

**Between “the Most Holy Trinity” and the
“people of Éire”: Nationalist
Metanarrativity and Constitutional
Identity**

Thesis submitted for the degree of Ph.D.

Law

Trinity College Dublin, the University of
Dublin

2026

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Summary

In this thesis I argue that Bunreacht na hÉireann maintains at its normative core a conception of Ireland which preserves an element of ethno-symbolic nationalism. I base this argument in analysis of the text and the attendant context of its interpreters, in particular, the metanarrativity contained in the Preamble. That the emphasis on this aspect of the text has significantly diminished over the nearly ninety-year history of the Constitution, I suggest, demonstrates that the judicial interpretive community have developed a postmodern scepticism in relation to the Gaelic Catholic nationalism which remains therein.

I suggest that this scepticism emanates necessarily from the ambivalence and indeterminacy in the Constitution's theory of legitimacy; that it is couched in an overtly theistic natural law foundation, while textual and social developments have gone in the direction of greater secularity and liberal nationalism. I interrogate this developmental process from an initial syncretism between "the Most Holy Trinity" and "the people of Éire", to the current moment in which the procedural popular sovereignty of the Irish citizenry is theoretically unconstrained by the natural law foundations from which it is justified.

Furthermore, I argue that we can situate the introduction—and heretofore minimal utilisation—of the 'constitutional identity' doctrine within Irish jurisprudence as demonstrative of a reluctance by a majority of the Supreme Courts to engage in a modality of judicial reasoning which in the Irish context is inextricably linked to a metanarrativity of national identity.

In making this argument, I present an interdisciplinary thematic analysis of the discursive development of the conceptualisation of Irish popular sovereignty. I trace its conceptual development from the early 20th century nationalist discourses in which the synonymity between Gaelic, Catholic, and republican themes was rendered normatively salient through the events of 1916. The manner in which a historical and anti-colonial narrative imbued with an explicit ethno-symbolic justification of independence—which was based in the natural right of nations to sovereignty—informed the constitutional theories which underpinned both the 1922 Free State Constitution and Bunreacht na hÉireann, is examined through both texts in a comparative model.

My analysis then turns to examining the manner in which this nationalist metanarrativity has been interpreted in the case law of the Irish superior courts. I suggest that when the judiciary are faced with “hard cases” in which a certain normative reasoning is necessary, there is a pattern in which we can observe a shift from an initial Catholic democratic reading of the Constitution, eventually moving to one of benevolent secularism, which in turn led to a post-Catholic reading. It is at this juncture that I suggest that the Constitution, in its interpretation developed a postmodern condition.

However, even as the discursive narrative of Irish popular sovereignty has shifted from what we can call an “Irish Ireland” reading to one of procedural popular sovereignty, I argue that this proceduralist narrative relies on the inherited normativity of the still textually constant ethno-symbolic nationalist metanarrativity. The judicial fidelity to a robust reading of popular sovereignty, as evinced through iterative judicial decisions, is illustrative of both its continuing normativity, while concomitantly demonstrating the de-escalation of the substantive principle on which this procedure is justified.

Acknowledgments

I would like to thank my supervisor David Kenny for the guidance, consideration, and advice he has given me during the course of this research. Over the years he was always willing to read an unwieldy draft at short notice and offer constructive feedback and much needed counsel as to phraseology and style. Furthermore, I cannot think of a book or article he brought to my attention which has not in some way informed my reasoning in this work and beyond, and for these recommendations, I am very grateful. His efforts were always, and will always be, very much appreciated.

Similarly, I would like to thank Oran Doyle, Aileen Kavanagh, and Natalie Wynn for recommending books, journals, and responding with enthusiasm to queries regarding their research. These recommendations and exchanges were all exceptionally useful and are very much appreciated.

I would like to thank Nicky and Noel Barcoe, who have supported me in so many ways both before and during these last few years of work. Their generosity and genuine kindness towards me have exceeded what could have ever been expected, and for that I will be forever grateful.

Similarly, I would like to give long overdue thanks to Freda Mishan for her support and advice over very many years. She has suffered through many robust debates around the dinner table and over cups of coffee, and for her patience in these moments, and for much more I am very grateful.

I would also like to thank my main interlocutor in these robust debates, Kevin McCarthy. He has filled my life with books and was always there to bounce ideas off, while having an uncanny knack for finding just the right piece of scholarship to illuminate his point. Honor O'Brien has given me unceasing encouragement and care without which this research and so much more would not be possible. For all the insightful, uplifting, and invaluable conversations, I will be forever grateful. For the support of both my parents in all my endeavours, academic and otherwise, I am thankful.

I would like to thank Shelley Barcoe in particular for being a constant reassurance during these last few years, and at all times. From the beginning of this process over a burger, to the final moment of dotting i's and crossing t's, she has been nothing but supportive and I

owe her a lifetime of compensation for her toleration of my thinking this thesis through out loud.

And finally, thank you to Mariann for being a joy.

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Introduction

This thesis presents a critical historical exploration of the most significant constitutional principle within Irish constitutionalism—popular sovereignty—and its symbiotic relationship with conceptions of ethno-symbolic national identity. By doing so it is interrogating whether the doctrine of ‘constitutional identity’ within Irish constitutionalism is inextricably connected with the nationalist metanarrative of Bunreacht na hÉireann.

This research critically engages with the interpretive consequences of procedural popular sovereignty serving as the norm through which the nationalist metanarrative embedded within Bunreacht na hÉireann is expressed. To do so, this thesis presents an historical and theoretical account of the process by which popular sovereignty has been elevated in interpretive significance beyond all other principles in Irish constitutional jurisprudence.

One of the consequences which this process eventuates, which this work engages with, is the “problem of identity” brought about by constitutional normativity being grounded in a metanarrative of nationalism, with the pooling of sovereign competencies in a conceptually supranational legal order—which grounds validity in general principles and values of constitutionalism. This work interrogates whether this process has served to bolster or de-escalate the nationalist metanarrativity of the Irish Constitution.

This work also presents a descriptive account of Irish constitutional normativity as the metanarrativity of the nationalism. This account is developed from the position that the foundation of normativity within Irish political and judicial constitutional discourse, is the principle of nationalism. The constitutional text serves as the authoritative site in which the nationalist metanarrative of normativity is formally embedded as the Irish theory of constitutional validity. The descriptive account of metanarrativity presented in this thesis fulsomely captures both the positivist and natural law readings of the text and explains the divergence in theory as being rooted in different narratives of legitimacy. This work does not provide a normative account positing a determinate reading of the constitutional text; rather, I suggest that indeterminacy is an ineluctable feature of Irish constitutional theory.

This thesis suggests that through a process of political contestation, iterative judicial interpretations, and through the referendum process, the Irish Constitution has come to embody a postmodern condition. This condition is reflective of the progressive disaggregation of the essentialism of the textual representation of the “people of Éire”. This is as a result of the changes in social context of Ireland, the altered dispensation of

constitutional primacy eventuated by membership of the EU, and the shift in permissible intertextual sources appealed to in judicial normative reasoning. Concomitantly, it is suggested that these processes are re-narrations of constitutional metanarrativity. I argue that we can observe, through the development of Irish constitutional jurisprudence, a trend of judicial postmodern scepticism towards the metanarrativity of ethno-symbolic nationalism, as textually enshrined. A text which remains theoretically grounded in appeals to the “Most Holy Trinity”, “the people of Éire”, and the “unremitting struggle to regain the rightful independence of our Nation”, has been judicially interpreted as being defined by an appeal to popular sovereignty as understood procedurally. This serves to seemingly divorce the substantive normative foundations from the evident fidelity the collective Irish judicial mind has iteratively demonstrated to hold to that procedural principle.

However, this thesis seeks to refute the conceptualisation of Irish constitutional identity as purely procedural popular sovereignty. In doing so, the argument is made that the procedure of popular sovereignty remains reliant on national metanarrativity. As Irish constitutionalism has developed in such a manner as to diminish the salience of ethno-symbolic nationalism by orientating towards greater European integration and liberalism, this has served to reflexively bolster a civic/liberal national principle, which remains textually grounded on the normativity of a distinct “people of Éire”. Whether this “people” is a civic or ethnic constitutional subject is identified as a defining dynamic tension informing the constitutional discourse and the indeterminacy of “Irishness” as a constitutional subject.

Furthermore, I suggest that there is an observable pattern within constitutional interpretation among the Irish judiciary to appeal to readings of the Constitution which rely on extratextual normative characterisations as to the nature of the text. This pattern—which I suggest indicates an interstitial openness to identity-centred judicial reasoning within Irish jurisprudence—provides moments of expression which demonstrate a gradual shift away from the initial synthesis of jurisprudence with nationalist metanarrativity towards a greater reluctance to appeal directly to this national normativity. The current instance in which we see this reliance on a descriptive account of identity of the Constitution is the doctrine of ‘constitutional identity’ most evident in the jurisprudence of Gerard Hogan.

The introduction of constitutional identity as a formal doctrine in Irish jurisprudence—as opposed to an approach constitutional theory and analysis—demonstrates the complex

implications of EU membership on Irish constitutional nationalism. As a doctrine in positive law, it emanates from the Treaties of a partially post-national legal order—yet, as the “identity” of the Irish Constitution is rooted in a metanarrative of nationalism—it seems to bolster the claim of the pre-potent national sovereignty of the “people of Éire”.¹

This thesis—by providing a model of metanarrativity for analysing the Irish Constitution as it relates to the questions posed—makes a contribution to the theory of Irish constitutionalism. Furthermore, it makes a contribution to the theory of Irish constitutional history. It does so by analysing the intersubjective discursive interplay between historiography and judicial interpretation Ireland, relying on contextual analysis of discourses of political, academic, and judicial actors.

Methodology

To develop metanarrativity as an analytical model for the Irish Constitution, concepts and terminology are utilised in a broadly interdisciplinary methodology, drawing from constitutional and literary theory, history and historiography, and theories of discourse. This interdisciplinary approach is justified as being product of culture, a constitution is deeply embedded in the socio-political context from which it emerges, as well as being a text among others in the *genre* of politico-legal texts. In turn, those who authoritatively interpret a constitution are both pedagogically and professionally rooted in constitutional jurisprudence, while also being embedded in the broader social context of the polity. Therefore, the epistemic² or interpretive³ community of institutionally authoritative interpreters are dualistically conditioned by both their function within the constitutional polity and their social context.

¹ Which in turn complicates a descriptive account of the European Union. Whether one can characterise it as supranational, intergovernmental, or post-national, depends on which aspect of the institutional architecture of the European Union one is examining. Furthermore, the *sui generis* nature of the EU, with its un-realised federalism – or imperfect con-federalism – inherently complicates descriptive accounts of member states constitutional orders, as they partake therein.

² “An epistemic community is a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area...a shared set of normative and principled beliefs, which provide a value-based rationale for the social action of community members...notions of validity that is, intersubjective, internally defined criteria for weighing and validating knowledge in the domain of their expertise...common policy enterprise—that is, a set of common practices associated with a set of problems to which their professional competence is directed, presumably out of the conviction that human welfare will be enhanced as a consequence.” See, Peter M. Haas, ‘Introduction: Epistemic Communities and International Policy Coordination’ *International Organization* [1992] vol. 46, no. 1.

³ See, Stanley Fish, *Is There a Text in This Class: The Authority of Interpretive Communities*, (Harvard University Press, 1980) wherein an interpretive community is understood as an intersubjective community wherein strategies of interpretation, beliefs, and assumptions are shared.

So, in order to present a holistic descriptive account of the Constitution's identity, we must examine the texts and contexts which inform how readings of its provisions, judicial decisions, are realised. In doing so, the following approach is utilised to analyse the development of Ireland's particular post-colonial formation of its constitutional metanarrative of nationalism.

This process occurs through discursive interpretation carried under the auspices of the institutionalised norms of the constitutional order. In analysing a process of development, it is necessary to identify an inception point—even if doing so is somewhat artificial—and examine how the object of analysis develops therefrom. As such, this work engages in a thematic chronological analysis; examining the political and cultural formation of the Irish nationalist metanarrative which preceded its textual realisation in *Bunreacht na hÉireann*. Then, the text of the Constitution is critically engaged with as a free-standing text, analysing the manner in which it did—and didn't—fully embody an ethno-symbolic national identity. Thereafter, how this ethno-symbolic identity was gradually ameliorated through the prism of iterative judicial decisions which rely on articulations or characterisations of the identity or nature of the Constitution.

The metanarrative of Irish nationalism in the Irish Constitution is analysed within a constructivist analytical framing. The idea of 'the Nation' is treated as a socially realised concept—understood herein to rely on narrative formation—and is developed and maintained by discourses which permits its re-narration within the norms of the epistemic communities who rely on it. These political, jurisprudential, and academic discourses are examined in order to demonstrate the manner in which the idea of the nation and a national people as found within Irish constitutionalism has been iteratively developed. This methodology allows for the interrogation of the social and political conditions which have informed this development, while interrogating the consequences this holds for the judicial epistemic community duty bound to interpret the meaning of *Bunreacht na hÉireann*.

Structure

Part 1 of this thesis—Theory—establishes the theoretical and analytical aspects which underpin the methodology of this research (a descriptive and non-normative analytical model of Irish constitutionalism as metanarrativity). This approach is justified by establishing a theoretical grounding within an interdisciplinary approach, which is presented in Chapter 1.

Within this theoretical framework, an anti-foundationalist epistemology is adopted. As such, it is the position of this work that foundational beliefs within a system of knowledge—such as Irish constitutional jurisprudence—are contingently foundational. So, the fidelity demonstrated by the Irish judiciary to the principle of popular sovereignty—as manifest in the procedure of the referendum—is contingent on the coherence of an ancillary set of assumptions within the social context of Irish constitutionalism.

I argue that these ancillary set of assumptions are conditioned by a context of Irish nationalism. As already established this work adopts a constructivist understanding of nationalism. The discursively realised idea of Ireland as a ‘Nation’—textually embedded within *Bunreacht na hÉireann*—relies on a national mythology expressed through appeals to shared ethno-symbolic traits: language, religion, and culture. In so doing, these shared symbols of identity are formed into a teleological historical narrative which presents the Irish Constitution as a partial deliverance in the progressive realisation of an independent, 32 county, Irish, national republic. Inherent in a constructivist approach to theorising nationalism is the recognition of the non-static nature of the idea of “the Nation”. As a construct, it is pliable or amenable to changing understandings thereof.

As this research is deeply engaged with context and contingency, the characterisation of Ireland’s socio-cultural condition—as politically expressed in the rhetoric of anti-colonial nationalism—is central. The primary constitutional drafters were from a political tradition which narrativized Ireland as a victim of Imperial suppression. That tradition understood their political project in terms of continuous resistance to British administration in Ireland and the revival of a national polity which drew legitimacy from a pre-colonial Gaelic identity. As this was the conception of “Irishness” which would be embedded in the Constitution, it is theoretically justified to analyse this claim through the prism of post-colonialism.

This narrativization developed a theory of constitutional legitimacy premised on the normativity of an ethno-symbolic historical narrative of the “people of Éire”. Therefore, as this metanarrative of nationalism is a narrative, it requires the analytical approaches of narratology in order to capture it with descriptive accuracy. Narratology provides a conceptual vocabulary through which we can analyse the way this metanarrative functions within constitutional jurisprudence. As popular sovereignty as a procedure is justified by a teleological narrativization of the inalienable natural right of the “people of Éire” to

determine in final appeal the political conditions in Ireland, we should be developing the analytical toolkit for fully describing the components and function of that narrative form.

The manner in which history is used in the narrative of constitutional legitimacy is presented in this work as being realised through intersubjective historiography. In analysing the political thought, judicial philosophies, and academic commentary of Irish constitutional discourse; the process whereby the conceptualisation of the “people of Éire” and the Irish ‘Nation’ has been substantially altered. Yes, there has been the formal textual alterations enacted through the referendum procedure, but there has also been the discursive reformation of Irish identity around the pillars established by political activists of the 19th and 20th century, who appealed to history as a justificatory source of constitutional legitimacy. The traditional nationalist historiography was—and still is in parts—embedded in the Constitution, but this reading of Irish history has undergone a revisionist critique, which I suggest is reflected in commentary, judicial interpretation, and formal constitutional amendment.

This initial chapter establishes the theoretical framework which is then utilised in the analysis of later chapters. By utilising an interdisciplinary methodology, the epistemological point of view of those who partake in the Irish constitutional discourse is accurately captured and critically engaged with. This serves the purpose of demonstrating how Irishness as an instrumental normative identity was formed through narrative. It also provides a coherent descriptive account of how this ‘Irishness’ continues to function within the constitutional metanarrative today.

Chapter 2 develops the theoretical positions established in Chapter 1 by applying them to questions of general constitutional theory. The idiosyncrasies of Ireland’s national metanarrativity are mediated through the architextual norms of constitutionalism as a politico-legal textual genre. As such, the ethno-symbolic identity of the “people of Éire” is treated as a constitutional subject and engaged with through that prism. Similarly, the metanarrative of Irish nationalism—as already stated—functions as a theory of constitutional legitimacy, and also legal validity in positive law through the procedure of the referendum. So, the ancillary assumptions inherent in this metanarrativity, when rationalised within the constraints of general principles of constitutionalism, become the ‘constitutional imagination’ of the Irish constitutional polity. How this construction alters and prospectively develops as different narrative elements are introduced—such as the

pooling of national sovereignty with other member states in the EU and the ongoing process emergent from the Good Friday Agreement—can be understood as the constitutional imagination of the polity: Irish particularism as mediated through the general principles of constitutionalism.

How these processes function within a continuous discourse claiming ontological stability—which at times presents paradoxical emanations and conceptual conundrums—is expressed in ‘constitutional identity’ reasoning, which eventuates a problem temporality. This work deals with constitutional identity in Ireland in two ways. Firstly, this work presents a non-normative descriptive account of Irish constitutional identity through different judicial iterative articulations. Secondly, this work engages with ‘constitutional identity’ in Ireland as a formal doctrine emanating from the Treaties of the EU. These two manifestations of identity are not viewed as mutually exclusive, rather, they are presented as integers on a continuum of metanarrative development in Irish constitutionalism. This chapter engages with constitutional identity as a constitutional theory and presents a metaphoric reconceptualization of the problems inherent in identity analysis within constitutionalism.

Part 2 of this thesis—Constituting the Subject—examines the process by which the simulacrum⁴ of the “people of Éire” as the Irish constitutional subject became discursively realised through its conceptual formation in the pre-constitutional imaginings of the late 19th and 20th century political and cultural Irish nationalism.

Chapter 3 presents an analysis of the formation and coalescence of the nodal points⁵ of Ireland’s post-colonial constitutional identity. It examines the process by which Irishness was formed into a politically normative identity in the nationalist imaginings of the revolutionary generations of late 19th and early 20th century. These nodal points formed a discursive structure wherein an inversion of the ethno-symbolic characteristics which had served as sites of colonial suppression—language, religion, and institutional autonomy—

⁴ Simulacrum in this context is utilised in a manner consistent with the writings of Jean Baudrillard, in that a simulacrum is an image, representation, or sign which reflects, constructs, and ultimately denatures reality. In our case, the Irish constitutional subject is a politically and legally realised representation of what had been a national discursive process of a national self-image. Once realised in this manner and formally enshrined as an authoritative sign or representation, a process begins wherein this simulacrum is questioned and resituated as a deviant representation of the true reality of the “People of Éire”, thereby being a site which can be situated in a discourse as an unfaithful, representation. This can then ultimately lead to a point of Hyperreality, wherein, it is incidental that this representation relates to a social reality. See, Jean Baudrillard, *Simulacra and Simulation*, (Sheila Fria Glaser (trans), The University of Michigan Press, 1994).

⁵ Nodal points as a feature of Discourse theory are discussed in Chapter 1.7.

would be instrumentalised as credentials of the national claim to self-determination based in a metanarrativity of Irish difference and subaltern subjectivity. This chapter also deals with the revisionist critique of the propriety of post-colonial analysis as applied to Ireland. Acknowledging this critique is vital as it is emblematic of the symbiotic contest over history and identity in Ireland.

Chapter 4 continues and develops this analysis of the process of forming Irishness as a politically normative identity. It examines the manner in which this nationalist narrative became—by the very nature of the historical elements it relied on in its narrativity—inextricably linked to ideas of popular sovereignty. This idea of Irish national independence *qua* popular sovereignty emerged from the intellectual context of cultural revival and Catholic piety. As such, what I term the pre-constitutional ephemera—being texts which preceded and influenced the formal constitutional text—are analysed to chart the progressive development of the constitutional metanarrative of Irish sovereignty. This chapter begins to introduce and examine the corollary ‘othering’ which takes place when the language of ethno-symbolism is employed within the articulation of a consistent historical narrative. This process eventuates indeterminacy, internal paradoxes, and seemingly contradictory points within the historically based theory of constitutional legitimacy; these paradoxes are identified and interrogated in this chapter.

Chapter 5 examines the partial realisation of aspirations to independence in the Anglo-Irish Treaty and the constrictions placed on nationalist aspirations embodied in the 1922 Constitution of Saorstát Éireann. Furthermore, this chapter presents an analysis of the narratives to justify and delegitimise this text as a constitutional representation of Irish subjectivity as formed in nationalist imaginings as articulated in pre-constitutional ephemera. In this chapter the constitutional discourse of Irish sovereignty is primarily centred on the contradictory positions between divergent conceptions of the ultimate foundations or *Grundnormen* of the 1922 text.

Chapter 6 presents an analysis of the process by which the 1922 text was legalistically undermined by the politics of the Free State. The means and manner by which this Constitution was progressively sabotaged is presented as demonstrating the salience of the ethno-symbolic normative identity of Irishness as grounded in an anti-colonial amalgam of Gaelic Catholicity and republicanism. This analysis examines the competing constitutional theories which divergently grounded the validity of the 1922 Irish Constitution and

examines how the judiciary of the Saorstát conceptualised Irish sovereignty under this constitutional order.

Part 3 of the thesis—Bunreacht na hÉireann—presents a thematic analysis of the 1937 Constitution as a definitional articulation of a normative Irish identity of the polity as a fulsome representation of the Catholic, Gaelic, and anti-colonial metanarrative. This section of the thesis also critically engages with the discursive process whereby this identity has been progressively subverted by the application of general principles of constitutionalism embodied in liberalism, republicanism, and Europeanism.

Chapter 7 presents a comparative analysis of the 1922 and 1937 texts to examine their textual deliverance of the normative Irish constitutional theory and its primary metanarrativity of popular sovereignty. I suggest that the comparative success of the 1937 text—compared with the 1922 text—is based in the realisation of a constitutional identity which more fulsomely delivered on the salient ethno-symbolic nodal points of Irishness as a normative identity. This realisation of identity relates both to the constitutional metanarrative and the institutional architecture of the State.

Chapter 8 presents a framework for analysing the development of Irish constitutional jurisprudence wherein through different periods—or interpretive frameworks—we can observe a shifting understanding of the identity of Bunreacht na hÉireann. These frameworks are the context contingent realisations of identity emergent from interpretive strategies of the judiciary, which relied on a definitional characterisation of the Constitution so as to realise an acceptable outcome in a “hard case”.⁶ I suggest in this chapter that we can observe the gradual re-narration of Irish constitutional metanarrativity through the different extra-textual and intertextual sources which were permissibly appealed to in the normative reasoning of the Court. In this shifting corpus of intertextual influence, the judicial scepticism towards ethno-symbolic nationalism is evident. I suggest that we can periodise these interpretive frameworks as: the Catholic Democracy; Benevolent Secularism; and Post-Catholicism. Therefore, we can characterise the judicial

⁶ “hard cases” here is used in the Dworkinian sense, in that they are cases where the simple application of legal rules is insufficient in determining a “right answer” for the case at hand, and the judicial actor will have to engage in their interpretive function, although instead of a Herculean Judge, I propose an Odyssean Judge, who finds “an answer”. See, Ronald Dworkin, *Taking Rights Seriously*, (Harvard University Press, 1977), Chapter 4, “Hard Cases”.

conceptualisation of the Constitution as embodying a procedural understanding of popular sovereignty as necessarily emblematic of a postmodern condition.

Chapter 9 engages with the conceptual re-narration of popular sovereignty as procedural, as brought about by the pooling of sovereign competencies within the EU. The narrative of a community of shared values and principles as embodied in the EU Treaties has served to create a distinct “third space” wherein intra and extra-national cleavages can be potentially reconciled. These general principles of EU constitutionalism can function as a means of de-escalating the interpretive significance of national metanarrativity by re-orientating the frontiers of “We” and “Other” beyond the ethno-symbolic. However, by partially eroding the coherence of the national metanarrative—as demonstrated in Irish jurisprudence on ratification of Treaties and Agreements—this process of European post-national integration necessitated a re-conceptualisation of Irish nationalism in an EU context, as embodied in Article 4(2) TEU.

Chapter 10 deals with how the “constitutional identity” provisions within the EU Treaties have given this doctrine an intertextual grounding within Irish jurisprudence; which was eventually utilised in *Costello*.⁷ This chapter examines Irish constitutional identity jurisprudence which emerged from its initial context of judicial review of executive capacities to ratify supranational agreements which potentially violated Irish sovereignty, through the internal turn this line of reasoning has taken. This chapter examines the case law of the superior courts when dealing with matters of entirely domestic concern and how this has shaped the conceptual boundaries of ‘constitutional identity’.

Chapter 11 concludes this work offering reflections and final thoughts as to the analysis herein. Furthermore, it offers some commentary as to potential trends of Irish constitutional metanarrativity going forward.

⁷ *Costello v. Government of Ireland* [2022] IESC 44.

Chapter 1: Metanarrativity

1.1 Metanarrativity as an Analytical Approach

A metanarrative is a legitimatising grand narrative which situates sites of discourse and is appealed to for recursive legitimation of juridico-political interpretations.¹ It is the abstract level of narration which is beyond the basic components of a singular narrative—incidents, actions, and resolution—and provides a framework that guides values, beliefs, and thought.² A metanarrative is the story behind a narrative, which gives legitimacy to knowledge and truth claims which necessarily utilise it as foundational. As such, I suggest that metanarrativity is a descriptive account which best captures—as reconciling is almost definitionally out of the question—the indeterminate construction of legal normativity and ultimate authority in Irish constitutionalism. Oran Doyle acknowledged the inherent limitations of both the theories of natural law and positivist procedural popular sovereignty for resolving to the paradox of Irish legal validity:

“When legal officials attempt to explain the existence of their own legal system, they produce legal arguments which are circular in that they purport to identify an anterior moral standard by reference to the positive legal system.”³

This potential for infinite regression is in part a result of viewing the law as a normatively closed system. However, increasingly it is apparent that the judiciary are willing to look beyond a conception of the law from an exclusively internal perspective. The interpretive strategies of the superior courts are seemingly increasingly reticent to rely on rigorous textualist literalism and demonstrating a willingness—out of perceived necessity—to countenance fundamental principles, the purposes behind provisions, and relevance of historical context.⁴ As such situating the process of constitutional interpretation within a broader discourse of national metanarrativity is justified by the judiciary appealing to extratextual and subtextual analysis.

However, as recognised in postmodern critiques of metanarratives, they only create the appearance of a totalising normatively closed account of reality. I would suggest that in

¹ Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge*, (Geoff Bennington and Brian Massumi (trans), Manchester University Press, 1984).

² Kaplan, Y. R., Sheaffer, T., & Shenhav, S. R. ‘Do we have something in common? Understanding national identities through a metanarrative analysis’ [2022] *Nations and Nationalism*, 28(4), 1152-1172.

³ Oran Doyle, ‘Legal Validity: Reflections on the Irish Constitution’ [2003] 25 *DULJ* 56.

⁴ The reasoning of Murray J as to the proper means of interpreting the Constitution in *Tomás Heneghan v Minister for Housing, Planning and Local Government* [2023] IESC 7, at paras 83-85.

permitting these interpretive appeals beyond the text, the superior courts have brought to the fore a scepticism towards some of the principles, the purposes, and historical context of Ireland's constitutional order. Furthermore, some are demonstrating that they are uncomfortable in affording these principles the normativity one may expect.⁵

As such, the appearance within Irish constitutionalism of dichotomous accounts of legal normativity—natural law or popular sovereignty—from the internal perspective of legal epistemology, in the interest of legal certainty, both could not be “true”. However, I suggest that when we view this theoretical ambivalence through a broader account of Irish nationalist metanarrativity—conceptualising Irish constitutionalism as a discourse exhibiting a postmodern condition—thereby developing an account which accommodates this internal tension. Moreover, it is a descriptive account which acknowledges the textual validity of each account without making a normative judgment as to which is “correct”. It does this by not positing a singular point of validity, rather a narrative structure with many possible interconnected points of legitimacy, which are interrelated and mutually self-sustaining. One may be privileged over another at a given time, but all points remain subtextually significant.

Kaplan et al. have provided a systematic methodology for analysing metanarrativity as a comparative tool by identifying its specific structural components: actions, actors, and values.⁶ They apply this structural analysis—using constitutional preambles as their input content—and infer from different narrative components a general typology. While being a significant methodological contribution—in providing a systematisation of metanarrativity by its structural components—the aspiration of making it a valuable typological tool for comparative analysis may be perhaps beyond what is achievable within the limits of the concept itself. This analytical limitation in comparative work stems from the absence of the role of interpretation within their methodology.

In constitutional jurisprudence, legal interpretation is crucial for realising the meaning of the text. Legal interpretation is a process of understanding a legal text, and every

⁵ This tension is made clear in *John O'Meara & Ors v. The Minister for Social Protection, Ireland and The Attorney General* [2024] IESC 1, in the judgments delivered by O'Donnell CJ and Hogan J, wherein their views as to the historical context underpinning Article 41 were very much at odds. Hogan J reading an untenable liberalism back into the context of 1937, whereas O'Donnell CJ accorded an altogether more historically plausible account of attitudes and purposes underlying the Article.

⁶ Kaplan, Y. R., Sheaffer, T., & Shenhav, S. R. (2022). Do we have something in common? Understanding national identities through a metanarrative analysis. *Nations and Nationalism*, 28(4), 1152-1172.

understanding is the result of interpretation.⁷ As such, a comprehensive account of metanarrativity must go beyond the bare words on the page of a constitutional text and encompass an examination of the context of its interpreters, and the text of their interpretations. A small-c constitutional emphasis in methodology is posited by Silvia Gagliardi⁸ et al. in their comparative analysis of popular conceptions of national and constitutional identity in a comparative framework.

The significance of interpretation makes the utility of metanarrativity as a comparative analytical approach somewhat speculative, as one would need a fully developed account of the history, text, and jurisprudence of multiple polities to draw out meaningful comparative conclusions. Indeed, this is tacitly acknowledged by the methodology of Gagliardi et al. in that they rely on focus groups for popular conceptions of national metanarrativity, thereby acknowledging by omission the task of deeply contextual comparative metnarrativity. However, as an approach to analysing a polity on its own terms, metanarrativity can provide a more holistic descriptive account of a constitution's identity.

Judicial interpretations which recursively develop through iterative readings a polity's constitutional normative narrative of parliamentary sovereignty, national sovereignty—and in the Irish case, popular sovereignty—are absent from the typology of metanarrativity identified by Kaplan et al. An interpretation, in our case, is an interpretation presented within a formal judicial setting. Judicial reasoning in that interpretive community demonstrating the process for determining which available interpretation is “right” or “correct” by appeal—explicit or implicit—to consistency or approximate realisation of the metanarrative.

This research seeks to present metanarrativity as a non-normative descriptive account of the discursive structure brought about by the congruence of Irish ethno-symbolic nationalism with a liberal democratic constitutional polity. With the discursive structure of metanarrativity as an analytical model, we capture the formation of nodal points⁹ of

⁷ Aharon Barak, “On Constitutional Implications and Constitutional Structure”, in David Dyzenhaus & Malcolm Thorburn (eds) *Philosophical Foundations of Constitutional Law*, (Oxford University Press, 2016) p. 56.

⁸ Silvia Gagliardi, Eoin Carolan, Somsubhra Banerjee, Demian Ernesto Iglesias Seifert, Daniela Rodríguez Gutiérrez, ‘The Influence of Popular Conceptions of National and Constitutional Identity on the Position of Marginalized or Minority Groups Within a Nation State. A Legal, Empirical, and Comparative Analysis of Four Jurisdictions Through the Prism of Gender’, [2024] *Latin American Legal Studies* Vol. 12, no. 1, pp. 158-224.

⁹ The meaning of nodal points in this research is consistent with the discourse theory of Ernesto Laclau and Chantal Mouffe. Their theory posits a discursive structure which forms around central privileged nodal points.

national identity, the general principles of constitutionalism, and how these are balanced and understood in judicial interpretation. Further, we can examine how narrative elements provide normativity to the institutional identity of the polity, providing an approach to questions of constitutional validity which can reconcile a shift or change in foundational norms without fracturing the ontological stability of the legal order.

Within positivist approaches, a substantial change to a grounding norm requires a revolutionary moment as expressed Kelsen's *Grundnorm* explanatory theory of legal validity.¹⁰ However, this mode of analysis lacks a comprehensive account of the legitimacy of this normative order by its logical hierarchical schema. An analytical approach of metanarrativity allows for continuous re-narration—or reinterpretation—of the meaning of central nodal points of the normative metanarrative. Furthermore, this analytical approach can also provide a narratology of nationalism and constitutionalism wherein the subject, identity, and imagination of the constitutional polity can be concomitantly analysed. As such it can explain why the validity norm is accepted as legitimate.

Inherent in the congruence between nationalism and state-centred constitutionalism is a discursive process of forming and reforming the national and constitutional identity of the “We” and the necessary corollary of the “Other”. This process within the Irish context, initially formed around ethno-symbolic nodal points of identity and anti-colonial rhetoric, thereby dually othering Britishness internally and externally. An aspect of this was reliance on inverting Catholicism as a site of particularity of Irishness within a British context, as both an ethnic identity and superior moral epistemology. This Irish normative identity would become inextricably connected with a political ethos of republicanism, to the point where they were partially synonymous, thereby instantiating a tension within the heart of Irish constitutional identity. This tension was expressed in the *de jure* claim to all island sovereignty in the original Articles 2 and 3 of Bunreacht na hÉireann, without obtaining the democratically expressed consent of a portion of the claimed Irish Nation.

A discursive structure is a system of meaning that shapes our perception of our reality, for our purposes the reality of the Irish constitutional polity. However, the meaning which derives from discourse is inherently unstable, in that it is subject to reinterpretation. Even meaning which seems fixed or natural is subject to change through the ongoing discursive process. This discursive process forms around a centre made up of nodal points. These nodal points are themselves not static, yet they provide a fixed point around which other elements in the discourse can be temporarily stabilised. Within Irish constitutional discourse nodal points are conceptually vague principles from which interpretive agents discern meaning, i.e., sovereignty, democracy, the Nation, and “the People of Éire”. See, Ernesto Laclau & Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics*, (Verso, 1985).

¹⁰ Hans Kelsen, *General Theory of Law and State*, (Law Book Exchange Ltd, 2007) p.116.

This ambivalence would require reflexive interpretation and development of the normative metanarrative of inalienable popular sovereignty of the distinct “people of Éire”. This discursive process has developed in such a manner as to denude the natural law foundation of national rights within the constitutional text of coherence, thereby subverting a central aspect of the constitutional metanarrative as originally established.

This has been done by a gradual shift in the canon of extratextual sources from which interpretive agents appeal to realise the intertextuality¹¹ of the constitutional metanarrative. To realise a contextually-informed interpretation of what a particular nodal point of Irish constitutionalism means at a given moment, the judiciary have relied on variously: Brehon Law, Catholic Social Teaching, judicial precedence from relevant foreign jurisdictions, and the corpus of supranational European law. This shifting intertextuality serves to renegotiate formations of the indeterminate constitutional subject “We” and the protean “Other” within Irish constitutional identity as reflexive of national metanarrativity. By adopting an approach to constitutional analysis wherein the national principle which underpins constitutionalism is conceptualised as metanarration, we can interrogate the formal boundaries and conceptual frontiers of the nation—acknowledging that this establishes a bounded rationality from which interpretive meaning is produced—and thereby critique the frontiers of this conceptualisation.

1.2 Anti-Foundationalism

A further theoretical point to establish is that this thesis adopts an anti-foundationalist approach to the analysis herein. What this entails at its most basic is a scepticism towards or rejection of arguments from natural objective meaning: there are always divergent constructions of conceptual meaning which—within reason—are permissibly cogent. The approach herein posits that there are, in constitutional discourses, no natural non-positivist foundations. All constitutional principles are necessarily discursively realised, thereby being sites of ongoing contestation over “correct” or “right” meaning. How meaning is

¹¹ Intertextuality in this research is consistent with the literary theory of Gérard Genette. Intertextuality can be understood as the co-presence between two or more texts. Intertextuality as an analytical model allows us to conceptualise the direct or indirect reliance of one text on another for a successful comprehensive reading. Intertextuality is relevant to the Irish Constitution in many ways as the text cannot be fully comprehended as a free-standing text. For instance, Article 29 cannot be fully understood without indirect reference to texts which attempt to capture the generally recognised principles of international law. Nor can it be fully comprehended without direct reference to the Treaties of the EU or the British-Irish Agreement 1998. Intertextuality is a sub-branch of Genette’s broader concept of transtextuality which covers all possible relations a text can have with other texts in a less formal manner than is expressed with intertextuality. See, Gérard Genette, *Palimpsests: Literature in the second degree*, (University of Nebraska Press, 1997).

attributed to constitutional principles is reliant on how these principles relate to a web or cluster of associable concepts within an epistemological point of view. Constitutional interpreters can exercise a situated agency, meaning that they are constrained both by the formal limitations of the text, but also by what is made possible by their embeddedness in their given epistemic and interpretive community. Yet, it is important to acknowledge that there is always the capacity to adopt beliefs and interpretations, even novel ones, for individuated reasons, and in doing so transform the social background. This is however, always situated in a particular context.¹²

For instance, a person socialised on the island of Ireland will look upon a hurley and know it is an implement of sport. They could not alienate themselves from the embeddedness of this cultural object. Only a true absolute reductionist could view it and say it is a piece of ash with a metal band and adhesive tape, as to be socialised in a given context is to be embedded in the nexus of associated attributes, which serves to inform the process of realising interpretive meaning.¹³ If an individual socialised in this context were to see a hurl, they could not have a response which would misidentify it as a baseball bat, walking stick, or shovel. The interpretive identification of the object would be grounded in the particularity of the cultural context.

However, this account permits the ambivalence and differentiation in the web of associative attributes around the object. For example, an individual from a certain community within a certain geographic area could view it in purely positive terms, viewing the hurley as a totem representing cultural tradition, family, and community. A person from the same community could be apathetic to it or associate it with a certain insular attitude within their locality but would still understand the grounding normativity of the values associated with the cultural object.

Contrariwise, another individual socialised in a different community in a different geographic locality, still bound by the initial identification of it as a certain genus of object, i.e., hurley, could have a substantially different nexus of attributable associations with the object; it may be viewed as an inherently threatening cultural signifier emblematic of certain political views. But the point is that all individuals considered are socialised within a broad overarching shared context, which means, they could not look upon it as something

¹² Mark Bevir & R.A.W. Rhodes, *The State as Cultural Practice*, (Oxford University Press, 2010) p.74.

¹³ Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*, (Duke University Press, 1989). See, 'Introduction: Going Down the Anti-Formalist Road'.

other than what it is as a cultural object: a hurley. It may be situated in a divergent construction of interpretive meaning—based on the nexus of associated attributes, which would be informed by the collective identity of their specific ethno-cultural group—impacted by contingent sociological realities of geography and history. But if they were to view it as a cricket bat, fencepost, or paper weight, they would be demonstrating a collapse in their interpretive function. Or they would be demonstrating that they have not been fully socialised within the pre-eminent culture of the given context. In this way we can see that relativism or radical subjectivity is not a foreseeable aspect of an anti-foundationalist epistemology. There is a finitude to the boundaries of constructing interpretative meaning within a given context; there is situated interpretive agency, neither unbridled scope, nor essentialist rigidity.¹⁴

We can apply the same analysis to the most seemingly straight forward provisions of the Constitution, which would seem to need no interpretation to successfully realise meaning. Article 7 establishes that “The national flag is the tricolour of green, white and orange.” Within this straightforward definition of the Irish national flag there are webs of symbolism and potentialities for different readings based on the ethno-cultural identity of the interpreter. There is the vexillological traditions of republicanism as associated with the tricolour design; the expression of Irish Catholic nationalism represented by the green vertical stripe; the orange stripe representing the Protestant community of Ireland; and the white stripe representing peaceful relations between the two communities of Ireland. And yet this *national* flag can be a symbol for the loyalist community in Northern Ireland—which are in theory represented by the orange stripe—as a foreign flag, threatening their cultural identity with erasure as a direct challenge to the Union, which is core to their identity, making it a political and cultural emblem which is ritualistically burned, on the basis of cultural expression, on the 11th and 12th of July.

Here we can see at least two diametrically opposed interpretations of a symbol which is meant to be a unifying symbol, while they are both bound by the basic contextually realised identification of this emblem as the tricolour of Ireland. In this manner the model of analysis herein is broadly within a Dworkinian conception of law as being deeply bound up with interpretation. As such, a conceptualisation of interpretivism wherein a text can be properly interpreted by the judiciary where there is evident textual ambivalence and disagreement

¹⁴ *ibid*, pp. 127-129.

which is not resolvable by application of formal legal rules applies. Judges operate within a professional and intellectual context in which the principles of the system have functionary constraints—which also guide the interpretive process—precluding radical subjectivity.¹⁵

In justifying this as an epistemological position, the intellectual lineage of Richard Rorty,¹⁶ Stanley Fish,¹⁷ and Richard Posner¹⁸ is followed. The greatest utility we can draw from Rorty *et al* in this regard can be drawn from an insight which emphasises the inherent contingency and discursively constructed character of our most fundamental concepts, disabusing us of the reliance on transcendental means of giving meaning to human conduct, of which we can count the human action to constitutionalise:

“...outside the haphazard and perilous experiments we perform there lies something (God, Science, Knowledge, Rationality, or Truth) which will, if only we perform the correct rituals, step in to save us.”¹⁹

Adopting at the outset an analytical position in which these transcendental properties are not out there, existing externally to the discourse which describes and interprets our social reality, can aid in forcing us to not bypass as seemingly self-evident certain concepts or authoritative personae within the constitutional text. If our understanding of God, the Nation, and the People are not “natural” but rather the result of a contingent discursive formation, we can conceptualise them within our current constitutional arrangement with greater clarity and analytical rigour. Yes, the material world is out there; there is an island in the North Atlantic which has a short channel of water separating it from a neighbouring island. But it is through our descriptive capacity and the process of discursive formation of identity that we linguistically create and inherit “Ireland” and “Britain”, and create a narrative which interprets the relations the peoples who inhabit these islands have had

¹⁵ Most fulsomely articulated in his expounding of his theory of Law as Integrity in, Ronald Dworkin, *Law's Empire* (Hart Publishing 1998).

¹⁶ Richard Rorty, *Consequences of Pragmatism*, (Minneapolis University Press, 1982). Richard Rorty, *Contingency, Irony, and Solidarity*, (Cambridge University Press, 1989).

¹⁷ Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*, (Duke University Press, 1989). Stanley Fish, *Is There a Text in This Class: The Authority of Interpretive Communities*, (Harvard University Press, 1980).

¹⁸ Richard Posner, ‘The Problematics of Moral and Legal Theory’ [1997] 111 *Harvard Law Review* 1637 & Richard Posner, *The Problem of Jurisprudence*, (Harvard University Press, 1990).

¹⁹ Richard Rorty, *Consequences of Pragmatism*, (Minneapolis University Press, 1982) p. 208.

historically, and thereby justify a political reality which reflects this narrativization of historic events:

“Truth cannot be out there—cannot exist independently of the human mind—because sentences cannot so exist, or be out there. The world is out there, but descriptions of the world are not. Only descriptions of the world can be true or false. The world on its own—unaided by the describing activities of human beings—cannot.”²⁰

How then we reach a point where we can observe the common interpretation in judicial discourse that popular sovereignty is the objective meaning of Irish constitutionalism, is as a result of the intersubjectivity or solidarity of those interpreters in an epistemic community. This can also explain the process whereby God and natural law were collectively read out of the text of the Constitution by iterative interpretations of the judiciary. This interpretive discourse is taking place within a constitutionalised institutional paradigm wherein Irish nationalism is the pre-eminent principle, it has been re-narrated in different guises by the application of different interpretive frameworks.

1.3 The Nation and Nationalism

We can apply the understanding of the discursive formation of constitutional principles to one of the central pillars of Irish constitutionalism, the ‘Nation’. What constitutes the constitutionally enshrined idea of the nation, is the product of a politically realised conception of the legitimately claimable sovereign domain. This thesis posits an understanding of a nation which situates the typology of nationalisms—civic/liberal, ethno-racial, territorial/multicultural—as a dialogue within the institutionalised paradigm of nationalism, wherein a constitution serves as the articulation of, and discursive structure under which, the nation is realised. There is internal discursive contestation between seemingly contradictory axiomatic values of liberal democratic constitutionalism and national particularism.

In the intellectual context of post-Enlightenment, peoples have organised into states, which have typically used their constitutions both to organise their government and to commit their constitutional polities to some fundamental or universal moral principles.²¹ This presents a seemingly dichotomous aspect of normativity within the confines of the national

²⁰ Richard Rorty, *Contingency, Irony, and Solidarity*, (Cambridge University Press, 1989) p.5.

²¹ Mark Tushnet, ‘Review of The Universal and the Particular in Constitutional Law: An Israeli Case Study, by Pnina Lahav’ [2000] *Columbia Law Review* 100, no. 5, pp. 1327–46.

metanarrative as constitutionalised. There are those provisions which are normatively legitimated through the particularities of the national community, both civic and ethnocultural, and there are those which are articulated to have normative basis in universal/cosmopolitan appeals. Universal values are not understood to derive their normativity from any appeal to a specific ethno-religious or socio-cultural foundation; the inherent dignity of humanity *in toto* serves as a foundation upon which certain universal values—freedom, justice, equality etc—are justified.

Particularist properties in constitutions, formed around nodal points of identity, derive their normativity from the idiosyncratic ethno-religious or socio-cultural metanarrative of a given polity. These aspects of particularity, which contribute to the normative basis of the legitimising metanarrative of the constitutional regime, bind the aspirations of the constitutional project to a particular people with appeals to their shared ethno-symbolic characteristics and mutually cognisable historico-political lineage. These principles of particularity rely on inherently bounded foundations: the nation, territory, and collective identity,²² affording rights and privileges to a discernible subset of the human species grounded normatively *human qua citizen/national*. Universal principles, conversely, are normatively justified on a *human qua human* foundation.

The social and political realities of communities, nations, and states have not given credence to the inherent normativity of universal values grounded merely in rationalism. Rationalities are intrinsically bounded by their social, political, historical, and culturally contingent context, there is no ultimate foundation, or ground, and so foundations must be constructed because no such thing as society is possible in what would otherwise be a vacuum of meaning.²³ In order for universal values and general principles of constitutionalism to be actualised they need to be institutionalised, these institutions cannot rely on mere coercive power for the normativity of institutionalised legal order, as such an order grounded on said values, has an internal logic which delimits coercive power to that exercised within a derivative framework from universal values, i.e., human dignity is

²² These collective identities can be grounded in varying degrees in a distinct typology posited by Eisenstadt and Giesen and applied by Orgad: primordial, civic, and cultural. The primordial is grounded on birth and filiation. The civic is constructed on familiarity with communities' rules of conduct and social mores and can be learned and membership is open if one participates in political life, follows laws and adopts local mores. The cultural identity operates between the two others and relates to confirmation of a community's taboos, membership is a process of communication, education, and conversion. See, Liav Orgad, *The Cultural Defence of Nations* (Oxford University Press, 2015), p.10.

²³ Thomassen, L. 'The "populist" foundation of liberal democracy: Jan-Werner Müller, Chantal Mouffe, and post-foundationalism' [2022] *Philosophy & Social Criticism*, 48(7).

common to all; human dignity necessitates a legal system with certain characteristics (rule of law, equality, liberty, etc); the facility of the enforcement of law is intertwined with the legitimacy of a genesis of law that claims to be rational because it guarantees liberty.²⁴ It is in the recognition of the legitimacy of a national metanarrative by a sufficient number of the politically-enfranchised community of a polity that the legal system, or constitution, gains normativity and its theory of validity accepted.

In other words, the normativity of universalities within a delineated political community is necessarily reliant on the demarcation of a cognisable political community. Unless and until we have a universally recognised legal authority to institutionalise and enforce universal values, then the particularity of distinct and discrete realms of legal enforcement are necessary for universalities to be actualised through institutions with sovereign capacities. With this necessity for sovereign realms of legal enforcement, necessarily predicated on claims to validity on basis of real or theoretical consent, we reach the corollary necessity of national particularity. Is then the claim of universal properties stable if they rely on particularities intrinsically? Is the objective truth (the normativity of universals) truly objective if it requires subjective institutionalisation for validity of the normative claim? If the universal is indeed universal, in that its normativity should be derived by reason alone, then surely the particular or idiosyncratic is merely a deviant manifestation of a framework based on universal values.

If the normativity of the claim of universal values *has to* be normatively grounded in exclusive and iterative particularities, can they have normative justifications beyond those particular contexts? Conversely, if all that is universal is really just particular, how do we normatively evaluate conflicting particularities? Such is the conceptual chasm over which the constitution of a nation state traverses. National metanarratives, and the corresponding conceptual boundaries, frontiers, and borders which are inherent therein, provide an intermediary set of rights and obligations which mediate the permeability of structures wherein values are realised.

Situating this tension within the specifically constitutional context, we see textual articulations of values and aspirations which are couched in universalist norms, yet, as already stated they are necessarily bounded by the limitations of sovereign capacity and national locus of normativity. The institutions of state are definitionally contrary to

²⁴ Jürgen Habermas, *Between Facts and Norms*, (MIT Press, 1999) p.28.

universalism—they bolster the exclusivity of the national community, on which the legitimacy of the claim to sovereignty rests. For instance, citizenship is a formalised demarcation between the national in-group and out-group, while also being a procedural expression of the universal principle of democracy. One could make an argument that citizenship is a mere necessity of a democratic system, that it is a purely procedural arrangement, with a thin layer of normative justification. However, what is more often the case is that a filial basis of membership of a pre-political community—or adopting the particularities of that political community as proxy for commitment to the character or identity of the pre-political community—is utilised as normative justification of civic membership and corresponding rights.

Citizenship is acquired by right of descent from a discrete community which attaches you by bonds of ethno-symbolism, which are deeper than the thin normativity of electoral integrity; or at minimum, the individual commits to a process of socialisation to the particularities of the national community. As Martha Nussbaum avers to, even in the American context, which has served as the paradigmatic liberal-democratic civic conception of a national community, eschewing an ethno-symbolic metanarrative of constitutional legitimacy:

“Americans have frequently supported the principle of *Bande Mataram* (Hail Motherland), giving the fact of being American a special salience in moral and political deliberation, and pride in a specifically American identity and a specifically American citizenship a special power among the motivations to political action.”²⁵

In service of legitimising a constitutional regime which expresses the norms and values of this particular pre-constitutional community, or of the assumed values of the creedal political community, particular properties of identity are imbedded in the text which constitutionalise a subset of specific index features of communal identity. These particularist properties can run contrary to the universalist principles,²⁶ while simultaneously serving as a metanarratively necessary pre-requisite by which these universals are legitimised. You can have a constitutional polity which enshrines the

²⁵ Martha Nussbaum, ‘Patriotism and Cosmopolitanism’, *Boston Review*, (Boston, 01/10/1994).

²⁶ An interesting aspect in this regard are the particularities which conceptualise themselves as universals. For instance, the difference between the universalist claims of the Roman Catholic Church, which is manifested as a particularity in constitutional regimes, Ireland, Poland, and Malta, with that of ethno-religious particularities such as Greek Orthodoxy or Judaism within the Cypriot Constitution and the unfolding Israeli treatment of what it means to be a Jewish state.

commitment to justice and equality, but how this will be interpreted and given meaning will be through a particular reflexive discursive metanarrativity. For instance, let us say a polity wherein Roman Catholicism is a constituent characteristic of the national metanarrative of sovereignty, constitutionalised by textually enshrining certain characteristics expressive of that particular moral worldview, which has bounded conceptualisations of permissible behaviour. This will have outcomes in discursive formation of the “meaning” of universal values which will differ from a polity where liberty and equality are similarly enshrined, but where the national metanarrative has a different foundation of normativity.

Therefore, depending on the narrative elements of a polity’s national metanarrativity, the universal value of equality can have outcomes for individuals of the same sex accessing the institution of marriage via a constitutional guarantee of equality.²⁷ Or the right of the unborn to life can be co-equal with that of the individual carrying the pregnancy.²⁸ The manner in which universals are realised is inherently discursively formed, and particularities of the socio-cultural context, as mediated through the constitutional paradigm, will provide the structure in which this is discursively contested.

Therefore, as has been recognised by thinkers as diverse as Martha Nussbaum²⁹ and Roger Scruton,³⁰ national sovereignty, which either tacitly or explicitly relies on a claim to particularity, is a morally normative basis for political association, a locus of authority which is inherently disrupted by the integration of a partially post-national legal order with established supremacy.

²⁷ *Obergefell v Hodges*, 576 U.S. 644 (2015).

²⁸ Old Article 40. 3. 3. Bunreacht na hÉireann, 1937. This view of equality between unborn and mother was upheld in *X case* [1992] 1 IR 1.

²⁹ Nussbaum reaches this concession to national context through a capability and functionalist manner, wherein the universal right to self-determination of peoples is morally desirable as they possess the practical capacity to vindicate rights as they are accountable by proximity to accountability of civic rights, “International law has some useful roles to play, and might be further developed. But one should always beware of leaching away national sovereignty, particularly in favor of an international realm that is not decently accountable to people in each nation through their own political choices and self-given laws”. Nussbaum, *The Cosmopolitan Tradition: A Noble but Flawed Ideal*, (The Belknap Press of Harvard University Press, 2019), p.218.

³⁰ Scruton uses a similar form of argument to suggest that Nationality as a form of social membership from which to develop a political apparatus is most practical for vindicating democratic ideal, “Nationality is not the only kind of social membership, nor is it an exclusive tie. However, it is the only form of membership that has so far shown itself able to sustain a democratic process and a liberal rule of law.” However, instead of the singularly vehicular model of Nussbaum, or those of the Constitutional Patriotism school Habermas and Werner-Müller, Scruton places moral dimension to the genuine salience to national loyalty, “National loyalty is founded in the love of place, of the customs and traditions that have been inscribed in the landscape and of the desire to protect these good things through a common law and a common loyalty”, Roger Scruton, *England and the Need for Nations*, (Civitas: Institute for the Study of Civil Society, 2004).10-16.

The interrelated conception of the nation and nationalism within this thesis are constructivist, meaning that nations are socially realised and non-primordial. They are imagined communities³¹ with invented traditions³² wherein nationalism as a political principle renders normative the prescription that the nation should be congruent with the political,³³ as institutionalised with a constitution. The manner in which these imagined communities are constitutionalised relies on a coherent narrativization of the process by which this moment is legitimated. In this, the language of ethno-symbolism,³⁴ perennialism, and even primordialism may be invoked in the writing of the constitutionally-authorised “biography of nations”.³⁵ These narrative forms each contain contradictions and the dual potential to construct emancipatory purposive communities of action, and concomitantly provide narrative resources liable to exploitation for negative ends: the diminution of rights of communities or individuals who, by virtue of their identities or place in history, reveal the disjunction between the metanarrative and the reality of the constitutional nation state.

How constitutional actors have understood what is meant by “Ireland” relates to how the claim to territory and people has been justified in a historical narrative. This narrative establishes an aspirational claim which is beyond what is justiciable in positive law. Where the boundary between a claim which is founded in a belief in the natural universal right, *of all peoples*, to self-determination is confronted by a counternarrative held by part of what is viewed as a natural community of this “people” which does not recognise the legitimacy thereof, the consent required by liberal democratic values is withheld. As such, the foundation of a universal natural right must seemingly be subsumed into the particular claim which is being forwarded. The manner in which Irishness as a constitutionalised identity in the Republic relied heavily for normativity on anti-colonial nationalism wherein the majority community—Gaelic Roman Catholics—were victims of imperial rule enacted by the minority Anglo Protestants, has developed in such a manner as to subsume that community within the aegis of the national narrative. However, when “Irishness” is viewed as an all-island identity, it must not be ecumenical in merely theological terms, but also in

³¹ Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism*, (Verso, 2016).

³² Eric Hobsbawm, *The Invention of Tradition*, (Cambridge University Press, 1983).

³³ Ernest Gellner, *Nations and Nationalism*, (Cornell university Press, 1983).

³⁴ Anthony D. Smith, *Ethno-Symbolism and Nationalism: A Cultural Approach*, (Routledge, 2009).

³⁵ Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism*, (Verso, 2016). p. 204-206.

terms of political nationalism, wherein the cogency of the metanarrative reaches a point of instability.³⁶

The national claim becomes hegemonic when it is recognised as authoritative by a sufficient proportion of those who exercise political agency; that this claim is constitutionally enshrined establishes and institutionalises a paradigm in which political and judicial discourses as to the meaning and consequences of said claim as it relates to different contexts: elections, international relations, citizen rights, supranational obligations in international law, etc., are carried out. Using the theorisation of Hegemony as developed by Ernesto Laclau and Chantal Mouffe, in which political identity is discursively formed, or stabilised, through political contestation, wherein another identity is necessarily “othered” allows us to examine the process of identity formation and its contingency, thereby giving us strategies to undermine, if need be, the exclusivity of certain hegemonic identities. Normative political identities become hegemonic when they subsume other identities into their own, establishing the paradigm for the continued discourse.³⁷ Irish nationality, with its constituent conceptual nodal points—language, territory, history, and religion—becomes hegemonic through the constitutional institutional structure under which the discursive process of identity formation occurs.

1.4 Post-Colonialism

One of the aspects of the political realisation of the modern Irish constitutional state was an appeal to a political national narrative based in anti-colonial separatism presented as being achieved by physical force. The characteristics of this narrative, and the narratological rationality which emerges therefrom, have informed the development of Irish constitutionalism. The insights of post-colonial analysis are informative in drawing out the general process by which the colonised, that is the subaltern, move from the object of discursive formation by the coloniser to being their own subject, in our context through the process of constitutional articulation of their self-image as a subject.³⁸

³⁶ In this respect EU with its alternative post-national common citizenship can provide alternative structures which disrupt the centrality of nationality as a normative base for political institutions.

³⁷ The Gramscian concept of cultural hegemony as developed in his *Prison Notebooks* is situated in a post-structuralist discursive framework by the authors in, Ernesto Laclau & Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics*, (Verso, 1985).

³⁸ Patrick Hanafin, *Constituting Identity: Political identity formation and the Constitution in post-independence Ireland*, (Dartmouth Publishing Company Ltd and Ashgate Publishing Ltd, 2001). See, Chapter 2., ‘Origi(N)ation: Problems of Constitutional Subjectivity’.

In articulating a claim to national independence, a particular historical narrative—of a distinct people who had never consented to their political association with an imperial power—had been relied upon. This necessitated the construction of a distinct people through appeals to communal traits which had been variously used as sites of colonial suppression. These traits broadly fall under an ethnic umbrella: religion, language, and custom. By inverting these traits as signifiers of authenticity or prestige, the political project of national independence was developing binary constraints in how meaning could be afforded to the “natural” foundations of people and nationality.

The constitutional domain would eventually be the site in which this inversion of subaltern traits would be achieved. This has rendered the constitutional subject within Ireland a subject of hybridity, where once it was articulated using an identity of political essentialism. The conception of hybridity in this regard is utilising the work of Homi Bhaba, who contributed to postcolonial theory an understanding of the dynamic relationship between coloniser and colonized, and the generative significance of “third space”.³⁹ Bhaba further argues that the nation should be understood as a narrativized cultural structure. By engaging with it as a non-holistic, conceptually ambivalent, and temporally contingent discourse with its own language and rhetoric, one can thereby engage with the nation so as to alter its conceptual basis.⁴⁰ The binaries of difference which serve to develop a national consciousness, which inevitably foster internal and external ‘Others’, can then be subverted so as to make a more inclusive discourse of national identity.

I contend that the constitutional settlement in Ireland at present—which is post-colonial, post-Catholic, and possibly post-nationalist⁴¹—is such a site of hybridity. It is an

³⁹ Homi Bhaba, *The Location of Culture*, (Routledge, 2004), wherein through the process of mimicry a colonial subject creates an avenue for developing agency within the colonial discourse as they are subverting the rigid boundaries of difference with the colonial discursive regime.

⁴⁰ Homi Bhaba (eds), *Nation and Narration*, (Routledge, 1990).

⁴¹ It is post-nationalist, as opposed to post-national. Tom Garvin writes of the development in Irish nationalism from the monism of the ‘Priest and Patriot’ symbiotic nationalism of the early years of the Irish state, to at the time of writing in the early 2000’s an Irishness which was self-consciously “peoples of the islands, and we are European peoples who are learning to celebrate our diversity and also our underlying deep cultural kinship with one another. Furthermore, we have the advantage also of being peoples of the Anglo-American world and partakers in, and contributors toward, the American experiment.” So, this may seem like a post-nationalist conception of Irishness, however, Garvin in the same piece writes that “Nationalism comes in many forms, often disguised as liberalism, conservatism, religious enthusiasm or other political systems of ideas.” So, we can analyse Ireland’s transition from Gaelic Catholic nationalism to a modern pluralist liberal democratic member state of the EU with economic and cultural ties with North America as the triumph of liberal toleration, or we can problematise it as re-negotiation of the points of difference with the perennial external other, the UK during and after the post-Brexit era. Tom Garvin, ‘The fading of traditional nationalism in the Republic of Ireland’, in John Coakley (eds) *Changing Shades of Orange and Green: Redefining the Union and Nation in Contemporary Ireland*, (UCD Press, 2002), p. 123-131.

authoritative site in which identity is encapsulated by the articulation, subversion, and re-narration of all the traversable and entrenched social, cultural, political, and legal boundaries of Irishness.⁴² Where it may once have been that political Irishness⁴³ was constructed as a negation of Britishness, the course of constitutional development between Britain and Ireland can be characterised as a process of subverting these rigid binaries.⁴⁴

Post-colonial critical analysis as developed by Edward Said⁴⁵ and Homi Bhaba was applied to the specifically Irish context by Clare Carroll,⁴⁶ Declan Kiberd,⁴⁷ and Patrick Hanafin⁴⁸ amongst others. These analytical approaches are employed to place the Irish Constitution within a broader canon of cultural texts which attempt to write Irish subjectivity, by in some manner objectifying *Irishness*. The shift throughout the constitutional text from the subjective “we” to the descriptive “its”, or the writing *as* Ireland, and the description of Ireland, and its people as objects of description, are all devices through which we can analyse what is meant constitutionally by “Ireland” and the “people of Éire”.

1.5 Narratology

Narratology, simply put, is the theoretical study of narrative.⁴⁹ Narrative touches every aspect of human life, all our experiences are mediated through a narrative structure so that we have the cognitive means of understanding them: life is understood backwards and lived forwards,⁵⁰ yet in the living we necessarily rely on our capacity to comprehend the experiences we encounter. Therefore, narrativity is all-encompassing, as such, it is inherent in the nature of law. As David Kenny succinctly puts it:

⁴² “What is theoretically innovative, and politically crucial, is the need to think beyond narratives of originary and initial subjectivities and to focus on those moments or processes that are produced in the articulation of cultural differences. These ‘in-between’ spaces provide the terrain for elaborating strategies of selfhood – singular or communal – that initiate new sings of identity, and innovative sites of collaboration, and contestation, in the act of defining the idea of society itself”. Bhaba, *Location*, p. 2

⁴³ The Irishness as articulated and used as justification of physical force separatism in the late 19th and early 20th century.

⁴⁴ This may be a consequence of the commitments inherent in the cohort of nationalism who would eventually partially deliver on cause of national independence subscribing to republicanism, or perhaps a result of the principles of constitutionalism, or indeed Europeanising the “Irish Problem”.

⁴⁵ Edward Said, *Culture and Imperialism*, (Vintage Books, 1994). Edward Said, *Orientalism*, (Vintage Books, 1978).

⁴⁶ Clare Carrol & Patricia King (eds), *Ireland and Postcolonial Theory*, (Cork University Press, 2003).

⁴⁷ Declan Kiberd, *Inventing Ireland*, (Vintage Books, 1996).

⁴⁸ Patrick Hanafin, *Constituting Identity: Political identity formation and the Constitution in post-independence Ireland*, (Dartmouth Publishing Company Ltd and Ashgate Publishing Ltd, 2001).

⁴⁹ Monika Fludernik, *An Introduction to Narratology*, (Patricia Häusler-Greenfield and Monika Fludernik (trans), Routledge, 2009), ch.1 ‘Narrative and narrating’.

⁵⁰ Søren Kierkegaard, *Papers and Journals: A Selection*. (Penguin Books, 1996), p.161.

“Lawyers tell stories. Judges tell stories. The law itself—its rules, precedents, statutes—can only be understood in the context of the stories and history that shaped them and, in turn, help us understand and narrativize the experiences of life that they shape.”⁵¹

The Constitution can be analysed with its inherent narrativity to the fore: it has a narrator, it presents its narrative in a structured manner, and it has a story which communicates a metaphysical and epistemological world view as to Ireland and the Irish people. It is the position of this thesis that a constitution functions in the manner of a quasi-linear narrative of justification. If a narrative is to provide a full account of constitutional legitimacy—or to provide a plausible account of legal validity in jurisprudential positivism—it must have a beginning, a middle, and an end.⁵² In this manner the metanarrative underpinning the narrative of Irish constitutionalism is that of nationalism. The narrative of the Constitution posits a beginning in a history of colonial suppression and a *heroic and unrelenting struggle* to national independence; a middle, in the current partial deliverance on national independence; and an end, in which *the unity of our country restored*. The events of Ireland’s history, present conditions, and aspirations for the future are formed around an observable narrative structure. Narratology provides the analytical vocabulary to distinguish between events in the world and the ways in which they are presented in narratives.⁵³

The Constitution as a text develops mutually sustaining characterisations of the author and reader; at times articulating the story of what is meant by a certain semantic and syntactic sequence in a univocal first-person plural, “We, the people of Éire”, thereby constructing legitimacy of the provision by the identity of authorship, which gives pre-established legitimacy to subsequent articulation of the procedural functions of the third person “the people”.

I argue throughout this thesis that the national claim—or the story of Ireland—as enshrined in the constitutional metanarrative, is recursively retold in political, judicial, and academic discourses. These retellings have gradually subverted the character of the constitutional reliance on an ethnic conception of Irish Gaelic Catholicity. I characterise the story as quasi-

⁵¹ David Kenny, *Pragmatism, Law, and Literature*, (Routledge, 2025), p.177.

⁵² Thomas Twining (trans), *The Poetics of Aristotle*, (William and Curry Company, 1851), p.15.

⁵³ Peter Brooks, ‘Narrative Transactions: Does the Law Need a Narratology?’ [2006] *Yale Journal of Law & the Humanities*, Vol 18:1.

linear to denote the seeming linearity of internal structure to the text, while acknowledging that this linearity is disrupted by the process of amendment, which can serve to disrupt the coherence of the narrative as originally written. If we understand, as we do in Irish constitutionalism, the people to be the author of their own legal order, we may say that they are unreliable in the narration of their own story. They are a distinctively Catholic people, who have gradually read God out of the text, despite his ghostly shade remaining within the poetic aspects of the Constitution. Additionally, they are a sovereign Gaelic people, who have opened the civic conception of the polity to a British nationality once vehemently denied.

The use of a narratological analysis of the Constitution serves to critique certain approaches to constitutional analysis in two ways by providing a sustainable account of the indeterminacy of developing understandings of the nature of constitutional foundations. What is meant by metanarrative in this work is the political and legal claim on which the validity of the positivist institutions of the polity are iteratively legitimised. Firstly, if our understanding of validity is conceptualised merely through jurisprudential positivism, we may draw equivalence⁵⁴—as Gerard Hogan is wont to do—with Kelsen’s *Grundnorm*.⁵⁵ However, these jurisprudentially positivist concept denotes a strong reliance on principled certainty as to ultimate source of legal validity:⁵⁶ if the rule is no longer—or never was—accepted among institutional officials or the rule/norm changes, this eventuates a revolution. Yet, within Irish constitutional jurisprudence we can see different—occasionally diametrically opposed—conceptions of the ultimate source of constitutional validity, while maintaining a claim to ontological stability of the constitutional order.

Aileen Kavanagh analysed with a great degree of subtlety the potentially fallacious dichotomy within Irish constitutional jurisprudence between positivism and natural law, detailing the manner in which the jurisprudence developed from an initial rejection of

⁵⁴ Further analysis of legal validity may be aided by engaging with the Rule of Recognition in, H.L.A. Hart, *The Concept of Law*, (Oxford University Press, 2012) ch.6 “*The Foundations of a Legal System*”. Indeed, Gerard Hogan has drawn broad equivalences between the conceptualisations of legal validity as espoused by the “three great legal positivists – Holmes, Hart and Kelsen...” in *West of the Landstrasse: Searching for the Grundnormen in UK and Irish Constitutional Law*. Delivered by Mr. Justice Gerard Hogan at the Society of Legal Scholars (SLS) Annual Hale Lecture on 24th October 2023.

⁵⁵ Hans Kelsen, *Pure Theory of Laws*, (The Law Book Exchange, 2005), The historically first Norm or the transcendental logical presupposition.

⁵⁶ For instance, if we take Hart’s explanation of the Rule of Recognition as a rule which “provides criteria for the assessment of the validity of other rules; but it is also unlike them in that there is no rule providing criteria for the assessment of its own legal validity” then our legal system cannot plausibly invoke natural law and permit the positivistic abrogation of inalienable rights. Hart, *The Concept of Law*, (Oxford University Press, 2012), p.107.

British positivist tradition for a conception of legal validity which appealed to a transcendent natural law source, which eventually developed to a supervening conception of justice as individual dignity and personhood.⁵⁷ This jurisprudential development demonstrates that there was uncertainty as to ultimate source of legal validity within the Irish constitutional order, which descriptive accounts relying on positivism or natural law cannot holistically capture.

I argue, by using the concept of metanarrative,⁵⁸ we better capture the role of the ongoing discursive processes of constitutional development. It conceptualises constitutional normativity as a story, which can be interpreted and altered so as to better realise a “correct” reading given the social context in which it is being read. This more accurately reflects the validating function of a pre-eminent concept, while allowing for uncertainty and alteration to its exact character through time: a discursive structure of relatively stable nodal points (but still capable of change over time) surrounded by a less stable layer of narrativity. In this sense it is not that there is one objective “right answer” in the manner posited by Dworkin through his theory of interpretivism, there are always multiple “right answers”, such that a judge's proper aim in difficult cases should be delivering a reasonable result rather than a demonstrably right one.⁵⁹

Secondly, a narratological conceptualisation of constitutionalism, and its underpinning national principle, serves to develop the insights from law and literature, and indeed from law as performance. In constitutionalism we inhabit a normative universe in which we constantly create and maintain a world of what is constitutional and what is constitutionally invalid. The values and principles of constitutionalism, the formal institutions of the law, and the context of the social order are important to that world; they are, however, but a small part of the normative universe. No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.⁶⁰

A narratological conception of constitutionalism erodes the demarcation between the text and its performance in judicial interpretation, by focusing on how both encapsulate and affect the narrative arc. We can view this trajectory through to gradual shift in the works of

⁵⁷ Aileen Kavanagh, ‘The Irish Constitution at 75 Years: Natural Law, Christian Values, and the Ideal of Justice’ [2012] *Irish Jurist*, New Series, Vol. 48.

⁵⁸ A concept which Ran Hirschl has used throughout his writings without ever fully articulating a theoretically robust account of thereof.

⁵⁹ Richard Posner, *The Problem of Jurisprudence*, (Harvard University Press, 1990), p.26.

⁶⁰ Robert M. Cover, ‘*Nomos and Narrative*’ [1983] *Harvard Law Review*, Vol. 97:4.

Balkin⁶¹ and Levinson.⁶² Their initial insights into law as literature gradually shifting to an understanding of law as performance, emphasising not merely the text on the page but rather the social function and context of those who actualise the law as a social phenomenon. Instead of attempting to then follow this analogy and develop a dramaturgical theory of law,⁶³ I suggest we should emphasis what is central to both literature and performance: narrative. The primary object of interpretation—such as the constitutional text in a judicial setting—is always a combination of narrative(s) of facts and the relevant legal proposition. The manner a narrative is constructed matters, as it will steer the reader towards a certain interpretation.⁶⁴

The analytical tools of literary theory can make a substantive contribution to better analysing the process of constitutional development. Constitutional development here shifts the focus from merely assessing constitutional change by demonstrating the importance of constitutional stasis, and the means by which both are actualised and discursively justified.

Throughout this work I employ terminology in describing the Irish constitution as it relates to itself internally; previous texts in Irish nationalist canon or pre-constitutional ephemera; non-formally binding texts in the genre constitutionelle;⁶⁵ and texts with formal effect in Irish constitutionalism,⁶⁶ which are prevalent in literary criticism. In analysing how the Constitution operates in relation to itself as a text we must necessarily acknowledge that it cannot be holistically understood as a free-standing text—it is inherently relational to other legal and cultural texts. In analysing how the Constitution relates to other texts, a model of

⁶¹ J.M. Balkin, 'Deconstructive Practices and Legal Theory' [1987] 96 *Yale L.J.* 743.

⁶² Sanford Levinson, 'Law as Literature' [1982] 60 *Texas Law Review* 373. Further see, Balkin, J M, and Sanford Levinson, 'Law as Performance', in Michael Freeman, and Andrew D E Lewis (eds), *Law and Literature: Current Legal Issues 1999* (Oxford, 1999; online edn, Oxford Academic, 31 Oct. 2023).

⁶³ Although there is merit in doing so as the process of legal interpretation in a public role, not carried out in private as one may do with a poem or novel. See, Jessica Rizzo, 'Towards a Dramaturgical Theory of Constitutional Interpretation' [2022] *Seattle University Law Review*, Vol. 45:1127.

⁶⁴ Jeanne Gaaker, *Judging from Experience: Law, Praxis, Humanities*, (Edinburgh University Press, 2019), see, 'A Pragmatic Approach'.

⁶⁵ Throughout this work the idea of pre-constitutional ephemera is used to categorise a broad range of texts which are significant in the development of the nodal points within the constitutional discourse. This can include the political writings of those who played a significant part in delivering the constitutional moment. It also includes more formally legal texts which grounded the legitimacy of the process of constitutionalising moment.

⁶⁶ These are the texts which have tangible interpretive and binding influence on the constitutional text. Within the Irish context the EU Treaties, the Good Friday Agreement are essential texts for giving holistic meaning to certain provisions in the 1937 text. Similarly for the 1922 text the Anglo-Irish Treaty and the Government of Ireland Act would be similarly texts which give holistic meaning to the Irish text.

variously prefixed forms of textuality—para-, meta-, sub-, trans-, archi-, and extra-textuality—are utilised.⁶⁷

These are employed to denote the internal and external relationality of the Irish Constitution as a text. By this I mean that in order to realise a meaning for a textual provision, the utilisation of an additional text can be necessary. This can be in the form of appeals to, variously, Catholic social teaching; constitutional jurisprudence of another relevant jurisdiction; or obligations of supranational legal orders. In this manner the Irish Constitution is understood as a palimpsest: a palimpsest being a text which consciously relates to an earlier or parallel texts and assumes cognizance of these earlier or parallel texts on behalf of the reader.⁶⁸ Therefore, there are levels of narrativity within the text which readers can engage with on different levels depending on their familiarity with the canon, in our case Irish national constitutional texts and jurisprudence. One can read James Joyce's *Ulysses*⁶⁹ as a free-standing text and extricate meaning from it. However, if one is familiar with Irish historical context, the geography of Dublin, and Homer's *Odyssey*, they will experience deeper levels of interpretive meaning and narrative coherence. Much of the analytical schema of textual analysis utilised herein, comes from the work of Gérard Genette, as his methodology provides one of the most coherent and structured models to emerge from the postmodernist critical theorists. As such, being most beneficially applicable to analysis of a structured legal text. If we accept that there is some accuracy in the claim that all judicial actors in the broadly defined common law constitutional tradition, at least at some level, “are all textualists now”⁷⁰ then we need to take seriously the methodology of textual analysis.⁷¹

1.6 History

Historical analysis plays a significant role throughout this thesis; this in part is necessitated by the inherent temporality of analysing the development of a certain aspect of a text through time. It is further justified in the context of this analysis in that the identity of the

⁶⁷ Gérard Genette, *Palimpsests: Literature in the second degree*, (University of Nebraska Press, 1997).

⁶⁸ Gérard Genette, *Palimpsests: Literature in the second degree*, (University of Nebraska Press, 1997).

⁶⁹ Joyce, J., *Ulysses*, (3rd edn, Alma Books Ltd, 2017).

⁷⁰ As quipped in a Dialogue with Justice Elena Kagan, The Antonin Scalia Lecture Series: on the Reading of Statutes, Harvard Law School. YouTube, at 08:29 (Nov. 25, 2015), <https://youtu.be/dpEtszFT0Tg>.

⁷¹ Textualism within Irish constitutional interpretation is not a dogmatic interpretive canon, but it has been a trend to anchor clearly one's analysis in the text, a instance of a stipulation of the text and objective meaning of words on the page in a hierarchy of approaches can be seen in the articulation of the *Bacik* Principles in, *Bacik v An Taoiseach* [2020] IEHC 313, at para 80.

constitutional subject, and how this relates to constitutional identity jurisprudence, is centred in a historical narrative. The sovereignty of the Irish people, as it is justified in the 1937 text, is legitimated in a metanarrative of historic colonisation and deliverance on an unceasing project of national liberation. The claim to national independence is justified by an appeal to a natural right of distinct peoples to self-determination. The claim is doubly couched in non-positivistic naturalism in that specifically deistic invocations are appealed to and embedded throughout the text, and rights of both individuals and the nation are prescribed as natural inalienable rights.

However, as has been already established, for analytical purposes, this thesis understands all constitutional concepts as iterative and discursively realised. So, when a constitutional actor is appealing to the essential or fundamental character of a text, which in part refers to “natural” underarticulated concepts, it is necessary to assess the process by which an interpretation thereof has been reached. In other words, to carry out a genealogical analysis of the claim to assess its narratological consistency or inconstancy.

In carrying out historical analysis it is necessary to at least have a partially formed philosophy of historical enquiry. In this regard, reflective of development in historiographic methodologies, this work attempts present analysis which is cognisant of underlying theoretical question of “what is history?”. Since E.H. Carr identified the distinction between events in the past and historical fact, and in establishing that it is the historian who through their interpretive elevation of certain events in the past renders a past event as “history”, the subjectivity of historical interpretation has been central.⁷² Therefore, the understanding herein is that history is epistemically intersubjective, it is a narrative discourse: the comingling of knowable events and interpretations in a paradigmatic whole. In this sense there is no singular Irish constitutional history, but rather a constellation of Irish constitutional histories.

For instance, the 1996 Report of the Constitutional Review Group—which presented an analysis of the 1937 text within its contemporaneous context, making normative evaluations as to the propriety of continuity or change—was fundamentally informed by the context of mid-90’s liberal democratic optimism. It presented a view of the history of the text in which the ethno-symbolic nationalism of the 1930’s, with the overtly Catholic nationalist epistemology expressed therein, was demonstrative that the text was in need of

⁷² E.H. Carr, *What is History?* (Penguin, 1987).

liberalisation. It was written in a context of a developing Peace Process in Northern Ireland and coming in the wake of the Maastricht Treaty in 1992 and greater EU enlargement. The temporality and situatedness of this analysis was in a time when Ireland was—as a result of Celtic tiger economic prosperity⁷³ and globalisation—being redefined, re-imagined and reinvented. The urban, professional, middle-class intelligentsia embodied an image of a country which was becoming a postmodern society, before becoming a “modern” nation, disassociating themselves from narrow nationalism of earlier decades and embracing Europe as a locus of politics. This entailed a heightened concern to present an image of Ireland for a European and global audience as a progressive country with an open economy, ready for investment.⁷⁴ This social context was reflected in the revisionist critique of nationalism, which was developing a narrative reinterpretation of Irish history.

How such an analysis of the Constitution may be received now, in the context the re-emergence of nationalism as a salient political principle and the populist⁷⁵ turn in Western liberal democracies, may be substantially different. The analysis presented the history of Irish constitutionalism as something it was detached from, able to render objective assessment thereon, with an objectivity informed by its enlightened historical position.

Indeed, we can see from political events of the past two decades⁷⁶ that in contrast to the optimistic consensus of the post-cold war era—most commonly associated with Francis Fukuyama’s conclusions in *The End of History and the Last Man*⁷⁷—that the pluralist liberal democratic system was still internally dependent on the national principle. Which as a principle, relies to some degree on a *nationalist* foundation, which is increasingly reasserting itself in Western political discourse. Far from reaching a consensus that liberal

⁷³ Importantly, this prosperity was experienced unevenly, and contrary to common conceptions and popular retellings of boomtimes for all, the Celtic tiger exacerbated as opposed solved the problems of poverty and inequality in Ireland. As argued by Vittorio Bufacchi, ‘Ireland After the Celtic Tiger: A Study in Social Justice’, in Clara Fischer and Áine Mahon (eds) *Philosophical Perspectives on Contemporary Ireland*, (Routledge, 2022). Just as the economic benefits of this period were experienced unevenly, so too would be the concomitant experience of disassociation from the core identification with older more traditional conceptions of nationalism.

⁷⁴ Jim Mac Laughlin, ‘Ireland in the Global Economy: An End to a Distinct Nation?’, in Ethel Crowley and Jim Mac Laughlin (eds), *Under the Belly of the Tiger: Class, Race, Identity and Culture in the Global Ireland*, (Irish Reporter Publications, 1997).

⁷⁵ Chantal Mouffe, *For a Left Populism*, (Verso Books, 2018).

⁷⁶ At time of writing, in EU Member States, there are seven countries with explicitly nationalist governments (Croatia, Czechia, Finland, Hungary, Italy, The Netherlands, and Slovakia). Within the EU Parliament, the number of MEPs within political groups which are explicitly nationalist or with national sovereignty as primary motivating principle (Europe of Sovereign Nations Group, European Conservative and Reformist Group, and Patriots for Europe Group) number 187 out of 720 seats. <https://www.europarl.europa.eu/meps/en/home>.

⁷⁷ (Free Press, 1992).

democracy had conquered its rival ideologies as it was free from grave defects and irrationalities, the *rationality* of liberal democracy was standing on the shoulders of *irrational* nationalism. Liberal proceduralism, wherein national identity can be normatively incidental—as was evident in the suggested alterations proposed in the 1996 Report—perhaps opens up rhetorical space for the undermining of liberal democratic values by alienating them from the ancillary values which afford them normativity.

These histories are informed consciously or unconsciously by political ideology and an epistemological point of view, thus rendering verifiable falsification of an interpretation a rather difficult task. This is not to say that all historical interpretation is equally correct; I am assuming historical analysis done in good faith, utilising the recognised conventions and methodologies of the field. In this way we can be sceptical of the interpretations of historians with poor practices. For instance, we can be critical of Peter Hart's assessment of the Kilmichael Ambush in *The IRA and its Enemies*⁷⁸ as it appears that there were evidential issues from which he derived his interpretation of events. However, this does not equate with a general critique of Irish historical revisionism based in sound evidential practices.

Unlike histories which focus on a presenting comprehensive history of drafting process of either the 1922⁷⁹ or 1937 texts⁸⁰—which either present a clear chronology of drafts, to assess the relative influences of different actors, or to analyse the political constraints evident in the drafting process—the analysis herein is consciously thematic. It is not seeking to present a holistic totalising treatment of the text, but rather to analyse the unfurling discursive process of identity within the text and interpretations thereof.

1.7 Discourse

By focusing in this research on the discursive formation of identity within Irish constitutionalism, certain central interpretive actors and their discursive processes are analysed. There are three principal actors engaged in the formation of Irish identitarian constitutional discourse: political, judicial, and academic. These mutually sustaining discourses in the overarching discursive structure of Irish national metanarrativity, as

⁷⁸ (Oxford University Press, 1998).

⁷⁹ Cahillane, L., *Drafting the Irish Free State Constitution*, (Manchester University Press, 2016).

⁸⁰ Coffey, D.K., *Drafting the Irish Constitution, 1935-1937: Transnational Influences in Interwar Europe*, (Palgrave Macmillan, 2018). Hogan, G., *The Origins of the Irish Constitution 1928-1941*, (Royal Irish Academy, 2012). Keogh, D., and McCarthy, A., *The Making of the Irish Constitution 1937: Bunreacht na hÉireann*, (Mercier Press, 2007).

constitutionally enshrined, form around nodal points on which institutional actors contest. These include Irish nationality, Irish statehood, and popular sovereignty. The meaning of these nodal points is iteratively constructed in these different domains, each with a different social function imbedded in their respective professional cultures.⁸¹

The political actors of constitutional discourse in Ireland both pre-date the actual constitutionalising of Irish independence and carry out their discourse within the parliamentary institutional constraints which were brought about by the constitutionalising generation. For this reason, the pre-constitutional ephemera of Irish nationalist political actors is considered. The narratological lineage of the constitutional metanarrative consciously relates to the nationalist canon from which it emerged. We can see the development of conceptions of Irish nationality, statehood, and sovereignty which were formulated in a pre-institutional context. Therefore, we must look to organisations and actors which existed and operated primarily outside the institutional architecture of the state. In this regard we run the gamut from secret oath bound paramilitary societies; formal cultural organisations; journalism; and literary movements. However, once this discourse traverses the institutional boundary, we must examine it within the constraints of the new social functions of those political agents, from revolutionaries to administrators. The discourse is then structured within the legislative, parliamentary, electoral mechanism of democratic politics. The function of this discourse is not authoritative in the formal legal sense, but it provides significant insight into the political interpretations of the content of nodal points within the discourse which leads to either legislative or constitutional texts.

The judicial discursive formation of identity functions in a much more rigorously institutional setting: judges delivering judgements on case specific issues. They are in this sense offering forth an authoritative interpretation or their reading of a text(s). This process is inherently discursive as we have the metanarrative being articulated through what is required by a particular factual circumstance which is being contested within a judicial setting. Furthermore, as we have multiple judgements delivered within the Irish legal system we have the internal judicial discourse as between judgments. This discourse is institutionally constrained by the function of the judiciary within the structure of the state.

⁸¹ These nodal points are internal and hegemonic within the discursive structure. They are the partially fixed signifiers which permit the development of a web of meaning making concepts by rendering the social practices which emerge therefrom the appearance of “naturalness” as opposed to being emergent from the process of the political hegemony. Laclau and Mouffe, from *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (Verso, 1985).

They are bound by principles of law in general, common law specifically, Irish constitutional law particularly,⁸² and by concerns for institutional legitimacy. Even so, both in judicial and extra-judicial writings, we can see much of the normative biases within the judicial discourse through the performativity of different judges. Within the language, and indeed language in the general sense as being inherently performative,⁸³ of constitutional jurisprudence, we can extrapolate divergent conceptions of the fundamental metanarrative of Irish nationality *qua* popular sovereignty within Irish constitutionalism.

We then have academic constitutional discourse on identitarian nodal points, this encompasses commentary and critique of both the political and judicial discourses and provides interpretations thereof within the accepted professional norms and conventions of the academe. These academic discourses traverse from the descriptive to the analytically prescriptive. Furthermore, the academic social function is also pedagogic, the influence of the academe can be seen in the epistemic formation of generations of future constitutional actors, political and judicial. The pedagogic function of the academic discourse is most salient as it involves the instruction of reading the constitutional text, this is necessarily carried out through the reading of the small-c constitution, namely, the jurisprudence, or judicial discourse, of the superior courts, and the critical and normative analysis thereof. This inculcates a jurisprudential epistemology of inherited interpretive strategies which present constitutional development as a teleological process.

Furthermore, the narrativization of Irish constitutionalism under accounts which seek to provide analysis which relies on extratextual explanations—whether that be culture or *zeitgeist*—are demonstrating, to varying degrees, the non-formalist turn in jurisprudence. These efforts suggest the acknowledgment within the academe of the limits of formalism, which speaks to a previously under-theorised component within the operations of constitutional jurisprudence. However, within these accounts there is an acknowledgment of methodological or epistemological challenges which the law as an academic discipline is only beginning to countenance. Accounts which utilise *zeitgeist* as a description to capture moments within the development of Irish constitutional jurisprudence,⁸⁴ are casting about for explanations—both cultural and institutional—for developments in either judicial attitudes or methodologies. David Kenny, who is to the forefront of developing cultural

⁸² Again, in the Dworkinian sense, these are the legal rules, underpinned by principles, which develop into his theory of Law as Integrity. Ronald Dworkin, *Law's Empire* (Hart Publishing 1998).

⁸³ Homi Bhaba (eds), *Nation and Narration*, (Routledge, 1990), p.3.

⁸⁴ Gerard Hogan, 'Harkening to the Tristan Chords: the Constitution at 80' (2017) 40 *DULJ* 71.

analysis of Irish constitutionalism acknowledges the inherent challenges when seeking to study culture:

“...any picture of culture is partial and limited by the biases of our perspective. Those outside of the culture cannot know it fully because it is known by internalisation through immersion. External observers will see it only through a glass darkly. Those inside it, however, may be too enmeshed in it to give a full account of it: since the culture is subconscious and informal, it cannot necessarily be consciously articulated by those who have internalised it. They are so close to it that it becomes part of them, and they cannot step outside of it to know and say all the ways it influences them and their conduct. ...Causation will be hard to pin down, as other factors may have been at work that are not completely apparent to us, and our inferences about culture might be wrong or incomplete. We simply cannot get hard and fast evidence of culture at work...culture is not uniform across a community, or static over time. Culture is absorbed to different degrees by different participants, and participants may react to certain aspects of it differently...The culture is always in the process of being disputed and changed by new practices and beliefs that take hold and augment or displace the old.”⁸⁵

As Casey and Doyle acknowledge, the current zeitgeist on the Court—and by necessary extension the academe—is not to make a single grand or overarching claim.⁸⁶ However, I would situate this scepticism or reticence for providing or adhering to previously clearly expressed overarching understandings of the character of Irish constitutionalism as emblematic of the postmodern condition of Bunreacht na hÉireann in text and interpretation. These divergences within the academic discourse are part of the re-conceptualisation of national metanarrativity, and as such cannot develop a coherent narrative of change as there is uncertainty within and towards the underpinning constitutional metanarrative.

These mutually reliant discourses all take place within the discursive structure of Irish national constitutionalism and therefore all contribute to articulating the meaning of specific nodal points of identity as established in the constitutional text: people, nation,

⁸⁵ David Kenny, ‘The Risks of Referendums: ‘Referendum culture’ in Ireland as a solution?’ In Maria Cahill, Seán Ó Conaill, Colm O’Cinneide, Conor O’Mahony (eds), *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland*, (Routledge, 2021), p. 11/12.

⁸⁶ Conor Casey, & Oran Doyle, ‘Higher Law or Great Charter of the Irish People? The Constitution under the New Supreme Court’, [2024] *DULJ*, Vol 44(1).

state. Therefore, “understanding” the Irish constitutional text, requires a genealogical analysis of both context and text.

Chapter 2: The Problem of Identity

2.1 Constitutional Subject, Imagination, and Identity

The notion of the “constitutional subject” is both analytically necessary and incurably conceptually indeterminate. Its indeterminacy stems from a lack of clarity as to whether it refers to those who are subject to a constitution, or to the makers of a constitution, or to the subject matter of a constitution.¹ This indeterminacy can be seemingly compounded in the Irish context by the characterisation of the generative illocutionary act of authorship in *Bunreacht na hÉireann* being couched in the univocal first-person plural “We”. Adopting this metaphorical voice wherein national metanarrativity encompasses all potential candidates for identification as the constitutional subject under the aegis of the totalising “We” does, however, artificially erode the frontiers between those who drafted and those who will be subject to the constitutional order as enacted through this rhetorical device, thereby affording democratic legitimacy to the value structure prescribed therein; which demonstrates its conceptual necessity. Indeed, this has a narrative coherence: once this moment of constitutional enactment has been realised—assuming we are dealing with a text which broadly conforms with the general principles of constitutionalism—then the drafters are subject to the principles which are established therein, as are the populace in general who have either explicitly or theoretically given the text a democratic mandate.

In the present analysis we are primarily dealing with the constitutional subject, “We, the people of Éire”, and analysing the discursive process by which the identity of this Author/subject came to be, and continues to be, realised. It is mediated through formal alterations to the constitutional text, as well as shifting conceptualisations of the meaning of symbolic nodal points within the discourse of Ireland, Irishness, and Irish sovereignty.

Once this constitutional illocutionary moment had been realised in Ireland with the 1937 Constitution, the nationalist imaginings of those who drafted the text were constrained to the constitutional horizons they had prescribed. The discursive structure of both political and judicial discourses is inherently bounded by the metanarrativity of sovereignty of the “people of Éire”, who had in theory and practice performed so as to “*adopt, enact, and give to ourselves this Constitution*”.² The inauguration of the legal normativity of this national metanarrative is what we may call the inception of a “constitutional imagination”.

¹ Michel Rosenfeld, ‘The Identity of the Constitutional Subject’, [1995] 16 *Cardozo Law Review*, 1049.

² Preamble, *Bunreacht na hÉireann*, 1937.

Constitutional imagination refers to the manner in which constitutions harness the power of narrative, symbol, ritual and myth to project an account of political existence in ways that shape political reality. The concept draws our attention to the capacity of constitutions to offer alternative perceptions of reality, revealing new ways of conceiving the boundaries of practical political action.³ But it also draws our attention to the conceptual constraints that are inherent in the dynamic interplay between the national imaginings and the general principles of constitutionalism, which concomitantly inform the process of developing the constitutional imagination by necessarily reflexively appealing to conformity with the national metanarrative.

It is from this reflexive interplay between national metanarrative and constraints of the constitutional imagination that we may analyse what can be described as the ‘constitutional identity’ of the regime under analysis. Theorising a constitutional identity for a polity is a complex process, as there is no definitional consistency to the manner in which the concept is theorised. There are perhaps five different theoretical discourses on constitutional identity.⁴ Therefore, it may be a fool’s errand to attempt to present a definitional articulation of constitutional identity, as to do so would be to fall into the trap of one of the blind who attempt to describe an elephant, which they are encountering for the first time, by only their experience of a limited aspect thereof. However, ambivalence or indeterminacy of a concept does not mean it lacks analytical utility; as discussed, all concepts are by their nature discursively realised, thereby subject to different instrumental conceptualisations. I will therefore outline the conceptualisation of constitutional identity which operates within the parameters of this research.

The conceptualisation of constitutional identity within which this research is concerned is that of being understood as a discursively realised hegemonic identity of a national constitutional people. This is articulated, constrained and realised through the paradigmatic

³ Loughlin, Martin. ‘The Constitutional Imagination’ [2015] *The Modern Law Review*, vol. 78, no. 1. pp. 1–25.

⁴ (1) being a standard of judicial review in the domestic courts of member states to justify violation or derogation from EU law, sourced from Art. 4(2) TEU. (2) relates to the first but concerns a more general justification of a domestic court justifying a principled violation of public international law through recourse to their constitutional identity. (3) In this discourse, constitutional identity is primarily understood as the identity of the constitution itself and is a purely normative concept. (4) this discourse is one on constitutional identity understood as a special collective identity of a people or a nation that is also expressed, determined and shaped by the constitution. (5) this discourse is centred on constitutional identity and immigration. The main idea here is that immigration policies in particular also contribute to the self-definition of a nation or community. See, Monika Polzin, ‘Constitutional Identity as a Constructed Reality and a Restless Soul’, [2018] *German Law Journal*, Vol. 18 No. 07.

institutional structure inaugurated by the constitutionalisation of the national metanarrative. This follows broadly in the same definitional theories of Michel Rosenfeld and Gary Jeffrey Jacobsohn, while being quite distinct from the normative approach of “Constitutional Patriotism”:

“...the idea that political attachment ought to center on the norms, the values and, more indirectly, the procedures of a liberal democratic constitution. Put differently, political allegiance is owed primarily neither to a national culture, as proponents of liberal nationalism have claimed, nor to “the worldwide community of human beings,” as, for instance, Martha Nussbaum’s conception of cosmopolitanism has it. Constitutional patriotism offers a vision distinct from both nationalism and cosmopolitanism, but also from republican patriotism as traditionally understood in, broadly speaking, the history of Euro-American political thought.”⁵

The approach of metanarrativity which is proposed herein has aspects which differentiate the account of constitutional identity in this research. The account of constitutional identity presented in this research has been developed from close reading of Irish constitutionalism. This has in many ways limited the applicability of Constitutional Patriotism, as it is an explicitly normative conceptualisation of constitutional identity. Moreover, Irish constitutionalism, as currently interpreted, falls broadly within a liberal nationalist or republican model. Furthermore, the most salient constitutional principle which appears to have longstanding primacy within the judicial epistemology is that of popular sovereignty, which is couched in an ethno-symbolic national metanarrative. As will be examined through the development of jurisprudence to follow, fidelity to this principle is interpreted as the abiding norm of the metanarrative. The natural law has been read out of the text, thereby eroding substantive coherence of the narrativity of the national claim. Constitutional Patriotism may be an aspect of Irish constitutionalism through the intertextuality and supra-constitutional primacy of EU law, however; despite high levels of continued support for Irish membership of the EU, at 82% in most recent annual polling,⁶ there still remains an evident national locus of Irish constitutional normativity.

Therefore, the work of Rosenfeld, wherein constitutional identity is distinct from national identity and from all other relevant pre-constitutional and extra-constitutional identities

⁵ Jan-Werner Müller, *Constitutional Patriotism*, (Princeton University Press, 2007), p.1/2.

⁶ EU Poll 2025: Ireland and Northern Ireland, European Movement Ireland, available at europeanmovement.ie.

such as national, ethnic, religious, or cultural identity,⁷ has minimal utility in this research. The dissonances which emanate from the disjunction between coherence of the national metanarrative and developments in dispensation of sovereign capacities and changing conceptualisation of the constitutional subject can be partially conceptualised as the realisation of a constitutional, as opposed to national, identity of the Irish polity.

Similarly, Jacobsohn's account posits that constitutional identity is acquired:

“...through experience, that this identity exists neither as a discrete object of invention nor as a heavily encrusted essence embedded in a society's culture, requiring only to be discovered. Rather, identity emerges dialogically and represents a mix of political aspirations and commitments that are expressive of a nation's past, as well as a determination of those within the society who seek in some ways to transcend this past”⁸

This provides an approach to identity wherein in continuity and change are salient to realising constitutional identity as an analytical model.

Within these theorisations of constitutional identity, there is a level of abstraction which is necessary in attempting to develop a generalisable constitutional theory. However, this can engender a conceptualisation which can be critiqued as an overly general theoretical approach, which can add little in terms of analytical clarity and obscure relevant detail in a case study through service to generalisation of the analytical model. In constitutional identity analysis there is a necessity to characterise a provision or provisions as essential properties of the constitution, as their maintenance demonstrates the ontological stability of the identity of a constitutional order. When other principles or provisions of the constitutional order are changed or altered, this is recognised as the ongoing process of a constitutional identity being realised. These provisions or principles are thereby characterised as the accidental or incidental aspects of the constitution's identity. However, is it not these accidental properties which render the essential property as metanarratively normative? Can we say that the ontological stability of the identity of a constitutional order is consistent if the fundamental principle, norm, or rule, which provides normativity to the legal order has been altered by the changing ancillary principles which give the norm its

⁷ Michel Rosenfeld, 'The Identity of the Constitutional Subject' [1995] 16 *Cardozo Law Review* 1049.

⁸ Gary Jeffrey Jacobsohn, *Constitutional Identity*, (Harvard University Press, 2010), p.7.

narrative coherence? This is another reason why I suggest the model of metanarrativity as a more descriptively accurate analytical approach to Irish constitutionalism.

However, as Ireland is operating under the EU, constitutional identity is also a formal doctrinal reality in the legal order of the Irish polity with Article 4(2) of the TEU. So, an account of the Irish discursive formation of identity necessarily requires a treatment of Irish constitutional identity as emanating from the intertextual position of the Treaties within the constitutional text and jurisprudence of the superior courts. Yet, the emphasis in this research is on the particular instance of the Irish use of this doctrine, and not to provide a general account of the use of Article 4(2) in a generalised EU context.

This effort at particularising—as opposed to generalising—is rooted in the salience of context. I attempt to avoid the generalisations which pepper the academic discourse in this area, which similarly qualify their analysis by recognising how constitutions are deeply embedded in their domestic cultures, while then proceeding to compare constitutional polities with vastly divergent national metanarratives and political realities. This undermines the contextual rigour of their analysis. This research has sought to recognise the deep contextual and cultural embeddedness of constitutional identity, and to find an appropriate prism through which to engage therewith and develop an analytical framework which honours the salience of this cultural and contextual particularity.

2.2 Constitutional Identity: Once Upon a Time, There Was a Ship

By way of illustrating a conceptual weakness of using constitutional identity as an analytical prism, I will offer a narrative reconceptualization of the temporality “problem of identity”. Jacobsohn employs the metaphor of a table in order to express his conceptualisation of identity, and in so doing presents the opportunity to suggest a different metaphorical formation. He writes that in a similar way that identifying the constituent attributes of a table enables us to recognise it as a certain genus of object, identifying certain attributes of a text enable us to identify it as of a constitutional genus. Once this initial identification has been made, we can look to other attributes which take us beyond the identification of the object as being of a general type.

“...when we distinguish a dining room table from, say, a pool table. If we wanted to preserve the identity of the latter, we would prevent the removal of its pockets and

distinctive felt playing top, just as we would protect the identity of any table by guaranteeing that its base and horizontal surface remain in place.”⁹

Therefore, we can say that certain accidental attributes of the general type may be essential to the identity of the object in question: secularism in India,¹⁰ federalism in Germany,¹¹ and republicanism in France.¹² This account is appealing in that it seems to analytically traverse the general principles of constitutionalism and particularity of national context in a manner which services both the general and specific foundational norms of a particular national polity. Jacobsohn argues that this model for the recognition of attributes and the manner in which they interact with each other allows us to recognise the identity of a particular constitution. As the general attributes of constitutionalism concern constraints on political action, and accidental aspects of the constitution concern aspirations, it is “scarcely imaginable” that we could address issues of constitutional change without addressing the challenge of identity.¹³ However, I would suggest that instead of the metaphor of the table, let us instead use the metaphor of a ship.

Constitutional regimes, to be recognised as possessing a legal order with a legitimate instantiation of constitutionalism, must exhibit certain characteristics: the rule of law, sovereignty, separation of powers, civil society. Sovereignty is a principle that must be present, to some extent, for the state to exist.¹⁴ If the institutions which embody the state cannot issue binding authoritative edicts, then it is unlikely that it has been recognised as a legitimate sovereign power domestically, which may also delegitimise its claim internationally.

Separation of powers is essential for the protection of the liberty of the citizenry, but also for efficiency of the state in carrying out the justification of statehood, advancing common good.¹⁵ Without a clear delineation between the law making and law applying institutions of the state, the citizenry is subject to moving goalposts and institutional efficiency will be severely curtailed by obfuscation of clear accountability and functional capacity. Adherence to the rule of law is necessary for a legal order to exist; there are aspects of the

⁹ Jacobsohn, Gary Jeffrey, ‘Constitutional Identity’ [2006] *The Review of Politics*, vol. 68, no. 3, pp. 361–97.

¹⁰ Preamble and Art.25 of The Constitution of India, 1949.

¹¹ Art.20(1) and 79(3), Basic Law for the Federal Republic of Germany, 1949.

¹² Art.1, Constitution of the Fifth French Republic, 1958.

¹³ Jacobsohn, Gary Jeffrey, ‘Constitutional Identity’ [2006] *The Review of Politics*, vol. 68, no. 3, pp. 361–97.

¹⁴ N.W. Barber, *The Principles of Constitutionalism*, (Oxford University Press, 2018) p. 49.

¹⁵ *ibid*, p. 54-56.

principle that must be present in a system if that system is to count as one of law.¹⁶ States require legal orders in service of making good on their claims of authority. Law is the means by which states act and make those acts effective.¹⁷ Civil society is the interface between the public and the private: the rules and, around those rules, the dispositions that define the relationships between the state and other social institutions, and in so doing, shape the state and these private entities.¹⁸ The state needs private groups private groups to achieve its defining purpose, but private groups also need states if they are to flourish.¹⁹

These essential principles are considered to be foundational to any constitutional regime; so, let us consider these to be essential attributes without which we could not call a political regime a legitimate constitutional order. This is analogous to how an archaic ship could not be legitimately recognised as such if it did not have a mast, hull, or prow.

However, these characteristics alone, have a deficiency in generating attachment or proprietary feeling among the national community under the constitutional regime. The atomised underpinning of liberal or republican contractual proceduralism cannot account for the construction of a “we”. It merely accounts for individuals experience and capacity to pursue separate interests with minimum boundaries of interference. Liberal or republican contractual proceduralism relies on the “we” of national identity to produce actions towards common interest²⁰ and therein lies a problem of legitimation and identification of a particular constitutional regime. A descriptive account of metanarrativity seeks to erode the distinction between what is essential and accidental by analysing the narratological contingency of one upon the other.

Basic indices of accepted legitimacy can be identified as a proprietary feeling of national authenticity, that is the capacity of a regime to elicit loyalty by traditional sources of support within the political community. The longevity of a political regime can, and usually does, contribute to the systems acceptance, and creates an aura of “naturalness” of the political institutions. The resilience of a political regime in regard to major systemic tests is a further indicator of the legitimacy of the political regime.²¹ In order to engender a constitutional regime with these indices of legitimacy, political actors may incorporate into the design of

¹⁶ N.W. Barber, *The Principles of Constitutionalism*, p. 85.

¹⁷ *ibid*, p. 105.

¹⁸ *ibid*, p. 121.

¹⁹ *ibid*, p. 144.

²⁰ Attracta Ingram, ‘Constitutional Patriotism’, [1996] *Philosophy and Social Criticism*, Vol.22, Issue 6, p.5.

²¹ S. Bialer, ‘The Question of Legitimacy’ in David Held et al (eds) *States and Societies* (The Open University, 1983), p. 419.

their constitutional texts’ certain expressions of particularistic ethno-symbolic identity. These serve to elicit a sense of popular ownership or identitarian attachment from the political community. Let us consider these the accidental properties of constitutionalism, but let us remain open to conceptualising them as essential properties of the locally situated national metanarrative.

These aspects of the Irish text have been variously described—in a negative manner—as the Constitution’s “manifesto” parts, as opposed to its bare law by J.M. Kelly.²² Oran Doyle—utilising the typology identified by Walter Bagehot as a constitution’s “dignified” and “efficient” parts—describing the Preamble and the early Articles on the Nation as the “obviously regressive” dignified component of the text.²³ The same typology is employed by Gerard Hogan extrajudicially, wherein he describes the dignified aspects of the Constitution as reflecting Catholic nationalism, which does not fit well with a “modern European society” while also being only mere “ornamental symbolism” with no impact on the efficient aspects.²⁴ Ivana Bacik referred to these sections as the “distinctly theocratic aspects” which are reflected in the constitutional text, and cautioned against dismissing these as “mere rhetorical flourishes”, citing the “symbolic importance” of the text.²⁵ Furthermore, Eoin Daly has suggested these aspects of national identity as textually embedded—some of which have now been removed—were widely understood as “oppressive or unjust”, “conservative”, and “quaint or embarrassing”.²⁶

To extend the metaphor of the archaic ship, these accidental properties—which serve to engender loyalty and communal investment in the legitimate authority and binding effect of political outcomes of the constitutional order—would be akin to hoisting sails with colours synonymous with the polity which it represents: emblems or figureheads denoting loyalty to state or polis, and use of language which was cognisable and resonant with all thereon. These properties engender loyalty and sentiments of sufficient common purpose from the personnel who populate the vessel and determine the direction of the ship. Without

²² J.M. Kelly, ‘Law and Manifesto’, in Frank Litton (eds) *The Constitution of Ireland: 1937-1987*, [1987] *Administration* (Special Issue) *Journal of the Institute of Public Administration*. Vol 35. No 4.

²³ Oran Doyle, *The Constitution of Ireland: a contextual analysis*, (Bloomsbury, 2018) p.46.

²⁴ Gerard Hogan, ‘Harkening to the Tristan Chords: the Constitution at 80’ (2017) 40 *DULJ* 71.

²⁵ Ivana Bacik, ‘Future Directions for the Constitution’, in Eoin Carolan & Oran Doyle (eds), *The Irish Constitution: Governance and Values*, (Thomson Roundhall, 2008), p.139.

²⁶ Eoin Daly, ‘From sovereignty to social liberalism: two new dimensions of constitutional identity in Ireland’ [2024] *Public Law*. pp. 528-544.

these accidental properties, it would still be definitionally a ship; it may be inert and motionless, but structurally it is still cognisable as of a certain species of object.

Herein emerges the potentiality within a constitutional order for dynamism, dissonance, and disjunction. The presence of the essential properties permits a recognition of a political regime as being one with a principled constitution, espousing the essential or general principles inherent to the *genre constitutionnelle*. The incorporation of the accidental properties, expressive of the assumed ethnocultural characteristics of the constitutional subject, service a perceived need for engendering acceptance of the regime. The act of designing, framing, and ratifying a constitution is one of self-definition and self-realisation, assuming the generation of constitutional architects are co-extant with the polity and population they write the subjectivity of. By this act, choices between competing intra-national values and aspirations are enacted, meaning that there are within the subtext of a constitutional text the alternative conceptions which coalesce around the nodal point therein. Thereafter, these choices, and the unfurling discursive process, develop a constitutional dynamic which we can analyse as the narrativity of identity within the constitutional order.

The structure of our archaic ship provides the capacity for motion, the weather and waters provide the environmental conditions with which our ship must navigate, the regalia and mutual impetus for being aboard, give us our crew. The crew have diffuse concerns and reasons for being aboard, from helmsman to oarsmen, and individual aspirations and motivations are aggregated under the aegis of crew membership. They are directed at collective endeavour and instrumentalised within the parameters of their company structure. They can jointly contest a prevailing wind or current and determine the direction the ship will travel and successfully navigate their vessel to their prescribed end.

Identity develops from the journey of the ship, and how the fellow feeling of the crew is maintained under the structure inaugurated by the ship and its underpinning mission for the voyage.

The function of a constitution as a political instrument, in a liberal or republican account, is to establish a framework which will serve to integrate those with disparate aspirations and binding normative moral commitments into a constructed, but emotively resonant political community. The totality of a population within a defined geographic territory cannot be truly homogeneous across comparative indices. Disparate aspirations may

emerge along political lines, dependent on interpretations of history, class, gender, and regional affiliation.

In a liberal nationalist account, binding normative commitments emerge in relation to ethnocultural characteristics such as religion, tradition, and language. Constitutions serve an integrative function in seeking to foster a sense of commonness, mutuality, and civic solidarity among citizens. It serves to alleviate the economic, social, cultural, religious, ideological, and political cleavages inherent in a society and construct a nation.²⁷ A characteristic of a robust constitutional order is to permit, by its generative and frequentative resilience, both the construction of the agglomerated political community while not mandating rigid homogeneity and protecting index features of difference. The civic or shared public domain, “third space” is the realm of contestation on mutually binding terms of engagement.

Accommodation of these divergent interests into a singular framework with necessarily sufficient “buy in”, meant to evoke and elicit attachment and emotional resonance, can render the constitutional regime seemingly internally dissonant or unprincipled. Enshrining seemingly contradictory principles in a constitutional framework seems necessary in order to instantiate a collective recognition of the legitimacy of the political system and the outcomes of that system’s democratic contestation. Compromises between social groups and political goals enshrined in constitutional frameworks permit meditation and reconciliation. A constitution is, in text and interpretation, a product of culture;²⁸ the proper role of constitutions is forging a fruitful interplay between the reinforcement of identity and the preservation of diversity²⁹ inherent in any political community. If there is a collapse in the affinity to the common purpose or the principle of solidarity among the citizens of the polity, it is hard to imagine how the ontological stability or the normativity of the national metanarrative could be sustained.

According to Jacobsohn, it is in this discordance—the dialogical interplay between core commitments and the assertions of self-definition as an intrinsic component of the socio-

²⁷ Ulrich K. Preuss, ‘Constitutionalism in Fragmented Societies: The integrative Function of Constitutions’ in Enrique Peruzzotti & Martin Plot (eds) *Critical Theory and Democracy: Civil Society, Dictatorship, and Constitutionalism in Andrew Arato’s Democratic Theory*, (Routledge, 2013).

²⁸David Kenny, ‘The Virtues of Unprincipled Constitutional Compromises: Church and State in the Irish Constitution’, [2020] *European Constitutional Law Review*, 16.

²⁹Michel Rosenfeld, ‘Modern Constitutionalism as Interplay Between Identity and Diversity: An Introduction’ [1993] 14 *Cardozo Law Review* 497.

politico environment in which this contestation takes place—that those seeking constitutional identity will find it. The idea of identity is fluid, and the course of constitutional identity is impelled by the discordance of ordinary politics within the limits established by commitments from the past.³⁰ Jacobsohn, substantially utilises the thought of Edmund Burke in relation to what he recognises as the ‘prescribed constitution’. The concept of the nation is that of an idea of continuity³¹ and the influence of the constitutional form is dependent in some measure upon its continuing capacity to faithfully reflect the collective political identity.³² Change is thus an inherent characteristic in the unfolding narrative of the constitutional story.

However, Jacobsohn argues that certain narrative developments would be of such discordance with existing narrative structure that they would undermine the constitutional genre itself.³³ The conceptualisation of the boundaries of constitutional change as being informed by the prescriptive or received materiality of the social, political, and historical past, bounded by the essential properties of the principles of constitutionalism, demonstrate the underlying normative assumptions of Jacobsohn’s treatment of constitutional identity. The continuity of the nation as expressed in the prescriptive constitution, permits variability and dynamism, but only within what is possible within the limits asserted in the commitments, aspirations, and possibilities of what the past has made available to the present.³⁴ In this Jacobsohn assumes the “authenticity” of officially ascribed historical narrative which informs the constitutional regime, and the process of identity construction as settled. His account, while acknowledging the contested views of history, such as in his treatment of the three “I’s”, insufficiently justifies his commitment to the normativity of the constitutional regime as an emanation of a settled historical process. His account never fully reconciles the parameters of radical change to the ancillary of accidental properties of a constitution, and how these changes fundamentally alter the national metanarrative, while permitting ontological stability of a sense of continuity.

The “essential” principles of constitutionalism gain their normativity from the “accidental” principles of the particular polity; so, what is accidental in the general sense, is essential in the particular context. Sovereignty cannot be justified merely because it is an efficient and

³⁰ Jacobsohn, *Constitutional identity*, pp. 13-15

³¹ *ibid*, p. 40.

³² *ibid*, p. 48.

³³ *ibid*, p. 69.

³⁴ *ibid*, p. 111.

effective organisational principle; coercion and inducements can coordinate action as well. It must have a morally attractive account, justifying it as a desirable principle.³⁵ Sovereignty necessarily needs identification of the boundaries of its reach³⁶ and we see in Ireland that not even the geographical confines and seemingly “natural” boundaries of oceans and seas can answer the contested question of the reach of sovereignty. Whether it is desirable or not, particular or accidental narratives justify conceptual boundaries of general or essential principles. When there are one or more seemingly irreconcilable narratives or discourses making the same universal claim to natural right of sovereignty and self-determination, through the prism of their own particular narrative, which claim is legitimate? One land, two peoples, two fully overlapping stories, both true.³⁷

The authenticity or prescribed normativity of the pre-eminent historical narrative of a political community is perhaps assumed too readily in constitutional identity theory. Rosenfeld argues that a working constitutional order must revolve around a predominant identity, while emphasising that diversity among the body politic will have disparate experiences of the law and these divergent experiences must be accounted for.³⁸ Therefore, the role of constitutional identity is to emphasise certain similarities and minimise differences.³⁹ The idea of a national identity which functions in differing ways to different intra-national groups within the constitutional order serves to construct a mutually binding in-group out of diversity. The nation functions both as the deliberative community of citizens bound together by a social contract, expressive of the general will, and as incorporating the notions of a pre-political community. There is no single national identity which is shared by everyone, the role of constitutional identity is to draw both conceptions of national identity within the singular framework, which binds them as they are bearers of same constitutional rights.⁴⁰

What of those who do not recognise the legitimacy of the constructed civic identity? We need only look at separatist movements in Scotland, Catalonia, Northern Ireland, and the Basque region, among many others, to see how communities can have national narrative

³⁵ N.W. Barber, *The Principles of Constitutionalism*, (Oxford University Press, 2018), p. 32.

³⁶ *ibid*, p. 33.

³⁷ Wendy May Jacobs, ‘Thinking Anew: Honouring the stories of our enemies’, *Irish Times* (Dublin, 11/03/2023). <https://www.irishtimes.com/ireland/social-affairs/2023/03/11/thinking-anew-honouring-the-stories-of-our-enemies/> accessed 15/03/2023.

³⁸ Michel Rosenfeld, ‘Modern Constitutionalism as Interplay between Identity and Diversity: An Introduction’, 14 *Cardozo Law Review* 497.

³⁹ *ibid*.

⁴⁰ *ibid*.

discourses which do not recognise or accept the civic conception of shared identity and view the state under which their community resides as illegitimate *ab initio*.

In this way, we see that constitutional identity is a constructed abstraction, or higher-order identity which is meant to provide the shared space of commonality. This theoretical landscape is very much influenced by, and concerned with, the divergent views of the foundational national character expressed in constitutional polity. However, if a country foregrounds a national identity with particular emphasis on a certain set of ethno-symbolic characteristics, it instantiates nodal points which structure the interpretations of manufacturers of meaning within the discursive process. If the values identified as ‘constitutional identity’ emphasise the integrative conception of constitutional identity, then these values will afford interpreters scope within judicial review to safeguard this constitutional identity from those seeking to emphasise the salience of their conception national identity. However, this creedal conception of constitutional identity too can be used to exclude and “other” those outside the “imagined” pre-political national community,⁴¹ such as in the militant secularism of France’s constitutional commitment to *Laïcité*.⁴²

This is drawn out by Jacobsohn in his distinction between what he calls the “militant” and “acquiescent” constitution and how they represent the difference between the divergent salience of pre-political and creedal constitutional identities. Both conceptions are concerned with the permissibility of change, but ultimately is it not the case that this is a distinction without a difference, if both engender a process of internal or external othering as a constitution will either serve to uphold the social order, or to subvert it, then it functions as an imposition or alienating condition for some subset of the polity. In this process there will be a renegotiation of the inherent gap between the foundational ideals, the essential properties of constitutionalism, and existing realities, the values and aspirations of the body politic.⁴³

⁴¹ This capacity for liberal normative values to serve an ‘othering’ function is identified by Gagliardi et al., ‘The Influence of Popular Conceptions of National and Constitutional Identity on the Position of Marginalized or Minority Groups Within a Nation State. A Legal, Empirical, and Comparative Analysis of Four Jurisdictions Through the Prism of Gender’ [2024] *Latin American Legal Studies* Vol. 12 N° 1, pp. 158-224.

⁴² The banning of conspicuous religious symbols in schools, *loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics*.

⁴³ Jacobsohn, *Constitutional Identity*, p. 214.

The claim to legitimacy of a constitutional regime, in the liberal or republican model, rests on the principle that this document is an emanation of the constituent power of the people over which it presides. Various preambulatory articulations of “We, the people” serve to construct, by emphasising the desired characteristics of normative political community, the foundations on which the constitutional order is built. The totemic expressions of identity which this normative community is then ascribed, whether that be based on; religion, language, culture, and ethnicity will be axiomatically exclusionary to those who are “Other”. The principles of constitutionalism will delimit the power of the normative political community over the minority “Other”. Concurrently, the provisions which enshrine and construct legitimacy of the constitutional order on the basis of the shared identity of the assumed normative political community will delimit the capacity of the “Other” to be fully folded into the legitimised political community.

If the constitutional discourse in a polity develops in such a manner as to render the general principles of constitutionalism as conceptually pre-eminent within the discursive structure of the polity, does this have the potentiality to undermine the coherence of the national metanarrative on which the whole regime is premised, rendering the national identity of the polity, however, defined, as incidental?

Furthermore, if the coherence of the national metanarrative has been fundamentally altered under the discursive structure inaugurated by a constitution, can we with surety claim that it is one and the same constitution, merely because of the ontological stability afforded by continuity of author/subject identity? Would the identity of our archaic ship exhibit continuity if all, or some, of the accidental properties were excised? Imagine a case where appeals to the particular were recognised as benignly unnecessary, or maximally malign as dangerous externalities to the constitutional order, and that the political community should be established only on the essential properties of a constitution—the norms, the values, and, more indirectly, the procedures of liberal democracy.⁴⁴ Would our crew stay loyal to a ship which appealed only to the process of mutual endeavour, without the appeal to totems or emblems, or would the values themselves become totemic and end up serving the same function?

⁴⁴ Jan-Werner Müller & Kim Lane Scheppele, ‘Constitutional Patriotism: An Introduction’ [2008] 6 *INT’L J. Const. L.* 67.

If values are not justified through any historical reflection about how they became values for the individual and the political community, they will exist in an autonomous realm,⁴⁵ and will become their own rhetorical source of recursive normativity. If the structure which is necessary for seafaring remains intact, and the material properties of this structure remain constant, but the crew, totems, and foundational mission are excised or supplanted, is it the same ship?

Conversely, if the crew, with their vexillogical symbols and totems, take up residence on another vessel, with different foundational architecture—perhaps, a submarine—do they have a claim to ontological stability and continuity of identity? If they change from a mercantile to war footing, a shift in common endeavour, do they have the same collective identity they possessed on our initial ship? If they had initially been commissioned under a certain mandate, could the exigencies of their environment be sufficient reasons for change, or is the permissibility of change bounded by the initial commitments of the commission?

Through this metaphor, I am demonstrating the problem of analysing continuity of identity when, through formal and interpretive change, there is discordant alteration to how a text is understood. I contend that in constitutional interpretation we, as a necessary characteristic of the species of cultural object with which we are engaging, necessarily engage in interpretation cognisable with the reader-response approach to literary criticism. Central to the reading of every literary work is the interaction between its structure and its recipient.⁴⁶ The authors of the document(s) of a constitution establish certain principled constraints—they inculcate a certain metanarrative within the particularist invocations and value architecture of the work. The interpretive community share a common context, socialised in the same epistemological environment, thereby rendering radical subjectivity or rigid essentialism an impossibility.⁴⁷ From this we can recognise that a literary work—in our case a constitutional text—has two poles: the artistic and aesthetic. The artistic pole is the author's text, and the aesthetic is the realisation accomplished by the reader.⁴⁸ The realization emerges somewhere between these polarities, as part of an iterative process of discursive interpretation.

⁴⁵ Pierre Schlag, 'Values' [1994] 6 *Yale JL & Human* 219.

⁴⁶ Andrew Bennet, *Readers and Reading*, (Oxon Routledge 1995), p. 21.

⁴⁷ *ibid*, p. 32.

⁴⁸ *ibid*, p. 21.

As the context of the reader changes over time, so too does the manner in which interpreters engage with the work, through iterative readings interpretive strategies and frameworks develop. The reader—in our case, the authorised interpretive community—imparts their own contextualised viewpoint with that of the received text and constructs meaning of the provisions. The interpreter is an active agent, not merely passive communicator of the authorial dead hand. This is especially true in relation to the constitutional genre, as authorship cannot be ascribed to a single individual, or even committee, at a specific time—amendment and interpretations shape the character of the text. As such, a single text—after alterations to its provisions and developments in interpretive frameworks—can be understood to be idiosyncratically Roman Catholic;⁴⁹ Christian and democratic;⁵⁰ *democratic* then Christian;⁵¹ and ultimately defined by a proceduralist interpretation of the democratic will of sovereign people as expressed through parliament,⁵² where popular sovereignty is the essential identity of the text.⁵³ Yet, once this discursive process has reached a point of partial interpretive equilibrium—where the text and its interpretation has gone through a substantial process of formal and informal alteration—can we identify it as one and the same text as initially authored? The answer is yes, if we tell ourselves a story which says that it is so. If there is a narrative of continuity that is accepted, a ship involved in a 19th century exploration of the Arctic sailing under the flag of the British Royal Navy, can now present as a desk in the office of the American President, and as a symbol of the enduring special relationship between central actors in the Anglo-American world.

It is my argument herein that the model of analysis which best captures both the ontological stability and radical alteration to constitutional structure—and the identity this implies—of the polity is metanarrativity. As an approach to analysis, it encompasses the interplay between both foundational national identity and the constitutional identity which discursively emerges from the general principles of constitutionalism, while also accommodating the condition of paradoxical realities which emanate from this. It allows for divergent relationality to the constitutional subject by both internal and external

⁴⁹ *Maguire v Attorney General* [1943] IR 238. A judgment which expressly delineated the Preamble as Roman Catholic and not merely Christian.

⁵⁰ *Ryan v AG* [1965] IR 294.

⁵¹ *Attorney General v X* [1992] IESC 1 IR 1.

⁵² *Fleming v Ireland* [2013] 2 ILRM 9 (HC), [2013] 2 ILRM 73 (SC), where it was established that were legislation which would facilitate assisted dying be passed by the Dáil, it would not be *de facto* contrary to the spirit of the Constitution. This illustrates that Catholic particularism, or Christian ethos more broadly is no longer evident in the interpretive reasoning of the Court.

⁵³ *Crotty, Pringle*, with *Costello* as the apotheosis of this lineage of identity concerned reasoning with 1st decision to use Constitutional Identity as a doctrinal instrument.

otherings, while also acknowledging that this is a discursive process, thereby allowing for re-narration of these relations through iterative re-writings and readings.

The general principles of constitutionalism do not and cannot diminish nationalism within a constitutional polity. They can however serve to re-formulate the characteristics of this nationalism, but the coherence of the constitutional genre is premised on a *national* metanarrative. This analysis focuses on Ireland through the prism of a polity which constitutionalised a metanarrative based in the historical experience of intra-European colonisation, and which would eventually rationalise the diminution or pooling of sovereignty within a European locus, through recourse to the normativity of a principle within the metanarrative: popular sovereignty.

Furthermore, the nodal points of hegemonic identity which animated the movement for sovereignty based in the “people of Éire” have been denuded of much of the ethno-symbolism on which they were initially realised, becoming gradually more pluralist. It has been suggested that there has been a “hollowing out” of Irish national identity. This entails a process whereby the symbols on which Irish national identity was constructed—Gaelicism and Catholicism—remain as symbolically significant, while attendant practices and tangible engagement therewith have become weakened and identification with them has waned.⁵⁴

When this is analysed through a prism of EU integration as read through primacy and supremacy of EU law, as against the constraints of popular sovereignty understood as liberal proceduralism, one can identify that the coherence of the Irish metanarrative has become stretched. It is not that the national locus is unassailable, but rather it now can be read as a procedural—not substantive—obstacle to greater integration. The procedure of popular sovereignty remains the only principle with normative consensus among authoritative interpreters; other values—which would have been central to the formation of the metanarrative—must be read as incidental. Therefore, postmodern scepticism towards metanarratives is evident in the interpretive strategies of the court, which reads God as an agnostic, the nation as a cosmopolitan, and inalienable as something which can qualify for abrogation. The narratological consistency of the Irish constitutional metanarrative hinges on the popular sovereignty of the “people of Éire”. Who those people are, and how they

⁵⁴ Iarflaith Watson & Lorenzo Posocco, ‘National Identity Hollowed-Out: Irish National Identity 100 Years After Independence’ [2025] *International Journal of Politics, Culture, and Society*.

choose to constitutionally represent themselves has been altered substantially. But, at minimum, the narrative coherence of popular sovereignty continues to have normative metanarrativity; it remains a national claim.

Part 2: Constituting the Subject

Chapter 3: Ireland's Post-Colonial Constitutional Identity

That a constitution is intimately entwined with its polity's particularities—political, historical, cultural—and social conditions is readily apparent. A constitution is a politico-legal construct which emanates necessarily from particularity and the claim to distinction. Indeed, it formally constitutes the distinct constitutional “people”, professes the polity's individuation, and institutes a state apparatus which affords positive valence to the polity's particularity. This particularity is mediated through the general rhetorical devices essential to the *genre constitutionnelle*.¹ This mediation is not enacted at a discrete “constitutional moment” but is rather a discursive process iteratively engaged with within the structure characterised by a nationalist metanarrative—the articulation of the identity of the polity, establishing conceptual nodal points around which the discourse takes place. What it means to be “this people” in “this nation” abiding by “our constitutional principles” is understood by agents of an interpretive community reading their current dilemma through the idiosyncratic rationality of the Constitution's national claim.

How a polity constructs its constitutional state—thereby instituting the spoken and unspoken boundaries of permissible or conceivable constitutional interpretation—is dependent on the normative salience and character of the claim to distinction. The constitutional theory which validates the polity's existence is narrativized and depends on the circumstances of the proposed constitutional state, it must be able to acquire sufficient resonance and affinity from the enfranchised population so as to engender the perception of legitimacy. Once the claim is sufficiently recognised, the political and institutional actors within the polity will act in a manner which accords binding authority to this arrangement. In this sense, the constitutional state can be conceptualised as a set of culturally discursive practices afforded authority as well as a formal set of institutions and normative principles. Culture here is the socially constructed structure of both authority and participation,

¹ A significant contribution to the discussion on the essentiality of certain principles of constitutionalism can be found in N.W. Barber's *Principles of Constitutionalism*, (Oxford University Press, 2018), which proffers an account of constitutional essentials; Sovereignty, Separation of Powers, Rule of Law, Civil Society, Democracy, and Subsidiarity, in which the rationality of the state requires certain interrelated constitutional principles to inform and ground the operation of the apparatus of the state to function as such. This applies all those under the structure of the constitution, whether that be political agents or legal agents. Even if the interpretive agents disagree on the exact meaning of the essential principles therein, they must all be committed to the principles. Within the argument proffered, local variation in application of the principles is permissible if the circumstances of the locality require differentiated application. The principles are meant to be obtainable ideals, and they permit local differentiation.

benevolent in what it includes, incorporates, and validates, less so in what it demotes and excludes.²

The national metanarrative is the grounding normativity by which various constitutional principles and state institutions are reflexively justified. These principles and institutions, within the constitutional discourse, serve as contested signifiers or nodal points, within the discursive structure of the Constitution. Each signifier or node is a site of contestation wherein the meaning or function of said principle or institution is worked out by the state actors which are prescribed with this role within the polity.

The national metanarrative, which is partially articulated within the constitutional claim to legitimacy, functions to justify why this polity is the legitimate representation of the “people” and is necessarily to be respected as sovereign domestically and in international relations. As the plenitude of constitutional states today have emerged from vastly different historical processes, the foundation upon which the polity’s claim to legitimacy is constructed will by necessity express divergent characteristics. Darrell Figgis—journalist, author, nationalist propagandist, and vice-chairman of the committee to draft the Irish Free State Constitution³—wrote in a passage which is prescient with regard to constitutional identity,

“All constitution-building is speculation; but if speculation is based on history, and a just and critical search into that history with a view to discovering what are its permanent and what its impermanent, what its fundamental and incidental, elements, then it will be a national uplifting and not an irritation, a national hope and not an embarrassment and frustration.”⁴

Each national metanarrative serves to rationalise the historical experience of the polity into a justificatory constitutional claim which employs a narratology of nationalism which can take many forms within a typology of nationalism: civic/liberal, ethno-symbolic, or creedal/ideological. No matter which type of nationalism is being utilised, at its core, there is a claim to commonality of identity or purpose, which is being actualised within the structures of this constitutional polity. The constitutional vernacular therefore is Whiggish.⁵

² Edward Said, *Culture and Imperialism*, (Vintage Books, 1994) p. 15.

³ William Murphy, ‘Darrell Figgis’, in *Dictionary of Irish Biography*, (Royal Irish Academy, 2009).

⁴ Darrell Figgis, *The Gaelic State in the Past & Future: or ‘The Crown of a Nation’*, (Maunsell and Company, 1917) p.7.

⁵ The concept of a distinctive Whig approach to historiography as being an approach worthy of critique emerged from the work of Hubert Butterfield, *The Whig Interpretation of History*, (W.W. Norton & Company.

the events leading to the formalising of this constitutional arrangement are rationalised teleologically.

Furthermore, as a constitution claims to serve as the representation of the polity *in toto*, the claim is commonly articulated via a univocal metaphorical voice. This consciously harmonises the fragmented populace supposedly being voiced, and yet cleavages—socio-cultural, historico-political, and ethno-linguistic—by and large will persist. In the stable constitutional polity, these cleavages are reconciled within the constitutional structure, and contestation is carried out within acceptable constitutional domains. Contestation is ideally carried out within the prescribed norms of a constitution: the most salient grounding principles are mutually constraining, and broad consonance characterises the realm of constitutional conduct. Therefore, mutually bolstering discourses of “nationality”, “the State”, and “constitutionalism” serve to maintain the legitimacy of the dispensation of power within the polity.

The constitutional claim, as an articulation of a national metanarrative, grounds the rationale for the state’s institutional dispensation of power. Depending on the point in history at which the constitutional discourse within a territory or people gained primacy, the influence of an ethno-symbolic nationalist principle will be more or less significant. Newer states in the post-imperial process are more likely to explicitly draw congruence of nation and state in constitutional metanarrative.⁶

The identity of a distinct national people may be irrevocably intertwined with the sovereignty of the state, depending on the type of national metanarrative which is

Inc, 1965). His general critique was of the assumption that historical analysis was that of a clear and linear narrative towards progress. As he puts it at pages 22/23, “The fallacy of the whig historian lies in the way in which he takes his short cut through this complexity. The difficulty of the general historian is that he has to abridge and that he must do it without altering the meaning and the peculiar message of history. The danger in any survey of the past is lest we argue in a circle and impute lessons to history which history has never taught and historical research has never discovered — lessons which are really inferences from the particular organisation that we have given to our knowledge. We may believe in some doctrine of evolution or some idea of progress and we may use this in our interpretation of the history of centuries; but what our history contributes is not evolution but rather the realisation of how crooked and perverse the ways of progress are, with what wilfulness and waste it twists and turns, and takes anything but the straight track to its goal, and how often it seems to go astray, and to be deflected by any conjuncture, to return to us - if it does return - by a backdoor. We may believe in some providence that guides the destiny of men and we may if we like read this into our history; but what our history brings to us is not proof of providence but rather the realisation of how mysterious are its ways, how strange its caprices — the knowledge that this providence uses any means to get to its end and works often at cross-purposes with itself and is curiously wayward.”

⁶ Bill Kissane and Nick Sitter, ‘National Identity and Constitutions in Modern Europe: Into the Fifth Zone’, in Landau and Lerner, (eds) *Comparative Constitution Making*, (Edward Elgar, 2019). This article demonstrates to varying salience of nationality as a foundation of the constitutional claim adapting Ernest Gellner’s Four time zones of European nationalism, postulating a fifth zone “globalization and the EU”.

constitutionally enacted. Therefore, if that identity is altered, the national metanarrative which grounds the constitutional claim may lose its salience as a claim to legitimacy and may be challenged by a counterclaim or alternative theory of validity. It is at this juncture that reactionary measures, in the form of reflexive appeal to salience of national metanarrativity, may be utilised by institutional actors within the polity. We can see this in the context of supranational commitments which affect capacity to exercise sovereignty; when the national identity of a state is intricately coiled around the claim of state sovereignty, then the use of constitutional identity can be viewed as a powerful new judicial weapon⁷—which may be as either a shield or sword.⁸ This raises the question of the relationality between constitutionalism as the vehicle for actualising the national metanarrative, and whether this relationship disaggregates the coherence of national principle. Furthermore, does the project of EU integration—necessarily a challenge to the salience of nationalism⁹—and the development of legal supremacy within Union law serve to further disturb the national principle, or may it serve the opposite function of precipitating a reflexive strengthening of national metanarrative?

This is the function that I argue constitutional identity serves within the Irish Constitution. Constitutional identity is a modality of judicial reasoning in which the judiciary construct a singular interpretation of a constitution as a harmonious whole. They¹⁰ construct a reading of the constitutional text in totality and identify a basic structure or constitutional identity which cannot or does not allow for contravention either by domestic actors or supranational commitments in a manner which undermines the coherence of the national metanarrative as a theory of validity. Importantly, this does not rely on eternity or entrenchment clauses, as in the Irish case; what it does imply is that, from what appears to be an unprincipled or postmodern text, there is at minimum an identifiable national locus of normativity.

⁷ Barrett, Gavin: *Constitutional Identity, Ireland and the EU: The Irish Supreme Court Ruling Costello v. Government of Ireland*, *VerfBlog*, 2023/3/22, <https://verfassungsblog.de/constitutional-identity-ireland-and-the-eu/>.

⁸ Pietro Faraguna, ‘Constitutional Identity in the EU—A Shield or a Sword?’ [2017] *German Law Journal*, vol.18, no.7. In this article Faraguna develops a dualist conception of the function of constitutional identity in the context of EU integration. The shield: guides EU integration in a direction favoured by national courts as in *Solange I* and *Frontini*. The sword: composes conflicts between national and EU law, such as in *Taricco* and *OMT*. Whether shield or sword, a conflict is afoot.

⁹ A point made by Neil Walker, who specifically identifies the project of Supranationalism of the EU as being conceptualised and constructed against sovereignty. See, Neil Walker, ‘Sovereignty and the European Union: An Enduringly Awkward Fit’, *University of Edinburgh School of Law Working Paper* No. 2024/05.

¹⁰ “They” here referring to the judiciary legitimately ascribed the role of constitutional interpretation, and also political agents who may utilise either national, or constitutional by proxy, identity centred reading.

Constitutional identity is inextricably connected to national identity *within* the Constitution as the identic provisions within the text—whether ethno-symbolic or civic/ideological—serve to construct and enshrine the particularities of a constitutional people. This articulation of the character or identity of a constitutional people serves to bolster legitimacy through the politicalisation of a claim of variance of a people, and it is from here that the right of self-determination is grounded.

3.1 Self-Determination and the Irish Subaltern

The doctrine of self-determination is primarily a foundational normative principle prescribing how international society should be organized, it recognises a natural right of “peoples” to be final arbiters on their political institutions.¹¹ The political utilisation of the doctrine in Ireland reflects a general tension between the “external” and “internal” characteristics of self-determination, ultimately being used as a vehicle for the justification of the national metanarrative in particular arguments about the nature of Irish history. Since that history had always provided different models¹² of independence, it was no surprise that the movement would grapple with questions of identity, progress, and democracy.¹³

The theorists of physical force separatism in Ireland articulated a justificatory narrative whereby the Irish are a distinct national people, thereby constructing the claim to independence in an international law frame and not within an internalised British constitutional framework. This disjunction between theory and reality would be made manifest in the contrary theories as to the *Grundnorm* of the 1922 Constitution; whether in Westminster Statute or in a Treaty between coequal nations. The Irish narrative used for claiming the natural right of self-determination was that of an ancient European nation subjected to all the exploitation suggested by the term colonialism, which had never

¹¹ A political doctrine which emerged contingently from the intellectual milieu of the late 19th and early 20th century, being a international law concept of great utility in disintegration of imperial powers and decolonisation of newly independent states. The doctrine permeates UN Charter 1945: Article 1.2, Article 73, and Article 76. Given further expression in International Covenant on Civil and Political Rights, which entered in to force in 1976, which gives a concise formulation in Article 1.1, “ All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” The same language appearing in the Declaration on the Granting of Independence to Colonial Countries and Peoples 1960.

¹² Daniel O’Connell’s Irish Catholic Whig nationalism, Arthur Griffith’s dual-monarchy, Patrick Pearse’s Gaelic Republic, James Connolly’s Workers Republic, Henry Grattan’s Protestant Patriot Parliament, Thomas Davis’s Republicanism, Éamon de Valera’s Ireland that we dreamed of, Irish Parliamentary Party’s Home Rule, etc.

¹³ Bill Kissane, ‘The doctrine of self-determination and the Irish move to independence, 1916–1922’ [2003] *Journal of Political Ideologies* 8(3), 327–346.

consented to membership of the empire.¹⁴ The centrality of history to the theory of justification for Irish independence is well put by Anthony Carty:

“An independent nation had been deprived of its legal right to be separate and was reasserting that right. It was not a matter of changing the political status of the Irish, however defined, within the UK by a means of the latter’s political process. None the less the essential element of the argument had to be that a continuity of identity could be demonstrated. If it could not, it would be quite unproblematic for those in Ireland who did not constitute part of the ‘alleged’ Irish nation to assert some variation of the argument that they were no more newcomers to the island than their neighbours and political opponents, and that their presence did not contravene any previously acquired right.”¹⁵

Therefore, the function of ethno-symbolic provisions within the national metanarrative of legitimacy are dynamic, in that they serve to garner affinity within the enfranchised populace, but also to legitimise and delimit the boundaries of interference from both internal and external actors. Certain traits are constituted as essential to the identity of the polity; the logical corollary of this is that if this were substantially altered, the nature of the constitutional claim would be similarly altered, the polity may cease to exist, or at minimum, not exist in the same manner. Both constitutional identity and identity *within* the constitution—as politico-legal concepts which are contestable—provide anchors around which significant alteration can take place.

In this process, dissonance is an ineluctable characteristic: this is especially true of polities with intra-national cleavages umbrellaed under a hegemonic identity. This dissonance, is, I argue, more readily apparent in polities which have experienced a process of colonisation. This is so because the experience of colonisation will have fundamentally altered the structure of the pre-colonial environ. The constitutional claim of independence by necessity will either harken back to an ethnic primordiality, which is necessarily unretrievable, or will present a claim which accommodates plurality but which may enshrine the

¹⁴ The position conveniently explains away a century of Irish representation at Westminster, Irish service in the British army, and the loyalty of great numbers of Irish people to the throne, with claims of illegality and illegitimacy. Bill Kissane, ‘The doctrine of self-determination and the Irish move to independence, 1916–1922’ [2003] *Journal of Political Ideologies*, 8(3), 327–346.

¹⁵ Anthony Carty, *Was Ireland Conquered? International Law and the Irish Question*, (Pluto Press, 1996) p. 16.

perpetuation of essentialist binaries.¹⁶ Post-colonial constitutional claims seem to struggle to satisfactorily concede the hybridity of society in the rhetorical construction of the justificatory metanarrative, even if the institutional arrangements of the state come to reflect this hybridity. Declan Kiberd articulates this post-colonial condition when he writes on the leitmotif of a cracked mirror in Irish literature being evoked by Brian Friel in *Dancing at Lughnasa*:

“...from Maria Edgeworth's fear that the people would only smash any glass which offered an honest reflection of their condition to Synge's Christy Mahon who rails against the devilish mirror in his fathers home, which 'would twist a squint across an angel's brow'. In Ulysses Stephen Dedalus had suggested that the cracked looking glass of a servant was a fitting symbol of Irish art. Synge's use was perhaps the most radical of all, for he had seen in the image the limits of a literary realism which could render only social surfaces but give no deeper account of the psychic condition of country people. In his eyes all mirrors were problematic, since they afforded only a distorted image of the self.”¹⁷

No text can be a true representation of a “people”, especially one which constructs an artificial still frame from the ongoing process of post-colonial national identity re-formation. The constitutional subject—the people of Éire—is a necessary constitutional simulacrum: how those who are nominally represented by it relate to it informs feelings on internal “othering”.

3.2 The Constitutional Subject: The Subaltern

The process of identity formation for the independent Irish state was that of an inversion of the subalternated Gaelic “authenticity” of the western “peasant” as a celebrated well-spring¹⁸ of the Irish nation over the pernicious infiltration from the east of fallen “English” values. This inversion served to provide much of the rhetorical dynamism motivating physical force separatism, although, as with all political movements, the independence

¹⁶ These binaries are of course oversimplifications, as I have suggested that constitutions are structured processes of interpretation within a discursive paradigm, no essentialist, or quintessence in constitutional state is achievable.

¹⁷ Declan Kiberd, ‘Dancing at Lughnasa’ [2001] *The Irish Review* (Cork), Summer, No. 27, A Post-Christian Ireland? pp. 18-39.

¹⁸ Or as more acerbically put by D.P. Moran, the “ignorant peasants...In them are yet to be seen, undeveloped and clouded perhaps, the marks of the Gaelic race...They still possess the unspoiled raw material for the making of a vigorous and a real Irish character.” D.P. Moran, *The Philosophy of Irish Ireland* (University College Dublin, 2006), p. 4.

movement was intellectually and emotively multivalent. The struggle within the politically and socially pre-eminent Irish nationalism—which was temporarily reconciled between 1916 and 1922—was between political polarities; those who sought to mythologize and view the contemporary in terms of sacred traditions of the past, and one which sought to demythologize and look beyond the present in terms of secular progress towards a pluralist future.¹⁹ Indeed, this dynamic was evident even in the late 19th Century as observed by James Connolly commenting on the work of Gaelic and national revivalists:

“...doing a work of lasting benefit to this country in helping to save from extinction the precious racial and national history, language and characteristics of our people. Nevertheless, there is a danger that by too strict an adherence to their present methods of propaganda, and consequent neglect of vital living issues, they may only succeed in stereotyping our historical studies into a worship of the past, or crystallising nationalism into a tradition—glorious and heroic indeed, but still only a tradition...If the national movement of our day is not merely to re-enact the old sad tragedies of our past history, it must show itself capable of rising to the exigencies of the moment. It must demonstrate to the people of Ireland that our nationalism is not merely a morbid idealising of the past, but is also capable of formulating a distinct and definite answer to the problems of the present and a political and economic creed capable of adjustment to the wants of the future.”²⁰

The political principle from which the narrative justifying independence would develop was the necessity of the independence of the “Irish Nation State”. This pre-eminent principle would bind both polarities within Irish nationalism, mutually constraining the varying inflections of these basic binary oppositions.²¹ This inverted the discourse of Gaelic or Catholic inferiority as justification for political and legal impediments within UK by foundationalising these traits as nodal points on which nationhood would be constructed. This simultaneously demoted “English” or “Protestant” influences on the island of Ireland and served to enshrine political binaries throughout the 20th century.²² Furthermore, it

¹⁹ Indeed, one could say that the forecasting of secular progress towards a pluralist future similarly requires the rhetoric of fiction, prophecy as opposed to mythology.

²⁰ James Connolly ‘Socialism and Nationalism’, *Shan Van Vocht*, January 1897, in Peter Berresford Ellis (eds), *James Connolly: Selected Writings* (Pluto Press, 1997).

²¹ Shaun Richards, ‘Breaking the Cracked Mirror’, in Colin Graham & Richard Kirkland (eds), *Ireland and Cultural Theory* (Macmillan Press, 1999) p. 100.

²² This national chauvinism was identified and robustly critiqued by James Connolly writing again in 1897, “...the Irish Socialist Republican Party seeks independence of the nation, while refusing to conform to the methods or to employ the arguments of the chauvinist Nationalist. As Socialists we are not imbued with

permitted a conservative *de facto* confessional ethos to characterise the formal non-sectarianism of independent Ireland.²³ Edward Said identified the pitfalls of inversion within the decolonising process of a country:

“...in Post-colonial national states, the liabilities of such essences as the Celtic spirit, *négritude*, or Islam are clear: they have much to do not only with the native manipulators, who also use them to cover up contemporary faults, corruptions, tyrannies, but also with the embattled imperial contexts out of which they came and in which they were felt to be necessary”²⁴

Bunreacht na hÉireann textualized a certain interpretation of the history of Ireland. From this interpretation, a certain rationality emerges from within which the identity of the Irish people as a constitutional subject is constituted, and from which the values and principles of the Constitution are reflexively justified. It is historical interpretation as constitutional metanarrativity. Clare Carroll succinctly sketches the colonial and post-colonial conditions which characterise an interpretation of an Irish experience of history:

“On one hand, there is a past history of colonialism: conquest, confiscation of land, religious persecution, famine, mass immigration, and the loss of the Irish language. On the other hand, there is a more recent history of postcolonialism: a civil war that ended in the exile or execution of recalcitrant revolutionaries; a Free State that limited colonial institutions more than it lived up to the revolutionary ideals of 1916, and a state-sponsored Catholicism whose tragic abuse of power has in large measure meant the loss of the spiritual authority it once had and an outlawed Church. Postcolonial Ireland is also an island divided into two states.”²⁵

national or racial hatred...We recognize rather that during all these centuries the great mass of the British people had no political existence whatever; that England was, politically and socially, terrorized by a numerically small governing class; that the atrocities which have been perpetrated against Ireland are only imputable to the unscrupulous ambition of this class,...that up to the present generation the great majority of English people were denied a deliberate voice in the government of their own country; that it is therefore, manifestly unjust to charge English people with the past crimes of their Government...whilst refusing to base our political action on hereditary national antipathy, and wishing rather comradeship with the English workers that to regard them with hatred, we desire with our precursors the United Irishmen of 1798 that our animosities be buried with the bones of our ancestors...” Connolly, ‘Socialism and Irish Nationalism’ *L’Irlande Libre*, Paris, 1987, in Peter Berresford Ellis (eds) *James Connolly: Selected Writings* (Pluto Press, 1997).

²³ Gerard Hogan, ‘Law and Religion: Church State Relations in Ireland from Independence to the Present Day’ (1987) *The American Journal of Comparative Law*, vol.35, No.1.

²⁴ Edward Said, *Culture and Imperialism* (Vintage Books, 1994) p. 16.

²⁵ Clare Carroll, ‘The Nation and Postcolonial Theory’, in Clare Carroll & Patricia King (eds), *Ireland and Postcolonial Theory*, (Cork University Press, 2003) p.1

This passage expresses an oversimplification or a narrow view of Irish history, which Carroll acknowledges is somewhat complicated by the reality that Ireland is a part of the “West”, geographically and culturally, thereby being a transgressive site for postcolonial theory.²⁶ Furthermore, the participation of Irish people—Protestant Ascendancy, Scots Irish, and the Catholic Irish²⁷—in the process of colonization around the globe²⁸ challenges the propriety of Ireland’s place in the postcolonial world.

Yet, it would also be inappropriate to slot Ireland in with other “post-British” countries such as the US and other “old” Dominions; Canada, Australia, and New Zealand. In these settler-colonial states, the indigenous populations became, up until recently,²⁹ politically insignificant, whereas in Ireland, outside Ulster, the “indigenous population”, at a price of extensive assimilation within the colonial structure, became the normative socio-cultural and political identity. The Ireland of today is culturally hybrid and represents a successful, if not totally harmonious synthesis of “native” and British cultural themes.³⁰

As a culturally hybrid polity, even if the rhetorical invocations of the constitutional metanarrative are essentialist, certain concessions are admitted, or mythologised provenances are afforded to principles and institutions to “legitimise” them. We see this most strikingly in the institutions of the state, which broadly cohere with a Westminster model, yet employ Irish language nomenclature,³¹ thereby exemplifying the polity’s liminality or hybridity.

²⁶ Clare Carroll, ‘The Nation and Postcolonial Theory’, in Clare Carrol & Patricia King (eds), *Ireland and Postcolonial Theory*, (Cork University Press, 2003), p.3.

²⁷ The utilisation of these demonyms is telling in that the Protestant Ascendancy is lexically constructed without “Irish” in their moniker, Scots Irish has their Britishness foregrounded, and it is Catholic Irish who are primarily denoted by the primordialist amalgam of Catholicity and Irishry as identic moniker. I believe such constructions serve to legitimise and delegitimise “Irishness” of certain cohorts of Irish communities by dint of identic role in historical narratives of Irish history.

²⁸ Clare Carroll, ‘The Nation and Postcolonial Theory’, in Clare Carrol & Patricia King (eds), *Ireland and Postcolonial Theory*, (Cork University Press, 2003) p.4.

²⁹ In Canada Section 35 of the *Constitution Act 1982* ascribes Indigenous First Nation rights, Māori peoples of Aotearoa (New Zealand) have focused organisation for honouring rights in the Treaty of Waitangi 1840 and have reserved seats in the unicameral parliament. Australia held the “Voice” referendum in 2023, which would have afforded Aboriginal and Torres Strait Islanders an assembly in which to express communal interests univocally. Although it failed to pass, it was the first proposed amendment to the Australian Constitution in 50 years, demonstrating the salience of the issue. As evidence of this shift, we can point to the UN Declaration on the Rights of Indigenous Peoples adopted by the General Assembly in 2007. A non-binding resolution, 4 states voted against: Australia, Canada, New Zealand, and the United States. All 4 have accepted the content at a later date, but maintained that it would remain non-binding, thereby non-justiciable.

³⁰ Tom Garvin, *The Evolution of Irish Nationalist Politics*, (Gill and Macmillan, 1981) p. 2

³¹ One could almost call it the first instance of green washing. A metaphor for the whole process of state-building could cynically be expressed in the painting green of post-boxes.

The Irish language is an illustrative site of the disjunction or dissonance between the constitutional metanarrative and the reality of modern Irish society. Article 8 of Bunreacht na hÉireann stipulates that the Irish language is the “national language”, and that English is a “second official language”. The individuation of the Irish nation had a strong ethno-linguistic current at its core, yet the language continued to decline in number of speakers in the post-independence era. The “national language” is far overwhelmed in number of proficient speakers by that of speakers of the “second official language”. One could then ask if Ireland is a “Gaelic state” for a “Gaelic people” if the idiom of daily exchange at all levels of society is anglophonic?³² Or might it be more robustly argued that Ireland is a more thoroughly Anglo-Irish or Hiberno-English polity, with a minority Gaelic speaking population? I state these matters in a non-normative fashion: hereinafter I am not going to make arguments for and against Irish language provision or elevation in the polity. I am merely recognising the material reality that the Constitution envisages a polity in which Irish is the language of the nation, being synonymous with the state, as in times of contradiction, the Irish language version takes supremacy over the English translation³³ but it has either failed or unconsciously abandoned this aspiration. Perhaps the utility of this conception of “Irishness” served its purpose in the independence movement but was deemed impractical or undesirable in the modern Irish state.

So, what of the polity which cannot with any proficiency speak or conduct its matters of state³⁴ primarily in the language it holds as authentically that of the nation,³⁵ and must concede to the actual language of the population at large? The liminality, hybridity, and

³² By no means a new observation, D.P. Moran again from *The Philosophy of Irish Ireland*, (University College Dublin, 2006), p.26, “We must be original Irish, and not imitation English. Above all, we must re-learn our language, and become a bi-lingual people. For, the great connecting link between us and the real Ireland, which few of us know anything about, is the Gaelic tongue. A national language will differentiate us from the rest of the world, and keep us ever in mind that we are an entity of original and historic growth, not a parasite stuck on to the side of England because our own heart was too weak to keep the vital spark in us. A distinct language is the great weapon by which we can ward off undue foreign influence...The value of such a language as a fount of a hundred inspirations; its direct and indirect influence on the character of a people...They will cease to be the unworkable compound which they are now—Gaels by heredity, and English by adoption.”

³³ Article 25.4.6 ; Bunreacht na hÉireann, 1937.

³⁴ Indeed, that the State was failing in this regard was recognised in the eventual legislative response to the lack of provision of State interactions through the medium of Irish with the Official Languages Act, 2003. And that was further built upon with the Official Language Amendment Act, 2021.

³⁵ Indeed, D.P. Moran exemplifies this contradiction in that a vociferous advocate for language revival and the intrinsic connection between Gaeldom, in language and religion, and nationality never developed fluency in Irish.

dissonance within the metanarrative of the Constitution is readily apparent in this disjunction. The point is interestingly articulated by Lisa Foran:

“I am an Irish philosopher who does not speak Irish... I cannot *speak* in Irish, I cannot joke and laugh *as Gaeilge*, I cannot understand in Irish, I cannot *think* in Irish. I do these things in English—English is my first language, but it is not *my* language because I am Irish... While Ireland is a *de jure* bilingual state, it has produced a *de facto* monolingual population. As post-colonial countries go, this is a very unusual situation... the autochthonous population more or less shed its own native language and took instead that of the colonizer... we should not pass over the fact that the number of native Irish speakers continued a rapid decline *after* Irish independence.”³⁶

This liminality is indicative of the somewhat equivocal character of Ireland’s constitutional principles; there is a disjunction between idealised claim and pragmatic reality.

3.3 The Revisionist Critique

There persists a disciplinary debate between revisionist historians and postcolonial literary theorists over the propriety of the postcolonial prism with regard to Irish studies. When comparisons are made along materialist or positivist empirical metrics such as economic structures, living standards, and quality of life indicators³⁷ we can see a substantial disparity between the conditions in Ireland and other comparative colonised territories. Indeed, it has been argued that Ireland seems closer to its European regional counterparts than their former colonies. And yet, postcolonial theoreticians recognise that each colonial experience is unique and shares only the original subjugation by the imperial power, meaning that any generalisation across colonial experiences would miss the “uneven development” inherent in the colonial experience.³⁸ Liam Kennedy expresses an interpretation of Irish history which places the Irish historical experience into an inherently European context of regionality as opposed to post-colonial model of analysis:

“It is crude and unhistorical to see the Anglo-Irish relationship as fixed and unchanging through time, not least as it stretched across many centuries. It is true, for

³⁶ Lisa Foran, ‘Who’s Afraid of the Irish Language?: The National Philosophical Possibilities of a Lost Tongue’, in Clara Fischer and Áine Mahon (eds) *Philosophical Perspectives on Contemporary Ireland*, (Routledge, 2022), p. 230/231.

³⁷ Liam Kennedy. ‘Modern Ireland: Post-Colonial Society or Post-Colonial Pretensions?’ (1992) *The Irish Review* (1986-), no. 13, pp. 107–21.

³⁸ Kumar, M. S., & Scanlon, L. A. ‘Ireland and Irishness: The Contextuality of Postcolonial Identity’ [2019] *Annals of the Association of American Geographers*, 109(1), 202-222.

instance, that in the mid-seventeenth century many of the lordships and chieftainships of Ireland were destroyed and the whole island reduced to the status of a colony of England. That was less than exceptional. Other regions of Europe, in the early modern period and subsequently, were being annexed by powerful neighbouring regions, in the process of formation of modern nation states. One thinks immediately of Brittany, Provence, Catalonia, Hanover, Schleswig-Holstein, Alsace and Lorraine. Of the 150 or so officially designated regions of the European Community today, it would be difficult to think of many regions which do not have some experience of colonisation in some sense or other. To suggest, however, that the essence of their history and contemporary status can be apprehended by reference to the idea of a post-colonial region, or a post-colonial society, would be far-fetched.”³⁹

Although this is a rich and provocative academic debate, engaging in it is not the purpose of this work. What is important to this analysis is not the material “reality” of post-colonial society in Ireland. The important aspect for our purposes is that there are disjunctive interpretations and experiences of both Irish history and current social dynamics; and that these are discursively contested within the structure inaugurated under the auspices of the justificatory metanarrative enshrined in Ireland’s constitutional claim. Yet, when interrogating the genealogy of Ireland’s constitutional claim, and the constitutional identity from where therefrom flows, it is important to acknowledge this debate. Indeed, as Edward Said points to its:

“...the crucial question of whether or not Ireland was a colony, and whether its history is therefore in large measure a colonial and subsequently a postcolonial one. This is no mere antiquarian or academic squabble, since what is at stake is nothing less than the whole question of Irish identity, the present course of Irish culture and politics, and above all, the interpretation of Ireland, its people, and the course of its history.”⁴⁰

3.4 Irishness as Historical Narrative

The salient issue for this piece is that those who were the main architects of the modern Irish state understood themselves to be engaged in a historically consistent “national” anti-colonial struggle of “Irish” against the “English”. The claim was that of “unremitting

³⁹ Liam Kennedy, ‘Modern Ireland: Post-Colonial Society or Post-Colonial Pretensions?’ [1992] *The Irish Review* (1986-), no. 13, pp. 107–21.

⁴⁰ Edward Said, ‘Reflections on Ireland and Postcolonialism’, in Clare Carrol & Patricia King (eds), *Ireland and Postcolonial Theory*, (Cork University Press, 2003) p.177.

struggle” to regain a national independence once lost. The rhetorical motifs used within the Irish nationalist principle, which was textualized in the constitutional metanarrative, was that of a distinct Gaelic and Catholic Irish Nation⁴¹ which had been subjugated by their British neighbours reasserting its rightful sovereignty. This premise, that Ireland was conquered and colonised, was central the nationalist principle. This inaugurated a discursive structure—in which the Constitution was developed—stipulating the boundaries and delimitations of the nationalist political project. The salience of this reading of Irish history is well put by Carty:

“Whether and how Ireland was conquered still remains a hotly disputed question. Its implications for Irish identity are central, since the status of a victim of conquest will be a central feature of the self-esteem of Irish society. It is equally central to the question both of division of the country and its separation from Britain. If the country was not ‘really conquered’, or not ‘all that conquered’, this would have serious implications for the quality of the association between Ireland and Britain and between Ireland and Northern Ireland. Simply, a country which has not been conquered does not require liberation.”⁴²

This Irish constitutional claim was definitionally exclusionary in that it sought to formally demarcate the Irish state from the UK. But it was also internally exclusionary, insofar as a portion of the population of the now-independent Irish state were afforded the role of colonial oppressor within the official constitutionalised narrative of the state. The Protestant minority found itself a beached people within the independent 26 county state and had to reconstruct its own identity to its new administrative environ. A circumstance well-articulated by Ian d’Alton, who writes of the identic resilience of Southern Protestant community, who cleaved to Ireland as a place “not a nation”. The community lived in a state which demanded their adherence to and exclusion from the nation simultaneously.

⁴¹ A passage from Moran is illustrative of the situating of ecumenical republicanism within the more broadly accepting conception of nationalist popular politics wherein to be Irish meant to be Gaelic and Catholic, “No one wants to fall out with Davis’s comprehensive idea of the Irish people as a composite race drawn from various sources, and professing any creed they like, nor would an attempt to rake up racial prejudices be tolerated by anyone. We are proud of Grattan, Flood, Tone, Emmett, and all the rest who dreamt and worked for an independent country, even though they had no conception of an Irish nation; but it is necessary that they should be put in their place, and that place is not on the top as the only beacon lights to succeeding generations. The foundation of Ireland is the Gael, and the Gael must be the element that absorbs. On no other basis. can an Irish nation be reared that would not topple over by force of the very ridicule that it would beget.” D.P. Moran, *The Philosophy of Irish Ireland*, (University College Dublin, 2006), p.36/37.

⁴² Anthony Carty, *Was Ireland Conquered? International Law and the Irish Question*, (Pluto Press, 1996) p. 11.

Most of this Southern Protestant community got from independence to the 1960s with little dislocation to their lives, this compares favourably with other stranded ethnic communities in Europe after the first World War. The community managed to maintain the characteristics of their peoplehood, “a language, a discourse and a use of symbolism that was designed not to throw out the British baby with the Irish bathwater”.⁴³

One could make the argument that the relative ease with which this transition took place was a direct result of the thoroughness of the process of colonisation in that Ireland, more than any other British colony was more fully integrated within the Anglosphere. The marginalization of the Irish language, the ubiquity in Ireland of English language legal, academic, and mass media meant an onerous process of cultural and intellectual decolonization. In essence the Irish person is both Irish and English, and seemingly also American and indeed European.⁴⁴ However, employing stable identities in notions of decolonisation implies a fixed point of identic “purity” or “authenticity” which relies on essentialist metaphysical ideal types which bear little or no relation to the diverse social realities of any modern state.⁴⁵

The primordialism of identities—which is seemingly both relied on and rejected in post-colonial studies—may not withstand rigorous interrogation and can serve to merely substitute one essentialist narrative for another in terms of causation and explanatory significance. Indeed, some post-colonial accounts can tend to homogenise Irish experience across time, space, and social class.⁴⁶ They poorly account for an “organic” development of culture, as they situate imperialism and colonialism as disrupters of development of identity as opposed to moments in a developmental process of political identity consciousness.

Yet, as an analytical approach, it provides a salient framework for engaging with Ireland’s constitutional metanarrative and identity. One of the main strengths of postcolonial analysis is that it can widen, instead of narrow, the interpretive perspective, which is another way of

⁴³ Ian d’Alton, ‘No Country’?: Protestant ‘Belongings’ in Independent Ireland, 1922-49’, in Ian d’Alton and Ida Milne (eds) *Protestant and Irish: The Minority’s Search for Place in Independent Ireland*, (Cork University Press, 2020) p. 20.

⁴⁴ Clare Carroll, ‘The Nation and Postcolonial Theory’, in Clare Carroll & Patricia King (eds), *Ireland and Postcolonial Theory*, (Cork University Press, 2003) p. 5.

⁴⁵ To demarcate certain aspects of a population’s identity as “Irish” and others as “English”, or “European” is to situate “Irishness” in splendid isolation. The population of this island has continuously been engaged and engaging with neighbouring islands and mainland Europe for time immemorial. Furthermore, Ireland and Irish people have played, and continue to play a significant part in the Atlantic World.

⁴⁶ Stephen Howe, ‘Questioning the (bad) Question: Was Ireland a Colony’, [2008] *Irish Historical Studies*.

saying that it liberates instead of further constricting the mind.⁴⁷ Alternatively, our revisionist historians would caution being *too* open in thinking about history.⁴⁸

3.5 Post-Colonial Hybridity

A significant contribution from postcolonial analysis which we can apply to the development of Ireland's constitutional metanarrative and relatedly its constitutional identity is that of hybridity. The idea of hybridity arises from the meeting of cultures which have been, in themselves, often posited as stable and homogeneous; in this context the hybrid is perceived as marginal or liminal. Interrogating the process of cultural formation—which is crucial as constitutions are cultural texts—necessitates a movement to the borders: cultural critics have employed the idea of hybridity to destabilise notions of the authentic; increasingly we understand all cultural formulations as *essentially* hybridised.⁴⁹ For the theorists of Irish independence, constructing an Irish cultural and political identity which would express the “authenticity” and continuity of Irishness was paramount in the development of Ireland's constitutional metanarrative. In this manner it was a distinctively nationalist project, yet the constitutional project would contain the mechanisms for the destabilisation of the nationalist essentialism on which independence movement heavily relied.

In the movement for political and constitutional independence, the hybridity or liminality of “Irishness” and the Irish state were seen by some as obstacles to be overcome, or unavoidable realities which would be intentionally marginalised. This can be captured in the common parlance within early 20th century nationalism of a certain stripe of the concept of “West-Briton”. The centring of the liminal is the framework through which we can analyse the theme of identity throughout constitutional provisions which serve as elements of constitutional identity within the Irish context. The concept of hybridity in this work is crucially a non-normative one. It is utilised to critique and destabilise the essentialism of the Green/Orange, Irish/EU, Ireland/UK binaries, yet it does not seek provide another stable essential—shall we call it the “New Ireland” or “Shared island”—

⁴⁷ Edward W. Said, ‘Reflections on Ireland and Postcolonialism’, in Clare Carrol & Patricia King (eds), *Ireland and Postcolonial Theory*, (Cork University Press, 2003) p.179.

⁴⁸ Stephen Howe, ‘Questioning the (bad) Question: Was Ireland a Colony’, [2008] *Irish Historical Studies*.

⁴⁹ Richard Kirkland, ‘Questioning the Frame: Hybridity, Ireland, and the Institution’, in Colin Graham and Richard Kirkland (eds) *Ireland and Cultural Theory*, (Macmillan Press, 1999).

as a teleological goal. It merely serves to descriptively situate the analysis of Ireland's national constitutional discursive process.

It is indeed the hybridity or hyphenated character of Ireland and its political institutions which engendered a dissonance within the constitutional structure of the Republic of Ireland.⁵⁰ Indeed, this paradoxical dissonance has served an instrumental function in maintaining political stability in the part of the island which obtained the autonomy to situate "Irishness" as the locus of political and social identity.

⁵⁰ Which in and of itself is evidence of the apparent dissonance within the "Irish" national constitutional discourse not yet reconciled. A movement which claimed sovereignty over the whole Irish Nation, which enshrined such an atomised identic constitutional structure, over a disunited island enacted a glaring disjunction.

Chapter 4: Irishness as Normative Identity

4.1 Irishness as a Normative Identity: Popular Sovereignty

The nationalist metanarrative was couched in essentialism of Gaeldom and Catholicity, and the authenticity of the “Irish” state as an expression thereof. Having much of the Unionist and Protestant population—which would have been sizeable minority within a united Ireland—in Northern Ireland allowed the 26-county state to embed its hegemonic identity.¹ The state which was constructed in the post-independence era owed its democratic stability to both the “Gaelic Catholic Irish” ethno-symbolic hegemony² in conjunction with its British administrative inheritance. It is a uniquely Irish³ irony that political stability, in part, was as a result of this hybridity and proximity, geographically and culturally, to the former colonial metropole. The potent admixture of Catholic Gaelic nationalism in tandem the inheritance of a Westminster parliamentarianism and state bureaucracy eventuated a remarkably stable democratic polity. This irony, which is compounded by the official myth of the Republic, which asserted the state’s historical legitimacy as a successor state to a half-imaginary Gaelic polity of the pre-conquest period, to a degree remains.

One may indeed question what is “Gaelic” about Irish political institutions, or what would a Gaelic administrative state look like?⁴ Indeed, the spuriousness of a claim to a Gaelic

¹ The choices made by the Cosgrave government around the Boundary Commission demonstrate that to some extent, whether desired or merely defeatist, the nationalist government of the Saorstát recognised partition was a *fait accompli*. They did not pursue reunification either by force or by attraction, beginning a process of confessionalisation of the state with the prohibition of divorce in 1925. The boundary commission fiasco would give de Valera the opportunity needed to return to constitutional politics and set in motion further double think in regard to the political partition of the island. See, J.J. Lee, *Ireland 1912-1985: Politics and Society*, (Cambridge University Press, 1989) 147-151.

² Dermot Keogh, *Twentieth Century Ireland: Revolution and State Building*, (Gill & Macmillan, 2005) p. 28.

³ I say uniquely Irish in that the Common Travel Area and reciprocal rights of Irish and British citizens permitted mass emigration of Irish individuals ill accommodated in the Irish state the capacity to migrate to a neighbouring state with little to no formal or cultural barriers. Indeed, some have characterised this migration as the “safety valve” of potential instability in the Republic. Emigration from Ireland to the US & UK has acted as a safety valve from the time of the Irish famine and set in train a pattern of migration which would not cease until comparatively recently in the 1960s and seemingly finally coming into a European norm in the 1990s. So, as emigration proved an embarrassment for the independent Irish state and potentially brought into question the merits of independence, more pragmatically it eased short term economic issues. For more see, Ó Gráda, Cormac., and Kevin H. O’Rourke. ‘Migration as Disaster Relief: Lessons from the Great Irish Famine’ *European Review of Economic History*, vol. 1, no. 1, 1997, pp. 3–25. & Mary E. Daly, ‘Migration since 1914’ in Thomas Bartlett (eds) *The Cambridge History of Ireland, vol. IV* (Cambridge University Press, 2018). Ch17.

⁴ Indeed, the incapacity, or unwillingness to have the state intervene and pay on behalf of Eoin MacNeill and Ernest Blythe in the early years of state building to properly support state initiatives to propagate the Irish language and the reality that the early spontaneous enthusiasm for the Gaelic League was nullified by the success of political republicans makes one question how thoroughgoing the desire to Gaelicise Ireland was. Once it had served its utility was the romantic notion of a truly Gaelic Ireland spent? See J.J. Lee, *Ireland 1912-1985: Politics and Society* (Cambridge University Press, 1989) 133-135.

political continuity of consciousness points to two concerns for the early Irish state: its newness, and its need for legitimation. Its combination of traditional nationalist symbolism with underlying newness of the political departure is typical of many post-colonial states.⁵ What this demonstrates is that the inherent logic of the historical narrative constructed to justify and validate the new Irish state, when constitutionalised, enshrined a reliance on the narrative coherence of a distinct Irish people. The claim relied on the ethno-symbolic pillars of Gaeldom⁶ and Catholicism of a colonised people to justify the natural right and status as a legitimately sovereign state.

Laura Cahillane points to the influence of the utopian idealising of the pre-Norman Gaelic legal system in the minds of the drafters of the 1922 Constitution and how it influenced their thinking on popular sovereignty, gender equality, and public ownership of land. She suggests that they conveniently ignored the fact that it was a structured society involving layered classes⁷ from royalty to “servitors”.⁸ Hugh Kennedy was a Cumann na nGaedheal TD, the Free State’s first Attorney General, and Chief Justice of Supreme Court. He was also himself a Gaelic Leaguer, at one time honorary secretary of the Ard-Chraobh. He was anxious to transform the Irish legal system along “indigenous” lines, an opportunity to do so presenting itself with his taking part as a member of committees tasked with both drafting a new constitution for the Free state and also with establishing a new court system. He was cut from the clothe of romantic cultural nationalism,⁹ in juxtaposition to the pragmatic and conservative milieu of the Cumman na nGeadheal government, but

⁵ Tom Garvin, *The Evolution of Irish Nationalist Politics*, (Gill and Macmillan, 1981) p.3.

⁶ Indeed, this nativist character was much informed by the writings of Eoin MacNeill, who as a co-founder of the Gaelic League more readily identified a political dimension to Hyde’s recognised need to “de-Anglicise” Ireland. Indeed, MacNeill was to indicate that he would not attach any great merit to Irish independence if it were not a distinctive Irish civilisation, meaning Gaelic. This was to inform MacNeill’s works *Phases of Irish history* and *Tripartite life of Saint Patrick*. These works placed the Irish language, Celtic culture, and Irish Catholicism in the European, internationalist context and sought to highlight prestige and distinction to Irish state. See, Carew, Mairéad. ‘Eoin MacNeill: Revolutionary Cultural Ideologue’ [2016] *Studies: An Irish Quarterly Review*, vol. 105, no. 417, pp. 67–75.

⁷ This historical interpretation of ancient Gaelic society is itself a creation of the subjectivity, or perhaps intersubjectivity of its historians. The argument presented by Peter Berresford Ellis, *A History of The Irish Working Class*, (Victor Gollancz Ltd, 1972), presents a communistic reading of the ancient Gaelic society arguing that class structure of that society was fluid, critiquing the conservative historiography of the period as written by Eoin MacNeill.

⁸ Laura Cahillane, *Drafting the Irish Free State Constitution*, (Manchester University Press, 2016) p. 79-81.

⁹ Indeed, this cultural nationalism nearly gained sartorial expression in Kennedy’s attempt to replace the austere tradition judicial garb, which he identified as a British inheritance, and replace it with a robe more reminiscent of the ancient Brehon. He was supported in this by W.B. Yeats, but did not arouse the enthusiasm of his judicial colleagues for this symbolic Gaelicisation of the judiciary. Ruadhán Mac Cormaic, *The Supreme Court*, (Penguin Books, 2016) p. 25.

ultimately the initial changes to the legal system would be minimal.¹⁰ Kennedy viewed the legal system in Ireland as institutionally English, thereby in character inherently alien to this island; he believed if Irish people were to accept the Free State, “foreign” systems would have to be replaced:¹¹

“The body of laws and the system of judicature so imposed upon this Nation were English (not even British) in their seed, English in their growth, English in their vitality... Thus it comes about that there is nothing more prized among our newly won liberties than the liberty to construct a system of judiciary and an administration of law and justice according to the dictates of our own needs and after a pattern of our own designing.”¹²

However, the principal difference in the legal systems of Ireland and the UK stems from the difference in popular and parliamentary sovereignty, which necessarily included a constitutionally formalised procedure of judicial review. It is a republican form of the Westminster system which persists in Ireland today. The 1922 Constitution partly followed the Westminster model of government but partly innovated, inspired by the continental European constitutions that had been adopted in the aftermath of World War I.¹³ Both the 1919 Dáil Éireann Constitution¹⁴ and the 1922 Free State Constitution embedded the British inheritance of the Westminster model of responsible government—the Free State Constitution doing so as mandated in Article 1 of the Anglo-Irish Treaty, whereas the 1919 Dáil Constitution was under no obligation to do so—in effect the die had been cast and so the 1937 Constitution followed course; that model remains firmly entrenched in 21st century Ireland.¹⁵ One could say that it was merely control on the levers of power which motivated the nationalists and not any tangible return to Brehon law or tanistry.¹⁶

¹⁰ J.J. Lee, *Ireland 1912-1985: Politics and Society*, (Cambridge University Press, 1989) p.128

¹¹ Thomas Towey, ‘Hugh Kennedy and the Constitutional Development of the Irish Free State, [1977] *Irish Jurist*, Vol.12, No.2.

¹² SPO, S1739, W.T. Cosgrave, Circular to members of the Judiciary Committee 29 January 1923. As reproduced in Towey, [1977] *Irish Jurist*, Vol.12, No.2.

¹³ Oran Doyle & Tom Hickey, *Constitutional Law: Text, Cases and Materials*, (2nd edn, Clarus Press, 2019,) p. 11.

¹⁴ As prescribed in Article. 2(c) and 2(f), Dáil Éireann Constitution, 1919.

¹⁵ *ibid*, p. 107.

¹⁶ Although, the intellectual landscape of the Gaelic revival and the vocationalist, corporatist, and fascist ideas of the early twentieth century would lead Ernest Blythe, among a small coterie of others, to conclude that democratic politics in the fashion of Westminster parliamentarianism and party politics in general was inimical to Gaeldom, and that tanistry would be more readily embodied in one party state. See, R.M. Douglas, *Architects of the Resurrection: Ailtirí na hAiséirghe and the Fascist 'New Order' in Ireland*, (Manchester University Press, 2009) ch.4

While the Gaelic credentials of Ireland's political institutions may be questioned—although, if Gaeldom amounts to popular sovereignty then the claim may be significant—the Catholicity of the constitutional polity and the development of political and social identity was certainly significant. The 1937 Constitution has been consistently critiqued by historians on these grounds. J.H. Whyte acknowledged both the Catholicity of the document while acknowledging that there were many who thought it should have gone further.¹⁷ Although de Valera's constitution did not go quite so far in the direction of recognising Catholic values as some clerics desired, it certainly went much further than the 1922 constitution had done. The 1937 Constitution can be considered a significant step in the developing confessionalisation of the polity, but it was merely one more instance of an ongoing process, regardless of which party was in power, since the establishment of the State to enshrine Catholic principles in the law of the land.¹⁸

J.J. Lee was similarly critical for the sectarian implications of the document, remarking on the invocation of 'Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial'¹⁹ asked: what God and whose fathers?

"Our fathers' who sustained their trials at Derry, Enniskillen, Aughrim and the Boyne? Was this the same God that Protestant people celebrated as 'Our help in ages past'? 'Gratefully remembering their heroic and unrelenting struggle to regain the rightful independence of our nation' immediately eliminated the vast majority of the Protestant people as an integral part of 'our nation'. If there was only one Irish people, must the Protestant people jettison their heritage and deny their own fathers before they could become truly part of 'the people of Éire'?"²⁰

However, this same document, with some textual reforms, could be praised by Gerard Hogan as a text which has accommodated the process of deconfessionalising the state through its liberal democratic values—what Hogan calls "Protestant" values—respect for individual rights and the separation of the Church and State. Hogan—contrary to much of the historiography of the Constitution—praises the extent to which *it does not* reflect Catholic social teaching.²¹ This demonstrates the centrality of themes of identity to the

¹⁷ J.H. Whyte, *Church and State in Modern Ireland 1923-1970*, (Gill and MacMillan, 1971) p. 52-56.

¹⁸ *ibid*, p. 56.

¹⁹ Preamble, Bunreacht na hÉireann, 1937.

²⁰ J.J. Lee, *Ireland 1912-1985: Politics and Society*, (Cambridge University Press, 1989) p.205.

²¹ Gerard Hogan, 'Foreword' in Dermot Keogh & Andrew McCarthy, *The Making of The Irish Constitution 1937*, (Mercier Press, 2007) p. 15/16.

discourse of Ireland's constitutional development. Perhaps this indicates some of the reasoning underpinning Hogan's seeming elevation of the procedure for carrying out this process—popular sovereignty expressed through referendum—to that of Ireland's constitutional *Grundnorm* and constitutional identity. It is a process whereby the elements of the constitutional metanarrative, made manifest in democratic procedures of the text, has iteratively denuded itself of one of the central pillars of its underpinning rationale.

From the time of Daniel O'Connell—who situated the priest as an agent of agitation in a mass political movement based on Catholic discontent—liberalism has also been a characteristic within Irish nationalism.²² All subsequent significant movements for Irish freedom retained O'Connellite nationalism's dynamic commitments to Catholicity and liberal principles, and post-treaty nationalists were to be bound—albeit in some instances reluctantly and superficially—to the pledges of their predecessors. But despite the ecumenical convictions of its theoreticians, Irish nationalism only latterly, and perhaps only minimally, has become more inclusive.²³

Ireland during the 1930s, the decade of de Valera's constitutional project, was that of a society where outward-facing piety was performed *in extremis*,²⁴ at once demonstrating great public devotion while simultaneously failing to live up to the moral dictums of the Church. This disjunction is identified by Diarmaid Ferriter:

²² Indeed, O'Connell's liberalism was of its time and conformed broadly with the Whig liberalism of British Aristocracy in the 19th century. From his earliest public intervention, a speech in 1800 at the Royal Exchange opposing the Act of Union, O'Connell identified his belief in the unalienable rights of the Kingdom of Ireland to parliamentary independence, over and above his belief in Catholic emancipation, "*Let us show to Ireland, that we have nothing in view but her good; nothing in our hearts but the desire for mutual forgiveness, mutual toleration, and mutual affection; in fine, let every man who feels with me proclaim, that if the alternative were offered to him of union, or the re-enactment of the penal code in all its pristine horrors, that he would prefer without hesitation the latter as the lesser and more sufferable evil; that he would rather confide in the justice of his brethren, the Protestants of Ireland, who have already liberated him than lay his country at the feet of foreigners.*" His Constitutional monarchism, in contradistinction from his Republican contemporaries in the United Irishmen, whom he robustly condemned for their unleashing on bloodshed and in his words, "could not forgive them for helping Pitt to carry the Union" presents a different model of Irish Nationalism. See, John O'Connell (eds), *The Life and Speeches of Daniel O'Connell*, (John Duffy, 1843) p.13.

²³ McCaffrey, Lawrence J. 'Irish Nationalism and Irish Catholicism: A Study in Cultural Identity' [1973] *Church History*, vol. 42, no. 4, pp. 524–34.

²⁴ This ostentatious public piety was most exemplified by the Free State hosting the 31st Eucharistic Congress in 1932. This event was thematically built around the 1500th anniversary of St. Patrick's evangelism in Ireland, allowed for mass public display of Gaelic and Catholic identity. As a major project for the State, it served the purpose of demonstrating the ability of the State to host such a mass participatory occasion. It further allowed for the demonstrating of the Catholicity of the Irish State, thereby serving to entrench partitionist sentiment. It was also fortuitous timing for Éamon de Valera and the Fianna Fáil party, many of whom had been excommunicated for their republican activity, to burnish their Catholic bona fides. See, Rory O'Dwyer, *The Eucharistic Congress, Dublin 1932*, (Nonsuch, 2009).

“Things that were regularly denounced by the Church—cinema and imported tabloid newspapers, for example—were loudly criticised precisely because they were so popular. People continued to be quite capable of distinguishing between their theoretical devotion to faith and patriotism, and their practise.”²⁵

However, just because the level of devotion was partially theoretical and customary as opposed to intellectually thoroughgoing, does not mean it was in any way insincere or superficial. Such a suggestion would misapprehend the role of Catholicism in Irish society: it was an ethnic identity. Catholic liturgy was the mortar cementing the majority of the Irish community: birth, marriage, sickness, death.²⁶ As such, it was often a pillar of an identity which came to clash with the perceived necessary means of servicing another aspect of one’s commitments to the cause of the nation. Irish physical force nationalists repeatedly drew the recrimination and condemnation of the Irish clerical hierarchy. From agrarian agitation in the nineteenth century through to independence, and even beyond that in Northern Ireland, the Catholic Church has formally condemned irredentist physical force republicanism.²⁷

One of the necessary pillars of Irish individuation within the British structure was simultaneously necessary and condemnatory to the physical force tradition which forced through an independent Irish Catholic state. This interesting dissonance is expressed by Brendan Behan in *Borstal Boy*, where the protagonist is soothed by the prospect that he will be able to attend a mass. The author also alludes to the Irish Catholic Churches deeply damaging view of human sexuality—which in conjunction with Irish culture’s authoritarian strain²⁸ and an Ultramontanist Church influenced by the moral rigorism associated with Jansenism—would lead to a social and political culture of repressive confessionalism, although never formal integralism:

“...I had difficulties when I was thirteen or so, with myself and sex, and with the Church because they always seemed to be against Republicans. My father had been excommunicated in 1922 with thousands of others, and so had De Valera, and the Bishops were always backing the shooting and imprisoning of IRA men. I had been for the Republicans in Spain; and it seemed the Church was always for the rich against

²⁵ Diarmaid Ferriter, *The Transformation of Ireland: 1900-2000*, (Profile Books, 2004) p. 360

²⁶ McCaffrey, Lawrence J. ‘Irish Nationalism and Irish Catholicism: A Study in Cultural Identity’ [1973] *Church History*, vol. 42, no. 4, pp. 524–34.

²⁷ J.H. Whyte, *Church and State in Modern Ireland 1923-1970*, (Gill and MacMillan, 1971) p. 11.

²⁸ *ibid* p. 22.

the poor. But I have never given up the Faith (for what would I give it up for?) and now I was glad that even in this well-washed smelly English hell-hole of old Victorian cruelty, I had the Faith to fall back on. Every Sunday and holiday, I would be at one with hundreds of millions of Catholics, at the sacrifice of the Mass, to worship the God of our ancestors, and pray to Our Lady, the delight of the Gael, the consolation of mankind, the mother of God and man, the pride of poets and artists...in Florence, in France, in Kerry.”²⁹

Catholicism gave Irish identity a prestige, a trait which led to discrimination within the UK, gave the Irish Catholic majority a community beyond the bounds of these isles. This was an inversion of the colonial tools of suppression, wherein Catholicism³⁰ and Gaelic identity were demarcations of inferiority,³¹ The conception of Irish nationalism embedded in the Constitution of 1937 would celebrate these features. However, inversion can, did, and indeed does serve to bolster ethno-symbolically justified national binaries.

The influence of the Catholic Church had reached its zenith by the 1950s,³² by which time it had become an unreflective institution unable to respond to the nascent efforts at dismantling Ireland’s confessional legislative and constitutional ethos.³³ Yet it would only be the abuses of Catholic clergy, and the gradual disassociation of the laity from Church institutions and their perceived cruelties, which would rupture the identic binaries in the Republic. Indeed, it is only once the prestige of Catholicism had been tarnished in Ireland that the importance of the institutional Church as synonymous with religion as nodal point

²⁹ Brendan Behan, *Borstal Boy*, (Arrow Books, 1990), p.52/53.

³⁰ The legislative corpus commonly referred to as the “penal laws” span the centuries from the prescription of the Oath of Supremacy under Elizabeth I in 1558, to 1755 wherein an act for the better regulating of juries was passed under George II, wherein “papists” serving on juries in actions between a Protestant and a Catholic, may have their competency to sit as a juror challenged because of their religion. The laws spanned a wide array of subject matter including, but not limited to restrictions in employment, voting rights, education, land ownership, capacity to hold arms, and religious practise.

³¹ Clare Carroll presents an analysis of the discourse on Irish barbarity from Gerald of Wales through to John Derricke wherein Irish are represented by the Anglo literati as barbarous, pagan and outside the law in Gerald’s *Topographia* and rebellious Catholics under the law in Derricke’s *Image of Ireland*. Carrol, ‘Barbarous Slaves and Civil Cannibals’ in Carrol and King (eds), *Ireland and Postcolonial Theory* (Cork University Press, 2003).

³² Perhaps best exemplified by the Mother and Child scheme crisis in 1951 wherein the Catholic Church, the Irish medical profession, and the right-wing component of the governing coalition collectively worked to defeat the programme of Noël Browne. Which would further demonstrate the increasing partitionist divergence between Northern Ireland, which had obtained publicly funded medical care in 1948.

³³ Daithí Ó Corráin, ‘Catholicism in Ireland, 1880–2015: Rise, Ascendancy and Retreat’, in Thomas Bartlett (eds) *The Cambridge History of Ireland, Vol. IV* (Cambridge University Press, 2018), ch.24

of identity would diminish; scandal would serve as an accelerant to a gradual process of shifting patterns in religiosity and a changing religious landscape.³⁴

The incapacity of either the populace, or most impactfully the clergy themselves, to live in accordance with the Church's moral social teaching—which was so central to Catholic Irish identity—led to a diminution of Catholicism as a constitutional epistemology for judicial interpretation. This process of rupturing, or dramatic expression of internal dissonance, has been embodied in the constitutional development of the state. A process which in and of itself has reinforced the hegemony of the *national* discourse; the Constitution has been utilised as a site on which a national reckoning with the ramifications of the nationalist Catholic premise on which independence was founded can be re-narrated. By enacting a legalistic response to state shame, the state inaugurates unitary official histories. The constitutional response to this is to, through amendment, permit a collective sense of righting perceived wrongs of the past. Alongside this, through the use of limited inquires; adversarial interrogation; adherence to fixed evidentiary standards; and a focus on monetary redress, the state reinforces professed competence to determine how painful national events are understood and resolved. This reinforces state sovereignty.³⁵

The process of constitutional amendment channels a societal issue of normative dissensus through the performance of popular sovereignty—as consistent with the metanarrative—thereby iteratively rebolstering the authority of the constitutions claim to democratic legitimacy through enacting reform. All of which happens on the State's terms.³⁶

4.2 Writing the National Claim as Historical Narrative

This analysis demonstrates that the image of “Irishness” which was pre-eminent in the national independence movement embedded their salient notions of identity within the constitutional discursive structure. This was a Gaelic and Catholic characterisation of the “Irish Nation” demarcating itself from British identity and administration, thereby textualizing high rhetorical dependence on national popular sovereignty. The analysis will show that although co-equal loci of authority remain in the Preamble and Article 6—that of Christian theism of a particular Roman Catholic hew and national popular sovereignty—

³⁴ *ibid*, ch.24.

³⁵ Sinéad Ring & Máiréad Enright, ‘State Shame, Sovereignty, and Legal Responses to Historical Institutional Abuse’, in Clara Fischer and Áine Mahon (eds), *Philosophical Perspectives on Contemporary Ireland* (Routledge, 2020).

³⁶ Article 46.2. Bunreacht na hÉireann, 1937.

a process of deconfessionalisation has partially reconciled the sectarian dissonance of the constitutional discourse. However, the dissonance at the heart of the national question remains, and it is this dissonance which has led to the continued necessary assertion by the judiciary of popular sovereignty as the abiding constitutional identity of Ireland.

Ireland remains linked to the UK geographically, culturally, and politically.³⁷ It is also formally part of the EU and the Council of Europe which has caused significant effects in regard to its supranational commitments. This in turn has impacted on Ireland's capacity to rely exclusively on its "own genius and traditions"³⁸ in terms of expressing state identity. Popular sovereignty in the Irish Constitution is constructed on the basis of sovereignty emerging from the people of the "Irish Nation". But it may also be the case that the nation-state as the organisational model of administration, and nationalism, patriotism, and parochialism is losing normative salience as a result of increasingly globalised challenges and supranational intermediary identic frames. If so, a dissonance emerges, and this is being moderated by the judiciary with 'constitutional identity'. This work critically engages with the process by which the hegemonic Irish ethno-symbolist discourse was embedded in constitutional text; how dissonance emerged and continues within the process; and how challenges to the notions of the essentialist construct of "Irish Nation" are continually processed.

In Said's words:

"All over the world, in as many societies as one can think of, there is a struggle over national narrative, what its components are, who its main constituents are, what is shaping forces are, why some elements have been silenced and why others have been triumphed, what lessons about national identity—if there is such a thing—can be

³⁷ Ireland shares a land and sea border with the UK. Irish and British citizens have reciprocal rights in each other's states and share a Common Travel Area, and both sit on the British and Irish Council. Indeed, the British-Irish Agreement 1998 is specifically constitutionally intertextual through Article 29.7 of Bunreacht na hÉireann. Illustrative of the entangled and complex relationship between both populations and their sense of national identity can be seen in popular culture when an Irish person is claimed by the British upon earning international acclaim, and the complicated process by which some British people with Irish connections are either claimed to be "really Irish" or a "plastic paddy". One need look no further than the individuals who have represented, or chosen not to represent, Ireland's football teams to see the interconnectedness of these islands. For an interesting account of Ireland's relationship with its diaspora see, Hickman, M. J., 'Locating' the Irish Diaspora' [2002] *Irish Journal of Sociology*, 11(2), 8–26

³⁸ Article 1, Bunreacht na hÉireann, 1937.

learned. This struggle has taken many forms, some academic and discursive, others collective and organized.”³⁹

The paradigmatic nationalist discourse in which political⁴⁰ contestation occurs on this island is, at its most basic, a claim that the affairs of this island should be administered by those who are of this island and on this island. This is as uncontentious a rendering of the claim as one can articulate. The issues emerge when questions arise as to what association this island should have with its neighbours; who can “legitimately” call themselves of this island; and by what means should this island be administered. The pre-eminent national claim is that the island of Ireland should be the omphalos upon which we gaze, and from which we should organise our political and legal institutions. The institutions of the state should be founded on the premise of finding in all instances an “Irish solution to an Irish problem”.⁴¹

The secessionist agenda of the dominant element in post-1916 nationalism was justified on the idea that Irish Ireland was seen as good in itself. Furthermore, the construction of this “Irish Ireland” was characterised by an idea of “Irishness” which was rhetorically committed to a conception of Irish identity which could not but be at odds with “the English”. As much of the grievances which had been the impetus for agrarian disruption and land agitation had led to a “killing of home rule with kindness” approach from Westminster, the Irish Parliamentary Party had finally achieved the passage of the third Home Rule Bill or Government of Ireland Act 1914. This led to a situation in which the irredentist nationalist elements had to shift the realm of agitation from a rights-based argument for independence to a cultural claim.⁴² Ireland was no longer an inequitably treated region of the UK, it was a “Nation” which could not be reconciled to British administration.

This rhetorical development can best be embodied in the person of Patrick Pearse, whose political philosophy was to develop from a respect for constitutional nationalists like Charles Stewart Parnell and Daniel O’Connell, to an almost personal syncretism with revolutionary figures like Theobald Wolfe-Tone and Robert Emmet. At one time a cultural

³⁹ Edward W. Said, ‘Reflections on Ireland and Postcolonialism’, in (eds) Clare Carrol & Patricia King, *Ireland and Postcolonial Theory*, (Cork University Press, 2003) p.180.

⁴⁰ Politics in and of itself being a cultural structure in which resources are competed for.

⁴¹ Comments by Mr. Charles Haughey in introducing the Health (Family Planning) Bill, 1978: at Second Stage to the Dáil in February 28th 1979.

⁴² O’Kelly, Ciarán. ‘Politics of Identity — V: Being Irish’ [2004] *Government and Opposition*, vol. 39, no. 3, pp. 504–20.

nationalist concerned more with the debates over divergences between provincial Irish dialects and the bilingual educationalist policies of Belgium, and a tacit supporter of Home Rule, Pearse became the primary rhetorician of physical force nationalism.⁴³ Similarly, Éamon de Valera underwent an equivalent ideological development. As a student in Blackrock, he supported the motion debated in the Literary and Debating Society that “constitutional monarchy as a form of government is preferable to republicanism”,⁴⁴ and had expressed no discernible interest in nationalist politics.⁴⁵ He would later become consumed by cultural nationalism’s political expression, which is indicative of the potency of the national principle.

On to the modern concept of nationality Pearse grafted his own contribution: its elevation to a religion.⁴⁶ In the national metanarrative which Pearse articulated, rationalising the nationalist movement necessitated a narrative of continuity in which a separatist tradition in Ireland reached back to those who resisted the Norman invasion in 1169. Pearse attributed to the political and military figures of earlier generations a philosophy of nationality which had not developed until the nineteenth century.⁴⁷ To understand, rationalise, and make morally normative the desire for Irish national independence, the historical past was interpreted as narratologically consistent, the Irish people had unremittingly been resisting “foreign” administration and struggling for national sovereignty. The nationalist culture which predicated political independence was one informed by the intellectual imaginative landscape prevalent in the last decades of the 19th century romanticism; “cultural nationalism”. This shifted the Irish struggle onto a spiritual plane.⁴⁸ Poets and orators had constructed a paradigmatic discourse whereby contemporary events would be judged by the immutable values of a legendary past, and the comparison was bound to be unsatisfactory.⁴⁹ Popular sovereignty was a leitmotif which ran through

⁴³ The development of Pádraic Pearse’s political thinking is well covered in Ruth Dudley Edwards biography of the man. She demonstrates that the rationality of cultural nationalism, in tandem with a rationality of action and the early 20th century romantic glorification of violence and sacrifice for the nation led the once moderate Pearse to his revolutionary stand in 1916. Ruth Dudley Edwards, *The Triumph of Failure*, (Poolbeg Press, 1977) ch.5.

⁴⁴ Ronan Fanning, *Éamon de Valera: A Will to Power*, (Faber & Faber, 2015), p. 13.

⁴⁵ *ibid* p. 20.

⁴⁶ Ruth Dudley Edwards, *The Triumph of Failure*, (Poolbeg Press, 1977) p.253.

⁴⁷ *ibid* p.252.

⁴⁸ Martin Williams, ‘Ancient mythology and Revolutionary Ideology in Ireland: 1878-1916’, [1983] *The Historical Journal*, vol. 26, no. 2, pp. 307–28.

⁴⁹ *ibid*.

Irish separatist thought, from Theobald Wolfe Tone through the Irish state-builders,⁵⁰ and continues through to our Supreme Court Justices today.

Independence, in the thinking of those who would ultimately bring it about, linked indissolubly the nation and popular sovereignty; the nation was the “Irish people”, and the state was to be of them, by them, if not always and everywhere to materially benefit them as individuals. The unitary construction of the Irish nation was in certain aspects of the state to severely diminish liberal protections for the individual for the benefit of Ireland and the consistency of its self-understanding.⁵¹

4.3 The Paradox of Normative identity: The Internal Others.

By constructing “Irishness” as the impetus for statehood and inextricably connecting Irishness with ethno-linguistic amalgam of Gaeldom and Catholicism, dissenters or transgressors are justifiably rebukeable or punishable as they threaten not just the “state” but the moral health of the ‘Nation’. This can be seen in a suite of legislative measures in the early years of independence which sought to safeguard and bolster the “moral health” of the people *qua* nation. For those who did not exist within, or conform to, the masculinist, heterosexual, Catholic, and sedentary paradigm enshrined within the constitutional and legislative corpus of the rhetorically, politically, and legally constructed simulacrum of “Irishness”, then the solid house built by the nationalist political project could be a very cold house indeed.⁵²

Clara Fischer argues that the “national imaginary” which underpinned the construction of Ireland’s nascent nation-state was one which clearly relied on the differentiation of British and Irish identity. In service of this act of imaginative construction, the themes or nodal points in a discourse of national consciousness—of “purity, chastity, and virtue” as differentiated from “impurity, licentiousness, and vice”—were attributed respectively to Irish identity and the “morally corrupt former colonizer”, thereby inverting narratives of

⁵⁰ Laura Cahillane, *Drafting the Irish Free State Constitution*, (Manchester University Press, 2016) p. 79.

⁵¹ O’Kelly, Ciarán. ‘Politics of Identity — V: Being Irish’ [2004] *Government and Opposition*, vol. 39, no. 3, pp. 504–20

⁵² For instance: The Censorship of Films Act of 1923, The Censorship of Publications Act of 1929, Criminal Law Amendment Act of 1935 (banned the sale of contraceptives), The Intoxicating Liquor Acts of 1924 and 1927, The Public Dance Halls Act of 1935, all of which served to try and exercise control over the population on rationale of protecting the moral health of the nation. David Kenny & Peter McCarthy, ‘Religion and Law in Ireland’s Post-Colonial Nation-Building’, in *Talk About: Law and Religion*, *BYU law International Center for Law and Religious Studies*, 11/1/2024. <https://talkabout.iclrs.org/2024/01/11/religion-and-law-in-irelands-post-colonial-nation-building/>.

inferiority and mere Irishry. This political project of state-building from a distinctively Irish nationalist imaginary, or epistemic viewpoint, was bolstered by the intellectual prestige of Catholic social teaching. This new national identity founded on moral purity was given expression in the legislative and constitutional corpus of early decades of the Irish state. Fischer notes the particularly gendered⁵³ emphasis this project would undertake:

“Notably, the moral purity at stake in the project of Irish identity formation was essentially a sexual purity enacted and problematized through women’s bodies. Women were saddled with the task of being guardians and upholders of virtue in the home—a sphere deemed more appropriately their domain—while serving as symbols of the fledgling nation.”⁵⁴

Ruth Fletcher further draws out the consequences of this post-colonial discursive structure as it relates to national identity and moral purity. Fletcher argues that Ireland’s restrictive abortion policy, pre-dating the repeal of the Eighth Amendment, can be situated in the post-colonial national identity discourse, in that it was site within the process of inversion wherein “English” became a by word for inferior to “Irish” values. This contributed to a discourse in which a “culturally authentic pro-life Irishness” was differentiated from “British colonial pro-choice culture”. This argument situates the constitutional prohibition of abortion and the near absolute protection of the foetal life as a symbol of the moral superiority of the post-independence Irish people *qua* state. Fletcher draws a lineage in the formation of this discourse from the colonial project which necessitated a binary structure between “British and Irish, the barbarous and the civilised”, demonstrating that the post-colonial inversion thereof, in different formations over time, situated the Irish as morally civilised and the British as morally barbarous. Demonstrating the continued significance of the post-colonial discursive framing in the politics of abortion law in Ireland, Fletcher points to the structure of inversion remaining constant with the argumentative position being transversal:

⁵³ This is most evidently manifested in both the scandals of Mother and Baby Homes and Magdalen Laundries. Details of which can be viewed in ‘Final Report of the Commission of Investigation into Mother and Baby Homes’, (Department of Children, Disability, and Equality, 12 January 2021) and ‘Report of the Inter-Departmental Committee to establish the facts of State involvement with the Magdalen Laundries, (Department of Justice, Home Affairs, and Migration, first published 5 February 2013, last updated 9 August 2021).

⁵⁴ Fischer, Clara. ‘Gender, Nation, and the Politics of Shame: Magdalen Laundries and the Institutionalization of Feminine Transgression in Modern Ireland’ [2016] *Signs*, vol. 41, no. 4, pp. 821–43.

“Sometimes abortion law and politics has put Irish colonial history to work by constructing Irishness as needing protection from infiltration by the 'Protestant' pro-choice values of the former colonial power. At other times we see an emphasis on the need to protect Irishness from exploitation by the reproductive service providers of the former colonizer. On yet other occasions we see pro-choice critics of anti-abortion policy adapt the colonial legacy to support their critique as they depict abortion as an ancient native practice, or represent the ill-treatment of abortion-seeking women as 'colonial'. These arguments show that Irish post-coloniality is part of the historical backdrop to abortion politics, but they also show that the effects of colonial history change over time and between agents.”⁵⁵

David Norris, writing in 1981, argued that this construction of national identity was still having tangible consequence in how the assumed homogeneity of Irish identity, wherein the identity of the people was conterminous with the state, impacted on homosexuals in the Republic. While acknowledging that Ireland was not unique in this heteronormative construction of nation *qua* people *qua* state—Ireland was merely a microcosm of pervasive attitudes to homosexuals internationally—he said the near homogeneity of Irish society sharpened “the focus of public attitudes within somewhat unreal limits”. There was an assumption that Irishness meant “to be white, heterosexual, and Roman Catholic”. In this essentialist construction of national identity, those who were transgressive for one reason or another, be that religion, sexuality, ethnicity, or gender, or an intersection thereof, a discourse with institutional authority could rebuke, other, and punish:

“Homosexual people as one might expect, are the special victims of this method and so successful has it been that there remained in the minds of many people until recently a doubt as to whether the terms "Christian" and "Homosexual" or "Irish" and "Homosexual" were not mutually exclusive.”⁵⁶

Jane Helleiner, situates parliamentary discourses with strong anti-Traveller content as consistent with this necessity of the post-colonial “Irish Ireland” national identity of people *qua* state, being a good in and of itself. If Britain was the cause of all ills that befell the Irish people, then an Irish state would be, *ipso facto*, better and more successful. This overly

⁵⁵ Fletcher, Ruth. ‘Post-Colonial Fragments: Representations of Abortion in Irish Law and Politics’ [2001] *Journal of Law and Society*, vol. 28, no. 4. pp. 568–89.

⁵⁶ Norris, David. ‘Homosexual People and the Christian Churches in Ireland: A Minority and Its Oppressors’ [1981] *The Crane Bag*, vol. 5, no. 1, pp. 31–37.

simplistic narrativization of Irish political realities was periodically undermined by a stagnated economy. Economic failure of the nascent independent state was partially rationalised through the negative social influence presented by the “dangerous” Traveller community. The failure of the state to deliver economic prosperity served as sufficient impetus for the political utilisation of already perceptible anti-Traveller sentiments in Irish culture and parliamentary discourse. As an indigenous community which did not fit within the sedentary principles and assumed normative constitutionally enshrined Irish identity, Travellers were politically scapegoated and discursively situated as a “problem” which needed to be resolved.

The political discourse of “itinerancy” situated the Travelling people as in need of assimilation in the socio-normative identity of sedentary settled urban community; this official attitude can be summed up by the comments of Charles Haughey when addressing members of the committee formed to draft a report on this “problem of itinerancy”, i.e., the way of life and ethno-cultural identity of the Travelling people, “there could be no final solution until itinerant families were absorbed into the general community”.⁵⁷ Robbie McVeigh suggests that far from being a linguistic *faux pas* which inadvertently echoed the rhetoric of Nazism, there was a pattern of Irish politicians advocating for measures to solve the so-called “problem” of Itinerants, by means such as: “shooting”, “tagging”, “castration”, “internment in concentration camps”, and “incineration”.⁵⁸

This followed an earlier attempt to assimilate the children of the Travelling people in the normative sedentary community with the School Attendance Bill 1942, which gave powers to the Court to send children to industrial or reformatory schools per section 19. However, it made particular provision for the children of “vagrants” in sub-s 21(1), “the word ‘vagrant’ means a person who has no fixed place of abode and habitually wanders from place to place”. This section granted sweeping powers of arrest, without warrant, to an Garda Síochána, and the power to the Court to commit the child/ren to an industrial school. Timothy Linehan TD thought the phraseology of sub-s 21(1) to be too lenient as it would not include those of Traveller ethnicity who indeed had a fixed abode, articulating with terrible clarity the community to which this act was aimed. This reflected the common belief at this time that the Travelling people were in essence failed settled people who had

⁵⁷ Terms of Reference for The Commission on Itinerancy, ‘Report of the Commission on Itinerancy’ (The Stationery Office; 1963).

⁵⁸ Robbie Mc Veigh, ‘The ‘Final Solution’: Reformism, Ethnicity Denial and the Politics of Anti-Travellerism in Ireland’ [2008] *Social Policy & Society*, 7:1, 91–102.

at some point in their family's history taken to the roads, or what could be termed the "drop out theory" of Traveller origins:⁵⁹

"...quite a number of these vagrants who have a fixed place of abode in the sense that in some small town they have a little dump that is the headquarters of the clan or tribe... They return, like swallows, at stated intervals. When a new season opens, they set out again on their travels. Their season usually lasts from early spring to late autumn, because their mode of living is to travel from fair to fair... Very often they own these hovels themselves or some member of the family may rent them at a small rent. They would legally have a fixed place of abode... If this sub-section is allowed to stand, the Minister might find his object as regards vagrants very easily defeated. I can assure the Minister that if there is any great number of prosecutions against these vagrants, they are the one fraternity who have no lack of knowledge of the law, and if there is a loophole of this sort to be found, they will find it as quickly as anybody else."⁶⁰

This Bill was ultimately subject to an Article 26 referral—under then President Douglas Hyde—and was deemed repugnant to the Constitution, specifically Article 42.3.2°, although it was not based in reasoning relating to sections 19 or 21. Rather, the reasoning focused on section 4 of said Bill, relying on the issue of granting the minister concerned broad discretionary power to set a standard of education which would be subjective and beyond what was cognisable as minimum standard in the Constitution.⁶¹

Indeed, this situating of the Traveller community as a danger to the moral health of the body politic was not infrequent in the discourse of the independent institutions of Ireland. As Helleiner argues, Travellers were situated as a threat not only to private property but to the broader public health, national economy and "social order". This construction of Travellers as a collective "danger" to the nation had political uses in the post-war period as one of the causes of the failed promises of the post-colonial state. The scapegoating of Travellers allowed for a partial deflection of social unrest onto the shoulders of Travellers, a deflection with political benefits for political elites.⁶²

⁵⁹ A common political, popular, and until recently academic trope, succinctly disabused in Shuinéar, Sinéad ní. 'Apocrypha to Canon: Inventing Irish Traveller History' [2004] *History Ireland*, vol. 12, no. 4, pp. 15–19.

⁶⁰ Dáil Éireann debate - Wednesday, 28 Oct 1942, Vol. 88 No. 12.

⁶¹ Re School Attendance Bill, 1942 [1943] IR 334.

⁶² Helleiner, Jane. 'Menace to the Social Order': Anti-Traveller Discourse in the Irish Parliament 1939–59' [1998] *The Canadian Journal of Irish Studies*, vol. 24, no. 1, pp. 75–91.

Tom Garvin has written on manner in which this conceptually exclusive constitutional subject, and the varying understandings of the genesis of Irish national identity, as either constructed by an approach of primordialism,⁶³ perennialism,⁶⁴ or modernism.⁶⁵ In *National Identity in Ireland* he points to the late 19th century post-famine synthesis of the Irish national identity which would be the genesis of the constitutional construct as expressed by post-1916 state-builders. So, although the nation is a modern construct its rhetoric would be at its most stringent primordialist and to varying degrees perennialist or rhetorically ethno-symbolist, or as Bill Kissane succinctly phrased it, “the paradox of nationalism is that nations are objectively modern but subjectively ancient”.⁶⁶

“After 1879, rurality, farming and Catholicism became the mark of the true Irishman or Irishwoman. Town origins, Protestantism and even advanced education came to be looked upon covertly as being alien and as marks of the outsider. The Irish language was eventually grabbed as a mainly symbolic ideological claim to authenticity and aboriginal status. An alliance of Faith and Fatherland that was to last for a century was forged. The aftermath in the form of partition and independence is well known.”⁶⁷

Conradh na Gaeilge, among other cultural organisations such as the GAA, played a significant role in the development of this cultural nationalism, although the revolutionary politics and Catholicity of this normative national identity would have been antithetical to Dr Douglas Hyde and other prominent Anglo-Irish leaguers. It was a cultural project initiated by those who sought to connect themselves more with “native” culture following the collapse of the Ascendency position with the Act of Union 1800 and the Catholic Emancipation Act 1829, in the hope that the league, and the Irish language would act as a bridge between Catholic and Protestant in Ireland.

⁶³ That the nation is an organic social unit independent of the processes of politics or history. It is the prepotent, innate, and natural social phenomena.

⁶⁴ That nations have historically continuous lineages.

⁶⁵ Nations emerge necessarily from the historical processes of the 18th Century: industrialisation, democratisation, and revolutionary movements.

⁶⁶ Bill Kissane, ‘The doctrine of self-determination and the Irish move to independence, 1916–1922’ [2003] *Journal of Political Ideologies* (October), 8(3), 327–346.

⁶⁷ Garvin, Tom. ‘National Identity in Ireland’ [2006] *Studies: An Irish Quarterly Review*, vol. 95, no. 379, pp. 241–50.

The national imaginary forged from the milieu of Gaelic League was therefore not to be sectarian, but its rationality would inevitably lead to such an ethno-symbolic construct.⁶⁸ It was to be un-English, which meant in practice, English popular culture, art, and literature, together with the non-Irish and non-Catholic systems of political and social ideas emanating from London were to be presented as “un-Irish”. The seeds of the rhetoric of cultural segregation were present from the early days of the Gaelic League.⁶⁹ It was situated thus that Pearse, D.P. Moran, and others in the nationalist cohort were to forge their view of Irish Ireland, its people, culture, and politics.

Hyde himself recognised the political significance of the League by acknowledging that the Dáil was kin of the Gaelic League and not of the Irish Parliamentary Party who were devoted to “the Old House in College Green” and explicitly parliamentary figures such as Grattan and Flood. The members of the Oireachtas, whether or not they had been leaguers themselves, were operating in a construct which was necessarily of the League and not in the spirit of the Ascendency Parliament. The paradoxical outcome of such a lineage being drawn from a consciously apolitical organisation, which was founded and populated by many who were of the ascendancy class, is a consequence of the revivalist rationale of the League and the national imaginary it brought about. A national consciousness was spread in which uncomplicated figures such as Cuchulain⁷⁰ and Brían Bóru could be adopted or appropriated by the hybridised Anglo-Irish.⁷¹

Indeed, in the writings of W.B. Yeats we can see this paradox played out. In *Cathleen Ni Houlihan*, the Old Woman has “Too many strangers in the house”, she laments “land that was taken from me”, “[m]y four beautiful green fields”. She goes on to evoke the heroism of those who “died for the love of me”; “the red man of the O’Donnell’s... there was one

⁶⁸ Emblematic of the essentialism entailed in a movement which formed national aspiration on cultural traits as opposed to republican values was succinctly articulated by Moran, “The United Irish Movement was organised and led by men of the Pale...there are few more masculine characters than Theobald Wolfe Tone. But the truth remains that he was not an Irishman. He was a great Irish rebel...If I were asked to define Tone’s nationality I should say that he was a Frenchman born in Ireland of English parents. The principles of the French Revolution made a deeper impression on the English in Ireland than on the English at home, and that greater impression helped to widen the detailed differences between the peoples. Nevertheless, the United Irish Movement was a colossal failure, for it was not a movement running in line with the genius of the Irish people,” (University College Press, 2006), p.40.

⁶⁹ Tom Garvin, *The Evolution of Irish Nationalist Politics*, (Gill and Macmillan, 1981)p. 102.

⁷⁰ Although, as Tom Garvin pointed out in ‘Garvin, Tom. ‘National Identity in Ireland’ *Studies: An Irish Quarterly Review*’ Cú Chulain can be read as the first partitionist, so perhaps not so uncontroversial after all.

⁷¹ Tierney, Michael. ‘What Did the Gaelic League Accomplish?: 1893-1963’ [1963] *Studies: An Irish Quarterly Review*, vol. 52, no. 208, pp. 337–47.

Brian who lost his life at Clontarf by the sea". To help the Old Woman "he must give me himself, he must give me all".⁷²

At the safe distance of 1921, Yeats would implicate himself in the events of 1916, questioning the human cost of lives lost in service of an abstract ideal which he credits himself with articulating.⁷³ The poet asks "And what if excess of love, Bewildered them till they died?...A terrible beauty is born".⁷⁴ The sense here is that the rationality of romantic nationalism leads inexorably to violence, and the utilisation of violence in service of an abstract, emotional, idealised nation will render that idea morally salient for the foreseeable future; its character will be informed by the manner of its attainment. The pre-eminent conception of the Irish Nation was sealed by the actions of those inspired by imagined realities of pre-colonial Ireland. However, the grand nationalist narrative by which they were being motivated was refracted through the pen of those whom themselves may have been considered by certain strains within nationalism to be from the lineage of the "strangers in the house", who when displeased with the trajectory of national independence could emit an expression of ascendancy chauvinism. Yeats in the Seanad, debating a ban on divorce, presents a narrative of Irish history wherein it is to the patriotic Protestant tradition to which Irish cultural and political independence is most indebted, and that, perhaps, Catholics, after all, may be unfit for national administration:

"I think it is tragic that within three years of this country gaining its independence we should be discussing a measure which a minority of this nation considers to be grossly oppressive. I am proud to consider myself a typical man of that minority. We against whom you have done this thing, are no petty people. We are one of the great stocks of Europe. We are the people of Burke; we are the people of Grattan; we are the people of Swift, the people of Emmet, the people of Parnell. We have created the most of the modern literature of this country. We have created the best of its political intelligence...You have defined our position and have given us a popular following. If we have not lost our stamina then your victory will be brief, and your defeat final, and when it comes this nation may be transformed."⁷⁵

⁷² W.B. Yeats, 'Cathleen Ni Houlihan', in John P. Harrington (eds), *Modern Irish Drama*, (W.W. Norton & Company, 1991).

⁷³ Declan Kiberd, *Inventing Ireland*, (Vintage Books, 1996) p.113.

⁷⁴ W.B. Yeats, 'Easter 1916', in Seamus Heaney (eds), *W.B. Yeats*, (Faber & Faber, 2000).

⁷⁵ Seanad Éireann debate - Thursday, 11 Jun 1925, Vol. 5 No. 7.

4.4 Pearse and the Pre-Constitutional Ephemera

The cultural nationalism which informed physical force separatism was the paradigmatic ideology in which a distinctively Irish constitutionalism developed. The writings of Pearse—which we may consider pre-constitutional ephemera as they had much more influence over the post-First World War generation than the speeches of those in the Irish Parliamentary Party⁷⁶—are emblematic of the syncretism of nation, people, and political sovereignty:

“National independence involves national sovereignty. National sovereignty is twofold in its nature. It is both internal and external. It implies the sovereignty of the nation over all its parts, over all men and things within the nation; and it implies the sovereignty of the nation as against all other nations. Nationality is a spiritual fact; but nationhood includes physical freedom, and physical power in order to the maintenance of physical freedom, as well as the spiritual fact of nationality. This physical freedom is necessary to the healthy life, and may even be necessary to the continued existence of the nation. Without it the nation droops, withers, ultimately perhaps dies; only a very steadfast nation, a nation of great spiritual and intellectual strength like Ireland, can live for more than a few generations in its absence, and without it even so stubborn a nation as Ireland would doubtless ultimately perish.”⁷⁷

The distillation and consecration of this national ideology was sealed in the text and “blood sacrifice” of Easter 1916. The Proclamation being a text which echoes throughout subsequent nationalist texts and constitutional theory:

“We declare the right of the people of Ireland to the ownership of Ireland, and to the unfettered control of Irish destinies, to be sovereign and indefeasible. The long usurpation of that right by a foreign people and government has not extinguished the right, nor can it ever be extinguished except by the destruction of the Irish people. In every generation the Irish people have asserted their right to national freedom and sovereignty; six times during the past three hundred years they have asserted it in arms. Standing on that fundamental right and again asserting it in arms in the face of

⁷⁶ Dermot Keogh and Finín O’Driscoll, ‘Ireland’ in Tom Buchanan and Martin Conway (eds), *Political Catholicism in Europe, 1918-1965*, (Clarendon Press, 1996), p. 276.

⁷⁷ Pádraig H. Pearse, *The Sovereign People*, (UCC CELT, 2010), p. 335/336.

the world, we hereby proclaim the Irish Republic as a Sovereign Independent State...”⁷⁸

This simulacrum of Irishness, which the bourgeois, urban Gaelic Leaguers in part constructed, was a quixotic glorification of subaltern west of Ireland “peasant” culture that stood as a proxy for “authentic” Gaelic identity. This would be the founding mythology of the independent Irish state. The proclamation functioned as a stunningly ambitious act of imagination⁷⁹ which by the eventual execution of the 1916 leaders would enact a paradigm shift in Irish political consciousness. and render manifest and binding their republican *and* ethno-nationalist rationality. That the ideals and aspirations for which those who carried out the Easter Rising sacrificed life and liberty—a united, Gaelic, republic, as of yet to be realised—has served as a recursive metanarrativity which establishes criterion by which to de/legitimise violence and statecraft.⁸⁰

The Gaelic revivalists accentuated Ireland’s Celtic history and mythology, positing an “authentic” Irish national identity that predated colonial influence. Indeed, the images, forms, ideas, and narratives are not exclusively from ancient Gaelic tradition in Ireland. They are the product of constructing “Irishness” as a national identity through the prism of a romantic 19th century urban literati. They owe more to the constructions of W.B. Yeats, James Stephens and George Russell (AE) who were engaging a literary prism of Orientalism⁸¹ to their neo-Celticism in the writing of their narratives.⁸² The irony of the Gaelic Revival was that the romanticisation of Gaelic culture, as filtered through 19th and early 20th century literary forms, emanated in part from a deviant wing of the ascendancy upper class and those reliant on their patronage. This strategically repositioned these figures in response to decline in political power, finding common cause with nationalism from

⁷⁸ *Proclamation of the Irish Republic*, (Easter Monday, 24/04/1916).

⁷⁹ Fearghal McGarry, *The Rising*, (Oxford University Press, 2010) p.134.

⁸⁰ *ibid*, p.287.

⁸¹ Orientalism being the critical concept developed by Edward Said to analyse the manner in which Europeans have constructed a representation of the “East” as an “Other”. The aspect of Orientalism to which we can apply in this regard is the Orientalism/Celticism which is “a style of thought based upon ontological and epistemological distinction made between the “Orient” and (most of the time) “the Occident”. Thus a very large mass of writers, among whom are poets, novelists, philosophers, political theorists, economists, and imperial administrators, have accepted the basic distinction between East and West as a starting point for elaborate theories, epics, novels, social descriptions, and political accounts concerning the Orient, its people, customs, ‘mind,’ destiny, and so on.” If you supplant Orient and East for Gaelic/Celtic Irish, and West for Anglo/British, the concept maps with relative ease. Edward Said, *Orientalism*, (Vintage Books, 1978) p.2

⁸² Joseph Lennon, ‘Irish Orientalism’, in Carroll & King (eds), *Ireland and Postcolonial Theory* (Cork University Press, 2003).

below, by the very class which was busily digging their graves.⁸³ Further irony abounds when one considers that if the forebears of the colonial class in Ireland had been a little less intent on undermining the native culture, their sons and daughters would not have needed to busy themselves with reviving it.⁸⁴

That the pre-colonial Gaelic state was a mythologized literary invention does not in any way mean it is not a legitimate means of constructing a constitutional nation state. All ideas of a nation emerge from the realm of imagination and selective remembering. Successful political myths, and the metanarratives they generate, are usually a strange mixture of truth and falsehood; the Irish nationalist myth had a fair amount of truth in it. However, the truthfulness of a political myth is almost incidental; a political myth is not a scientific account of events but is primarily a theory of justification. It could even be argued that the antidote for myth, if one is needed, is not an account intended to demythologise, but rather another, more appealing myth. In this we regard we could substitute the Gaelic mythology for the prophetic republicanism of United Irishmen or Young Irelanders, a vision of Ireland which was as follows:

“...a nationality which will not only raise our people from their poverty, by securing to them the blessings of a domestic legislature, but inflame and purify them with a lofty and heroic love of country; a nationality of the spirit as well as the letter; a nationality which may come to be stamped upon our manners, our literature, and our deeds; a nationality which may embrace Protestant, Catholic, and Dissenter, Milesian and Cromwellian, the Irishman of a hundred generations, and the stranger who is within our gates; not a nationality which would preclude civil war, but which would establish internal union and external independence...”⁸⁵

⁸³ “By the early eighteenth century, Catholics owned only around 5 per cent of land, mainly in Connaught...The period from roughly the beginning of the Georgian era in 1714 to the Act of Union in 1801 represented the heyday of the emergent aristocracy...Importantly, they were also the political elite at both national and local levels. Almost without exception, aristocratic families, and landlords in general, were loyal subjects of the British crown and empire, determined to maintain Ireland’s place in the United Kingdom...As the land questions coalesced in Ireland, the perpetual legacies of enmity, related to the confiscation of land over the centuries, religious divides, aristocratic imperialism and social exclusivity, provided rising Catholic nationalists with the potential for significant political capital as they could malign landlords as symbols of ‘spoliation and conquest’, as well as religious distance and tyranny.” Terence Dooley, *Burning the Big Houses*, (Yale University Press, 2022), p.5-8.

⁸⁴ Terry Eagleton, *Heathcliff and The Great Hunger: Studies in Irish Culture*, (Verso, 1995) p.251.

⁸⁵ P. A. Sillard, ‘Prospectus for The Nation Newspaper of the Young Irelanders’, in *Life of John Mitchel* (Dublin: James Duffy & Co., Ltd 1908), p.3

In the Irish case, nationalists found that the past supplied plenty of material and they clothed their cause in resonant motifs derived from earlier nationalist campaigns and from the older and very different lost causes of Stuart and Gaelic Ireland.⁸⁶

What then of this mythology when utilised as a justification and organising principle for state building? It is perhaps telling that the vital element of this quixotic construction, the principle of national self-determination premised on distinctive peoplehood, remains the enduring principle within Irish constitutional development.⁸⁷ The point of examining the cultural context in which the constitutional process of Ireland was contiguous is that the drafters and interpreters of the Constitutions of Ireland are of the culture; they are not atomised interpreters in an epistemological vacuum. Therefore, understanding as much as possible the intellectual culture and epistemic point of view of these interpreters' aids in interrogating the national claim as constituted, thereby institutionalising a structure in which these interpreters are both institutionally and intellectually situated.

⁸⁶ Tom Garvin, *The Evolution of Irish Nationalist Politics*, (Gill and Macmillan, 1981), p 105.

⁸⁷ Indeed, when asked years later for his opinion on the content of the Proclamation Dev was dismissive of its social elements, the demand for self-government was of paramount importance, Ronan Fanning, *Éamon de Valera: A Will to Power*, (Faber & Faber, 2015) p.35.

Chapter 5: An Interregnum of Ideologues? From the Anglo-Irish Treaty to Bunreacht na hÉireann

5.1 Constraining the Nationalist Imaginary

The nationalist ideology which had supremacy at the time of the Treaty and drafting of the 1922 Constitution—which were the initial forays into authoritative national self-representation—was one which had rendered republicanism and nationality practically synonymous through an almost theological syncretism between the sovereignty of the Irish people and the infrastructure of the state. On this principle—disregarding other valid critiques one can make on the content of the 1922 Constitution in comparison with its 1937 successor, a matter which will be dealt with in more detail below—a most conspicuous comparison can be drawn in terms the realisation of this pre-eminent nationalist ideology.

The 1922 Constitution was a creature of the Anglo-Irish Treaty 1921; therefore, it could not deliver the state as envisaged in nearly all of the pre-constitutional ephemera of the nationalist movement in the late 19th and early 20th century. (The exception may be Arthur Griffith’s pre-1917 Sinn Féin policies and the aspirations of the parliamentary Home Rule movement, excepting of course the partitioning of the island.) Depending on one’s own normative assumptions on such matters, the Treaty and its constitutional emanation may be characterised the achievement of a bifurcated Home Rule. This was not the premise on which the physical force tradition had justified the War of Independence, or the imperfect initial deliverance of a recognition of Ireland’s rights as a distinct and sovereign nation.

As such, it remains a vexatious question in some quarters to attempt to locate the precise inception point of the modern Irish state. One could make arguments, with varying degrees of soundness and depending on one’s criteria, for: 1916 and the Proclamation of the Irish Republic; the 1918 general election as a ratification by democratic mandate of the Irish Republic;¹ the meeting of the First Dáil and Declaration of Independence in January 1919; the signing of the Treaty in 1921; the ratification of the Statute of Westminster in 1931; the 1937 Constitution; the formal declaration of a Republic with the passage of the Republic of Ireland Act 1948; the Third Amendment to the Constitution in 1972 which altered the

¹ Sinn Féin standing on a platform of “...securing the establishment of that Republic.” While harkening backwards to legitimate what would be the first instance of democratic ascent to the republican conception of Irish nationalism articulated in “the Proclamation of the Provisional Government of Easter, 1916, reasserting the inalienable right of the Irish Nation to sovereign independence, reaffirming the determination of the Irish people to achieve it, and guaranteeing within the independent Nation equal rights and equal opportunities to all its citizens. Sinn Féin standing committee, ‘The Manifesto of Sinn Féin as prepared for circulation for the General Election of December, 1918’, (UCC CELT, 2008).

Article 29 so as to permit assession to the EEC and thereby bring Ireland—North and South—within one legal and economic order; or the Nineteenth Amendment which ratified the British Irish Agreement as signed on Good Friday 1998.² For the truly irredentist nationalist, a legitimate Irish nation state has yet to be brought about as a theoretically and practically a united Ireland is yet to be realised. These moments all express the deliverance of some characteristic of the complex cluster of associated concepts which collectively contribute to the broad structure of Irish nationalism which gained pre-eminence during the developments of the 19th and 20th century.

The 1922 Constitution, as an emanation of the Anglo-Irish Treaty would irreparably be seen as illegitimate by irredentist republican nationalists, as the symbolic locus of validity was maintained on the island of Great Britain with its monarch, and not on, or in, the sovereign Irish nation. The Treaty appealed, or contrariwise was repugnant to, the divergent camps among Irish nationalists for this acquiescence to external Dominion status, as Kissane articulated:

“Its virtue in the eyes of pragmatists was that it allowed internal self-determination, while leaving Britain and Ireland a unit in military terms. Its flaw for republicans was not only that it denied the litmus test of sovereignty since 1917, external recognition as a Republic, but that it was the first time Irish nationalists had assented to inclusion in the British empire. It may be that without the earlier push towards external self-determination questions of status might not have mattered, but conceptions of history and of status were intimately interlinked.”³

Irish nationalism’s intense focus on status, because of the logical corollary of republicanism and nationalism within separatist nationalist ideology, differentiated it from other Dominions, in that sovereignty, independence, nationality and republicanism were at times conceptually synonymous. The rhetoric of anti-Treatyites was that concession on any facet of the amalgam they posited was an inherent betrayal of not mere political ideals, but of the national principle itself. We can compare the synonymity of republicanism and nationalism in the thinking of Éamon de Valera, among other republicans, with that of the

² Some may even be minded to make a historical argument for the Constitution of 1782, which secured the Irish Parliament’s legislative and judicial independence in a group of acts: Repeal of Act for Securing Dependence of Ireland Act 1782 & Irish Appeals Act 1783, which achieved a degree of parliamentary independence for the Kingdom of Ireland.

³ Bill Kissane, ‘The doctrine of self-determination and the Irish move to independence, 1916–1922’ [2003] *Journal of Political Ideologies* (October), 8(3), 327–346.

pragmatic, but no less nationalist reasoning of Griffith and the pro-Treatyites. De Valera lays out clearly in a letter to David Lloyd George the synonymy of republicanism and national independence:

“Our nation has formally declared its independence and recognises itself as a sovereign State. It is only as the representatives of that State and as its chosen guardians that we have any authority or powers to act on behalf of our people. As regards the principle of “government by consent of the governed,” in the very nature of things it must be the basis of any agreement that will achieve the purpose we have at heart, that is, the final reconciliation of our nation with yours.”⁴

Or as Mary MacSwiney put it on the same day during the Treaty debates, expressing the rationality of nationalist republicans, referring to the “strong uncompromising minority” who would continue to refuse allegiance “direct or indirect” to the British Crown. In the rationale of this cohort, the Republic had been established, and it was the only legitimate entity, that did and could validly govern Ireland. That “uncompromising minority” swore an oath to the Irish Republic; to have taken that oath and then acquiesce to Dominion status inside the Empire was “ethically and psychologically wrong”. The Rising and subsequent War of Independence had, in theory if not practice, won a victory in the intra-nationalist contest between republicans and the moderate parliamentary nationalist tradition, with the success of the later movement being put down to that “the majority in the country” who before the rising in their support of Irish Parliamentary Party “were West Britons”.⁵

These contributions clearly articulate the rationality of the counter-majoritarian revolutionary political elite, which understood the irredentist republican strain within Irish nationalism to be the vanguard of the Irish nation, or indeed after the ratification of the Treaty the “Legion of the Rearguard”. Compared to the pro-Treatyites—still operating within the paradigmatic nationalist ideology, a difference in degree and not kind—the irredentism of some republicans amounted to “a quibble of words”, as Arthur Griffith⁶ described it, framing his support in the recognition of Ireland as a co-equal nation:

⁴ The content of said letter was read into the record in, Dáil Éireann debate -Wednesday, 14 Sep 1921, Vol. S No. 10.

⁵ *ibid.*

⁶ Indeed, Griffith’s nationalism was pragmatic to the point of accepting the role of the British monarchy as a dual-monarch for the co-equal kingdom of Ireland, a vision of Ireland’s national independence and the means of its achievement: passive resistance based on the legitimacy of the Renunciation Act 1783 and illegality of Act of Union 1801, thereby Irish withdrawal from Westminster Parliament and the restoration of Parliament

“It is the first Treaty between the representatives of the Irish Government and the representatives of the English Government since 1172 signed on equal footing. It is the first Treaty that admits the equality of Ireland. It is a Treaty of equality, and because of that I am standing by it. We have come back from London with that Treaty—Saorstat na hÉireann recognised—the Free State of Ireland. We have brought back the flag; we have brought back the evacuation of Ireland after 700 years by British troops and the formation of an Irish army (applause). We have brought back to Ireland her full rights and powers of fiscal control. We have brought back to Ireland equality with England, equality with all nations which form that Commonwealth, and an equal voice in the direction of foreign affairs in peace and war. Well, we are told that that Treaty is a derogation from our status; that it is a Treaty not to be accepted, that it is a poor thing, and that the Irish people ought to go back and fight for something more, and that something more is what I describe as a quibble of words”.⁷

Hugh Kennedy provided a jurisprudential justification of the Treaty wherein he argued that political institutions were of two kinds: those derived from the people and those whose existence flowed from an external authority. Since a Treaty could only be signed by two sovereign states, it followed that the legal genus of the text indicated Irish sovereignty. However, the hybridity of institutions which would emerge were bound to raise difficulties, as it was a Treaty agreed between republicans and an empire wedded to the concept of “the Crown in parliament”.⁸ This construction of a nationalist argument in favour of the Treaty as proffered by Kennedy, himself an advanced cultural and constitutional nationalist, saw Dominion status as an avenue to the development of a distinctly Irish, as opposed to English-inspired, structure of the Irish state and its institutions.⁹ By couching the argument in favour of the Treaty in an international law framework, the diminution of the republican ideal could be reconciled as the nationalist principle was sufficiently, in the eyes of the pro-Treatyites, realised.

in Ireland under a common or dual monarchy, as paralleled with Austro-Hungarian model in, Arthur Griffith, *Resurrection of Hungary*, (3rd edn, Whelan and Son, 1918).

⁷ Dáil Éireann debate -Monday, 19 Dec 1921 Vol. T No. 6.

⁸ Bill Kissane, ‘The doctrine of self-determination and the Irish move to independence, 1916–1922’ [2003] *Journal of Political Ideologies* (October), 8(3), 327–346.

⁹ Towey, Thomas. ‘Hugh Kennedy and the Constitutional Development of The Irish Free State, 1922–1923’ [1977] *Irish Jurist*, vol. 12, no. 2, pp. 355–70.

The Provisional and Free State governments were thereby dually constricted, firstly by their own nationalist aspirations and those of their irredentist compatriots in the “legion of the rearguard”, and secondly by the constrictions of the Treaty and an imperial power which could not at that time countenance the total renunciation of all aspects—tangible or symbolic—of British Imperium in Ireland.

Kennedy, and his fellow committee members, who drafted the 1922 document, were trying to serve two masters. Indeed, one can either recognise or denounce the wisdom in the biblical assertion that “No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other”; as this committee seemingly managed to square the circle of popular sovereignty within a monarchical imperial tradition. Article 2 declared that all powers of government and all authority, legislative, executive and judicial were derived from the people, entirely at odds with British constitutional theory. The monarch by virtue of the Treaty was to appear a mere functionary of Irish people in the lexical construction of the text.¹⁰ A most telling credential as to the degree to which they serviced two masters is that most of the content of the 1922 Constitution found its way into the 1937 document. Cahillane even questions whether the failure of the 1922 Constitution was more related to the political turmoil of the time as opposed to any error in drafting of the Constitution:¹¹

“We will never know whether a more settled atmosphere might have led to a more successful trial of the experiments in the 1922 document or whether the true spirit of the Constitution might have been realised with proper management of the document.”¹²

Any objective observer would acknowledge that executive and legislative independence had been achieved, although applications to the Privy Council amongst other provisions remained thorny issues. But it was a constitution which had not sufficiently realised the nationalist normative metanarrative maintained by a strain of nationalism, that of a “truly” sovereign, Gaelic, Catholic, republican, 32-county Irish nation state. The factors which were preventing the “more settled atmosphere” which Cahillane refers to was the armed challenge to the legitimacy of the fledgling state. The fallout from the signing of the Treaty

¹⁰ James Casey, *Constitutional Law in Ireland*, (Round Hall Sweet & Maxwell, 2000, 3rd edn) p. 9.

¹¹ Of course, acknowledging that Article 50 amendment powers, which permitting constitutional amendment by normal legislation was a drafting error.

¹² Laura Cahillane, *Drafting the Irish Free State Constitution* (Manchester University Press, 2016) p. 179.

remained even after physical hostilities had ceased. The anti-Treatyites, who maintained that the Treaty had been a betrayal of the principles of self-determination, never accepted the 1922 document as legitimate as it did not guarantee maximal sovereignty, internal and external, in the form of a republic. This was despite de Valera acknowledging as early as 15th of December 1921 that a majority of the Irish people would support the Treaty, only partially extricating himself from this logical fallacy by appealing to a natural law foundation of the inalienable rights of nations, stipulating “the people have never a right to do wrong”.¹³

Whereupon eventually acceding to government, Fianna Fáil set about dismantling the Treaty, which as a necessary corollary required undermining the 1922 Constitution. The Constitution (Removal of Oath) Bill 1932 purported to delete the requirement of Article 17 that all members of the Oireachtas swear an oath to the monarch and their heirs. However, this in turn required the deletion of Article 2 and the amendment of Article 50. This led to a protracted legislative process wherein the Dáil was dissolved before the Bill could be passed. The subsequent general election provided Fianna Fáil with a majority, which led to the Act being signed on May 3rd 1933 and coming immediately into law.¹⁴ This would set in train a set of events which would necessitate the drafting of a new constitution, all because of “a quibble of words”.

The period after the culmination of the physical force hostilities within the confines of Saorstát Éireann, and before the advent of the 1937 Constitution, demonstrate the perennial salience of symbolism as it relates to development of institutional architecture of the constitutional state. The process whereby the cultural traits which were used to demote Ireland and Irishness within the imperial structure would now invert and be employed as identic nodal points of prestige. The language of ethno-symbolism would overlay the new departure in administration. How the identitarian principles which accompanied this process of post-colonial inversion, as embodied within the constitutional institutions of the state, were to varying degrees realised is indicative of the discursive interplay between nationalist imaginings and political realities. Both textual manifestations of Ireland’s constitutional imagination would develop constitutional identities which would, in differentiated ways, embody hybridity, the negation of imagined authenticity for composite

¹³ J.J. Lee, *Ireland 1912-1985: Politics and Society*, (Cambridge University Press, 1989) p. 54.

¹⁴ Gerard Hogan, *The Origins of the Irish Constitution 1928-1941*, (Royal Irish Academy, 2012), p. 29

realities, and accurately reflect the cracked mirror of Ireland and Irishness as an indeterminate constitutional subject.

Once the perceived utility of violence had run its course, the previously eschewed constitutional and parliamentary method once more resurfaced.¹⁵ It would be overly simplistic and uncharitable to give too much credence to Arthur Griffith's diagnosis that objection to the conditions of the Anglo-Irish Treaty amounted to a *mere* "quibble over words". But it does seem apparent that it was the salience of idealistic rhetoric and ethno-symbolism, rather than rigorously substantive institutional critiques, which caused continued republican objection.

Symbolism in constitutional discourse was, and remains, important, as it is from words that signify identity—when elevated to constitutional status—that national culture and political aspiration coalesce into a justificatory national metanarrative. Through enactment, they become a theory of constitutional legitimacy. Indeed, the salience of language is such as it is a social phenomenon itself indicative of ethnic identity—by dint of the lexicographic revolution whereby national languages are the property and justificatory core of an imagined community's metanarrative—it serves as a foundational principle upon which the normativity of a claim to national sovereignty and justification of an independent polity rest.¹⁶

5.2 A Gaelic Constitutional Subject

Again, the utility of the Irish language as a means of justifying the distinctiveness of the "Irish" was paramount; the revival of the Irish language was the most marked symptom of a re-awakened national consciousness and pride.¹⁷ Conradh na Gaeilge, as a causative agent in developing a self-consciously Irish epistemic community, played a central role in shaping the ideas of the generation, which carried out the War of Independence and which founded the Free State. A political movement that utilised a national mythos of revival and return to an authentic origin—articulated in such a fashion as to be compatible with the intellectual

¹⁵ This is to say that mainstream nationalism had mostly returned to a political methodology, while maintaining close affiliation with respectively, the IRA and the Blueshirts, which were pressurising the political system with paramilitarist ideologues still active in the period between 1922-1937. It is to express that the constitutional means and not recourse to the gun which eventually won the day in intra-nationalist contestation.

¹⁶ Benedict Anderson, *Imagined Communities*, (Verso, 1983) p. 84

¹⁷ Hugh Kennedy, 'Character and Sources of the Constitution of the Irish Free State' [1928] *American Bar Association Journal*, August-September, Vol. 14, No. 8, pp. 437-445

currents of Catholic social teaching—would avail of, and harness to its own purpose, the normative justification of the language and cultural revival.

The League's founding principle of political non-alignment was formally brought to an end, with its non-political character being forgone in favour of open support for a free Ireland, at its 1915 *ard fheis*.¹⁸ Those immersed in the Gaelic Revival imbibed and found political utility in the potent construct of the mythologised Irishry, and sought to make manifest their idea of Ireland in deed and in word. The apogee of this Gaelic Catholic suffusion of the broader progression toward greater autonomy on the island of Ireland can be seen in the 1937 Constitution. But before that partial deliverance of the quixotic Gaelic Irish Republic, we can observe a process in which idealism was encumbered by impositions meted out by realities of domestic and international dissonant imaginings of Ireland's constitutional identity, its juristic foundation, and prospective development.

A dynamic within Irish political discourse which one can observe is recourse to golden age of the imagined past, whether that be the pre-Norman Gaelic tuath, or to the proclaimed Republic of 1916 which existed in mind if not matter. History as an element of political justification can serve to constrict the horizons of the imaginative landscape of political and legal interpretive communities operating within the discursive structure developed with historicist concepts. The newly independent Irish state was not conceptualised as a new departure, a blank canvass waiting to have institutional architecture or the visage of the citizenry etched anew. Those animated to political action brought with them a justificatory narrative which appealed to pre-existing and emotively rooted interpretations of the political community based on a hagiography of their identity. The verisimilitude of divergent historical narratives—as mediated through the constitutional metanarrative—affected the feelings of proprietorship under the new legal order.

In any polity, if there is a significant section of the populace who will not reconcile themselves to the representation of the people as expressed in the institutional architecture of the Constitution, then it is unlikely that this disjunction will be ameliorated within a contrapuntal developmental process. The section which does not accept the legitimacy of the Constitution as a representation of their idea what a correct or valid expression of their

¹⁸ Timothy G. McMahon, 'The Gaelic Revival', in Crowley, Ó' Drisceoil, Murphy, Borgonovo (eds), *Atlas of the Irish Revolution*, (Cork University Press, 2017), p. 100-101.

national identity is, may not be feel bound to adhere to means of political contestation prescribed by the Constitution.

With the signing of the Treaty, what was being asked of those who rejected it¹⁹ was to renege, in their imaginative landscape, on the oath they had sworn to a certain imagined simulacrum or idea of Ireland. Although most revolutionary movements are multivalent²⁰—in that individuals involved have divergent conceptions as to what they are fighting for—for many of Ireland’s revolutionary generation, their vision of Ireland was narrow: a Gaelic and Catholic nation that was distinct, which could at best tolerate Norman and Anglo-Irish as exotic minority settlers.²¹ Even constitutionalists primarily involved in the process of realising these concessions, such as Hugh Kennedy, expressed an imbibing of the ethno-nationalist rationality of their age which informed their endeavours:

“...indeed it would be ungracious, to remind you of the struggle of the old race, whom for convenience without challenge to the ethnologists, we may call the Gael or the Irishry, a struggle for bare life during many centuries against a sequence of invasions, dispossessions, plantations, and settlements, generally ending in the absorption by the old race of the successive new racial elements introduced into the island - *Graecia capta ferum victorem cepit* - one only resisting assimilation, the settlers in the North East corner, who have never wholly yielded to the blandishments of the Gael in whose territory they were planted but still turn to gore their political Minos-eye outside the land of their adoption.”²²

Who was truly Irish and who wasn’t—and what an Irish state for those Irish people should be—were questions with clear answers in the mind of those who drafted the 1922 Constitution. To be truly Irish was to be “Gaelic”, or at least amenable to accepting as your own the traits those “true Gaels” ascribed to that identity. The rhetorical locus of authority was in the people of the Irish nation, which was understood as mutually exclusive to Britishness and imperialism; republicanism based on national identity was the binding idea of Ireland most prevalent in nationalist political imagination. Therefore, for the irredentist

¹⁹ Who had been animated by their nationalist self-understanding to inflict, endure, facilitate, and justify violence, who had lost comrades, loved ones, and caused or excused that self-same loss in others.

²⁰ A fantastic exposition of the diversity of those who were caught up in the revolutionary zeal of the IRB, but who brought their own reasons to the ‘revolution’ can be seen in Roy Foster, *Vivid Faces: The Revolutionary Generation in Ireland 1890-1923*, (Penguin, 2014).

²¹ Diarmaid Ferriter, *The Transformation of Ireland 1900-2000*, (Profile Books, 2004) p. 191.

²² Hugh Kennedy, ‘Character and Sources of the Constitution of the Irish Free State’ [1928] *American Bar Association Journal*, August-September, Vol. 14, No. 8, pp. 437-445

republican cohort, already animated to violence, the post-independence state would have to reflect this ethno-symbolic construction of Irishness in its institutional architecture. However, even those who had enacted pragmatic concessions in the Treaty and 1922 Constitution brought with them an epistemology which gave salience to aspects of essentialist identity. Some were less rigorously attached to republican ideals, with the early notions of those in the Cumman na Gaedheal gene pool either lamenting the lack of a fitting lineage from which to draw an authentically Irish monarch, and proposing a theological board made up of clergy with powers to veto legislation, on the basis of being contrary to faith and morals, being expressed.²³

5.3 Birth Pangs of a Terrible Beauty: 1922 Constitution of the Irish Free State

The 1922 Constitution did not endure, that is not the same as saying that it could not have endured. Donal Coffey has suggested four strands which cumulatively necessitated the advent of a new constitution: the implementation of Fianna Fáil's republican constitutional project; the juristic basis of the State as exposed in *State (Ryan) v Lennon*²⁴; the degradation of the rights provisions of the Irish Free State Constitution; and the weaknesses in the drafting of the 1922 Constitution.²⁵

Coffey points to the strategic piecemeal approach to undermining the 1922 Constitution adopted by Fianna Fáil, and the fact that de Valera had issued a countermanding order to the Constitutional Review Committee 1934 on their role: they understood it to be drafting a new constitution, but de Valera's preference was for a review of the existing document, as demonstrating a partial acceptance of the constrictions of the 1922 text.²⁶ Coffey argues this is strong evidence that de Valera did not simply reject the 1922 document at the outset.

Yet, of the four conditions he identifies as eventually necessitating a new constitutional settlement, we can point to the imaginary of the nationalist epistemic community, of which both Fianna Fáil and Cummann na nGaedhgal were a part, as instantiating the supposed necessity. Fianna Fáil's stated constitutional aim would necessarily require radical constitutional alterations. The whole thrust of Fianna Fáil approach undermined as opposed to rectifying the 1922 Constitution. It is fair to think this emanated from the rejection of the

²³ Pádraig Óg Ó Ruairic, *Burn Them Out: A History of Fascism and The Far Right in Ireland*, (Head of Pegasus, 2025) p. 67.

²⁴ *State (Ryan) v Lennon* [1935] IR 170.

²⁵ Donal Coffey, 'The Need for a New Constitution: Irish Constitutional Change 1932-35' [2012] *Irish Jurist*, vol.48.

²⁶ *ibid.*

authenticity of the constitutional position wherein the Free State was mechanically free as a Dominion in the Commonwealth, in favour of the maximalist view of sovereignty which was only serviceable by the manifestation of the Gaelic Republic.²⁷

Doyle provides his own triplet of reasons for the demise of 1922 constitutional arrangement, which point more squarely to the outright rejection within nationalism of this Treaty bound constitutional settlement. However, in this, Doyle refers to the lack of constitutional credibility among “Irish people” and that continued connection with the UK was objectionable to “the Irish”.²⁸ If by this he means that there was a lack of proprietorial fidelity shown by political actors to the integrity of text as initially enacted, then yes. However, writing as if the “people” and certain political actors, which do not represent the totality of elected representatives, are synonymous merely serves to further perpetuate a narrow view of Irish diversity. Indeed, for some like Séan Mac Eoin—TD and IRA commandant—the Treaty had achieved what he and others had fought for: “To me symbols, recognitions, shadows, have very little meaning. What I want, what the people of Ireland want, is not shadows but substances, and I hold that this Treaty between the two nations gives us not shadows but real substances.”²⁹

The perceptible dissonance between ideals and reality as embodied in the Anglo-Irish Treaty is summed up by Tom Garvin:

“Dominion status did not appear to be total independence, although it was later to prove to be. The symbols of the new Irish Free State were an uneasy synthesis of post-British and republican themes, and it could be, and was, easily represented by republican propagandists as a British puppet regime. Most importantly, the Republic was disestablished and an oath of allegiance to the British monarch was included...”³⁰

The necessities of narratological consistency for the republican nationalist independence movement could not concede even tacit consent to a place within the imperial monarchical realm. The “Irish” understood as a victim of British imperialism could not acquiesce to a

²⁷ One could point out here certain political non-starters within the development of this irredentist national sovereigntist imaginary: Arthur Griffith’s dual monarchism in Austro-Hungarian model, de Valera’s External Association gambit during Treaty negotiations, and at further remove in this nationalist historiography the endeavours the Irish Parliamentary Party who worked for political independence within Westminster Parliamentary system, thus viewing Irish political independence as consistent in some form with British Constitutional Monarchy and Empire.

²⁸ Oran Doyle, *The Constitution of Ireland : a contextual analysis*, (Hart Publishing, 2018) p. 29/30.

²⁹ Dáil Éireann debate -Monday, 19 Dec 1921 Vol. T No. 6.

³⁰ Tom Garvin, *The Evolution of Irish Nationalist Politics*, (Gill and Macmillan, 1981) p. 129/130.

contented position as a Dominion in the imagination of the nationalist republican culture. Empire was a conception to which Ireland could never be reconciled.³¹ The narratological significance of this is on the cultural plain—as embodied in the underpinning constitutional metanarrative as the legislative domestic independence of the Oireachtas—could not be questioned.

5.4 A House Divided Against Itself Shall Not Stand: *Grundnormen* of 1922

The differing and ultimately irreconcilable schools of thought as to the precise character and locus of the legal foundations of the Irish Free State would eventually be examined in the jurisprudence of Ireland and the UK. As the Constitution did not develop autochthonously (no such thing is possible in a polity wherein physical force is employed to achieve political ends), and as the Treaty was an unromantic concession to the realities of centuries of entangled political history, there was ample rhetorical purchase to justify violence and political resistance. Arthur Mitchell articulates an understanding of the reality of the concessions which emerged after the Treaty was signed as containing “many great benefits to Ireland”:

“British recognition of Irish autonomy, complete control of affairs within the country, the takeover of the Dublin Castle administration, its bureaucracy and resources, and the obvious potential for further constitutional development. One of the negative aspects, felt by everyone in the Dáil, was the fact that the agreement required the maintenance of some constitutional linkage with Britain, including an oath of allegiance”³²

For the narratological consistency of anti-colonial national republicanism, as a constitutional theory, to formally admit monarchical supremacy would undermine the claim to continuous resistance of the Irish nation. Indeed, the romantic narrative which animated this movement could not adequately reconcile that in Ireland there were both victims and agents of empire.³³ The crucial aspect which would subsequently play out over the lifespan of the 1922 Constitution was on this plain of legal foundations in the *State (Ryan) v*

³¹ Hugh Kennedy, ‘Character and Sources of the Constitution of the Irish Free State’ [1928] *American Bar Association Journal*, August-September, Vol. 14, No. 8, pp. 437-445.

³² Arthur Mitchell, *Revolutionary Government in Ireland: Dáil Éireann 1919-22*, (Gill & Macmillan, 1995) p.326.

³³ For an exposition of the complexities of Ireland’s place within British Imperial history see, Jane Ohlmeyer *Making Empire: Ireland, Imperialism, and the Early Modern World*, (Oxford University Press, 2023).

Lennon,³⁴ the legal effect of the Statute of Westminster 1931, and the intellectual elasticity required in rationalising—for the nationalist constitutional imaginary—an appeal to the Privy Council which confirmed British recognition of Irish sovereignty in *Moore and Others v Attorney General*.³⁵

Yet, even with this compromise of an agreement—wherein sovereignty was not a maximalist or absolute condition, but rather a fungible commodity in pragmatic political exchange—many with strong nationalist revolutionary credentials were convinced to give democratic assent to the Treaty. Mitchell says:

“Both public opinion and a large number of deputies supported the Treaty. Furthermore, there was every indication that most politically conscious Irish people were willing to accept the Treaty on the grounds that it provided for peace, stability, and the opportunity to look to the future.”³⁶

Why then was this issue of Irish independence not resolved in a like manner as other Dominions? Ireland was not adequately reconciled to a similar status as that of Canada, Australia, New Zealand, or South Africa as those polities had experienced significantly divergent bourgeois politico-cultural formation, thereby shaping different national metanarratives for their respective interpretive communities to rationalise. Indeed, from the founding of Canada as a British Dominion in 1867³⁷ right up until the early twentieth century, Canadian culture was dominated by its connection to Britain and its reliance on Britishness for cultural norms, though it is clear that there was an attempt to portray a uniquely Canadian culture from the post-war period.³⁸ Those in Canada looked to British lineage as justificatory of status, whereas the emergent Catholic petit-bourgeoisie in Ireland understood themselves to have gained their relative status in *spite* of Britain.³⁹ From the

³⁴ *State (Ryan) v Lennon* [1935] IR 170.

³⁵ *Moore v Attorney General* [1927] IR 569. [1929] IR 191. (No. 3) [1930] IR 471. [1934] IR 44. [1935] UKPC 34 (6 June 1935).

³⁶ Arthur Mitchell, *Revolutionary Government in Ireland: Dáil Éireann 1919-22*, (Gill & Macmillan, 1995) p. 327.

³⁷ Using British North America Act, 1867 as a moment to denote the “founding” of Canada.

³⁸ One can trace the development of official Canadian national identity, official being the top-down articulation of Canadian identity as constructed through governmental statements and parliamentary debates, from a unitary British Canadian identity, bicultural and bilingual English/French Canadian identity, and a Multicultural identity. See, Shannon Conway, ‘From Britishness to Multiculturalism: Official Canadian Identity in the 1960s’ [2018] *Études canadiennes / Canadian Studies*, 84. Further, the Indian Act 1873 governed the lives of First Nations peoples, only permitting full federal electoral enfranchisement without assimilation conditions which did not contravene their status as First Nation peoples.

³⁹ Tom Garvin writing on cultural background of cohorts who supported emergent parties in Ireland, *The Evolution of Irish Nationalist Politics*, (Gill and Macmillan, 1981) ch. 10.

federation of the six British colonies of Australia in 1901 and perhaps officially until 1973 with the repeal of the “White Australia” policy, British descent was constituent of Australia’s ethno-nationalist national identity.⁴⁰ In Aotearoa/New Zealand there was evident idealism in the pronouncement of Governor William Hobson at the signing of the Treaty of Waitangi 1840, “He iwi tahi tatou”—“We are one people now”. However, the Treaty was declared “a simple nullity” by New Zealand Supreme Court in *Wi Parata v Bishop of Wellington* 1877,⁴¹ and a policy of Māori assimilation and usurpation of land was pursued. This assimilation was largely to British identity, and it was only in the 1970s that we saw the development of bicultural national identity.⁴² The official national identity of the Union of South Africa, established by the South Africa Act 1909, is harder to categorise, as the Afrikaners did not identify with British heritage for their prestige. Indeed, they were exponents of an anti-British nationalism which many in Ireland identified with. However, after the culmination of the Second Anglo-Boer War, the articulation of nationhood was an all-white affair with European continental heritage being the basis for a racially exclusivist conception of national identity within the British Commonwealth.⁴³ This process of cultural formation of the political classes in each Dominion permitted a gradualist approach to greater constitutional autonomy within a British locus of constitutional validity.

The gradualist process by which the political classes in Canada, Australia, and New Zealand gained formal constitutional independence and patriated their legal orders is markedly different from that of Ireland. Indeed, these three countries remain constitutional monarchies and although Canada⁴⁴ and Australia⁴⁵ have written constitutional texts, and New Zealand has Acts which codify certain elements of its unwritten Constitution,⁴⁶ their metanarratives remain imbedded with the principle of ‘Crown in Parliament’. South Africa in many ways has internal complexities which would render certain comparisons being

⁴⁰ Levey, Geoffrey Brahm. ‘Australia’s ‘Liberal Nationalist’ Multiculturalism’ in Richard T. Ashcroft and Mark Bevir (eds), *Multiculturalism in the British Commonwealth: Comparative Perspectives on Theory and Practice*, (1st edn., University of California Press, 2019) pp. 83–103.

⁴¹ *Wi Parata v Bishop of Wellington* [1877] 3 NZ Jur (NS) SC 72.

⁴² Smits, Katherine. ‘Multiculturalism, Biculturalism, and National Identity in Aotearoa/New Zealand’ in Richard T. Ashcroft and Mark Bevir (eds), *Multiculturalism in the British Commonwealth: Comparative Perspectives on Theory and Practice*, (1st edn., University of California Press, 2019), pp. 104–24.

⁴³ Ramutsindela, M. F. ‘National Identity in South Africa: The Search for Harmony’ [1997] *GeoJournal*, vol. 43, no. 1, pp. 99–110.

⁴⁴ The Constitution Act 1867 (before patriation in 1982 was an Act of Westminster Parliament the, The British North America Act), and The Constitution Act 1982 (One facet of which was the patriation and renaming of original Westminster Act).

⁴⁵ Commonwealth of Australia Act 1900.

⁴⁶ Constitution Act 1986, which repealed and replaced the Westminster statute The New Zealand Constitution Act 1852.

drawn as laboured to the point of potential insensitivity towards the *sui generis* characteristics of the polity. The linguistic, ethnic, and cultural diversity of the polity and the experience of the apartheid regime differentiate the South African constitutional context from that of other post-British states, although in a pre-republic context⁴⁷ the experience could be comparable to other post-British countries, and in its post-apartheid era one could draw certain comparisons with post-conflict constitutions which attempt to reconcile divided polities, so it would have varying analytical utility based on timeframe and text.⁴⁸

Contrastingly, the political movement to independence in Ireland understood itself to be part of a tradition which had never acquiesced to “Britishness”, or a place among the British Empire consensually. Therefore, recourse to the symbolic authority of the monarch and the “Mother of Parliaments”, or the Anglo-Irish Treaty as the binding *Grundnorm* of Ireland’s 1922 Constitution would not last as there was minimal sentiment of proprietorial legitimacy among the political epistemic community or the judicial interpretive community rely on.⁴⁹

Yet, while the formal structure of the constitutional arrangement gave the Free State practical or “mechanical” independence, the Commonwealth veneer or identity of the 1922 Constitution was distasteful to Anti-treaty Sinn Féin and Fianna Fáil. This was less in terms of legal outcomes, but rather in terms of “character” or “essence” of its constitutional identity. The nationalist principle was definitionally exclusionary to a nebulous conception of “Britishness”, which would include monarchy, the Empire, the Commonwealth and traits associated with lingering British identity.⁵⁰ Indeed, Hogan, writing prior to his judicial

⁴⁷ Republic of South Africa Constitution Act, 1961, one could compare South Africa with both post-British countries (in that its constitution was grounded in British statutory canon) and indeed The Republic of Ireland in that it formally disavowed British metanarrative, initially with the Republic of South Africa Constitution Act, 1961, albeit on unrepresentative franchise of exclusively white population. Indeed, there was much support for Boer nationalism, which never fully reconciled itself to British rule and fought two wars resisting Empire, among Irish nationalists in the early 20th century, spanning from James Connolly and the Irish Socialist Republican Party which passed a resolution in support of the Boers at a public meeting on August 27th 1899 to John McBride, who formed the Irish Transvaal Brigade gaining naturalised citizenship for his service. See, Donal P. McCracken, ‘John McBride’, *Dictionary of Irish Biography*, (Royal Irish Academy, 2009).

⁴⁸ Ran Hirschl comparative study of judicial empowerment across Israel, Canada, New Zealand, and South Africa provides an instructive methodology for thematic comparative constitutional analysis across polity’s with vastly different internal politics. Ran Hirschl, ‘The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions’ [2000] *Law & Social Inquiry*, Vol. 25, No. 1, pp. 91-149.

⁴⁹ I am cognizant of the historian’s fallacy or hindsight bias here. As it did not last it seems inevitable that it could not last. Of course, this is not the case, it could have lasted it is merely difficult to imagine a counterfactual in which the recalcitrant republican minority would forever reconcile themselves to the democratic will of the populace as expressed in the ratification of the Treaty.

⁵⁰ Indeed, that the ‘Irish’ had fought for the cause of a Catholic monarch in the war of three Kingdoms and had politically coalesced around a movement for the reintroduction of an Irish Parliament in the mould of Grattan’s before the Act of Union for the majority of the 19th century, and that a quarter of the population of

career in 1986, wrote of the continued salience of nationalism within the judicial interpretive community, which we can see spanned from Hugh Kennedy to his time of writing:

“One of the most interesting developments in the Irish legal system in the last twenty years has been the desire on the part of many senior members of the Irish judiciary to enhance the distinctiveness of Irish law. It is reflected in the wish to de-anglicise the Irish legal system, and to create an indigenous body of law.”⁵¹

One could argue that this continues on the bench of today. Such an observation may be justified by a later article in Hogan’s extra-judicial writing in which he is exceptionally critical of the turn constitutional jurisprudence took during the 1990’s. Hogan observes in the case-law a reticence to rely principally on arguments rooted in the Irish Constitution, and the preference among lawyers and litigants to rely on the ECHR. Concomitantly, he is critical of the “silent judicial counter-revolution” in which judges on the superior courts have retreated from the significant power afforded to them by Article 34.3.2°, viewing the effects of the remedy as too severe. Similarly, he is critical of the “judiciary’s hidden love of the common law”. He collectively—and pejoratively—refers to these trends as demonstrating “Seonínism”, denoting an Irish person who prefers “English traditions”.⁵²

It is a recurrent motif of Irish political and legal discourse that there is a need to be seen to bolster or enhance the authentic “Irishness” of the systems of the state. What follows is an analysis of how, through legal and political means, the “Irish Ireland” ideologues dismantled both the Anglo-Irish Treaty and the 1922 Constitution. In so doing, they utilised a republican nationalism and the pursuit of “authenticity” as a judicial and constitutional philosophy with consequences which resonate to this day. In this endeavour, intellectual flexibility and pragmatic obfuscations were utilised in order to pursue a maximalist construction of sovereignty.

the entire island in the early 20th century would express either a British, Unionist, or Protestant identity was seemingly incidental to this mode of thinking.

⁵¹ Gerard Hogan, ‘Irish Nationalism as a Legal Ideology’ [1986] *Studies: An Irish Quarterly Review*, Vol. 75, No. 300 (Winter), pp. 528-538

⁵² Gerard Hogan, ‘Harkening to the Tristan Chords: the Constitution at 80’ (2017) 40 *DULJ*, 71.

Chapter 6: 1922 Saorstát Éireann

6.1 The Need to Undermine the 1922 Constitution from Within?

The conditions of the Anglo-Irish Treaty 1921 stipulated symbolic constraints on Irish sovereignty, an endeavour on the part of British negotiators to camouflage the extent to which a new independent state was being created.¹ The Treaty was to be the foundation upon which the constitutional edifice of the Irish state was to be constructed. Yet, questioning remained as to the precise locus of legal normativity, and the origin point of constitutional validity would haunt its constitutional emanation. Left unclear was the precise relationship the Free State Constitution would have to the Treaty, and whether the constitutional authority of that constitution would lie in Dublin or London.

Until the legislation setting up the Free State could be passed, both in the British parliament and in the Dáil, a provisional Government was established. The only authority for this Provisional Government's existence was the Treaty, thereby creating dual governments with many coterminous members, instantiating considerable constitutional ambiguity.² This ambiguity—the Provisional Parliament acting as constituent assembly passing decrees and in one instance a Resolution³ as they did not have formal powers to pass legislation—would only be somewhat reconciled when the Provisional Government felt secure enough to permit the Dáil to meet once more. This established the Third Dáil, with republican abstention.⁴

¹ Gerard Hogan, *The Origins of the Irish Constitution, 1928-1941*, (Royal Irish Academy, 2012) p.1.

² Michael Hopkinson, *Green against Green: The Irish Civil War* (Gill & Macmillan, 1988) p.52-54.

³ Army (Emergency Powers) Resolution 1922 which can be seen as a retrenchment from the idealism of the liberal republican movement, enshrining measures which many in the house who passed it would have been subject to under the British regime. Justified by W.T. Cosgrave “We did it, as we explained, to preserve the lives of our soldiers, to preserve the freedom of Deputies coming here, and to preserve the ordered fabric of society... they did it for the security of their own troops, for the security of their own families, and of the families of the nation... these people are guilty of the crimes that have been laid down in the regulations. They are crimes—they are crimes against the nation and the law of this country.” Dáil Éireann debate - Wednesday, 18 Oct 1922, Vol. 1 No. 23.

⁴ The exception was one aged figure, Laurence Ginnell, land agitator and politician, formerly an MP of the Irish Parliamentary Party, the only nationalist MP to join Sinn Féin, who was rapidly ejected for refusing to desist from repetitious questioning concerning the constitutional status of the assembly. See, Pauric Dempsey & Shaun Boylan, ‘Laurence Ginnell’, *Dictionary of Irish Biography*, (Royal Irish Academy, 2009). Ginnell TD refused to sign the roles and permit the orderly election of the Ceann Comhairle until his repeated question “I have not signed the Roll. I want some explanation before I sign. I have been elected in pursuance of a Decree of Dáil Éireann, which Decree embodied the Decree of May 20th, 1922. I have heard nothing read with reference to that Decree, nothing but an Act of a foreign Parliament. I have not been elected to attend any such Parliament. I have been elected as a Member of Dáil Éireann... Will anyone tell me with authority whether this is Dáil Éireann or a Partition Parliament?” was answered. Dáil Éireann debate - Saturday, 9 Sep 1922, Vol. 1 No. 1.

The first major business for the new Dáil was the passage of the Constitution.⁵ The Labour party served as opposition, questioning changes in constitutional drafts and seeking clarification as to the governing instrument of the State, and were reassured that the Treaty was the governing instrument.⁶ Labour found much to criticise in the retrenchment from the socio-economic reasoning prevalent in the 1919 Democratic Programme of the First Dáil, which Labour had been instrumental in drafting, as compensation for being convinced to not contest 1918 General Election so as to not split voters between themselves and Sinn Féin.⁷

The constitution that the Third Dáil ultimately ratified maintained the symbolic remnants of British imperium in Ireland as stipulated in the Treaty, they were to be beyond the amendment power of the Dáil and Seanad of the Saorstát.⁸ In this regard the ultimate locus of authority—or that quality which gave “validity” to the 1922 Constitution—would prove to be a theoretical issue, seemingly irreconcilable, over the course of that document’s operative duration. The retention of the office of Governor General, as the monarch’s representative in Ireland,⁹ with the *theoretical* power to reserve legislation emanating from the Irish legislature;¹⁰ the retention of the oath of allegiance to the Crown;¹¹ the potential of appeals to the Privy Council;¹² and the apparent disestablishment of the Irish Republic declared by Dáil Éireann in January 1919 all served to *symbolically* subordinate the sovereignty of the Irish nation.

However, the symbolism belied the reality of the constitutional mechanics of the 1922 document. Article 2 declared all authority in Ireland was derived from the people, and in the analysis of Leo Kohn, the monarch merely served “as a functionary of the Irish people”.¹³ Indeed, Laura Cahillane has argued that the 1922 Constitution did make tangible the doctrine of popular sovereignty which differentiated Ireland’s constitutional identity

⁵ Michael Hopkinson, *Green against Green: The Irish Civil War* (Gill & Macmillan, 1988) p.180

⁶ *ibid*, p.181

⁷ See, Niamh Puirseil, *The Irish Labour Party: 1922-73*, (University College Dublin Press, 2007), ch.1 ‘A Very Constitutional Party’.

⁸ Repugnancy being the characteristic which would render constitutional amendments void. Constitution of the Irish Free State (Saorstát Éireann) Act, 1922.

⁹ The Governor-General Article 60 Constitution, 1922.

¹⁰ Article 41, Irish Free State Constitution, 1922.

¹¹ Article 17, Irish Free State Constitution, 1922.

¹² Article 66, Irish Free State Constitution, 1922.

¹³ Leo Kohn, *The Constitution of the Irish Free State*, (George Allen & Unwin Ltd, 1932) p. 114.

from other Dominion constitutions and Canada specifically, which was supposed to be the comparative model of Ireland's constitutional status:

“The declaration of popular sovereignty was seen by the people also as a republican aspect of the Constitution; a sign that the Irish Free State was not going to be controlled by the Crown. No doubt many felt comforted by that fact that their rights would be protected in a system in which it was the people who were declared sovereign. As proof that the declaration was not just rhetoric, many other devices were included in the Constitution in order to invest the idea with ‘concrete reality’.”¹⁴

To say that popular sovereignty was a concrete reality in 1922 may perhaps be true rhetorically. But, as Bill Kissane has detailed, the political culture which persisted in Ireland from 1922 to 1937 served to undermine the principles of popular sovereignty and direct democracy. It did this to such an extent that all the idealism and experimentation which one could see in the document was absent from its operation.¹⁵ The “concrete reality” of popular sovereignty may be accurately said of today's Constitution, as Hogan J increasingly relies on an understanding that popular sovereignty is the ‘constitutional identity’ of Ireland's manifestation of constitutionalism.¹⁶ Yet, this leads us to the paradox of constitutionalism as articulated by Colm O' Cinneide:

“...an inherent tension exists between how popular sovereignty is treated as the foundational principle of the Irish constitutional order and the manner in which the people as a collective entity play a marginal role...the people are everywhere acknowledged to be sovereign, but in liberal democracies they have little direct say in how the executive, legislative and judicial branches of the State govern on their behalf.”¹⁷

One must therefore ask why the 1922 document, understood as an emanation from the Treaty, was viewed with such recrimination by those who did not accept it as a legitimate

¹⁴ Laura Cahillane, *Drafting the Irish Free State Constitution*, (Manchester University Press, 2016) p. 99.

¹⁵ Bill Kissane, *New Beginnings: Constitutionalism & Democracy in Modern Ireland*, (UCD Press, 2011), ch. 1&2.

¹⁶ See, *Heneghan v Minister For Housing* IESC 7, Hogan J at para 38. “Any other conclusion would effectively mean that the sovereign will of the People as democratically expressed through the referendum process in the manner envisaged by Article 46 and Article 47 – perhaps the most fundamental and core feature of our constitutional identity as a State – would be thwarted by an obvious failure of legislative inertia.”

¹⁷ Colm O'Cinneide, “The People Are The Masters” The Paradox of Constitutionalism and The Uncertain Status of Popular Sovereignty Within The Irish Constitutional Order’ [2012] *Irish Jurist*, New Series, Vol. 48, pp. 249-274.

constitution for Ireland? If the relative position of the sovereign people is much the same, whether in 1922, 1937, and today, what was so unconscionable about the British Monarch, as opposed to our Divine Lord Jesus Christ being a symbolic locus of normativity? The answer, I would contend, is that as much as issues such as permitting appeals to the Privy Council and the theoretical power of the Governor General caused discontent, it was the underlying identitarian culture of the nationalist republican project which was the impetus of constitutional disquiet. The concentration on symbolism by the opponents of the Treaty may have been due, in part, to the fact that they could not find much else that was objectionable.¹⁸

The political cadre most affiliated with this position coalesced around Éamon de Valera,¹⁹ who roundly rejected the legitimacy²⁰ of the both the Treaty and its constitutional emanation. This position was expressed in the critique of the Labour Party proffered by Séan Lemass in drawing a distinction between their constitutional “pale pink respectability” and his parties radical “slightly constitutional” character.²¹ The reality was that in the imaginary of this recalcitrant cohort, the 1922 document had been in large part “imposed” by “outsiders” in a non-consensual manner. However, when this position is interrogated, instabilities in this reasoning emerge.

In order to sustain this view, one must have rigid definitionally discrete conceptions of the parties involved and admit no fluidity in personnel and opinion in order to maintain a descriptively coherent interpretation of the 1922 Constitution—in total or in part—being an imposition. Yet, as a rhetorical device in constitutional politics and judicial reasoning, the concept of constitutional imposition can be of central narratological value in delegitimising a constitutional legal order.²²

¹⁸ Arthur Mitchell, *Revolutionary Government in Ireland: Dáil Éireann 1919-22*, (Gill & Macmillan, 1995) p. 327.

¹⁹ One can take a more cynical view in which the Treaty split was a top-down succession crises over who would ultimately gain control of the wheel of newly independent state. See, Bill Kissane, ‘The Politics of the Treaty Split and The Civil War’, in Crowley, Ó Drisceoil, Murphy, Borgonovo (eds) *Atlas of the Irish Revolution*, (Cork University Press, 2017).

²⁰ Indeed, the party would only take seats on foot of the passage of the Electoral (Amendment) (No. 2) Act, 1927, Section 4. of which stipulated that those who would not take the Oath of allegiance within a stipulated timeframe would be “disqualified for continuing to be a member of the Oireachtas”.

²¹ Even as taking their seats in the Dáil in August 1927, the Fianna Fáil position was that the institutions of the State remained illegitimate. A quixotic and pragmatic approach indeed. The quip on slight constitutionalism in Dáil Éireann debate - Wednesday, 21 Mar 1928 Vol. 22 No. 14.

²² See, David S. Law, ‘Imposed Constitutions and Romantic Constitutions’, *Legal Studies Research Paper Series Paper* No. 18-05-01.

The nationalism which motivated this cohort was essentialist, in that their idea of Ireland and the Irish was grounded in certain cultural traits, in which the synonymity of Irish identity with a syncretism of Gael, Catholic, and republican was assumed. Essentialism here refers to a reduction of the diversity in the population to some single, or reductive criterion held to constitute its defining essence and most crucial character.²³ From this epistemic viewpoint being the prime framework through which those who could not reconcile themselves to the concessions of the 1922 being textualized in 1937, we inherit an orientation towards essentialism in the interpretive strategies of the judiciary; reasoning that there is an essential character, spirit, or identity of the text, as there is an essential character of a people. There are a people of Éire, and their will, regardless of what it may be, is sacrosanct.

The significance of the symbolic in the formative process of constitutional development in Ireland stems from the intellectual formation of an epistemic community of cultural and militant nationalism and the methods utilised by the independence movement: political theatrics; activism; dramatic gestures; manifestos; glorification of the IRA; and the necessity of continuing the atmosphere of revolutionary fervour among those who were elected to the Dáil, many of whom had undeveloped policies beyond the movement for independence.²⁴

Indeed, the underdevelopment of economic and social policies could be somewhat masked by appeals to quixotic nationalism as mediated through Gaelic-Catholic mythologising of the “people of Éire”. Fianna Fáil’s autarkic policies—an economic programme to enhance self-sufficiency and develop a domestic market for Irish capital—could be narrativized as consistent with the principle of popular sovereignty. The idea of the subalternated rural Gael, and an egalitarian anti-materialist confessional polity,²⁵ informed how this idea of Ireland would be articulated in the 1937 text.²⁶

Keogh and McCarthy sum up de Valera’s repudiation of the 1922 constitutional settlement as follows:

²³ Craig Calhoun, *Nationalism*, (Open University Press, 1997) p. 18.

²⁴ Arthur Mitchell, *Revolutionary Government in Ireland: Dáil Éireann 1919-22*, (Gill & Macmillan, 1995) p.328.

²⁵ A rather more rhetorically ornate rendition of this theme can be heard in De Valera’s ‘Ireland that we dreamed of’ speech on St. Patrick’s Day marking the 50th anniversary of the founding of Conradh na Gaeilge in 1943.

²⁶ Most evidently in the Preamble, Article 5. On the State, Article 41. On the Family, and Article 45. The Directive Principles of Social Policy.

“De Valera’s fundamental objection remained that, however independent in practice, the new state was still for him subject in character...De Valera remained convinced when he entered the Dáil that the Treaty settlement would not end the centuries of conflict between Great Britain and Ireland. His long-term political strategy remained to dismantle the Treaty settlement and re-write the Free State Constitution.”²⁷

Again, once Fianna Fáil won a general election²⁸ in 1932 they set in train a project to dismantle the Treaty.²⁹ It is however important to note that Fianna Fáil, as the mainstream voice of republicanism at that point, had since 1927 accepted the parliamentary and constitutional method to achieve their aims of undermining the Constitution. Contrariwise some figures on the pro-Treaty side who were significant figures in the institutions of the Irish Free State had become the primary threat to the constitutional democracy which the Treaty had brought about. This demonstrates the fragility of the nascent democracy and the need to develop a constitutional settlement which would encompass the re-fractured camps within Irish nationalism under a structure which appealed to their divergent aspirations. One such threat to democracy was Eoin O’Duffy, one of the founders of Fine Gael, first commissioner of an Garda Síochána, and leader of the ACA, who had upon the electoral victory of Fianna Fáil sought to carry out a coup d’état and install himself as military dictator.³⁰

The removal of the Oath of Allegiance had been a pledge in the Fianna Fáil electoral manifesto, but it was the only constitutional change³¹ which was specified.³² That the provision of the Constitution which had even in practice the least tangible consequence should be the abiding issue for those who did not accept the legitimacy of both the Treaty

²⁷ Dermot Keogh and Andrew McCarthy, *The Making of the Irish Constitution 1937: Bunreacht na hÉireann*, (Mercier Press, 2007) p. 41.

²⁸ Although falling five seats short of an overall majority and needing the support of the Labour Party to form a government.

²⁹ Although Cumann na nGaedheal had been at the vanguard within the confines of the Commonwealth to advance the independence of *all* Dominions. See, David McCullagh, *The Reluctant Taoiseach*, (Gill & Macmillan, 2011) ch.4. and Thomas Mohr, ‘The Statute of Westminster, 1931: An Irish Perspective’ [2013] *Law and History Review* Vol. 31, No. 4 (November), pp. 749-791

³⁰ Pádraig Óg Ó Ruairic, *Burn Them Out: A History of Fascism and The Far Right in Ireland*, (Head of Pegasus, 2025) p. 73.

³¹ Although in its National Programme issued upon its founding in 1926 it was the stated aim to “replace the Free State Constitution, with its articles dictated by England, by a Constitution freely framed by the representatives of the people”. Reproduced in Coffey, ‘The Need for a New Constitution: Irish Constitutional Change 1932-35’ [2012] *Irish Jurist*, vol.48.

³² For reproduction of the election manifesto, see Moynihan, *Speeches*, p. 188-191. Quoted in Dermot Keogh and Andrew McCarthy, *The Making of the Irish Constitution 1937: Bunreacht na hÉireann*, (Mercier Press, 2007).

and the 1922 Constitution is indicative of the true core of their position: it was identitarian, and not primarily institutional. Or at least demonstrates a near synonymity between identity and institutions. It was a formula of words which offended the very idea of what it was for them to be Irish; it was cultural and even metaphysical. Their further stated institutional constitutional aims were unattainable in their reasoning if this first change was not made.³³

Fianna Fáil enacted a republican nationalist project within confines of constitutionalism, which both utilised and simultaneously could not openly admit Ireland's functional independence. Any provisions which did not cohere with what was understood to be authentically Irish could not be countenanced, and it was, by virtue of Ireland's constitutional position within the Commonwealth, in their power to remove it. In a contribution in the Dáil Debates on the removal of the Oath, Desmond Fitzgerald TD, makes a contribution which points to the discrepancies in Fianna Fáil's constitutional position:

"I say that it was an outrage against ordinary honesty for the Government to seek power to abolish the State as it exists and create a new State without making it clear to the people that that was going to be done as a result of the election...it seems to me if this piecemeal transmigration of the Free State into some sort of republic were to be agreed to, the last way by which that should be done is by this abolition of the Oath...The President, by this Act which he has brought in and which he now proposes to pass, is clearly, as he is performing a positive act in order to create that situation, proposing that, in this country, the State of which he is the head has not the right to claim loyalty and obedience and fidelity from its people. If that doctrine of his is sound, then we are here in a state of anarchy. How does this State exist except by the assent of the people and by the insistence of the Government that there shall be that obedience to law that is implied in that word "fidelity"? I, on national principle, must oppose this...He, as head of the Government, must recognise that if we, coming in here to legislate, do not owe fidelity and obedience to this State and to those sections which form the Constitution, the Executive Council, the Governor-

³³ Institutionally, perhaps the most salient aspect of the Constitution (Removal of Oath) Act, 1933, was s.3. This section removed reference to the Scheduled Treaty from Art.50 (on Amendment procedure), lifted any offending limitations on the Oireachtas.

General and so on, if the Government has no right to insist on that, by virtue of what does the Government govern?”³⁴

De Valera articulated the necessity of the removal of the Oath by asserting:³⁵

“We were interested in getting rid of it because we knew that the majority of the Irish people did not want any confession of allegiance to a foreign king on the part of their representatives. We wanted to get rid of it because this formal acknowledgment on the part of the elected representatives of the people, no matter how that acknowledgment might be whittled down by those who set themselves up to interpret it, meant that a large section of our people were not going to acknowledge the authority of the elected representatives of the people...The opinion that a large section of our people legitimately hold is this, that they have a right to be completely free, that they have a right to determine for themselves, without any interference from outside, what their form of Government shall be, and if association with other States be suggested to them that they shall be at liberty to determine whether it is to their own interest to belong to that association or not... There must be no barrier such as this Oath, there must be no test which, by bearing on their conscience, would have the effect of excluding them.”³⁶

We see here the incapacity of de Valera to conceptualise the Treaty settlement and its constitutional emanation as an authentic expression of Irish liberty. Liberty does not exist as a maximalist condition in the same manner as sovereignty does not. That the polity of the Free State was functionally at liberty to abolish this Oath seems to contradict the claim that there was a constraint on mechanical freedom of the Free State. It is merely that the functionality which rendered this possible did not cohere with the narrative by which nationalists understood the identity of Ireland and its people, to be part of British Commonwealth.

6.2 The Constitutional Subject Speaks from the Dock

³⁴ Dáil Éireann debate - Wednesday, 3 May 1933 - Vol. 47 No. 4.

³⁵ That the issue of an Oath would animate the politics of Ireland to such a degree for so long, and yet one of the main protagonists would oversee further Oaths being prescribed in the 1937 Constitution which reflected a particular theological position demonstrates both that de Valera and his civil servants were condiment in fulsomely expressing a state apparatus imbued with theological theism and further that they would not have conceived of these confessional oaths causing conscientious disquiet.

³⁶ Dáil Éireann debate - Wednesday, 3 May 1933 - Vol. 47 No. 4.

Two divergent approaches to conceptualising Irish constitutionalism under the 1922 text can be broadly demarcated as “mechanical” and “organic”,³⁷ or we may call them the “pragmatic” and the “authentic”. Within the Constitutional Committee for drafting the 1922 document we can see these divergent approaches in the different drafts.³⁸ The functionality of the machinery of state was not an incidental concern, as will be dealt with below, but it was a cognitive rejection of all concessions to “Britishness” as a constituent quality of “Irishness” which drove the organic or authentic theories of judicial and constitutional nationalism. The idea of Ireland in which the State must be synonymous with the nation *qua* people informs formal arrangements to the present day.³⁹ That it does so, even after over 100 years of contradiction, dissonance, and potential incoherence, points to a credential by longevity. However, this does not change the reality that it is a quixotic construct that emerged from a marginal political credo which only gained significant popular appeal after the paradigm shift induced by the performance of insurrection in 1916. Andrew Vincent articulates this multivariant, somewhat paradoxical relationship between nationalism and sovereignty:

“...every nation necessarily expresses itself through the ‘first person plural’, or a ‘we saying’. Thus, nationalism provides a convenient identity for the state. Yet, given that sovereignty is *also* focused on identity, there appears to be a duplication of identities. The conventional and often implicit response to this is to register a distinction between legal and cultural, or, impersonal and personal identity. The suggestion that sovereignty may provide a form of overt rational legal identity and *modus operandi* to the state, but it is cold, rule-governed, overly theoretical, abstract and impersonal—namely—what is essentially required of a legal order. Nationalism, on the other hand, provides and untheoretical, warm, and expressive identity. Nations are thus a ghostly tepid emotive presence within states.”⁴⁰

³⁷ Bill Kissane, *New Beginnings: Constitutionalism & Democracy in Modern Ireland* (University College Dublin Press, 2011) p 55/56.

³⁸ Particularly with draft C, which would have made manifest more than any other the principle of popular sovereignty and direct democracy in its amendment procedures, Articles 68-71, and the complete absence of reference to the Crown therein. See, Drafts reproduced in Laura Cahillane, *Drafting the Irish Free State Constitution*, (Manchester University Press, 2016) Appendix 2,3, and 4.

³⁹ This characteristic of Irish constitutionalism has caused Jacobsohn to define Irish constitutionalism as exhibiting an expressivist dynamic. Jacobsohn, *Constitutional Identity*, (Harvard University Press, 2010), at pp. 12, 31, 194, and 283.

⁴⁰ Andrew Vincent, *Nationalism and Particularity*, (Cambridge University Press, 2002) p. 29.

This duplication of identities in Irish constitutional theory is imperfectly reconciled by grounding the constitutional validity of the polity in a legitimising metanarrative of ethno-symbolist normative identity. The constitutional architecture of the Irish state seeks to enliven the cold realm of legal sovereignty by populating it with a quasi-metaphysical ideal as represented by the simulacrum of the constitutional subject “people of Éire”. This in itself is a construct of a nationalist founding mythology. Being a textualist in Irish constitutional theory means taking as read that there are a “people of Éire” and that they are the locus of validity. Furthermore, it is the Irish People who have the right to choose whether to subordinate themselves to a monarch and their heirs, or to All Mighty God. However, this is an interpretation of Irish sovereignty which has been discursively realised through the developing jurisprudence of an interpretive community dealing with the fundamental questions of national metanarrativity within a paradigm of constitutionalism.

6.3 Moore and Others v. Attorney-General: of Fish, Plantation, and the Privy Council

A dispute concerning fishing rights on the River Erne with direct links to the Plantation of Ulster was to bring to the surface a dissonance between the mechanics and symbolism in the 1922 Constitution. A conscious act on the part of 6 local men to flagrantly and publicly challenge an exclusive title of the Protestant owned Erne Fishing Company by poaching on the river provoked the desired reaction: the Erne Fishing Company brought legal proceedings against the men. This eventuated a platform on which long held historical grievances could be argued in an “Irish” judicial setting. With the advent of this case, the normative metanarrativity of Irish cultural nationalism, and its corollary constitutional theory, was to be stress tested against the practicalities of the Treaty settlement.

Thomas Mohr identifies three reasons for the significance of the *Erne Fishing Case*. Firstly, the case delved into Irish history to an unprecedented degree, with many of the most eminent historians of the day giving evidence. Thus, historical controversies concerning the Plantation of Ulster, the Anglo-Norman conquest, and the nature of pre-conquest Gaelic society were argued before the courts. Secondly, issues of the long obsolete Brehon law proved to be crucial to the eventual outcome of the case and thus this ancient law code would briefly come back to life as they were interpreted by twentieth century judges. Thirdly, the Erne Fishery Company's appeal to the Judicial Committee of the Privy Council

would ignite a legal and political dispute concerning one of the most controversial legacies of the 1921 Anglo-Irish Treaty.⁴¹

The lingering prospect of the Irish judiciary being overruled by a decision of the Privy Council was unconscionable to Irish nationalist imaginary, regardless of whether the result was favourable in practice—if not their constitutional theory—to the “Irish” cause. On the British side of the Treaty negotiations, the requirement that the vestiges of British administration in Ireland must remain can be evinced by the response of British officialdom upon receiving the initial Draft of the 1922 Constitution, which contained no provision for appeal to the Privy Council in a like manner as that of Canada. Lloyd George PM accused Griffith and Collins of creating a “republic in disguise” which “stripped the monarchy of any influence or prestige and made it ridiculous”. Hugh Kennedy would maintain that there was nothing contrary to Treaty provisions in his meetings with Lord Chief Justice Hewart, thereafter Kennedy emphasised the unique position of Ireland as opposed to other Dominions, mainly Canada, in that the English common law had been imposed by statute and was therefore alien to the country, making the organic or authentic argument. The appeal to the Privy Council would ultimately make its way into the 1922 Constitution. In the process of redrafting, the British negotiators got most of their way, only on the issue of sovereignty of the people did the reasoning of Kennedy prevail over the objections issued on the initial draft.⁴²

All this disputation, it is important to remember, did not take place in a vacuum. At all times those negotiating and haranguing over the exact formulae of sovereignty and association had the very real prospect of violence rematerializing. Thus, with that very real prospect hanging like an albatross around the necks of the ideological nationalists, concessions were made. Mohr argues that in “Article 66, as nowhere else in the 1922 Constitution, can the great gulf that lay between the spirit of the Constitution originally drafted and the one eventually enacted be seen”.⁴³

Once the Privy Council began giving leave to appeal to Irish cases, and theory became practice, the initially amicable relationship between the Irish Free State judiciary and the Judicial Committee of the UK began to sour. One could hardly construct a more contentious

⁴¹ Thomas Mohr, ‘Law Without Loyalty – The Abolition of the Irish Appeal to the Privy Council’ [2002] *Irish Jurist*, New Series, Vol. 37, pp. 187-226

⁴² See, Cahillane, *Drafting the Irish Free State Constitution*, (Manchester University Press, 2016) ch.4

⁴³ Thomas Mohr, ‘Law Without Loyalty – The Abolition of the Irish Appeal to the Privy Council’ [2002] *Irish Jurist*, New Series, Vol. 37, pp. 187-226.

case to be granted leave to appeal to the Privy Council then a case which turned on interpretations of pre-feudal Brehon Law, Magna Carta, the Plantation of Ulster, and the ultimate foundations and identity of the Free State Constitution, but such was the circumstance of *Erne Fishing*. Once the Supreme Court overturned the decision of Johnson J in the High Court in finding for the defendants, Frank Gallagher the solicitor who had manufactured this case, exclaimed that no longer were the rivers in “the hands of foreigners” and no longer would “native Irish fishermen” be “outlaws”.⁴⁴ To still be othering individuals—regardless of the underlying grievance—from communities who have lived on this island for centuries as foreigners gives an insight into the culture which was generating an environment in which the continuation of Treaty concessions would not be countenanced.

As already stated, Fianna Fáil worked throughout their initial decade at the executive helm to undermine the 1922 Constitution and Treaty settlement. In keeping with this endeavour, the procedure of Appeal to the Privy Council would be brought forward for proposed amendment. The Constitution (Amendment no.22) Bill 1933, which would abolish and prohibit the appeal to the Privy Council, stipulated at 1(b):

“...and no appeal shall lie from a decision of the Supreme Court or of any other Court in the Irish Free State (Saorstát Eireann) to His Majesty in Council, and it shall not be lawful for any person to petition His Majesty for leave to bring any such appeal.”

During the final stages of the committee debates as to this amendment, a contribution was made by Professor William Thrift, representative at that time of Trinity College. Professor Thrift presented an argument which was antithetical to nationalistic essentialism. Far from being a foreign imposition or illegitimate usurpation of judicial sovereignty, the appeal to the Privy Council contained in Article 66 was part of a bargain, a bargain which gained democratic assent through the Treaty, not merely between Britain and Ireland, but between the co-nationals of Ireland, unionist and nationalist.⁴⁵ Thrift articulated his position as such:

⁴⁴ *Donegal Democrat*, (Letterkenny, 12/08/1933).

⁴⁵ When one examines the 1918 election results, one can see that if it had not been for first past the post electoral system, there is an approximate 50-25-25 split of vote share between republican nationalism, constitutional nationalism, and unionism. The 1921 Election which returned the Second Dáil was overwhelmingly revolutionary Sinn Féin, 124 seats in a 128-seat house, with 4 seats going to independent Unionists. This picture is overwhelming as the Gordian Knot of nationalisms was sliced and not solved, Northern Ireland had its own elections, returning a 3/4 Unionist majority with the remaining quarter equally divided between revolutionary and constitutional nationalism. Furthermore, the Treaty had the democratic

“I do not refer to the bargain made with the British people; I do refer to the bargain made with your own nationals...I am speaking as a national of this State...That acquiescence, I think, has been honourably adhered to by them ever since. They have done their best, whatever it may have been worth, to make the Treaty position a workable one. Ever since then attempts have been made to whittle away the concessions which were made in order to secure their acquiescence, or at any rate without which that acquiescence would not have been obtained...Every step you take in that direction—I say this merely as a warning—puts further from you what I believe is your ideal, a united Ireland by consent of the members of all Ireland...I am not talking about a bargain with another country at all; I am talking about a bargain amongst ourselves.”⁴⁶

De Valera responding, invoked the democratic mandate the constitutional project his party was pursuing, as obtained electorally from “*our people*”:

“As far as we are concerned, at any rate, we have gone to our people on a definite programme. We came into office having gone to our people on that programme. We put it clearly before them. All our actions are taken in consonance with that programme and in consonance with the mandate which we got from the people. This Bill was introduced here in accordance with that mandate...At any rate, as far as we are concerned, we are representing the people of this country. We believe that our people have a right to be completely free and that no outside body has any right whatever to dictate to them in regard to internal policies. We intend, as long as we are in office, to proceed along these lines. If there are any bargains standing in the way of the sovereignty of our people they have got to go.”

The irony of this expression of fidelity to the sanctity of the democratic principle from a politician who previously asserted that “the people have never a right to do wrong” is clear. That the aspiration for maximalist sovereignty for *our people* could override their democratic mandate when contradictory to the political aspirations of de Valera and his fellow republicans—who claimed to know the wishes of the Irish people by looking inwardly to his own heart—were sacrosanct once they had conformed to his own idea of

mandate, passed by majority in the Dáil on 7th of January, and by the provisional government on the 14th, demonstrating the reassertion of constitutional tradition in Ireland.

⁴⁶ Constitution (Amendment No. 22) Bill 1933 - Committee and Final Stages, Dáil Éireann debate - Thursday, 12 Oct 1933 Vol. 49 No. 19.

Ireland, is a convenient development in de Valera's democratic values. This demonstrates that in order for the democratic institutions of the State gain lasting stability, the balance within the constitutional settlement would have to embody in a more fulsome manner the rationality of the "legion of the rearguard".

The development of Fianna Fáil's constitutional principles must be contextualised within the nationalist epoch of early 20th century European politics. Fianna Fáil's idea of "our people" and sovereignty were resolute, but eventually so to would be their commitment to electoral democracy. Once Fianna Fáil had managed to fully divest themselves from the more irredentist and abstentionist elements of Sinn Féin, they could present their paradigmatic nationalist and republican principles in a manner compatible with mainstream parliamentary politics. Bill Kissane sums up the ductile commitment of de Valera to democracy by highlighting the choices available to nationalist leaders at this time "democracy or dictatorship".⁴⁷ In the Irish context, on the side of dictatorship you had the ACA (Blueshirts) presenting a far-right vision for a Christian-nationalist Ireland based most rigorously in Catholicism being the normative core of an integralist state. For instance, they limited their membership to those of Irish parentage and Christian faith. They sought to mimic the success of their ideological contemporaries by carrying out a march on Dublin in the style of successful European fascist movements under the pretence of commemorating Collins, Griffith and O'Higgins in August 1933.⁴⁸

The process of bringing republicans within the parliamentary and democratic process—initiated by Gerard Boland and Austin Stack at a meeting of the anti-Treaty Sinn Féin Comhairle na dTeachtaí in the aftermath of the Boundary Commission⁴⁹—had allowed for constitutionalism and the principles of democratic consent to firmly take root among republicans in the South. This facilitated a political context whereby the Irish state in 1937 was the only stable Catholic democracy in the world. The strongest justification for democracy in 1937—and indeed the most enduring one to this day—was the prevention of dictatorship, and de Valera wanted to align Ireland firmly in the democratic camp.⁵⁰

⁴⁷ Bill Kissane, 'Éamon de Valéra and the Survival of Democracy in Inter-War Ireland' [2007] *Journal of Contemporary History*, Vol. 42, No. 2, pp. 213-226

⁴⁸ Pádraig Óg Ó Ruairic, *Burn Them Out: A History of Fascism and The Far Right in Ireland*, (Head of Pegasus, 2025) p. 83-87.

⁴⁹ Stephen Kelly, *Fianna Fáil, Partition, and Northern Ireland: 1921-1971*, (Irish Academic Press, 2013). p.22/23.

⁵⁰ Bill Kissane, 'Éamon de Valéra and the Survival of Democracy in Inter-War Ireland' [2007] *Journal of Contemporary History*, Vol. 42, No. 2, pp. 213-226

J.J. Lee articulates the frustration one experiences when trying to hold a definitive interpretation of de Valera when assessing his legacy. The “contradictions and paradoxes” of the historiography of de Valera are complex as he was denounced both as an extreme republican and by extreme republicans. He would denounce executions of republican prisoners in the Civil War and sanction the execution of IRA men during the Second World War. He was at one time identifiably an anti-constitutionalist in 1922 and would introduce his own Constitution in 1937. With policies of neutrality and autarky, he could be reviled as an isolationist, and yet he passionately preached the doctrine of collective security at the League of Nations in the 1930s.⁵¹ Indeed, these personal ambivalences are reflected in the Constitution which de Valera would deliver in 1937.

While professor Thrift and de Valera were debating as to the interstitial wavering sanctity of the democratic mandate of the Irish people, the proprietors of Erne Fishing Company were setting about a process which would draw out all the paradoxes and contradictions of the anomalous position Ireland had in the Commonwealth and the British Empire.

The central issue which was to be dealt with in the *Erne Fishing* case was articulated as such by Kennedy CJ when determining the propriety of issuing the sought after injunction:

“Two main objections have been argued on behalf of the defendants against the granting of an injunction, namely, first, that the plaintiffs have not shown *primâ facie* evidence of title to a several fishery as claimed in the action... Upon the first of these matters, the position is this. It is common case that the waters in dispute are tidal waters, that is to say waters which *primâ facie* belong to the public with the right of fishing therein. The defendants have fished in these waters, in the manner complained of, in assertion of such public right, against a private monopoly which they contend does not, and could not, exist in these waters.”⁵²

The plaintiffs were relying on Patents from King James I and the “exclusive and undisturbed” possession of these fishing rights and that at the date of the coming into operation of the Constitution of the Irish Free State the plaintiffs or their predecessors in title were entitled, under a valid and subsisting grant, to the several fishery for salmon and all other kinds of fish in the entire tidal portion of the River Erne.

⁵¹ J. J. Lee, ‘De Valera's Use of Words: Three Case-Studies’ [2001] *Radharc*, Vol. 2 (Nov), pp. 75-100.

⁵² [1927] IR 569 at para 11-12.

On behalf of the defendants, it was argued that no such rights to the waters of the Erne were grantable, through the Attorney General acting on behalf of the public, as it was a public right being pursued. They denied that the tidal portion of the River Erne or the bed and soil underlying the said waters—or the sole and several rights of fishing for salmon or any other fish therein—had been put in defence at any time prior to the date of Magna Charta, relying on Chapter XVI therein:

“No banks shall be defended from henceforth, but such as were in defence in the time of King Henry our grandfather, by the same places and the same bound, as they were wont to be in his time.”

Therefore, they could not have become vested in, or rendered part of the possessions of the kings and queens of England prior to the granting of the letters patent mentioned in the statement of claim; the claim being “that no private right of several fishery existed in these waters which could have been acquired by confiscation or otherwise by the Stuart Kings and passed by their grants”. It was also argued in the High Court, unsuccessfully, that under Brehon Law no private fishing rights could be granted in pre-Norman Gaelic society.⁵³ Furthermore, under the provisions of Article 11 of the Constitution, the right of fishing for salmon and all other fish in the said portion of the said river belonged to the Irish Free State, subject to any trusts, grants, leases, or concessions existing in respect thereof on the date of the coming into operation of that Constitution.⁵⁴

On the argument of applicability of the Great Charter in Ireland, Kennedy CJ was clear,

“The Great Charter was transmitted to Ireland in the reign of Henry III in a form somewhat different from that published by King John in England, but the latter has for centuries been held to apply to Ireland. Poynings' Act applied to Ireland the statutes lately made in England, and this description will include the statutory confirmations of the Great Charter made at various times in England. Magna Charta prohibited the recognition of a several fishery in tidal rivers unless the several fishery had prior to the death of Henry II existed as the possession of some private individual, or unless the public had already at that date been excluded by the Crown... Under the law as now authoritatively laid down, in order to sustain their claim to the several fishery the plaintiffs must prove as a matter of fact by reasonable evidence that a

⁵³ [1929] IR 191.

⁵⁴ [1930] IR 471.

several fishery in the tidal waters, the subject-matter of this action, was appropriated by the Crown itself or was in fact possessed by some one else prior to the year 1189... it is expressly stated that the application of the law of England to a territory not previously subject to this law involves that the public right of fishing in tidal waters can be ousted only if there has been an appropriation against the public at some time anterior to the death of Henry II.”⁵⁵

On this point, Brehon Law would have to be interpreted by the contemporary Court.

“In Tirconnail, during the period we are considering, the Brehon law was in force—that is from the year 1189 until the introduction of English law... It is perfectly clear that, as in Roman law, the right of fishing was *publici juris*, so in Brehon law the right of fishing for salmon was vested in the inhabitants of the Tuath and an effort was made to secure equality for all by allowing each person to take one salmon... the Brehon law continued to be in force until it was extirpated in the sixteenth century by the introduction of English law. The plaintiffs did not attempt to prove that a several fishery or anything equivalent to it was recognised by the Brehon law. It is impossible to recapitulate at length all the evidence given, but we are clearly of opinion that the Brehon law of the twelfth century did not incorporate the feudal notion of the ownership of fishing in tidal waters... In our opinion the plaintiffs are not entitled to an ancient fishery appropriated to private ownership prior to Magna Charta”⁵⁶

Kennedy CJ, ultimately concludes through extensive exposition of historical statutes, that the letters patent from James I could not have granted exclusive title to the waters in question, “the foundations upon which the plaintiffs' title might be said to rest disappeared and, if we must state our opinion to be that the plaintiffs' claim is invalid,”⁵⁷

The reasoning of Kennedy CJ in this case demonstrates the hybrid nature of Ireland’s legal history, as well as irreconcilable historical narratives as refracted through the prism of nationalist judicial reasoning. In this case we have the Brehon Law being utilized in a twentieth century courtroom—a creature of the 1922 Constitution—alongside Magna Carta and 19th Century rulings of the House of Lords. It is a truism in Ireland that memory runs deep, and the coagulation and festering of grievance is not measured in years but in

⁵⁵ [1934] IR 44, at para 13.

⁵⁶ [1934] IR 44, at para 25.

⁵⁷ [1934] IR 44, at para 45.

centuries. This case evidences the salience of these issues where a new state has justified itself in antipathy to its former colonial administration through historical narrative.

Indeed, memory maintains a dialogical relationship with history; just as memory is constructed by history, history is constructed by memory, insofar as historical events were originally experienced with reference to pre-existing memory.⁵⁸ Would the Kildoney defendants have been emboldened to take action against this long-standing grievance if they had not felt sure that their case would find itself before an authentically “Irish” and thus sympathetic bench with juridical sovereignty? Assuredly not, as the first challenge to the exclusive title of the Erne Fishing Company was in 1925. Indeed, this issue of juridical foundations and judicial sovereignty would bring to fruition the reasoning of Kennedy CJ as articulated in his dissenting judgment in *State (Ryan)*⁵⁹ in the reasoning of the Privy Council.

The Dáil passed the Constitution (Amendment No. 22) Bill 1933 on November 15th; contained therein was a retrospectivity amendment generated in the Seanad. The Erne Fishing Company declared their intention to make just such an appeal which would challenge the authority of the Oireachtas to instantiate such an amendment to the Constitution. The Irish State in both its legislative and judicial organs refused to cooperate with the process of the Appeal to the Privy Council.

In the reasoning of the Irish position, the legitimacy of this process had been undermined as it was no longer a constitutionally valid process. Therefore, it would be the Attorney General of England who would represent Ireland in these proceedings. The Privy Council would have to assess the correct legal foundation of the 1922 Constitution so as to determine whether or not the Oireachtas had it within its purview to renunciate certain aspects therein, such as Article 66. On this point the Privy Council determined:

“the Treaty received force of law, both in the United Kingdom and Ireland by reason of the passing of an Act of the Imperial Parliament; and the Constituent Act owed its validity to the same authority...It seems that the proviso to article 66 of the Constitution was inserted to give effect in that particular regard to Article 2 of the Treaty, and hence under article 50 of the Constitution that proviso could not be

⁵⁸ Guy Beiner, ‘Probing the boundaries of Irish memory: from postmemory to prememory and back’ [2014] *Irish Historical Studies*, Vol. 39, No. 154 (November), pp. 296-307

⁵⁹ [1935] IR 170.

amended in the way in which it is sought to amend it by abolishing the right of appeal because such an amendment would not be within the terms of the Scheduled Treaty...On the 11th of December, 1931, the Statute of Westminster, hereinafter, called the Statute, was enacted, It was the result of the proceedings at the Imperial Conference, 1930, which representatives of the Irish Free State took part...Section 3 and 4 also refer to the Irish Free State as being a Dominion within the meaning of the Statute...as what the Oireachtas was doing was in truth, as already stated, the repealing or amending of parts of an imperial Statute, viz., the Irish Free State Constitution Act, 1922, what the Oireachtas did must, in their Lordships' judgment, be deemed to have been done in the way in which alone it could legally be done, that is by virtue of the powers given by the Statute. It follows that by virtue of the Statute, article 66 of the Constitution has been validly amended with the result that the proviso to that article is removed and appeals to the King in Council are now prohibited.”⁶⁰

Therefore, several years after the delegates—acting as the Irish plenipotentiaries—had signed the Treaty in London in 1921, the Irish Free State had been deemed to have legally abolished the right of appeal to the Privy Council, through an appeal to the Privy Council, which had conclusively decided to uphold the legitimacy of its own abolition.

Mohr argues that as a result of this decision, June 6th, 1935, can be considered the day in which Ireland gained judicial sovereignty, and should be considered a significant advancement for Irish sovereignty as a whole. It was now recognised, both in Ireland and Britain, that the Oireachtas could legitimately break the terms of the Anglo-Irish Treaty.⁶¹ But, if we were to acknowledge the significance of this moment then we would be explicitly accepting the British understanding of the means of validating the Amendment via the Statute of Westminster. By acknowledging the formal significance of this in a purely analytical jurisprudential manner, we would be invalidating the stated position of the Irish Free State.⁶²

6.4 Ryan as an indication of Irish Constitutional *Grundnorm*

⁶⁰ Robert Lyon Moore and others (Petition) v The Attorney General for the Irish Free State and others (Irish Free State) [1935] UKPC 34 (6 June 1935).

⁶¹ Thomas Mohr, 'Law Without Loyalty – The Abolition of the Irish Appeal to the Privy Council' [2002] *Irish Jurist*, New Series, Vol. 37, pp. 187-226

⁶² A constitutional theory that authority derived from the people and through the constituent assembly which “one and all-sufficient root of title”, *Cahill v Attorney General* [1925] IR 70.

One can see the evident disjunction between the two constitutional theories adopted in the interregnum between the Treaty and an mBunreacht: organic authenticity and mechanical pragmatism. The question as to the ultimate validating authority from which the 1922 Constitution gained its authority was articulated in *State (Ryan) v Lennon*,⁶³ which dealt with the validity, or lack thereof, of the Constitution Amendment Act (No.16) 1929 and the Constitution Amendment Act (No.17) 1931. The lingering issue was to be whether the Third Dáil acting as a Constituent Assembly, had the inherent authority to validate the Constitution, or whether they had been empowered by an Act of Imperial Parliament to do so, thereby wedding the validity of the Constitution to a British locus of authority. As articulated by Kennedy CJ:

“The Third Dáil has, therefore, as a Constituent Assembly, of its own supreme authority, proclaimed its acceptance of declared, in relation to the Constitution which it enacted...In my opinion, any amendment of the Constitution, purporting to be made under the power given by the Constituent Assembly, which would be a violation of, or be inconsistent with, any fundamental principle so declared, is necessarily outside the scope of the power and invalid and void.”⁶⁴

These contradictory positions were further compounded by the reality that the 1922 Constitution was enacted in parallel statutes in UK and Ireland. Potential amendments to the 1922 Constitution were constrained by Article 50 which stipulated that any and all amendments to the text had to remain within the terms of the Scheduled Treaty. That was until the Statute of Westminster 1931 afforded authority to the autonomous legislative acts of Dominions of the Commonwealth, thereby rendering them genuinely sovereign States. Yet, in Irish constitutional theory as expressed by Kennedy CJ, the Irish legislature was bound not by any recourse to British Statute, but by the binding acts of the Third Dáil. Therefore, the Statute of Westminster would not change the mechanics of Irish constitutional law. As referenced already, the Privy Council brought to conclusion the remnants of Treaty constraints via the 1931 Statute.

These contrasting understandings of the 1922 Constitution draw out and illustrate definitional distinctions which are important to bear in mind when one is analysing the development of Ireland’s constitutional identity. The geminate pair of statutes which served

⁶³ [1935] IR 170.

⁶⁴ [1935] IR 170. Kennedy CJ, at para 34.

as foundations of the 1922 document were irreconcilable in the essentialist paradigm which characterises the culture of the interpretive community of Irish constitutionalism. This essentialism operates on two strata, the identitarian and the institutional. The identitarian refers to the recourse to ethno-symbolic traits and ethos which permeates the constitutional text. The institutional concerns structures and constraints, but most saliently the ultimate *Grundnorm* which both validates and constrains constitutional development. The two are inextricably linked, with the institutional structuring of popular sovereignty as a procedural process of constitutional validity being afforded legitimacy by the metanarrativity of Irish nationalism.

If we are to view this dualistic condition of the 1922 Constitution through an analytical jurisprudential framework—with the legal values of objectivity and certainty in mind—then both the Irish proposition and the British proposition as expressed in the divergent constructions of validity, cannot conterminously be “true”. A legal order is ultimately concerned with the valid exercise of coercive power, as demonstrated in the *Erne Fishing Case*. Could, and should, individuals be punished for transgressing the norm of private property, if that right is held in a manner consistent with the underpinning validating *Grundnorm* of the legal order, which gains normativity from the metanarrative of the political order, and precluded from doing so again? The basic norm of a legal order is the cognisable principle that one ought to behave as the founders of the constitutional order and the individuals—directly and indirectly— authorised by the constitution, command. Coercive acts ought to only be carried out under conditions and in a way determined by the “fathers” of the Constitution.⁶⁵

But what if we have contradictory views as to the parentage of the national legal order? Laws remain valid so long as they have not been invalidated in the manner in which the legal order has itself determined. This holds true unless there is a revolution, which occurs whenever the legal order of a community is nullified and a new order inaugurated in an illegitimate way, that is in a way not prescribed by the first order itself.⁶⁶ Aspects of the former legal order may persist in the new legal order, but they are no longer valid by virtue of having been created in a manner consistent with the obsolete order, they are received into the new order either explicitly or tacitly.⁶⁷ The new *Grundnorm* is instantiated by

⁶⁵ Hans Kelsen, *General Theory of Law and State*, (Law Book Exchange Ltd, 2007) p.116.

⁶⁶ *ibid*, p.117.

⁶⁷ *ibid*, p.117.

individuals recognising and constraining their conduct in a manner which recognises the legitimacy of the new order by operating within the procedures of validity inaugurated by the new order. If a new order is efficacious, then we can assert that the basic norm has been altered.⁶⁸

When then, precisely can we identify that the Irish basic norm was altered? At what point had the locus of the basic norm shifted from the Imperial Parliament to the ‘People’? Such are the questions one asks when concerned with the basic norms. As constitutional identity—as an analytical approach—is more elastic or ephemeral than some other jurisprudential concepts, it can be more descriptively coherent in capturing both the continuity and change in this process.⁶⁹ So, we may with some authority claim that upon the development from the Treaty to the ratification of Bunreacht na hÉireann, the mechanics or formal structures came to cohere with the logic of republican nationalism in that the basic norm of the constitutional order was to definitively be the people, state *qua* nation *qua* people. However, we can assess the constitutional identity of that legal order shifting over time.

Irish constitutionalism has interwoven the two strata, identitarian and institutional, so that they are *almost* indistinguishable. The *Grundnorm* of Irish constitutionalism is that there are a “people of Éire” and they have given themselves a legal order, and must validate all alterations to that constitutional order. This then validates all other laws in that it regulates the creation of all subordinate laws.⁷⁰ So, in the divergent understandings of the 1922 Constitution we can see two opposing views of the *Grundnorm* as expressed in the reasoning of Kennedy CJ and Privy Council. This indeterminate dualism, in which ever manner you reason your way there, has been replaced with the clarity of the 1937 Constitution. Bunreacht na hÉireann has been interpreted as unequivocal in clearly locating the locus of legitimate validating authority in the Irish people, and it provided a clearly articulated construct of that people.

The identity of that “people”—language, values, and culture—were clearly represented in the 1937 text. However, the initial representative simulacrum of that people has been formally altered over successive generations, while retaining narrative components of that

⁶⁸ *ibid*, p.118.

⁶⁹ Constitutional identity has been conceptualised as the “restless soul of a legal order”. Monika Polzin, ‘Constitutional Identity as a Constructed Reality and Restless Soul’ [2017] *German Law Journal*.

⁷⁰ Hans Kelsen, *Pure Theory of Law*, (The Law Book Exchange, 2002) p. 221.

representation of the “people of Éire” as textually embedded. The succeeding chapters of this work examine the effects of the interpretive strategies of the Irish judiciary as an epistemic community in explicating the *Grundnorm* of popular sovereignty within Irish constitutionalism. I posit that there is interpretive significance in theorising the normative legitimacy of the constitutional basic norm through a teleological metanarrative of an ethno-symbolic community when this community no longer represents itself in the same manner. This interpretive significance is evident in the developing judicial understandings of what the implications of popular sovereignty are within the Irish constitutional order. I trace the discursive interplay between the general principles of constitutionalism and the indeterminate hybrid “people of Éire” as constitutional subject through the concept wherein they intersect—and their interdependence is most readily apparent—in the doctrine of popular sovereignty. To do so, we must interrogate the manner in which this constitutional order was realised in a text which justified political sovereignty by enlivening it with a metanarrative of nationalism by donning a glib and mantle.

Part 3: Bunreacht na hÉireann

Chapter 7. Donning the Glib and Mantle: Identity of and within the 1937 Constitution.

Why does one constitution collapse and another last? In answering we can look to the design of institutional architecture for jurisprudential analysis of governance, rigidity, and textual insufficiencies, but underlying these is a more salient cause: the degree to which the polity's theory of legitimisation, as articulated in the national metanarrative, is realised. Where certain concepts are integral to the justificatory metanarrative of a polity's self-identification and legitimising discourse, then constitutional structures which do not sufficiently reconcile or accommodate this narratological rationality will embolden those who would seek to undermine or replace it. I would argue that such was the case with the process whereby the 1922 Constitution was undermined; instead of being constructively amended, the document was functionally sabotaged,¹ eventually creating sufficient need to draft a new constitution. This text necessarily had to more comprehensively reconcile its constitutional structure within the dominant nationalist paradigm, by textually realising the narrative components and ethos of the national metanarrative.

The 1937 text more fulsomely enshrines the narratological rationality of the political movement which served as principal force in building the modern Irish state. The pragmatic concessions to British imperial symbolism of the 1922 document were exorcised and a revivalist Gaelic and Catholic Irish identity was enshrined in the provisions of the 1937 text. Through that process, we see the deliverance of the inversion of colonial identity-

¹ Indeed, in relation to its identity as a document legitimated by appeals to sovereignty of the Irish people, the passage of the Constitution (Amendment No. 10) Act, 1928, which severely diminished the procedural directly democratic character of the text can be seen as a sabotage. So, too with the Constitution (Amendment No. 16) Act 1929, which extended the period of time with which a direct democratic mandate in popular referendum was unnecessary for constitutional amendment. And perhaps most detrimental to conventional understandings of constitutional politics respecting the integrity of the constitutional polity, The Constitution (Amendment No. 17) Act 1931, granting emergency power to the Executive Council to suspend much of the rights guarantees in the text and establish military tribunals. These amendments would undermine the 'republican' aspects of the text; whereas the Constitution (Removal of Oath) Act 1933, Constitution (Amendment No. 20) Act 1933 (transferring the power to recommend the appropriation of money from the Governor General to Executive Council), The Constitution (Amendment No. 21) Act 1933 (abolishing the right of the Governor General to refuse to ratify an act of the Oireachtas), The Constitution (Amendment No. 22) Act 1933 (abolished appeals to the Privy Council), The Constitution (Amendment No. 24) Act, 1936 (abolishing the Seanad, rendering the Free State a unicameral legislature), and on foot of the abdication crisis in the UK The Constitution (Amendment No. 27) Act 1936 (which removed all references to the British Monarch), would serve to undermine or sabotage the "Dominion" aspects of the text.

based rationality as instantiated through constitutionalising and rigidifying identic traits as essentialisms of national identity as a constitutional subject.

National essentialisms can develop within and between proximate polities. These essentialisms can serve either in the justification of subjugation, colonisation, secession, or liberation. They symbiotically rely on—and in turn develop—national identities centrally based on traits of minor differentiation.² When I say minor differences in this regard I do not mean to trivialise or minimise the salience of these traits to the communities who hold them as emblematic of their collective identity. I mean that they are in some fashion fungible, mutable, volitional, or permeable. They are not immutable characteristics in a biological sense; rather, they are socio-cultural traits. As such, they are a threat to rigid binary conceptions of national identity—which is strategically essential in the colonial process—as they are traversable and amalgamable. It is from the principle of national identity that we develop a corollary concept of constitutional identity, the reasoning being that a constitution’s defining character will be reflective of constitutionally formalising that national identity, the essential essence which stabilises a “We” and an “Other”. Indeed, it is from this intense focus on small difference that we can trace both Anglo-Irish relations over the centuries and intra-Irish disputation on national identity, and ask: is Irishness as a constitutional subject a civic or ethnic identity, or both?

The constitutional domain is the prism through which this work seeks to analyse this process of writing Irish subjectivity through a constitutionalising of Irishness as a normative identity, and the discursive adaptation which emerges therefrom through interpretation. What ultimately caused the ebb of the 1922 document and the flow of the 1937 text as already discussed can, and I argue should, be viewed as contestation over and between ideas of Irishness as a normative identity. Article 50³ may have been the means by

² Linda Colley makes a strong argument for the formation of a British identity, being related more to external neighbourly “Others” as opposed to the internal integration of Welsh, Scottish, English, and Irish identities. The Catholic ‘Other’ of continental Europe and Ireland was to serve as a site of differentiation which would build up an identity of Britishness as Protestant, overlaying regional and national identities, thereby encompassing High Church Anglicanism, Scottish Presbyterianism, dissenters of Welsh Methodism, but significantly not Irish Catholicism. See, Colley, Linda. ‘Britishness and Otherness: An Argument’ [1992] *Journal of British Studies*, vol. 31, no. 4, pp. 309–29

³ “Amendments of this Constitution within the terms of the Scheduled Treaty may be made by the Oireachtas, but no such amendment, passed by both Houses of the Oireachtas, after the expiration of a period of eight years from the date of the coming into operation of this Constitution, shall become law, unless the same shall, after it has been passed or deemed to have been passed by the said two Houses of the Oireachtas, have been submitted to a Referendum of the people, and unless a majority of the voters on the register shall have recorded their votes on such Referendum, and either the votes of a majority of the voters on the register, or two-thirds of the votes recorded, shall have been cast in favour of such amendment. Any such amendment

which this process was carried out, but it was not the cause. If the concessions⁴ of the 1922 text had resonated, its rationality internalised and imbedded within the political culture of the polity, then perhaps that initial 8-year period of amendment by way of ordinary legislation would have passed without—or with only minimal—utilisation. However, the pre-eminent nationalist culture which was paradigmatic within Irish politics served to prevent an uncontentious legitimisation of the 1922 text.

7.1 Romanticism: An Ethno-symbolist Narrative to Delegitimise 1922.

The 1922 text would not be sustained as it insufficiently instantiated an Irish state which was reconcilable to the romantic simulacrum of Irishness constructed in late 19th and early 20th century revivalist nationalist imaginary. The question now arises as to why the 1937 Constitution has been so resilient? Are these texts so radically divergent? Is the 1937 text a Gaelic crown for the nation, a text which delivered on the call to de-anglicise Ireland?⁵ Or conversely is it a text which, similarly to the 1922 text, tacitly recognises the inherent hybridity which characterises all nations of the north Atlantic archipelago emanating from the tumultuous shared history of these isles, but more adeptly appeals to nationalist epistemology through ethno-symbolism?

The process by which the Irish polity came to self-identify necessarily utilised a narrative wherein the people as a singular, univocal entity was afforded characteristics which were necessarily coherent, but which in substance cannot be said to be possessed of by all. It was the “reality” of this entity, the “people of Éire”—constructed upon certain normative assumptions—which served, and continues to serve as the normative core of Ireland’s constitutional identity. Therefore, we must ask did the 1937 text succeed as a result of merely donning the Gaelic glib and mantle⁶ and holding aloft the Catholic crosier as

may be made within the said period of eight years by way of ordinary legislation and as such shall be subject to the provisions of Article 47 hereof.”

⁴ Which posited an independent Irish people within the British Commonwealth, with the dualistic legitimating Grundnormen in the Irish people and the British theory of constitutional monarchy.

⁵ Interestingly, when one reads Douglas Hyde’s lecture calling for the de-anglicising of Ireland, one can see the appeal is one of strategic adoption by the Anglo-Irish of Gaelic identity as a means of Protestants of the ascendancy positioning themselves at the centre of an emerging national consciousness that was being formed in contradistinction to a British identity wedded to empire. “It is just because there appears no earthly chance of their becoming good members of Empire that I argue that they should not remain in the anomalous position they are in, but since they absolutely refuse to become the one thing, that they become the other; cultivate what they have rejected, and build up an Irish nation on Irish lines.” Douglas Hyde, ‘The Necessity for Deanglicising Ireland’, in Sir. Charles Gavan Duffy, Dr. George Sigerson, and Dr. Douglas Hyde, *The Revival of Irish Literature and Other Addresses*, (London, T. Fisher Unwin 1894), 120.

⁶ The glib was a hairstyle prominent in Gaelic Ireland and the Mantle was a style of loose-fitting cloak worn in Ireland in 16th century. Both were focused on by English literati of the time as sharp points of distinction

symbols which better adorned the inexorable concession to Ireland's composite identity? And does this text still persist precisely because the narrative which is told within Ireland about "our Constitution" still relies principally not on its republican political structures, its reflection of the mores and values of the polity, but rather on the continued normativity of the Irish Ireland national principle on which it is founded?

The representation of an Irish people as imagined and constitutionalised in the late 19th and early 20th century was broadly supported because of its close correspondence to the reality of its material equivalent, the citizens of the polity. However, the reality of Irish society today has a diminishing correspondence with the representation of it in the constitutional text. It may have once been the reflection of a reality, but over time it came to mask and denature that reality, and now it has only minimal or no relation to reality.⁷ Yet, it remains a necessity to represent a subject on which a constitutional polity can be iteratively justified. By behaving as if the constitutional subject—the people of Éire—is reality, it becomes a reality, or as Jean Baudrillard would say it:

"To dissimulate is to pretend not to have what one has. To simulate is to feign to have what one doesn't have. One implies a presence, the other an absence. But it is more complicated than that because simulating is not pretending: "Whoever fakes an illness can simply stay in bed and make everyone believe he is ill. Whoever simulates and illness produces in himself some of the symptoms (Littré). Therefore, pretending, or dissimulating, leaves the principle reality intact: the difference is always clear, it is simply masked, whereas as simulation threatens the difference between "true" and the "false", the "real" and the "imaginary". Is the simulator sick or not, given that he produces "true" symptoms? Objectively one cannot treat him as being either ill or not ill."⁸

By constructing a simulation of what an Irish state for a sovereign Irish people would be, an Irish state in which the Irish people are sovereign was constructed. That there is dissonance in this process is almost definitional. By performing as if there is such a collective identity as the "people of Éire" those minded to physical force separatism in the

between Irish and English, thus demonstrating the easily traversable minor differences. Similarly, the Irish language obviously played a role as well as religion. See, Ziegler, John R. 'Irish Mantles, English Nationalism: Apparel and National Identity in Early Modern English and Irish Texts' [2013] *Journal for Early Modern Cultural Studies*, vol. 13, no. 1, pp. 73–95 & Jane Ohlmeyer, *Making Empire*, (Oxford University Press, 2023), ch.2/3 on Anglicisation and Assimilation.

⁷ Baudrillard, *Simulacra and Simulation*, (The University of Michigan Press, 1994) p. 6.

⁸ *ibid*, p.2.

early 20th century constructed a constitutional polity which embedded this entity as necessarily sovereign, and enshrined within the basic law of the state a referendum procedure through which the Irish collective entity could perform their popular sovereignty.⁹ The constitutional is the theatre in which the discursive process of identity formation is performed. The metanarrative of popular sovereignty is performed by different social actors fulfilling their performative functions within the discursive process. Political actors rhetorically invoke the principle and put measures to the people informed by the sovereignty principle; the people perform their role as citizens in voting either in referendums or at times of election; and the judiciary perform their role through interpreting the texts which emerge from this process. All performers when fulfilling their function within the procedure exercise situated agency within the social and institutional constraints of their epistemic community, as cohering with the normative constraints of national metanarrative.¹⁰

7.2 The Medium is the Message: Constitutions as Narrative Discourse

De Valera clearly articulated his view of the 1922 Constitution, and his view of the proposed new Constitution, in a radio broadcast to the nation on the 39th of April 1937. We see in this address the logic of his constitutional theory articulated for a national audience. Demonstrating the continued salience of pre-constitutional ephemera, Dev argued that the 1919 Democratic Programme was merely an articulation of the “character of the state” and that it was enacted when the country was in “a war situation”. The content of the social and economic aspects of the Democratic Programme were not core to the constitutional aspirations of mainstream nationalism, as is evinced through their near absence or relegation within the 1937 text to the non-justiciable Article 45 “Directive Principles”. Indeed, Willie Norton TD, commenting on the draft Constitution and Article 45 in particular, stated to the annual general conference of the Post Office Workers Union, in the context of a wage dispute, that the disjunction between constitutional rhetoric and government policy was “ironic” and that if the government did not intend to bring policy

⁹ The performativity of popular sovereignty in Ireland has only increased in the last decade with the advent of the Citizens Assembly, a forum for deliberative democracy, without any positivist powers in a legal sense, but a strong performativity function by issuing recommendations on issues of contention within the Irish constitutional polity.

¹⁰ Balkin, J M, and Sanford Levinson, 'Law as Performance', in Michael Freeman and Andrew D E Lewis (eds), *Law and Literature: Current Legal Issues* (Oxford, 1999; online edn, Oxford Academic, 31 Oct. 2023).

into concord with their constitutional rhetoric that they “ought to be ashamed to put them into the Constitution at all.”¹¹

De Valera proffered a narrative wherein this draft of a new constitution being put before the people in a plebiscite was a differentiated constitutional juncture in the development of Irish history. It would permit the performance of an authentically democratic expression of popular sovereignty from the enfranchised people, fulfilling the rituals of republicanism by gaining consent to the constitutional arrangement of the state:

“If our State is to be governed on the democratic principle, it is essential that it should be understood and deliberately approved of before it is enacted. Never before have our people been given an opportunity such as this.”

The argument in which this is a novel democratic constitutional moment in Ireland is built on a narrative in which the 1922 text was inauthentic, imposed, and passed by party political chicanery:

“The Constitution adopted on that occasion suffered from the fatal defects that it was not framed altogether by Irish hands and that it was made subject to a treaty admittedly imposed by the threat of force. Such a Constitution could have but one fate...”

As well as this justificatory narrativization of the issues with the 1922 text, and the proposed democratic necessity of a new constitutional arrangement, we get in this speech a clear articulation of a justification for the more effusive nationalist and identity centred provisions of the Constitution. The function of text is not merely legalistic and procedural, it is generative of emotional resonance and democratic proprietorship:

“In my judgment, a Constitution ought to do more than define the character of the legislative, executive, and judicial regime, and if it be based on the democratic principle it ought to do more, for example, than prescribe how the representative institutions should function, how the parliamentary responsibility of the Executive is to be secured, the independence of the judiciary maintained, or the principles of universal suffrage applied. It should inspire, as well as control, elicit loyalty as well as compel it...Every elector who casts his vote in favour of the adoption of this

¹¹ *Irish Independent*, (Dublin, 07/05/1937).

Constitution will in effect be subscribing his name to the proposition that in this country the people and the people alone are the masters.”¹²

It was, for de Valera not so much what the Constitution did, but what it *was*—an “authentically” Irish Constitution—which rendered it legitimate. It is important to note that the people are not a monolith.¹³ There are those who will be—for reason of identity or political ideology—outside the normative identity articulated within the constitutional text. For those “Others”, constitutions are in some facet imposed: it is a matter of degree and not of distinction. What differentiates the imposition of the 1922 document from the 1937 document, in the rationality expressed by de Valera and the Fianna Fáil party, was that this imposition has been fashioned *exclusively* by “Irish” hands. In the broadly styled liberal republican tradition there is no greater sin than lack of consent in domination; thus, an imposed constitution, with this stain of original sin, is illegitimate *ab initio*.¹⁴ D.S. Law makes the argument that it is the capacity to generate a resonant romantic narrative, which either delegitimises or conversely legitimises a constitution, that informs its narratological characterisation as imposed or not. In making the argument, the point is made that all constitutions are by some degree imposed.¹⁵

We can see that in the imagination of irredentist republican nationalists, 1922 was non-consensual imposition whose parentage was insufficiently authentic. However, a similar argument was being made at the introduction of the draft of the 1937 text in the Dáil. Prof. John Marcus O’Sullivan—philosopher, historian, Catholic apologist, politician, and grower of vegetables¹⁶—in his contribution during the debates on the 1937 draft excoriated Fianna Fáil for the manner in which this constitution was introduced:

¹² Reproduced in *Irish Press*, (Dublin, 1/5/1937).

¹³ Even in 1936, wherein the census showed of the 2,968,420 people in the jurisdiction, 2,773,920 were Catholic, there was still diversity among that populace. The cleavages of politics and class were acute. This societal pluralism has only expanded since that time, with religion now being a site of diversity, along with a fracturing in political consensus embodied in Ireland’s historic pattern of the 2 and a half party system, and the disparity in socio-economic class expanding after a pattern of narrowing in recent decades. Data available at <https://www.cso.ie/en/census/censusvolumes1926to1991/historicalreports/census1936reports/>.

¹⁴ David S. Law, ‘Imposed Constitutions and Romantic Constitutions’, *Legal Studies Research Paper Series Paper No. 18-05-01*.

¹⁵ “Or any constitution that is imposed by one portion of society upon another or, indeed, any constitution that commands less than unanimous support? Why is a constitution imposed upon a minority not an “imposed” constitution? Is it not the case that every single constitution in the world is “imposed” from the perspective of at least some people? And if there are always people who experience a constitution as “nonconsensual” or “imposed,” then how can any constitution escape the “imposed constitution” label? David S. Law, ‘Imposed Constitutions and Romantic Constitutions’.

¹⁶ Patrick Maume, ‘John Marcus O’Sullivan’, *Dictionary of Irish Biography*, (Royal Irish Academy, 2009).

“The President, by fixing this debate now, by putting the decision to the people on the same day as the general election, as I understand he is going to do—whether it is on the same day or not does not matter so long as the election looms ahead or looms there with the Constitution— has seen to it that the people will not give this Constitution the consideration that he professes it deserves. Many will simply ignore it. Then the claim will be put forward that this Constitution has got the *fiat* of the people; that the people consented to the shackles this Constitution puts upon them. Nothing could be further from the truth than such a contention.”¹⁷

The counter narrative was proffered that this Constitution would, if passed, be a party-political imposition by dint of chicanery of electoral politics. This argument to delegitimise the 1937 text was given *some* credence by the slim mandate the text eventually received. In effect marginally more than one third of the overall electorate passed the 1937 text. The Constitution was approved by 685,105 votes to 526,945 in the plebiscite.¹⁸ There was a very large number of spoiled votes, but not enough to change the outcome. There was significant overlap between party voting and support or lack thereof for the Constitution, with an observable pattern of Fianna Fáil voters supporting the Constitution and Fine Gael voters rejecting it. Of the constituencies which returned a majority ‘No’ vote, some had significant Protestant populations, such as Wicklow and Dublin township. In Sligo and West Cork, where there was less sizable Protestant communities, but which similarly returned a ‘No’, there were sizable abstentions, suggesting that Fine Gael voters didn’t want to vote against a constitution with such a Catholic influence, but still informed by party affiliation—and the attendant, still raw, Civil War animus party identification embodied—could not positively support the Fianna Fáil Constitution.¹⁹ By servicing the Catholic identity of the Fine Gael voter base within the metanarrativity of the text, their political self-conception was sufficiently represented.

As such, we can countenance an argument that the masters to which de Valera refers to on that day were the marginal majority, who imposed their democratic mandate on the slight

¹⁷ Dáil Éireann debate - Wednesday, 12 May 1937 Vol. 67 No. 2.

¹⁸ The Department of Housing, Local Government and Heritage, ‘Referendum Results: 1937-2024’, last updated, 7 August 2024. <https://assets.gov.ie/static/documents/referendum-results-1937-2024.pdf>.

¹⁹ Dermot Keogh & Andrew McCarthy, *The Making of the Irish Constitution 1937: Bunreacht na hÉireann*, (Mercier Press, 2007) p. 210/211.

minority who opposed this democratic imposition.²⁰ Those who were inspired by the document gave their democratic imprimatur; those who were insufficiently inspired would now have their loyalty compelled. This is not to make any argument for illegitimacy of the result and the Constitution it brought about, but to acknowledge that one person's authentic democratic expression is perhaps another's imposition. We can draw an inference from the results as presented that it was the inclusion of identitarian nodal points within the appeal to normative Catholic metanarrativity as an authentic expression of the people of Éire which would garner the slight majority.

David Kenny suggests that reading the 1937 presents many seemingly contradictory or incoherent values concomitantly embedded. As such one may critique it—on the assumed synonymity between constitutionalism and principled consistency—for failing to fully be one thing or the other. Yet, Kenny argues that this is in actuality the virtue of the Constitution. It has served as a pragmatic compromise which brought into a constitutional polity the two divergent political positions of Catholic confessionalism and the population of Protestants which needed some degree of protection from Catholic majoritarianism if they were not to frustrate aspirations to a united Ireland.²¹ I would suggest an additional component in this process of “unprincipled” compromise was the lineage of republicanism and its attendant principle of pluralism—as expressed throughout much of the pre-constitutional ephemera—of the tradition from which de Valera and Fianna Fáil drew their historic legitimacy.

With this in mind, let us take a brief thematic examination of the differences between both constitutional texts in relation to identity, as opposed to rigidly structural examination of formal institutions, as there was to a great degree institutional continuity.

7.3 Éire or West-Briton? A Battle for the Soul of the Text: Identity in 1922 and 1937 Compared

Identity here refers to the manner in which the Irish state and its people are presented within the two constitutional texts. By comparing the two texts across the divergent and coterminous provisions, we can analyse how one articulation of Irishness was insufficient

²⁰ This is not to mention the issues surrounding Northern Ireland which was in theory subject to the conception of Nation as prescribed within the text, yet did not have the franchise, whether desired or not, to give democratic assent thereto.

²¹ David Kenny, ‘The Virtues of Unprincipled Constitutional Compromises: Church and State in the Irish Constitution’ [2020] *European Constitutional Law Review*, 16: 417–439.

to appease those determined to see their own idea of Ireland constitutionalised. We can also explore how—as a consequence of the discursive paradigm of anti-colonial, Catholic, Gaelic, Irish nationalism—the anti-Treatyite republican milieu were eventually able to instantiate a constitution which was reconcilable with a vision of Ireland minimally acceptable to pro-Treatyites.

Within the discourse of constitutional identity, the Preamble—which is often overlooked or fleetingly examined in both case law and academic sources—should be subject to more rigorous examination. In new states, such as post-Treaty Ireland, preambles are utilised to express the purposes for which this new state is founded.²² A preamble is salient in terms of doctrinal constitutional identity as they are a legal/literary device instrumental in constructing or representing a metanarrativity of the identity of the State and its citizenry. It serves as the quintessential distillation of the constitutional understandings of the framers.²³

The argument of this thesis relies on examining the framing of the constitutional metanarrative and how this theory of justification necessitated a certain identity of the constitutional subject. Furthermore, it critically examines how both the metanarrative, and constitutional subject, have developed over the lifespan of the constitutional text as mediated through the performance of judicial interpretation, and by doing so constructing ‘constitutional identity’ through iterative readings.

As we are dealing with judicial reasoning which utilises a doctrine which is conceptually indeterminate, all the lexical symbolism contained within a constitution, as well as formal institutional structure, will come into the interpretive gamut of the judiciary. So, the function of an interpretive preamble, as found in the Irish Constitution,²⁴ is to provide a guiding framework for constitutional interpretation.²⁵ Therefore, the genealogy of the discursive concepts and nodal points therein should be critically analysed. This will give

²² Bill Kissane, *New Beginnings: Constitutionalism & Democracy in Modern Ireland*, (University College Dublin Press, 2011) p. 33.

²³ Liav Orgad, ‘The Preamble in Constitutional Interpretation’ [2010] *International Journal of Constitutional Law*, vol.8, Issue 4.

²⁴ A view expressly articulated in *Attorney General v Southern Industrial Trust* 94 ILTR 161, wherein Lavery J reasons, “‘The declaration in the Preamble, made in general terms, may add little to the more precise terms of the relevant Articles. Nevertheless, the words of the Preamble declaring the purpose of the people in adopting, enacting, and giving to themselves the Constitution may help in determining the meaning of and the effect to be given to particular provisions.’”

²⁵ Liav Orgad, ‘The Preamble in Constitutional Interpretation’, *International Journal of Constitutional Law*, [2010] vol.8, Issue 4.

greater analytical clarity to examining subsequent constitutional provisions expressive of identic traits in areas such as language, religion, nationality etc.

(a) The Preamble: Realising Irish Metanarrativity

The Constitutional Committee convened to draft the 1922 text eventually would produce three drafts. Within these drafts²⁶ we could see variations in the emphasis espoused the respective preambles. Draft A reads as follows:

“We, the people of Ireland, in our resolve to renew and re-establish our State and to found it on principles of freedom and justice, take control of our destiny in order that Ireland may take her place among the Nations of the world as a free democratic State. In exercise of our sovereign right as a free people and to promote the welfare and to preserve and develop the heritage and the spiritual aspirations of our people, we hereby declare Saorstát Éireann established and give it this Constitution.”

Here we can see the primacy of popular sovereignty through the equivalence articulated between people and nation, which in pursuit of its “destiny” and “spiritual aspirations” established its state. This national principle resounded through all instances of constitutional reasoning in Ireland. We see the use of historical narrative as a tool for shaping the present and signalling to the future. It is telling that revivalism is expressed in “renew and re-establish” and “develop the heritage”. At once this preamble is invoking ancient nationhood and new junctures with “founding it on principles of freedom and justice”.

Draft B reads as follows:

“We, the people of Ireland, acknowledging that all authority comes from God, and in the exercise of our right as a free people, do hereby create Saorstát Éireann and give it this Constitution. Through it we shall endeavour to re-establish our national life and unity that Ireland may take her rightful place among the Nations of the earth.”

Here we get a direct invocation of the dual loci of authority in theism and the people of Ireland, a theme which would be given greater expression in the eventual 1937 preamble. Including the words “free people” intended to convey the magnitude of the new status of the country.²⁷ In contrast to other preambulatory lexical constructions, a distinction is

²⁶ See, Appendixes 1,2,3, and 4 of Cahillane, *Drafting the Irish Free State Constitution*.

²⁷ Cahillane, *Drafting the Free State Constitution*, (Manchester University Press, 2016) p.17.

drawn between the “free people” of Ireland and the “national life”, which is yet to be established. A further demarcation is that of the created state; essentially, we have an authentic people who will instrumentalise the artifice of state architecture to regain a national *esse*, presumably that which existed pre-Norman settlement, and would be eventuated through the removal of partition. This articulation acknowledges that this juncture is but a starting point, and the eventual synthesising of people, state, and nation will only be achieved when unity is achieved.

Draft C reads as follows:

“We, the Irish people, acknowledging that political authority comes from God to the people, asserting our natural right to national independence and unity, and in pursuance of our claim to determine freely the forms of Irish government, hereby vote and confirm the Constitution in the Constituent Assembly of the Irish Free State, in order to base the organisation and development of our country on the principles of justice and liberty”.

Again, here we get the dual loci of authority, a theme which would be emphasised within Draft C which sought to instantiate a form of anti-party direct democracy redolent of Switzerland with a strong Catholic influence. We see a distinction between the organs of state and the people; the two are not synonymous. The people are free by right to choose for themselves the forms of government, leaving open both constitutional monarchy by consent and a republic. Also, this draft formally positions the act of the Constituent Assembly as formal legitimising mechanism for bringing in this Constitution. The Irish people have a “natural right to national independence”, herein we see the synthesis of natural law reasoning with national politics in a manner which would come to define the 1937 text.²⁸ Furthermore, the concept of sovereignty in this construction is firmly in a natural law framework as “our natural right”, as such it is a right which precedes any positive recognition, and is thereby inalienable.²⁹

The draft constitution which would ultimately be chosen to be presented to the British negotiators originally contained a preamble which was far more expressive of a

²⁸ That is until the Supreme Court interpreted the text in such a manner as to render the Catholic or Aquinian character of it a near nullity.

²⁹ This is significant as over successive interpretations of Irish sovereignty have seen fit to render it a right subject to popular mandate, meaning that if the enfranchised ‘people of Éire’ vote in favour of a diminution or abdication of this right, they are constitutionally free to do so. The positivist democratic mechanism has superseded the substantive normativity of the concept of sovereignty as understood in the attainment thereof.

distinctively nationalist narrative and interpretation of history. It was ultimately dropped from the text even before the delegation went to London with the draft so as to not draw the ire of the British contingent and keep things amicable, providing more scope for the Irish delegation to argue more rigorously for more substantive provisions.³⁰ One can see this as a felicitous decision as the content of the draft preamble would have surely caused obtrusive argument in the negotiations. However, it is most redolent of the eventual preamble which would be enshrined in 1937. It read:

“Whereas in the good providence of God an end has been made of foreign rule in Ireland and the sufferings and sacrifices of its people have been rewarded with freedom by Divine Mercy, we the people of Ireland, acknowledging that all lawful authority comes from God, and in the exercise of our National right, do hereby proclaim this to be the Constitution of Saorstát Éireann.”

Here we see the fulsome expression of the tripartite national metanarrative: Ireland is an ancient nation unduly subjugated by foreign British rule; Irish people are a religious people who have been maintained by the national claim and their faith; and that there has been a continuous push or “sufferings and sacrifices of its people” in order to regain that “National right”. This religiously infused nationalistic interpretation of history had constitutional precedent in the Polish Constitution 1921. This was a distinctive aspect of both texts in the context of post-war Europe in that most other new states did not explicitly appeal to a pre-existing majority national community, rather couching their constitutional claims in universal principles.³¹

Ultimately none of these drafts would precede the 1922 text, and I would suggest that the absence of such a clear articulation of the nationalist metanarrative, as mediated through the constitutional text, would give sufficient material for those seeking to construct a counter-narrative in which 1922 text was an inauthentic constitutional emanation with suspect sources.³² As the Treaty, and the constitution which emanated therefrom, were a constraint on nationalists, they could not go into the very high poetic language they might have gone into if they had got an “absolute victory” as Ernest Blythe TD put it.³³ It could

³⁰ Cahillane, *Drafting the Free State Constitution*, (Manchester University Press, 2016) p. 59.

³¹ Bill Kissane, *New Beginnings: Constitutionalism & Democracy in Modern Ireland*, (University College Dublin Press, 2011) p. 35/36.

³² Indeed, the preamble plays a significant part of the argument against the 1922 Constitution as argued by Frank Gallagher in, *King and Constitution*, Fianna Fáil (Republican Party), Pamphlet No. 2.

³³ Dáil Éireann debate, Wednesday, 11 Oct 1922, Vol. 1 No. 21.

be situated in a narrative as an inauthentic imposition, as opposed to a narrative which positioned it as the deliverance on the constitutionalist project of the 19th century endeavours of the large majority of Irish nationalist political sentiment. That compromise was enacted in this symbolic, yet fundamental aspect of the Constitution, rendered the character or identity of the text sufficiently suspect in the rationality of irredentist physical force nationalism. The preliminary which replaced the final draft preamble clearly positioned the Treaty as pre-eminent in Irish law and caused republican animus. It read:

“Dáil Éireann sitting as a Constituent Assembly in this Provisional Parliament, acknowledging that all lawful authority comes from God to the people and in the confidence that the National life and unity of Ireland shall thus be restored, hereby proclaims the establishment of The Irish Free State (otherwise called Saorstát Eireann) and in the exercise of undoubted right, decrees and enacts as follows:—

1. The Constitution set forth in the First Schedule hereto annexed shall be the Constitution of The Irish Free State (Saorstát Eireann).

2. The said Constitution shall be construed with reference to the Articles of Agreement for a Treaty between Great Britain and Ireland set forth in the Second Schedule hereto annexed (hereinafter referred to as “the Scheduled Treaty”) which are hereby given the force of law, and if any provision of the said Constitution or of any amendment thereof or of any law made thereunder is in any respect repugnant to any of the provisions of the Scheduled Treaty, it shall, to the extent only of such repugnancy, be absolutely void and inoperative and the Parliament and the Executive Council of the Irish Free State (Saorstát Eireann) shall respectively pass such further legislation and do all such other things as may be necessary to implement the Scheduled Treaty”

In this articulation of the nationalist metanarrative, the basic motifs in the theory of justification are all present, if communicated in more anaemic tenor. Authority comes to the people from God; that authority has been expressed through the constituent assembly, which was a creature of the Treaty, and thereby is legitimately binding itself to the Treaty as an instance of the popular sovereignty basis of the Constitution of Saorstát Éireann. We still have the teleological conceptualisation of the Treaty and Constitution as a “stepping

stone” to the restoration of “National life” and “unity of Ireland”. But this is a rhetorically truncated expression of the national principle, hemmed in by theoretical limitations imposed by the Treaty settlement.

Having already dealt with the consequences and constitutional developments which flowed from this articulation of constitutional authority in preceding chapters, let us now turn to the development of the preamble which still adorns and informs the contemporary constitution, thereby functioning as a tabernacle or repository of the constitution’s identity.

John Hearne, who was the main civil servant charged with the drafting work of the 1937 Constitution, came from the tradition of constitutionalism within Irish nationalism. He, and his family, had been Redmondite campaigners for the Irish Parliamentary Party in Waterford. In his campaigning for William Redmond, son of deceased John Redmond, during the 1918 election, John Hearne appealed to the electorate of Waterford to maintain the Redmondite constitutional and parliamentary legacy of “political sound sense” and exhorted them to “smash Sinn Féin” and asserted that “Waterford was safe for political sanity”.³⁴ Animating Home Rule supporters in this election was their revulsion at the political direction being advanced by physical force nationalism. They fought the 1918 election on the hopes of restoring the constitutional tradition in the face of revolutionary zeal.³⁵

This political and intellectual background would be evident in the drafts which were principally attributable to Hearne which emerged from the Constitution Committee. A preliminary Draft for Saorstát Éireann dated 17th May 1935 has a preamble which is largely redolent of the early 1922 drafts, but which differentiates itself from the eventually dismissed final draft preamble by not appealing to any physical force tradition. Instead, it makes appeals for “domestic peace” and “harmonious relations with neighbouring peoples”. The dual loci of authority, God and the sovereign people, are once again foregrounded. It is clear on the basis of the national principle; the Irish people are a distinct national community with the undoubted natural right to enact a constitution on its own terms. Indeed, we see in this draft a tacit acceptance of the current partitioned state, but the

³⁴ Eugene Broderick, *John Hearne: Architect of the 1937 Constitution of Ireland*, (Irish Academic Press, 2017) p. 15

³⁵ *ibid*, p.16.

teleological narrative of positive law as a means for enacting the natural unity of the island, remains ever-present. It reads:

“In the Name of Almighty God, We, the Sovereign Irish People through our elected representatives assembled in this Dáil Éireann sitting as a Constituent Assembly, in order to declare and confirm our constitutional rights and liberties, consolidate our national life, establish and maintain domestic peace on the basis of freedom, equality and justice, ensure harmonious relations with neighbouring peoples, and promote the ultimate unity of Ireland do hereby, as of undoubted right, ordain and enact this constitution.”

Hearne’s draft, and the preamble in particular, is afforded high praise from Gerard Hogan. This draft was largely secular or minimally ecumenical, containing almost none of the specifically Catholic influences to be found in the final version. Hogan calls this draft “noble” and “fair-minded”.³⁶ This initial draft would undergo many subsequent alterations as it was reworked by the Committee, de Valera’s own hand, and also the guiding hand of the Catholic Church in the persons of Fr. Edward Cahill S.J. and Archbishop John Charles McQuaid.

Fr. Cahill, a Jesuit, fully articulated his understanding of the ideal “Christian State” in textbook length form, which would eventually be distilled into his suggested draft preamble. He understood the object of the State to be promote and secure temporal well-being of its members. It is, he thought, like the Church, a perfect or supreme society in the sense that it is sovereign in its own sphere, not depending in any way on any other power than God alone. The interdependences it shares with the Church and other states are regulated by divine and natural laws of Justice and Charity.³⁷ The temporal good to which the States final end is, includes man’s moral and intellectual well-being; and is to be regarded as subordinate to the eternal happiness which is man’s ultimate end. The State is not something apart from its members, it is a union of individuals and families held together by reciprocal rights and duties.³⁸ The State, like the family is a creation of nature, thereby it is intended by God.³⁹ Other elements which are necessary to a well-ordered civic society are the virtues of Justice, Charity, and Patriotism. Cahill subordinates the virtue of

³⁶ Gerard Hogan, *The Origins of the Irish Constitution 1928-1941*, (Royal Irish Academy, 2012) p. 156.

³⁷ E. Cahill S.J. *The Framework of a Christian State : an Introduction to Social Science*, (M.H. Gill and Son, 1932), p. 451.

³⁸ *ibid*, p.455.

³⁹ *ibid*, p. 458.

Patriotism to the other virtues necessary to civic society but, does ascribe it paramount importance for the temporal context of his writing. He does this by contrasting the “colourless” and “ineffective love of humanity” espoused by the modernism of both Liberal and Communist ideologies, thereby necessitating the natural and traditional virtue of devotion to one’s own country.⁴⁰ Indeed, a committed cultural nationalist, Cahill in his role as rector of Mungret College sought to implement his ideas for the cultural and intellectual development of Irish youth along national lines.⁴¹ And so, with these principles in mind, Cahill—who had a longstanding formal correspondence with de Valera—sought to contribute to the drafting of the new Constitution. After sending his own “rough” drafts, de Valera responded that the content may not be appropriate for the main body of the text, but that some principles might be set forth in a preamble; and suggested that Cahill form a draft preamble.⁴² After consultation with his Jesuit confrères’ they produced a draft which reads:

“In the Name of the Most Holy Trinity and of our Lord Jesus Christ, the Universal King. We the people of Ireland, being the parent nation of the Irish race, mindful of the long centuries of persecution we have had to endure, and full of gratitude to God who has mercifully preserved us from innumerable dangers in the past; hereby as an independent Christian nation, establish this sovereign Civil Society of the Irish people...”

The draft preamble continues for three further paragraphs reiterating the ideas of the State already articulated by Cahill in the *Christian State*, and finishes ornately “we freely and deliberately, to the Glory of God, and the honour of Ireland, sanction this Constitution, and decree and enact as follows:”. The synthesis between Catholicism, nationalism, and popular sovereignty which emerged initially from the Jesuit draft and the subsequent influence of Archbishop McQuaid would have lasting influence on the Preamble with which we still look to for interpretive guidance. It reads:

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

We, the people of Éire,

⁴⁰ *ibid*, p. 574.

⁴¹ C.J. Woods, ‘Edward Cahill’ *Dictionary of Irish Biography* (Royal Irish Academy, 2009).

⁴² Dermot Keogh & Andrew McCarthy, *The Making of The Irish Constitution: Bunreacht na hÉireann*, (Mercier Press, 2007), p.95.

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

Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation,

And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations,

Do hereby adopt, enact, and give to ourselves this Constitution.”

In this final Preamble we see the inheritances of preceding drafts. The popular sovereignty leitmotif—which is only absent from the preliminary which began the 1922 text—of some variation of “we the people...” is given second billing under the invocation of the Christian deity. In this formulation—and throughout the Preamble—we can see the influence of the neo-Thomism which was current in Catholic theology of the time. This influence is further expressed in the writing of Fr. Cahill, the metaphysics of which was used to combat rationally idealistic, positivist, and materialistic ideas current in the modernism of the age.⁴³

Worthy of note is the shift from “of Ireland” or “Irish” as a demonym of the first-person plural subject which is given voice in this text to “of Éire”. This places this constitutional subject in both a spatial and ideological realm. The people are those who inhabit the island of Ireland, but more so they are those who have affinity with the legitimating lineage of Gaelic identity. By employing the Irish language name “Éire” as the name of the State, whether that be in English or Irish translations of the Constitution, the framers were asserting the centrality of this cultural heritage in the new constitutional framework. The inconsistency of the name of the State from the Preamble to Article 5 was identified as an issue and was one of the suggested changes of the 1967 Committee on the Constitution.⁴⁴

There was much debate as to the exact implications of the language used to describe the state in Ireland which was made up of the 26 counties. Ireland seems to have been used to describe the island in geographic totality, whereas Saorstát Éireann, Irish Free State, Éire,

⁴³ Szocik, Konrad, and Philip L. Walden. ‘The Attitude of the Catholic Church toward the Jews: An Outline of a Turbulent History’ [2017] *Numen*, vol. 64, no. 2/3, pp. 209–28

⁴⁴ Informal Committee on the Constitution, *Report of the committee on the constitution* (Dublin, 1967), p.141.

or ultimately the Republic of Ireland were used to signify the state excluding the six counties which make up Northern Ireland.⁴⁵

What we can say assuredly is that the identity of this state was to express Catholicity and Gaeldom, which traced its founding mythology not to the constitutional tradition in Ireland, but rather the reflexively justified physical force revolutionary tradition. This was the deliverance of the tradition of physical force as embraced by the United Irishmen, Young Ireland, and the IRB, not of Grattan, O'Connell, or the Irish Parliamentary Party.

The Constitutional Review Group, which delivered its report in 1996, was critical of the many aspects of the 1937 Preamble including that it had been relied on in the interpretation of other substantive provisions of the text, which they viewed as sufficient in and of themselves for interpretation. If a preamble served any purpose they thought, it was to “express a sense of national identity and destiny”. As Ireland had gone through a substantial fracturing of the normative consensus in the intervening 60 years of the operative duration of the Constitution, the Preamble should be amended to either be a minimal illocutionary act of enactment ‘by the people of Ireland’, or to remove the religious tenor so as to reflect the diversity of belief systems and to not mandate a confessional declaration by those who were naturalising as Irish citizens.

Further, that there should be recognition of the diverse origins and traditions, ethnic, historical, political and spiritual, of the people, their varying social and cultural heritages, and the sacrifices and sufferings as well as the achievements of the people's forebears. It should be affirmed that the aspiration to unity of many in Ireland will be sought peacefully and through reconciliation and consent as well as general aspirations of peace, reconciliation, justice, freedom and economic, social and cultural progress, together with the common good and concord and cooperation with other nations, as aims to be promoted, pursued on the basis of the inherent dignity of the individual and the equality of all. The Committee also said that the Preamble should be declared not to be cognisable by the courts.⁴⁶ In essence, the Preamble as envisioned by the Review Group was one which denuded the representation of Irish people of all the ethno-symbolism of the 1937 articulation. It would have rendered the metanarrative of Irish constitutionalism as

⁴⁵ For a full examination of the politics of naming in Ireland and the UK see, Mary Daly, ‘The Irish Free State/Éire/Republic of Ireland/Ireland: “A Country by Any Other Name”?’ [2007] *Journal of British Studies*, Vol. 46, No. 1, pp. 72-90

⁴⁶ *Constitutional Review Group Report*, (Dublin Stationary Office, 1996).

exclusively civic, representing a nationalism which was maximally inclusive, perhaps almost to the point of incoherence. The Review Group were in their reluctant attempt at theorising a preamble to a constitution for an independent Irish state, awkwardly encompassing those of a political tradition which did not, and does not want either an independent Ireland, or aspire to be a constituent part thereof.

(b) Religion

One of the constitutional properties most central to the national principle, which is most conspicuous when both texts are compared, are the Articles concerning religion. As already established, the 1922 text was evidently a creature of the Treaty, thereby bound by the articles therein. Article 16⁴⁷ of the Anglo-Irish Treaty of 1921 stipulates:

“Neither the Parliament of the Irish Free State nor the Parliament of Northern Ireland shall make any law so as either directly or indirectly to endow any religion or prohibit or restrict the free exercise thereof or give any preference or impose any disability on account of religious belief or religious status or affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at the school or make any discrimination as respects state aid between schools under the management of different religious denominations or divert from any religious denomination. or any educational institution any of its property except for public utility purposes and on payment of compensation”

This principle would be given constitutional expression in Article 8 of the 1922 text, which reads:

“Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen, and no law may be made either directly or indirectly to endow any religion...”⁴⁸

We can see that the text here stipulates a fairly rigorous secularism for the state which was enshrined in the Constitution. However, that this secularism was not reflected in the course

⁴⁷ Which itself mirrors language used in Article 5(1) of the Government of Ireland Act 1920.

⁴⁸ Continues with a copy and paste of the language in Treaty – “, or prohibit or restrict the free exercise thereof or give any preference, or impose any disability on account of religious belief or religious status, or affect prejudicially the right of any child to attend a school receiving public money without attending the religious instruction at the school, or make any discrimination as respects State aid between schools under the management of different religious denominations, or divert from any religious denomination or any educational institution any of its property except for the purpose of roads, railways, lighting, water or drainage works or other works of public utility, and on payment of compensation.”

of the normal legislative agenda of the Irish Free State is unsurprising. In a suite of legislative measures the state apparatus sought to bolster the moral integrity or “authenticity” of the newly independent state as one of pious Catholicity, free from the corrupting and alien influences of the former coloniser and other anglophone contemporaries.⁴⁹ When states are partitioned along sectarian lines it is a relatively safe assumption that the norms of both religious identities will gain some expression in the legislative corpus of those respective states.

Neither the Roman Catholic Church, nor its social teachings were a substantive influence on the 1922 text. Yet, by the time we get to 1937, we can see fulsome expression of Ireland’s Catholic identity—through language and epistemology—in the textual identity and substantive provisions of the Constitution, rendering the state established by that document as conspicuously credal, if not maximally denominational. In its pre-amendment articulation, the provisions regarding religion in Article 44 of the 1937 text read as follows:

“1. The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion.

2° The State recognises the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens.

3° The State also recognises the Church of Ireland, the Presbyterian Church in Ireland, the Methodist Church in Ireland, the Religious Society of Friends in Ireland, as well as the Jewish Congregations and the other religious denominations existing in Ireland at the date of the coming into operation of this Constitution.

This would give the distinct impression to any mildly constitutionally curious lay person that the polity over which this constitution presided was procedurally confessional and nominally recognised those other Judeo-Christian faiths present in the jurisdiction. In reaching the final version of this text on religion, it is important to note the trajectory of the drafting process, and those who were influential in reaching this final wording. Fr. John

⁴⁹ The Censorship of Films Act 1929, The Censorship of Publications Act 1929, Criminal Law Amendment Act 1935, The Intoxicating Liquor Acts 1924/1927, The Public Dance Halls Act 1935, The change in standings orders in the Dáil were changed to disallow divorce by private act of Parliament in 1925. See David Kenny & Peter McCarthy, ‘Religion and Law in Ireland’s Post-Colonial Nation-Building’, in *Talk About: Law and Religion*, *BYU law International Center for Law and Religious Studies*, 11/1/2024, <https://talkabout.iclrs.org/2024/01/11/religion-and-law-in-irelands-post-colonial-nation-building/>.

Charles McQuaid, at that point President of Blackrock College, was consulted by de Valera extensively on the formulation of Articles relating to religion. There was indeed at one juncture in drafting a “one true Church” formulae, which would have been a fulsome expression of the synthesis of neo-Thomist epistemology and post-colonial inversion of a site of civic discrimination towards the Catholic Church. However, it would have been a subjugation of the republican tradition to which Fianna Fáil—The Republican Party—also espoused.

In service of this more ecumenical republican tradition,⁵⁰ de Valera expanded his coterie of religious contributors beyond the Catholic hierarchy, which now included the papal nuncio Paschal Robinson, Archbishop of Dublin Edward Byrne, and Cardinal Joseph MacRory, who communicated directly with Pope Pius XI about the developing drafts of Ireland’s Constitution, to the leaders of the minority denominations in Ireland. Over a busy April in 1937,⁵¹ the drafts of the constitutional Article on religion was seen and discussed by: Dr James Irwin, a moderator of the Presbyterian Church and Fianna Fáil man, going on to serve on the Executive Council thereof; Church of Ireland Archbishop of Dublin Dr John Gregg who although Unionist in political persuasion stewarded the Church of Ireland into the newly independent state by serving in the Free State Senate, accepting and cooperating with the teaching of compulsory Irish in Church of Ireland schools, and his alteration of Anglican prayers to suit the republican form of government;⁵² President of the Methodist Church in Ireland W.H. Massey who would die in office that same year.

There is no record of de Valera consulting with the then chief Rabbi of Ireland for his input. However, Dermot Keogh argues that as de Valera had a longstanding friendship with former Chief Rabbi Isaac Herzog this would have influenced his tolerant conceptualisation of the

⁵⁰ The development of this republican ecumenism can be seen in pre-constitutional nationalist ephemera, Article 3 of the Declaration of the Society of United Irishmen 1791, “...no reform is practicable, effacious, or just, which shall not include Irishmen of every religious persuasion...”. Available at <https://cartlann.org/authors/united-irishmen/declaration-of-the-united-irishmen-1791/> The 18th provision of the Constitution of the IRB Supreme Council 1889, “In the Irish Republic there shall be no State Religion, but every citizen shall be free to worship God according to his conscience, and perfect freedom of worship shall be guaranteed as a right and not granted as a privilege.” The 1916 Proclamation articulated the principle as such, “The Republic guarantees religious and civil liberty, equal rights and equal opportunities to all its citizens, and declares its resolve to pursue the happiness and prosperity of the whole nation and of all its parts, cherishing all the children of the nation equally, and oblivious of the differences carefully fostered by an alien Government...”. Available at <https://cartlann.org/authors/irish-republican-brotherhood/constitution-of-the-irb-supreme-council/>

⁵¹ For chronology of this process see Keogh and McCarthy, *The Making of the Irish Constitution 1937: Bunreacht na hÉireann*, (Mercier Press, 2007) ch.6.

⁵² Helen Andrews, ‘John Allen Fitzgerald Gregg’, *Dictionary of Irish Biography* (Royal Irish Academy, 2009).

Jewish faith within the Irish context. Keogh also points out that once the Constitution was enacted, Dev received a letter from the Jewish Rabbinate Committee expressing their satisfaction with the recognition their religious community had received in the provision relating to religion.⁵³ However, this conclusion is questioned by Natalie Wynn who argues that these assertions of familiarity and friendship between Herzog and de Valera are overplayed and spurious. That there was a longstanding friendship is unsupported by solid evidence; what is ascertainable is that there was a “warm, longstanding, and mutually respectful—but primarily professional—relationship” between the two public figures.⁵⁴ In fact, de Valera’s tolerant attitudes and interest in Judaism—with some suggestions de Valera was philo-Semitic—may be owed in small part to his close relationship with Fianna Fáil backbencher Robert Briscoe, the Irish state’s only Jewish TD for almost four decades. Kevin McCarthy has suggested that this close personal relationship is demonstrated by the mutual fidelity demonstrated between the two men during a time and context of broad and pronounced antisemitism. De Valera resisted the temptation to cast aside Briscoe during the overtly antisemitic aspects of the “red scare” of the 1930’s directed at him both at home—from parliamentarians in Cumann na nGaedheal and from within their own Fianna Fáil party—and abroad, in antisemitic French publications. The two men were indeed brought closer by Briscoe’s participation in the anti-partition campaign in Palestine, which fitted well with de Valera’s Irish anti-partitionist stance and presented an opportunity for making it a common cause when in international fora.⁵⁵

The intra-nationalist discourse between the ethnic justification of Irish national sovereignty—being the Gaelic and Catholic colonised community reasserting pre-colonial independence—and the liberal republican justification—that of the illegitimacy of the Irish people, in all their various traditions, being governed from a foreign jurisdiction without the express consent of the governed—is somewhat reconciled in the original Article 44. Through the Fifth Amendment this provision would be further orientated to the liberal republican thesis.

⁵³ Keogh and McCarthy, *The Making of the Irish Constitution 1937: Bunreacht na hÉireann*, (Mercier Press, 2007) ch.6.

⁵⁴ Wynn, N. ‘Jews, Antisemitism and Irish Politics: A Tale of Two Narratives’ [2012] *PaRDeS: Zeitschrift der Vereinigung für Jüdische Studien*, e.V. 18: 51–66.

⁵⁵ Kevin McCarthy, ‘Éamon de Valera’s Relationship with Robert Briscoe: A Reappraisal’ [2014] *Irish Studies in International Affairs*, vol. 25, pp. 165–86.

Laudable, given the antisemitic context of Europe at that time, was the recognition of the Jewish Congregations who lived on the island at time of drafting.⁵⁶ This was a significant manifestation of the republican principles embedded within the text undermining the edifice of outright confessional specificity.⁵⁷ This is especially significant as the Catholic Church in its dogma was still influenced by neo-Thomistic epistemology, which posits a model worldview in which there was but one truth, easily acquired through human reason.⁵⁸ Accordingly, the Church still viewed those of a Jewish faith—through scripture and tradition—as those who rejected the “truth” of the Christian messiah,⁵⁹ and collectively responsible for deicide.⁶⁰ A doctrine only somewhat ameliorated with the passage of *Nostra Aetate* in 1965.⁶¹ Emblematic of this belief was the practice of praying as part of the Good Friday mass, as prescribed in the *Missale Romanum*, for the conversion of “perfidis Judaeis” (unbelieving or faithless Jews) which was only stopped in 1959.⁶²

⁵⁶ Michael McDowell, then Minister for Justice when speaking at the inaugural Holocaust Memorial Day in 2003, stated that in failing to do more to prevent the Holocaust and protect Jewish communities of Europe from the Nazi regime, the State had failed that constitutional recognition. Quoted from Frank McNally, ‘Ireland ‘betrayed’ its Constitution in failing to protect Jews’ *Irish Times* (Dublin, Mon Jan 27 2003).

⁵⁷ A principle which would only begin to germinate at a remove of 3 decades and come into be near fully realised a further 3 decades after that.

⁵⁸ Szocik, Konrad, and Philip L. Walden. ‘The Attitude of the Catholic Church toward the Jews: An Outline of a Turbulent History’ [2017] *Numen*, vol. 64, no. 2/3, pp. 209–28.

⁵⁹ Indeed, de Valera, in refuting an accusation perennially levelled at him that his parentage was somehow suspect, with the implication of Sephardic Jewish heritage, repeated this trope in his reply, “There is not, as far as I know, a single drop of Jewish blood in my veins. I am not one of those who try to attack the Jews or want to make any use of the popular dislike of them. I know that originally they were God's people; that they turned against Him and that the punishment which their turning against God brought upon them made even Christ Himself weep. In disclaiming that there is no Jewish blood in me I do not want it to be interpreted as an attack upon the Jews.” Dáil Éireann debate - Friday, 2 Mar 1934 Vol. 50 No. 17.

⁶⁰ Oliver Flanagan TD, in a contribution in a debate around the use of emergency powers, repeated the charge of deicide and unchallenged called for emergency powers to be used against Jewish citizens in a like manner as in Germany, “How is it that we do not see any of these Acts directed against the Jews, who crucified Our Saviour nineteen hundred years ago, and who are crucifying us every day in the week?... There is one thing that Germany did, and that was to rout the Jews out of their country. Until we rout the Jews out of this country it does not matter a hair's breadth what orders you make. Where the bees are there is the honey, and where the Jews are there is the money.” Dáil Éireann debate - Friday, 9 Jul 1943 Vol. 91 No. 5.

⁶¹ The document presents an argument which is clearly informed by the atrocities of the Shoah seeking to refute from the dogma of the Catholic Church a positive valence of antisemitism, “True, the Jewish authorities and those who followed their lead pressed for the death of Christ; still, what happened in His passion cannot be charged against all the Jews, without distinction, then alive, nor against the Jews of today. Although the Church is the new people of God, the Jews should not be presented as rejected or accursed by God, as if this followed from the Holy Scriptures... Furthermore, in her rejection of every persecution against any man, the Church, mindful of the patrimony she shares with the Jews and moved not by political reasons but by the Gospel's spiritual love, decries hatred, persecutions, displays of anti-Semitism, directed against Jews at any time and by anyone... No foundation therefore remains for any theory or practice that leads to discrimination between man and man or people and people, so far as their human dignity and the rights flowing from it are concerned.” Declaration on The Relation of The Church to Non-Cristian Religions, Pope Paul VI, *Nostra Aetate*, (Vatican, October 28, 1965).

⁶² See, Szocik, Konrad, and Philip L. Walden. ‘The Attitude of the Catholic Church toward the Jews: An Outline of a Turbulent History’ [2017] *Numen*, vol. 64, no. 2/3, pp. 209–28

Indeed, the permissibility of antisemitism in the new state was dealt with judicially, in a case seeking to establish whether a prejudice founded in matters of faith was a permissible ground for the refusal of tenancy of a private dwelling. The question was answered in the negative as to whether antisemitism, in the parlance of the court made the individual concerned a “bad citizen”. Gavan Duffy P, went on to write:

“The plaintiff’s objection has been characterised as a caprice and as mere prejudice; but caprice is not the right word for an anti-Semitism, which, far from being a peculiar crotchet, is notoriously shared by a number of other citizens; and, if prejudice be the right word, the antagonism between Christian and Jew has its roots in nearly 2,000 years of history and is too prevalent as a habit of mind to be dismissed off-hand, in a country where religion matters, as the eccentric extravagance of a bigot, without regard to the actual conditions under which consent was withheld. I fail, by the way, to see the supposed connection between the problem before Mrs. Schlegel and the constitutional veto (Art. 44, clause 2, sub-clause 3) upon any discrimination by the State on the ground of religious belief.”⁶³

In this judgement we see that toleration of religious belief in Article 44 was understood to be a negative duty on the State not to discriminate on the grounds of religion. And yet the individual within certain autonomous spheres was tolerated in their religious discriminations. However, this negative duty of religious toleration for the State seemingly stops short of countenancing atheistic, non-deistic, polytheistic, pantheistic systems of belief or lack thereof.

In one sense, this Article was enfolding these religious communities within the aegis of the new polity. As Ian d’Alton has argued, the Protestant community, in return for an outward acceptance of this constitutional dispensation, had to some degree expiated their former imperial sins.⁶⁴ They were recognised as part of the Irish polity, which presents itself consistently as a victim of empire, thereby permitting a process whereby guilt could be exported across the Irish sea.⁶⁵ Simultaneously this was a process of othering those communities who were nominally—if not in the recursive metanarrative of Irish nationalism, authentically or indigenously—“Irish”. To be Irish was to be amongst the great majority of the citizens in professing the Roman Catholic faith. Irish identity is internally

⁶³ *Schlegel v. Corcoran and Gross* [1942] IR 19. Gavan Duffy J at para 12.

⁶⁴ Ian d’Alton, *Protestant and Irish*, (Cork University Press, 2020) p. 23

⁶⁵ One might make the same claim for Irish participation in empire, British and other.

conflicting within the text of the Constitution, at one and the same time an ethnic identity which justified the establishment of a national political entity by right, and a civic political identity, justified by its values. By way of analogy, we may conceptualise the Irish Constitution as neither speaking with exclusively the voice of the Citizen or of Leopold Bloom in the “Cyclops” episode of *Ulysses*. Rather, the Irish Constitution is Barney Kiernan’s pub, it is a structure under which both voices dialogue. The primordial Irish nationalism of the Citizen and the liberal modernity of Bloom’s Irishness discursively express themselves under the aegis of the edifice of the pub.⁶⁶

The Fifth Amendment in 1972 ultimately removed the ‘special position’ and enumeration of the religious denominations within the State. The jurisprudence around the precise meaning of Article 44 as it relates to identity of the state will be dealt with under the section on interpretive frameworks.

(c) Language

Article 4 of the 1922 Constitution read:

“The National Language of the Irish Free State is the Irish Language, but the English shall be equally recognised as an official language...”

It is hard to overstate the significance of this provision, symbolically if not practically. A political movement which drew heavily on the enthusiasm for linguistic revival to provide a philosophical and historical justification for a campaign of physical force separatism against a place within British Imperial structure had succeeded in achieving a polity in which this language was now constitutionally the “National Language”. This position, wherein the Irish language was now constitutionally recognised, is a far cry from the Statutes of Kilkenny 1366, which still reverberated in the folk-memory of anti-colonial nationalism, the 3rd Article of which stipulated:

“...it is ordained and established, that every Englishman do use the English language...and if any English, or Irish living amongst the English, use the Irish language amongst themselves, contrary to the ordinance, and therof be attained, his

⁶⁶ See, James Joyce, *Ulysses*, (3rd edn, Alma Books Ltd, 2017), ch. 12.

land tenements, if he have any, shall be seized into the hands of his immediate lord”⁶⁷

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While this statute primarily applied to the “old English” in Ireland, pre-Cromwellian Norman settlers, the Administration of Justice (Language) Act (Ireland) 1737, which mandated the exclusive use of English in legal and administrative settings, was applicable unilaterally. This meant that the indigenous language of Ireland could not be used in official settings. Indeed, the continuing salience of this site of contestation over identity and rights was such that this piece of legislation was only repealed in Northern Ireland on the 2nd of February 2025.

Irish being situated as the national language perhaps marked the consummation of the process of “national emancipation”⁶⁹ inaugurated with Dr. Hyde’s call to de-Anglicise Ireland. This conceptual interweaving between the polity which was to be the administrative manifestation of the “Irish nation” and the Irish language was to be reiterated in the 1937 text, Article 8 reads:

“1. The Irish language as the national language is the first official language.

2. The English language is recognised as a second official language.”

The symbolic subordination of the English idiom, as an inversion of the folk memory of the denigration of Irish language within the British administrative legacy, is given a practical significance in Article 25.5.4°:

“In case of conflict between the texts of any copy of this Constitution enrolled under this section, the text in the national language should prevail.”

And yet it was argued at the time by W.T. Cosgrave, as a reason to denigrate the new Constitution, that the Irish version was a mere translation of the English,⁷⁰ a charge which was rebuffed by Dev, who argued that the process of drafting was carried out side by side,

⁶⁷ Article 3. A Statute of the Fortieth Year of King Edward III., enacted in a parliament held in Kilkenny, A.D. 1367, before Lionel Duke of Clarence, Lord Lieutenant of Ireland, (UCC CELT, 2011) <https://celt.ucc.ie/published/T300001-001/index.html>.

⁶⁸ The Statutes are chiefly remembered for a policy of racial exclusiveness, with a preamble lamenting the replacement of English ways with Irish. By legislating against the Irish way of life, the statutes sought to protect and consolidate the cultural, racial and political identity of a declining English colony in Ireland: they were essentially defensive in character. See, G.J. Hand, ‘The Forgotten Statutes of Kilkenny: A Brief Survey’ [1966] *Irish Jurist*, Vol.1, No.2, pp.299-312.

⁶⁹ Leo Kohn, *Constitution of the Irish Free State*, (George Allen & Unwin Ltd, 1932), p.123.

⁷⁰ Dáil Éireann debate - Monday, 14 Jun 1937 Vol. 68 No. 4.

or *pari passu*.⁷¹ It has been understood that the Irish and English texts are complementary, not identical, in text, but with only infrequent lack of correspondence between the two.⁷² The ideological construct of the Irish Nation manifested in the 1937 Constitution is therefore one which subordinates the first language of the vast majority of the polity to the first language of a slight minority on the basis of a cultural nationalist ideological justification. Herein we can evince the lingering ethno-linguistic core of the national principle within the 1937 Constitution, one which comes into discordance with the liberal values therein. This expression of quixotic ethno-linguistic nationalism was recommended to be removed by the Constitutional Review Group, which suggested a formula wherein Irish and English were co-equal official languages, and a commitment, because of tradition and culture of the Irish language, for State to take special care to nurture the language and to increase its use.⁷³

(d) Citizenship

A core constituent part of the process by which the Irish Nation would realise a State which was an “authentic” expression of their distinction from Britain would be citizenship. By justifying the claim to national independence by right from an ethnic lineage, “*the dead generations from which she receives her old tradition of nationhood*”, in opposition to “*The long usurpation of that right by a foreign people*” while also endeavouring to cherish “*all the children of the nation equally and oblivious of the differences carefully fostered by an alien government, which have divided a minority from the majority in the past*”⁷⁴ seems like a Gordian knot. The only solution is to slice through, or in the Irish⁷⁵ case, partition.

To be by virtue of membership of the Irish nation a citizen of a distinctive Irish state is surely the apogee of a self-consciously national political project. Civic rights—such as right to vote—which flow directly from shared lineage of the “people of Éire” is an administrative synthesis between nation and state. It is the symbolic realisation of, and

⁷¹ *ibid.*

⁷² Gerard Hogan, *Origins of the Irish Constitution: 1928-1941*, (Royal Irish Academy 2012) p.359

⁷³ Constitutional Review Group Report, (Dublin Stationary Office, 1996).

⁷⁴ Quoted from the Proclamation of the Irish Republic 1916. These rhetorical themes of ethnic justification are repeated in many internal and external expressions of the fledgling state. “Nationally, the race, the language, the customs and traditions of Ireland are radically distinct from the English. Ireland is one of the most ancient nations in Europe, and she has preserved her national integrity, vigorous and intact, through seven centuries of foreign oppression: she has never relinquished her national rights, and throughout the long era of English usurpation she has in every generation defiantly proclaimed her inalienable right of nationhood” 1919 Message to The Free Nations of the World.

⁷⁵ As in Israel, India, and inadvertently in Cyprus.

mechanical procedure for, actualising the will of the people through performing popular sovereignty.

The 1922 text did indeed establish a distinctly Irish citizenship, in contradistinction to other Dominion's in that their national citizenship was at this juncture a purely domestic instrument and when travelling as aliens in non-British jurisdictions they were British subjects in common, whether Canadian, Kiwi, or South African.⁷⁶ However, once more in discordance with the seemingly ethnic core of the national claim, we see citizenship in 1922 text admit the possibility of entitlement to citizenship through shared commensurability and participation in the jurisdiction of the new polity. Article 3 reads:

“Every person, without distinction of sex, domiciled in the area of jurisdiction of the Irish Free State (Saorstát Éireann) at the time of the coming into operation of this Constitution, who was born in Ireland or either of whose parents was born in Ireland, or who has been ordinarily resident in the area of the jurisdiction of the Irish Free State (Saorstát Éireann) for not less than seven years, is a citizen of the Irish Free State.”

Although somewhat intentionally defective in its drafting,⁷⁷ it is an instance wherein the principles of liberal or civic republican nationalism would trump that of ethno-nationalism. The *jus soli* citizenship principle, once fully realised through the Nationality and Citizenship Act 1935, afforded civic rights not merely through ethnic lineage,⁷⁸ but afforded positive valence to shared civic space.

This liberal and republican citizenship provision would be bolstered in the original citizenship provision of the 1937 text in that Article 9.1.1., established that:

⁷⁶ For more on the novelty of this position, passports, British subjects, common citizenship, etc., see, Mary Daly, ‘Irish Nationality and Citizenship since 1922’ [2001] *Irish Historical Studies*, vol.32, no.127 and O’Grady, Joseph P. ‘The Irish Free State Passport and the Question of Citizenship, 1921-4’ [1989] *Irish Historical Studies*, vol. 26, no. 104, pp. 396–405.

⁷⁷ Subsequent legislation was needed to rectify some chasms left, such as foreign births and the acquisition of citizenship, whereby those who would in normal rationale of citizenship be afforded such an entitlement. The Irish Nationality and Citizenship Act 1935, rectified much of these lacunae by defining who was to be considered a Natural-born citizen (s.2) and established the means by which individuals could naturalise as citizens.

⁷⁸ Although patrilineal descent qualified an individual for citizenship. This *jus sanguinis* provision was aimed at “her exiled children in America”.

“On the coming into operation of this Constitution any person who was a citizen of Saorstát Éireann immediately before the coming into operation of this Constitution shall become and be a citizen of Ireland.”

Again, resulting from the lacuna of disentanglement emanating from the old text, Article 9.1.2., afforded ambit for legislative rectification in that future acquisition or loss of Irish nationality *and* citizenship would be determined by law. This would come to be pass with the Irish Nationality and Citizenship Act, 1956, sub-section 6.1. of which established “Every person born in Ireland is an Irish citizen from birth”.

This would then in the context of the Good Friday Agreement become a constitutionalised entitlement with the removal of provisions claiming sovereignty over the totality of the island⁷⁹ and the insertion of more conciliatory and aspirational provisions, one of which was the new Article 2, which read:

“It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage.”

In this provision, it is not merely the civic right of citizenship which is the entitlement of all individuals born in Ireland, it is a more symbolic enfolding into the more general and pluralistic concept of nationhood. Where previously there seemed to be an “authentic” Irish Nation which all the internalised ‘Others’, as part of the Irish citizenry, nominally were a part thereof, post Good-Friday, Irish Nationality seemed more inclusive. However, there is another possible reading: the Good-Friday Agreement—with the appendix of the British-Irish Agreement, and its provisions for individuals in Northern Ireland to be entitled to be recognised as Irish, British, or both—brought to an end the one nation metanarrative on which the 1937 text was founded. This instantiates an evident intertextual contradiction. Citizenship is the predicate for certain civic entitlements and citizenship in turn is syncretic with Irish nationality. At times throughout the Constitution the “people” who hold inherent sovereignty seem—in terms of civic rights in elections—synonymous with citizenship.

⁷⁹ Original Article 2., “The national territory consists of the whole island of Ireland, its islands and the territorial seas.”, Bunreacht na hÉireann, 1937.

These exclusive rights of citizenship are the entitlement to vote in presidential elections,⁸⁰ in referendums,⁸¹ and indeed to stand for election to the Oireachtas.⁸² If someone in Northern Ireland is entitled to be exclusively a British national,⁸³ they may be excluded from being—in a united Ireland—able to exercise popular sovereignty through full civic entitlements.⁸⁴ This is of course premised on the understanding of the Constitution remaining in its current form, which in the case of a united Ireland coming about is extremely unlikely.

So, on one reading, the Good-Friday Agreement has made the concept of the nation more inclusive; on another, the Agreement has undone the concept of an Irish nation which corresponded with a geographic territory and all the people therein. This moment of conceptual dissonance is not resolved; it is still being discursively processed. What the Irish nation as a nodal point means was at its most open and nebulous in the post-1998 moment.

With the Twenty-Seventh Amendment, citizenship was once more tethered to filiality. Resulting from the inclusivity, or dissonance, of the Nineteenth Amendment and how it stipulated rights to citizenship, there was, it was argued by the governing coalition of the day—Fianna Fáil and the Progressive Democrats—an unforeseen constitutional defect which was ripe for exploitation by those seeking to gain citizenship in Ireland for their children. Article 9.2.1°, now states:

“Notwithstanding any other provision of this Constitution, a person born in the island of Ireland, which includes its islands and seas, who does not have, at the time of the birth of that person, at least one parent who is an Irish citizen or entitled to be an Irish citizen is not entitled to Irish citizenship or nationality, unless provided for by law.”

Enacting this Amendment at a time when according to the most concurrent available data—the 2002 Census—out of a total population of 3,917,336, those who had Irish nationality was numbering at 3,584,975 and of that cohort 3,462,606 were still self-reporting as Roman

⁸⁰ Article 12.2.2°, Bunreacht na hÉireann, 1937.

⁸¹ Article 47.3, Bunreacht na hÉireann, 1937.

⁸² Articles 12.4.1 ° 16.1.1 ° and 18.2. Bunreacht na hÉireann, 1937.

⁸³ Section 2.1(vi) which commits the participants to the Agreement, i.e., the British and Irish governments respectively to “recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.” Belfast Agreement, 10th April, 1998.

⁸⁴ Richard Humphreys, ‘Constitutional Contradictions: Accommodating Multiple Identities After the Good Friday Agreement’, in Eoin Carolan & Oran Doyle (eds), *The Irish Constitution: Governance and Values*, (Thomson Roundhall, 2008).

Catholic, demonstrates that the Constitution was now enshrining an inextricable *de facto* if not *de jure* connection between citizenship and the ethno-symbolic national identity which implicitly connected Irishness and Catholicism as practically synonymous.

7.4 Institutional Identity: Westminster of the Gaelic Tuath?

In suggesting that perhaps the resilience of the 1937 Constitution has more to do with romantic narrativity being realised rather than rationality, it is in this process of donning the glib and mantle to which I am referring. So far, I have presented a brief chronology of the development of the claim to national independence, as justified through the recursive metanarrative of revival of the distinctive identic traits of the Gaelic and Catholic Irish. In so doing, there were recurrent rhetorical motifs, expressed in both pre-constitutional ephemera and formal constitutional texts, which were significant in influencing the cohort who would eventually bring about Irish independence. In constitutionalising these motifs, they were creating a text which sufficiently serviced many reconciliatory aspects of the pre-eminent nationalist metanarrative.

The rubric for judging the institutional architecture of the State, proposed constitutional change, or legislative policy would be recourse to the authenticity of its content as expressive of the “people”. This would be institutionalised in the referendum process being the ultimate *Grundnorm* of the 1937 text; if a referendum is democratically passed it is the organic/authentic expression of the sovereignty of the people. One could argue, with the near homogeneity of the state for much of its tenure, and the introduction of the Twenty-seventh Amendment of the Constitution Act 2004,⁸⁵ which constitutionalised an ethnic filial construction of citizenship into the Irish Constitution at the first sign of inward migration, the character of the state is tacitly an ethno-democracy.⁸⁶ The referendum result is an absolute, it is unconditional, and the nuance or plurality of the people is mediated in Yes/No essentialist binary.

⁸⁵ “Notwithstanding any other provision of this Constitution, a person born in the island of Ireland, which includes its islands and seas, who does not have, at the time of the birth of that person, at least one parent who is an Irish citizen or entitled to be an Irish citizen is not entitled to Irish citizenship or nationality, unless provided for by law.” Article 9.2.1, Bunreacht na hÉireann, 1937.

⁸⁶ This is increasingly salient as the diminution of natural law reasoning, and the absence of an eternity clause, and the burgeoning jurisprudence on popular sovereignty as a constitutional identity in conjunction with the Court’s adherence to a principle of unfettered amendability, could afford the sovereign will of the people, regardless of content, as without constriction as all aspects of Constitution may be amended per, Art.46.1, Bunreacht na hÉireann, 1937.

However, politics in Ireland evidently does not boil down to direct democracy. The constitutional provision which was most proximate to manifesting the metanarrative of the sovereign Irish people was the original text of Articles 47 and 48 of the 1922 Constitution respectively. Article 48 came closest as it provided that “The Oireachtas may provide for the Initiation by the people of proposals for laws or constitutional amendments”; unused and abolished by the Constitution (Amendment No. 10) Act 1928, the initiative process would have been most redolent of the underpinning logic of the elective assembly⁸⁷ of the Tuath⁸⁸ in Gaelic custom of tanistry.⁸⁹

The institutions which have become imbedded in the political structures of the State are those reflective of the Westminster model of responsible government. The institutional architecture which is most associated with Britain remains intact in Ireland, the alterations are cosmetic as the inherited system has merely been afforded monikers, institutional vernacular, and official nomenclature which are more consonant with nationalist taste. In this manner, the ornaments of Gaeldom⁹⁰ have been adorned upon institutions and offices with more heritage in the house of parliament on the Thames than to the pre-colonial Gaelic Tuath.

But if we do not adopt a nationalist essentialist binary to our construction of the people of Ireland and their institutional history, then we can point to the presence of parliamentary

⁸⁷ “The chief political power of the free community was exercised in and by the assembly. In it kings were elected and deposed, agreements and disagreements with external states were decided, lawsuits were heard, taxes imposed, laws enacted. Among the normal powers exercised was that of adopting an agreement with a neighbouring state to establish a common jurisdiction between them...We learn that the agreement was negotiated in the first instance between the kings of the two states and then submitted to their assemblies for ratification, that it held good for a year and required to be renewed in successive assemblies.” Eoin MacNeill, *Early Irish Laws and Institutions*, (Burns Oates and Washbourne Ltd., 1934) p. 102.

⁸⁸ “Ireland established a number of small states distinct political communities. The Irish name for such a state is Tuath. The central factor in each Tuath was the public assembly. At the head of each state was a king. He was the military commander, president of the assembly, the judge in matters of litigation, and possibly also chief priest. These states were of small territorial extent, so that attendance at the public assembly was convenient to everyone and implied no length of travel or prolonged absence from home.” Eoin MacNeill, *Early Irish Laws and Institutions*, (Burns Oates and Washbourne Ltd., 1934) p.60.

⁸⁹ “Tanistry was the name given by contemporary English observers to the practice under which Irish succession devolved through the male line or agnatic descendants of a common grandfather to the most-worthy male member of the extended kin group”, Indigenous Law Center, ‘The Case of Tanistry (Le Case de Tanistry)’ [2001] *Australian Indigenous Law Reporter*, vol. 6, no. 3, pp. 73–81.

⁹⁰ Indeed, the impact of this greening of the Irish state was referenced by Frank MacDermot TD during the Dáil Debates on the 1937 text wherein he stated, “Finally, the Northern representatives, if we had them here, would, I think, object to being compelled, even when speaking English, to refer to the Prime Minister as the Taoiseach, and to the Second Minister as the Tanaiste, and to our common country as Eire instead of Ireland. What have we to gain either in patriotism or culture by this kind of childishness? This may seem a trifle, but it is the sort of thing that irritates as well as lending itself to ridicule...Once again, Sir, partition can only be cured when we attain some unity of heart and mind, when we are able to gather up conflicting traditions and aspirations and fuse them into one national life.” 11 May 1937, Vol. 67 No. 1.

politics on this island spanning from the 13th century through to the Act of Union 1800, thereby affording us the historical purchase to construct an argument for authenticity of parliamentary lineage on this island. An interesting treatment of these contradictory positions being held simultaneously can be evinced in a Seanad debate on 18th of June 2014, commemorating the 750th anniversary of the “first” Irish Parliament. In contributions throughout this debate, we see arguments which both try to concomitantly claim and disavow the legacy of this parliamentary tradition.

Jimmy Deenihan TD⁹¹ opened proceedings by highlighting the chronology of Irish parliamentarianism, “the parliament in Castledermot preceded the English parliament by several months”. He further acknowledges that subsequent parliaments in Ireland were composed of “Anglo-Irish nobles, bishops and some Gaelic Irish. They were not representative of the people of Ireland”. However, despite this lack of true representation in these parliaments, he extols the chamber to claim ownership of this legacy “Remembering that first Parliament held on this day 750 years ago, we can stand justly proud of our legacy of parliamentary tradition.” At one and the same time these parliaments did not represent the Irish people, yet they are our legacy to be proud of.

Senator Labhrás Ó Murchú, acknowledges the historicity of Irish parliamentarianism, but is conscious to emphasise that “*The first real Irish Parliament was Dáil Éireann, where the will of the people was sovereign*”.⁹² Senator Terry Brennan makes the case for the continuity of administrative institutions and structures, “Today is a special and historic day for our country as it marks the 750th anniversary of the first known Irish Parliament. The Normans were the first to give Ireland a centralised administration and many of the systems under which we still operate, including our legal system and courts of law, survive from that time.”⁹³

Senator Sean D. Barrett points to a different juncture in seeking to generate a sense of proprietorship and patriotic resonance with the parliamentary tradition of the island:

“The words of Henry Grattan come to mind when he achieved legislative independence in 1782: ‘I found Ireland upon her knees, I watched over her with a paternal solicitude; I have traced her progress from injuries to arms and from arms to

⁹¹ Seanad Éireann debate - Wednesday, 18 Jun 2014 Vol. 232 No. 5.

⁹² *ibid*, my italics.

⁹³ *ibid*.

liberty. Spirit of Swift! Spirit of Molyneux! your genius has prevailed. Ireland is now a nation!”⁹⁴

Senator Ivana Bacik espouses an uncomplicated triumphalism, expressing undoubted proprietorship over the institutional parliamentary legacy in Ireland, yet while doing so utilising nationalist motifs; “Yet again, we beat the English to another important historic date. Not only did we elect the first female MP, but our parliamentary sitting predated the first one in England”.⁹⁵

These confusing contributions seem to take contradictory positions coterminously on whether to take ownership of the complex administrative history of Irish politics. These positions were disavowed by Senator Trevor Ó Clochartaigh:

“I believe, is wrongly described as the first Irish parliament. There was no such thing. It was a meeting of the English colonisers who occupied the shrinking Pale, a century after the Anglo-Norman invasion of Ireland. These were the descendants of the robber barons and their followers who attempted to grab Ireland for their own profit and for the English Crown...We should never forget that it was the plain people of Ireland through centuries of the struggle and endurance, to which we owe our freedom, and not some land-owning aristocrats who people would seek to honour today. The bottom line is that there was no democracy in Ireland until the Irish people took it for themselves.”⁹⁶

In this one debate the Irish are called to be proud of beating the English to the parliamentary punch; the English people described in a racialised manner as inauthentically of this island; Irish people are encouraged to claim the parliamentary legacy of Grattan and the ascendancy parliament; and are also to acknowledge that our first “authentic” parliament was the first Dáil. The cognitive dissonance on display here is quizzical. However, the binary essentialist view held by Senator Ó Clochartaigh is perhaps most constitutionally disquieting. In its consistency we are to view history and the contemporary as an unrelenting struggle between oppressed “true” people⁹⁷ and alien “elites”:

⁹⁴ *ibid.*

⁹⁵ Seanad Éireann debate - Wednesday, 18 Jun 2014 Vol. 232 No. 5.

⁹⁶ *ibid.*

⁹⁷ In rhetoric which evokes historical interpretation such as those in *The Philosophy of Irish Ireland*, (University College Dublin, 2006), “The position of Grattan and his followers is simple enough. Their attitude towards England was similar – though more wishywashy – to that of the American revolutionists. They had, broadly speaking, a common past with England; they had the same root ideals, the same speech, the same

“However much we may wish to delude ourselves today with this nonsensical debate, the fact is that we have yet to create a free Republic in which all people are treated with respect and dignity and where justice and equality are embedded in the body politic.”⁹⁸

We see at work here the continued discourse of post-colonial hybridity as against the binary nationalist paradigm enshrined after 1916. Indeed, the first Dáil was in no way unclear over how it understood its place within Irish history. It was the first institution which claimed legitimacy as a governing institution in Ireland for 700 years, thereby claiming that the entire parliamentary tradition on this island up until that point was illegitimate. This is recursive in the contribution from senator Ó Clochartaigh, although the Senator would seemingly disavow the chamber in which he himself sat as alien and illegitimate *ab initio*.

In language redolent of the 1916 Proclamation, which would also be enshrined in the Preamble of the 1937 document, the Declaration of Independence 1919 stipulated the claim to national sovereignty through appeals to the distinct ancient Irish people and a revival or reclamation of freedom. Therein 700 years of Irish history, in which there was waxing and waning of British practical administration in Ireland, both victimisation and participation in empire by Irish people, assimilation and resistance, autonomy and colonisation, is narrativized as consistent:

“Whereas the Irish people is by right a free people :

And Whereas for seven hundred years the Irish people has never ceased to repudiate and has repeatedly protested in arms against foreign usurpation :

religion, and the same hatred for other people's religion. There was no radical, though there were several detail, differences between the patriots of 1782 and Englishmen. England had been fighting the mere Irish for centuries, and telling lies about them, and it is not difficult to understand – for England has no sentiment that will not go under before the gentlest tap of self-interest, let her talk as loud as she likes to the contrary – how she overlooked her own colony in the island, and bundled the whole population into one, and treated all as her enemies. The English in Ireland resented such treatment, not because it hurt their sense of patriotism or self-respect, but because it affected their pockets and prestige, and timorously and gradually they developed the sulks. Eventually they began to look upon themselves as a kind of English-Irish colony, that ought to be independent of English Parliamentary interference. Many of them, like Swift, regarded Irishmen with contempt, and even Flood, who left his fortune eventually for the study of Irish, was a bigoted opponent of Catholic emancipation, which then meant a bigoted anti-Gael. Those people, in fact, cared nothing about the Gaels, who, to their minds, were undesirable aborigines, speaking gibberish: a low multitude, whose existence they would like to forget, if they could.”

⁹⁸ Seanad Éireann debate - Wednesday, 18 Jun 2014 Vol. 232 No. 5.

And Whereas English rule in this country is, and always has been, based upon force and fraud and maintained by military occupation against the declared will of the people...

And Whereas at the threshold of a new era in history the Irish electorate has in the General Election of December, 1918, seized the first occasion to declare by an overwhelming majority its firm allegiance to the Irish Republic:

Now, therefore, we, the elected Representatives of the ancient Irish people in National Parliament assembled, do, in the name of the Irish nation, ratify the establishment of the Irish Republic and pledge ourselves and our people to make this declaration effective by every means at our command:

We solemnly declare foreign government in Ireland to be an invasion of our national right which we will never tolerate, and we demand the evacuation of our country by the English Garrison”⁹⁹

That the debate on the legacy of the first Irish Parliament would take place in the Seanad is most appropriate; the lineage of this bicameral chamber, as it was narrativized by republican nationalists, a British imposition on the revolutionary unicameral Dáil; “a bulwark of imperialism” as it was put by Sean Lemass.¹⁰⁰ It was initially conceived of as an intentionally over representative chamber for southern Irish Protestants,¹⁰¹ who included former unionists politicians and British holders of honorific titles and peerages; it was abolished with the passage of the Constitution (Amendment No. 24) Act, 1936. The rationale provided for its abolition was that the manner in which it was constituted rendered it not a boon to the legislative process and commonweal of the country but rather an anti-democratic and anti-nationalist “danger”.¹⁰² The position of Cumann na

⁹⁹ First Dáil, ‘Declaration of Independence’, Dáil Éireann debate - Tuesday, 21 Jan 1919 Vol. F No. 1.

¹⁰⁰ Indeed the nationalist/sectarian view of history is articulated by Lemass in his assessment of the chamber by stating that by its Protestant over representation the body should not be reformed, it should be abolished, “It is a body created, as well as know, not to improve the machinery of administration in this country, but to give political power to a certain class that could not get that power if they had to go before the people at a free election and get the people to vote them into office. The Senate was set up to put a certain section of the community into a position where they could influence the course of legislation—a section of the community that was always hostile to the interests of Irish nationalism, and that was always hostile to the Irish nation.” Dáil Éireann debate - Wednesday, 22 Feb 1928 Vol. 22 No. 2.

¹⁰¹ Article 82(b), Irish Free State Constitution, 1922, “The thirty nominated members of Seanad Eireann shall be nominated by the President of the Executive Council who shall, in making such nominations, have special regard to the providing of representation for groups or parties not then adequately represented in Dáil Eireann.”

¹⁰² De Valera, Dáil Éireann debate - Thursday, 28 May 1936. Vol. 62 No. 9.

nGaedheal was rather that the danger was from Fianna Fáil, a position articulated by Prof. John Marcus O'Sullivan TD:

“In the last couple of weeks the Minister has given us one of the best lessons we could get on the dangers of Single Chamber government...and it is quite obvious that there is nothing in the Constitution that is safe from the destructive hands of the present Government. Nothing is permanently safe. Take that Constitution—can anybody tell me that there is a single thing in it that has any element of permanency about it? Not even parliamentary government,”¹⁰³

Under the 1937 Constitution, the Seanad was reconstituted and conceived as a corporatists vocational body,¹⁰⁴ modelled on Catholic social teaching as articulated in *Quadragesimo anno*¹⁰⁵ with limited power to challenge legislation.¹⁰⁶ Indeed, the suitability of bicameralism to the Irish state would be debated again in 2013, with the respective positions of the parties switched: Fianna Fáil now campaigned to keep the Seanad, and Fine Gael (in coalition with Labour, who maintained a position in favour of abolition from the 1930's)¹⁰⁷ campaigned for its abolition. Fianna Fáil accused the Fine Gael-led government of its Bill proposing to abolish the Seanad being “the worst act of political vandalism in the history of the State”¹⁰⁸ and that it was “a sad day when we are discussing the abolition of Seanad Éireann” a proposition that was “fundamentally anti-democratic”.¹⁰⁹ Fine Gael questioned the democratic necessity and continued propriety of bicameralism in a state such as Ireland. Phil Hogan TD said:

“The Government believes that a second chamber is no more necessary here in Ireland than it is in other small unitary states. In addition, the Seanad is an outdated

¹⁰³ O'Sullivan, Dáil Éireann debate - Thursday, 28 May 1936. Vol. 62 No. 9

¹⁰⁴ Article 18.7.1 °provides for 5 panels: National Language and Culture, Agriculture and Fisheries, Labour, Industry and Commerce, and Public Administration.

¹⁰⁵ Pope Pius XI, 15 May 1931. A succinct distillation of the concept can be seen in clause 73 thereof, “Let, then, both workers and employers strive with united strength and counsel to overcome the difficulties and obstacles and let a wise provision on the part of public authority aid them in so salutary a work.”

¹⁰⁶ Articles; 20, 21, and 22.

¹⁰⁷ Willie Norton, “the Deputy did not give us the slightest evidence that the Seanad was in any way a protection to democratic Parliamentary rights, as he described them. The Seanad has long ceased to have any pretence to be a defender of democratic rights or Parliamentary government... has long since forfeited any claim to exercise any custodianship of democratic or Parliamentary government.” Thursday, 28 May 1936. Vol. 62 No. 9. While being debated in 2013 Dominic Hanigan, “the institution in which the Senators serve is rotten and in my view, rotten beyond reform... It has become little more than an expensive crèche for aspiring TDs and a nursing home for elder states-people. We need to do what other small, mature democracies have done, namely, shut it down and move on.” Dáil Éireann debate - Thursday, 20 Jun 2013, Vol. 807 No. 4.

¹⁰⁸ Darragh O'Brian, Seanad Éireann debate - Tuesday, 23 Jul 2013 Vol. 225 No. 7.

¹⁰⁹ Niall Collins, Dáil Éireann debate - Tuesday, 25 Jun 2013, Vol. 808 No. 1.

institution. The theory on which it is based is no longer relevant and its composition does not reflect modern society. Maintaining a House of Parliament that is produced by the electoral and nomination system that produces the Seanad is simply not defensible.”¹¹⁰

The ongoing legacy of British administration of Ireland can be traced through the variegated arguments put forth at different junctures as to the propriety of the institutional architecture of the polity as constitutionally enshrined. The contours of this discourse on parliamentary structures use the proximity between the nationalist, popular sovereignty, democratic metanarrativity as a means to either legitimise or delegitimise bicameralism. Fidelity to the Constitution as democratically enacted, or fealty to electoral mandate for reform or abolition of bicameralism, and ultimately the sanctity of the mandate as instantiated through the referendum procedure, are all recursive to the national principle. Indeed, it would be a case concerning the franchise for elections to the Seanad which would once more elicit an articulation of the identity of the Constitution.¹¹¹

7.5 The Nation and State: Whether the Twain Shall Meet.

The metanarrative justifying political legitimacy which underpins both the 1922 and 1937 text is that of nationalism: the political edifice of the State is justified by its proximate congruence with the nationalist principle. The nationalist paradigm of Irish constitutionalism conceptualises the nation through a syncretism of ethno-symbolism and geography in an amalgam of people and territory.¹¹²

As discussed in detail, both texts have sourced their authority in the singular, univocal, conception of a distinctively Irish national people. But this claim is not merely an

¹¹⁰ Phil Hogan, Dáil Éireann debate - Tuesday, 25 Jun 2013, Vol. 808 No. 1.

¹¹¹ *Heneghan* [2023] IESC 7.

¹¹² These two nearly syncretic principles were however distinguishable to a degree even in the mind of de Valera, who would not forgo the idea of Ireland a Gaelic “Irish Ireland” even if it meant the reunification of the territory of the island, “...speaking for myself—I am not talking about Government policy in the matter, which has been largely embodied in the Constitution—I would not to-morrow, for the sake of a united Ireland, give up the policy of trying to make this a really Irish Ireland—not by any means. If I were told to-morrow: “You can have a united Ireland if you give up your idea of restoring the national language to be the spoken language of the majority of the people,” I would, for myself, say no. I do not know how many would agree with me. I would say no, and I would say it for this reason: that I believe that as long as the language remains you have a distinguishing characteristic of nationality which will enable the nation to persist. If you lose the language the danger is that there would be absorption.” Seanad Éireann debate - Tuesday, 7 Feb 1939, Vol. 22 No. 11.

identitarian one, this identity is coterminous with an assumed natural right of a geographic claim to ancestral territory: Ireland in totality, all its islands and seas. The centrality of the territorial principle within constitutionalism as consequential to analysis of all other provisions therein is highlighted by Oran Doyle:

“This geographic referent underpins all analysis of a constitution’s democratic credentials (and therefore the structure of government it creates), the appropriate amendment method, and the legitimacy of constitutional replacement.”¹¹³

The 1937 text is unequivocal, even in its post-Good Friday amended provisions, in conceptualising the nation as a unitary people and whole island polity. Therefore, we cannot conceptually conflate the apparatus of statehood as established by the 1937 text and the nation as coextensive, although this is the teleological narrative of nationalism conceived of therein.¹¹⁴ The aspiration is to synthesise the nation and state through the constitutionally enshrined goal of a united all island nation state. Indeed, this accounts for the sub-constitutional statutory denoting of the 26-county polity as a Republic¹¹⁵ and the constitutionally enshrined capacity to alter the configuration of centralised power and devolution to subordinate legislatures within.¹¹⁶ It is this nationalist principle, more than any other, which characterises Irish constitutional identity, as all subsidiary or tertiary constitutional principles derive normativity from this paradigmatic nationalist metanarrativity.

The 1937 text, which employs a univocal characterisation of the “people of Éire”, articulates “the firm will of the Irish nation”¹¹⁷ for unity through democratic means, and mandates “Fidelity to the nation and loyalty to the State”¹¹⁸ as duties of all citizens. Yet, this constitution was not enacted on an all-island franchise and thereby cannot account for the community both claimed and disavowed for their non-compliance with the

¹¹³ Oran Doyle, ‘The silent constitution of territory’ [2018] *International Journal of Constitutional Law*, Volume 16, Issue 3, pp. 887–903.

¹¹⁴ Even though the semantic ambiguity and conflation abounds throughout the text, see Article 29 where as the Article moves through chronological sub sections where we see a shift from ‘Ireland affirms’ and ‘Ireland accepts’ to ‘the State may’ and ‘the State shall’.

¹¹⁵ The Republic of Ireland Act 1948 repealed the Executive Authority (External Relations) Act 1936 which had diminished the British vestigial symbolic executive power in external relations, capitalising on the abdication of Edward VIII. Interestingly, the 1966 Report of the Committee on the Constitution recommended altering Article 5 so as to elevate republican statue of state to the constitutional realm, where the 1996 Constitutional Review Group saw the 1948 Act as sufficient.

¹¹⁶ Article 15.2.2 °Bunreacht na hÉireann, 1937.

¹¹⁷ Article 3, Bunreacht na hÉireann, 1937.

¹¹⁸ Article 9.3. Bunreacht na hÉireann, 1937.

narrative of Irish nationalism. Although belatedly acknowledging the diversity of identities and traditions, Irish nationalism does not seem to accept that those traditions may not be fully reconcilable to a nationalism which is self-consciously imbued and legitimated by an invocation of anti-colonial historical interpretation.¹¹⁹

The abstract and imagined community of the nation is reified; it can demand duties from the citizens of the State, and has inalienable, indefeasible and sovereign rights to statehood.¹²⁰ Therefore, the national metanarrative which is premised on the distinctiveness and difference of Irishness as a national identity, is also a claim of sameness, in that it is situating Irishness as a functioning in the same manner as other national identities in being a normative justification for the construction of a constitutional subject which is sovereign, and over which, domestic state sovereignty can be exercised, and externally respected.

The text affords the apparatus of statehood markers of identity not merely abridged to the State created by the text, but those of supra-state national character. The Irish language is not merely the first administrative language of the State, it is the *national* language; the *national* flag is the tricolour; the policy of the State is *national* policy;¹²¹ the Oireachtas is the *national* parliament; the President is Uachtarán na hÉireann, not Uachtarán na Poblachta.¹²² Therefore, the institutions of the 26-county jurisdiction are afforded national pre-potency, without realising the democratic consent of the envisioned nation therein.

From Article 40-44 on fundamental personal rights, we see the shift to the use of state once more, the individual has natural rights against which the *State* cannot violate. In this we truncate the interface between the individual and the overarching apparatus in which they have both rights and obligations; it is not that the individual citizen has rights against the nation to which they owe fidelity, it is only the entity of the State which interacts with the citizen in a rights/obligations dynamic. This permits the nation to operate at a level of abstraction so as to permit citizenship to function in a differentiated manner to national community affiliation. This presents the possibility for inclusion into citizenship of those who do not share in the constructed national identity as expressed

¹¹⁹ Compare the visions of Ireland in the Preamble with those of Article 3.1.

¹²⁰ Article 1. Bunreacht na hÉireann, 1937.

¹²¹ Article 6, Bunreacht na hÉireann, 1937, powers of the state derive under God from the people, who have right to designate rulers of state, yet it is national and not state policy which they decide.

¹²² Article 12. Bunreacht na hÉireann, 1937.

in the formation around ethno-symbolic nodal points, while also maintaining a paradigm of national othering. So, one can be of British, American, Polish, Nigerian, or Pakistani nationality, but can share in Irish citizenship, without being fully reconciled under the banner of nationalism as currently textually enshrined.

However, it does also afford the possibility, in the new context of the amendment to the original Articles 2 and 3, for “entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish Nation”. Yet, this does not mean that an individual now enjoys an entitlement of birthright citizenship, as has been dealt with already, unless they have at least one parent who has Irish nationality/citizenship. The coherence of the nationalist metanarrativity is becoming fractured as the index features of Irishness as formed around nodal point of ethno-symbolism have become disaggregated. The implicit political rationale of Irish nationalism has progressively shifted from expressing the salience of difference and distinctiveness, to inclusion and similarity. The republican values of commensurability and shared civic life of the polity are in dynamic contestation with the nodes of ethnicity, which preferentially enfold an individual of up to three generations remove from Ireland, whether they are from Boston, Birmingham, or Brisbane, constitutionally as more “authentically” of the nation. The Constitution still—in parts—holds to the one nation paradigm¹²³ of unitary national people and polity. Yet, at other times it seems to concede to the reality of multi-national identity of Ireland.

7.6 Ontological Stability of the Constitutional Author/Subject

¹²³ This one-nation Irish nationalist paradigm was most prevalent in 20th century and has been somewhat ameliorated by the Good-Friday Agreement. However, in the political science literature on nationalism there are multiple different theoretical arguments as to how many nations exist on the island. Michael Gallagher writing in 1995 identified at least 6 different understandings of the national identity of the island of Ireland. (1) The no-nation theory – the most recondite – posited that Ireland was an unrealised nation which had its development truncated by partition and neither what is understood as the nation in the 26 counties or in Northern Ireland can be construed as a realised nation. (2) The one-nation paradigm, which has most commonly held in the Republic and was embedded in Bunreacht na hÉireann. (3) The nation plus a part of another, which posits the realisation of both an Irish nation and Protestants of Northern Ireland being a part of the British national community. (4) The nation and a bit thesis suggests that there is an Irish nation, but the Protestant and Unionist community are neither of that Irish nation nor a fully realised part of the British nation. (5) There is the two-nation theory which posits a fully realised Irish nation along with a distinct Ulster nation. (6) And finally, the three nation (two nations and part of another) theory suggests that there is an Irish nation, British nation, and an Ulster nation. Ultimately Gallagher finds the three-nation theory most convincing as it captures the intersubjective formation of identities which populate the island. However, as there has been substantial immigration to Ireland since his time of writing, perhaps now to an ever greater degree this multi-national reality would have to be accounted for in theories of national identity in Ireland. See Michael Gallagher, ‘How many nations are there in Ireland’ [1995] *Ethnic and Racial Studies*, vol 8, no.4, pp, 715-738.

This chapter has aimed to demonstrate how the process of constructing a constitution for the Irish state was deeply wound up in questions of identity. The identity or root of title of the 1922 constitution, with the Dáil acting in the capacity of a constituent assembly, ultimately conceded to nominally constrain the Constitution of the new Irish polity to the Treaty which had formally brought it about. This was the least offensive of two unpalatable conceptualisations of the identity of that text, the other being that the identity or parentage of the text was an emanation of The Irish Free State Constitution Act 1922, with Westminster being a suspect source for the governing document of the nationalist state.

These two different interpretations should have led to formally differentiated level of constraint on the development of said text. The British interpretation, wherein the text had root in an Act of the Westminster Parliament, in conjunction with the statute of Westminster 1931, afforded greatest scope for the Irish parliament to amend the text as it so wished. The Irish interpretation *should* have made the amendments they enacted which were contrary to the Treaty illegitimate. Yet, we can see that the lifespan of that document saw its provisions sabotaged by successive governments through alteration.

These issues of indeterminacy—in conjunction with the symbolic vestiges of British lineage—were mostly reconciled with the enactment of the 1937 text. That this represented a formal rupturing of the legal intermingling of the Irish polity from the British is evident. However, I would have reservations about a limited account such as this being a supplanting of one *Grundnorm* (albeit a disputed one) by another; and thus, legally speaking, to a revolution.¹²⁴ I concede that Bunreacht na hÉireann was validated in a manner not consistent with the legal order which preceded it, thereby appearing to be a peaceful revolution. However, this account is incomplete and has a paucity in descriptive and explanatory value. As such, my hesitancy in relying solely on this positivist account stems from the claim to ontological stability in conceptualising the undergirding normative metanarrative which gave authority, such as there was, to each document: the recursive appeal to the will of the sovereign Irish people.

Reiterated both in political rhetoric and jurisprudence of the Irish courts is the recursive motif of a distinct sovereign people which have conferred a democratic mandate for a

¹²⁴ Hogan, Kenny, Walsh, Whyte, *Kelly: The Irish Constitution*, (5th edn, Bloomsbury Professional, 2018) [2.1.06]

distinct model of administration through an electoral expression of their sovereign collective will. The narrative of administrative ontological continuity claiming authority from a democratic expression of sovereign will begins with the 1918 general election, which gave the First Dáil a supposed mandate for an independent Irish parliament which declared independence with a public sitting of Dáil Éireann on 21st January 1919. The democratically elected representatives of Dáil Éireann passing the Treaty with a 64 to 57 majority. The 1922 general election which produced a Provisional Government and Constituent Assembly which gave democratic legitimacy to 1922 Constitution. The election of the 7th Dáil which brought in Fianna Fáil on a manifesto to significantly alter the character of the 1922 text. And most explicitly and conclusively with the plebiscite which enacted Bunreacht na hÉireann in 1937, which still endures. What is quite remarkable is that a movement which emerged from a revolutionary moment in 1916, which had nothing approximating a democratic mandate, but which in rhetoric portrayed itself as the authentic voice of the people, imbued a fidelity to popular sovereignty such that it contained the motifs from which would develop robust democratic principles. This political act—and the theory upon which it was based—managed to, in many ways, imbue a sanctity for the will of that people, which despite many anti-democratic possibilities, some pursued, and others avoided, managed to maintain continuity of the democratic mandate.

This is acknowledged repeatedly in judicial interpretations of the polity's unbroken ontological metanarrativity, as demonstrated in the case of *Fogarty v O'Donoghue*¹²⁵ concerning to whom a substantial sum of moneys, 10,000 dollars, lodged in the Munster and Leinster Bank as funds for Dáil Éireann. On the 30th of June 1922 the trusteeship of Most Rev. Michael Fogarty, Éamon de Valera and Stephen M. O'Mara, came to an end. On the 13th of September 1922, the Dáil passed a resolution naming Michael Fogarty, Richard Mulcahy, and Richard Hayes as new trustees. The former challenged the legitimacy of the claim of the later to be entitled to claim funds allocated to use of the Dáil, as this Parliament was an emanation from British statute, not being one and the same as the Parliament declared independent on in 1919. Meredith J, dealt with this clearly formulating a judicial interpretation of the continuity of popular mandate when he wrote:

¹²⁵ *Fogarty and Others v. O'Donoghue and Others* [1926] IR 531.

“An argument was pressed by Mr. Overend, on behalf of the defendants, that the body called the third Dáil could not be the successor of the second Dáil by reason of the fact that in some way the third Dáil was derived from the British Government, and its authority based upon Acts of the British Parliament. To my mind the sufficient and conclusive argument to the contrary is found in the solemn pronouncement embodied in the Constitution, which states the source of all authority as derived through the people of Ireland. The web of life cannot, however, easily be broken and the Constitution adopted, as Dáil Éireann had previously adopted the existing laws and statutes.”¹²⁶

The historical justification for political autonomy in Ireland which relied extensively on the continuity of a distinct ethnic identity undergirds the democratic procedures of popular sovereignty in this jurisdiction. The rationale which underpins the emerging jurisprudence on popular sovereignty being the constitutional identity of the 1937 text is definitionally entwined with the ethno-symbolic construction of Irishness. It is a foundation which cannot be easily extirpated from the both the institutional and moral provisions of the Irish Constitution. It coexists in dynamic relationship with the liberal, republican, European, and internationalist values within the text, at times in relative harmony, at others in discordance.

With the emerging constitutional identity jurisprudence in Ireland being conceptualised as a general principle, and by some scholars as *procedural* as opposed to *substantive*¹²⁷—arguing that the Catholic-Nationalist influences of the text have conterminously weakened¹²⁸—we must be cognisant of textual continuity. Many of the ethno-symbolist nodal points remain, and substantive identity reasoning is static therein. Indeed, the very claim of popular sovereignty is in and of itself a substantive claim, as it is an inalienable national right of the “people of Éire” to exercise their sovereign rights in the manner in which republican plebiscitary democracy has been inextricably

¹²⁶ *ibid.* Murnaghan J at para, 18.

¹²⁷ Eoin Daly, ‘Constitutional Identity in Ireland: National and Popular Sovereignty as Checks on European Integration’ in Christian Calliess and Gerhard Van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (2019, Cambridge University Press) p.183. And Seán Rainford, ‘Costello v Ireland and an Irish Constitutional Identity’ [2023] *Irish Judicial Studies Journal*, edn 1.

¹²⁸ Rainford, ‘Costello v Ireland and an Irish Constitutional Identity’ [2023] *Irish Judicial Studies Journal*, edn 1.

synonymised. The normativity of fulsome adherence to the referendum procedure is grounded in a theory of democracy bound up in a nationalist interpretation of history.

We can broadly observe the evident diminution of Catholic influence. However, the nationalist influence—which itself has its origin in Catholic discontent—remains a principal feature influencing Irish constitutional development. While Irish nationalism—within the Constitution—has been significantly altered to be more pluralistic, it is yet to be conclusively demonstrated that it is entirely disentangled from its ethno-symbolic origins. As has been judicially recognised, one thing that can be said about the Constitution is that it was a nationalist constitution.¹²⁹

¹²⁹ *McGimpsey v Ireland* [1989] ILRM 209. Barrington J.

Chapter 8. Identity of the Irish Constitution over 3 Interpretive Frameworks

This chapter seeks to present metanarrativity as a model for analysing the judicial development of the identity of the 1937 text. This is a methodologically innovative analysis, treating the Constitution as a text in a historico-literary and not merely legal sense—an endeavour that is increasingly relevant with the partial textualist turn in recent Irish jurisprudence. The seemingly incongruous recent departure of the constitutional identity doctrine in Irish law has no root of derivation textually in positive law of the 1937 document as a free-standing text. However, when analysed as a necessarily postmodern¹ text which relies on intertextuality and interpretation to construct the meaning of the harmonious whole, then we can better rationalise the so-far partial taking up of constitutional identity as an interpretive doctrine which encounters ambivalence in the text and attempts harmonious interpretation by applying a hermeneutic of procedural popular sovereignty. This approach permits an acknowledgment of the new departure of constitutional identity as a formal doctrine in the *Costello*² case, but rather than characterising this as a jarring contrast with the recent jurisprudence of the Supreme Court,³ it is a return to a mode of judicial reasoning which was evident for much of the history of the Supreme Court. This appeal to broad characterisations of the Constitution—much criticised both in the academe and in extra-judicial writings of current Supreme Court Judges—went into a period of stasis following *re Article 26 and the Regulation of Information (Services outside the State for the Termination of Pregnancies) Bill 1995*.⁴ Now we can observe what may be a brief re-emergence—albeit in entirely secular terms—of such appeals to constitutional metanarrativity.

In this endeavour we can analyse judicial interpretations of the character, spirit, identity, and meaning of the text, and how these are conditioned by what is read in as subtextual, and what extratextual sources are employed. By doing so, we can identify what have been interpreted as the essential and accidental properties of the Constitution, using longevity as an imperfect but indicative evaluative rubric or credential. The imperfection of this

¹ Necessarily intertextual, with a pastiche of positivist institutions of the state, liberalism, natural law, ethno-nationalism, and the hyperreality of identity of the polity. These characteristics, in tandem with the scepticism evident towards affording positive valence to a grand narrative of Irish constitutionalism in the interpretive strategies of some on the bench, render the Irish text in structure and interpretation necessarily postmodern.

² [2022] IESC 44.

³ Barrett, Gavin: *Constitutional Identity, Ireland and the EU: The Irish Supreme Court Ruling Costello v. Government of Ireland*, *VerfBlog*, 2023/3/22, <https://verfassungsblog.de/constitutional-identity-ireland-and-the-eu/>.

⁴ [1995] 1 IR 1.

credential is that mere textual longevity can be misleading: a distinctively Christian deity is invoked throughout the Irish constitutional text but has in practice been read out of the text by the judiciary. It is not in the judicial habit to suggest interpretive significance in the theological foundations of the dispensation of authority in a text they declared, in the presence of God, to maintain.⁵ Which raises the question: how has the clear theological foundations of the Constitution been interpreted as non-essential or accidental?

An answer, I argue, lies in the changes to the interpretive salience and intertextual significance—as established in the theoretical introduction to this thesis—of subtextual or extratextual sources. How we conceptualise the nature of the constitutional text necessarily informs how we interpret it in any temporal context. So as much as one can fall into an approach which favours close textual historicity or interpretation through general/universal principles, what these approaches are really expressing is a differentiation in canon of intertextual sources. Both approaches are a reaction to a process whereby the original intent of the “people”, which is self-evident from the metanarrative enshrined in the text, becomes increasingly inharmonious with later amendment; the internal nodal points of the metanarrative contained in different Articles within the text are increasingly discordant. What can facilitate this narrative divergence, while maintaining the ontological stability of the text, is a conception the Irish Constitution as a chain novel;⁶ it is a postmodern, internally contradictory text, and “the people” are unreliable narrators. Original/Authorial intent, its interpretation, or the process by which constitutional properties are given meaning, necessarily requires other interrelated texts.

The *acquis constitutionnel*⁷ does not merely determine outcomes of cases where a rigorous textualist reading is unsatisfactory, where the semantic construction or objective meaning is ambiguous or open textured; what is interpreted as the objective textual meaning itself, is conditioned by the *acquis constitutionnel*. This is so as the interpretive community, who

⁵ The modern Irish judicial agent is a professional ironist. By denuding the constitutional text of natural law, interpreting the text as being entirely alterable by dint of popular sovereignty, and determining that the text is interpretable in light of values and mores of the moment, they have acknowledged the entire reliance on contingency. In the Rortian sense, they are incapable of adhering to a final vocabulary as the artificial foundation from which they acculturate, the Constitution, is protean. When the people introduce, alter, or delete an Article, the vocabulary of the judiciary is habituated to changes. Similarly, if the polity becomes habituated to new modes of discourse this too will impact the judicial vocabulary. See, Rorty, *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989).

⁶ “In this enterprise a group of novelists writes a novel seriatim; each novelist in the chain interprets the chapter he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on.” Ronald Dworkin, *Law's Empire*, (Harvard University Press, 1986), p. 229

⁷ The accumulated sense of the legal tradition, case-law, legal methodology, and reasoning. See, Gerard Hogan, ‘The Constitution, Property Rights and Proportionality’ [1997] *Irish Jurist*, Vol. 32. 373

share interpretive strategies and epistemic enculturation, make the text and its contingent meaning through reading.⁸ This is inherent in the educational process of a professional community, at a remove of decades from the inception of the text, as they are schooled in the small-c constitution as a pedagogic strategy for learning to read the text of the Constitution. From this process an authoritative teleological narrative is rehearsed wherein, the first decades of the Constitution it lay somewhat dormant, then in the 1960's an activist Court began "discovering" unenumerated substantive rights. This practise would reach a precipice wherein the Court may have seen fit to invalidate a democratically passed referendum and therein subordinating the popular sovereign to the theological sovereign. This precipice was retreated from, a risk averse "lawyerly" dispensation emerged on the Court, and only recently have tentative steps emerged wherein derived or implied rights based in human personality or human dignity, are being "recognised". Through this process, it is commonly argued, the true liberal nature of the text is being realised and the irrationality of the idiosyncratic decorative aspects of the text are paling in significance.

Interpreters of the text learn to read the text by engaging with this narrative arc as a means of gaining insight beyond what appears on the page. The British common law inheritance places previous interpretations of the text in case law at the forefront of the pedagogical and professional means of rendering authoritative interpretations.

The Constitution is an "open text", both in that it is a text which needs the cooperation of its reader as an active agent in the generative process of the text,⁹ and in that the internal properties of the text can be changed, altered, or removed formally by referendum, or informally through development in interpretation. In this regard, one might say certain aspects through desuetude cease to be part of the Constitution as the epistemic community cease to countenance them,¹⁰ or situate them within a different network of intertextual sources.

⁸ Stanley Fish, *Is There a Text in This Class*, (Harvard University Press, 1980). See, *Introduction, or How I Stopped Worrying and Learned To Love Interpretation* and *Interpreting the Variorum*.

⁹ Umberto Eco, *The Role of the Reader: Explorations in the Semiotics of Texts*, (Indiana University Press, 1984). See, Introduction.

¹⁰ As foreseen by Fr. Edward Cahill in a letter to de Valera on 23rd May 1937, wherein the cleric anticipates the manner in which a class of public men "whose ideas and mentality are much influenced by the individualistic and Liberal principles of English jurisprudence", would read private property rights. No. 199: NAI, DT S9856. As reproduced in Hogan, G., *The Origins of the Irish Constitution 1928-1941*, (Royal Irish Academy, 2012), p.571-574.

Longevity, as an affirmative credential for constitutional identity, functions as a demonstration of the resilience of the conception of popular sovereignty within Irish judicial vocabulary. In construction, it is the reflexive metanarrative in which the identity of the text is grounded. But as it narratologically conforms with post-colonial nationalist inversion, it could be read as somewhat discordant with pluralist, liberal, and secular republican properties therein. Yet, as a formal doctrine within Irish jurisprudence—as conceptualised as ‘constitutional identity’—it is necessarily conditional on a diffusion of popular sovereignty in the context of EU integration, having supra-textual grounding from Article 4(2) TEU, through 29.4.6°.

I argue that there is an observable tripartite periodisation between distinct interpretive frameworks in regard to sovereignty and interpretations of metanarrativity. These frameworks are not discrete timeframes, and in parts there is lag or retrenchment between different interpretive frameworks; they represent the shifting imaginary and the supplementing of certain canonical intertextual sources for others, by the judicial epistemic community. This analysis situates the metanarrative of the Constitution as most salient epistemological property within the Constitution and examines how this metanarrative is reinterpreted through different readings. The interpretive frameworks are informed by the “hard cases” of Irish jurisprudence, where this metanarrative is renegotiated to enfold different social events and constitutional amendments. Furthermore, this model of understanding Irish constitutional identity stipulates an emerging fourth framework wherein constitutional identity traverses from an analytical model to a normative doctrine.

This fourth framework is still in its infancy and may not reach maturation and decline in the manner that the others *seemingly* have. I would suggest that from this analysis we can see that the process whereby popular sovereignty has been interpreted as Ireland’s constitutional identity demonstrates that the judicial discourse has functionally disassociated popular sovereignty as a constitutional principle from its underlying metanarrativity, thereby seeming to present it as an autonomous value, appealing only to itself for normativity. This has been eventuated as a result of the gradual disaggregation of the essentialist simulacrum of the “people of Éire” as a national people, with a right in natural law to sovereignty. This interpretation is not however a textually prescribed procedural necessity, as there is a conscious reading out of the text of the vestiges of ethno-symbolic metanarrativity, which has the paradoxical consequence of re-bolstering the primacy of a national principle.

8.1 The Constitution as a Palimpsest and the Postmodern Condition

These different interpretive frameworks are the indicative of discursive formation of the nationalist principle as reflexively rationalised through the constitutional metanarrative. In analysing these developments, I am engaging a genealogical treatment of Ireland's constitutional identity, in service of critiquing its current utilisation.¹¹ These three interpretive frameworks are illustrative of the unfurling discourse between different polarities¹² within the 1937 text, the ethno-cultural and liberal nationalist axioms therein.

Over the course of the development of constitutional jurisprudence in Ireland we can observe what was initially understood to be a synthesis of faith and the polity as the understood character of the state, the Catholic Democratic phase. We can then observe a shift in interpretation to one of Benevolent Secularism, wherein catholicity is still present but with a diminution of formal influence. This creed was acknowledged as one among others, as an ever more robust pluralist character germinated. We can then observe a third interpretive phase wherein a post-Catholic interpretation of the Constitution emerged and a hermeneutic of proceduralism was applied to the text. Herein the specifically faith-imbued content of the text is considered as no normative constraint on the course of interpretation or constitutional development; conceptually there can be no unconstitutional constitutional amendment based on a substantive or supervening moral principle.

Religion as a locus of identitarian analysis is most salient as it is both a consistent moral and ethical foundation which informs how other constitutional values are interpreted, and it is a constituent trait within national identity. The salience of religion is most apparent as Irish constitutionalism stipulates in positive law the *fact* of natural rights and natural law.¹³ The judicial willingness to be cognizant of Catholic social teaching as instructive in the determination of what could be meant by natural law within the 1937 text has mapped onto the broader sociological shift from confessionalism to secularism in society. It is also illustrative of a discordance between the post-colonial nationalist metanarrative in the text and other provisions and interpretations of the text which speak to pluralism and secularity.

¹¹ This is in essence employing historico-critical "History of the Present" genealogical approach as employed by Foucault, *Discipline and Punish*, (Penguin Books, 2019). This is in itself consistent with a philosophy of historiography as espoused by E.H. Carr in that the past is discursively formed into a history by the transubstantiation of facts about the past into a historical facts by the elevation of them in a history by the act of selection by historians. E.H. Carr, *What is History?* (Penguin, 1987).

¹² The nationalist axioms of the Citizen and Bloom.

¹³ Article(s) Preamble, 1, 41.1.1; 42.1, 42A, 43.1. Bunreacht na hÉireann, 1937.

The judiciary have had to grapple with the *fact* of natural law while the value structure which informed this textual fact has transmuted from confessional to secular.

That there is a rigid distinction in the Constitution between fact and value is uncertain; they have a reciprocal¹⁴ relationship. By couching the factuality of natural law provisions in the text in broad generality—and concomitantly establishing them as a foundational norm for the national claim to self-determination and the substantive moral principles within the Constitution—necessarily means they will need to be interpreted. Therefore, the values which the interpreter brings to their reading of the text impacts the factual quality of certain provisions. That there was previously a distinction between fact and value is not apparent as the moral universe of the polity was mutually constrained by the near total homogeneity in demographics which corresponded with the broad normative consensus in extratextual sources to guide the enumeration of natural rights among the judicial interpretive community; popularly held Catholic moral values were considered factual.

The drafters and subsequent interpreters of the text all had, and have, situated agency within an epistemic cultural community wherein a standard of rationality is a cultural institution.¹⁵ What is consistent with practical reason is contingent on a host of culturally conditioned anterior premises of ethical and moral traditions¹⁶ in which one is operating.¹⁷ Indeed, when

¹⁴ Jeanne Gaaker, *Judging from Experience: Law, Praxis, Humanities*, (Edinburgh University Press, 2019), see, 'A Pragmatic Approach'.

¹⁵ See Hilary Putnam, *Reason, Truth, and History*, (Cambridge University Press, 1981) Ch. 6 'Fact and Value'

¹⁶ For instance, framing the problem of the contemporaneous determination of what is just and rational "what many of us are educated into is, not a coherent way of thinking and judging, but one constructed out of an amalgam of social and cultural fragments inherited both from different traditions from which our culture was originally derived (Puritan, Catholic, Jewish) and from different stages in and aspects of the development of modernity (the French Enlightenment, the Scottish Enlightenment, nineteenth-century economic liberalism, twentieth-century political liberalism...To know what justice is, so it may seem, we must first learn what rationality in practice requires of us. Yet someone who tries to learn this at once encounters the fact that disputes about the nature of rationality in general and about practical rationality in particular are apparently as manifold and intractable as disputes about justice." Furthermore, on the importance of historical context to the basic reasoning of what is our conception of justice and rationality, "So Aristotle's conception of justice and practical rationality articulated claims of one particular type of practice-based community, partially exemplified in the polis, while Aquinas', like Ibn Roschd's or Maimonides', expressed the claims of a more complex form of community in which religious and secular elements coexist within an integrated whole. So Hume's conception of justice and of the relationship of reasoning and action was both at home in and expressed claims of a particular form of English or Anglicising society ordered in terms of mutualities and reciprocities of passion and interest. That Aristotle, Aquinas, and Hume and indeed those other philosophers with whom we have been concerned, were historically situated in the way that they were, themselves members of just such forms of community, who were inescapably involved in the conflicts central to the historically developing life of those communities at those times and places, is not then a merely accidental or peripheral fact about the philosophy of each." Alasdair McIntyre, *Whose Justice? Which Rationality?*, (Duckworth, 1988), pp.2 & 389

¹⁷ For instance, if one has the anterior belief that human life begins at conception, then abortion is *ab initio* the taking of one life by another. However, if one does not place the moment at which "life" begins at conception, or through the culturally contingent development of their practical reasoning determines that

there is moral pluralism or a population with a large degree of normative dissensus, a supposed fact/value distinction is further eroded as the stability of the fact is dependent on the value which undergirds it. The judiciary have, by the very nature of the interpretive process, recognised that the Constitution is not frozen in 1937, the Constitution is a living instrument.¹⁸ As homogeneity of opinion, or normative consensus, has diminished in a post-Celtic Tiger era Ireland,¹⁹ the Court's recognition of the fact of theistically grounded natural law has been clearly disavowed²⁰ and recast around inherent dignity of the individual as a human person.

Where there is a panoply of values informed by socialisation in partially overlapping communities—tradition, geography, culture, family, religion, within a singular polity—a consciously constructivist²¹ constitutional identity can function to reconcile and unify. This is the basic thesis articulated by Michel Rosenfeld as dealt with in Chapter 1. Constitutional identity is distinct from national identity and a mechanism for integrating the peoples of the country with the democracy of the polity. This is, however, dependent on a constitutional identity which does not appeal to an exclusionary identitarian principle as the source of normativity. Where in a polity there is an explicitly exclusionary national principle—as in Ireland—and a social context wherein there is scepticism towards aspects of this national metanarrativity, the judicial response to this scepticism appears to privilege the procedural aspect of the text, silently underpinned by the nationalist principle. As such,

bodily autonomy is of higher order significance in their moral world view, then abortion is a permissible intervention in pregnancy.

¹⁸ *A v Governor of Arbour Hill Prison* [2006] 4 IR 88. Murray CJ, at para, 183.

¹⁹ Celtic Tiger era is here used as a shorthand for the culmination of the transformation of Ireland from an economically backward, in Western European context, polity. Furthermore, it presaged the shift from emigrant to immigrant dynamic in the population. It also saw the relative status quo on moral questions which were at play since the 1960's reach relative stasis, although further amendments would follow in 2010s and 20s. Also the full degree of Church scandal would begin to become public knowledge at this juncture. The anti-materialist spiritual polity imagined by de Valera was nearly fully subsumed by a Atlanticist and European liberalism. See, Tony Fahey, Helen Russell, Christopher T. Whelan (eds), *Best of Times? The Social Impact of the Celtic Tiger*, (Institute of Public Administration 2007). Further see R.F. Foster, *Luck and the Irish: A Brief History of Change from 1970*, (Oxford University Press, 2008) wherein a treatment of the expanding Irish national narrative is assessed along three lines: the perception of the North and the emergence of partitionist mindset, the internationalisation of the economy, and the shattering of the moral monopoly of the Roman Catholic Church.

²⁰ *M v Minister for Justice* [2018] IESC 14. Clarke CJ, at para 10.47.

²¹ Constructivist is being used here in the manner of Hobsbawm (Invented Traditions), Gellner (Nations and Nationalism), and Anderson (Imagined Communities). It is to suggest that nations are socially constructed as opposed to a primordial inheritance. As, such the curated historiographic narratives which define the conceptual boundaries of ideas of the nation can be re-narrated.

even if Irish national identity has become more fluid, the grounding normativity of the experience of “we” and “them” remains potent.²²

In this regard Gary Jeffrey Jacobsohn’s conception of constitutional identity being ultimately dialogical, emerging from change and interpretive development, may be a more relevant conception.²³ However, this conception also insufficiently accounts for more radical rejection of the minimal coherence of the foundational acceptance of the national constitutional claim.

In a polity like Ireland in which a plurality of moral “facts” abound—in succession to Catholic doctrine and neo-Thomist understanding of natural law—the ‘constitutional identity’ interpretive phase in which general principles of constitutionalism²⁴ are realised through the imagination of Irish constitutionalism, could function as an inclusionary interpretation of the Constitution. However, it is the argument herein that Ireland has a post-colonial metanarrative wherein popular sovereignty has a conceptual association with ethnicity. As such, it may have a conceptual lineage which could potentially be at odds with pluralist values and liberal proceduralism of its current construction.

Although popular sovereignty has not yet been conceptualised as the exclusive constitutional identity of Ireland, the tertiary values which have been recognised as contributory to Irish constitutional identity are all in some fashion co-extensive with it: independence, democracy, judicial and legislative sovereignty. Other jurisdictions, with whom which Ireland is “United in Diversity”, have identified substantive values in a constructive manner²⁵ which will develop the substantive principles of the European constitutional dialogue.²⁶ Ireland, however, due to the manner in which interpretations of

²² Iarflaith Watson & Lorenzo Posocco, ‘National Identity Hollowed-Out: Irish National Identity 100 Years After Independence’ [2025] *International Journal of Politics, Culture, and Society*.

²³ “...that a constitution acquires an identity through experience, that this identity exists neither as a discrete object of invention nor as a heavily encrusted essence embedded in a society’s culture, requiring only to be discovered. Rather, identity emerges dialogically and represents a mix of political aspirations and commitments that are expressive of a nation’s past, as well as a determination of those within the society who seek in some ways to transcend this past” G.J. Jacobsohn, *Constitutional Identity*, (Harvard University Press, 2010) p. 7.

²⁴ As embedded in the Treaties of the EU: Article 2 TEU “...the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.” Article 5 TEU “subsidiarity and proportionality.”

²⁵ Article 4(3) TEU “sincere cooperation”.

²⁶ German Federal Constitutional Court (GFCC), identity review mainly framed around Basic Law, Art. 79(3) which renders inadmissible amendments which would alter Art.1 “human dignity” and Art.20 “defensive

the Constitution have developed, has only demarcated its sphere of sovereign capacity, its distinct dominion.²⁷ So, perhaps, it will transpire that a doctrine used to particularise the general principles of EU constitutionalism may function in a like manner to that which Catholicism served in Irish constitutional theory: a universal principle instrumentalised to further burnish Irish distinction and separateness. As such, it is an observable trend in Irish constitutional development to cast off former constraints²⁸ while also adopting new limitations on exercise of its own genius and traditions.

8.2 Constitutional identity

There is no specific textual articulation for constitutional identity in Ireland's Constitution, other than what one may say is the simultaneously intertextual and intra-constitutional²⁹ footing of the Treaties of the European Union afforded by Article 29.4.6°;³⁰ wherein Article 4(2) of TEU establishes:

“The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State”.

This broad definition, which seems to draw equivalence between national identity and constitutional identity, has presented an affordance wherein member state political and judicial discourses can potentially develop a constitutional identity doctrine which is indistinguishable from national, or indeed nationalist, conceptions of their states. In Ireland, this ambivalent definition, and how it is to be applied, is conceptually obscure. The judiciary deemed that the only overriding principle of the text is sovereignty of the people,

democracy”, see *Solange I and II* and *Italy in the Taricco I and II* caselaw where the Court reached a position where there would be constitutional tolerance of national standard of fundamental rights.

²⁷ And even this, until the ratification of the Good Friday Agreement in 1998 was not a clear a settled issue.

²⁸ Violently leaving British Empire, politically working to legalistically undermine the 1922 Constitution which had Treaty as constraint, the judicial disavowing of Natural Law, keeping ECHR sub-constitutional, and rationalising EU Treaties, which entail an abrogation of sovereignty, as expressions of popular sovereignty.

²⁹ Intra-constitutional in that the Treaties are considered a part of the Irish Constitutional structure, as it is the Constitution itself which articulates the position of supremacy of EU Treaties and primacy of EU legal order, thereby rendering the post-national order consistent with popular sovereignty by amendment procedure.

³⁰ “No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State, before, on or after the entry into force of the Treaty of Lisbon, that are necessitated by the obligations of membership of the European Union...”

and that the text itself is intentionally crafted to be an unfinished project of national reunification. Therefore, “fundamental structures”, “regional and local self-government”, and “territorial integrity” as prescribed in the theory of the Irish Constitution are not merely subject to alteration through the liberal proceduralism of the referendum mechanism of popular sovereignty; the national and constitutional aspiration is for their eventual alteration.

This does not mean that the principle of popular sovereignty is, as Daly and Rainford have suggested, an exclusively conceptually procedural mechanism. It is in and of itself a substantive value; it is a conceptually thick substantive principle which, depending on the temporal epistemological context, can have a plurality of interpretations, liberal-nationalist or ethno-nationalist.³¹ It has substantive values which inhere in it, which are animated toward divergent readings, much depending on the supplementary provisions of the constitutional document which accompanies it.

With the re-introduction of this mode of identity-centred judicial reasoning, by observing an identity at work in the Constitution, the Court have developed the Constitution in having that identity. It has traversed from an analytical model to a normative doctrine. We can see this creeping normativity in that the doctrine is seemingly moving beyond its natural domain of EU-related issues of integration³² into issues of domestic governance.³³ The judiciary, mainly in the person of Gerard Hogan, are constructing a normative *is*; they are establishing a normative element by “discovering” the textual reality of Ireland’s constitutional identity.

To understand the development of this doctrine, one must situate it within Ireland’s post-colonial narrative discourse. One cannot appreciate the salience of popular sovereignty without, as I have attempted in preceding chapters to do, tracing the course of the conceptual development of popular sovereignty as a rhetorical element within a post-colonial separatist metanarrative. In this we can view the permissiveness of the judiciary to Catholic social teaching and doctrine as a way of asserting the sovereign and distinct character of Irish jurisprudence, in contrast to British jurisprudence. Moreover, the manner

³¹ Seeming unlikely is a constitutional patriotic reading in manner of Habermas or Werner-Müller as constitutional values are not placed beyond the reach of amendment/change. What may initially seem as Ireland’s consistency with this approach is undermined when one considers that the basis of the identity of popular sovereignty is an ethnic/nationalist claim.

³² *Costello v. Government of Ireland* [2022] IESC 44.

³³ *Heneghan* [2023] IESC 18.

in which European integration has been constitutionally rationalised within the Irish constitutional polity has managed to use EU integration as a method of further performing popular sovereignty by requiring a referendum for EU Treaties, distinguishing the Irish constitutional tradition further from British tradition. Therefore, to adequately problematise the propriety of this emerging interpretive doctrine, one must have cognizance of the potential peril in introducing this method of identitarian constitutional interpretation where there is, at the core of Irish constitutionalism, a perceptible metanarrative of exclusivist nationalist character: do the People, as masters,³⁴ have a right to do wrong?³⁵

The 1937 Constitution is not a static object, it is a palimpsest; functionally, where once it was a tool for expressing the distinct identity of the Roman Catholic population and state³⁶ and the nationalist claim of an all-island authority, it then became a tool through which “modernising” Ireland could mediate its national, British,³⁷ American, and European composite identity. The text can be considered a *mélange* or pastiche of different influences: nationalism, Catholicism, liberalism, Westminster parliamentarianism, and republicanism.³⁸ As such, in realising the meaning of the 1937 text, the reader or interpreter is necessarily engaged in an intertextual process. As the text evokes and employs underarticulated concepts—where the concept is presented as self-evident or natural, such as the nation, or the people of Éire—it is necessarily dependent on extratextual or subtextual conceptual miscellanea for interpreting meaning.³⁹ The same is, or more accurately *was*,

³⁴ Dáil Éireann debates, Tuesday 11 May 1937, Vol. 67 No. 1, “We here have always made clear that we believed in the fundamental right of our people to choose their own Government, the form of their State even, and, believing in that right, we naturally enshrined it in the Constitution. If there is one thing more than another that is clear and shining through this whole Constitution, it is the fact that the people are the masters.”

³⁵ Speech given by de Valera in Killarney on Treaty, as reported in *Irish Examiner* (*Cork Examiner* so called at time of publication) 20/03/1922 “the people had never a right to do wrong”.

³⁶ As referenced by Seán McEntee, “I do not know whether Deputies opposite join issue with us on the contention that, this being the Constitution of a Catholic State, it is only right we should not permit, since we have the responsibility in these matters, anything which would be contrary to public morality to be published or broadcast or exhibited any more than we would permit it if it were contrary to public order.” Dáil Debates, Tuesday 11 May 1937, Vol. 67 No. 1.

³⁷ By and through this process, the British lineage of Irish jurisprudence would be diminished. Indeed, one can see in *State (Quinn) v. Ryan* [1965] IR 70 a decidedly affirmative statement from Walsh J, at para. 6 of his contribution, on where metatextual influence should be found, “I reject the submissions that because upon the foundation of the State our courts took over an English system and a common law that the courts must be deemed to have adopted and should now adopt an approach to Constitutional questions conditioned by English traditional methods and English training,... In this State, one would have expected that if the approach of any court of final appeal of another State were to be held up as an example for this court to follow, it would be more appropriately have been the Supreme Court of the United States rather than the House of Lords.”

³⁸ D. K. Coffey, *Drafting the Irish Constitution, 1935-1937: Transnational Influences in Interwar Europe*, (Palgrave Macmillan, 2018) ch.1.

³⁹ In the nationalist canon we could point to: Pearse political pamphlets: *The Sovereign People*, *Ghosts*, *The Separatist Ideal*, and *The Spiritual Nation*, which in turn evoke earlier texts of Theobald Wolfe Tone, Thomas Davis, James Fintan Lalor, John Mitchel, and Charles Stewart Parnell. This textual lineage ultimately

true of the distinctively Catholic or Christian concepts which permeate the text.⁴⁰ The 1937 text is architextually⁴¹ a constitution, a single instance in the *genre constitutionnelle*, and more specifically a democratic text with protection of fundamental rights, judicial review, and a common law tradition. In the process of making arguments and discerning the meaning of the Irish Constitution, extratextual sources from other jurisdictions, which have no formal binding precedent have indirect or metatextual⁴² influence in Irish jurisprudence. Additionally, there is a hypertextual⁴³ relation between the 1937 text and the Treaties of the European Union.⁴⁴ Article 29.4 cannot be given a substantive meaning without these additional texts.

Furthermore, the Constitution serves as a site of national reckoning with the history of the independent state and its enmeshed relationship with the Roman Catholic Church. The Constitution would be instrumentally utilised to practically and symbolically subordinate faith to fatherland through a discourse between tradition and modernity. The idea of the nation is still paramount within the text; it is however a nation which is unsure of its fundamental identity, sure of its self-hood, but not what it means to be itself, grappling with the particularist and cosmopolitan constitutional properties therein. This internal tension or discordance, which was previously harmonious in the synthesis of Christian/Catholic Democratic identity of the text, is being enacted in two approaches⁴⁵ to interpreting the text by the judicial epistemic community today. It is into this discourse that constitutional identity as an interpretive doctrine emerges. The interpretive and textual vestiges of the different hermeneutic frameworks of the text are still present, but they have been rendered inert or in a condition of stasis. Indeed, there is much to be read into the observation of O'Donnell CJ:

succinctly expressed in the 1916 Proclamation and reiterated in Declaration of Independence 1919, Democratic Programme etc.

⁴⁰ As those ascribed with the function of interpreting the meaning of the text must make a declaration upon taking office, and we presume our judiciary would not intentionally deceive, which specifically invokes a deistic godhead. Art 34.6.1 °Bunreacht na hÉireann, 1937.

⁴¹ Terminology emanates from literary theory of Gerard Genette, “the entire set of general or transcendent categories...architextuality is, historically almost always constituted by way of imitation”. Gerard Genette, *Palimpsests: Literature in the second degree*, (University of Nebraska Press, 1997), p.1.

⁴² Genette once more, “the relationship most often labelled as “commentary”. It unites a given text to another, of which it speaks without necessarily citing it.”, *Palimpsests: Literature in the second degree*, (University of Nebraska Press, 1997), p.3.

⁴³ “What I call hypertext, then, is any text derived from a previous text either through simple transformation, which I shall simply call from now on *transformation*, or through indirect transformation, which I shall label *imitation*.” *ibid*, p.7.

⁴⁴ One could also include a metatextual influence of ECHR and Good Friday Agreement.

⁴⁵ Particularist and Generalist.

“The past, particularly in relation to these matters, is indeed a different country, but that is no reason not to learn its language, understand its culture, acknowledge in how many ways it is different from today, and recognise how it influenced the provisions of the Constitution which are still applicable today.”⁴⁶

We cannot understand the current doctrine of constitutional identity without examining the discursive process by which we have reached this point of proposed liberal procedural interpretive moment, wherein popular sovereignty will out. We, the people of Éire are sovereign, but exactly who we are and what we can do remains indeterminate.

8.3 The Catholic Democracy

This early phase of judicial understanding of the Constitution’s identity is at its most basic as follows; the Irish people are a religious people, they have given themselves a constitution which is self-consciously that of a Christian people, with a legitimate emphasis on the creedal invocations of Catholic particularism. This interpretive framework, with its deference to a spiritual and moral authority beyond the Irish sea, to the Holy see, is not contradictory to the principle of popular sovereignty: sanction is given to this model of Christian constitution specifically because the Irish people have afforded it a democratic mandate.⁴⁷ It is through this intertextual⁴⁸ model of interpreting the meaning of the Constitution that the judiciary saw as not merely legitimate, but in some regard necessary to countenance the doctrine of the Roman Catholic Church in its reasoning. In this sense we can apply a functionalist understanding to Christian Democracy, in that it was/is a conceptually diverse political ideology formed in response to the challenge of reconciling Christianity (Catholicism in particular) with modern democracy, by carving out a political role for the former within the institutional and conceptual horizon of the latter.⁴⁹ Donal Barrington, writing in 1954, prior to his judicial career argued that the identity or political philosophy which underpinned the Constitution was an inheritance from that first

⁴⁶ *John O’Meara & Ors v. The Minister for Social Protection, Ireland and The Attorney General* [2024] IESC 1. O’Donnell CJ, at para. 95.

⁴⁷ Indeed, one can find a Thomistic endorsement of Ireland’s construction of popular sovereignty in question 105 I:II of the *Summa Theologica*, wherein it is argued that all should take some share in the is government.

⁴⁸ Intertextual here in the sense articulated by Gerard Genette, “a relationship of copresence between two texts or among several texts: that is to say, eidetically and typically the actual presence of one text within another...in still less explicit and less literal guise, it is the practice of allusion: that is, an enunciation whose full meaning presupposes the perception of a relation between it and another text, to which it necessarily refers by some inflections that would otherwise remain unintelligible.” Genette, *Palimpsests: Literature in the second degree*, (University of Nebraska Press, 1997) p.1/2

⁴⁹ Carlo Invernizzi Accetti, *What is Christian Democracy? Politics, Religion, and Ideology*, (Cambridge University Press, 2019), p.20.

generation of Irish political elites which was worthy of much admiration; it was a basic structure which could foster unity, instead of exacerbating religious difference within the still fledgling polity:

“It is difficult to produce a political philosophy suited to a country such as ours where religious divisions cut so deep. But, fortunately, we have not got to do so, for our fathers have already given us a political philosophy which has been accepted by Catholic and Protestant alike and which has been enshrined in our Constitution. This philosophy may best be summed up in the two words, Christian Democracy.”⁵⁰

Yet, one may question whether at time of writing, this political philosophy was as ecumenical as was being advanced by Barrington. There was as of that time still an interpretive hermeneutic of nationalist Catholic preferentialism being applied to the Constitution.

We can see this formal preferentialism to the Catholic Church in *Maguire v Attorney General*.⁵¹ This case concerned the bequest of a sum of moneys for the purposes of establishing a convent as a means to the end of Perpetual Adoration of the Blessed Sacrament, and whether or not this bequest could be considered a charitable donation. The reasoning of the Court acknowledges that the contemplative life of prayer, not of outward good works, had not been understood as a charitable activity for the public in post-reformation UK law, as it would be hard for “strangely misled” Catholics and “pagan”⁵² critics to conceive of the of the monastic life as affording a public good, as opposed to being an exercise in individualism and egoism. The reasoning herein relies heavily on the belief that those living out a monastic life, such as those who may live under the Rule of St. Benedict are enacting a public good through their cloistered life of prayer. Through the lack of legislative specificity on the matter, Gavan Duffy P refers to the historic precedents of common law, which are impregnated with the “faith of the people”.⁵³ The judge brings a historical exposition on the intermingling of the common law of England and Ireland with the Catholic faith to the modern day with a clear articulation of the constitutional foundation which validates his reasoning and interpretation, that this bequest of monies for

⁵⁰ Donal Barrington, ‘Christian Democracy’ [1954] *The Irish Monthly*, 83, no. 968, pp. 135–40.

⁵¹ [1943] IR 238.

⁵² *ibid*, at para. 15.

⁵³ *ibid*, at para. 27.

perpetual adoration of the Blessed Sacrament, ought to be judicially considered a charitable gift.⁵⁴

“The common law knew the Mass. The common law knew the Blessed Sacrament. The common law knew the adoration of the Blessed Sacrament. Therefore I know them judicially. The doctrine known to the common law is the doctrine of the Catholic Church... And that conclusion is in harmony with the Constitution enacted by the Irish people “In the Name of the Most Holy Trinity ... to Whom, as our final end, all actions both of men and States must be referred.”⁵⁵

This judgment is instructive for our purposes in that we can see that Gavan Duffy P is drawing a distinction between the character of new polity in which he was working by delineating the affordances available to an Irish judge as opposed to a British judge. Furthermore, through an epistemological intermingling of a knowledge and acceptance of the legitimacy of Catholic teaching as to the purposes of monastic life and Adoration of the Blessed Sacrament, the essential Catholic character, identity, or spirit of the text and polity is acknowledged.

A similar point is more conspicuously made by the same Gavan Duffy P in *Re Tilson*.⁵⁶ A case much now remembered for dealing with the applicability of common law precedent after the introduction and enactment of Bunreacht na hÉireann in the jurisprudence of sex discrimination in marital and family matters in Ireland; indeed, the judgement acknowledges the constitutional departure in Ireland from the common law of the UK in appealing to both Article 14 of the 1922 text and Article 16 of 1937 which stipulate equality as between the sexes. Murnaghan J on appeal in the Supreme Court states:

“In the light of these facts I have to interpret the Constitution adopted by the people in 1937. The Constitution “states fundamental principles, and, however these principles may have been reached, when they are enshrined in the Constitution they become, and are, the fundamental law of the State.”⁵⁷

⁵⁴ Gavan Duffy P employed a similar utilisation of the preamble in a case involving the bequest of moneys for the erection of a monument to leader of the United Irish Men Theobald Wolfe Tone in the case *Att. Gen v. O’Sullivan* [1946] ILTSJ 33. Using the nationalist invocation in the preamble Gavan Duffy again overturned British precedent of charitable gifts.

⁵⁵ [1943] IR 238, at paras 31-33.

⁵⁶ [1951] IR 1.

⁵⁷ *ibid*, Murnaghan J, at para. 4.

The High Court found in favour of upholding the ante-nuptial agreement, and this view was upheld on appeal in the Supreme Court which held that the common law rule of paternal pre-potency could not be consistent with Article 42.1 of the 1937 Constitution. However, the High Court judgment was also a fulsome articulation—in obiter dicta—of the denominational preferentialism of the still new constitutional text and the discursive process of and between denominationalism and liberal secularism. The jurisprudence around the religious education of children from “mixed-marriages” provided ample opportunity for the expounding of an identity for the constitutional polity.

The case concerned the carrying away of three children by a Protestant father who sought to repudiate an ante-nuptial agreement to raise the children in the faith of the mother, a Catholic. Gavan Duffy P reiterates the new opportunities which the Irish Constitution has left open to Irish judges; there is a triumphalism in the avowedly confessional nature of the polity, in contradistinction to the modernity of contemporaneous Anglophone jurisdictions. The judgment reads:

“We are a people of deep religious convictions. Accordingly, our fundamental law deliberately establishes a Christian constitution; the indifferentism of our decadent era is utterly rejected by us. The Irish code marks a new departure from time-honoured precedents which are not ours and gives us a polity conceived in a spirit and couched in a language unfamiliar to the jurisprudence which dominated the United Kingdom of Great Britain and Ireland.”⁵⁸

The Preamble is once more interpreted as having an opening invocation which “explicitly acknowledges the supremacy of the moral law founded on Christian doctrine.”⁵⁹ This interpretation is given further ballast in later provisions of the Constitution with Articles 41, 42 and 44, “voicing the cherished convictions of a pious people who revere the Christian moral order”.⁶⁰ Article 44, which specifically deals with religion is interpreted, with its “special position” of the Roman Catholic Church, as in some ways having a preference inherent within the identity of the text.⁶¹ This interpretation rests on the affinity between

⁵⁸ [1951] IR 1. Gavan Duffy P. at para 35.

⁵⁹ *ibid*, at para 36.

⁶⁰ *ibid*, at para 37.

⁶¹ “Thus religion holds in the Constitution the place of honour which the community has always accorded to it in public opinion. The right of the Catholic Church to guard the faith of its children, the great majority, is registered in our fundamental document, while non-Catholics are assured that their principles shall be respected.” *ibid*, at para 38.

Articles of the Constitution and papal encyclicals found in the doctrine of the Catholic Church. Therefore, as a text imbued with Catholicity, and recognition of the ‘special position’, an interpretation is permissible which overturns precedent emanating from English common law, which would have favoured paternal prepotency, in favour of an authentically *Irish* reasoning which relies on the Catholic identity of the polity. Although the formal intertextual reliance on encyclicals is postulated, it is not endorsed at this juncture.

“Articles 41 and 42, redolent as they are of the great papal Encyclicals *in pari materiâ*, formulate first principles with conspicuous power and clarity... Thus, for religion, for marriage, for the family and the children, we have laid our own foundations. Much of the resultant polity is both remote from British precedent and alien to the English way of life...Perhaps the relevant Canons were part of the old Common Law and are again a part of it now that no Reformation law remains to suppress their vigour. Possibly the constitutional recognition of the special position of the Catholic Church would authorise our Courts to take judicial notice of Canon Law; but I cannot decide those questions without full debate...In my opinion, an order of the Court designed to secure the fulfilment of an agreement, peremptorily required before a "mixed marriage" by the Church whose special position in Ireland is officially recognised as the guardian of the faith of the Catholic spouse, cannot be withheld on any ground of public policy by the very State which pays that homage to that Church...”⁶²

The language herein demonstrates the inversion of British narrative of political and legal superiority.⁶³ It does not afford supremacy to the doctrine of the Roman Catholic Church, it is however, not completely disavowing this supposed preferentialism either. Indeed, in the dissenting opinion of William Bullick Black J—Sinn Féin and Fianna Fáil activist and son of a Methodist clergyman, making him the only Protestant member of the bench at that time—denied that there was any constitutionally prescribed preferentialism for Roman Catholicism contained in Article 44.1.2°, adding that if the text had established a distinction of preference based on religion “I never could have made a public declaration that I would

⁶² [1951] IR 1. Gavan Duffy P. at para 39.

⁶³ A position well characterised by an observation of Lord Bingham “When I started in practice [1959], it was an almost universal article of faith that English law and legal institutions were without peer in the world, with very little to be usefully learned from others.” In Tom Bingham, *There is a World Elsewhere: The Changing Perspectives of English Law*, The Business of Judging (Oxford University Press, 2000). p.88

uphold it; and if, in fact it did, I imagine it would gain for us an unenviable distinction among the democratic peoples of the world”.⁶⁴ Indeed, the dissenting judgement is fulsome in its critique of the reasoning of the majority, wherein references to Canon Law and the Preamble give the distinct impression that there is a preferential distinction for Roman Catholicism. The dissenting judgment reformulates the factual scenario, narrativizing a situation wherein the father involved would be Catholic and the mother Protestant, questioning whether the law, constitutionally based, would overturn the common law rule of paternal prepotency. Black J is unsure whether, on the basis of the ruling of the majority, that the finding would be the same:

“However, on reading the summary of the learned President's judgment, which was available to all the public, the first impression I got was that Mr. Liston's view was not his view as to the effect of the Constitution, from which I concluded that a great many other people might have got the same impression. I confess that on reading later his full judgment, as placed before us here, this first impression was appreciably weakened. Nevertheless, even now, having regard to his reference to Canon Law and to the Preamble, and, particularly, article 44, 2, of the Constitution, I am not at all sure as to whether the learned President thought that in regard to these ante-nuptial agreements the Constitution was discriminatory as between different religions or whether he thought that it was not. Ever since this Constitution was enacted I was firmly convinced, as I am still, that in respect of all legal rights and privileges, it admitted of no discrimination as between persons of different religions.”⁶⁵

The non-conformist dissent of Black J was continuing and building on his judgment *Re Corcoran Infants*.⁶⁶ Perhaps the most salient critique proffered by Black J in *Re Tilson* is that by not conclusively and explicitly stating that Article 44 in conjunction with other Articles of the text did not confer a benevolence on the Catholic Church, the justices were allowing this preferential construction an affordance of contemporaneous or future authority, he critiqued the other justices for their ambiguity on the matter. He called for a conclusive statement on the matter: “I think it would be in the national interest, and in that of our jurisprudence, that we should here and now unequivocally declare that our

⁶⁴ [1951] IR 1. Bullick Black J. at para 14.

⁶⁵ [1951] IR 1. Black J. at para 14.

⁶⁶ 86 ILTR 6.

Constitution does not confer any such privileged position before the law upon members of any religious denomination whatsoever.”⁶⁷

What we have evinced through this line of jurisprudence is the judicial arm of the polity overturning centuries of settled common law precedent, yes with the equality provisions of the Constitution, but also by and through an appeal and reliance on the catholicity of the polity. The *Ne Temere* decree 1908, which stipulated the specific requirements for legitimate Catholic marriage, and was interpreted as placing an obligation on parents in mixed marriages to an ante-nuptial agreement to raise their progeny in the Catholic faith, if they were to marry in a Catholic ceremony, was seemingly a key constituent in the reasoning of Gavan Duffy P in the High Court ruling of *Re Tilson*—unreferenced, but suffusing the circumstance of the case and judgement. This contributed to a view, expressed through oral history and folk memory of religious minorities, of the new Irish polity was allowing a permissible derogation from rule of law where the nationalist metanarrative could be serviced through having a formal preference for the Roman Catholic Church.⁶⁸ This interpretation of the *Tilson* case became significant within the historiography, despite the Supreme Court explicitly stating that:

“It is right, however, to say that the Court in arriving at its decision, is not now holding that these last-mentioned Articles confer any privileged position before the law upon members of the Roman Catholic Church, and during the argument counsel for the respondent expressly disclaimed any such privileged position.”⁶⁹

⁶⁷ [1951] IR 1. Black J. at para 15.

⁶⁸ One could include in this folk memory the Bandon Valley Massacres, which historians, revisionist and nationalist, still dispute the sectarian nature of killings, see Regan, John, M. ‘The ‘Bandon Valley Massacre’ as a Historical Problem’ [2012] *History*, vol. 97, no. 1 (325), pp. 70–98. Furthermore, the Mayo Librarian Controversy, in which a Protestant woman, Letitia Dunbar-Harrison was precluded from taking up her post in the County library and removed to a position in Dublin, which elicited the reasoning of Dev, “I say the people of Mayo, in a county where, I think – I forget the figures – over 98 per cent of the population is Catholic, are justified in insisting upon a Catholic librarian” see, J.H. Whyte, *Church and State in Modern Ireland 1923-1970*, (Gill & MacMillan, 1971) p.44-46. And with more specificity to the mixed marriage issue with which we are dealing here the 1957 Fethard-on-Sea Boycott, whereupon the local Catholic hierarchy organised a boycott of local Protestant business on the basis of a dispute on the religious education of children of a mixed marriage, see Catherine O’Connor “Women and Inter-church Marriage in Wexford, 1945-65” in ‘Protestant and Irish: The minority’s search for place in independent Ireland’ (Cork University Press, 2019) eds. Ian d’Alton and Ida Milne. One could also consider in terms of rule of law and a religious minority the murder of a Jewish civil servant in the department of Agriculture, Emmanuel Kahn, in 1923, a murder committed along antisemitic lines with no case to answer for. What is striking is that in 1934 it was mentioned in the Dáil that the identity of the perpetrator was known in senior political echelons, and yet no prosecution took place. Sean MacEntee in a debate on wearing of political uniforms says, “The man who murdered Kahn is going around in a blue shirt.” Dáil Éireann debate - Friday, 23 Feb 1934 Vol. 50 No. 14.

⁶⁹ [1951] IR 1, Murnaghan J at para 35.

As Hogan has acknowledged in his extra-judicial account of the *Re Tilson* case—given the “poor ecumenical relations” between Catholic and Protestant denominations in Ireland at that time—Murnaghan J’s rejection of the preferentialist language of Gavan Duffy P was ‘far too timid’.⁷⁰ And by this timidity, the impression of a constitutionally prescribed Catholic preferentialism was allowed to persist.

The issue of the propriety of utilising the encyclicals of the Catholic Church in the reasoning of the Court would eventually be decided for a time in the affirmative. This was to be divergence from earlier jurisprudence of the 1922 text. In *O’Callaghan v O’Sullivan*,⁷¹ a case which concerned the removal of a Parish Priest by his diocesan Bishop, and whether Canon law of the Roman Catholic Church was contravened in a manner which would render the Decree of Removal *ultra vires*. A central question being dealt with in the reasoning of the Court was whether Canon Law was foreign law, or *a priori* as result of its universality and newly independent Ireland’s confessional majority, part of the corpus of domestic law. Herein we see a core ethno-symbolic nodal point of identity, which animated the independence movement, Catholicity, being discursively rationalised through another metanarratively salient nodal point, sovereignty. In this instance, under the 1922 text, with its robust secularism, the sovereignty of Irish law was adjudged to render Canon Law *foreign*. Kennedy CJ stated the point unequivocally: “the Canon law of the Roman Catholic Church is foreign law, which must be proved as a fact and by the testimony of expert witnesses according to the well settled rules as to proof of foreign law”.⁷² The Constitution, following the Irish constitutional theory, was enacted by sovereign will of the people, they stipulated a manner in which law was validly enacted, and the Roman Catholic Canon was not validated as such:

“all law is foreign to these courts other than the law which these Courts have been set up under the Constitution of Saorstát Éireann to administer and enforce, that is to say, other than laws given force and validity by Article 73 of the Constitution and the enactments of the Oireachtas made after the coming into operation of the Constitution. No other laws are known to us judicially; nor can we take judicial notice of any other laws, unless they are proved to us as facts.”⁷³

⁷⁰ Gerard Hogan, ‘A Fresh Look at Tilson’s Case’ [1998] *Irish Jurist*, New Series, Vol. 33, pp. 311-332.

⁷¹ [1925] IR 90.

⁷² [1925] IR 90 at para 93.

⁷³ *ibid*, at para 75.

And yet, this conclusive statement on the position of Irish law and the doctrine of the Roman Catholic Church would be altered by the enactment of the 1937 text. This was seemingly the inevitable direction of Irish jurisprudence once a generation who had come of age in the context of the formation of a self-consciously denominational state, inculcated educationally and professionally with the lived experience of the Catholic nationalist infusion of the legislative agenda, with a remove from British system,⁷⁴ began interpreting the Constitution. In order to determine what it meant to be a Christian state, where else could one look in a constitutional system which gave textual credence to preferential standing of Catholic Church than to its teachings?

We can see this unfurling development of the identity conscious jurisprudence in *Ryan v Attorney General*.⁷⁵ One often marvels at how justices manage to expound interpretations of the character or identity of the Constitution from the most aberrant of cases. But, perhaps, this is in itself indicative of the cause, for situations not possibly contemplated within the provisions of the basic text, extratextual reasoning will fill in the conceptual gaps. Indeed, with the text's polarities—popular sovereignty and non-explicitly articulated natural⁷⁶ rights—the judiciary are in some manner forced to search out an extra-textual source of guidance, leading to divergent interpretive rubrics. In this instance, where fluoridation of public water supply as established by The Health (Fluoridation of Water Supplies) Act 1960, the Court “discovered” a right to bodily integrity within the Constitution. It located this right as having root of title in Article 40, although not specifically enumerated therein, giving birth to the much discussed unenumerated rights doctrine. The intertextual scaffolding for discovering this right was as a logical corollary of the “Christian and democratic nature of the state”:

“I think that the personal rights which may be involved to invalidate legislation are not confined to those specified in Article 40 but include all those rights which result from the Christian and democratic nature of the State... The words "in particular" show that sub-s. 2 is a detailed statement of something which is already contained in sub-s. 1 which is the *general* guarantee. But sub-s. 2 refers to rights in connection with life and good name and there are no rights in connection with these two matters

⁷⁴ Indeed, Gavan Duffy P regularly referred to the new affordances available to Irish judiciary as ‘reformation’ law no longer applied in Ireland. See, *Cook v Carroll* [1945] IR 515, wherein Sacerdotal privilege was introduced using Quebec as instructive precedent.

⁷⁵ [1965] IR 294.

⁷⁶ Explicitly in Article 1 and 41: Inalienable, imprescriptible, antecedent to all positive law, etc.

specified in Article 40. It follows, I think, that the *general* guarantee in sub-s. 1 must extend to rights not specified in Article 40. Secondly, there are many personal rights of the citizen which follow from the Christian and democratic nature of the State which are not mentioned in Article 40 at all—the right to free movement within the State and the right to marry are examples of this.”⁷⁷

Based in a semantic deconstruction of the meaning of Article 40, the Court introduced two conceptual properties as a rubric for discovering extratextual rights beyond the particular enumerated rights therein. Both concepts, Christianity and democracy, have a textual basis.⁷⁸ However, the Christian invocations do not articulate any formal mechanical function, whereas the democratic provisions have mechanical aspects stipulated in electoral procedure and institutional architecture of the State. Hogan—writing extra-judicially—argued that in terms of Kenny J’s claim that the State had a Christian character: “there is nothing in the Constitution to indicate that the State has this character and, indeed, there is much to suggest the contrary view”.⁷⁹ Yet, when reading the text of the Constitution one encounters the Christian God in several provisions. Further, as Hogan himself acknowledges later within *Unenumerated Personal Rights: Ryan's Case Re-Evaluated*: “The average voter is entitled to assume that each and every provision of the Constitution will have some legal meaning or effect.”⁸⁰ If this appeal to the democratic principle is applied consistently, then judicial cognisance of the evident theism of the text must be a permissible interpretive strategy. That it may not be an objective test for interpreting the broad generalities of the constitutional text does not mean that it was not a proper rubric to do so. If one has an issue with the utilisation of “Christian and democratic nature” test, then it is an issue taken with the language, structure, and identity of the text; which was a democratically validated expression of popular sovereignty through plebiscite.

The situation instantiated by this interpretive framework—the unenumerated rights doctrine—could be rendered as such: we are a self-consciously Christian polity; what does

⁷⁷ [1965] IR 294. Kenny J at paras 26-28.

⁷⁸ Christianity: Preamble, Art.6, Art.12.8, Art.31.4, Art.34.6.1°, Art.44, and the pre-Amendment crime of blasphemy in Art.40.6. Democracy: Art.5, Art.6, Art.12.2, Art.16.2°, Art.18.4 and 18.5, Art. 28A sub-sections 2,3, and 4, Art.46.2, Art.47. As well as these textual articulations, both concepts suffuse the subtext of the Constitution.

⁷⁹ Gerard Hogan, 'Unenumerated Personal Rights: Ryan's Case Re-Evaluated' [1990] *Irish Jurist*, New Series vol.25.1, p.104/105. Further, in this article Hogan J questions the utility of democracy as a rubric within a test for determining personal rights.

⁸⁰ *ibid*, p, 112.

that mean for the rights we think inhere in the individual?⁸¹ In this reasoning we see the picking up of a dropped stitch originally woven by Kennedy CJ in *State (Ryan) v Lennon*,⁸² wherein the Chief Justice reasoned in his dissenting judgment, that there was a substantive constraint on the exercise of popular sovereignty based in theistic natural law:

“The Constituent Assembly declared in the forefront of the Constitution Act (an Act which it is not within the power of the Oireachtas to alter, or amend, or repeal), that all lawful authority comes from God to the people, and it is declared by Article 2 of the Constitution that "all powers of government and all authority, legislative, executive, and judicial, in Ireland are derived from the people of Ireland . . ." It follows that every act, whether legislative, executive or judicial, in order to be lawful under the Constitution, must be capable of being justified under the authority thereby declared to be derived from God. From this it seems clear that, if any legislation of the Oireachtas (including any purported amendment of the Constitution) were to offend against that acknowledged ultimate Source from which the legislative authority has come through the people to the Oireachtas, as, for instance, if it were repugnant to the Natural Law, such legislation would be necessarily unconstitutional and invalid, and it would be, therefore, absolutely null and void and inoperative.”⁸³

This was an interpretation of the 1922 text, which was robustly non-denominational. Yet this interpretation—which couched a normative constraint based in theistic conception of natural law, even though a dissent and not favoured by the two other justices who saw no constraint to the power of parliament to amend under the Constitution—was extracted from it. As we have seen, the judiciary, operating under a different constitutional text, were reluctant to categorically disavow a preferentialist reading of the 1937 text. Therefore, the Court could reason that, constitutionally, the Catholic Church holds a ‘special position’ among the Christian denominations. As such, we may be justified in looking to Rome as *Mater et Magistra* for instruction as to what it means to be a Christian polity. In this vein, the Court had a useful articulation of the rights at hand with an encyclical addressed to “To Our Venerable Brethren the Patriarchs, Primates, Archbishops, Bishops, and all other Local Ordinaries who are at Peace and in Communion with the Apostolic See, and to the Clergy

⁸¹ Although not mentioned in the judgment, the Preamble could give further credence to this line of reasoning “*And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured,*”.

⁸² [1935] IR 170.

⁸³ *ibid*, Kennedy CJ, at para 27.

and Faithful of the *entire Catholic World, and to all Men of Good Will*".⁸⁴ The Irish polity was unequivocally a constituent jurisdiction of the *Catholic World*. So, it took judicial cognisance of *Pacem in Terris* 1963, Chapter 11 of which reads:

"Man has the right to live. He has the right of bodily integrity and to the means necessary for the proper development of life..."

Writing extra-judicially, Donal O'Donnell, when commenting on the utilisation of a papal encyclical as a means of discovering unenumerated rights and the contents of natural law argued that: "If *Pacem in Terris* could be a source of law, then almost any source was possible."⁸⁵ This assertion is questionable. If at that time a judge had attempted to deploy in their intertextual moral reasoning as to the content of natural law the Koran, the Communist Manifesto, the Bhagavad Gita, or the Doors of Perception as a source of authority it would have been totally without foundation within the corpus of Irish law, unlike the explicitly referenced Christian/Catholic character of Ireland's fundamental law. However, this was not in any means exceptional—as Gerard Hogan has persuasively argued—many other European constitutions exhibit even more robust denominational preferentialism.⁸⁶ The Irish Constitution, just as the State more broadly, was and is textually and epistemologically imbued with Catholicity. In an incisive and self-aware passage, O'Donnell critiques the Irish judicial tendency for moral philosophising:

"One of the things I do not like about the way *State (Ryan) v Lennon* is discussed, and certainly was discussed as of 1977, was the implicit endorsement of the approach of the view that a lawyerly approach to the Constitution should be discarded in favour of a more mystical philosophical approach in which the judge was to delve into natural law to ascertain desirable developments in society. There has always been, I think, a weakness in the Irish legal world for the image of the judge as part lawyer, part poet, part philosopher, sometimes with a reference to Brehon law when of course the judges fulfilled all three functions. I am not immune to the appeal of this approach, but I do think that when we hear the strains of that ethereal Celtic mystic music starting up in the background, we should be on our guard."⁸⁷

⁸⁴ My italics.

⁸⁵ Donal O'Donnell, 'The Sleep of Reason' [2017] *DULJ*, Vol. 40, no. 2, pp. 191-214

⁸⁶ The UK, Norwegian, Polish, Italian, Greek Constitutions are used as illustrative examples. See, Gerard Hogan, 'De Valera, The Constitution and the Historians' [2005] *Irish Jurist* 40, pp. 293-320.

⁸⁷ Donal O'Donnell, 'The Sleep of Reason' [2017] *DULJ*, Vol. 40, no. 2, pp. 191-214

However, in the case of *Ryan v Attorney General*, Kenny J was not assuming the role of Brehon, theologian, or latter-day philosopher-king.⁸⁸ He was deferring to the doctrine—understood as infallible—of a Church which understands itself as universal, and which was the majority faith of a polity which constitutionally recognised the ‘special position’ thereof.⁸⁹ Later legal scholars have sought to present these early cases as being in some manner idiosyncratic or peculiar.⁹⁰ They argue that the truly liberal content of the text would eventually and inevitably shine through, and the Catholic symbolism was merely that—symbolic. It was a glib, mantle, and Catholic crosier, decorating a liberal body. However, this may be a wilful embrace of the fallacy of hindsight. What is clear from even a cursory reading of the legislative and constitutional trajectory of the early years of the independent Irish State was that of a self-consciously Catholic polity, perhaps at that time the decorative adornment was that of the tricolour of republicanism.

Hogan has sought to make the argument that the Constitution was far from being the idiosyncratically Catholic text, as characterised by historians Lee,⁹¹ Whyte,⁹² Foster,⁹³ and most forthrightly by Conor Cruise O’Brien in *States of Ireland*, suggested it was. Cruise O’Brien evocatively refers to how the 1937 text “made sectarianism the law of the land in a far more permanent than his predecessors”⁹⁴. Rather, Hogan argues the 1937 text should

⁸⁸ Gerard Hogan, ‘Unenumerated Personal Rights: Ryan’s Case Re-Evaluated’ [1990] *Irish Jurist*, New Series vol.25.1, p. 110.

⁸⁹ Indeed, the remaining ambiguity as to the judicial effect of the ‘special position’ was averred in the Informal Committee on the Constitution, *Report of the committee on the constitution* (Dublin, 1967), “The significance of these provisions has subsequently been touched upon in a number of court decisions but their legal effect has not been conclusively pronounced upon...There seems, however, to be no doubt that these provisions give offence to non-Catholics and are also a useful weapon in the hands of those who are anxious to emphasise the differences between North and South.”

⁹⁰ A point which Gerard Hogan makes across many publications over a wide timeframe. The general thrust of his argument is that the 1937 text is unfairly maligned by non-legal academics who only engage with the text in isolation, not through its subsequent interpretation. Also, that John Hearne’s influence was substantial and that he brought a broadly liberal and egalitarian outlook to the text. See, Gerard Hogan, ‘De Valera, The Constitution and the Historians’ 40 *Irish Jurist* (NS) 293. Gerard Hogan, *The Origins of the Irish Constitution 1928-1941*, (Royal Irish Academy, 2012). Most recently in ‘Four Score and Seven Years of the Constitution – Is a New Birth of Freedom Required?’ Delivered by Mr Justice Gerard Hogan at the Attorney General’s Conference on 11 October 2024 (The Court Services of Ireland). Indeed, Aileen Kavanagh in “The Irish Constitution as 75: Natural Law, Christian Values, and the Ideal of Justice”, *Irish Jurist*, 2012, New Series, Vol. 48 (2012), pp. 71-101, similarly presents an argument in which the dissenting judgments in *Norris* may have only couched their reasoning in Christian ethos: “in order for their judgments to gain acceptance in the legal community, or indeed in Irish society more generally, they had to show that their decision was consonant with Christian values...Ultimately, the minority judgments in *Norris* were based on the dignitarian, democratic, and liberty dimensions of the Constitution.”. This thereby reads a liberalism back into the judgments of the Court which explicitly use Christian vernacular.

⁹¹ J.J. Lee, *Ireland 1912-1985: Politics and Society*, (Cambridge University Press, 1989).

⁹² J.H. Whyte, *Church and State in Modern Ireland 1923-1970*, (Gill and MacMillan, 1971).

⁹³ Roy Foster, *Modern Ireland: 1600-1972*, (Penguin Books, 1989).

⁹⁴ Conor Cruise O’Brien, *States of Ireland*, (Hutchinson, 1972), p.191.

be commended for how much it was not imbued with Catholicity, even espousing ‘Protestant’ and secular values.⁹⁵ The argument proffered by Hogan, in his extra-judicial writings, is that it is very difficult to see why provisions such as the Article 44 and the ‘special position’ caused so much fuss; it only effected so called “lawyer’s law”, or technical matters relating to charities.⁹⁶ However, as can be seen in *Re Tilson*, among others, that is not entirely reflective of the overall impact of such provisions. The indirect impact of having such a provision within the Constitution is evident from the caselaw so far detailed.

Indeed, Hogan critiques much of the historiography of the text,⁹⁷ and specifically the observation of Foster that there was an assumed identity of the Irish polity as Catholic as evinced in Articles 40-45.⁹⁸ In doing so Hogan engages in an extended treatment of other polity’s constitutional arrangements of Church and State. He points to other European constitutions and the more explicit established Church formulas in confessionally Protestant countries, and the proliferation of similarly articulated ‘special position’ formulas in Catholic countries. Hogan praises the advancement of fundamental rights protections found in the Irish Constitution and situates his argument in a post-Fifth Amendment championing of the true character of the content of Article 40 as evidence of its liberal, rationalist, or Atlanticist nature, relying on the eventual hermeneutic of the *acquis constitutionnelle* which determined that the ‘special position’ had only symbolic meaning. Hogan acknowledges on one hand that it could be judicially recognised in *Bank of Ireland Trustee Co. Ltd v Attorney General*⁹⁹ that it was “implicit in the terms” of the Constitution that “that adherence to and practice of any of the religions there recognized may be presumed to be of public benefit”. Then on the other hand, point to judicial comment, long after the amendment of the ‘special position’ provision had been enacted,

⁹⁵ Gerard Hogan, ‘De Valera, The Constitution and the Historians’ [2005] *Irish Jurist*, 40, pp. 293-320.

⁹⁶ *ibid*, p.297.

⁹⁷ A critique only recently revisited, ‘Four Score and Seven Years of the Constitution – Is a New Birth of Freedom Required?’ Delivered by Mr Justice Gerard Hogan at the Attorney General’s Conference on 11 October 2024 (The Court Services of Ireland).

⁹⁸ Roy Foster, *Modern Ireland: 1600-1972*, (Penguin Books, 1989) p.544 “But the democratic, popular sovereignty approach was combined with an assumption that the nature and identity of the Irish polity was Catholic, reflected in five articles defining ‘rights’. These were much influenced by papal encyclicals and current Catholic social teaching. Divorce was prohibited; the idea of working mothers denounced; the Roman Catholic Church granted a special position... as guardian of the faith of professed by a great majority of the citizens’, though the rights of the minority Churches were defined”.

⁹⁹ [1957] I.R. 257. Dixon J at 275.

that it “was not considered by constitutional lawyers to have any legal implications”¹⁰⁰ and was “merely a recognition of a fact and implied no privileged position at law”.¹⁰¹

Hogan argues that it is the content of the rights, and not their origin which should be our rubric for adjudging their character, whether inspired by Thomas Aquinas or Thomas Paine.¹⁰² The implication of this exhortation is that we have reached an epistemological vantage point wherein we can adjudge the quality of such concepts by a standard not informed by their origins. While all political and legal concepts exhibit elasticity, none ever proves to be exactly as malleable as any other. All bear the marks of their special historical trajectories, as long as adherents of continuity of that original meaning remain to advocate for that interpretation.¹⁰³

Hogan’s argument does not disprove the catholicity of the Irish text, rather, proving the comparative confessional nature of other texts. This analysis demonstrates only that Ireland was not an isolated case and that it was not as formally denominational as other more formal arrangements. However, as Hogan has acknowledged elsewhere, Ireland informally was perhaps more confessional than other more avowedly confessional states. However, this does not negate the influence of the avowedly denominationally specific trinitarian language that was embedded in the Constitution. Indeed, Ronit Lentin offered a critique of the 1937 text which persuasively argued that the construction of “Irishness” as a constitutional subject excluded from full enfolding within the assumed body politic in terms of class, ethnicity, and gender. Lentin suggested that Ireland at her time of writing, 1998,¹⁰⁴ exhibited characteristics of an ethnic democracy, wherein the levers of democratic power are synonymous with the identitarian majority. This critique was written even before the Twenty-seventh Amendment was enacted, which furthered the exclusionary construction of Irishness as a constitutional subject.

Hogan falls prey to a similar trap to that he critiques other historians for: he accepts as a basic premise that catholicity is in some manner a negative presence and influence within the constitutional text. The historiography expresses this in reading thick Catholicism in

¹⁰⁰ *O’Beolain v Fahy* [2001] 2 IR 279. Geoghegan J, at 365.

¹⁰¹ *Campaign to Separate Church and State Ltd v Minister for Education* [1998] 3 IR 321. Barrington J at 355.

¹⁰² Gerard Hogan, ‘De Valera, The Constitution and the Historians’ [2005] *Irish Jurist* 40.

¹⁰³ Samuel Moyn, ‘The Secret History of Constitutional Dignity’ [2014] *Yale Human Rights & Development Law Journal* Vol. XVII.

¹⁰⁴ Ronit Lentin, ‘Irishness’, the 1937 Constitution, and Citizenship: a gender and ethnicity view’ [1998] *Irish Journal of Sociology*, Vol.8.

the text of the Constitution and critiquing it on those grounds. Hogan—in critiquing this interpretation in the historical treatments of the 1937 text—reads his liberalism back into the text, arguing that the Catholicity therein was thin, minimal, or decorative. However, these arguments present a view of Catholicism very much shaped by the character of its Irish manifestation, expressive of both Ultramontanist and Jansenist, thereby associating what are presented as positive aspects of the text as emerging not from its Catholic lineage, but rather from post-reformation and Enlightenment values: liberalism, and republicanism. Yet this does not sufficiently account for the broad context of Catholic thought and the variety within Church teaching and structure. There is a historical counter-narrative wherein it is from Catholicism, with Aquinas’s theological formation as a Dominican, that these values—democracy, popular sovereignty, and separation of temporal and ecclesiastical powers—emerge.¹⁰⁵ It has further been argued that the origin of human dignity as a constitutional principle can be traced to the Irish Constitution and the context of “civil society” Catholic thought at that time which was against corporatist Catholic thought in placing the individual human person as a holder of dignity, as eventually expressed in the papal encyclical *Divini Redemptoris*.¹⁰⁶

What is absent from Hogan’s call to examine the content as opposed to the origin of a right is acknowledgement that how we adjudge the value content of a right is contingent on our socialisation in an epistemic community, thereby making the genealogy of a right significant. It is clear that in several decades of the operation of the 1937 Constitution it was understood as a text which, was distinctively Irish *qua* Catholic, and out of principle and pragmatism, in the face of nationalist political aspirations enshrined an element of pluralism, its moral point of view was orientated to the Holy See.¹⁰⁷ Moreover, as Hogan effectively illustrates, the Irish constitutional polity was part of a broader European Catholic constitutionalism, and in terms of analysis, the *acquis constitutionnelle* is as important, if not more so, than the bare words on the page. As such, we can see how the Irish Constitution was interpreted in a manner which for many decades was informed by

¹⁰⁵ See, Rahilly, Alfred. ‘The Catholic Origin of Democracy’ [1919] *Studies: An Irish Quarterly Review*, vol. 8, no. 29, pp. 1–18. And in a more detailed historical exposition Rahilly, Alfred. ‘The Sources of English and American Democracy’ [1919] *Studies: An Irish Quarterly Review*, vol. 8, no. 30, pp. 189–209. Across both these articles Rahilly argues that the so called “Protestant” values which Hogan J praises within the text owe more to Medieval Catholicism than what he styles as reformation despotism.

¹⁰⁶ Samuel Moyn, ‘The Secret History of Constitutional Dignity’ [2014] *Yale Human Rights & Development Law Journal*, Vol. XVII.

¹⁰⁷ Or more accurately to St. Patrick’s Roman Catholic Cathedral in Armagh or St. Mary’s Pro-Cathedral in Dublin. Although Irish Catholicism can be characterised by ultramontanist, it is acknowledged that local hierarchy are more significant in determining the doctrinal character of the local Church.

being a part of the intellectual and doctrinal development of the Roman Catholic Church, a point acknowledged in the Informal Report of Committee on the Constitution, wherein the analysis of the constitutional prohibition on divorce is critiqued as being overly stringent on the basis of developments emanating for the doctrinal developments of Vatican II.¹⁰⁸

However, the perception that there was a Catholic preferentialism within the Constitution would be significantly ameliorated by a later conclusive acceptance of Murnaghan J's timid rejection—along with the more forthright dissent of William Bullick Black J—of any constitutionally prescribed preferentialism in *Re Tilson*. The jurisprudence of the Court would conclusively consign denominational preferentialism within the Constitution with seeming finality to the repository of history, which again was in keeping with developments emanating from teachings emergent from currents of Vatican II.¹⁰⁹

“While our institutions reflect a firm conviction that we are a religious people, those institution by solemn constitutional injunction may not officially involve religion in such a way as to prefer, discriminate against, or oppress, a particular sect or religion.”¹¹⁰

8.4 Benevolent Secularism

That there has been no established Church in Ireland since the passage of the Irish Church Act 1869 which occasioned the disestablishment of the Anglican communion in Ireland,¹¹¹ and that this separationist Church/State arrangement was maintained in both 1922 and

¹⁰⁸ Informal Committee on the Constitution, *Report of the committee on the constitution* (Dublin, 1967).

¹⁰⁹ *Unitatis Redintegratio*, (Vatican, 1964), is the Church's decree on Ecumenism, which was passed in Vatican II. Chapter 3 provides that, “The children who are born into these Communities and who grow up believing in Christ cannot be accused of the sin involved in the separation, and the Catholic Church embraces upon them as brothers, with respect and affection. For men who believe in Christ and have been truly baptized are in communion with the Catholic Church even though this communion is imperfect. The differences that exist in varying degrees between them and the Catholic Church - whether in doctrine and sometimes in discipline, or concerning the structure of the Church - do indeed create many obstacles, sometimes serious ones, to full ecclesiastical communion. The ecumenical movement is striving to overcome these obstacles. But even in spite of them it remains true that all who have been justified by faith in Baptism are members of Christ's body, and have a right to be called Christian, and so are correctly accepted as brothers by the children of the Catholic Church.” Chapter 16 of *Lumen Gentium*, (Vatican, 1964), speaks of the salvation of those who not yet received the gospels through no fault of their own, Muslims who adore the merciful God and profess the faith of Abraham, and those who strive for a good life without the knowledge of God. Chapter 28 of *Gaudium et spes*, (Vatican, 1965), explicitly advocates respect for pluralism “Respect and love ought to be extended also to those who think or act differently than we do in social, political and even religious matters. In fact, the more deeply we come to understand their ways of thinking through such courtesy and love, the more easily will we be able to enter into dialogue with them.” And most directly *Nostra Aetate*, (Vatican, 1965), in totality.

¹¹⁰ Quoting from an American authority in *Quinn's Supermarket v Attorney General* [1972] IR 1.

¹¹¹ For analysis of freedom of conscience as British Gladstonian public policy for pacifying Ireland see, Steele, E. D. ‘Gladstone and Ireland’ [1970] *Irish Historical Studies* 17, no. 65, pp. 58–88.

1937, does not diminish the textual and interpretive significance of Catholicism. We have seen in the triumphant interpretative constructs of the judiciary the two elements of the supposed Irish quintessence, Catholicism and Gaelic nationalism. The influence of a particular denomination was not predicated on formal establishment. The influence of denominationalism in Irish law of the first several decades of the independent state was but one constituent part of broader national process of post-colonial inversion. This social phenomenon was intensified by partition along sectarian lines which occasioned an overwhelming majority of the population¹¹² of one creed, with a political elite—who like the population as a whole were deferential to the Church—constructed a polity¹¹³ which reflected its moral worldview. So, there may have been formal non-preferentialism in Article 44, but a confessional ethos was inherent the epistemic viewpoint clearly informed the imaginary of the electorate, legislatures, and the judiciary as an interpretive community.

This Catholic Democratic interpretive framework would eventually ameliorate to one which can be characterised as ‘benevolent secularism’. Benevolent secularism is a model for a polity wherein a state recognises and encourages an institutional faith as a legitimate public actor, carrying out key public functions and influencing policy, while also guaranteeing freedom of conscience and religion.¹¹⁴ Yet, we have seen how the judiciary, as a relatively homogeneous interpretive community, were interpreting the constitutional settlement of the polity through a distinctively Catholic framework, exhibiting formal preferential deference to Church influence. This preferentialism would lose normativity

¹¹² In the census of 1936, a year before the passage of Bunreacht na hÉireann, the population of Ireland’s Southern polity was 2,968,420. Of that total populace 2,773,920 were Catholic, meaning roughly 93% religious identity homogeneity. In the polity of Northern Ireland the percentage of population in census 1937 which was Roman Catholic was 33.5% of overall population. The majority of the population 66.5% were roughly evenly split between Presbyterian and Church of Ireland. Data available at, <https://www.cso.ie/en/census/censusvolumes1926to1991/historicalreports/census1936reports/>.

¹¹³ Most significantly in areas of education and public morality. These areas would permit a near totalising reach of the Church in affecting the cultural matrix of Irish society. See, Nolan, Michael, ‘The Influence of Catholic Nationalism on The Legislature of The Irish Free State’ [1975] *Irish Jurist* vol. 10, no. 1, pp. 128–69. Indeed, the socialisation in education was significant and studies of the teaching of history have pointed to the overtly nationalistic history textbooks of the Christian Brothers among a wider milieu of Catholic and Nationalist interpretation of history taught in nascent years of independence. See, John O’Callaghan, *Teaching Irish Independence: History in Irish Schools 1922-1972* (Cambridge Scholars Publishing, 2009). The pedagogical emphasis on Catholicism and political freedom in the teaching of history, teleologically fostering a national identity, also served a social function “emphasis served two principal functions. Firstly, it was a device by which the Irish people could reconcile themselves to their contemporary failures in the fields of economic and social progress; secondly, it represented a standard by which the measure of political separation from Britain could be justified”. See, Gabriel Doherty ‘National Identity and the Study of Irish History’ [1996] *The English Historical Review*, Vol. 111, No. 441, pp. 324-349.

¹¹⁴ Carolyn M. Warner, ‘Benevolent Secularism and the Recalibration of Church-State Relations in Ireland in the Aftermath of the Clergy Child Sex Abuse Scandals’ [2020] *Journal of Church and State* vol. 62 no. 1, pp. 86-109.

when the Church itself began to acquiesce to modernity¹¹⁵ and pluralist society¹¹⁶ in a post-Vatican II context.¹¹⁷

We can evince a conceptual reordering of the dominant judicial philosophy during this period from *Catholic* democracy to *democratic* Christianity.¹¹⁸ This means that while the judiciary, were still informed by their socialisation in a confessional culture, they were also professionally acculturated to working within a constitutional democracy. This would eventually lead to an evident confidence in transgressing from exact doctrinal precepts of Catholic social teaching, while still exhibiting a model of thought which was distinctly informed their confessional imaginative landscape. The precise doctrine of the Church is subordinated to the value of developing the principles which inform the doctrines themselves, *Mater si, Magistra no.*¹¹⁹ We see the judiciary making substantive the pluralist

¹¹⁵ This is a far cry from the critique one finds in Pope Pius X, *Pascendi Domini Gregis* (Vatican, 1907) where modernists are described as by their work to “generate a pestilence in the air which penetrates everywhere and spreads the contagion.” Or where the supposed modernists argument that all religion, including Catholicism as having root in sentiment of the subconscious need for the divine “Those who hear these audacious, these sacrilegious assertions, are simply shocked! And yet, Venerable Brethren, these are not merely the foolish babblings of infidels. There are many Catholics, yea, and priests too, who say these things openly; and they boast that they are going to reform the Church by these ravings!”

¹¹⁶ A point which was specifically referenced in the 1966 Report from the Committee on the Constitution when discussing the prohibition on divorce in Article 41.3.2°, “Finally, attention is sometimes drawn in discussing this subject to the more liberal attitude now prevailing in Catholic circles in regard to the rites and practices of other religious denominations, particularly since the Second Vatican Council...The absolute prohibition in our Constitution has, therefore, the effect of imposing on Catholics regulations more rigid than those required by the law of the Church.”

¹¹⁷ Again this doctrinal currents are evident throughout the encyclicals to emerge from Vatican II. As already averred to, *Lumen Gentium*. (Vatican 1964), *Gaudium et spes*, (Vatican, 1965), and most directly *Nostra Aetate*, (Vatican, 1965).

¹¹⁸ We can see this as part of the gradual process by which the Catholic church itself came to accept liberal democracy as a morally superior form of government. From the position in Pope Gregory XVI, *Mirari Vos* (Vatican, 1832) where religious toleration, as emblematic principle of liberal democracy, is described as “absurd and erroneous proposition which claims that liberty of conscience must be maintained for everyone...When all restraints are removed by which men are kept on the narrow path of truth, their nature, which is already inclined to evil, propels them to ruin.” The position is slightly ameliorated by the time of Pope Leo XIII *Libertas* (Vatican, 1888) where the state is given sanction “to tolerate what is at variance with truth and justice, for the sake of avoiding some greater evil, or of obtaining or preserving some greater good.”. Indeed, the Church at this time was ambivalent in terms of what form of government was morally desirable, so long as common good was motivating end “the Empire, the Monarchy, and the Republic. By giving one's self up to abstractions, one could at length conclude which is the best of these forms, considered in themselves; and in all truth it may be affirmed that each of them is good, provided it lead straight to its end - that is to say, to the common good for which social authority is constituted” Pope Leo XIII, *Au Milieu des Sollicitudes*, (Vatican, 1892). Most explicitly endorsing Christian Democracy as the most morally and theologically consistent form of governance in Pope Leo XIII, *Graves de Communi re*, (Vatican, 1901). Until we get the ultimate doctrinal sanction for freedom of religion and conscience in Pope John XXIII, *Pacem in Terris* (Vatican, 1963) “Also among man's rights is that of being able to worship God in accordance with the right dictates of his own conscience, and to profess his religion both in private and in public.”

¹¹⁹ For instance, the value of religion is upheld, not merely the value of Catholicism, although Catholicism benefits from this safeguarding of the value of religion within the polity. The family as the fundamental unit of society is permitted a privacy which allows them to transgress prohibition on contraception etc.

strand of Christian democratic constitutional philosophy, remaining a Christian polity, but also a multifaith democracy.

We can see this development in *Quinns Supermarket*.¹²⁰ This case concerned an exemption from closing hours imposed on shops involved in sale and preparation of Kosher meat which was provided for in the Victuallers' Shops (Hours of Trading on Weekdays) (Dublin, Dun Laoghaire and Bray) Order, 1948. This was constitutionally rationalised as a conflict between the constitutional guarantee of the free profession and practice of religion and the constitutional guarantee against discrimination on the ground of religious profession, belief or status. Appealing to the 'true spirit' of Article 44 the Court reasoned: "It would be completely contrary to the spirit and intendment of the provisions of Article 44.2, to permit the guarantee against discrimination on the ground of religious profession or belief to be made the very means of restricting or preventing the free profession or practice of religion."¹²¹ Brian Walsh J interprets the identity of the Constitution as one which acknowledges the Christianity of the people, but also that the polity is a pluralist democracy:

"Our Constitution reflects a firm conviction that we are religious people. The preamble to the Constitution acknowledges that we are a Christian people and Article 44, s. 1, sub-s. 1, acknowledges that the homage of public worship is due to Almighty God but it does so in terms which do not confine the benefit of that acknowledgment to members of the Christian faith. In Article 44, s. 1, of the Constitution the State recognises the existence of the several religious denominations there named...This declaration is an express recognition of the separate co-existence of the religious denominations, named and unnamed. It does not prefer one to the other and it does not confer any privilege or impose any disability or diminution of status upon any religious denomination, and it does not permit the State to do so."¹²²

How then should the judiciary interpret the reality of anterior rights based in natural justice when the hypertextual¹²³ relationship between Bunreacht na hÉireann and the doctrinal

¹²⁰ [1972] IR 1.

¹²¹ *ibid*, Walsh J. at para 22.

¹²² *ibid*, Walsh J. at para 21.

¹²³ Here again I am using this terminology in the manner of Genette "By hypertextuality I mean any relationship uniting a text B (which I shall call the hypertext) to an earlier text A (I shall, of course, call it the hypotext) upon which it is grafted in a manner which is not of commentary...let us posit the general notion of a text in the second degree, a text derived from another pre-existent text... text B not speaking of text A at all but being unable to exist, as such, without A, from which it originates through a process I shall

corpus of Catholicism has changed? The existence of these rights is unequivocally recognised by the Court¹²⁴ and therefore they are obliged by their role as interpreters of the text to determine from what extratextual source they shall adjudge these rights.¹²⁵ Indeed, Walsh acknowledged this as the role of judges, interpreting from their training and experience, guided by ideas of justice, prudence, charity, and conditioned by the passage of time interpret what justice—in its anterior standing to law—and what rights, are. Furthermore, how this is to be determined in light of prevailing ideas and concepts.¹²⁶ That these concepts can be an overly vague set of criteria instantiates a circle of subjectivity wherein the judge must rely on their own moral sense and intelligence.¹²⁷

Therefore, even if a judge is claiming to merely be following precedent they are relying on the moral sense of a previous judicial agent, and if they are overturning previous precedent, they are exercising their moral sense through situated agency. It is this inherent cognisance of context and temporality which to me suggests not a Herculean judge as theorised by Dworkin—a judge who is capable of finding the right answer to a hard case—but rather an Odyssean judge, who accepts the realities around them, and finds *an* answer, exercising their intelligence to deliver judgments with elastic or counter-intuitive reasoning.

The interpretive framework applied to the Constitution at this juncture was to permit the contestability of its fundamental concepts in response to changing social values. It was interpreted as such: the Preamble envisages a constitution which can absorb or be adapted to such changes. In other words, the Constitution did not seek to impose for all time the ideas prevalent or accepted with regard to these virtues at the time of its enactment.¹²⁸

provisionally call transformation, and which it consequently evokes more or less perceptibly without necessarily speaking of it or citing it. Genette, *Palimpsests: Literature in the second degree*, (University of Nebraska Press, 1997) p.5.

¹²⁴ “Articles 41, 42 and 43 emphatically reject the theory that there are no rights without laws, no rights contrary to the law and no rights anterior to the law. They indicate that justice is placed above the law and acknowledge that natural rights, or human rights, are not created by law but that the Constitution confirms their existence and gives them protection.” *McGee v Attorney General* [1974] IR 284. Walsh J. at para 13.

¹²⁵ In a sense here the authorial intent when including these extratextual rights is insufficient as in theory the nation is the constitutional author, the author is not I, you, or them, it is we. Reasoning as to what was the intent of those in 1937 is not only speculative, but also irrelevant as that was us then, not them or they, it is what “we” intend. What matters is what “we” think now as we are author and interpreter. We are interpreting our own work and giving it meaning. We are the author, and we die and are reborn in our daily lifespan as a national we. The author is dead, long live the author! But how are the interpreters of intent any more equipped to determine contemporaneous intent then intent of previous generations?

¹²⁶ *McGee v. Attorney General* IR 284

¹²⁷ Brian Walsh, ‘The Constitution and Constitutional Rights’ in Frank Litton (eds) *The Constitution of Ireland 1937-1987*, Administration (Special Issue) [1987] *Journal of the Institute of Public Administration*. Vol 35. No 4, p, 106.

¹²⁸ *The State (Healy) v. Donoghue* [1976] IR 325. O’Higgins CJ, at para 8.

So, although non-denominational, the fundamental rights which inform the identity of the Constitution were still interpreted as having a theological foundation. The judgment of Walsh J in *McGee*¹²⁹—a case wherein the Criminal Law Amendment Act 1935, which banned the importation and sale of contraceptives was successfully challenged—was a trojan horse judgment. It relies on Aquinian natural law to discover a right to marital privacy wherein obtaining contraceptives can be permitted, thereby contravening Church doctrine while maintaining that the anterior source of natural justice is of divine origin. Both in its Preamble and in Article 6, the Constitution acknowledges God as the ultimate source of all authority:

“The natural law as a theological concept is the law of God promulgated by reason and is the ultimate governor of all the laws of men. In view of the acknowledgment of Christianity in the preamble and in view of the reference to God in Article 6 of the Constitution, it must be accepted that the Constitution intended the natural human rights I have mentioned as being in the latter category rather than simply an acknowledgment of the ethical content of law in its ideal of justice. What exactly natural law is and what precisely it imports is a question which has exercised the minds of theologians for many centuries and on which they are not yet fully agreed. While the Constitution speaks of certain rights being imprescriptible or inalienable, or being antecedent and superior to all positive law, it does not specify them.”¹³⁰

That the Court did not see fit to countenance papal encyclicals in a case such as this one—which concerns a moral issue on which the Church has been explicit in doctrinal consistency—demonstrates that any lingering suspicions of Catholic preferentialism from the judiciary at that time were ill-founded. Hogan has argued that that the inherent subjectivity of determining unenumerated rights is demonstrated by the fact that the Court chose—seemingly arbitrarily—to rely on *Pacem in Terris* in *Ryan* and not on encyclicals latterly.¹³¹ I argue that this does not demonstrate an imprecise interpretive strategy from the Court, rather, it was the timing of this case—post Vatican II—which explains the lack of intertextual reliance on encyclicals such as *Casti connubii*¹³² and the later *Humane Vitae*.¹³³

¹²⁹ *McGee v. Attorney General* IR 284.

¹³⁰ *ibid*, Walsh J. at para 26.

¹³¹ Gerard Hogan, 'Unenumerated Personal Rights: Ryan's Case Re-Evaluated' [1990] *Irish Jurist*, New Series vol.25.1.

¹³² Pope Pius XI, (Vatican, 31st December 1930).

¹³³ Pope Paul VI, (Vatican, 25th July 1968).

And yet, this theological pluralism would be robustly rebuffed in the O’Higgins CJ majority judgement in *Norris*¹³⁴—a case which unsuccessfully challenged the constitutionality of both the Offences Against the Person Act 1861, and the Criminal Law Amendment Act 1885—which made consensual homosexual conduct between two adult men illegal. In this interpretation of the identity or character of the Irish Constitution, it is once more vehemently reasserted that Christianity, if not denominationally specific to Catholicism, informs the text, and the teaching of the Christian Churches¹³⁵ should be countenanced in determining the boundaries of individual rights as against common good and public morality, or indeed when constitutional rights conflict.¹³⁶ That the Constitution, democratically sanctioned by the Irish people, established a Christian polity is unequivocal in the interpretation of the Court:

“...the conduct in question had been condemned consistently in the name of Christ for almost two thousand years ... he asserts a "no go area" in so far as the law and the State is concerned in the field of private morality. I do not accept this view, either as a general philosophical proposition concerning the purpose of law, or as having particular reference to a right of privacy under our Constitution. I regard the State as having an interest in the general moral wellbeing of the community and being entitled, where it is practicable to do so, to discourage conduct which is morally wrong and harmful to a way of life and to values which the State wishes to protect... On the grounds of the Christian nature of our State and on the grounds that the deliberate practice of homosexuality is morally wrong, that it is damaging to the

¹³⁴ *Norris v. A.G.* [1984] IR 36.

¹³⁵ “From the earliest days, organised religion regarded homosexual conduct, such as sodomy and associated acts, with a deep revulsion as being contrary to the order of nature...an affront both to society and to God. With the advent of Christianity this view found clear expression in the teachings of St. Paul, and has been repeated over the centuries by the doctors and leaders of the Church in every land in which the Gospel of Christ has been preached. To-day, as appears from the evidence given in this case, this strict view is beginning to be questioned by individual Christian theologians but, nevertheless...it remains the teaching of all Christian Churches that homosexual acts are wrong.” *Norris v. A.G.* [1984] IR 36. O’Higgins CJ, at para 30.

¹³⁶ Kenny J, in *Shaw v. D.P.P.* 1981 WJSC-SC 1235, at para 6, prescribed a three-step method for determining where the priority of rights should be placed and is indicative of the identity of the polity as a constitutional democracy informed by Christian morality, “There is a hierarchy of constitutional rights and when a conflict arises between them, that which ranks higher must prevail. This is the law for the exercise of all three powers of Government and flows from the conception that all three powers must be exercised to promote the common good (Preamble to the Constitution). The decision on the priority of constitutional rights is to be made by the High Court and, on appeal, by this Court. When a conflict of constitutional rights arises, it must be resolved by having regard to (a) the terms of the Constitution, (b) the ethical values which all Christians living in the State acknowledge and accept and (c) the main tenets of our system of constitutional parliamentary democracy.

health both of individuals and the public and, finally, that it is potentially harmful to the institution of marriage, I can find no inconsistency with the Constitution”¹³⁷

That O’Higgins CJ was expressing a rather orthodox position on homosexuality as informed by Christian teaching, and the legislative corpus of the Irish state is not in question. Indeed, his reasoning was expressive of the majority on the bench in the High Court and Supreme Court. His reasoning is expressive of a moral and epistemological conception of homosexuality such that his judgment relies heavily on the “factuality” of its immoral quality in the doctrinal teachings of a religion which was posited as of moral authority, per the Constitution, through the Preamble and Article 6.

The dissenting voice which is most favourably remembered was that of Henchy J, who in his judgment reasoned that the constitutional right to privacy in Article 40.3, as discovered in *McGee*, would render the criminalisation of homosexuality unconstitutional. It is a dissent which developed the reasoning on human personality, so as to argue that the “pluralism necessary for the preservation of constitutional requirements in the Christian, democratic State envisaged by the Constitution”¹³⁸ means that criminalisation of human acts which are adjudged in the moral realm, should only be subject to sanction and qualified when the common good so requires. His conception of human dignity was such that homosexuality was covered within what was constitutionally afforded to the human person and dignity, which the Constitution recognises as inherent therein:

“...the purposive Christian ethos of the Constitution, particularly as set out in the preamble (‘to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations’), to the denomination of the State as ‘sovereign, independent, democratic’ in Article 5, and to the recognition, expressly or by necessary implication, of particular personal rights, such recognition being frequently hedged in by overriding requirements such as ‘public order and morality’ or ‘the authority of the State’ or ‘the exigencies of the common good’, there is necessarily given to the citizen, within the required social, political and moral framework, such a range of personal freedoms or immunities as are necessary to ensure his dignity and freedom

¹³⁷ *Norris v. A.G.* [1984] IR 36. O’Higgins CJ. at para 41.

¹³⁸ *ibid*, Henchy J. at para 42.

as an individual in the type of society envisaged. The essence of those rights is that they inhere in the individual personality of the citizen in his capacity as a vital human component of the social, political and moral order posited.”¹³⁹

Neither Henchy nor McCarthy JJ—also in the minority—reject the Christian ethos of the Constitution, they just read it as detached from the explicit doctrines of Christian denominations, appealing to the charitable virtues espoused by Christ, not the conceptions of justice as developed by Christians. The jurisprudence at this juncture has clear evidence of the nascent formations of the agnostic reading of Christian invocations in the text. Indeed, Hogan characterises the human personality test as presented by Henchy J as: “merely a secular version of earlier natural law theories.”¹⁴⁰ The character of the constitutional polity at this point was developing into one of a robustly pluralist democracy. That *Norris* would be successfully argued in the European Court of Human Rights,¹⁴¹ which found that Ireland’s criminalisation of homosexual conduct was contrary to Article 8 of the ECHR demonstrates that the jurisprudence at a European level was conceptualising the right to privacy in a manner which countenanced rights through a secular epistemology premised on principled universalism, thereby placing the Irish confessional conceptualisation outside of the norms of supranational European jurisprudence.

8.5 Post-Catholic Secularism: Vox Populi, Vox Dei

Norris was an evident retrenchment or reactionary lag from the jurisprudence which had been developing the pluralist, or even secular character of Irish Constitutional interpretation. It is telling that after a relatively short interval, a case which could have relied on Catholic doctrine to interpret the meaning of a constitutional provision instead relied on liberal and democratic constitutional properties, and associated principles, to ground its reasoning. In *Attorney General v X*,¹⁴² a case which concerned a 14-year-old, pregnant as a result of rape by an individual intimately known to the family, traveling to the UK—as many had done before, and many would do after—to obtain access to abortion services. Costello J in the High Court upheld an injunction sought by the Attorney General—and granted by the High Court—to stop the free travel of said minor to obtain

¹³⁹ *Norris v. A.G.* [1984] IR 36, Henchy J. at para 13.

¹⁴⁰ Gerard Hogan, 'Unenumerated Personal Rights: Ryan's Case Re-Evaluated' [1990] *Irish Jurist*, New Series vol.25.1, p.111.

¹⁴¹ *Norris v Ireland* (Application no. 10581/83).

¹⁴² *Attorney General v X* [1992] IESC 1 IR 1.

those services based on the Constitutional principle of the right of the unborn to life. In his judgment Costello J did not refer to Church teaching,¹⁴³ even though the genesis of the Eighth Amendment flowed from the moral imaginary of Catholicism, and anxiety over the metatextual influence of American jurisprudence.¹⁴⁴ The decisive factor in his interpretation was that it was democratic will of a sovereign people mediated through the prescribed constitutional mechanism. In other words, it was valid law, passed in compliance with the *Grundnorm* of popular sovereignty:

“This constitutional amendment was effected in the manner prescribed by art 46 of the Constitution, namely by means of a Bill passed by the two Houses of the Oireachtas, which was approved by the People in a referendum...It seems to me that if the court is apprised of a situation in which the life of the unborn is threatened then it would be failing in its constitutional duty to protect it merely because the Oireachtas had failed to legislate on how it was to have regard to the equal right of the mother, as provided for in the Eighth Amendment...The issue of whether the unborn have a right to life or whether women have a right to have an abortion are moral issues on which there are profound differences and deeply held views throughout the contemporary world. In Ireland the legislature and later a majority of the Irish electorate unequivocally expressed a definite conclusion on these issues by a constitutional amendment which acknowledged the right to life of the unborn and imposed duties on the organs of government to defend and vindicate that right.”¹⁴⁵

On appeal in the Supreme Court, Finlay CJ, sought to interpret harmoniously the text *in toto*, including the extratextual necessities of EU law. In doing so the Court ameliorated the stringency of the High Court’s interpretation of the requirements of Article 40.3.3, as it was seen to insufficiently vindicate the right to life of the mother where there was a substantial risk to her life, not merely health. Where there was a conflict of rights, such as between life and free movement, life would still subordinate travel in a hierarchy. It was determined that

¹⁴³ If the Court had been so minded a clear position was evident in Pope Paul VI, *Gaudium et Spes* (Vatican, 1965) Chapter 27, “whatever is opposed to life itself, such as any type of murder, genocide, abortion, euthanasia or wilful self-destruction...all these things and others of their like are infamies indeed. They poison human society, but they do more harm to those who practice them than those who suffer from the injury. Moreover, they are supreme dishonor to the Creator.”

¹⁴⁴ *Roe v. Wade*, 410 U.S. 113 (1973) Judicial activism of American and Irish Courts in recognising subtextual rights.

¹⁴⁵ *AG v X* 15 BMLR 104. Costello J. at para 16.

the Eighth Amendment must be interpreted with due regard to the life of the mother and was not a blanket prohibition on abortion in totality:

“...if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of pregnancy, such termination is permissible, having regard to the true interpretation of Article 40.3.3. of the Constitution.”¹⁴⁶

Significant for our purposes is that the Court did not engage a process of determining which rights prevails by appeal to Christian doctrine or ethics. It was no longer the case that the Court saw as a constituent property of the text the subtextual presence, or extratextual influence of the corpus of Christian teaching. And yet, the figure of God remained prevalent in the text, persisting as constituent in the Constitutions metanarrative of legitimacy.¹⁴⁷ So, it may indeed be true that within Irish constitutional theory “God is dead”¹⁴⁸ but it may also be a reality that the manner in which the death has been read into the text means that “Dead are all the Gods”.¹⁴⁹ If everything in the text must be harmonised with everything else, there is an inherent substantive judgment to be made as to what aspects must be minimised and prioritized, such that all provisions may be read in a like manner as that of the Christian invocations, if the judiciary interpret that to be appropriate given their intersubjective and contextually informed epistemology. Or, perhaps, the dualist dispensation of authority in Irish constitutionalism, God and the people, has become unipolar: the people have subsumed God, therefore, the apotheosed people are a sovereign in an unqualified manner.

We see formal jurisprudential subordination of theologically founded natural law to sovereign, positivist, and democratically expressed mandate of the Irish people with the passage of the Fourteenth Amendment. This amendment permitted the availability and obtaining of information for abortion services legally available in other jurisdictions. The subordination of the theological aspects of Ireland’s constitutional foundations was made readily apparent with the action taken by President Mary Robinson when she exercised her powers under Article 26 to refer a Bill to the Supreme Court for judicial review in *Re Article 26 and the Regulation of Information (Services outside of the State for Termination of Pregnancies Bill) 1995*,¹⁵⁰ wherein legislation introduced by the Oireachtas, in the wake of

¹⁴⁶ *Attorney General v X* [1992] 1 IR 1. Finlay CJ. at para 38.

¹⁴⁷ Preamble and Article 6 Bunreacht na hÉireann, 1937.

¹⁴⁸ Friedrich Nietzsche, *Thus spoke Zarathustra*, (Oxford University Press, 2005) p.11.

¹⁴⁹ *ibid*, p.68.

¹⁵⁰ [1995] 1 IR 1.

the *X case* and subsequent referenda, to preclude the availability of information as to abortion services in foreign jurisdictions, was subject to *ex ante* review.

The Court was once more dealing with the paradox of Irish Constitutional metanarrativity and foundations. At issue was the natural law foundations upon which that generation of Irish revolutionaries and state builders had premised independence; the central thesis of which was that there was such a divinely ordained natural law. One precept of this was that peoples had a natural right to their sovereignty as expressed in their political and civic life. The paradox emerges when that self-same sovereignty seems to be pointed in a direction of travel which is contrary to, or discordant with, another precept of that foundational natural law thesis. This eventuates analysis of whether this exercise of sovereignty—as provided in the procedures of Constitution—has supremacy, or whether it is constrained by the exercise of sovereignty which included invocations of a higher order theological supremacy. The Irish Constitutional metanarrative has been described as a “conundrum” which the Supreme Court in this instance had to “get around”¹⁵¹—much like the walls of Troy—as the will of the people was being expressed in a manner inharmonious with the foundational metanarrative as previously interpreted.

The Court stipulated the problem in language which is redolent of Kennedy CJ’s dissent in *State Ryan v Lennon*:

“...what is described as “the natural law” is the fundamental law of this State and as such is antecedent and superior to all positive law, including the Constitution and that it is impermissible for the People to exercise the power of amendment of the Constitution by way of variation, addition or repeal, as permitted by Article 46 of the Constitution unless such amendment is compatible with the natural law and existing provisions of the Constitution and if they purport to do so, such amendment had no effect. *The Court does not accept this argument.*”¹⁵²

And yet, the whole claim for national independence and for the sovereignty of the Irish people is based in a conceptual foundation of the natural right of national communities to have co-extensive states; a natural law foundation, which had now been seemingly disavowed by the Irish judiciary. The Court failed to substantively address the

¹⁵¹ Aileen Kavanagh, ‘The Irish Constitution at 75 Years: Natural Law, Christian Values, and the Ideal of Justice’ [2012] *Irish Jurist*, New Series, Vol. 48, p.89.

¹⁵² *Re Article 26 the Regulation of Information Bill 1995* [1995] 1 IR 1. Hamilton CJ. at para 38. My italics.

constitutional provisions and case law that suggested the Constitution itself was subject to natural law.¹⁵³ It is dissonant in that the Court recognised the Constitution as the fundamental law of the State, relying on the constitutional jurisprudence which demonstrates that the Court has “at no stage recognised the provisions of the natural law as superior to the Constitution”.¹⁵⁴ Yet, concomitantly relied on what Síobhan Mullaly has described as “relativist natural law” reasoning in that the Court still relied on the Preamble’s prescribed moral guidance of “prudence, justice, and charity”.¹⁵⁵ One could suggest that, under the 1937 Constitution—other than the joining of the EEC and the attendant referendums which altered the distribution of Irish sovereignty seemingly contravening the nationalist character of the metanarrative—that the Thirteenth and Fourteenth Amendments were the first exercises of popular sovereignty which seemed at odds with how natural law had been conceived of in Ireland up to that point. As such, this case—more than any hitherto—brought out the postmodern scepticism the judiciary had developed to the textual dual loci of authority in Irish constitutionalism. By not dealing with these Amendments or the attendant substantive issues within the case, the Court fundamentally re-conceptualised Irish constitutional narrativity.

By overly associating natural law with Christian, and specifically Catholic social teaching, the judiciary had seemingly thrown the natural law out with the Catholic epistemological bathwater. I would argue there is an important distinction to be made here. This is usually presented in academic analysis as a juncture where natural law was extricated from the judicial vocabulary and sovereignty as mere proceduralism became the paradigmatic interpretation. I suggest that proceduralism as a substantive value, not a mere methodology, became the paradigmatic interpretation. This is the case as it involves the interpretive community of the judiciary, adopting an epistemology wherein the textual reality of constitutional language, is ignored, or an ironic reading applied thereon. This is then justified by appeals to modern social mores, and at its most intellectually rigorous drawing legitimacy for this reading by appealing to shifting tertiary provisions of the text being

¹⁵³ Oran Doyle, ‘Constitutional Identity and Unamendability’, in Ran Hirschl and Yaniv Roznai (eds), *Deciphering the Genome of Constitutionalism: The Foundations and Future of Constitutional Identity* (Cambridge University Press, 2024), p. 264.

¹⁵⁴ *Re Article 26 the Regulation of Information Bill 1995* [1995] 1 IR 1. Hamilton CJ. at para 43.

¹⁵⁵ Síobhan Mullaly, ‘Searching for Foundations in Irish Constitutional Law’ [1998] *Irish Jurist*, New Series, Vol. 33, pp. 333-350.

formally amended in such a manner as to present an episteme of human dignity and autonomy.

Indeed, this is a broadly accurate description of the socio-cultural as well as politico-legal context. At this juncture in time, Ireland was fast becoming one of the most globalised open economies in the world. With this came the attendant social conditions of individualism, secularism, and social dislocation associated with post-industrial economies in late-stage modernity.¹⁵⁶ In the aftermath of the *X* case there was a publicly jarring awareness of the real implications which could have followed from a judicial reading with rigorous textual fidelity of the Eighth Amendment, such as *Costello J* in the High Court. Thereafter, a pattern of constitutional amendment began which only seems to have potentially culminated with the failure to pass the proposed Thirty-ninth and Fortieth Amendments. These proposals would have extended the constitutional definition of the family beyond the institution of marriage,¹⁵⁷ and altered the much maligned language in Article 41.2 where the social function of women is constitutionally defined in terms of motherhood and the domestic realm.¹⁵⁸ Between 1992 and 2024 the Constitution was changed so as to stipulate that the right to life of the unborn would not limit freedom to travel from Ireland;¹⁵⁹ would not limit access to information of health services available lawfully in other jurisdictions;¹⁶⁰ allow for the dissolution of marriages,¹⁶¹ and prohibit the death penalty.¹⁶² Furthermore, the public rejected an amendment which would have removed the threat of suicide as a reason for the termination of pregnancy;¹⁶³ allowed for equal access to the institution of marriage for same-sex couples;¹⁶⁴ removed the constitutional prohibition on abortion;¹⁶⁵ removed the constitutional crime of blasphemy;¹⁶⁶ and further liberalised the restrictions in regulating divorce.¹⁶⁷ This constitutional trajectory was part of the process by which the

¹⁵⁶ Iarflaith Watson & Lorenzo Posocco, 'National Identity Hollowed-Out: Irish National Identity 100 Years After Independence' [2025] *International Journal of Politics, Culture, and Society*.

¹⁵⁷ Article 41.3.1°, Bunreacht na hÉireann, 1937, "The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack."

¹⁵⁸ Article 41.1.1°; Bunreacht na hÉireann, 1937, "In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved." Article 41.1.2°, "The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home."

¹⁵⁹ Thirteenth Amendment to the Constitution 1992.

¹⁶⁰ Fourteenth Amendment to the Constitution 1992.

¹⁶¹ Fifteenth Amendment to the Constitution 1995.

¹⁶² Twenty-first Amendment to the Constitution 2001.

¹⁶³ Proposed Twenty-fifth Amendment 2002.

¹⁶⁴ Thirty-fourth Amendment to the Constitution 2015.

¹⁶⁵ Thirty-sixth Amendment to the Constitution 2018.

¹⁶⁶ Thirty-seventh Amendment to the Constitution 2018.

¹⁶⁷ Thirty-eight Amendment to the Constitution 2019.

Irish State and public uncoiled itself from the authority of the institutional Roman Catholic Church; it was, and is, a process wherein normative consensus derived from a Catholic moral monopoly was shattered and remade in the guise of rights-centred liberalism.

In *Fleming v Ireland*,¹⁶⁸ an individual suffering from multiple sclerosis sought to challenge the constitutionality of the Irish Criminal Law Act 1993 sub-section 2(2), which criminalised those who aided assisted dying, as it was contrary to Article 40.3.2 and ECHR Article 14. While in the High Court¹⁶⁹ Kearns P delivered a judgment wherein it was recognised that personal autonomy was a “core constitutional value”,¹⁷⁰ the legislative restriction on aiding and abetting such a volitional ending of an individual’s life was a proportionate restriction given the constitutional obligation on the State to protect life.¹⁷¹ The Supreme Court—on appeal—more stringently rejected the plaintiffs argument, narrowing the protection of personal autonomy as reasoned in the High Court as the correlative duties which would apply to the State would “sweep very far indeed”.¹⁷² Rather, Denham CJ interpreted the Constitution so as to permit this interference with the free exercise of individual autonomy as corresponding to the constitutional duty on the State to vindicate the right to life. However, Denham CJ, did state that:

“There can be no doubt but that Article 40.3.2 imposes a positive obligation on the State to protect life. That the obligation on the State to protect life is an important constitutional principle cannot, equally, be doubted... Nothing in this judgment should be taken as necessarily implying that it would not be open to the State, in the event that the Oireachtas were satisfied that measures with appropriate safeguards could be introduced, to legislate to deal with a case such as that of the appellant. If such legislation was introduced it would be for the courts to determine whether the balancing by the Oireachtas of any legitimate concerns was within the boundaries of what was constitutionally permissible. Any such consideration would, necessarily, have to pay appropriate regard to the assessment made by the Oireachtas both of any competing interests and the practicability of any measures thus introduced.”¹⁷³

¹⁶⁸ [2013] IESC 19.

¹⁶⁹ [2013] IEHC 5.

¹⁷⁰ *ibid*, Kearns P, at para 31.

¹⁷¹ *ibid*, Kearns P, at para(s) 72-74.

¹⁷² [2013] IESC 19, Denham CJ, at para 113.

¹⁷³ *ibid*, at para(s) 106-108.

Denham CJ acknowledged that the text recognises and respects the constitutional values of autonomy, self-determination, and dignity. These could, if a liberal hermeneutic was there applied, afford the possible identification and construction of an unenumerated or implied right, in conjunction with the vindication of a right to life, of a corollary right to terminate one's life in a manner of one's choosing. However, it is "not possible to discern support for such a theory in the provisions of the Constitution, without imposing upon it a philosophy and values not detectable from it."¹⁷⁴ To recognise such a right would be the "antithesis"¹⁷⁵ of the social order the Constitution envisages. Yet there is nothing which would preclude the Oireachtas from legislating for the provision and regulation of services which would permit the facilitation of such medical care, without a *prime facie* substantive principle to preclude their doing so. The Oireachtas, as the legislative proxy for the exercise of the general will of the popular sovereign, could conceivably—within constitutional limits—legislate for the autonomy of the individual to abridge said life.

So, as the judiciary are of the socio-cultural context—interpreting a text which has had certain characteristics expunged or significantly altered—it is consistent with an account of normative metanarrativity of constitutional interpretation that this would inform how other, formally linguistically unaltered provisions within the text, are read. Therefore, the textual invocations of Christian theism and the explicit textual identification of the factual reality of rights which are inalienable, have been read as potentially no substantive barrier to the abrogation of that life through an act of direct, or proxy, sovereign mandate. That such a prospective piece of legislation may have its constitutionality successfully challenged—perhaps through 40.3 right to life as read through the Preambles reference to dignity of the individual person—does not change the fact that Catholic theism, with its consistent ethic of life, would not explicitly feature in the Courts's reasoning. This acknowledges that under a different interpretive hermeneutic—as acknowledged by Denham CJ—dignity, life, an autonomy may be understood to be realised through permissibility of assisted dying.

This reasoning demonstrates the potentiality for a shift not merely in the constitutional structure, as much of the text remains the same, but a shift in judicial construction of substantive values, with proceduralism of popular sovereignty as a potentially supervening

¹⁷⁴ [2013] IESC 19, Denham CJ, at para 113.

¹⁷⁵ *ibid.*

value.¹⁷⁶ In the conceptual chasm between textual invocations of Christian theism, natural law, and liberalism, the procedure of popular sovereignty is appealed as the only mutually cognisable interpretive framework.

8.6 The Sovereignty Paradox

The Irish judiciary have had to grapple with the ambiguity of causality within Irish constitutional metanarrativity; in doing so they had to determine whether they would treat this issue as either a dilemma or paradox. They have necessarily interpreted it as a dilemma, as to do so otherwise, as a paradox would not permit a resolution which permits judicial action. The ambiguity is that of the seemingly distinct sovereign personae present in the Constitutional text, and from which ultimate authority derives from. This is a most salient dynamic, as we cannot conceptualise constitutional identity as it is currently being articulated without interrogating this process, whereby popular sovereignty has been interpreted as methodological or procedural principle. We have already examined how God and natural law has been subordinated to the sovereign people, now we must examine the judicial disambiguation of the Ireland which is sovereign: the People, Nation, and State. A dilemma is resolvable as it is an either or, whereas a paradox is a both/all problem, and can lead to infinite regress, not a possibility conducive to pragmatic adjudication.

There is a potentially paradoxical, contradictory dispensation of sovereign authority within the Irish Constitution. The Preamble states:

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

Article 1 establishes that the Irish Nation has inalienable, indefeasible, and sovereign rights to choose its own form of government among other state functions.¹⁷⁷ Furthermore, Article 4 establishes that the name of the State is *Éire*, or, in the English language, *Ireland*. Then, it is established that *Ireland* is a sovereign, independent, and democratic state.¹⁷⁸ Article 6.1 follows and restates the construction of the People wherein all powers of the State, derive under God, from the People, whose right it is to designate the rulers of the State and,

¹⁷⁶ What Daly has called either a meta-constitutional principle, or a meta-principle in the constitutional order. See, Eoin Daly, ‘From sovereignty to social liberalism: two new dimensions of constitutional identity in Ireland’, [2024] *Public Law*, Jul, 528-544.

¹⁷⁷ “...to determine its relations with other nations, and to develop its life, political, economic and cultural, in accordance with its own genius and traditions.”

¹⁷⁸ Article 5, Bunreacht na hÉireann, 1937.

in final appeal, to decide all questions of *national* policy, according to the exigencies of the common good. So, which entity is sovereign: God, the People, the Nation, or the State? As a paradox it is ouroboric, but as a dilemma or conundrum it is resolvable, and the Court has resolved to locate authority within the Irish People.¹⁷⁹

In *Byrne v Ireland*¹⁸⁰ Walsh J opined that:

“It appears to me abundantly clear from those provisions that the State is the creation of the People and is to be governed in accordance with the provisions of the Constitution which was enacted by the People and which can be amended by the People only, and that in the last analysis the sovereign authority is the People.”¹⁸¹

This was a case concerning whether the State, as Ireland could be sued for vicarious liability. The salient factor for the justices in resolving the dilemma of sovereignty was the procedure of enacting and amending the Constitution as constructed through Article(s) 6, 46, and 47 respectively. This is from where those who articulate Ireland’s constitutional identity as a positivist procedural methodology of popular sovereignty inform their analysis. And yet, the act of establishing this procedure presupposes a people, that people is a national people, which by principle has natural right to a state,¹⁸² but that people only gain formal identity and composition by the text of that self-same Constitution and statute; statute which appeals in turn to the Constitution for legitimacy.

This chronological or methodological resolution to the sovereignty question was upheld in *Webb v Ireland*,¹⁸³ wherein the Court acknowledged that the Irish Constitution makes use of an historical invocation of the prepotent Irish people; they have given themselves this State and imbued it with characteristics of sovereignty by proxy. The issue of this case was

¹⁷⁹ As distinct from the Irish Nation, which takes in those who are not coextensive with those who populate the Republic of Ireland, taking in those who so identify in Northern Ireland and controversially conceptually those who do not identify as such in Northern Ireland. The Irish Nation also seems to include in some degree the Irish Diaspora, or those who share in “its cultural identity and heritage”. Also, in distinction from the Irish State, although the complexity which derives from the internal and external demarcations of sovereign capacity are muddled by the capacity for judicial review of executive functions in foreign policy.

¹⁸⁰ [1972] IR 241.

¹⁸¹ [1972] IR 241. Walsh J. at para 5.

¹⁸² A principle espoused in International Law in *pari materia*: UN Charter Article 2(4), UN International Covenant on Civil and Political Rights, 1966 & International Covenant on Economic, Social and Cultural Rights Articles 1 respectively. Further elaborated in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Declaration on Friendly Relations). However, depending on one’s interpretation of Irish history and their place within it a more appropriate principle may be one that acknowledged the conflicting concepts of sovereignty and colonialism in UN Declaration on the Granting of Independence to Colonial Countries and Peoples 1960.

¹⁸³ [1987] IESC 2.

over the ownership of the Derrynaflan Hoard: did it belong to the State or to those who happened to find it?

“It would, I think, now be universally accepted, certainly by the People of Ireland, and by the people of most modern States, that one of the most important national assets belonging to the people is their heritage and knowledge of its true origins and the buildings and objects which constitute keys to their ancient history. If this be so, then it would appear to me to follow that a necessary ingredient of sovereignty in a modern State and certainly in this State, having regard to the terms of the Constitution, with an emphasis on its historical origins and a constant concern for the common good is and should be an ownership by the State of objects which constitute antiquities of importance which are discovered and which have no known owner. It would appear to me to be inconsistent with the framework of the society sought to be created and sought to be protected by the Constitution that such objects should become the exclusive property of those who by chance may find them.”¹⁸⁴

We see here the judicial cognisance of the textual recognition of the pre-constitutional inherent sovereignty, or natural sovereignty of the People. The State has sovereign nature as a consequence of the People, not as a distinct characteristic which inheres in this particular state, i.e., the extent of the island administered by the government of the Republic of Ireland.¹⁸⁵ The State is not co-extensive with the Nation, and the People are not co-extensive with the State as the text now explicitly acknowledges a filial ethnic demarcation of the People as distinct from the population as a whole.

However, this sovereign act of the “People”, authorising this constitution, amounted to a very slim majority of the electoral franchise of those who cast a vote in what was then Saorstát Éireann. That was a subset of what was another entity within Irish Constitutional theory, that of the Nation. The Nation seems to be constitutionally the territory of the whole of the island and its seas, and also every person born in the island of Ireland, as well as all persons otherwise qualified in accordance with law to be citizens of Ireland. It is further

¹⁸⁴ *Webb v Ireland* [1987] IESC 2. Finlay CJ. at para 62.

¹⁸⁵ “I am satisfied that the People as the sovereign authority having by the Constitution created the State, and by Article 5 declared it to be a sovereign State, have the right and the duty, acting by the State which is the juristic person capable of holding property by virtue of the Constitution, to exercise dominion over all objects forming part of the national heritage, whether they be found or not, subject always to the lawful title of a true owner if and when the true owner is discovered and to exercise full rights of ownership when no true owner can be ascertained.” [1987] IESC 2. Walsh J. at para 23.

stated that the Irish Nation can express and experience an emotional life as it, “cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage.”¹⁸⁶ Indeed, it is judicially acknowledged, in *Re Article 26. Criminal Law (Jurisdiction) Bill 1975*,¹⁸⁷ that the People of 1937 had a belief that:

“One of the theories held in 1937 by a substantial number of citizens was that a Nation as distinct from a State, had rights, that the Irish people living in what is now called the Republic of Ireland and in Northern Ireland together formed the Irish Nation, that a nation has a right to unity of territory in some form, be it as a unitary or federal state and that the Government of Ireland Act, 1920 though legally binding, was a violation of that national right to unity which was superior to positive law. This national claim to unity exists not in the legal but in the political order and is one of the rights which are envisaged in Art. 2 and is expressly saved by Art. 3. Art. 3 states the area to which the laws enacted by the Parliament established by the Constitution apply. The effect of Art. 3 is that until the division of the island of Ireland is ended, the laws enacted by the Parliament established by the Constitution are to apply to the same area and have the same extent of application as the laws of Saorstát Éireann had.”¹⁸⁸

The somewhat conceptually artificial distinction drawn by the Court between what are rights within a political order and those within a legal order was a pragmatic resolution of the sovereignty dilemma enacted through the normative metanarrativity of the nationalist constitutional claim. It was a judicial attempt at dealing with the third rail of Irish constitutional politics: the *de facto* recognition of Northern Ireland and the *de jure* constitutional claim, which was present in the metanarrativity implied throughout the text, most manifestly in the original Articles 2 and 3. This had been pragmatically side stepped in *Boland v An Taoiseach*¹⁸⁹ where both the High Court and the Supreme Court centred their reasoning on the separation of powers¹⁹⁰ concerns around a judicial interference with executive action in policy matters.¹⁹¹ Indeed, the choice to focus on separation of powers

¹⁸⁶ Article 2, Bunreacht na hÉireann, 1937.

¹⁸⁷ *Re Article 26. Criminal Law (Jurisdiction) Bill 1975*, [1975] WJSC-SC 435.

¹⁸⁸ *Re Article 26. Criminal Law (Jurisdiction) Bill 1975*, [1977] WJSC-SC 435 at para 147.

¹⁸⁹ [1974] IR 338.

¹⁹⁰ Clause 5 of a joint communique which emerged from the Sunningdale Conference 1973 was challenged by Kevin Boland as being repugnant to the Constitutional claim to geographic sovereignty over the whole island. Murnaghan J. at para 7 in the High Court acknowledges the *de jure/de facto* issue in stating that if a deprivation of a national right to sovereignty of the island has taken place, “the deprivation alleged took place about 50 years ago”.

¹⁹¹ A further example of the pragmatic judicial recognition of the *de facto* existence of Northern Ireland, which was acknowledged in old Article 3, can be evinced by the reasoning of Gannon J in *State (Gilsenan) v.*

issues as opposed to examining the substantive content of an agreement which the Government was seeking to ratify indicates at this juncture the unwillingness of the Court to fulsomely subordinate executive power to textual prescriptions and high rhetoric of popular sovereignty, an issue revisited in latterly in *Crotty*:

“...the Courts have no power, either express or implied, to supervise or interfere with the exercise by the Government of its executive functions, unless the circumstances are such as to amount to a clear disregard by the Government of the powers and duties conferred upon it by the Constitution.”¹⁹²

The issue, often judicially avoided, is one which arises from the reality that an unfinished project of revolutionary nationalism adopted a liberal democratic constitutional principle which justifies itself through a “natural” conception of the Nation. The narrative identity of a state which invokes ‘*heroic and unrelenting struggle to regain the rightful independence of our Nation*’ and presents its deliverance as achieved through the eschewing of democratic constitutional means in favour of campaign of armed conflict, would have to face the reality of the rejection of the cogency of this narrative by a community in Ireland. The Unionist community articulated a nationalist narrative, concomitantly with that of Irish nationalism, founded on the freely given consent to a binding covenant¹⁹³ with the British Crown.¹⁹⁴ This has been embodied through both political and paramilitary means. By and

McMorrow [1978] IR 360. “It is true that since 1937 there has been no general statutory interpretation or adaptation of the expression ‘Northern Ireland’, but the frequency with which it occurs in our statutes, the unambiguous way in which it has been used to identify the six counties over which the State does not exercise jurisdiction, and the clear intention of the legislature in such use that the Courts of this State should give judicial recognition to the identity of the territory....would make it impossible for our courts to say that Northern Ireland is other than an officially recognised and clear appellation for the part of this island which has remained within the United Kingdom.” Henchy J. at para 4.

¹⁹² *Boland v an Taoiseach* [1974] IR 338. Fitzgerald CJ. at para 11.

¹⁹³ The metanarrativity of covenanting within Ulster can trace its lineage to Scottish Covenanters, who were a Presbyterian politico-religious group who sought to oppose reforms to the religious practice of the Scottish Kirk along Anglican practices, signed a National Covenant in 1639, and ultimately the Solemn League and Covenant in 1643 between the Scottish Covenanters and the English Parliament during the War of Three Kingdoms between Royalists and Parliamentarians, and which after the eventual ascension of William and Mary to the British throne, wherein Presbyterianism was established as the structural and doctrinal theology of the Kirk of Scotland. The lineage of Covenanters is evident in the signing of the Ulster Solemn League and Covenant in 1912 resisting a Home Rule Parliament in Ireland. See, Perceval-Maxwell, M., ‘Strafford, the Ulster-Scots and the Covenanters.’ (1973), *Irish Historical Studies* 18, no. 72, pp. 524–51. Walker, G., ‘The Ulster Covenant and the pulse of Protestant Ulster.’ (2016), *National Identities*, 18(3), pp.313–325.

¹⁹⁴ Within Unionism, Loyalism is neither to the British State nor government thereof, it is a loyalty to the British Monarch and the Union. It is a binding covenant between the people and Crown to maintain the Protestant religion as the one true Christian faith, to Protestant traditions, history, and culture. Within this metanarrativity, anti-constitutional or illegal means are justified by the appeal to this higher order criteria of validity. See, John Barry, ‘National identities, historical narratives, and patron states in Northern Ireland’, in A. Linklater & M. Walker (eds) *Political Loyalty and the Nation-State* (Taylor and Francis, 2003).

large, this community has withheld consent from the normativity of a metanarrative which appeals to the “natural” and pre-colonial notion of the Irish nation. Liberal democratic constitutional theory, with its central principle of consent, does not allow the British government to expel a settled community that wants to remain within the polity,¹⁹⁵ nor can it easily reconcile a claim by Irish nationalists to a community who do not consent to inclusion within Irish nationality.

Furthermore, this constitutional state would have to rationalise the activities of those who view themselves as continuing in that self-same national revolutionary project claiming legal legitimacy under the Constitution and statute of that nationalist state, through the uncomfortable question of extradition to the UK.¹⁹⁶ Such was the case in *Russell v. Fanning*¹⁹⁷ wherein Hederman J in a dissenting judgement, reasoned that the natural concept of the Nation as found in the Constitution is sufficient to elevate the project of national unity beyond mere positive government policy: it is not limited to the policy of the Oireachtas, it is a “constitutional imperative” not merely a political aspiration.¹⁹⁸ Indeed, that this distinction somewhat artificially divergently conceptualised what was a political and legal right to deliverance on a national claim, was latterly judicially clarified by the

¹⁹⁵ In writing of the political ideology which underpinned Ulster Unionism and the conceptualisation of the Ulster Solemn League and Covenant, Bew wrote, “The unionists regarded the nationalist movement with both fear and suspicion...The uneven development of Irish capitalism had created a gap in basic outlook between Belfast and the rest of the island...Above all, it was a matter of the imagined community to which the unionists felt they belonged. In the late eighteenth century it was possible for a significant section of the Protestant political class in the north to have a natural primary identification with ‘Ireland’. Yet, all the key developments of the nineteenth century had weakened that identification: the development under O’Connell of a form of Catholic nationalism which disregarded the concerns of Protestant liberals; the dramatic industrialization of Belfast, locked into a Belfast–Glasgow–Liverpool triangle of economic interconnectedness which contrasted with the relative weakening of economic links with the rest of the country; and last but not least, the willingness of the British state until, at least, the 1880s to regard the Protestants as a potential garrison against Catholic revolt: more positively, the removal of the various grievances affecting Dissenting congregations throughout the nineteenth century further integrated Protestant Ulster within the rest of the United Kingdom.” Paul Bew, *Ireland: The Politics of Enmity 1789-2006*, (Oxford University Press, 2007) pp. 368-369.

¹⁹⁶ Indeed, the uncomfortable position of establishment Ireland in the Republic which venerates the heroism of its founders in the “good old IRA” being bound either by personal ethics, or for those sneaking regards pragmatism and the conventions of diplomacy, to condemn the campaign of the provisional IRA, is one which got expression in the sovereignty paradox. For accounts which draw qualified and unconditional equivalence between methods of IRA in the 1920’s and beyond, see, Pádraig Óg Ó Ruairc, *The Disappeared: Forced Disappearances in Ireland 1798- 1998*, (Merrion Press, 2024) and Danny Morrison, *Free Statism and The Good Old IRA*, (Greenisland Press, 2022).

¹⁹⁷ [1988] IR 505.

¹⁹⁸ “The reunification of the national territory, which consists of the whole island of Ireland, its islands and the territorial seas (see Art. 2 of the Constitution), is by the provisions of the preamble to the Constitution and of Art. 3 of the Constitution a constitutional imperative and not one, the pursuit of which, or the non-pursuit of which is within the discretion of the Government or any other organ of State. Therefore, the only question of policy which arises, is as to the manner in which this may be achieved...” [1988] IR 505 Hederman J. at para 7.

Court in asserting the *de jure* claim to the natural concept of the Nation in *McGimpsey v Ireland*:

“I am not satisfied that the statement that "this national claim to unity exists not in the legal but the political order and is one of the rights which are envisaged in Article 2", necessarily means that the claim to the entire national territory is not a claim of legal right. The phrase occurs in a decision tracing the historical, political and social background to the Constitution, and seems more appropriately understood as a reference to the origin of the claim than to its nature.”¹⁹⁹

We can evince in the reasoning presented in this case, wherein a unionist challenge to Anglo-Irish Agreement was utilising an Irish nationalist reading of the 1937 text, a parallel with the counterintuitive position in which the cause of Irish separatist nationalism was better served by an appeal to the Privy Council and the Statute of Westminster in the *Erne Fishing* case. Results which broadly cohere with what is desirous within the normative metanarrative can be of greater utility than the authenticity or ideological purity of the channels through which they are achieved; narratives, unlike the rigidity of rules or norms, are more amenable to unconventional twists. As such the Supreme Court both accepted the standing of the McGimpsey’s to utilise the Irish Courts to challenge the constitutional validity of the Anglo-Irish Agreement, and maintained a nationalist construction of the constitutional conceptualisation of the Irish Nation. They found against the McGimpsey’s in positing that “article 2(b) of the Anglo-Irish Agreement is that it constitutes a recognition of the de facto situation in Northern Ireland, but does so without abandoning the claim to the reintegration of the national territory”²⁰⁰ and was thereby not repugnant to the Constitutions *de jure* natural sovereignty over the whole island.

This brings us once more to the issue of the artificiality of the distinctions drawn between fact/value and national particularism as against general principles of constitutionalism. They are mutually sustaining sites—occasionally in dynamic tension—which rely symbiotically on one another in a discursive narrative structure. Which conception is determinative in constitutional interpretation, and whether identity is primarily determined by narrative of origin and development, or, rather, as determinable by appraisal of

¹⁹⁹ [1990] IESC 3. Finley CJ. at para 102.

²⁰⁰ *ibid*, at para 119.

contemporaneous constructions of general principles, varies across time.²⁰¹ General principles of constitutionalism, such as sovereignty, develop depending on the underpinning metanarrative which affords them normativity within a given context and can have vastly different outcomes in design and effect in different jurisdictions. Constitutional systems depend for their effectiveness on the entire complex of national characteristics, attitudes and history and what may be benign in one country may be quite dangerous in another.²⁰² Can we discern the objective or implied meaning of the textual wording of unarticulated “natural” constitutional conceptions of Irish popular sovereignty as a procedural value without dutiful countenance of how the origins of this principle are contemporaneously understood?

²⁰¹ Such arguments are not by any means new, they may perhaps be of greater salience in our current judicial period as the Court is faced with rationalising EU constitutionalism, but novel these arguments are not. For instance, when contemplating Irish constitutionalism within another supranational realm, the British Empire, Darrell Figgis was vociferous in arguing for Irish particularity in its constitutional sovereign state. “Canada, Australia, and South Africa have been laid under special contribution, because they are held to be adornments of the English Empire. The words Home Rule, Colonial Home Rule, and Dominion Rule buzz about the air like flies of a summer’s day... The air is racked with precedents from China to Peru... The answer therefore is not to be found in a study of constitutions of other peoples, but in a wise study of Irish history. Darrell Figgis, *The Gaelic State in the Past & Future or The Crown of a Nation*, (Maunsell & Co Ltd, 1917) p. 4/5.

²⁰² Such was the reasoning of the Committee on the Constitution in their report on the findings of the review they carried out of the text in 1967. They were at pains to point out that although they had consulted international precedents, they were not losing sight of the Irish locus of analysis. Informal Committee on the Constitution, Report of the committee on the constitution (Dublin, 1967), p.2

Chapter 9. Irish Metanarrativity and the European Union

9.1 Constitutional Identity: The Fourth Interpretive Framework.

It is generally understood, as the argument herein has acknowledged, that sovereignty of the People and polity has been the abiding constitutional theory which has animated the development of Ireland's constitutional text. However, this theory of legitimation has been substantively challenged by the supranational aggregation of sovereignty which has emanated from the primacy of EU law. Indeed, this disjuncture cuts right to the core of the spirit, soul, intention of the 1937 text. The Third Amendment of the Constitution in 1972, which amended Article 29 so as to permit the accession of Ireland as a Member State of the EU radically altered the coherence of the Irish constitutional metanarrative. It precipitated a linguistic and rhetorical dissonance within the text wherein certain phraseology would necessarily have a hermeneutic of irony—in the Rortian sense—there applied. As Seamus Henchy extrajudicially argued:

“Ireland's entry into the E.E.C. has involved the abrogation of some of the most basic and entrenched assumptions of the Irish Constitution as originally enacted. The right of the Irish people to control the institutions of government and to develop the life of the nation along the lines of its own genius and traditions", which was declared by the Constitution to be inalienable, has now in fact been alienated.”¹

The discursive structure established around nodal points of Irish difference would be reconceptualised so as to situate the identitarian aspects of the text as accidental or symbolic constitutional properties, which were in some manner deviations from a normative general European constitutionalism.

The emerging constitutional identity interpretive framework is symptomatic of the principle of constitutional pluralism within the EU being rationalised through the constitutional imagination of Ireland's constitutional metanarrative;² the primacy of EU law³ in dynamic contestation with the pre-eminent national principle of popular

¹ Seamus Henchy, 'The Irish Constitution and the E.E.C' [1977] 1 *DULJ* 20, 25

² Constitutional pluralism being the mutually constrained loci of constitutionalisms of nation-states within the context of EU integration. See, Neil Walker, *Sovereignty in Transition*, (Hart Publishing, 2006). “Constitutional pluralism... is a position which holds that states are no longer the sole locus of constitutional authority, but are now joined by other sites, or putative sites of constitutional authority... those situated at the supranational level.”

³ The ECJ affording the Union a quasi-constitutional character with the development of primacy and direct effect in Case 6/64 *Falminio Costa v ENEL* [1964] ECR and Case 26/62 *Van Gen den Loos* [1963] ECR 1.

sovereignty. What is characterised as a dialogue between national courts and the ECJ, which can be descriptively demarcated as constructive or as a destructive,⁴ uses the nebulous provisions contained within Article 4(2) of the TEU. However, whether we describe it as constructive or destructive (which depends on an anterior set of normative assumptions about the EU and the project of integration), the dynamic is that of power, in the form of sovereign capacities, being contested through judicial rather than formally political institutions.

My argument problematises the bipolarity of the contest—EU as against Ireland, or political as opposed to legal—by instead centralising the locus of this dialogue as an internal recursive, and as a reconceptualising of Irish metanarrativity. In this sense, we can situate Ireland's particular expression of constitutional identity in the Jacobsohnian dialogue of constitutional identity. However, the Jacobsohnian dialogic understanding of constitutional identity is employed here with a degree of scepticism. My scepticism results from the seeming rigidity of categorising certain elements as wishing to maintain commitments to the past and those who seek to transcend the past.⁵ Accepting necessarily that there are contradictory positions held within a dialogue, both may be animated by same intention, merely with different conceptions of achieving said aim. Such is the case in Ireland wherein concerns for upholding Irish sovereignty have been utilised both to occlude and advance EU alignment and integration.

This seeming contradiction is perhaps partially explained by the narrativization within Ireland, among other small EU member states, that sovereignty is advanced by its aggregation at EU level. One could suggest that membership of the EU and the interpretive effect of the ECHR—both which seemingly contradict Ireland's intense focus on national sovereignty—are narrativized in such a manner as to be consistent with Ireland's constitutional imaginary.⁶ Therefore, the argument which has been developed throughout—that of the postmodern condition of narratological constitutional development—is applied to Ireland's constitutional metanarrative of popular sovereignty within the context of EU

⁴ Indeed, this is the typology presented in a study commissioned by the EU Parliament on the concept of Constitutional Identity as it relates to EU Integration published by the Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies, PE 760.344- March 2024.

⁵ Gary Jeffrey Jacobsohn, *Constitutional Identity*, (Harvard University Press, 2010), p.7.

⁶ O'Cinneide, Colm: *Democracy, Sovereignty and Europe: The Contrasting European Trajectories of Ireland and the UK*, *VerfBlog*, 2023/4/12, <https://verfassungsblog.de/democracy-sovereignty-and-europe/>.

integration, and the consequence of this normative judicial doctrine in entirely domestic issues.

We may accept as a working definition of sovereignty that it is the discursive form in which a claim concerning the existence and character of a supreme ordering power for a particular polity is expressed. This supreme ordering power purports to establish and sustain the identity and status of the particular polity and to provide a continuing source of ultimate authority for the juridical ordering of that polity.⁷ As has been established throughout, the “supreme ordering power” within Irish constitutionalism has been understood to be the People, although, as shown previously, there is ambiguity in the text which has been worked out in different ways over time.

The ambiguity within Irish constitutionalism—from where does authority of the Constitution flow, the Most Holy Trinity or the People of Éire?—is further complicated by the Article 29.4.6°, which constitutionally enshrines the supremacy of EU law in the spheres of its competency over and above that of the national constitution. This occludes the proximity between popular sovereignty and legislative procedure. This sovereignty paradox was then further complicated with the passage of the Lisbon Treaty, at the second time of asking, which introduced the Article 4(2) national identity and fundamental constitutional structures review of EU law. One can question the propriety of this doctrine within Irish constitutional jurisprudence as it relates to the EU; the previously clearly articulated constitutional subject, expressive of a national identity, has been diffused with the passage of new Article 3.1,⁸ and the explicitly republican character of the state is sub-constitutional. Furthermore, as Article 46.1 clearly establishes, as “*Any provision of this Constitution may be amended*”⁹, no provision of the Constitution or State is fundamental in that it is not subject to change.

The metanarrative of popular sovereignty, as filtered through a doctrine of constitutional identity, has served as a seemingly definitive rhetorical device to resolve the paradox¹⁰ of

⁷ Neil Walker, *Sovereignty in Transition*, (Hart Publishing, 2006).

⁸ “It is the firm will of the Irish nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognising that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island. Until then, the laws enacted by the Parliament established by this Constitution shall have the like area and extent of application as the laws enacted by the Parliament that existed immediately before the coming into operation of this Constitution.”

⁹ My italics.

¹⁰ This is a paradox which persists even when the theological commitments often present in preambles and other theories of justification are ignored and the paradox is just popular sovereignty one its own, “Modern

authority within Irish constitutionalism. It has conceived of the problem as a dilemma resolvable by arguing from popular sovereignty as a fundamental validating norm. The people are the ultimate source of authority; once they have expressed their collective will through the procedure that they have bound themselves by, anything is permissible. The principal value appears then to be of methodological proceduralism.

I argue that this is a counter-majoritarian body—by and through its authoritative interpretive function—subordinating both natural law, Christian theism, and the validity of executive action to a methodologically proceduralist conception of the national principle embodied in popular sovereignty within the discursive structure of constitutional metanarrativity. The Irish Nation, as a constitutional subject, has been rhetorically unbounded.¹¹

Through a judicial discourse carried out by iterative interpretation of the constitutional metanarrative, reflexively rationalising that narrative through formal and informal constitutional development, the Court has developed a reading in which the People of Ireland have become rhetorically unfettered. I say rhetorically unfettered as the motif of popular sovereignty is still institutionally bound by the amendment procedure, which requires initiation of a Bill in Dáil Éireann, and be deemed to have passed both houses of the Oireachtas before being presented to the People. The disjunction between rhetorical maximalist sovereignty of the People and the reality of proximate distance from influencing the initiation of the amending process is further complicated by the advent of Citizens Assemblies, which somewhat re-positions the “People” in the amendment process by affording them a notional generative position by their deliberative and recommending

constitutionalism is underpinned by two fundamental though antagonistic imperatives: that governmental power ultimately is generated from the 'consent of the people* and that, to be sustained and effective, such power must be divided, constrained and exercised through distinctive institutional forms. The people, in Maistre's words, 'are a sovereign that cannot exercise sovereignty': the power they possess, it would appear, can only be exercised through constitutional forms already established or in the process of being established.” M. Loughlin and N. Walker, ‘Introduction’ in M. Loughlin and N. Walker (eds), *The Paradox of Constitutionalism* (Oxford University Press, 2007), p. 1

¹¹ Colm O’Cinneide has identified a certain disjunction between how Irish popular sovereignty has been conceptualised as inherently unconstrained – demonstrating a radical democratic commitment of the people being their ultimate controlling source of constitutional legitimacy – while still being bounded and having little impact in day-to-day in the organs of the state as constituted. Furthermore, he has highlighted that this conception of unfettered popular sovereignty has had – with the introduction of the Eighth and the Twenty-seventh Amendments – and continues to have a distinct potential to impact and limit individual or minority rights disproportionately. See, Colm O’Cinneide, ‘Conclusion: Irish Popular Sovereignty from a Domestic and Comparative Perspective’, in Cahill, M and O’Mahony, C and O’Conaill, S, (eds.) *Constitutional Change and Popular Sovereignty*, (Routledge, 2021).

function.¹² This enhances the performative role of the “People”¹³ within the process of constitutional development,¹⁴ which may increase a sense of proprietorship over the Constitution, without fundamentally altering the constitutional dispensation of procedural influence.

Positivist descriptive accounts in constitutional theory require an identifiable norm in a chronological or hierarchical account of validity of constitutional law. Accounts which attempt to describe a legal system which prioritise ultimate sources of validity and view these source as binding, must consider these sources as binding a priori, thereby rendering it the ultimate source of legal validity.¹⁵ But when there is ambivalence at the centre of the theory of validity of legal authority, as there is in Irish constitutionalism, alternative options in how to interpret popular sovereignty are available. It can be interpreted as either sacrosanct, imbued with doctrinal and quasi-metaphysical significance, or as an ingenious leitmotif which permits the continuity of a text and political order which has been substantially transformed. This transformation comes from constitutional actors either responding to—or perhaps corralling the popular will. The most substantive in Ireland has been the transfer of sovereign national competencies to the EU. How the theory of validity is characterised is contingent on the interpretation of constitutional metanarrative of legitimacy, and vice versa.

¹² Oran Doyle and Rachel Walsh have suggested that deliberative mini-publics – such as the Citizen’s Assemblies in Ireland – primarily function as public will forming bodies – as well as creating space for amendment debate outside of electoral or party politics – and recognise that depending on how citizen led the process is can have an impact on normative evaluations as to their democratic legitimacy. If the process is too elite-driven, they may function as opinion manipulating as opposed to opinion forming. See, Oran Doyle and Rachael Walsh, ‘Constitutional amendment and public will formation: Deliberative mini-publics as a tool for consensus democracy’ [2022] *International Journal of Constitutional Law*, Volume 20, Issue 1, pp. 398–427.

¹³ The performativity of this process is highlighted by Eoin Carolan and Séana Glennon – who in contradistinction to Doyle and Walsh – argue that deliberative mini-publics do not function so as to form consensus in public will, but rather merely serve to clarify public consensus. This consensus is not a representative consensus as there are issues around participation in mini-publics by individuals who are already politically inclined, or interested specifically in the issues at hand. This augments the type of consensus which emerges from the deliberative mini-public, which cause great concern in terms of a normative evaluation as to their democratic legitimacy. See, Eoin Carolan and Séana Glennon, ‘The consensus-clarifying role of deliberative mini-publics in constitutional amendment: A reply to Oran Doyle and Rachael Walsh’, [2024] *International Journal of Constitutional Law*, Volume 22, Issue 1, pp. 191–203,

¹⁴ However, Doyle and Walsh acknowledge that this deliberative departure in Irish constitutionalism is consistent with Ireland constitutional culture, wherein a strong tradition of citizen involvement in constitutional reform is evident and thereby can function as an adjunct to an already embedded democratic culture. See, Oran Doyle & Rachel Walsh, ‘Deliberative Mini-Publics as a Response to Populist Democratic Backsliding’, in Maria Cahill, Colm O’Cinneide, Seán Ó Conaill and Conor O’Mahony (eds), *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland*, (Routledge, 2020).

¹⁵ See, Oran Doyle, ‘Legal Validity: Reflections on the Irish Constitution’ [2003] 25 *DULJ* 56.

9.2 The People of Éire and the Ever-Closer Union Among the Peoples of Europe

Are the People a creature of the Constitution, and if so, are they themselves a substantive and procedural limitation on constitutional change, or are they bound by those substantive limits contained therein? It would seem a logical inference, from the administrative chronology of the events from United Kingdom of Great Britain and Ireland,¹⁶ The Irish Free State,¹⁷ Éire or Ireland,¹⁸ to the Republic of Ireland,¹⁹ that the Irish people are antecedent to the various administrative apparatus which oversaw and oversee the administration of these islands. But that there were a national people, which in some manner collectively chose to organise as a state, does not negate the textual reality that the “people of Éire” are a creature of the text, a constitutional subject, a legal persona of positive law. The people give birth to themselves; their authorship retroactively invented the author.²⁰ Oran Doyle has referred to this as the “paradox of the chicken and the egg” of positive law and legal validity.²¹ One may then wonder whether the Irish Nation is bound by the constraints which it has given itself?

I have dealt so far with how this “national people” has constitutionally discursively formed its identity through managing its external relationship with Great Britain and the Commonwealth; its internal relationship with the Catholic Church; and the self-understanding of what the relationship to Northern Ireland is as mediated through the articulation of the Nation constitutionally enshrined. Now I will provide an account of the constitutional rationalisation of the disaggregation of sovereignty in the joining of Ireland to the EEC in 1973.²² This is most salient as this dispensation of sovereign capacity, which cuts most clearly against the high poetry of the nationalist sovereignty rhetoric in the constitutional text. It marks a point at which the interpretive strategies of the Court would become postmodern, necessarily relying on intertextuality for interpretation as one cannot construct harmonious meaning of the Irish text without cognisance of European Treaties. The significant alteration to the dispensation of sovereignty in the original 1937 text that this brought about necessarily required a rationalisation which was minimally consistent

¹⁶ Act of Union, 1801.

¹⁷ Irish Free State Act, 1922.

¹⁸ Bunreacht na hÉireann, 1937.

¹⁹ The Republic of Ireland Act, 1948

²⁰ To coin a Derridean phrase, *Declarations of Independence*. Lecture delivered in University of Virginia 1976.

²¹ Oran Doyle, 'Legal Validity: Reflections on the Irish Constitution' (2003) 25 Dublin U LJ 56, p. 57.

²² Third Amendment of the Constitution Act, 1972.

with rhetorical motifs and nodal points underpinning the Irish constitutional discursive structure.

Part of the persuasive ingenuity utilised by Fianna Fáil, in the personages of Séan Lemass and Jack Lynch respectively, in arguing for membership of the European Community, was to invert the sovereignty narrative. They argued that the future of Irish political independence would be threatened, as prosperity and continued economic viability of the State would not be realised with the protectionist economy, which was still economically dependent on UK, unless Ireland joined the EEC.²³ By enfolding community membership into the conventions of post-colonial narrative structure, joining the EEC would mean sovereignty realised through sovereignty relinquished.²⁴ Indeed, the strength of this narrativization is demonstrated by the manner in which Ireland remains positive about the process of EU integration, despite the continued diffusion of national sovereignty. Irish governments have always managed to put together broad coalitions of popular support for continuing the process of EU alignment—despite occasional blips²⁵—as tested through the referendum process. Neither political actors nor the public have been obtrusively possessive about a rigorous conception national sovereignty in this regard, viewing the advantages of EU membership as more than compensating for nominal loss of national state level self-determination. Indeed, the eventually positive referendum results which mediate this process serve to insulate the requirements of EU law from legal or political challenges on a substantive invocation of national sovereignty.²⁶

This process has eventuated a dynamic in which the Irish constitutional order disavowed the intertextual reliance on Catholic social teaching in *McGee*, and by plebiscite introduced a secular corpus of intertextual binding influence in law of EEC. This intertextual corpus would be further Europeanised through the eventual legislative incorporation of the European Convention on Human Rights through statute in 2003,²⁷ and although the

²³ Andrew D. Devenney, 'A Unique and Unparalleled Surrender of Sovereignty': Early Opposition to European Integration in Ireland, 1961–72', [2008] *New Hibernia Review / Iris Éireannach Nua*, Vol. 12, No. 4.

²⁴ This line of reasoning is evident in the judicial discourse on sovereignty in Clarke J's reasoning in *Pringle*.

²⁵ Both the Nice and Lisbon Treaties were initially rejected by the people, but later passed the referendum process at the second time of asking.

²⁶ O'Cinneide, Colm: *Democracy, Sovereignty and Europe: The Contrasting European Trajectories of Ireland and the UK*, *VerfBlog*, 2023/4/12, <https://verfassungsblog.de/democracy-sovereignty-and-europe/>.

²⁷ Which would serve as a means of informing the elaboration, while still maintaining the Irish constitutional locus of authority, rights within Irish jurisprudence. See, *DPP v Gormley and White* [2014] IESC 17, *KRA v Minister for Justice and Equality* [2016] IEHC 289, *Duniyva v Residential Tenancies Board* [2017] IEHC 578, *EBS v Kenehan* [2017] IEHC 604, *Merriman v Fingal County Council* [2017] IEHC 695.

Constitution remains the locus of interpretive significance, in consistency with the sovereignty of the people of Éire metanarrativity, the indirect or persuasive interpretive effect of international and European law is observable within judicial hierarchy.²⁸

Éamon de Valera remains in the popular imagination the person most associated with the formal authorship of the Constitution. How would he look upon the State—by the performance of popular sovereignty—handing away for the second time²⁹ that hard won sovereignty? Anthony Coughlan, a persistent and vocal critic, with his colleague Raymond Crotty in the Common Market Defence Campaign, of the perceived loss of sovereignty to the EEC elucidated the point:

“Major Vivion de Valera told me in 1972 that he believed that his father had voted against the Third Amendment to the Constitution, which enabled Ireland to become a member of the European Community. If he was right in this belief, there is pathos in the thought of the elderly President being among the one-sixth of voters who said 'No' to a measure that subverted fundamentally the democratic basis of legislation as he had provided for it in the Constitution he had drafted thirty-five years before. For if the enactment of the 1937 Constitution by popular referendum rather than by act of the Dáil was a constitutional revolution, how much more so was the adoption of Article 29.4.3, which opened the way for the state and its citizens to be bound by a vast range of law emanating from bodies - the Commission, Council and Court of the European Community - which are not elected by or responsible to the Irish people, or indeed responsible as collectivities to any democratic assembly?”³⁰

The issue of the democratic deficit in the EU more broadly has been somewhat ameliorated, by the reforms passed in the Lisbon Treaty³¹ on the ordinary legislative procedure³² which increased the legislative power of the EU Parliament. Ireland’s line of jurisprudence on maintaining a national locus of sovereignty³³—which made tangible the high rhetoric of

²⁸ James Rooney, ‘International Rights as a Source of Unenumerated Rights: Lessons from the Natural Law’ September 5th, 2019. Available at SSRN, <https://ssrn.com/abstract=3448471>.

²⁹ The first being the vote in the 2nd Dáil to accept the Anglo-Irish Treaty, and the subsequent further democratic mandate this received by the elections for the 3rd Dáil in which pro-Treaty Sinn Féin returned a majority.

³⁰ Anthony Coughlan, ‘The Constitution and Social Policy’, in Frank Litton (eds) *The Constitution of Ireland: 1937-1987*, [1987] *Administration* (Special Issue) *Journal of the Institute of Public Administration*. Vol 35. No 4.

³¹ The withdrawal procedure introduced in Article 50, TEU.

³² Article 294, TFEU.

³³ Which preceded the Lisbon reforms and has presaged Article 4(2) TEU.

popular sovereignty within the text—would also only come later. That said, de Valera may have gone to his grave thinking that the Irish people had for a second time accepted through electoral expressions of their sovereignty a truncation of what he considered their natural sovereignty. Where once he had assuredly stated that the Irish people had no right to do wrong, he had enshrined a text which the judiciary had interpreted as formalising a system wherein the Irish people expressing their iterative constituent power could do no wrong.

9.3 The Judge as Part Lawyer, Part Poet, Part Philosopher, and the Guardian of Sovereignty

The dynamic process between the triumvirate of Irish constitutional actors; the Executive, the Judiciary, and the People³⁴ as to the meaning and consequence of the pooling of Irish sovereignty with the European Communities can be analysed across three judgements: *Crotty*,³⁵ *Pringle*,³⁶ and *Costello*.³⁷ These cases were to establish that the Government in its international relations with the EU was constrained by the textual commitment to popular sovereignty. A passage from an earlier case offers great insight into an enduring nationalist metanarrativity³⁸ within the judicial philosophy of Hogan J, who produced the most comprehensive articulation of Irish constitutional identity in *Costello*:

“The Constitution envisaged a plebiscitary as well as a parliamentary democracy and, in doing so, it has created a State which can demonstrate—in both word and deed—that it is a true democracy worthy of the name... that the theory of popular sovereignty for which Griffith argued and Pearse fought and Collins died and de Valera spoke and Hearne drafted and Henchy wrote and Walsh decided has become our own constitutional cornerstone. It is that very cornerstone on which the entire referendum edifice is constructed.”³⁹

That each of the individuals mentioned may have had a different vision of how this sovereignty should be expressed and utilised is incidental; the rhetorical effect of the poetic

³⁴ I do not include the legislature in this account as it persists in a Westminster system, where there is theoretical legislative primacy with responsible government, that the Executive operates in practice with a dominating power over the parliament. See, Conor Casey and David Kenny, ‘The Resilience of Executive Dominance in Westminster Systems: Ireland 2016-2019’, [2021] *Public Law*, pp. 355-374.

³⁵ *Crotty v. An Taoiseach* [1987] IESC 4.

³⁶ *Pringle v Government of Ireland* [2012] IESC 47.

³⁷ *Costello v. Government of Ireland* [2022] IESC 44.

³⁸ Albeit an explicitly civic and liberal nationalism as opposed to the Catholic nationalism of the 20th century. Although it is a nationalism, nonetheless.

³⁹ *Doherty v The Referendum Commission* [2012] IEHC 211. Hogan J. at para 23.

turn of phrase is to present a unified narrative of the national principle as monopolised by popular sovereignty. Staying with Hogan for a moment, speaking extra-judicially giving the Hale Lecture in 2023, a clear judicial philosophy was demonstrated through a comparative analysis of *Grundnorm/en* of the UK and Ireland. In the brief account of his conceptualisation of popular sovereignty as the Irish constitutional *Grundnorm*, Hogan stated:

“It is clear, therefore, that the referendum mechanism and popular sovereignty represents the ultimate Grundnorm in the Irish constitutional system. This has been long recognised and understood...If you head north west of the Landstrasse as the crow flies as you will ultimately come across two neighbouring islands with close ties of history, culture and language. Their paths have diverged in the last 100 years, with that divergence clearly marked in the field of constitutional law. One has opted for parliamentary sovereignty as its ultimate Grundnorm, the other for popular sovereignty.”⁴⁰

However, as has been demonstrated over the course of this thesis, the theory of justification which is still textually enshrined within the Preamble of the Irish Constitution has dual loci of authority: God and the People. That popular sovereignty has become the unipolar sovereign in the discourse of the Court and academe occurs in a manner similar to that which Hogan ascribes in his lecture to the UK: “The reason why UK courts give effect to the sovereignty of parliament is because of that long embedded tradition, history and precedent they essentially choose to do so.” It has been the choice of successive iterations of the Supreme Court to read out of the Constitutional text the binding authority of theistic natural law, and furthermore, to subordinate the agency of the democratically elected Executive to the sovereign People. The judiciary as an interpretive community have interpreted a text with at least plausible constraints on popular sovereignty therein, up to this point, as characterised principally by its democratic procedure for validating law. This is a reality which may not have been readily apparent to those legislators in the 8th Dáil who passed the Act which brought about the Constitution which made real their high rhetoric of popular sovereignty.

⁴⁰ *West of the Landstrasse: Searching for the Grundnormen in UK and Irish Constitutional Law*. Delivered by Mr. Justice Gerard Hogan at the Society of Legal Scholars (SLS) Annual Hale Lecture on 24th October 2023.

The choices of successive authoritative interpreters have been made, and *stare decisis* as a principle of legality is binding—right until the point when it isn't. We can therefore conceptualise the first two of following three cases as the embryonic doctrine of constitutional identity gestating, ultimately being delivered by Hogan J in the third. The judicial discourse in which this doctrinal interpretation of popular sovereignty has been articulated is most readily apparent in the triptych cases on popular sovereignty: *Crotty*, *Pringle*, and *Costello*.

9.4 A Triptych of Procedural Sovereignty.

*Crotty*⁴¹ concerned the adoption by the Dáil of the Single European Act, Title III⁴² of which committed the member states to jointly implement European foreign policy.⁴³ This case was the first to establish that a Treaty which would alter Irish sovereignty would necessarily have to be put before the People in a referendum, thereby setting a precedent which limited the capacity of the Executive to ratify through legislation⁴⁴ international Treaties which would substantively alter Ireland's constitutionally prescribed—and democratically sanctioned—dispensation of sovereignty. An account of sovereignty is provided throughout the judgments, although at its most basic in the context of external relations it is understood as the unfettered right to decide, to say yes or no.⁴⁵ In a clear articulation of the natural law and non-positivist construction of sovereignty, as understood in the Irish constitutional context, we see the pre-potent conception of not merely the Irish nation, but all those states which are the creation of national peoples. Importantly it is not that states and their executives enjoy unlimited sovereignty to conduct the business of international relations, they are servants of the People. In Ireland, the State and its Executive are servants of the People, and as creatures of the Constitution they subservient to that constitutional limit:

“Nevertheless the powers must be exercised in subordination to the applicable provisions of the Constitution. It is not within the competence of the Government, or

⁴¹ *Crotty v. An Taoiseach* [1987] IESC 4.

⁴² Title II of the Act was deemed to not impact on Irish sovereignty in a manner which would necessitate a referendum. So the Dáil could permissibly ratify it without recourse to popular plebiscite.

⁴³ Single European Act, Title III, Article 30.1, “The High Contracting Parties, being members of the European Communities, shall endeavour jointly to formulate and implement a European foreign policy.” And Article 30.6(a), “The High Contracting Parties consider that closer co-operation on questions of European security would contribute in an essential way to the development of a European identity in external policy matters. They are ready to co-ordinate their positions more closely on the political and economic aspects of security.”

⁴⁴ As was attempted in both *Pringle* (European Stability Mechanism) and *Costello* (EU-Canada Comprehensive Economic and Trade Agreement, CETA).

⁴⁵ *Crotty v. An Taoiseach* [1987] IESC 4, Finlay CJ. at para 36.

indeed of the Oireachtas, to free themselves from the restraints of the Constitution or to transfer their powers to other bodies unless expressly empowered so to do by the Constitution. They are both creatures of the Constitution and are not empowered to act free from the restraints of the Constitution. To the judicial organ of government alone is given the power conclusively to decide if there has been a breach of constitutional restraints. The powers of external sovereignty on the part of the State do not depend on the affirmative grant of this in the Constitution. They are implicit in the provisions of Article 5 of the Constitution. The State would not be completely sovereign if it did not have in common with other members of the family of nations the right and power in the field of international relations equal to the right and power of other states.”⁴⁶

It seems as if the Court is conceiving of Title III SEA as not merely unconstitutional on the basis of it being done through executive fiat or parliamentary procedure and not by the people performing popular sovereignty, but rather that the content is such that it would be contrary to the very basis of the text. Throughout the Constitution the central position of the common good of the Irish people is stressed as one of the most fundamental characteristics of Ireland as a sovereign, independent, democratic state.⁴⁷ The diminution of Ireland’s unqualified constitutionally prescribed sovereignty would be unconstitutional, that is of course *unless* with the passage by the People of the appropriate constitutional amendment, which was done with the Tenth Amendment of the Constitution Act, 1987. It is an interesting turn in the reasoning of the judgment; it points to the substantive nodal points within the text which would seem to preclude such a diminution of sovereignty, and yet then imbues the methodology of the procedure which realises this fundamental national principle with more substantive significance than the underpinning rationale on which it is premised. The Tenth Amendment altered Article 29.4.3° so as to permit greater integration of Ireland with the EU. It did not amend the constitutional provisions which establish the

⁴⁶ *Crotty v. An Taoiseach* [1987] IESC 4, Walsh J. at para 7.

⁴⁷ *ibid*, Henchy J. at para 20.

dispensation of authority and sovereign capacity which the Court used to reach its decision in *Crotty*; Articles 1,⁴⁸ 5,⁴⁹ 6.⁵⁰

If the Irish Nation *qua* People is a creature of the Constitution, and not a prepotent entity which is entitled to natural inalienable rights, then it is legally permissible to truncate its sovereign capacities through the legitimate procedure established by the Constitution. It has only gained this sovereign characteristic through the positive law of the text; therefore, the text governs the mechanics of the procedure for altering this state of affairs. That the text establishes that this is not the case—rather that the Irish Nation and its People are prepotent and sovereign by natural law, antecedent to all positive articulations—then a diminution of sovereignty by legalism seems a positivist affront to natural right of national peoples. The jurisprudence as it has developed, and the manner in which *Crotty* developed it, was to apply to an internally inconsistent text a hermeneutic of procedural popular sovereignty.

*Pringle*⁵¹ concerned a challenge to the legislative ratification of the European Stability Mechanism, as it was argued that this was a transfer of sovereignty in a like manner as was dealt with in *Crotty*. However, the Court would ultimately conclude that the ESM provisions did not function in a like manner to that as the SEA would have, drawing a delineation between the internal and external manifestations of sovereignty. *Crotty* concerned the unilateral abrogation by the executive power of Irish sovereignty and its exercise externally, whereas *Pringle* concerned internal power to make economic or financial policy in concord with other Eurozone members. As such, the Court reasoned that:

“The State has not ceded policy making for the future. The State has not ceded power to another institution to enable the creation of policy in the future. Nor has the State ceded to elsewhere the power to increase the State’s financial contributions. Consequently, there has been no transfer of sovereignty to any degree which is incompatible with the Constitution. To refer to the analysis by Walsh J. in *Crotty*, there has not been an abdication of freedom of action or to bind the State in its

⁴⁸ “The Irish nation hereby affirms its inalienable, indefeasible, and sovereign right to choose its own form of Government, to determine its relations with other nations, and to develop its life, political, economic and cultural, in accordance with its own genius and traditions.”

⁴⁹ “Ireland is a sovereign, independent, democratic state.”

⁵⁰ “All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.”

⁵¹ [2012] IESC 47.

freedom of action in its formulation of foreign policy. Nor, in reference to the judgment of Henchy J in *Crotty*, has there been any attempt by the Government to make a binding commitment to alienate to other States the conduct of foreign relations. Nor has there been any attempt at a fundamental transformation or diminution of sovereignty, such as arose in the *Crotty* case. Nor, in reference to the judgment of Hederman J. in *Crotty*, is this an agreement to subordinate or submit the exercise of the powers bestowed by the Constitution to the interests of other States. Rather, it is an election by the Government of a policy in union with other States in pursuit of an identical policy... I am satisfied that the Government did not abdicate, alienate, cede, or subordinate its power to another. The decision of the Government to enter into the ESM Treaty was a policy decision within its executive power, pursuant to the Constitution, and so did not involve an impermissible transfer of sovereignty.”⁵²

The reasoning of Hardiman J, in a dissenting minority of one, is significant for our analysis as he considered the abdication of economic competencies in a manner which was not covered by the “immunity” provisions of Article 29 in its much-amended manner, to indeed be an alienation of sovereignty:

“... by requiring a substantial sum of Irish public money to be transferred to a new financial institution, outside both Irish and European Union control,... rather than retained in Irish control and employed, in the manner specified in the Constitution, in furtherance of the common good of the Irish people... by requiring Ireland to submit to decisions as to the expenditure of the fund already mentioned, and itself to exercise its relevant powers... I have considerable doubts as to whether the commitments into which it is now proposed that Ireland should enter are consistent with the constitutional provisions for ensuring the democratic accountability of the government and of Ministers, and for ensuring democratic accountability, to the Irish people, for the appropriation and expenditure of the monies which compose the Central Fund.”⁵³

Hardiman J reasoned that the Constitution provides that the locus of common good, a principle orientating value in Irish constitutionalism, is that of Ireland, not that of Eurozone

⁵² *Pringle v Government of Ireland* [2012] IESC 47. Denham CJ. at para(s) 11-26.

⁵³ *ibid*, Hardiman J. in the dissent.

member states. It may seem a self-evident observation, that Ireland as a Nation is the locus of the Irish Constitution, and it is this central locus of metanarrativity which is most obfuscated by the disaggregation of sovereign capacities—but this interpretation of the ESM was not shared by the other justices of the Court. It is to this recursive metanarrativity to which Hardiman J is appealing in the reasoning of his judgment. However, the most interesting passage from this dissent relates to the meaning of the People’s sovereignty as it relates to the *Crotty* decision:

“Finally, I wish to emphasise that the right of the people (as opposed, for example, to the Government, the Oireachtas, or the European Union) in final appeal to decide all questions of national policy is enshrined in the Constitution and must be respected and upheld by the Courts. That right can of course be changed, qualified, *or even abolished* by the procedures laid down in the Constitution, but it is the people, and not the Government or the bureaucracy or the European Union who must do this. I would regard an interpretation of *Crotty* which undermines this basic principle as emptying that great case of meaning.”⁵⁴

If we are to take the objective meaning of all the appeals to sovereignty of the Irish people, as Hardiman J does in his reasoning,⁵⁵ then the assertion that the exercise of that natural right of national sovereignty can be abolished entirely if it is done so by the constitutionally provided procedure of amendment is a subordination of prepotent natural sovereignty of the Irish Nation to the procedural sovereignty of “the people of Éire”. That even in the only dissenting judgment, which would have rendered the ESM’s ratification subject to first passage by popular referendum and not mere legislative ratification, conceptually conceives of this sovereignty as subject to abrogation by the referendum procedure is worthy of note. It demonstrates a fidelity to procedure with a scepticism towards the metanarrative foundations on which this procedure is premised.⁵⁶

⁵⁴ My italics

⁵⁵ “I believe that in the formulation “inalienable, indefeasible and sovereign” and the Irish equivalent of those words, the Constitution deploys the very strongest words that are available in either language to indicate the absolute nature of the inherent and unrestricted right of the Irish nation to which they are applied” *Pringle v Government of Ireland* [2013] 3 IR 1.

⁵⁶ A position which was explicitly and vehemently decried by Pádraic H. Pearse in his essay *Ghosts*, wherein is caustic in his chastisement of the foregoing generation for not rising in violence against British administration in Ireland “They have conceived of nationality as a material thing, whereas it is a spiritual thing. They have made the same mistake that a man would make if he were to forget that he has an immortal soul. They have not recognised in their people the image and likeness of God. Hence, the nation to them is not all holy, a thing inviolate and inviolable, a thing that a man dare not sell or dishonour on pain of eternal perdition. They have thought of nationality as a thing to be negotiated about as men negotiate about a tariff

The *Crotty* case established the precedent of a necessary appeal to procedural or structural popular sovereignty, limiting executive power and discretion to ratify Treaties at the supranational level, by legislation. *Pringle* maintained the authority of this precedent, while perhaps limiting the scope of its utility to matters exclusively in foreign relations, negating the impact it could have in internal manifestations of sovereignty. It did so by limiting *Crotty* reasoning to international agreements which would cede policy-making competencies, not international agreements in a broader sense.

These two cases are demonstrative of the maintained national, as opposed to nationalist locus of sovereignty, as embodied in the referendum procedure centred on the principle of popular sovereignty. When these cases took place, *Crotty* at a time of gathering momentum for EU integration, and *Pringle* after multi-speed integration and increasingly contested questions as to the legitimacy of the project of integration altogether had become apparent⁵⁷—through the failed passage of the Treaty establishing a Constitution for Europe 2004 in France and the Netherlands—suggest that although EU membership may maintain popular support in Ireland,⁵⁸ the polity has maintained a consistent national metanarrativity. Particularly in smaller states of the EU, there has never manifested a popular conception of the EU being a project to explicitly construct a federal state analogous to the North America’s—a “United States of Europe”⁵⁹—and it is an interesting counterfactual to consider how the Irish public would have voted if a referendum would have been held on the TCE, given how its watered down Lisbon successor was initially rejected by the Irish public. The *Costello* judgment seems to develop this procedural popular sovereignty reading of the text, while demonstrating among some justices’ greater amenability to recursive appeal to national metanarrativity. Again, the broader social context at the present juncture seems more comfortable with national imaginings than at the juncture wherein *Crotty* and *Pringle* were decided.

or about a trade route, rather than as an immediate jewel to be preserved at all peril, a thing so sacred that it may not be brought into the market places at all or spoken of where men traffic.” Pearce, P.H., *Ghosts*, (UCC CELT, 2010), p. 224-225.

⁵⁷ Jan-Werner Müller, *Constitutional Patriotism*, (Princeton University Press, 2007), pp. 95-96.

⁵⁸ Ireland remains very much in favour of EU membership. Respondents in 2024 Eurobarometer expressed greater trust at the institutional level in the EU (56%) than their national parliament or government (both at 48%), concomitantly expressing a well above average among member states (61%) optimism about the future of the EU (77%). European Commission, ‘Ireland factsheet’, *Standard Eurobarometer 102*, Autumn 2024. https://ireland.representation.ec.europa.eu/document/download/a987490f-d851-4021-99bf-b1c7356d939d_en?filename=Eurobarometer_Standard_STD102_Autumn_2024_factsheet_ie_en.pdf

⁵⁹ Jan-Werner Müller, *Constitutional Patriotism*, (Princeton University Press, 2007), p. 99.

Chapter 10. Procedural Identity: Fidelity to Process Without Substantive Rationale?

10.1 *Costello*

*Costello*¹ concerned a challenge to the attempted ratification of CETA—a trade agreement between Canada and the EU—by a sitting member of the Oireachtas. It was from this case that we get the doctrinal utilisation of ‘constitutional identity’ for the first time. Seven judgments in total were delivered in the Supreme Court, three of which utilise ‘constitutional identity’ in some manner within their reasoning, and two others refer to it as a concept fleetingly, which is a majority of the Court recognising it as a conceptual and doctrinal reality within Irish constitutional jurisprudence. These different accounts of Ireland’s ‘constitutional identity’ illustrate minimal consensus as to what precisely this identity may be. Hogan J provides the most systematic account, no doubt informed by his familiarity with the concept from his time in Luxembourg as Advocate General at the Court of Justice of the European Union.

Baker J refers to ‘constitutional identity’ in a judgment which concludes that ratification of CETA would be unconstitutional, grounding this reasoning in Article 5 and the democratic nature of the Irish State. The reality of an Irish ‘constitutional identity’ is posited, not limited to textual analysis, but for the Irish courts.² The functions of CETA would undermine the finality of Irish jurisdiction, which would undermine the democratically established dispensation of juridical sovereignty within the Irish Constitution.³ In turn this would impermissibly undermine Ireland’s national sovereignty.⁴ No expansive definition of ‘constitutional identity’ is presented in the reasoning of this judgment, but it demonstrates an amenability to a broad model of judicial reasoning from constitutional identity.

Similarly, O’Donnell CJ refers in passing to the reality of a ‘constitutional identity’ of Ireland which could in practice be a constraint on the enforceability of decisions from international arbitration.⁵ However, the reference is fleeting to the point of irrelevance in relation to providing a descriptive account of Ireland’s utilisation of constitutional identity reasoning. This in itself is an indication of the lack of enthusiasm among a majority of the

¹ [2022] IESC 44.

² *ibid*, Baker J, at para 86.

³ *ibid*, at para 87.

⁴ *ibid*, at para 83.

⁵ O’Donnell CJ, at para 177.

Court to engage in such identity-centred reasoning, which gives credence to a sceptical disposition in the judicial milieu. Yet, the concept is imbued with a potentially significant power within this judgment. It could be a means of review in which Ireland could knowingly derogate from its obligations under international and EU Law.

Power J, in finding that the functioning of CETA would not contravene Ireland's legislative or juridical sovereignty, reasons that nothing with the agreement would undermine or destabilise⁶ the constitutional structure or identity of the State.⁷ The ratification of CETA, with its attendant Tribunal for deciding arbitrational awards, would not affect the essential character of the Irish constitutional order.⁸ While seemingly slightly more comfortable in utilizing the language of "identity", "structure", and "essential character", Power J did not provide a definitive doctrinal articulation of what these are.

MacMenamin J, on the other hand, took up reasoning from 'constitutional identity' with enthusiasm and read many constitutional provisions as constituent aspects of it. The process of defining the concept began by recognising that Article 5 is central to the fundamental structure of the State.⁹ The first relevant aspect of Ireland 'constitutional identity' identified by MacMenamin J was the separation of powers as derived from a reading of Article 6:

"Article 6, equally significantly, states that all powers of government derive under God from the People. Article 6.2 provides, in terms, that the powers of government are exercisable only by, or on the authority of, the organs of State established by this Constitution. What is provided in both Articles are part of the constitutional identity of this State."¹⁰

This recognition of separation of powers being a constituent aspect of Ireland's 'constitutional identity' is more expansively expressed latterly within the judgment. It is woven in with the procedural constraint placed on amending the Constitution through ratification of Treaties which would impact on Irish sovereignty as established in *Crotty* and *Pringle*:

"It is not open to a government, or any other body, to amend the Constitution of this State, simply by an international treaty. The Agreement is not necessitated by

⁶ Power J, at para 8.

⁷ *ibid*, at para, 59.

⁸ *ibid*, at para, 60.

⁹ [2022] IESC 44, MacMenamin, at para 9.

¹⁰ *ibid*, at para 10.

membership of the European Union, and, therefore, does not come within Article 29.4 of the Constitution. To permit an amendment of the Constitution *sub silentio* by a treaty would, now and in the future, be to offend against a fundamental feature of the constitutional identity and sovereignty of the State. Were it to be found that some action or actions, or decisions on foot of CETA did offend against fundamental constitutional values or the constitutional identity of the State, such as judicial independence, or the finality of judgments, a court, acting under the Constitution, would have no alternative but to refuse to enforce such an award.”¹¹

There is also an implicit appeal to the democratic validity, as emanating from the Constitutional metanarrative,¹² by invoking the archi-textuality of liberal democratic constitutionalism, and the “hard-won” fundamental rights¹³ that this protects:

“...it must be understood that states with written constitutions must deal with legal issues on the basis of that constitution, which include rights and duties which were hard-won. Matters going to the constitutional identity of the State cannot be abrogated by a treaty. Legitimacy of action must depend on a democratic mandate for such action.”¹⁴

It is interesting that MacMenamin J specifically acknowledges that there is often—presumably among the judiciary themselves and more broadly by academics, although this is not explicitly stated—scepticism or reserve regarded towards judicial rhetoric on matters of separation of powers¹⁵ as recursively constructed through broad appeals to fundamental rights and democratic accountability.¹⁶ However, this scepticism does not preclude MacMenamin J from proceeding to engage in just such a passage of rhetoric. By invoking the Indian comparison—specifically the constitutional theory of Dr. B.R. Ambedkar—the passage fully embraces the language and mode of reasoning from broad characterisations of ‘constitutional identity’, which in the Indian context is defined as the ‘Basic Structure’ doctrine.¹⁷ The comparison is justified—and demonstrative of—both the archi-textual and intertextual relationship between the Indian Constitution, inheriting and adapting aspects

¹¹ [2022] IESC 44, MacMenamin J, at para 163.

¹² *ibid*, at para 173. At this juncture the Preamble is specifically invoked.

¹³ *ibid*, at para 176.

¹⁴ *ibid*, at para 169.

¹⁵ Article 34, Bunreacht na hÉireann, 1937.

¹⁶ [2022] IESC 44, MacMenamin J, at para 177.

¹⁷ *Kesavananda Bharati v. State of Kerala*, A SC 1461 (1973).

of the Irish Constitution, as such they share an identity or constitutional “DNA”.¹⁸ This is an indirect sourcing of validity of a constitutional identity mode of reasoning—not from Article 4(2) TEU—but as a general principle within constitutions of a certain type—with the reference to hard one rights we may say, anti-imperial liberal democracies—of which India and Ireland are two examples.

It is the judgment delivered by Hogan J which provides most material in terms of reasoning from identity. The first aspects of the Irish Constitution which is recognised as encompassing “identity” is that of Article 34.1. The juridical sovereignty of the Irish State as expressed in said Article—in the reasoning of Hogan J—would be contravened by the enforcement in the High Court of a decision which could contravene Irish constitutional identity or constitutional values in a fundamental way.¹⁹ This early reference to ‘constitutional identity’ assumes the existence of such an identity and situates the Irish courts as a principal facet of the system which preserves this identity. This is an aspect of the “constitutional cure” which Hogan J presents, in which the Oireachtas would amend the Arbitration Act 2010 so as to vest in the High Court the authority to refuse enforcement of a decision which would materially compromise Ireland’s ‘constitutional identity’.²⁰

These initial references establish the procedural factuality of an observable identity of the Irish Constitution. In a comprehensive passage in the judgment Hogan J locates this identity as rooted in the sovereignty of the Irish People:

“So far as Irish law is concerned, the Constitution represents the most fundamental *Grundnorm* (“Bunreacht”) of all. It is, after all, the ultimate repository of our sovereignty and democracy. It expresses in a profound way key aspects of our national identity in legal form. Since our accession to the European Economic Community (as it then was) in 1973 and throughout the evolution of that Community into the European Union from 1973 onwards, Ireland has shared and pooled its sovereignty with other European states for the greater benefit of all in the manner so memorably described by the Court of Justice in *Van Gend en Loos*... Critically, however, at all relevant stages the Irish People have assented to that sharing and pooling of sovereignty in a series of constitutional amendments from 1972 onwards. If, however, there is to be any further material transfer of that sovereignty, it is

¹⁸ [2022] IESC 44, MacMenamin J, at para 177.

¹⁹ *ibid*, Hogan J, at para 16.

²⁰ *ibid*, at para 18.

essential to our system of constitutional democracy that the further consent of the Irish People is obtained.

As Article 5, Article 6 and Article 47 all in their own way demonstrate, this, at any rate, is the theory upon which the Constitution is founded. And herein lies the importance of Article 29.4.6. While it acknowledges the transfer of sovereignty which, for example, was entailed by the ratification of the Treaty of Lisbon (and, for that matter, the other relevant European treaties) and the assumption of the obligations thereby imposed by Union law, it also acts as a check on the further pooling of such sovereignty in a material fashion without the democratic assent of the People.”²¹

In his reasoning, the Constitution is a *repository* of our sovereignty, and it expresses key aspects of Irish *national* identity. This reasoning assumes the natural prepotency of Irish national popular sovereignty and posits the “people of Éire” as a creature of the Constitution which—in the lineage of *Crotty* and *Pringle* jurisprudence—can act as a check on further integration of the EU by the necessity to obtain democratic sanction through the referendum process. The mechanics of democracy as embedded in the text are an essential aspect of ‘constitutional identity’ as they serve as a means of channeling, and safeguarding,²² national sovereignty. Such is expressed by Hogan J when he reasoned:

“Article 5 of the Constitution declares that the State is a sovereign and democratic state. Democracy is thus made an indispensable feature of the very constitutional identity of the State and the provisions of Article 15.2.1, Article 16, Article 28.4, Article 29.5.2 and Article 47 are just some of the provisions of the Constitution which give practical effect to this commitment to democratic legitimacy and control.”²³

We can see from this expansive referencing of the actual text of the Constitution the significance of rooting this new doctrine in the language of the Constitution. This fits in with a general critique of former doctrines within Irish jurisprudence which supposedly were not sufficiently objective or textually derived. Yet, this textual specificity is offset later when Hogan J refers to “our general constitutional identity and fundamental

²¹ [2022] IESC 44, Hogan J, at para(s) 60 and 61.

²² *ibid*, at para 228. Wherein Hogan J refers to the option available to the Oireachtas to legislate for his ‘constitutional cure’ such that “that the constitutional identity of the State and its sovereignty was thereby safeguarded.”

²³ *ibid*, at para 213.

constitutional values”.²⁴ What is the “general constitutional identity” and is it distinct from fundamental constitutional values, or are they one and the same? Furthermore, if we have a general constitutional identity, is its generality derived from an internal or external standard? It would seem that it is an internal standard as Hogan J explicitly references it as distinct from “general EU obligations”. Also, it is significant to recall Hogan’s derisive characterisation of appeals beyond the Irish Constitution as demonstrating a “Seonínism”.²⁵ So, we must conclude that it is an internal generality, which is tantamount to saying a broad reading of the diffuse principles contained within the Irish Constitution. This construction of identity, fundamental values, and EU obligations is repeated throughout the judgment. Yet, in earlier extrajudicial writing, the fundamental values as embedded in rights within Article 40.3, are presented as the cornerstone on which the Constitution is built.²⁶ Sovereignty, democracy, and fundamental rights are mutually sustaining yet distinct principles within the text; principles which are complicated by the multi-level dispersion of sovereignty and democratic control as brought about by Ireland’s place in the EU.

The issue to be decided in this case was that of the constitutionality of investor dispute arbitration panels as conceived of within the CETA agreement. The Court—in the majority—reasoned that this could potentially threaten key aspects of Irish juridical sovereignty, and what was being nascently conceptualised as Irish constitutional identity. The enforceability of the panels’ judgments within Ireland would in practice be constitutionally impermissible, as this would diminish juridical sovereignty by potentially enforcing externally sourced decisions within Irish courts, thereby superseding the Irish juridical hierarchy.²⁷ As such, the exclusive jurisdiction of the Irish Courts would be diffused by the introduction of this arbitral body. That this could not be done by executive fiat, but was not *per se* unconstitutional in substance, was suggested by the Court’s ‘constitutional cure’: amending the Arbitration Act 2010 so as to give the High Courts powers to refuse to enforce a judgement emanating from CETA panels by reason of public policy. Indeed, as referenced, it was posited by O’Donnell CJ, that this power was

²⁴ [2022] IESC 44, Hogan J, at para 230.

²⁵ Gerard Hogan, 'Harkening to the Tristan Chords: the Constitution at 80' (2017) 40 *DULJ*, 71.

²⁶ Gerard Hogan, 'Unenumerated Personal Rights: Ryan's Case Re-Evaluated' [1990] *Irish Jurist*, New Series vol.25.1, p.96.

²⁷ “Would the ratification of CETA be contrary to Article 34.1 insofar as enforcement of such judgments of a CETA Tribunal would be almost automatic? Answer: Yes, because as matters stand the High Court would have no power to refuse enforcement even where the award compromised Irish constitutional identity or constitutional values in a fundamental way or where it was inconsistent with the requirements of EU law” Costello [2022] IESC 44, para 16

already inherently held the Courts, which could refuse an arbitral decision if it contravened Irish constitutional identity. This essentially keeps the locus of juridical sovereignty within the domestic setting, maintaining the proximate democratic accountability between popular sovereignty and executive action. This legislative cure formula—which was a new departure for the Court in going to such lengths to suggest how constitutional defects could be addressed²⁸—can be seen in practice with a similar cure being proffered in the later *Delaney*²⁹ case which is discussed later in this chapter.

This reasoning from constitutional identity would appear to be another deliverance of the reassertion of the centrality of Irish popular sovereignty in the context of further EU integration. In the face of the postmodern condition of the epistemic judicial community and the necessity of harmonious³⁰ interpretation, the judiciary have landed upon a doctrine which permits an overarching reading of the Constitution which can resolve textual dissonance. This could permit principles being re-narrativized—in doing so, changing the interpretive significance of the provisions in which they expressed—in service of coherence and the subordination of all principles to procedural popular sovereignty. It is this elevation of the democratic referendum procedure, and the maintenance of popular sovereign which it expresses, which seems to have been deemed Ireland’s constitutional identity. As a

²⁸ Oran Doyle, ‘Constitutional Identity, Legal Autonomy, and Sovereignty: *Costello v Government of Ireland* [2022] IESC 44’ *European Constitutional Law Review* 19(4): 715–37.

²⁹ [2024] 1 ILRM 349.

³⁰ *People v O’Shea* [1982] IR 384, “Any single constitutional right or power is but a component in an ensemble of interconnected and interacting provisions which must be brought into play as part of a larger composition, and which must be given such an integrated interpretation as will fit it harmoniously into the general constitutional order and modulation. It may be said of a constitution, more than of any other legal instrument, that “the letter killeth, but the spirit giveth life”... The Constitution as the fundamental law of the State must be accepted, interpreted and construed according to the words which are used and these words, where the meaning is plain and unambiguous, must be given their literal meaning. Of course the Constitution must be looked at as a whole and not merely in parts, and where doubt or ambiguity exists, regard may be had to other provisions of the Constitution and to the situation which obtained and the laws which were in force when it was enacted. Plain words must, however, be given their plain meaning unless qualified or restricted by the Constitution itself.” And more recently endorsed in *Heneghan v. Minister for House, Planning and Local Government* [2023] IESC 7, “The Constitution, as the basic law of the State, is animated by a number of fundamental principles and is intended to achieve its various purposes through a sequence of provisions intended to be read as one, and designed to function collectively. That understanding dictates the proper approach to the interpretation of any individual part of the instrument. As with any legal document, the intent of those adopting it is informed in the first instance by the language they have used (and having regard to Article 25.4, that appearing in the Irish text) but the exercise of interpreting that language involves not merely deducing the meaning of the words appearing in the provision in question, but also reconciling the text of the Article with the document in its entirety while at the same time ensuring that both are analysed in the light of their underlying purpose. The predominant importance of that purpose, and the fundamental principles that inform it, means that in undertaking the exercise of constitutional interpretation the courts must incline more to flexibility in subordinating the strictly literal interpretation of the text in order to attain a construction that is both internally harmonious, and that achieves a clearly ascertainable purpose, than might be the case when conducting the exercise of interpreting ordinary legislation.”

doctrine, in the manner it is utilised in judgments delivered in *Costello*, it seems that while the prepotent sovereignty of the Irish People is acknowledged, the Constitution—as a mere repository of that sovereignty—could provide the mechanism for its further diffusion. That being said, in this instance, the constitutional dispensation of sovereignty is being upheld in a manner which precludes the means by which CETA may have abrogated juridical sovereignty.

It remains unclear—even in the reasoning of Hogan J’s judgment—where identity, if it does, begins and ends. Oran Doyle suggests that the aspects which have been read into ‘constitutional identity’ in the judgments delivered in *Costello* are expansive such that the list appears almost as broad as the Constitution itself.³¹ Indeed, Hogan J acknowledges that as a category, constitutional identity and fundamentals, may be a list “never closed”.³² So, with the diffuse and open-ended manner in which this doctrine was conceptualised—and a lack of apparent methodological consensus as to how one discerns the precise contours of ‘constitutional identity’—one may feel it prudent to countenance the warning against such a model of judicial reasoning: “since the lack of objectivity in the method whereby such unenumerated rights are arrived at, coupled with the attendant uncertainty thereby entailed, all seriously undermine the important legal values of objectivity and certainty.” Indeed, this doctrine may have eventuated “a vast - and, it must be said, somewhat unprincipled - expansion of the power of judicial review.”³³ The judiciary are acting not as latter-day philosopher kings, rather, as a judicial Odysseus; taking the materials at hand and forming them into a construct which serves present purposes. Indeed, Doyle has averred to the potential for ‘constitutional identity’ to be a Trojan Horse³⁴ wherein the scope for potentially crossing the threshold of challenging EU law in Ireland on a substantive and not merely procedural basis has been introduced.

This judicial reaffirmation of the constitutionally proper proximity of sovereignty and democratic accountability to the national level—as acknowledged by Doyle—complicates the ease with which the Government operates at the supranational level. It could be read as an obtrusive delimitation of Ireland’s internationalist and European constitutional

³¹ Oran Doyle, ‘Constitutional Identity, Legal Autonomy, and Sovereignty’ [2023] *European Constitutional Law Review*, 19, p.13.

³² [2022] IESC 44, Hogan J, at para 235.

³³ Hogan, G., ‘Unenumerated Personal Rights: Ryan’s Case Re-Evaluated’ [1990] *Irish Jurist*, New Series vol.25.1.

³⁴ Doyle, Oran: *Trojan Horses and Constitutional Identity: Ireland’s Supreme Court Holds up Ratification of CETA*, *VerfBlog*, 2022/11/23, <https://verfassungsblog.de/trojan-horses-and-constitutional-identity/>.

principles contained in Article 29. Doyle, at the time of his writing, predicted the potential impact of *Costello*-model constitutional identity reasoning would have little influence beyond its novel circumstance.³⁵ He did not foresee the extent of the internal identity turn. Indeed, Doyle suggested that the reasoning delivered in the judgments of the majority in *Costello*—by way of discursively realising the unconstitutionality of CETA by an ill-defined concept of ‘constitutional identity’—meant that the prospective ratification of CETA is a “near insoluble conundrum”. This conundrum stems from the progressive disaggregation of sovereign capacities and expanding intertextual obligations being rationalised through a nationalist legitimating metanarrative. For now, at least, this conundrum is permitted to continue without significant negative implications politically for Ireland within the EU.

10.2 Procedural Identity as a Substantive Principle of Scepticism Towards Metanarrativity

This line of jurisprudence has led both Eoin Daly³⁶ and Seán Rainford³⁷ to identify Ireland’s ‘constitutional identity’ as *procedural* popular sovereignty. A characterisation of Irish constitutionalism as possessing a solely procedural identity is persuasive on some levels, as the Court has established that it recognises no substantive limit within the Constitution to find an amendment passed by referendum as unconstitutional, thereby adhering to a doctrine of unfettered amenability.³⁸ Furthermore, up until the slightly more expansive reasoning in *Costello*, the Court as of yet had not further articulated a substantive identity for the text.³⁹

However, this analysis raises two points requiring further comment. Firstly, to say that identity is procedural and not substantive is to divorce the normativity of the procedure

³⁵ Oran Doyle, ‘Constitutional Identity, Legal Autonomy, and Sovereignty’ [2023] *European Constitutional Law Review*, 19.

³⁶ Eoin Daly, ‘Constitutional Identity in Ireland: National and Popular Sovereignty as Checks on European Integration’ in Christian Calliess and Gerhard Van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press, 2019). More recently a view reiterated in Eoin Daly, ‘From sovereignty to social liberalism: two new dimensions of constitutional identity in Ireland’, *Public Law*, 2024, Jul, 528-544. Though in this article suggesting a different analytical model of constitutional identity inferred from referendums developing a social liberal identity for the Constitution.

³⁷ Seán Rainford, *Costello v Ireland* and an Irish Constitutional Identity, *Irish Judicial Studies Journal*, Volume 7 (1), pp. 70-81

³⁸ *Finn v Attorney General* [1983] IR 154, *Slaterry v An Taoiseach* [1993] 1 IR 286, and *In re Article 26 and the Regulation of Information (Services outside the State for the Termination of Pregnancies) Bill 1995* [1995] 1 IR 1.

³⁹ Such an argument is presented in, Eoin Daly, ‘From sovereignty to social liberalism: two new dimensions of constitutional identity in Ireland’, [2024] *Public Law*, Jul, 528-544.

from the substantive principle—expressed in Ireland’s constitutional metanarrative—which induces the persistent judicial adherence to it. Secondly, that the Court has only, so far, articulated the rigorous observance of the sanctity of procedure in the clinical language of jurisprudence does not mean that tertiary substantive principles which give normativity to it are now absent. As the Court itself has shown a postmodern scepticism towards the metanarrative as constructed within the text of the Constitution—legitimately so as the text is internally dissonant—its choice to elevate proceduralist principle in the manner it has is expressive of a substantive principle of their interpretive strategies.

To say that there has been a diminution of the salience of Catholicity in the interpretive canon of the Court, and more generally from the moral imagination of society more broadly is relatively incontrovertible.⁴⁰ Furthermore, acknowledging that the recent history of “social amendments” has embodied a form of populist rebranding of Irish national identity as a social liberal nation is similarly seemingly unassailable,⁴¹ although the recently rejected 39th and 40th amendments complicate this teleological progressive characterisation. However, it remains the case that theism still persists as a shade within the text. That the Court choose to ignore it is a conscious choice, wherein we see the judiciary as dually situated: by precedent which has developed in this manner, and in socio-political context which has similarly developed in this manner. Also, that nationalism has become less exclusive in the manner in which it is articulated within the text of the Constitution does not mean that as a substantive principle it has become detached from a certain teleological narrative still found in the Preamble and throughout the text. Doyle presents a characterisation of the Irish text as currently conceptualised, in which he states that the “religious influences have largely been bled out” and that the text “is close to agnostic about national reunification”.⁴² The manner in which the text has been interpreted may be nearly agnostic about national reunification, but the text on the page is not. Which is the “correct” or “real” descriptive account of the Constitution, the one which takes seriously the written text, or one that is the product of many judicial interpretive strategies, which has denuded

⁴⁰ I qualify this statement as the most recent census data available from CSO carried out in 2022 established that 77 percent of Irish citizens still self-identify as Roman Catholic. Data available at <https://www.cso.ie/en/releasesandpublications/ep/p-cpp5/censusofpopulation2022profile5-diversitymigrationethnicityirishtravellersreligion/religion/>

⁴¹ Such an argument is presented in, Eoin Daly, ‘From sovereignty to social liberalism: two new dimensions of constitutional identity in Ireland’, [2024] *Public Law*, Jul, 528-544.

⁴² Oran Doyle, *The Constitution of Ireland: A Contextual Analysis*, (Hart Publishing, 2018) p.43

certain words on the page of popularly understood original meaning,⁴³ depends on anterior assumptions within the epistemic community of interpreters. In privileging in jurisprudence and academic critique the authority of the ‘small c’ constitution as opposed the ‘large C’ constitutional text, we see the epistemic and interpretive community of Irish constitutionalism avert the need for formal textual alteration, thereby maintaining the metanarrativity of the Constitution, its ontological stability and continuity, while fundamentally altering its operative meaning without necessitating a constitutional revolution. Therefore, I suggest that fidelity to procedural popular sovereignty among the judiciary is a substantive principle. That it is paradoxical⁴⁴ and seemingly idiosyncratic to Ireland’s expression of constitutionalism, does not negate the descriptive propriety of this account.

The Irish judiciary as an interpretive community have developed the quality of an ironist as opposed to that of a theologian or metaphysician.⁴⁵ By this I mean that they have accepted the contingency of their conception of constitutional principles—they do not conceptualise these as having any intrinsic transhistorical nature as their vocabulary is not final, they operate in a historicist⁴⁶ discursive institution. This is not to suggest any deception either internally or externally. I suggest that as the judiciary are epistemically conditioned by the pedagogical process of learning to read the Constitution through how it has been previously interpreted, they are reading out certain provisions in good faith, believing that they are expressing institutional fidelity to the function they are prescribed within the Constitution. But that the text has been read in a manner which has established unfettered amenability as metanarratively consistent with a text which is laden with theism, nationalism, and natural law language, is surely expressive of a realisation of the contingency of their interpretive vocabulary.

As such, they can—in good faith—make a declaration upon their appointment to judicial office which is on its face confessional; which when taken syntactically with other theistic and naturalistic invocations throughout the text would point to the “reality” of transhistorical inalienable national and ethical principles. The judiciary—as an interpretive

⁴³ Conor Casey and Oran Doyle, ‘Higher Law or Great Charter of the Irish People? The Constitution under the New Supreme Court’, [2024] *DULJ*, Vol 44(1).

⁴⁴ As acknowledged by Eoin Daly in ‘From sovereignty to social liberalism: two new dimensions of constitutional identity in Ireland’, *Public Law*, 2024, Jul, 528-544.

⁴⁵ Richard Rorty, *Contingency, Irony, and Solidarity*, (Cambridge University Press, 1989).

⁴⁶ Or nominalist.

community—can then, by their institutional principle of adherence to precedent and their contextual enculturation in a society which relates to vestiges natural law and Christian theism in a broadly sceptical manner, render the text in interpretation positivistic and procedural.

Both the constitutional procedure which channels the democratic expression of the sovereignty principle, and the more general principles of constitutionalism within Ireland, are enmeshed in the substantive particularism of nationalism. At this present juncture it would appear that the sovereignty principle—as embodied in the referendum procedure—has a supervening interpretive normativity in the jurisprudence of the Court. Actions which appear to contradict the others tertiary principles of Irish constitutionalism, and the more substantive conceptions of nationalism, may be validated by the transubstantiating ritual and performance of popular sovereignty.

With the Irish Constitution having provisions which the Court has treated as being of various classification—thereby having different significance in their interpretive framework—and being a text which is now formally as well as informally intertextual; one may argue it is more of a library or compendium of constitutional provisions, rather than a singularly coherent text. Constitutional identity bestrides these diffuse literary, historical, political, and legal narratives and reduces them to one procedural truth. That this truth may not be descriptively holistic does not negate its usefulness.

This truth is that an action or omission which is contrary to Ireland’s constitutional fundamentals and constitutional identity⁴⁷ will be unconstitutional. That identity amounts to democracy as expressive of the principle of popular sovereignty. Democracy is thus made an indispensable feature of the constitutional identity of the State. This standard of review of executive power, developed from “clear disregard” in *Boland*; through the limitation established in *Crotty* on the basis of the Executive being a “creature of the Constitution”; and now “constitutional identity” within *Costello*, are built from multiple constitutional provisions: Article 5, Article 15.2.1, Article 16, Article 28.4, Article 29.5.2 and Article 47. These provisions are just some of the Articles of the Constitution which give practical effect to this commitment to democratic legitimacy and control.⁴⁸ The argument herein has attempted to problematise the notion that this doctrine is solely

⁴⁷ [2022] IESC 44, para 235.

⁴⁸ *ibid*, para 213.

procedural in nature and limited to the process of EU integration, or indeed potential stagnation, or eventual disintegration. A procedural characterisation of Ireland's constitutional identity relies on divorcing the normativity of democracy from that which animates it within Irish constitutionalism—that of a strong nationalist justification of sovereignty, emergent from a post-colonial inversion of ethnic sites of discrimination and subordination. That this narrative is still textually enshrined means that it is still a property of the text, even if dormant through alteration and desuetude: its normative potency still persists.

Judicial argumentation—based in a constitutional theology of primacy of popular sovereignty, with the democratic plebiscite as its procedure for transubstantiating the illegitimate into the legitimate—has hinged the authority of the legal order on a paradox which they have only partially reconciled.

10.3 The EU as a “Third-Space”

In a process which seeks the ever-closer union between peoples there comes a point where the conceptual frontiers between national *peoples* erode and, in their absence, emerges a continental *people*. The frontiers between the “We” of national constitutionalism, and the “Other” of other nations, becomes a “We” of EU member states, and an “Other” of non-EU member states. This is not a singular eidetic moment but rather a process, wherein the identity deficit in European Union would be overcome by non-legal, ethno-symbolically significant measures to build a European common metanarrativity. This might be induced by the continued development of a curriculum of language learning; collective European historical studies; and an identification of the conceptual limits of the European project⁴⁹ so as to build a fellow feeling of solidarity and identity among EU citizens. Perhaps it is by taking part in this process that the paradoxical conceptualisations of natural or positivist sovereignty of the *Irish* people will be ultimately resolved, at least in its external dimensions.⁵⁰ Europeanising the Irish Question in this way was central to the thinking of John Hume, who understood Irish conflicting national narratives as emanating from European wars of the seventeenth century, as such, positing that it would be a common citizenship of Europe which would lead to cooperation between the peoples of Ireland.

⁴⁹ Thierry Chopin, ‘Europe and the identity challenge: who are “we”?’, [2018] *European Issues* n°466 19th March.

⁵⁰ The supranational as opposed to the intranational.

Hume's argument posits that common citizenship has the potential to create a 'third space' in which the salience of national narrative cleavages could be de-escalated:

"In a divided society, the only way to provide equal citizenship is by recognising the existence of different identities and to put in place structures that treat people differently but equally...I would argue that politics and the role of the citizen remains as important as ever. To preserve and enhance the reality of citizenship in modern society, new and more complex forms of political institutions will be required. A balance must be struck between international, European, national and regional levels of decision-making...I believe that we are entering a post-nationalist world where the nation-state on its own is simultaneously too small and too big to be an effective means of delivering the essentials of any political system: economic development; social progress; and the moral and physical security of its citizens. The real task of politics in the next century will be to find ways in which the reality, not the appearance, of the sovereignty of the people will be upheld. For me, the sovereignty of the people can only mean the right of peoples to control their own destinies, to respect each other rights...The priority for the European Union must be to enhance the embryonic concept of European citizenship..."⁵¹

The discursive formation of Irish identity between nationalism and Europeanism may be eventually reconciled. If so, the contestation will inevitably have winners and losers; the pre-eminent national constitutional paradigm which has dominated European constitutionalism since Westphalia and the French Revolution will either maintain its supremacy or be partially subsumed into a model of continental identity of shared values. These shared values—unless and until a new European metanarrativity is constitutionally enshrined—will remain reliant on national narrativity for normative salience and will thereby be particularised in character to the national context. If European integration intensifies—a directionality away from state-centred sovereignty—paradoxically, this would likely lead to some form of federal statehood, which in turn would re-establish a global uniformity of public government in the form of the State.⁵²

⁵¹ John Hume, 'Citizenship in a Divided Society', *The Steveson Lecture on Citizenship*, University of Glasgow, May 3rd, 1995. https://cain.ulster.ac.uk/john_hume/docs/Hume_1995-05-03_lecture.pdf.

⁵² Bardo Fassbender, 'Are the EU Member States Still Sovereign States? The Perspective of International Law', [2023] *European Papers*, Vol. 8, No 3, p.1641.

My analysis does not take a position on state sovereignty as against greater EU integration. Neither do I attempt to provide a descriptive account of the character of the EU, whether that be supranational,⁵³ post-national,⁵⁴ or intergovernmental.⁵⁵ None of these models fully captures the *sui generis* character of the European Union and most have an inherent normative position for or against state-sovereignty contained therein. What I do suggest is that the picture of sovereignty that the EU renders for the Irish constitutional metanarrative of national popular sovereignty is complex. Furthermore, that it has served—paradoxically—to de-escalate the nationalist aspects of the Constitution, while permitting a judicial re-bolstering of popular sovereignty of the “people of Éire” as a constitutional subject.

However, it remains that the discourse of Irishness as enacted between national identity and an intermediary European identity of common values⁵⁶ is taking place in a jurisdiction where the supposed sovereign by natural right—the People—could be procedurally or

⁵³ One can situate a wide spectrum of thinkers in the nationalist tradition from conservative nationalists (See, Roger Scruton, ‘Europe Against the European’, *Forbes*, Jun 03, 2014) to liberal nationalists (David Miller, ‘On Nationality’, (Oxford University Press, 1997). Yael Tamir, *Liberal Nationalism*, (Princeton University Press, 1995) and more recently Tamir, ‘Why Nationalism’, (Princeton University Press, 2019), in this analytical space. The supranational quality of the EU poses a tangible challenge to basic definitions of state-sovereignty and national self-determination.

⁵⁴ We may assign this normative characterisation most closely with the Kantian influenced cosmopolitanism of Jürgen Habermas. A position, and exhortation for greater EU constitutional integration can be read in Habermas, *The Crisis of the European Union: A Response*, (Polity Press, 2012).

⁵⁵ We may identify this somewhat middle path with Richard Bellamy in *A Republican Europe of State: Cosmopolitanism, Intergovernmentalism, and Democracy in the EU*, (Cambridge University Press, 2019).

⁵⁶ This “European Identity” is specifically tied to the Treaties and the autonomy of the EU legal order to maintain uniformity among member states in adhering to these values in their constitutional and national identity. This dynamic is well captured by Koen Lenaerts and José A. Gutiérrez-Fons in their assessments of Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97 and case C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98, in ‘High Hope: Autonomy and the Identity of the EU’, [2023] *European Papers*, Vol. 8, No 3, p. 1498/1499. They present the reasoning of the Court of Justice in both cases as such, “the Court of Justice proceeded to stress the cardinal importance of the values on which the EU is founded. Before accession, a candidate State for EU membership must align its own constitution and national identity with those values. Once accession takes place, it is therefore presumed that the new Member State respects the values on which the EU is founded and thus may join a legal structure based on the principle of mutual trust. In the light of that principle, each Member State is equally committed to upholding those values and in so doing, to respecting EU law provisions that implement them...compliance must be guaranteed for as long as a Member State remains within the EU, since it is essential for the enjoyment of all the rights derived from the application of the Treaties to that Member State...the Court of Justice observed that the values contained in art. 2 TEU flow from the constitutional traditions common to the Member States... They crystallise the struggle of previous generations of Europeans who strived for freedom, democracy and justice. They form part of our common heritage as Europeans...established a conceptual link between those values and the identity of the EU as a common legal order. That link serves to cultivate a sense of belonging to a community of values where traditional elements forming part of national identity...are not relevant. The EU endorses a new type of identity that operates outside the paradigms of the nation-State. The identity of the EU brings all Europeans together, since we can all identify with the values contained in art. 2 TEU, regardless of our national identity. That identity is the bedrock on which to build “the process of creating an ever-closer union among the peoples of Europe”. We, Europeans are diverse... and yet we are united because we share and cherish those founding values. As a community of values, the EU is “united in diversity”.”

legalistically abolished, while maintaining a robust commitment democratic procedures and principles, with a lingering textual appeal to ethno-symbolic national sovereignty at its normative core. As sovereignty is used as an argument both in favour and against a more intense political and economic integration of states on a regional—as well as a universal level⁵⁷—it would appear as if some aspect within this dissonant construction of Irish constitutional identity must be subordinated for this process to develop. So, the paradox of Irish constitutionalism is concomitantly centred and obfuscated by the jurisprudence on popular sovereignty and the EU.

Yet, these contradictions have been ever present within the Irish Constitutional order, as has been evident in this discussion thus far: the 1922 text, with dual roots of title in Westminster statute and bilateral Treaty of equals; the Catholic democracy which guaranteed free practice of religion and recognised the minority faiths of the nation in text; and the *de jure* and *de facto* position of Northern Ireland as it relates to the Constitution. Perhaps a domestic legal order which places high rhetorical and procedural significance on popular sovereignty, which locates itself at the heart of a supranational autonomous legal order⁵⁸ could be an example par excellence of utilising identity as a narrative of continuity instrumentally to obscure the significance of reordering which has taken place.

In this model, the “People” can retain and continue to perform their sovereignty through the referendum procedure, and in so doing render their national constitution subordinate to a supranational autonomous legal order⁵⁹ which has supremacy thereover. To complete the

⁵⁷ Bardo Fassbender, ‘Are the EU Member States Still Sovereign States? The Perspective of International Law’, [2023] *European Papers*, Vol. 8, No 3, p.1631.

⁵⁸ Justin Lindeboom & Ramses A. Wessel, ‘The Autonomy of EU Law’, *Legal Theory and European Integration*, *European Papers*, Vol. 8, 2023, No 3, p. 1248. “From the early 1960s, the autonomy of the EU legal order has been central to the creation of the doctrines of direct effect and primacy and the process of “constitutionalising” EU law. Internally, therefore, the doctrine of the autonomy of EU law is central to the special nature of the EU legal order as a “domestic” legal order common to the Member States, distinct from ordinary international law. The main logic of internal autonomy is to transform EU law into a self-referential, coherent and complete system of norms. At the same time, the corollaries of autonomy, in particular the doctrines of primacy, direct effect and sincere cooperation have been key in not only establishing a “new legal order”, but also in creating links between the EU legal order and the already existing legal orders of the Member States.”

⁵⁹ Niamh Nic Shuibhne, ‘What is the autonomy of EU law, and why does that matter?’, *Nordic Journal of International Law*, vol. 88, no. 1, p.9, “In Van Gend en Loos, the Commission argued that ‘judged by the international law of contract and by the general legal practice between States, the European Treaties represent a far-reaching legal innovation and that it would be wrong to consider them in the light only of the general principles of the law of nations’. Here are seeds of the enduring sense that the EU legal order is distinctive. The autonomy of EU law expresses elements of that distinctiveness in concrete, legally meaningful ways. In essence, it serves to establish boundaries around the extent to which the EU legal order can interact with both national legal orders and the international legal order, reflecting a basic understanding of autonomy as ‘self-rule’ in many respects. But the underlying starting point of establishing and protecting the EU legal order as

circularity, it is through a provision of the Treaties of that legal order that the judiciary have located a doctrine through which domestic sovereign competencies—constitutionally enshrined—would be upheld.

However, the directionality of the change between national state sovereignty and supranational EU integration may not be unidirectional. In our current moment⁶⁰ we are seeing a certain political inflection point wherein discourses of national sovereignty are once more of primary salience in Western political discourse. To paraphrase Gramsci, the difficulty consists in the fact that the old is dying and the new cannot be born; in this interregnum a great variety of morbid symptoms appear.⁶¹ Which is the old and which is the new—national state sovereignty or supranational legal orders—is not immediately clear. Furthermore, it may be that a supranational legal order is merely just a polity which has not as of yet developed its national metanarrative. If the EU is going to develop beyond its descriptively thin legal and economic identity to develop a proto-national or continental political identity, could this be rationalised through the Irish text as currently established? So far, the EU has served as both a ‘third-space’ wherein the totality of Ireland could de-escalate nationally contingent issues and emphasise common interests. That was of course until Brexit in 2016 which served to heighten once more nationalism on both sides of the Irish Border. Further, it has also served to afford the Irish judiciary opportunities to rebooster the sovereignty of the “people of Éire”, which has at its normative core a nationalist metanarrativity.

The longevity of the Irish text is both attributable to its nationalistically resonant metanarrativity, and the unstated judicial treatment of this as narrative—as it has constructed a hermeneutic in which the Irish people can fundamentally alter all aspects of their own story—maintaining stability through the motif and procedure of sovereignty as authorship. Constitutional identity as a hermeneutic of the Irish Constitution ensures the

something distinctive has also produced a very particular, very powerful and often controversial conception of autonomy.”

⁶⁰ The re-emergence of nationalist ideologies in the 21st century is ascribed to instability and disruptive impacts brought about by ever greater sophistication of technologies by B.S. Rabinowitz, *Defensive Nationalism: Explaining the Rise of Populism and Fascism In The 21st Century*, (Oxford University Press, 2023). Rabinowitz argues that the conditions which are precipitating the current moment of nationalism in the West mirror those in the 19th Century.

⁶¹ A. Gramsci, *Quaderni del Carcere*, vol. 1, Quaderni 1–5 (Turin: Giulio Einaudi editore, 1977), 311. English translation quoted from *Selections from the Prison Notebooks of Antonio Gramsci*, ed. and trans. Quintin Hoare and Geoffrey Nowell-Smith (London: Lawrence & Wishart, 1971), 276.

continued salience of Irish nationalism, by affording the Irish Nation *qua* People, the supreme power over itself, even paradoxically, the power to abolish itself.

10.4 Constitutional Identity: Turning Inwards.

It seems inevitable that a judicial doctrine which conceptualises certain constitutional properties as fundamental or essential—even if the initial context for this is supranational—will have some consequence in the domestic realm of constitutional reasoning. If one conceptualises a constitutional principle or value as fundamental to the general identity of the constitutional order then the change, diminution, or abolishment thereof would lead to a rupturing of the continuity of said constitutional order. By doing so, the judiciary elevated matters of constitutionality from issues of transgression and remedy to issues of continuity or collapse. The stakes seem much greater for instances of unconstitutionality—in relation to this fundamental principle—which seemingly threaten the ontological stability of the constitutional order.

The doctrine of constitutional identity may not become established as canonical in Ireland, but this does not negate its potential influence on future reasoning. To formally disavow it would be a tangible example of negation; the judicial interpretive community rejecting the transformation of this indeterminate sub-set of constitutional principles from co-extant provisions among the rest, which serve to instantiate the harmonious whole.

Even mere non-formal disavowal through desuetude can tell us a significant amount about the constitutional culture of the polity, or about that particular moment in the constitutional culture. That certain ideas and doctrines do not find favour at certain junctures can point to the temperament or risk aversion of certain judges. It can also evince a differentiated understanding of the judiciary as to what their interpretive function demands, as a function of their broader conception of the nature of the Constitution.

From analysis of post-*Costello* case law of the Supreme Court we can observe the significance of this mode of judicial reasoning in the judgments delivered by Hogan J. It is evident that for Hogan, the effect of constitutional identity is transversal, effecting both the supranational context EU integration and purely internal constitutional matters. It would appear from his jurisprudence that democracy—as embodied in Article 5—has a robust sub-textual normativity beyond its explicit articulation, and is significant in the reading of all other provisions of the text. This is, however, not a mode of judicial reasoning which is being widely employed by his colleagues on the bench. At the same time, the ripple effect

of this singular adoption of constitutional identity can be seen in the discursive reasoning of the Court.

One of the first significant domestic issues wherein the doctrine of constitutional identity would appear in the reasoning of Hogan J was in *Heneghan v Minister for Housing, Planning and Local Government*.⁶² The case concerned the correct interpretation of Article 18.4, and the meaning of the change enacted by the Seventh Amendment. We can observe two shades of pragmatism in judicial interpretation, with the clarity of the decision of O'Moore J in the High Court,⁶³ and contrastingly the more intricate reasoning of Supreme Court.

The Seventh Amendment introduced new sub-sections into Article 18.4, which prescribes the means by which the Seanad shall be elected. The purpose as stated by the Government—John P. Wilson TD who at that time was Minister of Education—was to remove the potential Constitutional obstacle to university reform:

“The purpose of the Bill is to remove an obstacle in the way of legislation to deal with university reorganisation. Article 18 (4) of the Constitution stipulates that three Members each shall be elected to the Seanad by the National University of Ireland and by the University of Dublin. A proposal to establish independent universities at Dublin, Cork and Galway in place of the National University of Ireland involves an alteration in the arrangements for the election of Members to the Seanad.”⁶⁴

The Amendment was successfully passed by the people with 92% approval.⁶⁵ In the intervening decades since the passage of this Amendment, the NUI and Dublin University were not reformed or re-constituted. However, many new institutes of Higher Education were upgraded to university status. Following the rejection of the proposed Thirty-Second Amendment—which would have abolished the Seanad in 2013—a Working Group on Seanad Reform was established which delivered its recommendations in the “Manning Report” in 2015. This Working Group understood the 1979 Amendment, not to have provided a discretionary power to the Government to reform the university franchise, rather

⁶² [2023] IESC 7.

⁶³ Tomás Heneghan v. The Minister for Housing, Planning & Local Government, The Government of Ireland, The Attorney General & Ireland Defendants [2021] IEHC 716.

⁶⁴ Dáil Éireann debate - Tuesday, 22 May 1979, Vol. 314 No. 7.

⁶⁵ The Department of Housing, Local Government and Heritage, ‘Referendum Results: 1937-2024’, last updated, 7 August 2024. <https://assets.gov.ie/static/documents/referendum-results-1937-2024.pdf>

as prescribing the necessary performance of an obligatory agreement. Such is evident from their analysis on the electoral procedure wherein it was stated that:

“The implementation of 1979 Amendment to the Constitution will add significantly to the number of citizens eligible to vote on University panel. The Working Group is aware of the recently published General Scheme of the Seanad Electoral (University Members) (Amendment) Bill 2014 which has been circulated by the Government. As published it would appear complementary to the Working Group’s recommendations to introduce a popular franchise for Seanad General Elections.”⁶⁶

Although there were commitments from Fine Gael led Governments over two election cycles thereafter, and broad cross-party support for Seanad reform, no such reform had taken place at the time of Tomás Heneghan taking a case which challenged the lack of implementation of the 1979 referendum.

This moment of constitutional development instantiated a judicial conception of a textual contradiction within the confines of a provision which concerned the internal institutional architecture of Ireland’s polity. What was the meaning and consequence of a democratic mandate for (depending on how one interpreted the outcome of the referendum) affording the Oireachtas with the discretionary power to alter the Seanad franchise, or the obligation to alter the manner in which the electoral franchise for Seanad Éireann was constituted? This turned on the meaning of “may”, and how it syntactically relates to the other subsections of Article 18. In this regard Hogan J observes:

“...a clear contradiction between the mandatory obligation of Article 18.6 on the one hand and the permissive language of Article 18.4.2° on the other so far as these two Universities are concerned. One is also obliged to say that it is far from clear how Article 18.6 could or would function in the event that the National University of Ireland were ever to be dissolved. Despite these significant drafting difficulties, it nonetheless falls to this Court to endeavour to give a sensible, workable interpretation of these provisions insofar as such is possible.”⁶⁷

So, we are faced with the Court attempting to work through a textual dissonance and construct a normatively desirable, sensible and workable interpretation. The interpretive

⁶⁶ Report of the Working Group on Seanad Reform, ‘*The Manning Report*’, (The Department of the Taoiseach, 2015), Part 5 ‘Composition and Electoral Process’.

⁶⁷ [2023] IESC 7 at para(s) 12 & 13.

strategies employed are particularly Odyssean in that they take the materials as they present themselves and remake them to solve a problem. In this instance it is not Achaean boats and Trojan walls, rather, it is popular sovereignty and the implementation of the Seventh Amendment. The amendment as drafted and textually enshrined was conceived of by the Court as “hapless, incoherent and confused”.⁶⁸ Therefore, the Court understood itself as institutionally duty bound to render a construction of the provision which would rectify and salvage the coherence of the democratic will of the sovereign people as expressed through the 1979 referendum. The *text* was understood as contradictory, so it was to the structure, or more meta-textually, to constitutional identity, which Hogan J would appeal:

“It follows that Article 18.4.2° must accordingly be interpreted as requiring that the Oireachtas must revise the Seanad University constituencies by enacting legislation for this purpose within a reasonable period from the date of the passage of the 7th Amendment. To that extent, therefore, these provisions must be interpreted as imposing a mandatory obligation on the Oireachtas to extend the University franchise to at least certain other institutions of higher education in the State. Any other conclusion would effectively mean that the sovereign will of the People as democratically expressed through the referendum process in the manner envisaged by Article 46 and Article 47—perhaps the most fundamental and core feature of our constitutional identity as a State—would be thwarted by an obvious failure of legislative inertia.”⁶⁹

It is interesting to note that this textual dissonance had persisted without any significant⁷⁰ political or popular agitation for reform for over 40 years. One would think that if the sovereign will of “the People” had been thwarted in such a manner—that the fundamental core of the constitutional polity had been so flagrantly disregarded—then perhaps the People may have let their displeasure be known in a more strident manner than is evident from the longevity of the status quo which persisted after the Seventh Amendment was passed. Even if the subject matter was of limited popular concern, one might expect a radical disregard of an exercise of popular sovereignty to have aroused some politically

⁶⁸ *ibid* at para 4.

⁶⁹ Heneghan [2023] IESC 7, para 38.

⁷⁰ Significant is not to say none, merely that it did not become a major electoral issue or animating core of broad political movement. Indeed, the primary political cause in relation to the Seanad was its abolition and not expanding the franchise through a reading of the Seventh Amendment.

significant campaign. That this did not occur perhaps gives credence to the simple pragmatic interpretation as reasoned in the High Court.

Indeed, one struggles to see the fault in reasoning presented by the High Court in this regard.⁷¹ I would say that it is only as a result of different *a priori* extra-textual normative assumptions, and a perhaps overly enthusiastic self-conception as having a role as upholders of the Constitution, which allowed Murray and Hogan JJ to change a ‘*may*’ into a ‘*shall*’.

If it is the aim of the Court to rectify textual contradictions,⁷² are they assuming a role which subordinates the democratically elected legislators, who have a mandate to legislate for the expression of popular sovereignty as expressed through referendum procedure? Would it not be more democratically legitimate, if this is the supervening value and identity of the text, to do so by permitting a reading which is tied to the text that avoids an apparent contradiction by affording a plain meaning reading to the provision in question? In so doing, they would allow for civil society to coalesce around a campaign for reform, if a sufficient plurality of the People feel that this is not what their sovereign will was and is. The institutional function of the Court here is consciously that of the counter-majoritarian guardian of popular sovereignty. Yet, there was another construction which avoided an apparent contradiction between democratic mandate and positivist emanation, such was the reasoning presented by O'Moore J:

“The Court is satisfied that the facts of this case themselves illustrate precisely why a discretion should not be turned into an obligation...The Oireachtas is thus said to be under a legal obligation to legislate, but no guidance is given by Counsel for Mr. Heneghan as to what level of extension of the franchise (or what level of consideration of extension of the franchise) by the Oireachtas is sufficient to discharge this alleged legal duty... In the current circumstances it is clear that the 7th Amendment to the Constitution did not place any legal obligation on the Oireachtas

⁷¹ A view supported by Hickey who succinctly put it, “It is academic now, but the ‘least worst’ thing for the judges to do in Heneghan, in my view, would have been to effectively do nothing. Because at least then there would have been no obvious and direct conflict with the text and language of any constitutional provision, and – for all that it would have allowed for that effective mockery of the events of 1979 to persist – the democratic sky had hardly quite fallen in.” Tom Hickey, ‘How to interpret the Irish Constitution: Heneghan v Minister for Housing’, [2024] *Irish Supreme Court Review*, (6).

⁷² A principle developed through Irish jurisprudence and given clear expression in the *Bacik* principles articulated in the High Court, “(e) If a literal interpretation of one provision might bring it into conflict with the literal meaning of another provision, then it is legitimate to resort to the harmonious approach with a view to interpreting both provisions in a way which avoids inconsistency.” [2020] IEHC 313, at para 80.

to exercise its power to legislate to vary the franchise for the six seats. Even if Mr. Heneghan's submissions on this point are correct, and Article 18.4.2° now requires the Oireachtas to make provision by law for election on a franchise of the type contemplated by that clause, there remains the fact that Article 18.4.1° remains in situ. Subject to what is submitted on behalf of Mr. Heneghan about Article 18.4.1° being rendered a transitional provision, on the face of it his submission about the meaning of Article 18.4.2°, would, if correct, lead to a direct conflict between it and 18.4.1°. This would not involve a harmonious reading of the Constitution; rather, it would set two sequential provisions at loggerheads with each other, which is not a desirable interpretation of the basic law of the State. The Court therefore finds that “may” means “may” and not “shall” in the wording at the start of Article 18.4.2°.”⁷³

Indeed, Murray J⁷⁴ acknowledges the coherence of this reasoning on its face. However, he then suggests it to be somewhat superficial, dealing with a reading at “first blush”. What then followed was an account of what the Court perceives to be proper constitutional interpretation and its outer limits. Both undue literalism and non-textually rooted normative reasoning are to be avoided, and a so styled middle path pursued. Where the text produces contradictions or inharmonious dissonance, then it is to structure, fundamental principles, and purpose that the interpreter must turn. One may think this is constitutional identity disaggregated into its composite features. However, choosing to not employ identitarian language speaks to an aversion to inherent risks in indeterminate essentialising of identity centred doctrine.

“The Constitution, as the basic law of the State, is animated by a number of fundamental principles and is intended to achieve its various purposes through a sequence of provisions intended to be read as one, and designed to function collectively. That understanding dictates the proper approach to the interpretation of any individual part of the instrument. As with any legal document, the intent of those adopting it is informed in the first instance by the language they have used (and having regard to Article 25.4, that appearing in the Irish text) but the exercise of interpreting that language involves not merely deducing the meaning of the words appearing in the provision in question, but also reconciling the text of the Article with the document in its entirety while at the same time ensuring that both are analysed in

⁷³ [2021] IEHC 716. At para(s) 148-151.

⁷⁴ At para 38.

the light of their underlying purpose. The predominant importance of that purpose, and the fundamental principles that inform it, means that in undertaking the exercise of constitutional interpretation the courts must incline more to flexibility in subordinating the strictly literal interpretation of the text in order to attain a construction that is both internally harmonious, and that achieves a clearly ascertainable purpose, than might be the case when conducting the exercise of interpreting ordinary legislation.”⁷⁵

Furthermore, there followed an exemplary demonstration of the under-theorised judicial utilisation of appeals to history⁷⁶ for illumination of democratic purpose, which would latterly appear in *O’Meara*,⁷⁷ which concerned a challenge to the exclusion of unmarried parents who were co-habiting partners from accessing pension entitlements on the death of one partner—and was indeed presaged with the much earlier academic debate around private fishing rights under Brehon law between Professor Eoin MacNeill and Professor Daniel Binchy from initial agreement in *Erne* to disagreement in *Moy*. Two academic experts—Laura Cahilanne and Eoin O’Malley—in evidence before the High Court could not agree as to what the precise purpose of the Seventh Amendment was. That they could

⁷⁵ [2023] IESC 7, at para 85.

⁷⁶ Formally established as a legitimate source to appeal to when interpretation of text is unclear, ambiguous, contradictory. See, *Bacik v. An Taoiseach* [2020] IEHC 313, “(f) In case of doubt, ambiguity, inconsistency or silence, it is legitimate to have regard to factors such as the historical context.”

⁷⁷ Within this case we see very different conceptions of historical understandings of what ‘the people’ intended when enacting the 1937 Constitution, in particular the understanding that configuration of the people would have understood as the correct and objective meaning of such signifiers as “mothers”, “woman”, and “the family”. Hogan J at para 16, reading back into this cohort a cognisance of the economic vulnerability of unmarried mothers “After all, in 1937 the Oireachtas when enacting – and the People when approving – the Constitution would have been perfectly aware that it was often unmarried mothers who were the most economically vulnerable and that they were a particular category who might welcome and need State support to assist in defraying the cost of child rearing, even if, historically, that body showed itself reluctant to do very much about this. One might also say that, historically, at least, if there was any category of mothers who needed State support it was mothers who were not married.” Whereas, O’Donnell CJ, at para(s) 86/87, employing at least a countenance of the textual argument from history “ But it is, I consider, ahistorical to address this issue through modern eyes and assume that there was a live issue as to whether a non-marital family was included in Article 41 which needed to be put beyond doubt. The most natural interpretation of the fact that the Constitution did not say in words of one syllable that the Family in Article 41 did not include a non-marital unit was because it was considered obvious from what was said...Even looked at, therefore, as a simple matter of textual analysis without any reference to the historical background and subsequent case law, the overwhelmingly more plausible interpretation of the text is that the Family contemplated by Article 41 does not include a non-marital family unit, and this is how the Article has been interpreted. This conclusion is, however, strongly reinforced by a consideration of the historical background and by any consideration of the social thinking clearly reflected in the text of Article 41...Hogan J. suggests that the Article 41.2.2° to mothers must protect both married and unmarried mothers from being obliged to engage in labour, since the drafters and the People in 1937 would have been aware that unmarried mothers were often the most economically vulnerable and must have intended to protect them. Regrettably this is, in my view, an excessively generous view of our past and a very slender basis for a broader reading of the Article 41 Family.” *John O’Meara and Others v The Minister for Social Protection, Ireland and The Attorney General* [2024] IESC 1.

not agree on what is relatively recent history as to something as basic as this is indicative of the challenge facing the judiciary when engaging in interdisciplinary methodology. This is in part a consequence of the postmodern condition of the constitutional text, a text written by an unreliable author, which at a level of theoretical abstraction is the protean people.

So, a Court which has jurisprudentially developed to a point where we may characterise its professional culture as somewhat risk averse⁷⁸—and as an interpretive community to be epistemically lawyerly—permitted themselves scope to veer close to a radical position. This holding could have, were it not carefully reasoned, rendered each Oireachtas of the past 40 years illegitimate—and any future Seanad elected on same franchise—unconstitutional. That it was within their power to provide that this would not occur does not negate the fact that the Court had ventured once more into the judicial activism which it had retreated from in the preceding two decades.

This serves as an interesting counterpoint to the characterisation proffered by Conor Casey and Eoin Daly of a paradox in the culture of Irish constitutionalism. In their account, in Ireland there is a political culture of legalism which is contrary to a jurisprudence which permits a wide autonomy for political judgment.⁷⁹ It is also acknowledged by Brian M. Barry that—in comparison to other European jurisdictions—the Irish judiciary exhibit remarkably high levels of judicial restraint and deference towards the legislature. Furthermore, in terms of the types of remedies utilised by the Court, the reality is of a relatively homogenous, nondiverse approach taken by the courts. Rulings are almost exclusively either rejections or findings of substantive unconstitutionality with *ex tunc* effect as prescribed in Article 15.4.2°. The anomalies within this characterisations stem from the “hard cases”, many of which we have dealt with herein.⁸⁰ I would suggest—in this instance—we see some strong evidence of the Court affording itself some wide discretion in interpreting what the constitutional text meant, and being uncharacteristically critical of the discretion the Oireachtas permitted itself in—as the majority in the Supreme Court saw it—failing to legislate to implement democratic expression of the popular will.

⁷⁸ A clear trend from the point of the *Abortion Information Case* in 1995, wherein judicial activism went out of vogue, only recently are the Courts allowing themselves, in part because of the necessary creativity involved in rendering meaning from a dissonant text, interpretive discretion.

⁷⁹ Conor Casey and Eoin Daly, ‘Political constitutionalism under a culture of legalism: case studies from Ireland’, [2021] *European Constitutional Law Review*, 17(2), pp. 202-231.

⁸⁰ See, Brian M. Barry, ‘The Superior Courts of Ireland: Judicial restraint in a stable political environment’, in Kálmán Pócza (eds), *Constitutional Review in Western Europe: Judicial-Legislative Relations in Comparative Perspective* (Routledge 2024).

To avoid a rupture in continued democratic legitimacy, and to maintain the claim of institutional ontology from 1919 and the first Dáil to the present, along with the small matter of upholding the rule of law—one of the core features of our constitutional polity—O'Donnell CJ issued a suspended declaration of constitutional invalidity:

“The effect of the decision of this Court of 31 March, 2023 is to find that the State, through its Executive and Legislative organs, is in breach of its constitutional duty under Article 18.6 to enact a law compliant with the Constitution to provide for election to the university seats of Seanad Éireann, and also in breach of the specific obligation imposed under Article 18.6.2° by the people in 1979 to make provision for such election on an expanded basis... It has been established that this Court has, in rare cases, a jurisdiction to defer, postpone or suspend a declaration of constitutional invalidity of any statutory provision, where to make an immediate declaration of such invalidity would imperil the rule of law, and remove the possibility of the invalidity being capable of being remedied... Accordingly, the Court will suspend a declaration of the invalidity of s. 6 and s. 7 of the Seanad Electoral (University Members) Act, 1937 until 31 May, 2025.”⁸¹

O'Donnell previously suggested—derisively in his extrajudicial writings—that there may have been a sense in which the collective Irish legal mind had some inbuilt *a priori* assumptions upon which epistemological natural law language was particularly effective.⁸² Similarly, we may tentatively say that self-same “Irish legal mind” is now—by necessity—receptive to an altogether less textually grounded extratextual doctrine with the utilisation of a suspended⁸³ declaration of constitutional invalidity.⁸⁴ Which, seems to cut against his broad emphasis on textually grounded reasoning. This remedy has an inherent tension with the orthodoxy among the Irish judiciary to exercise restraint in respect of separation of powers and simplicity in judicial remedies, demonstrating the uncomfortable place the Court had reasoned itself to.⁸⁵

⁸¹ [2023] IESC 18, O'Donnell CJ. at para 39.

⁸² Donal O'Donnell, ‘The Sleep of Reason’, [2017] *DULJ*, Vol .40, 191.

⁸³ The Court had traditionally understood Article 15. 4. 2 of the Constitution to prescribe a declaration of invalidity to render such statutory provisions void ab initio.

⁸⁴ A jurisprudence which had come a long way from chaffing at being bound by Canadian comparison for Dominion status, now drawing on doctrines which emanate from Canadian jurisprudence, Reference Re Manitoba Language Rights [1985] 1 S.C.R.721.

⁸⁵ Suspended declarations of invalidity have a recent lineage in Irish jurisprudence with *NHV v Minister for Justice & Equality* [2017] IESC 35, usually identified as the first case to employ such a remedy, as was latterly acknowledged in *PC v Minister for Social Protection* [2018] IESC 57.

In furtherance of this line of constitutional identity reasoning, a case which dealt with matters internal to the polity which elicited identity centred reasoning, *In the matter of A (a minor) and B (a minor), C and D*,⁸⁶ concerned the speculative legality of recognition of the adoption by the non-genetic parent of children conceived through surrogacy in a foreign jurisdiction and whether this was contrary to public policy as construed through the Adoption Act 2010. In finding that there was nothing in the character and manner in which this adoption had been carried out to indicate illegality, Hogan J proffered a conception of the role of the judge in relation to determining what was to be inferred from questions of public policy by invoking the democratic nature of the State. Thereby further bolstering through frequency of use his conception of Ireland's democratic constitutional identity:

“Article 5 of the Constitution describes the State as a democracy and, as several members of this court observed in *Costello v Government of Ireland* [2022] IESC 44, this is a key feature of the State's constitutional identity. As unelected personages, therefore, judges do not have - and cannot be given - a free standing role in determining issues of public policy by reference, for example, to their own subjective or intuitive views as to what public policy on any given topic such as surrogacy should be. The reference in s.49(3) of the 2010 Act to public policy should therefore be understood as a reference to the public policy as can be objectively gleaned - whether expressly or inferentially - from established legal sources, such as the Constitution and perhaps more particularly Acts of the Oireachtas.”⁸⁷

Similarly, this argument from identity and structure to seemingly check the scope of subjective judicial reasoning, thereby ensuring the constitutionally implied obligations to ensure root of title in legislation, was affirmed *In the Matter of Article 26 of the Constitution and In the Matter of the Judicial Appointments Commission Bill 2022*.⁸⁸ In a judgment delivered by Dunne J, the Court was once more open to utilising an expansive reading of Article 5, interpreting it as an objectively clear indication of democratic nature of the State, as well as a conceptually rich⁸⁹ triptych, which when interpreted within the broader

⁸⁶ [2023] IESC 6.

⁸⁷ [2023] IESC 6. at para 32.

⁸⁸ [2024] 2 ILRM 1.

⁸⁹ A case which evinces this broad reading of democracy is that of *Emmett Corcoran and Oncor Ventures Limited Trading as the Democrat v The Commissioner of An Garda Síochána and The Director of Public Prosecutions* [2023] IESC 15. However, Hogan J specifically identifies that his reasoning on this constitutional issue should be considered *obiter*, but for our purposes it is worth including, “the democracy guarantee in Article 5 is a fundamental part of the State's constitutional identity. Democracy in this sense is, of course, rather more than simply filling in ballot papers at elections and referenda, vital though this is: it

structure of the Constitution,⁹⁰ strongly implies a significant democratic identity of the polity, thereby necessitating the Oireachtas to legislate for rules on eligibility for the appointment of judges:

“The entire structure of the Constitution presupposes the existence of a state and a legal system governed by the rule of law. Article 5 describes the State as a democracy, yet without the appropriate rule of law guarantees, the essential democratic character of the State could not be assured. As was observed in *Costello v Government of Ireland* [2022] IESC 44, this constitutional commitment to the democratic order is perhaps the most defining feature of the State's own constitutional identity. All of this means the Constitution has created a society governed by the rule of law, because it is principally through the enactment of legislation duly passed by a majority in a democratically elected Oireachtas that law is made for the State in accordance with Art.15.2.1°. This in turns means that citizens are entitled to regulate their affairs by reference to legislation enacted by the Oireachtas and, where applicable, by the corpus of common law and pre-1937 legislation carried over by Art.50.”⁹¹

Similar language was used in the case of *In the Matter of M McD*,⁹² concerning whether the High Court had been correct to issue Special Care Orders for two individuals in need of such care, despite the staff shortages in the Child and Family Agency, pursuant to relevant legislation, the Child Care Act 1991. In finding that the High Court had been correct to issue these two SCOs, the reasoning amounted to an institutional necessity, as that is what the relevant legislation bound them to do. That legislation had been passed in a manner consistent with the Constitution, so if the Court had not done so they would have acted in a manner which contravened what was constitutionally conceived of as their

also presupposes... the existence of an informed and deliberative societal and political discourse is thereby presupposed...by urging the citizenry to engage in robust political debate so that the forces of deliberation will prevail over the arbitrary and irrational so that, in this civic democracy, reasoned argument would prevail in this triumph of *discourse*... Without a free press there is no democracy. And the protection of sources is integral to a free press. It can thus be said that the inter-action of the *State's* constitutional identity as a democracy as provided for in Article 5 and the freedom of expression provisions of Article 40.6.1° combine to give constitutional standing to the protection of journalistic sources. Of course, just as freedom of expression is not absolute, nor is the right to protect sources. But, in general and subject to important exceptions, the protection of journalistic sources enjoys constitutional protection and the case for overriding this protection in any given case must be convincingly established.”⁸⁹

⁹⁰ Articles 6, 34.1, 35.2, and 36. [2024] 2 ILRM 1 at para 140.

⁹¹ [2024] 2 ILRM 1. at para 11.

⁹² [2024] IESC 6.

democratically prescribed institutional duty. In this manner, the reasoning bolsters the democratic validity of legislation as against judicial discretion. Hogan J reasoned:

“This Court has frequently emphasised in a series of recent judgments... that the Constitution's commitment to democracy and the rule of law are perhaps among the most fundamental features of the State's constitutional order and constitutional identity. As Dunne J. observed in the Judicial Appointments Commission Bill (at paragraph 11) “it is principally through the enactment of legislation duly passed by a majority in a democratically elected Oireachtas that law is made for the State.”⁹³

We can see in this line of reasoning the somewhat counterintuitive methodology being utilised by Hogan J. In seeking, as he sees it, to correctly demarcate and delimit the role of the judge in the democratic constitutional order, Hogan J is utilising a doctrine, which although has intertextual constitutional grounding in TEU Article 4(2) as mediated through Article 29, is perhaps ill suited to making such an argument. It is a doctrine which has been broadened beyond its original context in EU law, without rendering it conceptually moribund through excess or undue indeterminacy. The substantive content which is ascribed to Ireland's constitutional identity is broadly consistent, it is merely the scope of its application which is perhaps undermining its coherence and credibility as a jurisprudentially cogent doctrine.

The counterintuitive aspect of this doctrinal seepage is identified by Collins J in *Delaney v Personal Injuries Assessment Board, Judicial Council, Ireland and the Attorney General*.⁹⁴ The case concerned the speculative constitutionality of personal injury guidelines issued by the Judicial Council, under s.7(g) of the Judicial Council Act 2019, and the whether these guidelines were to be construed as having normative legal effect, being a delegation of primary as opposed to secondary legislative power from the Oireachtas to the Judicial Council,⁹⁵ thereby potentially contravening the constitutional separation of powers.

The Court delivered five judgements which are internally discursive, referring to each other's points throughout. What is most interesting for our purposes is the characterisation of the reasoning of Hogan by Collins JJ, the substance of which amounts to a rejection by

⁹³ [2024] IESC 6. at para 96.

⁹⁴[2024] 1 ILRM 349.

⁹⁵Independent Body established by Judicial Council Act 2019, being made up of all judges in the 5 Court hierarchy of Irish legal system.

Collins J of the continued utilisation by Hogan J of the democratic leitmotif which underpins much of his jurisprudence in developing the constitutional identity doctrine. The recursive appeal to Article 5 by Hogan was at issue.

Hogan J stipulates that if the guidelines had the effect of “hard law”, being a substantive constraint on the judiciary in awarding damages, then this would have been a breach of Article 15.2.1^o and Article 34.1. It would also have been, “a breach of the State's commitment to democracy contained in Article 5 as an inviolable constitutional fundamental.”⁹⁶ The reasoning here is recursive to first principles of the constitutional nation state. One principle within the triptych that is Article 5 in this instance adds little analytically: that Ireland is an independent state is clear and without issue, not adding much analytical heft within the confines of this case as it is purely in the domestic realm.

However, the invocation of Article 5, with its two other principles, did in this context serve to add rhetorical normative weight, if not analytical heft, to Hogan J's argument. That Ireland is a sovereign and democratic state—with an elision of national/state sovereignty and popular sovereignty throughout—meant we could conceptualise this potential delegation of legislative power as an evident widening of the proximity between popular democratic mandate and the substantive results emanating from the 2019 Act.

The paradox at the heart of the constitutional metanarrative, being an attempted synthesis of Nation *qua* People with a parliamentary legislature in the Westminster model, has been treated as a resolvable dilemma. Where the democratic proximity becomes too distant, as in an instance where there has been a delegation of legislative power to the Judicial Council, then the constitutional structure is being transgressed, and the democratic obligations of popular sovereignty will preclude such an impermissible delegation. One can see the attempt at evocative resonance and weight of normativity which is being deployed here. Without saying as much, the use of Article 5 in this context brings with it the subtextual and extratextual heft of pre-constitutional ephemera in the nationalist canon. A robust articulation of Hogan J's argument would be that the political and judicial elites are collaborating to bypass the People so as to create law without a mandate to do so.

⁹⁶ [2024] 1 ILRM 349. Hogan J. at para 46.

Weaving this case in with the previous cases wherein the constitutional identity doctrine has been utilised by Hogan J, we see the focus of this democratic critique—as an invalid diffusion of popular sovereignty—traverse the external/internal boundary:

“As this Court has frequently stressed in recent times—such as *Costello v. Ireland* and *Re Article 26 and the Judicial Appointments Commission Bill*—the concepts of democracy and democratic accountability are inviolable features of the constitutional identity of the State as described by Article 5 of the Constitution. All of this means that the making of any guidelines which have the effect of changing the substantive law in respect of personal injuries must receive democratic approval by the Oireachtas in the manner contemplated by Article 15.2.1°...Anything else would not be a democratic procedure and would, apart from anything else, violate Article 5.”⁹⁷

The contours of this ever-expanding utilisation of an appeal to popular sovereignty—conceptualised through democracy—within Irish constitutionalism, in both international and domestic jurisprudence, demonstrates a robust solicitous regard for the democratic expression of Irish popular sovereignty. The frequentative appeals to the nature of the Irish polity as expressed in Article 5 have a certain redolence of the exhortation attributed to Benjamin Franklin upon the conclusion of the Constitutional Convention in 1787 in which he replied to an eager enquirer as to the character of their new government, “a republic, if you can keep it”. Indeed, both Daly⁹⁸ and Hickey⁹⁹ have situated judicial review as a legalistic aspect which is reconcilable to the neo-republican school which serves as a counter-majoritarian mechanism for safeguarding the body politic from arbitrary political conduct. But that this is somewhat incongruous seems incontrovertible. Using the constitutionally embedded high rhetoric of sovereignty and democracy to invalidate a piece of legislation which has been passed by the representative body—democratically elected—seems to privilege majority voting among a small number of unelected judges, thereby potentially disenfranchising ordinary citizens and brushing aside the principle of representation,¹⁰⁰ which is itself justified by recourse to democracy. That said, this is not a

⁹⁷ [2024] 1 ILRM 349. Hogan J. at para 38.

⁹⁸ Eoin Daly, ‘Republican themes in the Irish constitutional tradition’, [2016] *Études Irlandaises*, 41-2.

⁹⁹ Tom Hickey, ‘The republican core of the case for judicial review’, [2019] *International Journal of Constitutional Law*, Volume 17, Issue 1, pp. 288–316

¹⁰⁰ This general line of democratic critique of judicial review can be seen throughout the writings of Jeremy Waldron amongst others. See, Jeremy Waldron, ‘The Core of the Case Against Judicial Review’, [2006] *The Yale Law Journal*, Vol.115, No.6, pp. 1346-1406.

normative critique of judicial review, nor is it a claim that the Irish judiciary are in anyway carrying this out in an illegitimate manner—as judicial review is textually embedded in Article 15.4 and Article 34—it is to suggest that overly broad invocations of Article 5 as emblematic of popular sovereignty and democracy, leaves one open to the charge of partial inconsistency. This may in turn weaken the precedential value of the doctrinal departure which is being forwarded in constitutional identity reasoning.

Indeed, it is this deployment of Article 5 within Hogan J’s reasoning which Collins J finds objectionable, because, for one thing, it was not a point argued by the plaintiff. In tackling this first principles democratic critique proffered in his colleagues reasoning, Collins J identifies yet another aspect of the paradox at the heart of Irish constitutionalism which is being embodied by Hogan J is his line of constitutional identity jurisprudence:

“There is, it must be said, something paradoxical about unelected judges invoking democratic accountability as a basis for striking down legislation duly enacted by the democratically elected legislature. That is particularly so when, as here, that is done on the basis that such legislation wrongly confers on “*the unelected judiciary*” the power to make rules for the assessment of general damages in circumstances where that is said to be a function that can only be exercised by the legislature itself...A further aspect of my colleague's analysis in this context must be mentioned. It relates to Article 5 of the Constitution, which provides that “*Ireland is a sovereign, independent and democratic state.*” It appears that he considers that Article 5 entitles a court to strike down legislation enacted by the Oireachtas on the basis that it breaches “*the State's commitment to democracy ... as an inviolable constitutional fundamental*” (para 46; see also para 62). That is a novel and startling proposition which, were it to be accepted, would inevitably involve a wholesale transfer of power from elected legislature to unelected judges (paradoxically—and ironically—in defence of democratic accountability).”¹⁰¹

This is truly the nub of the matter; where there is an attempt to essentialise one constitutional principle—rendering it fundamental and foundational, instead of one of many principles—that principle becomes the supervening principle, which can in turn become a rod for your own back. This is not to say that it is “incorrect” or that Hogan J is wrong; indeed, the majority in the case acknowledge that s.7.2(g) 2019 Act was

¹⁰¹ [2024] 1 ILRM 349. Collins J. at para 197-198.

unconstitutional. The Court reached a constitutional reconciliation by dint of the “constitutional cure” of the introduction of the Family Leave and Miscellaneous Provisions Act 2021, section 31 in particular, which gave formal democratic legitimacy to PIAB Guidelines through post hoc legislation. Furthermore, it is not to situate this matter within what is a well-worn debate on judicial review in the context of political or legal constitutionalism. This is a descriptive exercise which seeks to demonstrate the interpretive challenges faced by the judiciary when engaging with a text with dissonant principles, and identify the pitfalls inherent in privileging one principle above others as an attempt to impose harmonious interpretive coherence on the constitutional text.

The constitutional text can, through a chronological and methodological analysis, render constitutionally consistent an act which was passed by the legislature—the democratically elected body—which caused an unconstitutionality. An act which transgressed the democratic arrangement in the constitutional structure as enacted by the popular sovereign, can be latterly rendered constitutional by a further legislative act. This is what both Aileen Kavanagh¹⁰² suggests is normatively favourable and Eoin Carolan¹⁰³ suggests is a descriptively accurate account of the ‘collaborative constitution’.

The Court is spilling a great deal of ink in attempting to refine its methodology for constitutional interpretation when faced with a text with ever more apparent dissonance. The necessity of this methodological turn in the jurisprudence, I argue, is a consequence of the further distancing between the embedded metanarrative of nationalism and actual structure of the text. Casey and Doyle suggest we must situate this methodological turn in the jurisprudence—wherein interpretive approaches which are more soundly based doctrinal frameworks are being developed—within a zeitgeist of cautious expansion of individual rights and greater judicial scrutiny of executive action. In doing so, we dissolve the paradox of significant doctrinal development, which seems not to alter the substantive constitutional law in a radical manner.¹⁰⁴

Casey and Doyle argue that there is consensus among the judicial interpretive community that the objective of interpretation is to give effect to the will of the People expressed

¹⁰² Aileen Kavanagh, *The Collaborative Constitution*, (Cambridge University Press, 2024).

¹⁰³ Eoin Carolan, ‘A Model of Collaborative Constitutionalism: Bringing Substance Back to Institutional Separation’ (28/05/2014). SSRN: <https://ssrn.com/abstract=3855401> or <http://dx.doi.org/10.2139/ssrn.3855401>

¹⁰⁴Oran Doyle and Conor Casey, ‘Charter or Higher Law? The Constitution under the New Supreme Court’, [2024] *DULJ*, 44, (1).

through the Constitution. Similarly, there is an observable consensus that the constitutional text is itself of primary interpretive significance, requiring rigorous analysis; only thereafter, has contextual analysis come to play a role in the interpretive function of the Court. The dissensus lies in emphasis as to which context is more relevant: the particular socio-legal historical context of the Irish Constitution, or the generic constitutionalist context. Doyle and Casey characterise those judgments which emphasise the text in its idiosyncratic context as demonstrating a conception of the Constitution as a “higher law”,¹⁰⁵ whereas the generalist judgments demonstrate a conceptualisation of the Constitution as a “charter”.¹⁰⁶ Four layers of interpretation are identified as being present in the interpretive strategies of the Court:

“(i) the narrow textual context, ie a close parsing of other constitutional provisions to shed light on the intent reflected in a particular wording; (ii) the broad textual context, ie reading a constitutional provision in light of the Constitution’s underlying philosophy and broader commitments as revealed by other provisions—sometimes referred to as the ‘harmonious’ approach... The latter two layers involve extra-textual context: (iii) the sociolegal context, reading the provision in light of its historically situated purpose; (iv) the constitutionalist context, reading the provision in light of extra-textual understandings as to the sort of document the Constitution is and, by extension, the values of constitutionalism it must reflect.”¹⁰⁷

The most salient divergence emerges from the later contextual layers of interpretation. Judges who favour appealing to the particular socio-legal context, consider appeals to general constitutionalism as justifying first principles theorising, furthering the proximity between subjective contemporaneous interpretation and democratically enacted popular

¹⁰⁵ “By higher law we mean a vision of the Constitution as another species of legal instrument, like statute or contract, falling to be interpreted by lawyers and judges using lawyerly techniques. The Constitution is akin to a ‘super statute’ enacted by the People in their capacity as the ultimate lawmaker...the role of the Court in interpreting it should...strive to resemble how they interpret statutes and contracts – discerning and giving effect to whatever choices the creators of the instrument made, through careful reflection on text, structure, and intent.” *ibid*, p. 55-56.

¹⁰⁶ “...regards the Constitution as a...as a repository of generalised and abstract principles of political morality, a charter that contains the highest aspirations and commitments of the political community. The Court’s role, on this view, is to give full effect to these principles by integrating and diffusing them throughout the legal system.... Fundamentally, once the constitutional text makes a particular commitment, the Court’s responsibility is to provide the morally most compelling account of that commitment rather than the most factually accurate report of the commitment that the people thought they were making. While this outcome can still be presented as the People’s intent, it is an intent constructed through an interaction of political morality with text and context, rather than an intent empirically discerned through scrutiny of the available sources.” *ibid*, p. 57.

¹⁰⁷ *ibid*, p.43.

will. For the generalist, appeals to the particular, privilege the intent of drafters, or subsequent amenders, over the “people of Éire” as they are today.

However, we may question whether the interpretive doctrines of the current iteration of the judicial interpretive community are any sounder than that of previous iterations of the Court? Greater complexity does not, in and of, itself beget greater descriptive accuracy, if that is indeed the value which informs judicial reasoning. This thesis does not fully engage in a normative argument for or against textualism or some form of contextual based subtle pragmatism as the correct approach to judicial interpretation—rather being a descriptive analysis of what judges are methodologically doing when engaging with a postmodern, intertextual constitution. As David Kenny argues—whether conscious of it or not—everyone is a pragmatist anyway.¹⁰⁸ But one can see where Justice Scalia was coming from when he commented to Justice Breyer, both formerly of the Supreme Court of the United States, that the consciously pragmatic approach which Breyer advocated was such that it “was so complicated” that only Breyer himself could use it.¹⁰⁹

This quip is evidently fallacious, as the Irish judiciary join Breyer in engaging in such complexities. The Irish judiciary starts its analysis with the text but often finds it dissonant; they get the results they require when encountering dissonance by intellectually robust and deceptively ornate means. The phenomenon which demonstrates this most forthrightly is the reading out of the Constitution the remaining textual invocations of Christian theism. As Hogan has himself acknowledged:

“...the religious references in the Preamble remain: Article 6 continues to make reference to God in the context of the separation of powers and the president and judges are required to invoke the deity in their declarations of office... Perhaps there are letters to The Guardian complaining, for example, about the fact that the Queen must swear an oath of office upholding Protestantism or that the Church of England is the Established Church or to Frankfurter *Allegerneine Zeitung* complaining about the fact the German State endows the main Christian Churches, but if so, I have not read them”¹¹⁰

¹⁰⁸ David Kenny, *Pragmatism, Law, and Literature*, (Routledge, 2025), p.171.

¹⁰⁹ Stephen Breyer, ‘Pragmatism or Textualism’, *Harvard Law Review*, [2025] Vol.138, Issue 3.

¹¹⁰ Gerard Hogan, ‘Harkening to the Tristan Chords: the Constitution at 80’ (2017) 40 *Dublin U LJ* 71.

While it may not have been in the letter pages of *The Guardian* or *Frankfurter Allgemeine Zeitung*, a habitual reader of the *Irish Times* would have been exposed to much coverage of the ‘dignified’ aspects of the Constitution in the years after that specific observation. Róisín Shortall, with others, challenged the specifically theistic character of the declarations of office and argued in the European Court of Human Rights that Article 12.8 and Article 31.4 contravened their ECHR Article 9 rights to freedom of conscience. The Strasbourg Court ultimately deemed their application inadmissible as none of the applicants could demonstrate that they were at any real risk of being directly affected by such deistic declarations of high office.¹¹¹ One may speculate that if an individual could demonstrate that they could not in good conscience make a declaration which mandates an expression of theism, the ECHR would afford them protections, as is evident from the Strasbourg Court’s decision in *Buscarini and Others v. San Marino*¹¹² in which a similarly prescribed theistic oath for San Marinese parliamentarians was found to have violated their Article 9 Convention rights.

The point which this intervention highlights is that the ‘dignified’ aspects are not ‘efficient’ because the Court has read them as such over time. Indeed, so much is demonstrated even by Hogan who laments that we have only just begun to explore the implications of the guarantees in respect of dignity in the Preamble.¹¹³ Whether the Preamble—among the other ‘decorative’ aspects of the Constitution—are impactful on the interpretive strategies of the Court very much depends on the intersubjective willingness of the judicial interpretive community to afford them significance. Their textuality remains constant, it is context—and perhaps an attendant desire to reclaim the text from decades of academic and popular critique of its Catholic and nationalist metanarrativity—which eventuates the partial textualism, and divergent contextualism evident in the judiciary’s interpretive methodology. Yet, the manner in which the popular will, to which the Court has demonstrated iterative fidelity, has articulated itself in the Constitution remains—unless and until it is amended, altered, or removed—couched in the particular metanarrativity of an anti-colonial inversion of ethno-symbolic Gaelic *qua* Catholic nationalism.

¹¹¹ *Shortall and Others v Ireland*: Application no. 50272/18, 19 October 2021, at paras 51,59, 61.

¹¹² Application no 24645/94.

¹¹³ Gerard Hogan, 'Harkening to the Tristan Chords: the Constitution at 80' (2017) 40 *Dublin U LJ* 71.

Chapter 11: Conclusion

11.1 Democracy of the Dead Author

The superior courts in Ireland are working to reverse engineer a coherent methodology for interpreting a text which simultaneously appears in its jurisprudence to be a post-Catholic and post-nationalist small-c constitution, with a large-C constitution which remains in large parts embedded with theism and at minimum national, if not nationalist, metanarrativity. They are doing so primarily out of the justifiable belief that this is what both the text and social context require in our current moment. This is throwing up methodological and theoretical conundrums, dilemmas, and paradoxes which were not as pronounced at the inception of the Constitution. As such, an increasing internal dissonance in the text, as well as a postmodern scepticism within the contemporary collective judicial mind, is evident. The varying interpretive approaches which are expressed in the Supreme Court bring to mind two very different cultural critics of the 20th century. The approach of placing the text in its historically contingent context brings to mind G.K. Chesterton and a passage in his work *Orthodoxy* in which he elucidates his conception of the symbiotic relationship between tradition and democracy:

“It is obvious that tradition is only democracy extended through time. It is trusting to a consensus of common human voices rather than to some isolated or arbitrary record. The man who quotes some German historian against the tradition of the Catholic Church, for instance, is strictly appealing to aristocracy. He is appealing to the superiority of one expert against the awful authority of the mob...Tradition may be defined as an extension of the franchise. Tradition means giving votes to the most obscure of all classes, our ancestors. It is democracy of the dead. Tradition refuses to submit to the small and arrogant oligarchy of those who merely happen to be walking about. All democrats object to their being disqualified by accident of birth; tradition objects to their being disqualified by the accident of death. Democracy tells us not to neglect a good man’s opinion, even if he is our groom; tradition asks us not to neglect a good man’s opinion, even if he is our father.”¹

¹ G.K. Chesterton, *Orthodoxy*, (Bodley Head, 1908) see, intro to ‘Ethics in Elfland’.

Whereas the interpretive emphasis on general principles of constitutionalism and contemporaneous social context is redolent of the ideas espoused by Roland Barthe in *Death of the Author*:

“The author still rules in manuals of literary history, in biographies of writers, in magazine interviews, and even in the awareness of literary men, anxious to unite, by their private journals, their person and their work; the image of literature to be found in contemporary culture is tyrannically centered on the author, his person, his history, his tastes, his passions...it is language which speaks, not the author: to write is to reach, through a preexisting impersonality—never to be confused with the castrating objectivity of the realistic novelist—that point where language alone acts, “performs,” and not “oneself”...We know that a text does not consist of a line of words, releasing a single “theological” meaning (the “message” of the AuthorGod), but is a space of many dimensions, in which are wedded and contested various kinds of writing, no one of which is original: the text is a tissue of citations, resulting from the thousand sources of culture...Once the Author is gone, the claim to “decipher” a text becomes quite useless. To give an Author to a text is to impose upon that text a stop clause, to furnish it with a final signification, to close the writing.”²

The Court is concerned with interpreting the Constitution; how this is divergently done demonstrates that they have at least two different authors in mind. Those in the superior courts who concern themselves primarily with the idiosyncratic Irish socio-historical context attempt to discern the original intent of Chesterton’s “democracy of the dead” and afford it authority until otherwise altered by the democracy of the living.

Whereas for those judges who appeal to contemporaneous context and general principles: *the Author is dead, long live the Author!* The text should not be constrained by what was in the minds of de Valera and his fellow drafters—or indeed the public of 1937. What is most consequential is what the abstraction of the Author, i.e., ‘the people of Éire’, think these constitutional generalities mean today.

Both are intrinsically concerned with democratic legitimacy and the mechanics of popular sovereignty; the divergence stems from the temporality of ‘the people of Éire’. This constitutional subject, which was rendered from the narrative components of a pre-potent

² Roland Barthe, *The Rustle of Language*, (Hill and Wang, 1986), Richard Howard (trans). See, ‘The Death of the Author’.

ethno-symbolic national identity—providing ontological continuity and stability within the tremendous political and legal upheavals of the 20th century—causes a problem of identity through time.

The coherence of the resolution of the ambivalence of legal normativity within Irish constitutionalism relies on the narratological consistency of the Author as the central protagonist in the nationalist metanarrativity which underpins the Irish polity. The ontological stability of an Irish people justified the claim to self-determination; the historical narrative from which the Irish polity drew legitimacy was necessarily nationalist and anti-colonial and as a corollary was expressed by an ethno-symbolic inversion. The culture of political stability which has been evident since the adoption of the 1937 eventuates a generational problem of proximity to original intention. Furthermore, the trajectory of Irish sovereignty since the adoption of Bunreacht na hÉireann has been towards greater pooling of competencies to a supranational European locus and increased scepticism towards ethno-symbolic nationalism, thereby complicating original meaning of sovereignty as popularly understood in 1930's Ireland. That being, the natural right to sovereignty in the temporal realm for 'the people of Éire'. However, the text makes clear that what is permissible in that temporal realm is constrained by a higher order authority. This mostly clearly recognised in the opening line of the Preamble: "*In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,*". Which when read in conjunction with the justiciable provisions of the Constitution which explicitly refer to national, individual, and family rights which derive from the natural order—not positivist recognition—seem to suggest that 'the people of Éire' established themselves as masters; without permitting themselves the right to do what was wrong as determined by an anterior adjudicator.

As such, constitutional discourse on the symbiotic relationship between national and constitutional identity has demonstrated an unease or scepticism towards the underpinning ethno-symbolist nationalist metanarrativity of the Irish Constitution. While this scepticism has led to a diminution in interpretive significance of certain concepts and language in the Constitution, the interpretive fidelity to popular sovereignty in the interpretive strategies of the Courts demonstrate that nationalist metanarrativity is still anchoring the judicial epistemic community.

This research adds an additional layer of clarifying analytical vocabulary to the identification of the trends in Irish constitutional jurisprudence wherein an evident de-escalation³ in some explicitly ethno-symbolic and nationalist aspects of the text has taken place, and those aspects which remain are largely muted within the interpretive strategies of the judiciary.

11.2 Final Thoughts

Throughout this thesis I have mainly centred my analysis on the development of popular sovereignty as the abiding narrative of Irish constitutional normativity as against a natural law reading. In doing so, I have attempted to capture the paradoxes or conundrums which this has thrown up in the interpretations of the Irish superior courts, and how these have been pragmatically resolved or circumvented. This is not however an apologia for a natural law reading of the Constitution or advocacy for an approach to constitutional interpretation which would approximate an Irish version of Originalism. However, such readings and interpretations are at least as textually rooted as a procedural popular sovereignty reading and are thereby as justifiable for analysis as a reading of procedural popular sovereignty.⁴ However, as jurisprudence has developed in such a manner as to disavow such a reading—at this point—they do not inform the narrative of Irish constitutionalism and the theory of constitutional normativity with as much substantive influence as popular sovereignty. As such they have not received co-equal treatment herein.

I would suggest that the attendant problem of circularity or infinite regression in positivist analysis of constitutional validity in Ireland, as eventuated by a reading of procedural popular sovereignty, is only such as there has been evident change in the constitutional discourse—and more broadly within Irish social context—from a theistic to secular and sceptical epistemology: a postmodern condition. This insight is suggested and argued for

³ Oran Doyle, 'The silent constitution of territory' [2018] *International Journal of Constitutional Law*, Volume 16, Issue 3. p.901.

⁴ For examples of these normative natural law readings of the Irish Constitution see the extra-judicial writings of Roderick O'Hanlon, 'Natural Law and the Constitution', [1993] *ILT* Vol.11, No.8 and 'The Judiciary and the Moral Law' [1993] Vol.11 No.6. Further examples include Diarmaid Rossa Phelan, 'Natural Law and Popular Sovereignty' [1997] 86 *Studies: An Irish Quarterly Review* 215. Conor Casey, while acknowledging the decline in explicit references to natural law – and that there is an evident scepticism among the judiciary towards ultimate normative foundations of public law – argues that the "Classical Legal Tradition" is still evident in the interpretive strategies of the Irish superior courts, see Casey, Conor, 'Natural Law, Practical Reasoning, and Legal Interpretation', in *Natural Law and Modern Society*, (October 12, 2024). (Forthcoming, Jurisprudence, 2025)., Available at SSRN: <https://ssrn.com/abstract=4985899> or <http://dx.doi.org/10.2139/ssrn.4985899>.

in this work as neither a normatively desirable nor regrettable development in the analysis presented.

Furthermore, on this point of the non-normativity of this analysis, I have identified nationalism as the underpinning metanarrativity of Irish constitutionalism and have presented it as both a formal textual and subtextual influence within Irish constitutional discourse. This is not to suggest that this is normatively desirable, nor is it to suggest that this is an inherently problematic foundation on which to construct a polity. It is to identify the interpretive consequences of a text and context which have moved away from holding as emblematic of national identity a Gaelic and Catholic “people of Éire”, which maintains the textual vestiges of such a conception, and as such, in part relies on the inherited normativity thereof.

While this dissonance is particularly pronounced at this current moment, it has been ever thus in Irish constitutionalism. The die was cast long before the deliverance of the 1937 text, and it is not for the judiciary to work to solve the conundrums at the heart of Irish constitutional metanarrativity; its role is to endeavour to give a sensible, workable interpretation⁵ of the text as they encounter it. In doing so, they are constructing an ever more elaborated methodology which justifies a reading reflective of a perceived collective social shift from identification with Gaelic Catholic foundations of Irish national identity.

Finally, I would admit one note of caution. In a similar tone to O'Donnell's admonition to the Irish judicial mind for countenancing a self-understanding as lawyer, poet, and philosopher as embodied in the image of the ancient Gaelic Brehon,⁶ I would suggest that in the telling of Irish late 20th and early 21st century constitutional development we may be too readily adopting the narrative voice of the Seanachai. Constructing an imaginative narrative in which a liberal and progressive Ireland does not recursively appeal to outmoded transhistorical ideas of the nation or natural law, rather, embodying an enlightened balance of parliamentary, plebiscitary, and deliberative democratic institutions.

As already acknowledged, this narrative is largely unassailable. To briefly illustrate let us take the words of three Taoisigh from Fine Gael, the party in Ireland most associated with Christian democracy. These articulations of ideas of Ireland are illustrative of how those most closely associated with the executive power of the State understand the nature and

⁵ *Heneghan v Minister for Housing, Planning and Local Government* [2023] IESC 7 Murray J, at para 13.

⁶ Donal O'Donnell, 'The Sleep of Reason' [2017] *DULJ*, Vol. 40, no. 2, pp. 191-214.

character of state over which they preside. John A. Costello upon obtaining office in 1948 wrote to Pope Pius XII outlining a clear syncretism between public policy and Church teaching:

“On the occasion of our assumption of office... my colleagues and myself desire to repose at the feet of Your Holiness the assurance of our filial loyalty and devotion as well as our firm resolve to be guided in all our work by the teaching of Christ and to strive for the attainment of social order in Ireland based on Christian principles.”⁷

Compare this with the speech given by Enda Kenny, a practicing Catholic, 63 years later following the publication of the Cloyne report which detailed how the Vatican attempted to frustrate the course of justice regarding the sexual abuse of children in Ireland:

“...because for the first time in this country a report on child sexual abuse exposes an attempt by the Holy See to frustrate an inquiry in a sovereign, democratic republic as little as three years ago, not three decades ago... Thankfully for them and us, this is not Rome. Nor is it industrial school or Magdalene Ireland, where the swish of a soutane, smothered conscience and humanity and the swing of a thurible ruled the Irish Catholic world. This is the Republic of Ireland in 2011. It is a republic of laws, rights and responsibilities and proper civic order where the delinquency and arrogance of a particular version of a particular kind of morality will no longer be tolerated or ignored.”⁸

The clear delineation between the State and the authority of the Church is emotively and robustly presented in language made even more forceful by the source from which it came, a man of faith from a Christian democratic political party. The proximity between the Church’s moral authority and the trajectory of public opinion would grow ever more distant in the proceeding decades. The apogee of this trend may have been reached with the referendum to repeal the Eighth Amendment, proposed and passed under Governments led by Fine Gael. Leo Varadkar, in a speech given upon the passage of the Thirty-sixth Amendment which provided for the regulation of termination of pregnancies, echoed the rhetorical voice of the generation of Irish revolutionaries and state-builders in proclaiming that the idea of Ireland had reached some teleological point of deliverance or equilibrium:

⁷ John A. Costello to Pope Pius XII (Holy See) (Dublin, 20 February 1948), <https://www.difp.ie/volume-9/1948/fidelity-of-the-irish-government-to-the-catholic-church/4601/>.

⁸ Dáil Éireann debate - Wednesday, 20 Jul 2011, Vol. 739 No. 3.

“I believe today will be remembered as the day we embraced our responsibilities as citizens and as a country. The day Ireland stepped out from under the last of our shadows and into the light. The day we came of age as a country. The day we took our place among the nations of the world. Today, we have a modern constitution for a modern people.”⁹

This proclamation of a “modern constitution for a modern people” necessarily implies that up until that point Ireland had a pre-modern constitutional order under which a modern people chafed. However, it is important to bear in mind, in consistency with the abiding Irish constitutional theory of validity and narrative of legitimacy, this constitution was not imposed. It is the constitutional order which the People had given themselves. Its values are expressive of the values which the People think best reflect their idea of Ireland. That it was once avowedly imbued with Catholic nationalism is almost definitional from the development of anti-colonial nationalism in the late 19th and 20th century. That it began to shift, as with the teaching of the Church itself, in the 1960’s with the advent of Vatican II demonstrates that the Irish judicial intelligentsia were keeping lock step with currents in Catholic thought at that time. That the avowedly nationalist aspects of the text would be cause for constitutional alteration in the Republic¹⁰ while violence plagued Northern Ireland in the name of that self-same claim—based in anti-colonial ethno-symbolic nationalism—which underpinned the entire project of an independent Irish state demonstrates both that an acceptance of partition¹¹ had developed in the years since the island was segmented into two jurisdictions based on confessional majorities, and that pragmatic concerns for stability over quixotic nationalism had become the *modus operandi* in the political culture of Leinster House.¹² Similarly, that provisions which prescribed

⁹ Speech given by Leo Varadkar following the declaration on the Referendum on the Eighth Amendment, (Sunday 27th May 2018). <https://merriestreet.ie/en/news-room/speeches/speech-by-an-taoiseach-leo-varadkar-following-the-declaration-on-the-referendum-on-the-eighth-amendment.html>.

¹⁰ As reflected in the Fifth and Nineteenth Amendments respectively.

¹¹ See, John Coakley, ‘Adjusting to partition: from irredentism to “consent” in twentieth-century Ireland’, *Irish Studies Review*, [2017] Vol. 25, No. 2, 193–214.

¹² As is evidenced by the arms crisis wherein both Neil Blaney (charges ultimately dropped) and Charles Haughey (ultimately acquitted at trial), were removed as cabinet ministers by Taoiseach Jack Lynch in 1970 for alleged involvement with attempted gun running with funds made available for relief efforts sanctioned by the Dáil amounting to £50,000 being used for republicans based in Northern Ireland. The disjunction between the irredentist nationalist republicans and mainstream Fianna Fáil culminated at the 1971 Ard Fheis wherein future Uachtarán na hÉireann Dr. Patrick Hillery shouted down the republican agitators, most notably Kevin Boland, with his now famous “Ye can have Boland you can’t have Fianna Fáil”. See, Stephen Kelly, *Fianna Fáil, Partition, and Northern Ireland: 1921-1971*, (Irish Academic Press, 2013), Ch. 7 ‘1966-71’.

constraints on individual autonomy would be the focus of constitutional development in a post-Celtic tiger Ireland, wherein greater individualism followed economic prosperity seems narratively consistent. Yet, it must be acknowledged that all this change was justified through recourse to rhetorical normativity of the Nation, State, and People. The narrative changes, but metanarrativity of nationalism remains.

Attendant with these changes is the response of those who tell a counter-narrative. Whether that be on the political left¹³ or right,¹⁴ there are those who have conceptions of sovereignty and nationalism as their animating core principle. Their conceptions of the Nation are very far removed from each other, but their recursive normative appeal emanates from the same well-spring. It is the same well-spring which animated the participants of the 1916 Rising, one of whom was the main architect of 1937 Constitution. As such, it is a metanarrativity which remains in the text today. The continued salience of the ethno-symbolic nodal points within the discursive structure of the nationalist metanarrative can be seen in the initial phases of the 2025 election for the office of Uachtarán na hÉireann, who upon taking office declares:

“In the presence of Almighty God I do solemnly and sincerely promise and declare that I will maintain the Constitution of Ireland and uphold its laws, that I will fulfil

¹³ Sinn Féin most conspicuously drawing legitimacy for its political project from the same metanarrativity as 1916. In its party Constitution (*Bunreacht agus Rialacha*, 2013) under s.3(d), the objectives of the party are stated as “Bring the Proclamation of the Republic of Easter 1916 into effective operation and to establish the Republic, representative of the people of all Ireland, based on that Proclamation.” And further at s.3(e), “Seek a mandate to establish in the Republic a system of social justice based on Irish republican and socialist principles in accordance with the Proclamation of the Republic of 1916 and the Democratic Programme of the First Dáil Éireann in 1919...”. The transition from being the political mouthpiece for an armed paramilitary campaign has meant a shift in party rhetoric from teleology of armed struggle to gain sovereign independence to one of pluralism and equality. See, Sophie Whiting, ‘Mainstream Revolutionaries: Sinn Féin as a “Normal” Political Party?’, [2016] *Terrorism and Political Violence*, 28(3), 541–560. Furthermore, Adam Fusco presents an analysis wherein the synonymity between republicanism and nationalism in Ireland in the aspiration to reunification is interrogated treating republicanism as a political theory in its European and Atlantic context of neo-Roman conceptions of liberty and non-domination. In this analysis he posits that properly theorised republican principles can be satisfied in constitutional arrangements regarding Northern Ireland which do not amount to a united Ireland, arguing that a federalised UK or Ireland in concert with an autonomous British and Irish Council would be most plausible type of arrangement to ensure non-domination of individuals in the totality of the island. That such arrangements are not to the forefront of the popular conception of re-unification demonstrate that re-unification as an aspiration is driven more by nationalism as a principle rather than republicanism as a fully formed political theory. Adam Fusco, ‘Is Irish Reunification Republican’, in Clara Fischer and Áine Mahon (eds) *Philosophical Perspectives on Contemporary Ireland*, (Routledge, 2022).

¹⁴ From which we can see the rise in anti-immigrant/refugee agitators and rioters and nascent far-right parties. Also, the electoral successes of Aontú (while being slightly anomalous in that they are fiscally to the left, so perhaps being better styled as a populist party) and Independent Ireland who exist on the socially conservative right of parliamentary politics in Dáil Éireann. See, Pádraig Óg Ó Ruairic, *Burn Them Out: A History of Fascism and The Far Right in Ireland*, (Head of Pegasus, 2025) pp. 270-275.

my duties faithfully and conscientiously in accordance with the Constitution and the law, and that I will dedicate my abilities to the service and welfare of the people of Ireland. May God direct and sustain me.”¹⁵

The issues which emerged in the early stages of the campaign were whether the candidates can speak Irish,¹⁶ their views on Irish unity,¹⁷ and whether or not the religious and cultural background of one candidate and their family in Protestantism and the Orange Order is or isn't an issue.¹⁸ That such ethno-identitarian concerns are raised for the individual who will act as a nominal guardian of the Constitution¹⁹ demonstrates the continued salience in the polity of nationalist metanarrativity. I will conclude with one final former Fine Gael Taoiseach:

“Sacrifice breeds intransigence. The dead exert an unhealthy power over the living, persuading the living to hold out for the impossible, so that the sacrifice of the dead is not perceived to have been in vain...Betrayal of the sacrifices of the dead is one of the most emotionally powerful, and destructive, accusations within the canon of romantic nationalism.”²⁰

¹⁵ Article 8, Bunreacht na hÉireann, 1937.

¹⁶ Diarmaid Ferriter, ‘Two out of three candidates for the presidency can’t speak fluent Irish. That matters’, *Irish Times*, (26/09/25). <https://www.irishtimes.com/opinion/2025/09/26/diarmaid-ferriter-two-out-of-three-candidates-for-the-presidency-cant-speak-fluent-irish-that-matters/> accessed 27/09/2025.

¹⁷ Emmet Malone and Barry Roche, ‘Presidential election: Irish unity a ‘foregone conclusion’, says Catherine Connolly’, *Irish Times*, (27/09/2025). <https://www.irishtimes.com/politics/2025/09/27/presidential-race-irish-unity-a-foregone-conclusion-says-catherine-connolly/> accessed 27/09/2025.

¹⁸ Mark Hennessy, ‘In Heather Humphreys country: ‘It was hard to find a Protestant not in the Orange Order’, *Irish Times*, (21/09/2025). <https://www.irishtimes.com/politics/2025/09/20/in-heather-humphreys-country-it-was-hard-to-find-a-protestant-not-in-the-orange-order/> accessed 22/09/2025.

¹⁹ A conception which emanates from the powers of the President to refer a Bill to the Supreme Court for pre-emptive review as to its constitutionality, Article 26, Bunreacht na hÉireann, 1937.

²⁰ John Bruton, ‘Irish State should mark the enactment of Home Rule Law, says John Bruton’, *Meath Chronicle* (Saturday 9th of August 2014). <https://www.meathchronicle.ie/2014/08/09/irish-state-should-mark-the-enactment-of-home-rule-law-says-john-bruton/>.

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