last resort—power, real, practical, efficacious—in the hands of the British Parliament'.[81] There were comments that, simply by recognizing that safeguards would be needed, the government had shown that the Catholic majority could not be trusted and home rule would not work.[82] As a related point, some MPs argued that the judicial process would be too complex. The bill would have made the judicial committee of the privy council the final court of appeal for constitutional questions and the house of lords for all other disputes; according to some, this would create crippling conflicts in jurisdiction.[83]

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[80] O'Day, *Irish Home Rule*, 107-117; on the divisions amongst Liberals leading to the split, see Kendle, *Ireland*, 24-31; Timothy Moore, 'Anti-Gladstonianism and the pre-1886 Liberal secession', in D. George Boyce and Alan O'Day, eds., *Gladstone and Ireland: Politics, Religion and Nationality in the Victorian Age*, Basingstone, 2010, 65-85.

[81] *Parliamentary Debates*, series 3, vol. 306, cols. 1278-79, 10 June 1886 (House of Lords).

[82] See e.g. Sellar, *Parliamentary Debates*, series 3, vol. 306, col. 733, 1 June 1886 (House of Commons); see also Assheton Cross, *Parliamentary Debates*, series 3, vol. 305, col. 1166, 17 May 1886 (House of Commons).

[83] Clause 25; see Gibson, *Parliamentary Debates*, series 3, vol. 304, cols. 1316-1416, 12 April 1886 (House of Commons); Rigby, *Parliamentary Debates*, series 3, vol. 306, col. 359, 28 May 1886 (House of Commons); Webster, *Parliamentary Debates*, series 3, vol. 306,

Gladstone resigned on the defeat of the bill. In the general election that followed, Salisbury's Conservatives were able to form a government with the support of the Liberal Unionists.[84] In the 1892 election, the Conservatives and Liberal Unionists held a minority, but Salisbury continued in power until defeated on a vote of no confidence in August 1892. Gladstone then formed a government with support from the IPP. He immediately called together a drafting committee comprising himself and five other cabinet members to prepare a new home rule bill.[85] The resulting bill borrowed extensively from the 1886 version, with a few changes to Irish representation in parliament and the composition and structure of Irish legislature. In Gladstone's introductory speech, he made it clear that the five 'essential

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cols. 406-410, 28 May 1886 (House of Commons). Under clause 19 of the 1893 bill, the UK would have appointed two judges of the Irish supreme court as exchequer judges, with jurisdiction over matters not within the powers of the Irish legislature, and hence over the constitutionality of Irish legislation; appeals would be heard by the judicial committee of the privy council. Dicey argued that the new clause did not resolve the jurisdictional confusion, and in any case the judgments of the exchequer judges would be ignored in Ireland: A.V. Dicey, *A Leap in the Dark or Our New Constitution*, London, 1893.

[84] The Conservatives won 317 seats to the 191 seats for the Liberals and 85 for the IPP; with the support of the 77 Liberal Unionists, Salisbury formed a government and held power through to the 1892 general election.

[85] John Morley (chief secretary of the Irish Office), Earl Spencer (lord lieutenant of Ireland), Lord Herschell (lord chancellor), Sir Henry Bannerman-Campbell (secretary of state for war and a former chief secretary of the Irish Office), James Bryce (chancellor of the duchy of Lancaster and regius professor of civil law at Oxford).

conditions' of the 1886 bill also applied to the new bill.[86] The key development, in terms of safeguarding minorities, lay in the addition of the rights to due process, equal protection and just compensation in clause 4(5).[87]

Except for the references to a 'Magna Charta for Ireland' and the protection of minorities as an 'essential condition' of the bill, Gladstone's opening speech did not offer any explanation for the inclusion of the new clause 4(5) in the bill. Indeed, it does not appear

[86] *Parliamentary Debates*, series 4, vol. 8, col. 1250, 13 Feb. 1893 (House of Commons); see above, n. 70.

[87] The other addition was clause 4(7), barring the legislature from enacting laws depriving any inhabitant of the United Kingdom of 'equal rights as respects public sea fisheries'. Clause 34(1) added a three-year moratorium on legislation affecting landlord-tenant relations was also included, for the purpose of enabling parliament to complete land reforms. A number of specific amendments were accepted during the course of debate. New clauses prevented the Irish legislature from 'Diverting the property or without its consent altering the constitution of any religious body' (clause 4(3)) or allowing new chairs that imposed religious tests to be endowed from public funds (clause 4(5), as renumbered). Changes were made to the wording of other clauses: the original of clause 4(1) was identical to clause 4(1) of the 1886 bill, but the final version was modified to restrict legislation 'Respecting the establishment or endowment of religion, *whether directly or indirectly*, or prohibiting the free exercise thereof' (emphasis added); the original of clause 4(2) was identical to clause 4(2) of the 1886 bill but the final version was extended to restrict laws 'Imposing any disability, or conferring any privilege, on account of religious belief, *or raising or appropriating directly or indirectly, save as heretofore, any public revenue for any religious purpose, or for the benefit of the holder of any religious office as such'*; and the old clause 4(6) became 4(9) with an added takings clause.

that, prior to the introduction of the bill in parliament, there was any public discussion in Liberal circles about incorporating the new rights in a home rule bill.[88] For example, the National Liberal Federation supported home rule in its Newcastle conference in 1891, but there is no record of any discussion of such a clause or the value of a bill of rights generally, even though the conference resolutions formed the basis of the Liberal campaign in 1892. As explained above, the trend was one of indifference or opposition to justiciable bills of rights; executive forms of review would protect individuals in the colonies, with due sensitivity to wide political factors. Nevertheless, there were tactical reasons to expand the 1886 clause. In Britain, most intellectuals were already opposed to home rule,[89] as were many prominent newspapers and periodicals.[90] As Gladstone could not afford another round of defections, he

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[88] Gladstone reported to senior Liberals that he and Parnell discussed the safeguarding of contracts in their meetings on both 10 March 1888 (W.E. Gladstone, 'Memorandum of a meeting with Parnell', reprinted F.S.L. Lyons, *Charles Stewart Parnell*, London and New York: 1977, 441) and 18-19 Dec. 1889 (reprinted Lyons, *Charles Stewart Parnell*, 450-451). However, the focus of these discussions fell on the composition of the Irish legislature and Irish representation in parliament, and no definite conclusions were reached; see Lyons, *Charles Stewart Parnell*, 440-452.

[89] See Tom Dunne, 'La trahison des clercs: British intellectuals and the first home-rule crisis', 23 *Irish Historical Studies* (1982), 134; Christopher Harvie, 'Ideology and Home Rule: James Bryce, A. V. Dicey and Ireland, 1880-1887', 91 *The English Historical Review* ( 1976), 298; Ian Sheehy, '"A deplorable narrative": Gladstone, R. Barry O'Brien and the "historical argument" for Home Rule, 1880-90', in D. George Boyce and Alan O'Day, *Gladstone and Ireland: Politics, Religion and Nationality in the Victorian Age*, Basingstoke, 2010, 110.

[90] The Liberal periodicals were divided: see Ann Parry, 'The Home Rule Crisis and the "Liberal" Periodicals 1886-1895: Three Case Studies', 22 *Victorian Periodicals Review*

may have thought the clause would persuade any wavering supporters that home rule would not threaten minorities. This also seems to have been the view of James Bryce. He was a member of Gladstone's drafting committee for the bill and, although he did not claim any personal responsibility for the due process clause, it was widely believed that he drafted it.[91] It was taken from the constitution of the United States, and Bryce was the leading British expert on the American constitutional system, having published a lengthy treatise, *American Commonwealth*, in 1888.[92] As noted below, it is not clear that he believed that it would provide a real safeguard.[93] However, he did recognize its tactical value, as seen in his speech in the commons defending the clause:

> We considered the points where protection [of minorities] was thought to be necessary, and we found two subjects with regard to which it was said unjust legislation was possible, and proper protection was needed; and, without supposing

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(1989), 18. The clause did not seem to make a difference to the British news media: editorials regularly repeated the arguments made in parliament against the clause, and played even more openly on the mistrust of the Irish and of Gladstone's tactics. See, for example: *The Spectator*, 25 Feb. 1893, 246; *Saturday Review of Politics, Literature, Science and Art*, 4 March 1893, 229-230; *The National Observer*, 1 July 1893, 160-161; *Times*, 12 April 1893, 9; *Times*, 15 June 1893, 9; *Times*, 16 June 1893, 9; *Times*, 17 June 1893, 11; *Times*, 20 June 1893, 9. Over this period, the nationalist *Freeman's Journal* did not comment on the clause.

[91] Sir George Bartley adverted to this in parliament: *Parliamentary Debates*, series 4, vol. 13, col. 1082, 15 June 1893 (House of Commons).

[92] James Bryce, *The American Commonwealth*, London, New York, 1888.

[93] See below text accompanying n. 96.

those conclusions were well-founded, we desired to meet them as far as possible. Those two were religion and property.[94]

Bryce recognized that there were concerns that an Irish legislature might abuse its power, and yet he was careful not to alienate the IPP by suggesting that these concerns had any substance.

There is therefore some evidence that the clause was inserted for tactical reasons. Moreover, similar considerations suggest why Bryce turned to the American constitutional texts for the language for the clause: as Butt found at the Home Rule Conference, the American model avoided the negative associations of the old Catholic oaths. This is supported by Bryce's own shifts in opinion.[95] He initially dismissed the value of rights in his 1886 paper 'Alternative Politics in Ireland'.[96] It was not that he rejected the need for safeguards, especially for the landlords. As he put it, they could not be left to the 'mercy of an Irish authority', even though the 'sins of the class in time past' had cost them some of their support in England. Some landlords were innocent of any wrongdoing: 'ladies, for instance, with no livelihood save from their rents' had already suffered from legislation that allowed for judicial adjustment of rents. He said that Irish nationalists regarded the landlords as 'robbers' and would authorize compulsory purchase of their estates at nominal

[94] *Parliamentary Debates*, series 4, vol. 13, col. 1106, 15 June 1893 (House of Commons). Bryce did not refer to the protection of life and liberty, although they were significant in relation to the regular repression of civil liberties in Ireland and would be raised during the debates.

[95] For Bryce's explanation of his conversion to home rule, see James Bryce, 'How We Became Home Rulers', 51 *The Contemporary Review* (1887), 737.

[96] James Bryce, 'Alternative Politics in Ireland', 19 *Nineteenth Century* (1886), 312.

compensation.[97] Bryce was also concerned that abandoning the landlords in Ireland would undermine the security of property in England and Scotland. Nothing less than national honour was at stake: 'We could not look other nations in the face were we to throw over men whose property we confirmed as lately as by the Act of 1881'.[98] Nevertheless, he dismissed the value of justiciable rights, for two reasons. First, he said that 'such guarantees would not touch the police difficulty'.[99] The 'police difficulty' referred to the claim that, even if the courts did uphold the guarantees, the executive would ignore their judgments and the devolution of power would make it impossible for the British government to take effective action to require compliance.[100] Secondly, he said that guarantees 'would be uncertain in their effect, likely to give rise to infinite litigation, [and] certain to produce conflicts between any Irish authority and imperial statutes'.[101] As discussed below, Bryce would take a different view in the 1893 debates. Bryce's correspondence offers no explanation for his shifting opinion, so it is possible he was simply responding to instructions from Gladstone when he drafted the clause. Or, like Gladstone, he may have thought that it was worth pursuing any measure that might help to secure votes.

It is, of course, possible that Bryce felt that the clause would provide an important addition to the home rule bill. In this regard, it is worth noting that the clause incorporated the right to due process, whereas earlier suggestions had only concerned rights to equality, religion and just compensation. This provided a response to Salisbury's policies for dealing

[97] Ibid., 323.

[98] Ibid., 324; the 'Act of 1881' is the Land Law (Ireland) Act 1881, 44 & 45 Vict., c. 49, which, *inter alia*, gave power to a new commission and court to vary rents.

[99] Ibid.

[100] See e.g. Dicey, *England's Case Against Home Rule*, London, 1886, 257-261.

[101] Bryce, 'Alternative Politics', 324.

with the 'Irish question'. Salisbury believed that unrest could be brought to an end through reform – 'killing with kindness' – but only if it was coupled with a strict response to illegal protest. If necessary, this would include the suspension of civil liberties. In one respect, there was nothing novel about this: through most of the nineteenth century, 'Coercion Acts' suspended ordinary rights of criminal process, such as habeas corpus and trial by jury, for fixed periods of six months to a year.[102] The Criminal Law and Procedure (Ireland) Act 1887 marked an important departure from the practice, as it imposed 'permanent coercion' for an indefinite period.[103] In Salisbury's estimation, at least twenty years of repression would be needed before the Irish would understand that illegal protest would produce no gains. This, for many Liberals, made it clear that a choice had to be made between home rule and the permanent suspension of civil liberties. The guarantees of clause 4(5), especially in respect of due process and equal protection, cast the Liberal party as the party of individual freedom and constitutional rights. Indeed, to use Gladstone's rhetoric, the liberties of the subject would be restored under the 'Magna Charta for Ireland'. [104]

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[102] Desmond Greer, 'Crime, justice and legal literature in nineteenth-century Ireland', 37 *Irish Jurist* (2002), 241, notes that there are different ways of defining and counting the number of coercion Acts in the nineteenth century, but prior to 1893, there would have been around one each year. See also Charles Townshend, *Political Violence in Ireland: Government and Resistance Since 1848*, Oxford, 1983; Lewis Perry Curtis, *Coercion and Conciliation in Ireland 1880-1892: A Study in Conservative Unionism*, Princeton, 1963, ch. X.

[103] 50 & 51 Vict., c. 20; see Curtis, ibid., 179-186.

[104] See e.g. Gladstone in his opening speech on the 1886 bill: 'something must be done, something is imperatively demanded from us to restore to Ireland the first conditions of civil life—the free course of law, the liberty of every individual in the exercise of every legal right,

If this was the reason for including the clause in the bill, the government failed to explain it to parliament or the wider public. Home rule was frequently presented as the alternative to coercion, but the link to the clause was not made. In Gladstone's speeches introducing the bill and later at the start of the second reading, he scarcely referred to the clause, except in reference to the Magna Charta. Neither did Bryce nor the law officers, nor any other prominent Liberals or sympathetic newspapers. Ultimately, it was Canon McDermott's assessment in 1873 that proved correct: the inclusion of the clause did not produce any clear tactical gains. The final division in the commons followed party lines that were drawn well before the bill was introduced, and the overwhelming vote in the lords against the bill suggests that the clause also had no effect on it. Even as a rallying point for Liberals, it had little impact. Neither the Liberal government that introduced the third and fourth home rule bills of 1912[105] nor the coalition government of 1920[106] bothered to include anything corresponding to the rights to due process, equal protection or just compensation in

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the confidence of the people in the law, and their sympathy with the law, apart from which no country can be called, in the full sense of the word, a civilized country, nor can there be given to that country the blessings which it is the object of civilized society to attain'. *Parliamentary Debates*, series 3, vol. 304, cols. 1044-45, 8 April 1886 (House of Commons). For other contemporary writers, see Thomas A. Dickson, *An Irish Policy for a Liberal Government*, Committee on Irish Affairs Paper No. 4, London, 1885; Bryce, 'How We Became Home Rulers'; Lord Thring, 'Ireland's Alternatives', in James Bryce, ed., *Handbook of Home Rule*, London 1887, 194-213, and Parry, 'The Home Rule Crisis'.

[105] Enacted as the Government of Ireland Act 1914.

[106] Enacted as the Government of Ireland Act 1920. The government initially resisted but then accepted an amendment adding the just compensation clause to section 5, which was a provision on religious discrimination: see Allen, *Right to Property*, 41-43.

either bill. Hence, even for the Liberals, the clause did not capture the imagination of its membership, and it never seemed to have a function beyond the narrow tactical purpose. Civil liberties and constitutional rights may have been important, but enforcing them through judicial review of legislation did not become part of a broader vision of the relationship between the state and the individual. Its tactical value was not proven, and without that, even the Liberal governments could see no reason to revive it.

## V THE PARLIAMENTARY DEBATES

The opposition argued, as Bryce did in 'Alternative Politics', that the 'police difficulty' would make a rights clause ineffective. This was probably all that the opposition MPs, especially the Unionists, needed to say about the clause to satisfy their supporters. Jaconelli, writing in 1990, observed that 'no conceivable formulation of such guarantees would ever prove satisfactory' to the opponents of home rule; McDermott had predicted the same in 1873.[107] Nevertheless, the opposition also worked hard to demonstrate that the rights would not safeguard minorities, even without the 'police difficulty'. Its main line of attack was on the framing of the rights. The opposition claimed that the government deliberately expressed the rights in a way that would not impose a real restraint on the legislature. Two points were made. First, a number of opposition MPs argued that clause 4(5) contained rights that, in the United States, had relatively little impact on the legislature.[108] As noted above, Maine and Dicey saw the contracts clause, rather than the due process clause, as the most significant

[107] Jaconelli, 'Human Rights', 181; on McDermott, see text accompanying n. 53; see also Keane, 'Fundamental Rights'.

[108] Jaconelli, ibid., 188-189; Keane, ibid., 29-33.

provision in restricting legislatures.[109] In *A Leap in the Dark*, Dicey raised this apparent selectivity as evidence that the new legislature would be able to target landlords.[110] He also pointed out that the bill had not included the American prohibitions on acts of indemnity and ex post facto laws, with the result that the Irish legislature could pass laws protecting public officials from an abuse of power.[111] A number of members picked up on these points in parliament, arguing that the omissions were deliberate and showed that the government was not interested in protecting minorities.[112] In response, Bryce said that 'the sub-section is amply sufficient, taken along with the others, to cover every difficulty that has been raised'.[113] Nevertheless, Dunbar Barton, an Ulster Unionist, said it was an 'absolute fraud' and the bill would be better without it.[114] A.J. Balfour argued that it was nothing more than a trick intended to persuade the English supporters of loyalists into believing that 'they were not betraying the interests of those in Ireland who had trusted them'.[115]

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[109] Above, text accompanying n. 28-30.

[110] Dicey, *A Leap in the Dark*, 89-92.

[111] Ibid., 87-89.

[112] See Edward Carson: the clause was 'a mere paper section': *Parliamentary Debates*, series 4, vol. 13, col. 378, 6 June 1893 (House of Commons). See also Churchill, *Parliamentary Debates*, series 4, vol. 13, cols. 1089-90, 15 June 1893 (House of Commons); Mowbray, *Parliamentary Debates*, series 4, vol. 13, col. 1094, 15 June 1893 (House of Commons).

[113] *Parliamentary Debates*, series 4, vol. 13, cols. 1107-08, 15 June 1893 (House of Commons). See also the attorney general, at *Parliamentary Debates*, series 4, vol. 13, col. 1103, 15 June 1893 (House of Commons).

[114] *Parliamentary Debates*, series 4, vol. 13, col. 1142, 15 June 1893 (House of Commons); ~~see also Dunbar Barton,~~ delete or complete

[115] *Parliamentary Debates*, series 4, vol. 13, col. 1145, 15 June 1893 (House of Commons).

As a related point, Members also argued that the rights to 'due process of law' and the 'equal protection of the laws' were weak because their scope depended entirely on content of laws enacted by the legislature.[116] Similarly, the takings guarantee would be meaningless without some objective standard to determine whether compensation was 'just'.[117] This led to an interesting debate on the nature and proof of constitutional rights, as the government insisted that the clause embodied principles that were already recognized, but that would now be justiciable. The attorney general, Charles Russell, stated that 'due process of law is where the process of law follows settled principles of judicial procedure, or where such process follows sound precedent applicable to the subject-matter and the circumstances affecting it'.[118] Hence, the Irish legislature could enact a law making sheep-stealing a capital offence punishable by death, but not if it allowed a 'Stipendiary Magistrate, or any inferior functionary of that kind' to try the case and pass the sentence, 'because it would not be following settled, sound precedent applicable to the subject-matter there dealt with'. [119] Similarly, it could not simply deem that 'every occupier in Ireland should be the owner of the fee-simple of the land he occupied' because there would be 'no judicial machinery or

[116] See Macartney, *Parliamentary Debates*, vol. 10, col. 1697, 6 April 1893 (House of Commons); Murrary, **correct?** *Parliamentary Debates*, vol. 11, col. 168-169, 12 April 1893 (House of Commons); Carson, *Parliamentary Debates*, vol. 11, cols. 836-837, 20 April 1893 (House of Commons); Selborne, *Parliamentary Debates*, series 4, vol. 17, col. 374, 7 Sept. 1893 (House of Lords).

[117] See e.g. Cranborne, *Parliamentary Debates*, series 4, vol. 13, col. 1372, 19 June 1893 (House of Commons).

[118] *Parliamentary Debates*, series 4, 15 June 1893 vol. 13, col. 1116 (House of Commons).

[119] *Parliamentary Debates*, series 4, 15 June 1893 vol. 13, col. 1116 (House of Commons).

proceeding at all'.[120] Finally, the attorney general suggested that the legislature could pass a law suspending habeas corpus, but only in cases where, 'according to established precedent, there was an emergency or a state of circumstances justifying the action'.[121] Similarly, the solicitor general argued that the meaning of 'just compensation' would be governed by 'what the Irish and English laws at the present time think to be just', and that Irish Acts would be void if they infringed 'the fundamental laws of justice in granting compensation'.[122]

The law officers deliberately said very little on the sources or nature of precedent. In response, Dunbar Barton challenged the use of precedent: 'In no country had historical precedents been used in deciding legal questions; and if they could be used there would be nothing to prevent the Irish Legislature following the coercive policy of the present Government in past years'.[123] He did not raise the Criminal Law and Procedure (Ireland) Act 1887, but it provided a good example of the difficulty in using legislation as precedent: not only did it intrude on basic liberties, but there was nothing in the statute itself that would have explained why ministers and MPs thought it necessary to enact the bill or their views on its

[120] *Parliamentary Debates*, series 4, 15 June 1893 vol. 13, col. 1116 (House of Commons).

[121] *Parliamentary Debates*, series 4, 15 June 1893 vol. 13, col. 1116 (House of Commons); see also the solicitor general, *Parliamentary Debates*, series 4, vol. 13, cols. 1111-12, 15 June 1893 (House of Commons).

[122] *Parliamentary Debates*, series 4, vol. 11, col. 112, 11 April 1893 (House of Commons).

[123] *Parliamentary Debates*, series 4, vol. 13, cols. 1209-10, 16 June 1893 (House of Commons). See Greer, 'Crime, justice and legal literature', 241-268: prior to 1893, there would have been around one bill annually.

impact on constitutional rights.[124] The preamble stated only that it was intended 'to make better provision for the prevention and punishment of Crime in Ireland, and for other purposes relating thereto'.[125] This provided no information on the reasons for coercion, let alone the departure from the practice of limiting coercion legislation to fixed periods. George Wyndham made a similar point about precedent and land reform. He referred to the Land Law (Ireland) Act 1881 and the Land Law (Ireland) Act 1887 as proof that 'The Imperial Parliament was every day engaged in passing laws, extinguishing the rights of property in a manner some believed to be due and others believed to be undue'.[126]

In parliament, the concern over the use and abuse of 'historical precedent' led to numerous proposals for amendments. Wyndham, for example, argued that the Irish legislature should be restricted to laws 'giving not less security than is given by the common law, or by any Act of Parliament varying the common law'.[127] (He did not explain how he would reconcile this with the Land Law Acts.) Hobhouse would have changed 'just compensation' to 'such compensation as he [the owner] is at present by law entitled to'.[128] In response, the attorney general observed that land expropriation laws had evolved over the

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[124] Dicey raised the Prevention of Crime (Ireland) Act 1882, 45 & 46 Vict., c. 25, s.1, as an example of the danger of relying on precedent, as it took away the right to a jury trial for some crimes: *A Leap in the Dark*, 86 n2.

[125] 50 & 51 Vict., c. 20.

[126] *Parliamentary Debates*, series 4, 15 June 1893 vol. 13, col. 1129 (House of Commons). The Land Law (Ireland) Act 1881, 44 & 45 Vict., c. 49 and the Land Law (Ireland) Act 1887, 50 & 51 Vict., c. 33 allowed for the compulsory modification of rents and other terms of a lease.

[127] *Parliamentary Debates*, series 4, 15 June 1893 vol. 13, col. 1130 (House of Commons).

[128] Ibid., col. 1362.

fifty years prior to the bill and would continue to do so in response to changing circumstances and moral standards. The proposed amendments could not be accepted because the Irish legislature would require a similar power to adjust Irish law over time.[129] The Conservative Gerald Balfour then asked for a more general amendment, so as to bar the legislature from enacting laws infringing due process of law 'in accordance with the settled principles and precedents of judicial procedure, unalterable save by the Parliament of the United Kingdom'.[130] The attorney general stated that the amendment would add nothing to the bill, but ultimately the government agreed to accept it. However, it insisted that the reference to alteration by parliament should be dropped, in order to avoid giving 'these settled principles and precedent a stereotyped character'.[131] The attorney general also insisted that the reference to 'judicial procedure' should be omitted, again citing the danger of stereotyping the clause.[132] The government said that the amendment did nothing to change the meaning of the clause, but nonetheless it was controversial: ninety-five Liberals joined the IPP in voting against it.[133] It may seem odd that they would break with their leadership over an apparently meaningless amendment, but it sent the signal that they would not accept any further changes.

The possibility of relying on the American cases was also raised. James Bryce said, in relation to the interpretation of 'due process of law', that 'We are dealing with words which have received in the Courts of the United States a perfectly clear, perfectly uniform, perfectly

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[129] Ibid., cols. 1367-68.

[130] *Parliamentary Debates*, series 4, vol. 13, cols. 1198-1201, 16 June 1893 (House of Commons) (emphasis added).

[131] Ibid., cols. 1201-02ff.

[132] Ibid., col. 1202. See also Bryce, ibid., col. 1204.

[133] See, e.g., the speech of Earl Compton, a Liberal, explaining why some Liberals did not support the amendment: ibid., cols. 1215-16.

definite, and perfectly unambiguous construction. . . . a large body of interpretation has been accumulated in their Courts [i.e. State courts] as well as in the Federal Courts, leaving the question quite unambiguous'.[134] This line of argument was also rejected by the opposition, as some MPs questioned whether the American cases would provide the certainty that Bryce suggested.[135] Others stated that the American cases were irrelevant, because they decided in a system that was based on constitutional supremacy rather than parliamentary supremacy.[136]

It is difficult to say how closely Dunbar Barton, or the other MPs, engaged with the idea of rights or the use of historical precedent to establish rights. Jaconelli is correct in identifying their determination to reject any measure or argument that might have supported home rule.[137] Moreover, as shown below, the three main parties reversed their positions on these issues in 1912: the Liberal government did not incorporate a rights clause in the home rule bill, only for the Conservatives and Liberal Unionists to insist that it should have done so. The common element, in both 1893 and 1912, was the determination to show that nothing could make home rule safe for the minority. Nevertheless, it does seem contradictory that, in 1893, the opposition dismissed the clause on the basis that only parliament could protect the minority, but parliament's own precedents would undermine any judicial safeguards. Ultimately, for the opposition, the superiority of parliament (as opposed to its supremacy) in

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[134] *Parliamentary Debates*, series 4, vol. 13, cols. 1154-55, 15 June 1893 (House of Commons); see also Gladstone, ibid., col. 1087, the attorney general, *Parliamentary Debates*, series 4, vol. 13, col. 1035, 14 June 1893 (House of Commons).

[135] See e.g. A.J. Balfour, *Parliamentary Debates*, series 4, vol. 13, cols. 1037-38, 14 June 1893 (House of Commons); Bartley, *Parliamentary Debates*, series 4, 15 June 1893 vol. 13, cols. 1082-87 (House of Commons).

[136] Dicey, *A Leap in the Dark*, 86 n2.

[137] Jaconelli, 'Human Rights', 181.

the protection of minorities did not lie in its methods of reasoning or choice of precedent, assuming that these could be identified and described, but in its composition and power. Their trust lay in factors such as the qualifications to vote or stand in an election, the distribution of seats, the rules and conventions governing the conduct of its business, the engagement of the electorate, the manner in which public opinion was formed, and especially the balance of power between competing interest groups. For the opposition, this meant that even if an Irish legislature followed parliament's rules and procedures for electing representatives and enacting law, only parliament could be trusted to balance the interests of the Protestant minority against the Catholic majority. Of course, for the IPP, the opposite was the case: only an Irish legislature could be trusted to balance the interests of all groups. In the end, the parliamentary debates touched on the scholarly discussion of the impact of entrenching rights, but without engaging with it closely.

## VI THE LEGACY OF THE DEBATES

As stated in the Introduction, the debates had limited impact on development of human rights in Britain and the wider empire. To be sure, the British did not oppose all demands for bills of rights in the colonies. Indeed, the right to just compensation was included in the Government of Ireland Act 1920, although only as an amendment that was initially resisted by the government.[138] At the insistence of the Irish, the Anglo-Irish treaty and the Irish Free State

[138] Allen, *Right to Property*, 41-43. Thomas Mohr notes that Austen Chamberlain believed that a similar control should have been included in the Irish Free State Act: see Mohr, 'British Involvement in the Creation of the Constitution of the Irish Free State', 30 *Dublin University Law Journal* (2008), 166.

Act included a bill of rights; however, the provisions were not based on the 1893 bill but rather on American and European models.[139] In the colonies, interest was growing in bills of rights, but it does not appear that the 1893 bill provided the inspiration.[140] In Australia, a proposal to add a due process clause to the constitution was defeated in the convention debates of 1898. Two main arguments were employed against the clause: first, state legislatures were the guarantors of rights and had never intruded on them in the past; and, paradoxically, the fourteenth amendment indicated that the clause could prevent states from discriminating against the non-white population.[141] Elsewhere, the Indian National Congress put the protection of fundamental rights at the heart of its constitutional proposals of 1895,[142]

[139] McCrudden, 'Using Comparative Constitutionalism', 327-330; Arthur Berriedale Keith, The Governments of the British Empire, London, 1935, 236; Keane, 'Fundamental Rights'.

[140] See generally Parkinson, *Bills of Rights*, 1-50. The Commonwealth of Australia Constitution Act 1900, 63 & 64 Vict., c. 12, s. 51 (xxxi) protects a right to compensation, but not in the form of the 1893 bill. Three comprehensive analyses of the inter-war history of bills of rights in Canada make no reference to the home rule debates: Christopher MacLennan, *Toward the Charter: Canadians and the Demand for a National Bill of Rights, 1929-1960*, Montreal and Kingston, 2003; Eric M. Adams, 'The Idea of Constitutional Rights and the Transformation of Canadian Constitutional Law, 1930-1960', thesis submitted for the degree of Doctor of Philosophy, University of Toronto, Toronto, 2009; and Dominique Clément, *Human Rights in Canada: A History*, Waterloo, Ontario, 2016.

[141] Parkinson, *Bills of Rights*, 43-44; see e.g. *Official Record of the Debates of the Australasian Federal Convention*, third session, 8 Feb. 1898, 687-688 (Isaacs), 688 (Cockburn).

[142] Reprinted in Shiva Rao, ed., *The Framing of India's Constitution: Select Documents*, New Delhi, 1966, 5-14

1925[143] and 1928,[144] but there is no evidence that the drafters drew on the 1893 debates. The British view remained one of scepticism, until well after world war two. For example, in 1934, the parliamentary joint committee on Indian constitutional reform rejected calls for incorporating a declaration of rights in the Government of India Bill 1935, in terms that would have been familiar to those who participated in the 1893 debates:

> . . . either the declaration of rights is of so abstract a nature that it has no legal effect of any kind, or its legal effect will be to impose an embarrassing restriction on the powers of the Legislature and to create a grave risk that a large number of laws may be declared invalid by the Courts because inconsistent with one or another of the rights so declared.[145]

It seemed that there was no possibility of finding language that would place a bill of rights somewhere between having 'no legal effect' and creating a 'grave risk' to legislative power. As in 1893, the British did not reject arguments that minorities needed safeguards, but they did reject arguments that the courts could provide that protection.

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[143] Ibid., 44-48. The bill was introduced in parliament as a private member's bill, as the Commonwealth of India Bill, 1925: *Parliamentary Debates*, series 5, vol. 189, col. 1633, 17 Dec. 1925 (House of Commons) and *Parliamentary Debates*, series 5, vol. 202, col. 442, 11 Feb. 1927 (House of Commons) but it did not proceed to second reading on either occasion.

[144] Shiva Rao, *The Framing of India's Constitution*, 58-75.

[145] Joint Committee on Indian Constitutional Reform, *Report of the Joint Committee on Indian Constitutional Reform* (1934), vol. I, part I, para. 366. The white paper, *Proposals for Indian Constitutional Reform*, Cmd. 4268 (1933) para. 75 gave some limited support for minority and property rights, but recommended that a commitment to individual rights should be expressed through a 'pronouncement by the Sovereign' rather statutory provisions.

Why did the arguments of the sceptics prevail so thoroughly, especially given that the clause survived the close scrutiny of the committee stage and the bill was passed by the commons? As suggested above, a key factor was the instrumental nature of the debate: much of the discussion on nature and impact of a bill of rights was lost in the crossfire over home rule. Questions were asked and answers were given, but there was no real commitment to the positions that were taken. For example, in the commons, the opposition's frequent motions for amendments might suggest that it had a genuine interest in making a bill of rights effective. However, the focus was always on defeating home rule.[146] Indeed, amendments were proposed with such frequency that IPP members tried to dissuade government ministers from debating them. In their view, the government would only give credibility to the idea that home rule would jeopardize minorities. Thomas Sexton, an IPP member, stated that the government 'are allowing the country to be misled into the belief that these Amendments are moved for the purpose of improving the Bill'.[147]

The emphasis on the tactical advantages of raising or dismissing bills of rights became even more obvious in the debate on the third home rule bill. For example, in relation to the first home rule bill, Dicey started from what would become a fairly standard critique of justiciable rights. In *England's Case Against Home Rule* (1886), he argued that parliament was much better placed to protect minorities.[148] However, in *A Fool's Paradise: Being a Constitutionalist's Criticism on the Home Rule Bill of 1912*, he argued that there would be circumstances in which Ulster unionists could ignore the 1912 bill if it were enacted and

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[146] See above, n. 87 on the amendments to clause 4.

[147] *Parliamentary Debates*, series 4, vol. 13, cols. 1572-73, 21 June 1893 (House of Commons); see also Clancy, *Parliamentary Debates*, series 4, vol. 13, cols. 1213-14, 16 June 1893 (House of Commons).

[148] Dicey, *England's Case Against Home Rule*, 257-261.

came into force.[149] Indeed, in the debates on the 1912 bill, there was a 'remarkable reversal of roles', as members on both sides abandoned views taken in 1893.[150] The Liberals did not include provisions corresponding to clause 4(5) in the 1912 bill, only for the Conservatives to propose an amendment to incorporate it. The home rule opponents mounted a spirited attack on the government for rejecting the amendment, and the Liberals defended their position with vigour. Sir John Simon, the solicitor general, stated that the rights should not be incorporated because they were not 'reasonably susceptible of judicial determination', especially with the qualification that they should be interpreted 'in accordance with the settled principles and precedents'.[151] The prime minister, H.H. Asquith, criticized the amendment in a speech that could have been given by the opposition in 1893; in his view, the clause was

> full of ambiguity abounding in pitfall and certainly provocative of every kind of frivolous litigation. Look at the adjectives used. What are "settled principles?" What is "equal protection of the laws"? What is "just compensation?" . . . They are all really matters of opinion, bias, or inclination and judgment which cannot be acted on under anything like settled rules of law as to whether or not in any particular case equality or fairness, some abstract, some probably very-varying standard of quality or fairness has or has not been observed. I cannot imagine any subject in which unnecessary and

[149] Dicey, *A Fool's Paradise*, ch. 3; essentially, that such legislation would only have constitutional authority if it had been approved by the electorate, either by an election on the bill, or the Act before its effective date, or by a separate referendum.

[150] Keane, 'Fundamental Rights', 33. The IPP was consistent in its rejection of the clause. John Redmond, the leader of the IPP, wrote in 1912 that the amendment would have made it impossible to modify the law of criminal procedure: John Redmond, *The Home Rule Bill*, London, 1912, at 176.

[151] *Parliamentary Debates*, series 5, vol. 42, col. 2086, 22 Oct. 1912 (House of Commons).

> gratuitous litigation would be more readily-invited, or in regard to which the decisions of the tribunals would be received with less general respect and authority.[152]

He then attacked the opposition for its inconsistency in proposing the amendment. Predictably, the opposition retorted that it was in fact the Liberals who were inconsistent, citing the earlier speeches of Gladstone, Russell and Rigby to prove their point.[153] In 1893, the opposition argued that the inclusion of the clause was evidence of bad faith on the part of the government, but now it was the refusal to include the clause established bad faith.[154] Plainly, the Liberals had lost enthusiasm for entrenched rights, but that may have been simply because 1893 demonstrated that there were no political gains from putting them forward.

Arguably, the Liberal position was not merely tactical, as developments since 1893 made the addition of a due process more difficult to defend. Asquith noted that it had been omitted from the new constitutions of Australia and South Africa. Hence, the inclusion of the clause would be taken as admission that new legislature was less deserving of trust than the local and national legislatures of the dominions.[155] It is also apparent that the American experience had some impact on the Liberals. The bill was introduced to parliament in April 1912, several years into Theodore Roosevelt's campaign against the judicial obstruction of

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[152] *Parliamentary Debates*, series 5, vol. 42, cols. 2230-31, 23 Oct. 1912 (House of Commons).

[153] See e.g. Bonar Law, *Parliamentary Debates*, series 5, vol. 42, cols. 2234-35, 23 Oct. 1912 (House of Commons); Mitchell-Thomson, *Parliamentary Debates*, series 5, vol. 42, cols. 2237-38, 23 Oct. 1912 (House of Commons); Roberts, *Parliamentary Debates*, series 5, vol. 42, col. 2250, 23 Oct. 1912 (House of Commons).

[154] *Parliamentary Debates*, series 5, vol. 42, col. 2246, 23 Oct. 1912 (House of Commons) (Lough).

[155] Ibid., col. 2230.

social reforms.[156] Roosevelt was particularly exercised by the supreme court's judgment in *Lochner* v *New York*, where it held that a state law imposing the eight hour day in bakeries was contrary to the due process clause of the fourteenth amendment.[157] John Ward, a Liberal trade unionist, argued that the American cases demonstrated that the clause could be used to block legislation intended to improve conditions for labourers.[158] Asquith and Ronald Munro-Ferguson made the more general point that Roosevelt's campaign highlighted the risks and controversies that could arise from the inclusion of the clause.[159]

These arguments had little impact on the opposition. Indeed, it is hard to believe that the Conservatives or Unionists saw any real value in the clause, despite the arguments that they now made in its favour. Edward Carson, for example, attacked the clause in 1893, only to urge the government to incorporate it in the 1912 bill.[160] Moreover, the focus on home rule meant that neither party (nor the rising Labour party) looked beyond the Irish situation during the debate on rights, or after. To be sure, there were signs that the American experience was beginning to influence constitutional thinking in Britain and empire. Nevertheless, the

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[156] Victoria F. Nourse, 'A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights', 97 *California Law Review* (2009), 751, 779-785; Gary Murphy, '"Mr. Roosevelt Is Guilty": Theodore Roosevelt and the Crusade for Constitutionalism, 1910- 1912', 36 *Journal of American Studies* (2002), 441.

[157] 198 US 45 (1905).

[158] *Parliamentary Debates*, series 5, vol. 42, cols. 2216-2221, 23 Oct. 1912 (House of Commons).

[159] Ibid., cols. 2230-31, (Asquith); ibid., col. 2266, (Munro-Ferguson).

[160] Compare *Parliamentary Debates*, series 4, vol. 13, col. 378, 6 June 1893 (House of Commons), with *Parliamentary Debates*, series 5, vol. 42, cols, 2221-2228, 23 Oct. 1912 (House of Commons).

position that members took on the clause depended entirely on their position on home rule; the question of bills of rights did not seem to have meaning in any other context. Once the debates finished, attention quickly dropped, and there was no attempt to gather support for or against bills of rights. The sceptics won because there was no sustained, coherent argument made in favour of bills of rights.

## VII CONCLUSIONS

What might have happened if the lords passed the 1893 bill and the clause had come into force? This question, of course, imagines a world in which the resistance to home rule was nowhere near as great as it was, or at least where the Parliament Act 1911 was already in force. It also requires us to imagine what the new legislature would have done, especially in relation to the contentious issues of land reform and education, and whether it would have felt it necessary to impose coercion. If the Irish courts and privy council had followed the American cases, as Bryce suggested, would they have produced an Irish version of the *Lochner* jurisprudence of the supreme court of the United States?[161] There is some evidence that the privy council would have been so inclined, as it struck down progressive legislation in Canada over the following decades.[162] On the other hand, if we look to the earlier period, the opinions given on the Boothby case and the enactment of the Colonial Laws Validity Act 1865 suggest that the privy council and Irish courts would have been reluctant to use the

[161] *Lochner* v *New York* 198 US 45 (1905).

[162] Contemporary critics include John Willis, 'Administrative Law and the British North America Act', 53 *Harvard Law Review* (1939), 251 and Bora Laskin, '"Peace, Order and Good Government" Re-examined', 25 *Canadian Bar Review* (1947), 1054.

clause against the legislature. Indeed, Irish judges tended to take a formal, restrictive view of the rights protected under the Irish Free State Act; perhaps the judges would have done the same if the 1893 bill had come into force.

We might also ask questions about the process: for example, would the prospects for rights in Ireland and elsewhere have been different if Gladstone had not been so secretive in drafting the two homes rule bills? Or if many of the leading figures had not seen the rights clauses as little more than a concession that might win them some support, especially as they miscalculated the effect that it would have? Or, if constitutional scholars had separated the idea of a bill of rights from home rule for Ireland, would it have been the subject of a more searching public discussion, perhaps leading to the growth of a solid constituency that would have carried forward the idea of rights for Ireland or the empire? Plainly, any speculation could only take place against a background of many different assumptions. In the end, however, we are only left with the impression that the 1893 bill was not so much ahead of its time, as altogether out of its time.

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No potential conflict of interest was reported by the author.

**Notes on Contributor**

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