

Catholicism and the concept of ‘the State’ in the (1937) Irish Constitution.

Abstract: The concept of the State is expressed more frequently and in more ways in the Irish (1937) constitution than in most European constitutions. The 1922 constitution had hardly mentioned the concept at all. Using the tools of conceptual history this article shows how a combination of Catholicism and nationalism led to the inflation of the State in 1937. The article also considers what this inflation tells us about the controversy over the religious origins of the constitution. Rejecting the possibility that it ‘contaminated’ the document, the language of statehood is seen rather as an example of how a constitution could harmonize religious with secular values without corrupting the secular meaning of the State.

The current Irish constitution, *Bunreacht na hÉireann*, was passed into law in 1937 and replaced the 1922 constitution. Its most characteristic and peculiar feature was that it codified a set of nationalist and religious values that were not expressed in the 1922 constitution. A less commonly noticed difference was that while the 1922 constitution had hardly mentioned ‘the State’, Council of State, the State, state, states or *Saorstát Éireann* are mentioned one hundred and thirteen times in the 1937 constitution.¹ This conceptual change is the subject of this article.

What follows is not a study of Irish state-building but of the concept which followed. I trace the ways in which the rewriting of the Irish

¹ The article is based on [https://en.wikisource.org/wiki/Constitution_of_Ireland_\(original_text\)](https://en.wikisource.org/wiki/Constitution_of_Ireland_(original_text)).

constitutional order led to an inflation of the concept of the State in 1937. Three forms of conceptual change are discussed: the use of the State to redescribe the Irish Free State, changes not to the word State, but to its terms of reference and the definition of Church State relations. Using the tools of conceptual history I show why the State entered the Irish legal order when it did; why the concept was expressed in the ways it was.

Yet the article also considers what the provisions on the State say about the controversy over the religious origins of the constitution. There may be a time, in the history of any country, when it is appropriate to use religious language in a constitution. Such language may elicit loyalty and respect from the populace. But the mix could become problematic over time. Indeed, the idea that an otherwise liberal and democratic constitution could have been ‘contaminated’ by organised religion has informed two contrasting views of the 1937 constitution.

The first is that Catholicism and democracy were actually harmonized in ways that Judaism and democracy have not been in Israel.² The constitution successfully ‘blended’ value systems usually thought

² The tension between democratic aspiration and a more religious conception of the Israeli political community was one reason why the attempt to write a written constitution was abandoned in the 1940s. But it has subsequently resurfaced in legal controversies over immigration, the acquisition of land and family reunification (Gary Jacobsohn, *Constitutional Identity* (Harvard University Press 2010): 271-322).

incompatible. According to Garvin, while nationalist Ireland took its religion from Rome, its politics were taken ‘from a curious and mongrel mixture’ of Herder, Pearse, Marx, Irish historical memory, English liberalism, American constitutionalism, and in particular, Daniel O’Connell.³ The rival ‘contamination’ perspective questions the very appropriateness of expressing religious values in a democratic charter. Girvin criticizes the constitution’s ‘theocratic intellectual framework’, Fitzpatrick the general application of Catholic social teaching to secular concerns Jackson the compromise made with the Catholic Church.⁴

This debate raises two questions. If the Catholic influence did ‘contaminate’ the document was this also true for its conception of the State? Alternatively, if the constitution harmonized Catholic with secular values how was this ‘harmony’ achieved in the language of Statehood? There has been no analysis - in law or political science – of these questions. Jacobsohn considers harmony (and disharmony) a function of a dialogical engagement between the core commitments of a constitution and

³ Tom Garvin (*Preventing the Future: Why was Ireland so Poor for so Long ?* (Gill and MacMillan 2004) 21-24.

⁴ Girvin, *From Union to Union*, 141. David FitzPatrick, *The Two Ireland’s 1912-1939* (Oxford University Press 1998), 241, Alvin Jackson, *Ireland 1798-1998: Politics and War* (Blackwell 1999), 293-97.

its *external* environment.⁵ Yet harmony can have an internal application: pertaining to the organization of a constitution, its conceptual logic or (in this case) to its uses of language.

My focus on the language of the State will be a way of showing how the 1937 constitution attempted, and (with respect to the question of Statehood), largely succeeded in harmonizing the Catholic and democratic strands to Irish constitutionalism. Most uses of the State owe their place to nationalism as a legal ideology rather than to organized religion. Where they do reflect a distinctly Catholic input I distinguish between providing for a Catholic society and establishing a Catholic State. And while the concept of the State was inflated in the course of the drafting ‘Church’ hardly appears. Each point will be developed in turn. First I introduce the controversy about the religious origins of the constitution and suggest why it could benefit from a conceptual history of the State.

Harmony or Contamination?

The controversy is long-standing. Delanty and O’ Mahoney see a break with European thinking on individual freedom and rights, while Daly argues that neither the bias towards the Catholic religion, nor the huge informal power it retained, meant that the constitution’s conceptual

⁵ *Constitutional Identity* (Harvard University Press, 2010), p.13.

structure was severed from the constitutional thinking of the European democracies.⁶ The most important civil servant in the drafting process, John Hearne a legal official from the Department of Justice, had spent time in St. Patrick's College Maynooth training for the priesthood; he would remain a daily communicant.⁷ Hearne's combination of religious and secular training points to a dualism which judicial interpretation reflects. The Irish courts have ruled that certain rights not enumerated in the constitution derived from 'the Christian and democratic nature of the State'.⁸

From the contamination perspective, the mix of Catholicism and democracy is the issue. This critique was at its strongest in the early years of the Northern Irish conflict (1969-1998).⁹ One problem is that the

⁶Gerard Delanty and Patrick O' Mahony, *Rethinking Irish History: Nationalism, Identity and Ideology* (MacMillan 1998) 152-3; Eoin Daly, *Religion, Law and the Irish State: The Constitutional Framework* (Clarus Press 2012) 6

⁷ Eugene Broderick, *John Hearne: Architect of the 1937 Constitution of Ireland* (Irish Academic Press, 2017).

⁸ A reasoning now part of the state's own self-understanding. See 'Constitution and Government of Ireland', Ireland-information.com/reference.congov.htm

⁹ For a sample of critics see Ronit Lentin, 'Irishness, the 1937 constitution and citizenship. A gender and ethnicity view' 1998 8(1) *Irish Journal of Sociology* 5-24; Maria Luddy, 'A Sinister and Retrogressive Proposal: Irish Womens' Opposition to the 1937 Draft Constitution' 2005 15, *Transactions of the Royal Historical Society* 175-195. Thomas

constitution allowed the religious ethos of the Catholic majority to extend to questions which were considered matters of private conscience by Protestants. The document's ban divorce was one example. The constitution was also seen as symbolizing a confessional state: allowing the question of religion to enter into the definition of Irishness. On St. Patrick's Day 2010, public intellectual Fíach Mac Conghail asked 'How can we accept as a multi-cultural secular society that all actions of our people and the State should derive from the most Holy Trinity?'¹⁰

The harmonization approach goes back to historian Emmet Larkin who wrote (in 1984) that 'For the Irish, their political genius was that they were able to *integrate* to an unusual degree the various dimensions of liberty –personal, civil, political and religious –into a longer term communitarian ethos, and eventually *harmonize* both to produce a distinctive Irish political tradition, communitarianism'. Larkin adds that Catholicism's contribution to that tradition, and the way it 'blended' with the English tradition of liberty is told by the constitution it produced.¹¹ 'Blended' implies the

Murray, 'Socio-Economic Rights and the Making of the 1937 Constitution' 2016; 31 (4),

Irish Political Studies, 502-524.

¹⁰ Irish Times March 17 2010.

¹¹ Emmet Larkin, 'The Irish Political Tradition' in Thomas E. Hachey and Lawrence S. McCaffrey (eds.) *Perspectives on Irish Nationalism* (University of Kentucky Press 1984) p.100.

harmonious co-existence of values which might logically rule each other out, but which became blended because they took a practical form in the nineteenth century which subsequently proved workable and effective.

This contamination/harmony debate has not considered the formulations on the State.¹² Among others, the *Bunreacht* borrowed from states that were subverted (Weimar's 1919 constitution), occupied (Poland's 1921 and 1935 constitutions) and discredited (Salazar's 1933 constitution).¹³ This borrowing – in an era of State worship and authoritarianism – should make the State central to any debate about the contamination of the constitution. Indeed Girvin argues that article 9.2., which declared that fidelity to the nation and loyalty to the State are fundamental political values reflected the tenor of authoritarian nationalism at that time.¹⁴ One hundred and thirteen uses stands out in that context. The Polish 1921 constitution mentioned the State 45 only times; the shorter 1935 Polish constitution 51 times.

¹² For the latest discussion of the historiographical debate see Donal K. Coffey, *Constitutionalism in Ireland, 1932-1938: National, Commonwealth and International Perspectives* (Palgrave 2018) 119-163.

¹³ See Donal K. Coffey, *Drafting the Irish Constitution, 1935-1937: Transnational Influences in Interwar Europe* (Palgrave MacMillan 2018) 1-36.

¹⁴ Brian Girvin, *From Union to Union: The Act of Union to the European Union* (Gill and MacMillan 2002) 81.

Yet there has been no analysis of the place of the State in the 1937 constitution. One reason for this is the dominance of a religious prism, according to which the nature of Irish statehood has tended to be seen in terms of the *de facto* alliance between Church and State. While in Western Europe the State is generally associated with processes of secularization, in Ireland Church and State worked hand in hand. A great deal has accordingly been written about the Catholic influences on the constitution. And some go so far as to label Ireland a Catholic, confessional, or corporatist State. Yet they tend to ignore the constitution's formulations on this concept.¹⁵ The State is central to the constitution not to the debate about it.

Any debate about harmony or contamination is incomplete without a discussion of this idea. The State is a basic legal concept without which the 1937 constitution would be less coherent. Two conclusions are possible. Such was the Catholic influence that the formulations on the State could be said to have further 'contaminated' an otherwise democratic and liberal

¹⁵ For examples Desmond Clarke calls Ireland a confessional state in *Church and State; Essays in Political Philosophy* (Cork 1984); Maura Adshead and Michell Millar wrote *Ireland as a Catholic Corporatist State: A Historical Institutional Analysis of Healthcare in Ireland* (Limerick 2003); Kurt Bowen wrote *Protestants in a Catholic State: Ireland's Privileged Minority* (Quebec 1983). The feminist Hanna Sheehy Skeffington thought the 1937 constitution based on the 'Fascist Model' (see C. Beaumont, 'Women, citizenship and Catholicism in the Irish free state, 1922-1948', 1997 6 (4) *Women's History Review* 563-585.

document. Alternatively, we could conclude that not only were the provisions immune to such ‘contamination’, they were in fact an example of the harmonization Larkin referred to. My analysis will support this second conclusion. While a combination of nationalism and religion explains its inflated uses in 1937, the State remained a secular concept.

The Case for a Conceptual History Approach.

The State became a basic concept in the Irish constitutional order because of the close connection between nationalist constitution-writing and conceptual change. The independence movement *Sinn Féin’s* Declaration of Independence in 1919, the establishment of the Irish Free State in 1922, and the creation of *Éire* in 1937 had all involved constitutions. Since an elementary task of language is to name things, the 1937 *Bunreacht* came at the end of a process in which the new polity’s legal status was a concern of nationalists of the era. In 1936 (probably) the President of the Executive Council, Éamon de Valera drafted a short squared notepaper in which he outlined some early articles. The first bullet point simply read ‘The Name of the State is *Éire*’.¹⁶

The manner in which constitutional politics can lead to conceptual change has already been explored by Ball and Pocock with

¹⁶ Keogh and McCarthy, *The Making*, 78.

respect to the American constitution.¹⁷ That document also emerged from a period of flux and change in which those who became responsible for drafting it went through ‘a linguistic turn’ which made them progressively aware of the conceptually constituted character of their views on politics and citizenship. The changes in the concepts which constitute American thought – such as republic, constitution, sovereignty and federalism – took place in a relatively compressed time period, from 1781-to 1787, from 1776 to 1789 or from 1774-1880.¹⁸ The period between 1916 and 1937 in Ireland was also one of compressed change, but while the mechanisms of conceptual change Ball and Pocock identified were those of contradiction and criticism, the main motor in Ireland was nationalist self-definition. The 1922 constitution was called ‘The Constitution of the Irish Free State’: it was replaced in 1937 by ‘*Bunreacht na hÉireann*, the Irish constitution’.

This change had its origins in the Irish civil war of 1922-23, where, as a result of a split over the 1921 Anglo-Irish Treaty nationalists fought over the very meaning of sovereignty and independence. Pro-treaty *Cumann na nGaedhael* (which became Fine Gael in 1933) remained in power between 1922 and 1932. *Fianna Fáil: the Republican Party* replaced them from 1932 to 1948. The decision to replace the 1922

¹⁷ Terence Ball and John G. A. Pocock (eds), *Conceptual Change and the Constitution* (University of Kansas Press 1988).

¹⁸ *Ibid*, 15.

constitution was taken by de Valera between May 1934 and May 1935.¹⁹ The process continued until April 1937 when the final copy was produced. ‘De Valera’s constitution’ was approved in a plebiscite on July 1st 1937 and became law on December 29 1937.

Conceptual history tends to focus on ideas that change as they become subject to discussion and contestation. Like the replacement of ‘The President of the Executive Council’ by *Taoiseach Éire* was an example of ‘the general renaming of constitutional parts’ that occurred in 1937.²⁰ The 1922 constitution had hardly mentioned the State: in 1937 the drafters were freer to stress the reality of Irish statehood. Yet nationalism was only one influence. Another example of conceptual change is the inflation in the uses of the State after the contributions of the Catholic Church to the drafting. The result of this combination of nationalism and religion was a more conceptual constitution: ten mentions of the State in an early section called The State; sixteen in The Council of State middle section; and sixteen in the final two sections of the document.

The focus of conceptual history on concepts which change in the course of political conflict and debate is at odds with an older approach to the history of ideas. This approach sees concepts as ‘unit ideas’ whose meanings persist over time, despite changes to the historical and political

¹⁹Coffey, *Constitutionalism in Ireland, 1932-1938*, 78.

²⁰ Garvin, *Preventing the Future*, 21.

contexts in which they are expressed.²¹ If the State was a ‘unit idea’ we would expect it to remain uninfluenced by the ideological currents of the 1930s. The possibility that this approach explains the secular definition of the State in article 5 is discussed at the end of this article. In general conceptual historians reject the possibility that ideas can be autonomous and free-floating and prefer to locate concepts in specific contexts.²² Given the extent to which other parts of the constitution were influenced by the Catholic turn of the 1930s, article 5 is better seen as a deliberate choice.

Language has been important to the evaluation of the constitution: the Preamble (which begins ‘In the Name of the Most Holy Trinity’) has attracted attention in a way that the language of statehood has not. One can make a distinction between the colourful use of religious language and the more generic language of liberal democracy in the document.²³ This generic language is another reason why constitutional scholarship has overlooked the State. Generic or not, a concept is more than a word: the State passed into Irish law as part of an envelope of other concepts. Hence a proper conceptual history requires attention to the variety of ways the State was expressed, to

²¹ A. Lovejoy, *The Great Chain of Being: A Study in the History of Ideas* (Harvard: Harvard University Press, 1936).

²² *Ibid*, 83-85.

²³ Eoin Daly, ‘Republican themes in the Irish constitutional tradition’, *Études Irlandaises* 41 (2), 2016, pp.163-184.

the words (and combinations of words) for the State, and to the policy fields the State became a central concept for.

The use of *Bunrecht* (meaning basic law) as a name for the constitution raises another linguistic issue. Conceptual history, like constitutional theory, is concerned with events that are conceptually constituted and articulated in a given source language. I do not consider the 1937 constitution's linguistic sources: both Coffey and Hogan highlight the Weimar 1919 constitution.²⁴ Nor do I deal with the Irish language text; *Stát*, no less than *Eaglais* (Church) was centuries old by 1937. The conceptual politics I analyse was in English. The sources which enabled Ball and Pocock demonstrate what they saw as a heightened sensitivity to constitutional language in the United States were many: newspaper articles, broadsides, sermons, and pamphlets. Conceptual politics impacted on the actual words of the constitution, but originated in what we would now call civil society. Yet, the Irish conceptual politics were confined to a closed circle of Catholic priests, civil servants and politicians. We can see changes in the meaning of basic concepts as they furthered their work, draft by draft. Hence the focus here is not on civil society but on the constitutional drafts and the final text.

²⁴ Gerard Hogan. 'Some Thoughts on the Origins of the Constitution'. The Binchy Memorial Lecture. Burren Law School, May 5 2012; Coffey, *Drafting the Irish Constitution, 1935-37*, 1; *Constitutionalism in Ireland*, 144. See also Gerard Hogan, *The Origins of the Irish Constitution, 1928-1941* (Dublin: Royal Irish Academy, 2012).

To recap, the ‘conceptual statism’ of the final text was the result of three forms of conceptual change; the re-description of the Irish Free State, change not to the word State, but to its terms of reference and the definition of Church-State relations. My discussion of each form will support the harmonization perspective on the constitution. The next section discusses the redescription of the 1922 constitution. Religious ideas played a role in this process but not predominantly so. The subsequent section shows how the Catholic influence led to change in the State’s terms of reference in the later parts of the constitution. These provided for a Catholic society rather than for a Catholic State. The last two sections examine the formulations on Church and State and the definition of the State in article 5.

Redescribing the Free State.

My aim is not to establish when the Irish acquired a name for the State, but to focus on the time between 1922 and 1937 that the State entered into the state’s legal thinking. Such an approach involves a consideration of the differences with the 1922 constitution. On the one hand, by expressing Catholic and nationalist values subscribed to by the vast majority of the population, the 1937 constitution ensured that southern Irish society could develop free from internal conflict up to the 1970s. Yet the need to mark the difference with 1922 dictated much of the way the language

of statehood was used in 1937. This need did not exhaust the range of uses. Yet it is a good point of departure.

The State had not been central to the 1922 constitution. Article one began ‘The Irish Free State (otherwise hereinafter called or sometimes called *Saorstát Éireann*) is a co-equal member of the Community of *Nations* forming the British Commonwealth of *Nations*’. Subsequent to this, Free State or *Saorstát Éireann* are mentioned. Article 11 then states that ‘all the lands and waters, mines and minerals, within the territory of the Irish Free State (SE) ‘hitherto vested in the State.... Shall be controlled and administered by the *Oireachtas* (parliament)’. Hence the one use of ‘the State’ in the 1922 constitution was a reference to the United Kingdom! The place of the Crown in the document precluded such uses. The draft adopted by the Provisional Government, and sent by them to London in June 1922 had contained article 6 (1) which stated that ‘No title of honour may be conferred by the State upon any citizen of *Saorstát Éireann*’. This was not accepted. Nor was article 12 (2) which claimed the right of ‘the State’ to its natural resources.²⁵

In 1937 there was no British veto. The *Bunreacht’s* section on the National Parliament expresses the idea that the Executive authority is exercised by the government on behalf of the State. This formula was intended to stress that the Crown was no longer part of the legislature:

²⁵ Brian Farrell, ‘The Drafting of the Irish Free State Constitution 1’ 1970 5 *Irish Jurist* 115-140.

there was no higher body in a position to veto legislation. Despite the British reliance on ‘government’ in political discourse, the Irish distinguish State from government. Article 28.2 says that ‘the executive power of the State shall... be exercised by or on the authority of the Government’. On the other hand, while the constitution refers to ‘Departments of State’ the British usage of ‘government departments’ continued in practice.

Not all nationalist movements think this way. Hirst reflected that the Australians for example were completely indifferent to the State as the symbol of their independence. Australian independence, readily granted by the Crown did not have to be struggled for.²⁶ Sporting success, social welfare, and the outdoor way of life were more important. The comparison suggests why the Irish concept of the State acquired a very abstract quality. In 1939 the *Offences against the State Act* stated that through the activities of subversive organizations individuals offend an impersonal entity called ‘the State’.²⁷ Skinner’s suggestion that the modern State was unique in being conceived of in a doubly impersonal way – distinct from both rulers and ruled – captures this quality.

On the other hand, (unlike in Australia) the Irish State actually replaced the Crown as the lynchpin of the Irish constitutional order. Hence the inflated uses of this concept had a practical rather than a religious

²⁶ John Hirst, *Sense and Nonsense in Australian History* (2015). ReadWhatYouWant.com.

²⁷ “Offences Against the State Act,” PRES/1/P1193, National Archives.

function in that they brought a new legal personality into being. The State was, for this reason more than an abstraction. In order to symbolize this new personality's appearance on the world stage, the clauses on international relations refer to Ireland rather than the Irish Free State.

The uses of the State in 1937 generally reflected the influence of Irish nationalism: 'a legal ideology' which welcomed ideas that heightened the distinctiveness of the new State.²⁸ National pride was no barrier; foreign legal materials, including religious ones were used to mark the achievement of more independence in 1937. The 1922 preamble had not mentioned religion. That of 1937 begins,

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

This preamble was modeled on that of Poland's 1935 constitution. In 1922 a preamble modeled on the Polish (1921) constitution had been vetoed by the British government.

While the 1937 drafters saw their task as one of refounding the State, they employed a linguistic technique called re-description, the

²⁸ Gerard Hogan, 'Irish Nationalism as a Legal Ideology' 1986 75 (300) *Studies: An Irish Quarterly Review* 528-538.

essence of which is to replace a given evaluative description with a rival term that serves to picture an event no less plausibly, but serves at the same time to place it in a contrasting moral light.²⁹ By substituting *Éire* for Irish Free State, calling his constitution *Bunreacht ha hÉireann*, and drafting a separate Irish language text de Valera was employing language to redescribe the Free State. The differences with the 1922 constitution were heightened by the new preamble, two early sections called Nation and State, a section on The Council of State, and a non-justiciable section called Directive Principles of Social Policy.

There was also a re-description of the State's legal responsibilities. The 1922 constitution had devoted little space to its fundamental rights clauses (Articles 6-10). It had expressed the rights to freedom of expression, opinion and association briefly in one article (9). Article 40.6.1° from 1937 reads "The State guarantees liberty for the following rights, subject to public order and morality." The re-descriptive language is very affirmative of its role. Article 40.3.1° reads: "The State guarantees in its law to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen". One can argue for legal shift in Ireland since 1922 from the State as the protector of basic rights, to a situation that all

²⁹ Quentin Skinner, *Visions of Politics Volume 1 Regarding Method* (Cambridge University Press 2002), 183.

those responsible for the protection and promotion of these rights should strive for the active realisation of those rights with all their powers. This shift had already begun on the continent.³⁰

Re--description meant that a more nationalist and religious set of ideas had to be harmonised with the more liberal 1922 text, but article 40 provided a stronger legal basis for the protection of fundamental rights than had hitherto existed. Redescription helps explain why the State was used so frequently, why naming it was important, and why the State became a symbol of Irish sovereignty and its independent institutions. Since the replacement of a constitution offers ample scope for redescription it is no surprise that the State was used in different ways and in different sections of the document. Yet these uses mainly had little to do with religion: they mostly reflected the work of Irish nationalism.

One defence of the harmonisation theory is to distinguish between the text's 'manifesto' clauses and 'law', and to argue that while the technique of re-description was used to affirm Irish values it did not compromise the legal aspects of the constitution.³¹ The *Bunreacht* was not

³⁰ Coffey *Constitutionalism in Ireland, 1932-1938*, 143.

³¹ The distinction is made in John Kelly, 'The Constitution: Law and Manifesto' in Frank Litton (ed.) *The Constitution of Ireland, 1937-1987* (Dublin: Institute of Public Administration, 1988), 208.

unique in interwar Europe in devoting its early articles to the nature of the State.³² Yet the more dramatic usages of the State are actually in the later sections where Catholic social thinking was influential. There are 39 mentions of the State in the Fundamental Rights and Directive Principles sections alone. In establishing an interconnection between constitution, rights, and the State these later sections said much about the state-society relationship. Re-description does not capture this aspect of the *Bunreacht*; neither does it resolve the question of whether (and how) the State helped in the harmonization of religious and secular values. Hence it is necessary to explore what these later sections say about the State.

Catholic society Catholic State?

State theory has only recently been the focus of Irish political science.³³ The standard continental conception of the State - as the sole source of law and as the locus of sovereignty over a given territory - was well-understood by independence in 1921. The IRA campaign in the civil war (1922-23) was described by the Provisional Government as a conspiracy against 'the State'. That conflict gave expression to the worldly conception (rooted in Hobbes). The Provisional Government

³² For examples see Coffey, *Drafting the Irish Constitution, 1935-1937*, 64.

³³ Adshead, Maura, Kirby, Peadar, Millar Michelle (eds.) *Contesting the State: Lessons from the Irish case* (Manchester University Press 2008), 4.

defended the State's (secular) ends; defence from external enemies, preservation of internal peace, the acquisition of wealth and full enjoyment of internal liberty.³⁴

Yet although the Free State won this civil war it remained ideologically insecure and needed the moral backing of the Catholic Church. In 1931, the President of the Executive Council, William Cosgrave, declared that the social order rested on an acceptance of the authority of the State and adherence to Christian teaching.³⁵ The 1937 constitution does not define the State as a legal person: in English law, the King, (or Crown) was corporation sole. When the Crown was removed from the 1922 constitution, the word State appeared in 1937, but its legal or philosophical character remained undefined. Catholicism helped give it such a character.

Under the Union (1801-1921) a close identification had developed between the Irish nation and the Catholic religion. The 1937 constitution reflected the values of the majority of the population, and by that year legislation on divorce, contraception, and freedom of expression had already

³⁴ Ernst-Wolfgang Böckenförde, 'Security and Self-Preservation before Justice: The Paradigm Shift and Transition from a Natural-Law' to a Positive-Law Basis in Thomas Hobbes's System of Law', in Mirjam Künkler and Tine Stein (eds), *Constitutional and Political Theory: Selected Writings: Ernst-Wolfgang Böckenförde* (Oxford University Press 2017) 67.

³⁵ William Cosgrave, *Dáil Debates*, vol.40 col.49, 14 October 1931.

been brought into line with Catholic teaching. Hence by 1937 the Catholic Church was in a strong position to have its worldview inscribed on the workings of the legal world. De Valera's broadcast speech on the constitution was titled 'We are a Catholic People'.³⁶

The 1922 constitution had been secular. Yet draft C of the 1922 constitutional committee was mainly the work of Alfred O' Rahilly who believed that the majority of the population expected the expression of their religious values in their constitution. Its' section on *Family Education and Religion* (articles 53-60) placed marriage under 'the special protection of the State'. Article 60 stated that 'the State has the duty of making moral protection and religious ministry available for citizens in public institutions'. All natural resources were 'the property of the State'. The use of land was 'superintended by the State'.³⁷ Draft C was rejected by the Provisional Government but was prescient in giving the State a central role in the upholding of a Catholic social order.

Of the Catholic priests involved in the drafting in 1937 Dr. Edward Cahill was a Jesuit lecturer in Sociology and author of *The Framework of a*

³⁶ 'La Fhéile Pádraig: We Are A Catholic People', President's Broadcast Speech to the USA, 17/3/1937, P150/1959, UCD Archives.

³⁷ Brian Farrell, 'The Drafting of the Irish Free State Constitution 1'; 'The Drafting of the Irish Free State Constitution 11' (1970) 5-6 *Irish Jurist* 343-356; 'The Drafting of the Irish Free State Constitution 111' (1971) 6 *Irish Jurist* 111-35.

Christian State. He served as an intermediary between de Valera and a committee of more senior Jesuits who were appointed in October 1936 by their Irish provincial to make submissions for ‘a Catholic constitution’. Their proposals for a preamble based on the Polish 1934 constitution, for an article exhorting the State to aim at a wide distribution of private property, especially in land, and for an article acknowledging the special status of the Catholic religion influenced the final document. Rev. John McQuaid, President of Blackrock College pressed the claims of Catholic social teaching, notably *Rerum Novarum*, and he influenced the articles on the family, private property, education, and religion, as well as its Directive Principles. His role was like that of a ‘specialist advisor’ on Catholic moral and sociological principles: he was the most important clerical drafter.³⁸

The Catholic sources at the disposal of the drafters included the constitutions of Poland (1921, 1935), Portugal (1933), and Austria (1934), a copy of the 1934 Concordat between Austria and the Vatican, summaries of Catholic social philosophy, papal encyclicals, and (some Catholic) *Select Constitutions of the World* (edited by B. Shiva Roa for the Madras Law Journal Press in 1934). A Catholic conception of the State had already been developed on the continent, notably in Pope Leo XIII’s encyclicals, 1885 *Immortale Dei* (On the Christian Constitution of States) and 1891 *Rerum*

³⁸ *Drafting the Irish Constitution, 1935-1937*, 22.

Novarum (On Capital and Labour). *Rerum Novarum* said that the State was any government conformable in its institutions and laws to right reason, natural law and Church teachings.³⁹

In their documentary history Keogh and McCarthy reproduce a number of early drafts.⁴⁰ There was an inflation of the State as the drafting went on. And the most affirmative uses came after the contributions from the Catholic Church, when personal rights and social policy were included in the first official draft circulated to government departments in March 1937. Of twenty eight final clauses which begin ‘The State...’ all but one are in the Personal Rights and Directive Principles sections towards the end. The former section mentions the State seven times, that on The Family eight times, Education/eight times, Private Property four times, and that on Religion six times.

³⁹ These encyclicals were retrieved from www.vatican.va/offices/papal_docs_list.html.

⁴⁰ These drafts were A ‘Preliminary Draft of Heads of a Constitution for *Saorstát Éireann*’, by a legal official in the Department of Foreign Affairs, who played a major role in the drafting, John Hearne, finalised in May 1935; The ‘Squared Paper Draft’ produced by de Valera; the ‘Draft Constitution Considered at Cabinet’ October 1936; the ‘First Draft Updated’ Late 1936; and the ‘first Official Draft’ from March 1937. Coffey (2018) considers even more drafts. While the early ones drew on continental constitutions, over time the drafts were more closely aligned with Catholic thinking, *Constitutionalism in Ireland, 1932-1938*, 151.

The State became inflated in terms of how frequently it was used, the variety of ways it was expressed stylistically and the number of policy areas the State became a central concept for. On private property the verbs vary:

Article 43.

1. 1° *The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.*

2° *The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.*

2. 1° *The State recognizes, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.*

2° *The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.*

These sections suggest that the state itself takes legal decisions, an idea current today. A philosophical justification - (consistent with Catholic thinking) - is given, but the State's authority is limited both by the respect given to natural law, and by the fact that the state is expressly denied the right to abolish private property. The verbs (acknowledges, delimits, guarantees, recognizes, requires) affirm its legal authority. Article 43 involved a different type of

conceptual change than redescription: there were changes not in the word itself but in the state's reference, in its criteria for application and changes in its use as an indicator of approval or disapproval.⁴¹

A third meaning of inflation is the increase in the number of policy areas the State was made responsible for. The Vatican had identified three: education, the family, and the social economic order, which were to be protected from secular encroachment.⁴² The constitution's clauses concerning these areas are strongly affirmative of the role of the State which became a central concept for several political fields of meaning: International Relations, The Family, Education, Private Property, Security and Religion. The State was also to oversee gender roles. Article 41.2.1° and 41.2.2° reads,

In particular, the State recognizes that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

⁴¹ Skinner, *Visions of Politics*, 9.141.

⁴² Andrzej Fliz, 'The Catholic Church and Democracy in Modern Europe', in Tom Inglis, Zdzislaw Mach, and Rafal Mazanek (eds), *Religion and Politics: East-West Contrasts from Contemporary Europe* (UCD Press 2000). 31-49.

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.

The article led to the mobilisation of a network of women's organisations in protest. It was modified after a parliamentary debate, but retains a stereotypical view of women's place in society.

Accompanying this inflation of the State was the borrowing from European constitutions. Coffey shows that parts of article 41 on The Family were inspired by the 1919 Weimar constitution. It had three clauses, two of which mentioned the State. Article 41 of the *Bunreacht* mentions the State eight times. Coffey also discusses an early draft on private property whose wording corresponds closely to article 99 of the Polish 1921 constitution. As the drafting proceeded the resemblance faded. While article 99 mentioned the Republic of Poland twice, and the State once, the Irish article 43 has four sub-clauses all of which begin 'The State'. Finally, parts of article 42 on Education were inspired by the Portuguese 1933 constitution.⁴³ Its article 43 mentioned the State three times: its first sentence began 'The State'. Article 42 of the *Bunreacht* mentions the State six times, and four of its sentences begin 'The State'. Clearly, the Irish stylistic preference was for the State.

For the articles on education, the family and private property, Coffey identifies the drafting method: while the early formulations drew on

⁴³ Coffey, *Drafting the Irish Constitution, 1935-1937*, 222, 229, 237.

continental constitutions; these drafts which were then supplemented by Catholic teaching on natural law.⁴⁴ Yet this two-step approach did not require the State to feature so prominently in the final text. For example, the ‘Directive Principles of Social Policy’ section drew on *Quadragesimo Anno*.⁴⁵ The section from the constitution mentions the State ten times. Its affirmative language (most clauses begin The State), and the expressions (‘the State shall... strive, direct, favour, endeavour, pledges and secure), were not copied from that Encyclical. They were stylistic choices on the part of the drafters.

Conceptual historians have problematized the connection between change in the real world and conceptual change.⁴⁶ If political life sets the problems for constitutional and political thought, the Catholic turn in the 1930s was a set of answers, one that resulted in the State becoming a basic concept for several fields of meaning. Since law is the language the modern state speaks to itself, it matters that the usages of the State were deeply interwoven into the clauses on rights, justice and social order. The Catholic Church backed the extension of the State’s legal

⁴⁴ Ibid, 216.

⁴⁵ Ibid, 241-250.

⁴⁶ Reinhardt Koselleck, *Futures Past: On the Semantics of Historical Time* (trans with an introduction. Keith Tribe) (Columbia University Press 2004),75-95; Melvin Richter, *The History of Political and Social Concepts* (Oxford University Press 1995) 26-58; Quentin Skinner, *Visions of Politics Volume 1 Regarding Method* 183.

responsibilities into these fields: conversely, the State facilitated the continuance of the Catholic mission in Ireland and beyond. Yet the State, (not the Church) was made legally responsible for them. The later articles suggest the relatively seamless fusion of Catholicism with the Irish idea of statehood. As de Valera put it, the Irish had adopted a constitution based ‘on their own Christian conception of life’.⁴⁷ For Samuel Moyn this ‘religious constitutionalism’ involved not only the defence of Catholic morality, but an attempt to bring into being ‘a new sort of Christian state’.⁴⁸ He assumes that law is key to the identity of the Irish State but ignores what the constitution says about the State.

What type of conceptual change did this inflation actually involve? On the one hand, the question of what was to be taken from Catholic sources on ‘the State’ had already been settled outside of Ireland. The continental way of conceiving of it in the sources used by the 1937 drafters was generally inherited from Roman canon law, and solutions canon lawyers had for thinking about the church were themselves adapted when the needs of the modern state had to be considered.⁴⁹ On the

⁴⁷ Taoiseach’s Broadcast St. Patrick’s Day 1938, P150/1961 UCDA.

⁴⁸ Samuel Moyn, *Christian Human Rights* (University of Pennsylvania Press, 2015), 48.

⁴⁹ Olivier Beaud, ‘Conceptions of the State’ in Michel Rosenfeld and Andras Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012), 279.

other hand, while the constitution may not have changed the word itself; there were changes in the applications of the terms by which the State was expressed.⁵⁰ Article 43 on Private Property shows how the State was combined with adverbs and verbs that give it legal agency and force. Different concepts of State action and State authority are conveyed by this phraseology. The expressions ‘The State shall, The State acknowledges, the State guarantees, The State shall permit, the State pledges itself, the State shall see to it, the State shall favour’ are examples. These sections did not change the meaning of ‘the State’; they concern the range of circumstances in which people are prepared to apply it.⁵¹

This mode of conceptual change, retaining the generic meaning of the State, while changing the range of circumstances in which people are empowered to apply it is an example of harmonization at the conceptual level. Daly goes further: typically, Catholic social teachings were not expressed as such but given a secular translation.⁵² What happened was that religious ideas were secularized through the application of the State to the religious, moral, and social conceptions of the Catholic Church. Accordingly, a constitution deferential to this Church can be recruited into a story of how the state uses ‘religion’ in order to secularise itself. For

⁵⁰ Skinner, *Visions*, 179.

⁵¹ *Ibid*, 186.

⁵² Daly, *Religion, Law and the Irish State*, 5.

Oakeshott Hobbes' *Leviathan* represented, in the transfer (from Church to State) of the power to legislate on ethical matters a turning-point in European political development.⁵³ Secularism here being, not privatization, but rather the appropriation of religion for secular purposes, the later assumption by the Irish State of responsibility over more spheres of social life was facilitated by this conceptual change. A constitution which allowed for a close union between Church and State in 1937 is allowing for a distancing today.⁵⁴

On the other hand, harmonization does not imply any separation of Church and State. While the conceptual changes may not have involved changes to the word State, the changes to its terms of reference raise the question of what type of state-society relationship was provided for. Without the underlying Catholic social philosophy, the changes to the state's terms of reference, to its criteria for application, and to its use as an indicator of approval or disapproval would have been less extensive.⁵⁵ The drafters acquiesced in the social relations existing at that time : their assumption was of a Catholic society if not of a Catholic State. De Valera

⁵³ Michael Oakeshott, 'Introduction' to Thomas Hobbes, *Leviathan: or The matter, forme and power of a Commonwealth, ecclesiastical or civil* (Oxford University Press 1946), vii-lxvi.

⁵⁴ Daly, *Religion, Law and the Irish State*, 6.

⁵⁵ Skinner, *Visions of Politics*, 9.141.

openly defended a ‘third way’ that would avoid the pitfalls of too much individualism and collectivism. Hence the Irish State did not conform to the main regime forms in Western Europe: Fascism, Liberalism or Social Democracy.⁵⁶ Consistent with its natural law basis, and the Catholic principle of subsidiarity this would be a limited State for a Catholic society. De Valera suggested,

The Solution must be based upon the correct application of the function of the State in relation to the individual. As Catholics, we conceive of the function of the State to be not to submerge, but to aid the individual and the family which we acknowledge to be prior to and more fundamental than the State.⁵⁷

The institutional limits to Catholic power had much to do with the fact that the drafting did not disrupt established ways of governing. For Rev. Edward Cahill, it was of paramount importance that the new constitution ‘should mark a definite break with the liberal and non-Christian type of State’. Citing the Portuguese constitution, he proposed a directly elected President, with long tenure of office, an Executive

⁵⁶ Greg Luebbert, *Liberalism, Fascism or Social Democracy : Social Classes and the Political Origins of Regimes in Interwar Europe* (Oxford University Press 1991).

⁵⁷ ‘La Fhéile Pádraig: We Are A Catholic People’, President’s Broadcast Speech to the USA, 17/3/1937, P150/1959, UCD Archives.

independent of the legislature, and parish councils elected by heads of families, with priests as *ex-officio* members. These suggestions were never adopted.⁵⁸ The Catholic input did not change the legislative process, the design of institutions or the distribution of power within them.

Church and State.

I have not unearthed the historical origins of ‘the State’ in Ireland, or proven that that the constitution has been an engine of conceptual development since 1937. My focus has been on the State as a product of conceptual change. The constitution became the site of concept formation because of the confluence of three kinds. Re-description saw the concept of the State being used to rewrite the earlier document along nationalist and religious lines. Then there were changes not in the meaning of the State but changes in its terms of reference. The constitution also defined the meaning of some concepts *vis a vis* others. This section considers Church and State.

Church and State is a basic legal antinomy without which one cannot do constitutional analysis in Ireland. The structural changes in European societies in the nineteenth century had important consequences for the way we use concepts. Modernisation resulted in the diminishing of the power of intermediary structures (guilds, corporations, and churches),

⁵⁸ Bill Kissane, ‘Éamon de Valera and the Survival of Democracy in Inter-war Ireland’ (2007) 42 (2) *Journal of Contemporary History*, 224.

between the individual and society, which resulted in a clear articulation of ‘state’ and ‘civil society’ as two opposite poles in political life.⁵⁹ Yet in Ireland the power of the Catholic Church grew after independence. It continued to perform some of the functions of the State notably in education. The most important conceptual pair remained Church and State.

Conceptual historians agree that when a concept enters into a political culture, it usually does so as part of an envelope of other concepts. Establishing its full meaning requires not only a ‘semasiology’ in which the main meanings of the State in a document are covered, but an onomasiology which requires that the possible words (and combinations of words) for the State should be considered.⁶⁰ Pocock and Ball suggested that in America the concept of constitution was implicated in a network of other concepts among which were the State, the union, or the federal union.⁶¹ Similarly, there has never been one name for the Irish State. Consider former *Taoiseach* Edna Kenny’s speech to the *Dáil* (parliament) in July 2011 on the Cloyne report into sexual abuse within the Catholic Church. He used ‘the government’, ‘the state’ ‘the Republic’ and ‘Ireland’ as names for the polity (*Radio Telefís Éireann* 21 July 2011).

⁵⁹ John Breuilly, ‘Approaches to Nationalism’. In Gopal Balakrishnan and Benedict Anderson (eds), *Mapping the Nation* (Verso 1996) 164-66.

⁶⁰ Melvin Richter, *The History of Political and Social Concepts*, 47-48.

⁶¹ Ball and Pocock, *Conceptual Change*, 15.

In 1937 the drafters generally took care to differentiate related concepts. Writing of contemporary Greece, Pyne suggests that there is a radical difference between the people and the State, which Greek terminology, for pragmatic political reasons, confuses by using ‘ethnos’ as ‘the nation’ rather than ‘the people’, and thus making it possible for ‘nation’ to elide into State.⁶² The 1937 constitution, which begins with a section on ‘Nation’ followed by one on ‘State’, distinguished them more clearly. Moreover, while it defined the national territory as the whole island, article 5 defines *Éire* as a sovereign, independent and democratic State. The territorial idea of the State was used, rather than the Republic or *Poblacht na hÉireann* (a ‘sacred’ term for de Valera because it covered the whole island).⁶³

Where there was conceptual conflict and potential for confusion concerned the status of Catholicism within the State. Since the choice of one word over another, or the manner in which they are combined, (the onomasiology question), was a question of political values this aspect of Irish statehood gave rise to conflict. Not only did it bring into conflict the most powerful actors, it raised the question of whether it was possible to separate Church and State. The poet *Nuala ní Dhomhnaill* once

⁶² Richard Pyne, *Greece through Irish Eyes* (Liffey Press 2015) 292.

⁶³ Coffey, *Drafting the Irish Constitution, 1935-1937*, 63.

called Ireland ‘a non-military totalitarian Church-State’.⁶⁴ A failure to differentiate the two conceptually would support the contamination perspective.

Concepts are not singular, but have a concentration of meanings which depend on the historical context. The Irish context was such that questions of religious supremacy had strong political connotations. With partition in 1920 new hierarchies – Catholic over Protestant in independent Ireland, Protestant over Catholic in Northern Ireland – were being established. The original article 44.1.2° (removed in 1972) stated that ‘The State recognizes the special position of The Holy Roman and Apostolic Church as the guardian of the Faith professed by the great majority of its citizens’. Similar formulations were found in the Polish constitution of 1921, and the Jesuit committee’s draft of October 1936, but its origins can probably be traced back to the 1801 Concordat between Napoleon and the Catholic Church.⁶⁵ What was controversial was not its origins but how religious dominance was combined with law.

Article 44 involved much diplomacy between de Valera, McQuaid, the Jesuit committee and the Vatican itself. The final article 44 appears mainly

⁶⁴ Nuala Ní Dhomhnaill Interview In Jody Allen Randolph (ed). *Close to the Next Moment: Interviews from a Changing Ireland* (Manchester 2009), 91.

⁶⁵ Gerard Hogan, *The Origins of the Irish Constitution 1928-1941* (Royal Irish Academy 2012) 217-18.

as of liberal inspiration. That this outcome was contingent is evident from the documents shown to the Papal Nuncio on his first visit during the drafting. These contain an early version of article 42 on Religion and also de Valera's annotation.⁶⁶ The first five clauses are reproduced below.

1. The State acknowledges the right of Almighty God to public worship in that way which He has shown to be his Will.
2. Accordingly, the State shall hold in honour the name of God and shall consider it a duty to favour and protect religion ~~and shall not enact any measure that may inspire its credit.~~
- ~~3.~~ The State acknowledges that the true religion is that established by our Divine Lord, Jesus Christ Himself, which He committed to His Church to protect and propagate, ~~as the guardian and interpreter of true morality. It acknowledges moreover, that the Church of Christ is the Catholic Church: (spiritual guide of men and guardian of right morals).~~
- ~~4.~~ ~~The State recognises the Church of Christ as a perfect society: having within itself full competence and sovereign authority: in respect of the spiritual good of men.~~
5. 1.^o ~~Whatever may be ranked under the civil and political order is rightly subject to the supreme authority of the perfect society, the State, whose function is to procure the temporal well-being, moral and material, of Society.~~
2.^o ~~The State pledges itself, therefore, in virtue of this sovereign authority conferred by God within its temporal sphere to enforce respect, by its just laws, for the~~

⁶⁶ Keogh and McCarthy, *The Making*, 154.

~~inalienable rights of the citizen and the family, and to preserve, as best it can, conditions of right social and moral being.~~

~~3° In cases where the jurisdiction of Church and State requires to be harmoniously co-ordinated the State may come to a special agreement with the Church and other Religious Bodies, upon particular matters, civil, political, and religious.~~

The following five sub-sections remained undeleted.⁶⁷ Taken from the 1922 constitution they were liberal in conception. Unlike 2-6 above, most of which was rejected, they became part of the final article 44 on the status of the religions.

This conflict was not over the use of the State, or its extension to the religious domain but of the terms by which Church and State were expressed. McQuaid and others did not get the recognition in the constitution of the Catholic Church as the ‘one true Church’ and the Church ‘established by Christ’. They did not prevent recognition of the Irish Anglican Church as ‘The Church of Ireland’, and failed to convince the drafters of the wisdom of a legal formula whereby other Churches would be ‘tolerated’, not recognized.⁶⁸ The inflation of one concept meant the deflation of another. In the seven sub-clauses of article 44 there was no mention of Church: State is used four times, while religious denomination is

⁶⁷ Keogh and McCarthy, *The Making*, 447-8.

⁶⁸ *Ibid*, 150-174.

used in place of Churches, or Church three times. This deflation meant that religion, to which the state never formally delegated legislative authority enjoyed the essentially private juridical status common in other western states.⁶⁹

Koselleck's discussion of asymmetric concepts gets to the heart of the problem with the Catholic proposals.⁷⁰ Concepts are used by groups to circumscribe themselves against other groups and they create intense feelings when the comparisons they imply leave some groups in an unequal position.⁷¹ It is not unusual for a group to claim a singular status for itself by claiming something general – here the Christian faith – as their own. Yet as one group ascribes universal attributes to itself other groups resist this categorisation and feel linguistically deprived of their status. This inferiority is a product of the way a particular entity tends to claim a universality for its own organisation; 'the Church established by Christ' or 'the one true Church'. Asymmetrical counter-concepts were a feature of other Catholic constitutions. The Polish 1921 constitution declared the Catholic faith the 'leading' faith among the religions - 'all being equal' - but also referred to denominations and their rights. Salazar's 1933 constitution declared the

⁶⁹ Daly, *Religion, Law and the Irish State*, 6.

⁷⁰ *Futures Past*, 155-192.

⁷¹ *Ibid*, 156.

freedom of all religions, but uses the language of cults and associations too. Franco's 'Fundamental Laws of the Realm' would label other religions, other than the Catholic one, as cults-*cultos*. The Irish avoided this outcome by giving the Catholic religion a special status due to its numerical preponderance.⁷² The response of the Vatican official, Cardinal Pacelli, to the draft constitution - *Ni approve ni non disapprove; taceremo* – was mute.

Although the State was expressly prohibited from endowing any religion, this does not imply that Church and State were separated (in text or in practice). Nonetheless, the uses of the State generally support the harmonization perspective. Buckley concludes that while the Irish were largely 'faithful to secularism' in 1937 article 44 prevented the state from achieving 'a principled distance' with Catholicism.⁷³ It compromised the principle of religious pluralism by giving the dominant religion a special status. The Fifth Amendment removed the whole article from the constitution after a referendum in 1972. In the context of the northern Irish Troubles,

⁷² A positive view of article 44 is found in Niall Meehan (2019), who noted that Protestant religious leaders were consulted over the article and were satisfied with the outcome. While the article gave the appearance of conferring privilege on the Catholic Church, it was for Meehan, 'a factual statement, not unusual by comparative international standards', N. Meehan "Article 44 Reconsidered" *History Ireland* (January-February 2019), p.44.

⁷³ David T. Buckley, *Faithful to Secularism: the Religious Politics of Democracy in Ireland, Senegal and the Phillipines* (Columbia University Press 2017), 56.

which began in 1969, article 44 was seen as an obstacle to unity and reconciliation. Without such amendments, critics argued that Unionists were being invited to join a sectarian State.

Defining the State.

This article began with the observation that while the 1937 constitution expressed a set of nationalist and religious ideas that were not present in the 1922 constitution, it was also much more expressive of the State. Since the 'contamination' of the constitution is at issue, this final section considers why ideas from the 1930s did not influence the definition of the State in article 5.

In *The Irish Mind* Kearney argued against the thesis that so Anglicized was Ireland 'that we don't have our own concepts'. He suggested that 'From the earliest times, the Irish mind remained free, in significant measure, of the linear, centralizing logic of the Greco-Roman culture which dominated most of Western Europe'.⁷⁴ Yet we encounter throughout the constitution the standard western and modern idea of the State as the sole source of law and as the legitimate possessor of force within its territory.⁷⁵

This generic approach suggests one explanation for why the definition of the

⁷⁴ Richard Kearney, *The Irish Mind: Exploring Intellectual Traditions* (Wolfound Press 1985).9.

⁷⁵ Richter, *The History*, 133.

State in article 5 was secular. If the drafters were working with a ‘unit idea’ - one unaffected by changes in linguistic and historical contexts - they may have been unaware of the Catholic conceptions of the State that became current in the 1930s.

Yet this interpretation downplays the significance of the historical moment when the State passed into Irish law. Conceptual historians prefer to see the meaning of concepts as being rooted in more immediate contexts. The relevant context was 1930s Europe. The preamble of the 1934 Austrian constitution had stated that it was a constitution for a ‘Christian, German federal state’, to be organized on a corporate basis (article 2). A constitutional referendum in Portugal on 19 March 1933 established Salazar’s *Estado Novo* (new state) as a one-party state. Article 5 of the new constitution called it ‘a unitary and corporate republic’. The Polish ‘April’ 1935 constitution called the state ‘the common weal of all its citizens’.⁷⁶ Franco (who seized power between 1936 and 1939) enacted a series of laws after World War Two which made no distinction between his movement, the regime and the state. The 1947 *Ley de Sucesión en la Jefatura Del Estado*

⁷⁶ Sources, <http://verfassungen.at/34-38/index34.htm>;

en.wikisource.org/wiki/April_Constitution_of_Poland. Javier Fernández Sebastián and Juan Francisco Fuentes (eds.) *Diccionario político y social del siglo XX español* (Alianza Editorial 2008), p.499. [Britannica.com/place/Portugal/The First Republic-1910-26-ref1636](http://Britannica.com/place/Portugal/The_First_Republic-1910-26-ref1636).

stated that the state was ‘catholic, social and representative’. Such clauses were replaced when these countries later adopted democratic constitutions.

Given its influence on the constitution generally, the existence of this Catholic turn raises the question of why the opportunity to redefine the Irish State was not taken in 1937. The drafters’ hands were not tied: the 1922 constitution had not spelt out the nature of the Irish State. Neither were they unaware of developments on the continent. Some parts of the constitution were opened to Catholic influence, others were not. Since article 5 simply states that ‘Ireland is a sovereign, independent and democratic State’, it is hard to agree (with Samuel Moyn) that there was a desire to establish a new Christian type of state. Rather, the fact that the Catholic influences did not extend to this article suggests that the lay drafters had no such desire.

Indeed article 5 is more comparable to the early articles in the constitutions of Czechoslovakia (1920), Finland (1919), Greece (1975), France (1946 1958) and Turkey (1924 1961) - where the nature of the State is also defined without reference to religion. Yet in these countries the State was defined as being a Republic. An Irish Republic was declared only in 1948, and the constitution’s section on the State was preceded by a section on the Nation, which in article 2 declared the national territory to be the whole island. The distinctiveness of the de Valera approach, lies in the fact that the

Republican ideal was associated less with the secular State and more with an end to partition.

Ultimately, the reason the opportunity to redefine the State was not taken in 1937 is that Ireland - unlike Austria, Poland, Portugal, and Spain - remained democratic. In 1937 de Valera publicly rejected the totalitarian and the liberal state. 'The State function' he argued involved the dispensation of justice and the distribution of natural resources among private individuals so as to serve the common good.⁷⁷ Yet if Irish exceptionalism was at the heart this 'third way' vision de Valera remained a democrat. Hegel had conceived of the State as an absolute idea - God on Earth - and as a solution to an increasingly fragmented world.⁷⁸ God was made material in Irish law in 1937, but the State is not above the individual in 'de Valera's constitution'. Franco's 1967 Organic Laws for Spain declared that the State was 'the supreme institution' of the national community.⁷⁹ In Ireland nowhere is there a suggestion that the State is an end in itself. Nor is there a concern with power projection in international affairs.

The State is present in the constitution to help in the fulfillment of the ethical, religious and social ideals mentioned in the preamble (such as

⁷⁷ 'President's Message to USA and Australia', 18/3/1937 (P50/1959, UCDA).

⁷⁸ Raymond Plant, *Hegel* (Routledge 1999) 27-50.

⁷⁹ Sebastián and Fuentes (eds.) *Diccionario político y social del siglo XX español*, 497.

human dignity). By approving it in the plebiscite on July 1 1937 the electorate welcomed that ‘apparent contradiction in terms’ a Catholic liberal democracy.⁸⁰ The constitution is also emphatic in making the people, not the State the possessors of sovereignty. This principle has subsequently been defended by the courts, one (1972) Supreme Court ruling suggesting that the Royal Prerogative had never carried over into the post-1921 constitutional order.⁸¹

Is harmony the appropriate term for such a controversial constitution? The argument that the constitution succeeded -with respect to its language of statehood - in harmonizing religious and secular values could be strengthened by the kind of comparisons made in Jacobsohn’s *Constitutional Identity*.⁸² At issue in the Israeli case, he argues, has been the question of ‘whether constitutionalist principles can tolerate any official subordination in the treatment of particular groups’.⁸³ Admittedly, Israel is deeply-divided, both with respect to the Palestinian issue and over the nature of Jewish identity. Independent Ireland was not so divided. Moreover, the 1937 constitution did not help to resolve conflict on the island as a whole. The

⁸⁰ Garvin, *Preventing the Future*, 21.

⁸¹ Eoin Daly, E. and Tom Hickey, *The Political Theory of the Irish Constitution: Republicanism and the Basic Law* (Manchester University Press 2015) 162.

⁸² Gary Jacobsohn, *Constitutional Identity* (Harvard University Press 2010): 271-322.

⁸³ *Ibid*, 472.

document remains open to feminist, liberal, secular, socialist and unionist critiques. Nevertheless, I have shown that the combination of Catholicism and nationalism behind the inflated use of the State in 1937 was less corrupting of its secular meaning than one would assume. Moreover, the question of whether Ireland was a Catholic or a democratic State, has been less problematic for the system's legal development, putting the protection of democratic rights under less strain than in the cases under consideration in *Constitutional Identity*.

Of the many reasons for this harmony some lie outside the text. Larkin was right in suggesting that the blend of Catholicism, nationalism, and liberalism was characteristic of the political culture as a whole. At the same time he noted that the 1937 constitution articulated better than any previous document the realities of the Irish political system.⁸⁴ I have focused on the conceptual structure of the text itself. Considering the scope for redescription when one constitution replaces another, and given the context of the 1930s it would be a surprise if some usages of the State were not linked to religion. Most were not, and if the *Bunreacht* was a product of the 1930s the question is

⁸⁴ Emmet Larkin, 'The Irish Political Tradition' in Thomas E. Hachey and Lawrence S. McCaffrey (eds.) *Perspectives on Irish Nationalism* (University of Kentucky Press 1984) p.100.

why the opportunity to redefine the nature of the state was not taken. Sometimes what is not borrowed will reveal more about any particular constitutional enterprise than what crosses borders easily. Of course different sections of the constitution were open to different degrees of religious influence: no modern constitution is uniform. Yet the State's legal supremacy generally prevailed. This supremacy itself explains why the State's place in the constitutional order would go unchallenged (indeed unnoticed) by the generations that followed.