

THE IRISH CONSTITUTION AND COMMON GOOD CONSTITUTIONALISM

CONOR CASEY*

INTRODUCTION

A core part of the intellectual project classical lawyers like Professor Adrian Vermeule are engaged in has involved probing foundational questions about law and political authority: what their purpose and justification are, and what the proper relationship between principles of legal justice and morality stemming from the natural law, and posited law created by human deliberation and choice, should look like. While these questions remain of evergreen importance, if the revival of the classical tradition in the form of common good constitutionalism is to have any vibrancy or longevity, scholars and jurists must also probe how the basic precepts of the tradition are best made concrete under contemporary social, economic, and political conditions.¹ It should go without saying, this does not mean something like taking particular laws and customs from a point in time and applying them uncritically today. Rather, those interested in reviving the classical legal tradition in the domain of public law must engage in the demanding

* Associate Professor in Public Law & Legal Theory, University of Surrey School of Law; Fellow of the Surrey Centre for Law and Philosophy. The author would like to thank Trevor Jones and all the editors at the *Harvard Journal of Law & Public Policy* for excellent editorial assistance.

1. This fact was recognized by classical jurists during the post-WWII revival of the natural law tradition. Johannes Messner argued that “the chief task” for classical jurists was “the application of the natural law principles to the changing world in the political, social, economic, cultural field.” Johannes Messner, *Postwar Natural Law Revival and Its Outcome* NAT. L.F. 101, 105 (1959) (emphasis omitted).

methodological project of adapting, translating, and specifying the foundational elements of the classical legal ontology, and its justificatory framework, to contemporary circumstances.² Scholars have already begun to precisely undertake this task in the context of concrete questions of public law, or through study of a range of different legal systems.³

My symposium essay adds to this growing body of literature by analyzing the concrete application and elaboration of precepts of the classical tradition within the Irish legal system. I offer an extended case study of the Irish constitutional order's long engagement with the classical legal tradition, by showing how lawyers, jurists, and judges tried to work out and elaborate many of its basic precepts over several decades in the context of a common law constitutional democracy with a codified constitution. With this in-depth case study, which blends doctrinal and theoretical analysis, I hope to provide an intellectual resource featuring the classical legal tradition 'in action' that can yield useful points of reflection for jurists and scholars interested in ongoing debates over common-good constitutionalism.

I proceed in four parts. Part I gives an overview of the drafting history of the 1937 Irish Constitution and the main intellectual inspirations behind its text. It documents how the drafters of the Irish Constitution were influenced by a rich fusion of natural law thinking, Catholic social teaching, American and continental

2. Adrian Vermeule, *The Common Good as Universal Framework*, BALKINIZATION (July 27, 2022), <https://balkin.blogspot.com/2022/07/the-common-good-as-universal-framework.html> [<https://perma.cc/3773-2ZRZ>].

3. ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022); Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 HARV. J.L. & PUB. POL'Y 103 (2022); Michael Foran, *Rights, Common Good, and the Separation of Powers*, 86 MOD. L. REV. 599 (2023); Stéfane Sérafin et al., *Notwithstanding Judicial Specification: The Notwithstanding Clause within a Juridical Order*, 110 SUP. CT. L. REV. 135 (2023); Conor Casey, *'Common-Good Constitutionalism' and the New Battle over Constitutional Interpretation in the United States*, 4 PUB. L. 765 (2021). See generally Michael Foran, *Equal Dignity and the Common Good*, 46 HARV. J.L. & PUB. POL'Y 1009 (2023).

constitutionalism, and commitment to Westminster-style parliamentary democracy.

Part II offers an eclectic study of several domains of Irish public law doctrine, which showcase the Irish Courts' engagement with a diverse set of classical legal precepts. I begin by outlining the Court's approach to constitutional interpretation, which bears several of its hallmarks. I outline how Irish Courts see posited constitutional text as an important part, but not exhaustive of, the polity's overall legal commitments, which also include background principles of legal justice. In hard cases, Irish Courts approach interpretation by attempting to understand the meaning of posited constitutional text considering the principles of political morality and legal justice underpinning them. This approach is visible across a range of influential cases concerning the duties placed on political authorities to safeguard and vindicate the flourishing of citizens from unjust attack, and in cases providing robust protection to the institution of the Family from state overreach. It is also visible in the fact that Irish public law doctrine works from the premise that the Constitution envisages the common good and true social order as the proper ends of political authority.

Part III examines the pressures being placed on the classical legal tradition as the methodological lodestar of the Irish Courts and legal community. Finally, Part IV offers some points of reflection for ongoing debates over common good constitutionalism. Overall, I hope this contribution will serve as a useful intellectual resource for those interested in both encouraging and critiquing the revival of classical thinking in public law theory.

I. THE DRAFTING HISTORY AND INTELLECTUAL INSPIRATION FOR THE IRISH CONSTITUTION

In 1934, the President of the Executive Council of the Irish Free State, Éamon De Valera, set out to draft and enact an entirely new

constitution to replace the 1922 Free State Constitution.⁴ The 1922 Free State Constitution had been drafted with considerable political constraints imposed on its drafters by the United Kingdom. Now freed from such constraints, De Valera hoped to constitute a new Irish State complete with its own entirely indigenous basic law that would “represent the aspirations of Irish people to a politics which was adequate to their own culture and values.”⁵

The core team behind the drafting of the new Constitution included De Valera himself and a team of elite civil servants.⁶ Between them, the team was well versed in British, American, continental, and Commonwealth constitutional law, a breadth of learning reflected in the diverse range of constitutional sources the drafting team drew upon in their work. Recent archival work has shown that the drafting of the Constitution was influenced by the conventions and practice of the UK and Commonwealth constitutions, the 1789 United States Constitution, 1919 Weimar Germany Constitution, 1921 Polish Constitution, 1933 Portuguese Constitution, and 1934 Austrian Constitution.⁷

Many provisions of the Constitution were also enormously influenced by the comments and submissions of a group of Irish Jesuits led by Edward Cahill, S.J.,⁸ and suggestions offered by the future Archbishop of Dublin, John Charles McQuaid, C.S.Sp.⁹ The authors

4. See Arthur W. Bromage & Mary C. Bromage, *The Irish Constitution: A Discussion of Its Theoretical Aspects*, 2 REV. POL. 145, 145 (1940).

5. V. Bradley Lewis, *Natural Law in Irish Constitutional Jurisprudence*, 2 CATH. SOC. SCI. REV. 171, 172 (1997).

6. Of singular importance were the contributions of John Hearne, the chief legal advisor to the Department of Foreign Affairs.

7. For unrivalled accounts of the drafting of the 1937 Irish Constitution, see DONAL K. COFFEY, *DRAFTING THE IRISH CONSTITUTION, 1935–1937: TRANSNATIONAL INFLUENCES IN INTERWAR EUROPE* (2018); GERARD HOGAN, *THE ORIGINS OF THE IRISH CONSTITUTION, 1928–1941* (2012).

8. Cahill was a noted political theorist in his own right, authoring *THE FRAMEWORK OF A CHRISTIAN STATE: AN INTRODUCTION TO SCIENCE* (1934) shortly before the drafting process began.

9. See Finola Kennedy, *Two Priests, the Family and the Irish Constitution*, 87 *STUD.: IRISH Q. REV.* 353 (1998).

also drew on high-profile papal encyclicals dealing with Catholic socio-economic and political teachings, including *De Rerum Novarum*,¹⁰ *Quadragesimo Anno*,¹¹ *Castii Connubi*,¹² and *Divini Illius Magistri*.¹³ The drafters also liaised and solicited input from figures in the Church of Ireland and Methodist, Jewish,¹⁴ and Presbyterian congregations on the Constitution's draft provisions concerning religion.

The draft Constitution was approved by Dáil Éireann (the lower house of the legislature) in June 1937, approved by the People in a referendum on July 1st, 1937, and came into force on December 29th of the same year.¹⁵ Given the range of diverse actors and sources involved in the drafting process, it is unsurprising that the final text of the 1937 Constitution displayed a "mélange of different, and sometimes conflicting, influences" throughout.¹⁶ However, it is fair to say some intellectual influences eclipsed others.

Outside the provisions concerning the structural elements of the Constitution, which centre on a Westminster-style parliamentary

10. Pope Leo XIII, Encyclical Letter, *Rerum Novarum* (May 15, 1891), https://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum.html [https://perma.cc/A7TK-L9EK].

11. Pope Pius XI, Encyclical Letter, *Quadragesimo Anno* (May 15, 1931), https://www.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno.html [https://perma.cc/N4FU-F9ZJ].

12. Pope Pius XI, Encyclical Letter, *Casti Connubii* (Dec. 31, 1930), https://www.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19301231_casti-connubii.html [https://perma.cc/TFA8-8SNE].

13. Pope Pius XI, Encyclical Letter, *Divini Illius Magistri* (Dec. 31, 1929), https://www.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_31121929_divini-illius-magistri.html [https://perma.cc/9HW4-GGHL].

14. The Jewish Rabbinate of Ireland wrote a letter to President De Valera congratulating him on production of a "fair and just" document and noted with "satisfaction" the recognition of the Jewish congregations of Ireland. HOGAN, *supra* note 7, at 547.

15. See CONSTITUTION OF IRELAND 1937.

16. Professor Donal Coffey argues it is a mixture of "Commonwealth constitutionalism; popular constitutionalism; the liberal democratic constitutionalism in the immediate aftermath of the First World War; and Catholic corporate thought." COFFEY, *supra* note 7, at 1-4.

system,¹⁷ the dominant intellectual influence of the Irish Constitution undoubtedly stems from the Aristotelian-Thomistic natural law tradition. From start to finish, the influence of this tradition permeates the document and can be discerned in how it understands theoretical questions like the point and purpose of governmental power and the State, the nature and value of personal rights, and the centrality of institutions like marriage, religion, and Family to true social order.¹⁸ The drafters' understanding of natural law was in many instances filtered through Catholic social teaching's interpretation of the same. The provisions on education, property, and the family were deeply influenced by high-profile papal encyclicals like *Rerum Novarum* and *Quadragesimo Anno*.¹⁹

The preamble of the Irish Constitution provides that:

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

We, the people of Éire,

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

Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation,

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.²⁰

17. ORAN DOYLE, *THE CONSTITUTION OF IRELAND: A CONTEXTUAL ANALYSIS* 19 (2018).

18. *See* CONSTITUTION OF IRELAND 1937 arts. 40.3, 41–44.

19. COFFEY, *supra* note 7, at 187–252.

20. *See* CONSTITUTION OF IRELAND 1937 pmbi.

Moving beyond the preamble, which announces the core goals of the State as pursuing the common good and human dignity, the personal rights provisions of the Constitution are also clearly steeped in natural law thinking. These provisions, housed within Articles 40–44 of the Constitution, all share common themes: they emphasize the State’s responsibility to promote and vindicate human flourishing by respecting what is due in justice to individuals, families, and associations like schools, churches, unions, while ensuring all rights are properly ordered to the common good and true social order. These rights provisions also demonstrate deep respect for subsidiarity and the legitimate role of non-state actors in promoting this same end, particularly the Family.

The 1937 Irish Constitution’s precise alignment with Catholic magisterial teaching can be, however, overstated. An earlier draft of the Constitution contained a more forthright alignment of the State to the Catholic Church, but was quickly jettisoned in favor of a “special position” provision.²¹ De Valera’s compromise was no doubt motivated by a prudent desire not to inflame religious tensions in the island or scupper the prospect of eventual Irish reunification with the majority protestant North.²² The Holy See itself famously withheld public comment on the draft Constitution, to the disappointment of De Valera. Cardinal Eugenio Pacelli, the future Pope Pius XII, delivered the formal opinion of Pope Pius XI regarding the draft: “We do not approve nor do We disapprove: We shall remain silent in the matter, but his silence does not signify consent”.²³ While this response disappointed De Valera, it did not prompt any amendments to the draft.

21. Which stated: “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.” CONSTITUTION OF IRELAND 1937 art. 44.1 (repealed 1973).

22. HOGAN, *supra* note 7, at 214.

23. *Id.*

II. IRISH CONSTITUTIONAL JURISPRUDENCE AND THE CLASSICAL TRADITION

Irish legal practice—reflected in the argumentation and reasoning of lawyers, jurists, and judges—has, for much of the existence of the Irish constitutional order, firmly reflected a distinctive jurisprudential ethos and principled worldview: one steeped in the classical tradition. This was a mindset and worldview that regarded positive law like constitutional text as part of a broader web of law also including principles of legal justice stemming from the natural law; that accepted that these different sources of law should be harmonized wherever possible; that viewed the purpose and point of State power as promoting the common good; that regarded rights as a necessity for “free moral action”²⁴ and human flourishing, but understood they had to be properly ordered to fit within the overall context of the common good; and that put a premium on subsidiary institutions like marriage and the Family. In other words, Irish Courts were committed to a form of common good constitutionalism long before the current American debates began.

Methodologically, this account of Irish legal practice is internal and doctrinal; neither purely normative nor descriptive, but interpretative and deeply embedded in Irish constitutional argumentation and reasoning articulated through many years of doctrine.²⁵ As

24. V. Bradley Lewis, *Liberal Democracy, Natural Law, and Jurisprudence: Thomistic Notes on an Irish Debate*, in REASSESSING THE LIBERAL STATE: READING MARITAIN'S MAN AND THE STATE 140–58 (Timothy Fuller & John Hittinger eds., 2001).

25. With this approach, I am obviously taking inspiration from Professor Ronald Dworkin and his account of how legal practice and argumentation proceed in hard cases. In Dworkin's account, lawyers and judges make arguments about what the law is by reference to its point and by offering principled accounts of what the law requires in a given case that fit the prior web of legal materials coherently and in a morally sound way. In other words, it is an account of what the law is that, along these dimensions of fit and soundness, puts it in a compelling moral light. See RONALD DWORKIN, *LAW'S EMPIRE* (1986). However, I adopt this method in a qualified way. I do not follow Dworkin in saying that legal actors like judges *impose* meaning on legal practice when engaged in interpretation. Rather, following Professor Rodriguez-Blanco I think it is

such, I try to give a persuasive account of the great thrust of the law's internal trajectory in several key domains of public law doctrine; and argue that the principled underpinning of a great run of Irish public law jurisprudence is best understood and justified as setting the law in identifiably classically infused directions.

The classical tradition is emphatic that legal interpretation will be heavily distinct from all-things-considered-moral-reasoning and from deciding legal questions by reference to the "flow of general ("extra-legal") straightforward practical reasoning"²⁶ about what should be done. Professor John Finnis says a system of positive law should be understood, legally, "as internally complete" and "thus as sealed off (so to speak) from the unrestricted flow of practical reasoning about what is just and for the common good."²⁷ The main task of the judge, in the classical natural law tradition, is discerning the reasoned intention of the legitimate authority, by reflecting on the relationship between the legal scheme it adopted and the good it wished to achieve. However, scholars like Professor Finnis also note that "[t]his drive to insulate legal from moral reasoning can never. . . be complete."²⁸ In cases where provisions are ambiguous or under determinate, officials will invariably approach interpretation by reading legal materials like constitutional text, precedent, and historical practice in light of moral standards "prevalent in the judge's community but in the last analysis just those standards that

better to say we argue about and discern what the law requires in a given case by understanding how judges' practical reasoning engages with values, goods, and objectives immanent in the legal practice (in the deliberate acts, choices, and reasoned intentions of Constitution makers, legislators, judges, etc.) they are engaging with. As Professor Rodriguez-Blanco puts it, judges do "not engage in a theoretical exercise of imposing 'value,' 'meaning' or 'purpose' on the social practice because the practice itself has a structure that manifests values, meanings and purposes. Consequently, judges need to engage with the activity of deciding what is of value and why we should value it to produce decisions and actions." Veronica Rodriguez-Blanco, *Action in Law's Empire: Judging in the Deliberative Mode* 29 CAN. J.L. & JURIS. 431, 456 (2016).

26. JOHN FINNIS, *NATURAL LAW & NATURAL RIGHTS* 473 (2d ed. 2011).

27. *Id.* at 355.

28. John Finnis, *Natural Law and Legal Reasoning*, 38 CLEV. ST. L. REV. 1, 12 (1990).

the judge can accept as in truth morally sound,"²⁹ to reach a judgment that fits the community's existing law in a morally sound way. As I strive to document, Irish public law strongly reflects this classical picture of adjudication.

Irish courts have rejected the contention that there is one uniquely legitimate method for discerning constitutional meaning and discerning the reasoned choices of the People in promulgating the Constitution.³⁰ To invoke Professors Philip Bobbitt and Richard Fallon, Irish courts instead work with several modalities of interpretive method to discern the reasoned choices of the People in adopting the provisions of the Constitution.³¹ In some cases, where plain textual meaning is clear and unambiguous, such as provisions concerning numbers, places, and persons, Irish Courts will adhere to it.³² Irish Courts will also probe historical context as a helpful tool to discern the reasoned choice of the lawmaker, as expressed through the propositions they enacted into law.³³ Another consistent feature of constitutional interpretation in Ireland is that judges draw on what they take to be the Constitution's background principles of legal morality, to help determine the meaning of posited constitutional text where modalities like plain meaning textualism and historical understanding yield ambiguity, uncertainty, or several reasonable alternatives.³⁴

From the 1960s through the 1990s, judges understood the Constitution to be rooted in the natural law tradition, and its text a specification of its principles. Judicial invocation of natural law precepts

29. John Finnis, *Natural Law Theories*, STAN. ENCYC. PHIL. (June 3, 2020), <https://plato.stanford.edu/entries/natural-law-theories> [https://perma.cc/KG3R-SNBX].

30. The current Chief Justice summarized this attitude well when he wrote extrajudicially that "there is no single or correct approach to the interpretation of the Constitution". Donal O'Donnell, *The Sleep of Reason*, 40 DUBLIN U.L.J. 191, 213 (2017).

31. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 26 (1984); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1244, 1254 (1987).

32. GERARD HOGAN ET AL., *KELLY: THE IRISH CONSTITUTION* 10–14 (5th ed. 2018).

33. *Id.* at 29–44.

34. *Id.*

came in several different formulations over this time. Sometimes it came through reference to preambular principles of prudence, justice, charity, dignity, and respect for the common good and true social order; principles which serve as the objectives and orienting aim of the constitutional order. Other times it came through reference to the Christian and democratic nature of the Constitution and State it established. Finally, in many cases judges simply referred directly to the natural law as an appropriate interpretive aide.

A. *Classical Legal Revival in Ireland*

Perhaps to the disappointment of its drafters, it is fair to say enactment of the 1937 Constitution did not spark a classical legal revival overnight.³⁵ In some ways, the rather limp impact of the Constitution was unsurprising, given that its jurisprudential commitments were initially at odds with the prevailing outlook of the Irish bench and bar, which was ambivalent to the natural law tradition's relevance to legal practice, and steeped in the individualistic and liberal traditions of nineteenth-century English jurisprudence.³⁶ As such, from around 1937 until the early 1960s, many of the Constitution's more classically influenced provisions were simply rarely deployed by lawyers and not commented upon by judges.³⁷

This was to change with remarkable speed in the early 1960s, when a new generation of lawyers and judges well-versed in the natural law tradition, came to prominence. This group included Donal Barrington, Thomas Conolly, Declan Costello, Seamus Henchy, Cearbhall Ó Dálaigh, John Kenny, and Brian Walsh. All of these jurists (the vast majority of whom would proceed to become members of the superior courts) were educated at University

35. Edward McWhinney, *The Courts and the Constitution in Catholic Ireland*, 29 TUL. L. REV. 69, 86 (1954).

36. Thomas Mohr, *Natural Law in Early Twentieth Century Ireland: State (Ryan) v Lennon and its Aftermath*, 42 J. LEGAL HIST. 1, 24 (2021); V.T.H. Delaney, *The Constitution of Ireland: Its Origins and Development*, 12 U. TORONTO L.J. 1, 9–10 (1957).

37. See Gerard Hogan, *Irish Nationalism as a Legal Ideology*, 75 STUD.: IRISH Q. REV. 528, 531–32 (1986).

College Dublin³⁸ against an intellectual backdrop of a revival in natural law thinking in Ireland.³⁹ Many influential jurists of Ireland's classical legal revival were impacted by the instruction of the likes of Professors Daniel Binchy and Patrick McGilligan. The former was a famed scholar of jurisprudence and Roman law and fierce critic of legal positivism.⁴⁰ The latter was an Attorney General and firm proponent of natural law reasoning in constitutional adjudication, which he dubbed the 1937 Constitution's "sheet anchor".⁴¹

1. Natural law principles as interpretive aides

The opening salvo of judicial invocation of natural law precepts to aid legal interpretation came in the landmark case of *Ryan v. Attorney General*.⁴² *Ryan* concerned a challenge to the constitutionality of the Health (Fluoridation of Water) Act 1960, which obliged local government bodies to maintain a designated level of fluoride in public water supplies.⁴³ The statute was intended as a public measure to improve dental health amongst children and teenagers. The plaintiff's argument was that the statute breached Article 40.3 of the Constitution, by subjecting her and her son to a dangerous and unwanted health measure. As outlined above, this constitutional provision commits the State to the vindication and protection of the "personal rights" of citizens from unjust attack and provides that "in particular" the State will protect the life, person, property, and good name of citizens.

38. James Rooney, *Judicial Culture and Social Rights* at 98 (Feb. 2021) (Ph.D. thesis, Trinity College Dublin), <http://www.tara.tcd.ie/handle/2262/95213> [https://perma.cc/J9RK-3SYV].

39. See, e.g., Vincent Grogan, *The Constitution and the Natural Law*, 8 CHRISTUS REX 201, 201–18 (1954); Declan Costello, *The Natural Law and the Irish Constitution*, 45 STUD.: IRISH Q. REV. 403, 403–14 (1956); Seamus Henchy, *Precedent in the Irish Supreme Court*, 25 MOD. L. REV. 544, 549 (1962).

40. See Daniel A. Binchy et al., *The Law and the Universities*, 38 STUD.: IRISH Q. REV. 257, 262 (1949).

41. JOHN MAURICE KELLY, FUNDAMENTAL RIGHTS IN THE IRISH LAW AND CONSTITUTION 40 (1961).

42. [1965] IR 294.

43. *Id.* at 336.

In the High Court, Judge Kenny found that the combination of the phrase “in particular” and the fact two of the rights explicitly posited in Article 40.3—protection of one’s life and good name—did not otherwise appear elsewhere in the Constitution, made it reasonable to infer that the reference to “personal rights” was intended to encompass rights not explicitly enumerated.⁴⁴ This premise raised important additional questions: what did these personal rights encompass? How were they to be discerned? Did they include a right to be free from State action that could imperil one’s health?

Responding to these questions, Judge Kenny said that in discerning the content and scope of the under-determinate phrase “personal rights,” regard should be paid to the underlying ethos of the Constitution’s preamble and its other rights provisions. As Judge Kenny framed it, any rights reasonably implicit within the “personal rights” the State is charged with vindicating must derive from what he referred to as the “Christian and democratic” nature of the Constitution. Judge Kenny cited the right to marry or travel within the State as examples of such personal rights, any arbitrary restriction of which would be flatly contrary to the Constitution’s underlying ethos.⁴⁵ Judge Kenny considered a similarly bedrock right of the citizen to be an individual’s right to bodily integrity—the entitlement not to be exposed to bodily harm or mutilation by the State. Judge Kenny was bolstered in his view that this flowed from the Christian nature of the state—and by implication the natural law—by citing the recently issued papal encyclical *Pacem in Terris*.⁴⁶ This encyclical, which Professor Russell Hittinger describes as an emphatic account of the natural law’s non-negotiable requirements

44. *Id.* at 311–13.

45. *Id.* at 313.

46. *Id.* at 314 (citing Encyclical of Pope John XXIII: On Establishing Universal Peace in Truth, Justice, Charity, and Liberty (Apr. 11, 1963), https://www.vatican.va/content/john-xxiii/en/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem.html [<https://perma.cc/8VZ6-U2L8>]).

for legitimate domestic political order,⁴⁷ cites bodily integrity as a “universal” and “inalienable” right states must respect.⁴⁸ Based on the facts before him, Judge Kenny was satisfied that the evidence adduced by the State’s expert witnesses overwhelmingly demonstrated that the impugned measure posed no threat to human health or bodily integrity, but was in fact a benign public health measure for the common good.⁴⁹ Although the plaintiff’s legal challenge failed,⁵⁰ Judge Kenny’s dicta proved to be immensely influential; kickstarting a period of juristic reliance on natural law precepts as interpretive aides.

Natural law precepts also played a significant role in the landmark Supreme Court judgement of *Healy v. Donoghue*.⁵¹ Natural law theorists like Professor R.H. Helmholz have long recognized that an “operative principle of the European *ius commune*” was that “procedure must be consistent with the law of nature.”⁵² In *Healy*—a case about criminal procedure⁵³—the Court relied heavily on the natural law precept that no one should be subject to punishment without a fair hearing consistent with natural justice. The plaintiffs in *Healy* were two minors who had been tried and convicted before the District Court. Both had minimal formal education and were tried and convicted without the benefit of access to legal counsel. Legislation provided for a scheme of legal aid for defendants of limited means. While the plaintiffs were eligible to access this scheme, the 1962 Act did not explicitly require a defendant be made aware of their entitlement to legal aid by the presiding judge. In this case, the defendants were not informed by the judge of their entitlement

47. Russell Hittinger, *Introduction to Modern Catholicism*, in THE TEACHINGS OF MODERN ROMAN CATHOLICISM ON LAW, POLITICS, AND HUMAN NATURE 22 (John Witte, Jr. & Frank S. Alexander eds., 2007).

48. Pope John XXIII, *supra* note 46, at 2.

49. *Ryan*, [1965] IR 294, 312-313.

50. *Id.* at 353.

51. [1976] IR 325.

52. R.H. HELMHOLZ, NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE 46-49 (2015).

53. *See* [1976] IR 325, 345.

to access legal aid until a very late stage in proceedings and could not secure counsel.⁵⁴ The District Court, plainly of the view there was no constitutional impediment in advancing to trial, rejected further requests to postpone proceedings and eventually convicted and sentenced the defendants.

The plaintiffs mounted a constitutional challenge arguing that the Constitution's guarantee of a "trial in due course of law" for a criminal charge encompassed an entitlement to representation by professional counsel and, where necessary, an entitlement to be informed of this.⁵⁵ The State advanced a proto-originalist argument, to the effect that the reasonable citizen at the time of the Constitution's ratification would not have understood the requirement a criminal charge being brought in due course of law to encompass a constitutional entitlement to legal aid for indigent criminal defendants. A well-informed observer at the time of the Constitution's enactment, argued State counsel, would be aware that legal aid was only available for defendants in capital cases. While there was a common law right to *engage* and be represented by counsel, there was no entitlement to have one funded by the State if the defendant could not afford one.

Rejecting the State's submissions, the Supreme Court followed the path set by Justice Kenny in *Ryan* in holding the phrase "due course of law" fell to be considered in light of the Constitution's underlying principles, like the preamble's commitment to "dignity" and "justice."⁵⁶ For the Supreme Court, basic regard for such principles required that any criminal trial that put a person's life or liberty at risk had to be in accordance with natural justice and therefore *substantively* fair, not merely done in compliance with procedures historically viewed as fair.⁵⁷ This meant that the precise requirements of what constitutes a trial in due course of law might develop and unfold to accommodate new circumstances and

54. *Id.* at 352–53.

55. *See id.* at 347.

56. *Id.* at 349.

57. *Id.*

knowledge. The Court effectively affirmed that the core principle determined by the text—that of a fair trial prior to conviction—does not change. Rather, the concrete requirements needed to concretely vindicate it might. Concluding that the right to counsel had constitutional and not merely statutory pedigree, Justice Henchy noted the clear inequality of arms a young, poorly educated, and unrepresented defendant faced in the “alien complexity of courtroom procedures . . . confronted with the might of a prosecution backed by the State.”⁵⁸ In such circumstances, a defendant could be at serious risk of an unfair trial, regardless of whether this would have been apparent to the reasonable observer in 1937.

The Supreme Court went on to hold that criminal court judges had a constitutional duty to exercise their Article 34 judicial power in a manner harmonized with the Constitution’s underlying principles of legal morality like natural justice and fairness. This meant, at a minimum, judges had to conduct proceedings to ensure a defendant was made aware of, and facilitated in availing of their constitutional and statutory right to counsel.⁵⁹ A District Court judge that attempted to proceed to trial and sentencing of a defendant where they had not been informed of their right to these procedural safeguards, would stray beyond their jurisdiction. *Healy* proved to be an enormously influential decision, leading to widespread changes in Irish criminal procedure and defendants’ access to counsel.⁶⁰

In other significant cases, judges swapped indirect references to the natural law—whether under the rubric of the ‘Christian and democratic nature of the state’ or preambular principles—for its direct invocation. Arguably the most famous case in Irish constitutional history, *McGee v. Attorney General*⁶¹ showed Irish Courts at

58. *Id.* at 354.

59. *Id.* at 352.

60. Professor Gerry Whyte highlights how *Healy* led to an enormous five-fold increase in public expenditure on the provision of legal aid. See GERRY WHYTE, SOCIAL INCLUSION AND THE LEGAL SYSTEM: PUBLIC INTEREST LAW IN IRELAND 430 (2015).

61. [1974] IR 284.

their most emphatic in directly relying on natural law principles as interpretive aides to understand constitutional text. *McGee* concerned a challenge to constitutionality of legislation that, while not prohibiting their use, sale, or manufacture within the State, prevented the importation of contraceptives into the State. The challenge was brought by a young married woman who had four children in quick succession. She had suffered cerebral thrombosis in her second pregnancy and had been medically advised not to become pregnant again as her life might be placed in serious danger. Acting upon this medical advice and in agreement with her husband, the plaintiff attempted to import contraceptives into the State for personal use by the couple, but these were promptly seized by customs officials.

The Supreme Court, by a 4-1 majority, found the statutory prohibition unconstitutional.⁶² Justice Walsh began his judgment by noting that while the impugned legislative provisions did not forbid the sale or use of contraceptives, by prohibiting their import its effect was to make them entirely unavailable to married couples like the plaintiffs, unless they were willing to run the risk of criminal investigation and prosecution. Justice Walsh then proceeded to outline how provisions of the Constitution concerning the family, marriage, and property:

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. The individual has natural and human rights over which the State has no authority; and the family, as the natural primary and fundamental unit group of society, has rights as such which the State cannot control.⁶³

62. *Id.* at 320.

63. *Id.* at 310.

In other words, for Justice Walsh the posited text in Article 41, concerning the natural rights of the individual and Family, were *determinations*⁶⁴ making more specific the basic principles of natural law which serve as the “ultimate governor of all the laws of men.”⁶⁵ As such, Justice Walsh made it clear the precepts of the natural law were critically relevant to discerning the meaning and scope of the posited text of Article 41 and the appropriate relationship it anticipates between the individual, Family, and State.⁶⁶

Decisions concerning the sexual relations of spouses and the conception of children were, for Justice Walsh uniquely within the natural and thus constitutional authority of the Family, such that the State required very pressing justification to assert authority to intervene. Decisions that may be securely within the natural authority of spouses to decide—to refrain from sexual relations for instance—would in contrast be an intolerable intrusion by the State if it deigned to assert similar authority.⁶⁷ Justice Walsh similarly found that the decision of spouses in respect of whether to use contraceptive methods for family planning purposes, was peculiarly within the authority of the Family unit.⁶⁸ Respect for the authority of the marital Family ensured it had an entitlement to privacy over these kinds of decisions, an entitlement that operated to restrict the State’s capacity to intrude into this highly intimate domain through coercive tools like investigation, surveillance, interrogation, and criminal prosecution.

That many might regard the importation of contraceptives to use within marriage as immoral, and even contrary to natural law, did

64. The need for determination arises when principles of justice are general and thus do not specifically dictate particular legal rules or when those principles seem to conflict and must be mutually accommodated or balanced. Such general principles must be given further determinate content by positive civil lawmaking intelligently cabined, directed, and guided—but not dictated—by reason. See Casey & Vermeule, *supra* note 3, at 120.

65. *McGee*, [1974] IR 284, 317.

66. *Id.* at 317–20.

67. *Id.* at 311–12.

68. *Id.* at 312.

not necessarily mean that the common good *required* State investigation and possible prosecution of married couples for doing so. Unless criminalizing the private conduct of a marital couple was conducive to *public* order and upholding *public* morality, then it would involve unjust and excessive intrusion into the domain of the marital Family's decision-making to enforce. In sharp contrast, Justice Walsh issued a strong caveat, one that applied to all his remarks, when he noted that State regulation of internal familial decisions for the common good would be entirely justified for purposes like preventing damage to, or the destruction of, unborn human life. For the Court, these latter kinds of decisions implicated entirely different considerations in respect of the common good—concerning protection of the basic demands of justice and, as such, fell outside the legitimate authority of the family to make.⁶⁹

Natural law-anchored argumentation also featured in what is arguably Ireland's second most famous constitutional case—*Norris v. Attorney General*⁷⁰—which concerned a challenge to statutory provisions which criminalized male same-sex conduct (but not female same-sex conduct). At the time of challenge, this law was largely unenforced, but there was also no real legislative momentum for its imminent repeal.

In a 3-2 decision, the Supreme Court voted to uphold the statute. Writing for the majority, Chief Justice O'Higgins anchored the judgment on substantively originalist grounds, based on what the ratifying citizen would understand the effect of the Constitution to be in 1937. The Chief Justice took this understanding to mean it would be "incomprehensible" to suggest that a Constitution so infused with religious and natural law thinking could be invoked to invalidate the impugned statute. The Chief Justice found that:

The preamble to the Constitution proudly asserts the existence of God in the Most Holy Trinity and recites that the people of Ireland humbly acknowledge their obligation to 'our Divine Lord, Jesus

69. *Id.* at 312 – 13.

70. [1984] IR 36.

Christ.' It cannot be doubted that the people, so asserting and acknowledging their obligations to our Divine Lord Jesus Christ, were proclaiming a deep religious conviction and faith and an intention to adopt a Constitution consistent with that conviction and faith and with Christian beliefs. Yet it is suggested that, in the very act of so doing, the people rendered inoperative laws which had existed for hundreds of years prohibiting unnatural sexual conduct which Christian teaching held to be gravely sinful. It would require very clear and express provisions in the Constitution itself to convince me that such took place. When one considers that the conduct in question had been condemned consistently in the name of Christ for almost two thousand years and, at the time of the enactment of the Constitution, was prohibited as criminal by the laws in force in England, Wales, Scotland and Northern Ireland, the suggestion becomes more incomprehensible and difficult of acceptance.⁷¹

In a very highly influential dissent, Justice Henchy found that the provisions violated an essential component of the plaintiff's right of privacy—one of the "personal rights" protected by Article 40.3.⁷² Like the Courts in *Ryan* and *McGee*, Justice Henchy interpreted the scope of the personal rights protected in Article 40.3 by considering the Constitution's underlying moral principles from which the posited text sprang and made more concrete, which he found encompassed its "purposive Christian ethos," commitment to the "common good . . . Prudence, Justice and Charity" and "dignity and freedom of the individual."⁷³ With these precepts in mind, Justice Henchy said that the Constitution's personal rights must be interpreted to safeguard a "range of personal freedoms or immunities" necessary to ensure the plaintiff's "dignity and freedom as an individual" in a social order ordered to the common good and human flourishing.⁷⁴ For Justice Henchy, the "essence" of those range of personal freedoms and rights is that they "inhere in the individual

71. *Id.* at 64.

72. *Id.* at 71–72 (Henchy, J., dissenting).

73. *Id.* at 71.

74. *Id.*

personality of the citizen in his capacity as a vital human component of the social, political and moral order posited by the Constitution.⁷⁵ One of these freedoms was an entitlement to privacy from State interference or coercion in respect of a “secluded area of activity or non-activity which may be claimed as necessary for the expression of an individual personality.”⁷⁶ Justice Henchy accepted that this area of privacy may well sometimes be used for “purposes not always necessarily moral or commendable” but still merited “recognition in circumstances which do not engender considerations such as State security, public order or morality, or other essential components of the common good.”⁷⁷ While the moral order envisaged by the Constitution gives the Oireachtas (the Irish legislature) the duty and right to legislate for public order and morality, consistent with its Thomistic⁷⁸ underpinnings, the legislature does not have the competence to legislate to prohibit all vices or immoral conduct or compel all acts of virtue.⁷⁹ Sanctions of the criminal law may be attached to “immoral acts only when the common good requires their proscription as crimes.”⁸⁰

In other words, for Justice Henchy it was an important element of the common good that political authorities show respect for the individual’s capacity and possibility to freely develop one’s personality and make autonomous moral decisions about intimate aspects of one’s life, and this necessarily involved affording to people an area of privacy to make these decisions free from direction of the State, provided such decisions do not implicate or degrade public

75. *Id.*

76. *Id.* at 72.

77. *Id.*

78. Aquinas consistently held that there was good reason, linked to the common good, why human law should not seek to promote all virtue, nor suppress all vices prohibited by the natural law. Instead, the coercive force of posited laws exist to restrain the more grievous vices that threaten the maintenance of human society and neighborliness. See Thomas Aquinas, *Treatise on Laws*, in ed R.W. Dyson, *AQUINAS: POLITICAL WRITINGS* 140–41 (Cambridge Univ. Press, 2015).

79. *Norris*, [1984] IR at 78 (Henchy, J., dissenting).

80. *Id.*

order or morality. No doubt such a zone of autonomy could sometimes be used to make bad and immoral decisions in private, but to snuff out this zone of autonomy by deterring all vice by the rough engine of law and prosecution—even if it did not harm the public good or morality—would be an overbroad incursion by the State into a domain necessary for genuine human flourishing. The central issue in the case for Justice Henchy then turned on whether the plaintiff's claim to be entitled to engage in consensual homosexual acts in private must give way to the right and duty of the State to uphold considerations of public order and morality.⁸¹ Justice Henchy said that very many sexual acts could be prohibited by the Oireachtas for many reasons linked to public order and morality, including "the protection of the young, of the weak-willed . . . the maintenance inviolate of the family as the natural primary and fundamental unit of society; the upholding of the institution of marriage; the requirements of public health."⁸² But on the facts in *Norris*, Justice Henchy found the State failed to present evidence as to why investigating, criminalizing, and prosecuting *private* consensual homosexual conduct between adult males was required to uphold the above kind of considerations, particularly when similar acts were not criminalized for heterosexual or lesbian couples. As the State did not advance evidence why these measures were required to protect public order and morality, they went beyond the requirements of the common good and beyond the constitutional competence of the Oireachtas.⁸³

Following *McGee*, some of the most consequential judicial invocations of natural law principles have concerned cases involving the appropriate relationship between the family and State. *G v. An Bord Uchtala*,⁸⁴ for instance, concerned the proper statutory interpretation of adoption legislation. Irish law provided that the consent of a child's natural mother was required before it could be

81. *Id.* at 72.

82. *Id.* at 79.

83. *Id.* at 78.

84. [1980] IR 32 [hereinafter *An Bord Uchtala*].

placed for adoption, and that any such consent could be withdrawn prior to an adoption order becoming finalized.⁸⁵ Where consent to an adoption order was withdrawn, the applicant seeking the adoption order could apply to the High Court to dispense with the need for consent and to proceed with finalization of the adoption.⁸⁶ The statutory test the Court was to apply in deciding whether to dispense with consent was whether “it is in the best interests of the child so to do.”⁸⁷ *An Bord Uchtala* concerned a young unmarried mother of modest means who initially kept her pregnancy hidden from her family and, upon birth of the child, placed the child for adoption.⁸⁸ Shortly after the child was placed in the custody of prospective adoptive parents, the mother (now with the support of her family) changed her mind and withdrew consent to the adoption and began proceedings seeking return of the child to her custody.⁸⁹ The prospective adoptive parents, in turn, applied to retain custody, with a view to ultimately having the mother’s consent dispensed with and the adoption finalized.⁹⁰

In interpreting the statutory meaning of “best interests of the child,” both the High Court and Supreme Court noted that the phrase had to be understood within the broader context of the underlying principles of the Constitution.⁹¹ Chief Justice O’Higgins stated that while the plaintiff could not avail of Article 41, which refers to the rights of the marital family, the Court proceeded to draw on natural law principles to hold that the “personal rights” guaranteed to all individuals by Article 40.3 encompassed the right and duty to custody and care of one’s biological children.⁹² The Chief Justice added—again drawing on natural law principles—that the child also had a personal right through Article 40.3 to the

85. *Id.* at 42.

86. *Id.* at 43.

87. Pursuant to § 3 of the Adoption Act 1974. *See id.* at 43.

88. *Id.* at 52–53.

89. *Id.* at 53.

90. *Id.* at 32–34.

91. *Id.* at 44–46. Per Finlay P. in the High Court.

92. *Id.*

care and protection of its biological mother.⁹³ Justice Walsh, who delivered the opinion of the Court, referred to these as “natural rights”⁹⁴ that flowed from “the natural law.”⁹⁵ While this natural and constitutional parental right was not absolute, it was an important consideration in assessing where the best interests of the child lay. With this context in mind, the Court found that the phrase “best interests of the child” had to be understood in a manner respectful of the mother’s natural and constitutional rights to care and custody of her child—effectively imposing a statutory presumption.⁹⁶ In this case, application of the test led to the return of the child to the plaintiff, with the majority of the Court accepting it was permissible for the trial judge to presume that the child’s best interests would be met through the care provided by their natural mother.⁹⁷

Cases concerning the autonomy of the family to arrange its own domestic affairs free of State interference have seen Irish Courts strongly rely on natural law principles, deploying them to understand the family unit as a juridical entity and locus of authority responsibility to which the State should defer—when acting within its appropriate domain—save in limited circumstances. In *Northwestern Health Board v. HW*,⁹⁸ for example, the Court refused to grant an injunction sought by state medical officials that would compel the parents of an infant to permit a PKU test to be performed on their child.⁹⁹ This test involved blood being extracted from the heel of the infant by a needle.¹⁰⁰ This test is a screening test designed to identify certain metabolic conditions which, if undiagnosed, can lead to a range of negative physical and mental outcomes; it was

93. *Id.* at 67–68.

94. *Id.* at 67.

95. *Id.* at 68.

96. *Id.* at 33.

97. *Id.* at 93.

98. [2001] 3 IR 622.

99. *Id.* at 623.

100. *Id.* at 671.

standard practice in Irish hospitals at the time.¹⁰¹ The Court heard evidence that the likelihood of any of these conditions being present in an infant was small, but not negligible, and that the damage that could occur from them was serious.¹⁰² The parents' refusal was based on their dislike of the violation of bodily integrity the heel-prick test involved.¹⁰³ The relevant authorities sought an injunction to override the parents' decision to refuse consent to the test.¹⁰⁴

A majority of the Court rejected the application for an injunction.¹⁰⁵ Although the justices in the majority did not endorse the wisdom or prudence of the parents' choice, it noted that the terms of Articles 41 & 42—when understood against the backdrop of their natural law foundations—put a strong premium on the autonomy of the family unit against the State, especially as it pertained to how it organized its internal and domestic affairs, like what medical treatment a child will undergo.¹⁰⁶ Justice Murray accepted as uncontroversial the fact the State had a subsidiary role and duty to intervene to protect children in the interest of the common good. But this duty was reserved for “exceptional” circumstances where the parents had failed in their duty towards their children.¹⁰⁷ The Supreme Court was not convinced that this high threshold for intervention had been met.¹⁰⁸ Justice Murphy explicitly linked this high threshold for intervening in internal familial affairs to the fact that:

Thomistic philosophy—the influence of which on the Constitution has been so frequently recognised in the judgments and writings of Walsh, J.—confers an autonomy on parents which is clearly reflected in th[e] express terms of [Article 42 of] the

101. *Id.* at 670.

102. *Id.* at 670–71.

103. *Id.* at 674–75.

104. *Id.* at 672–73.

105. *Id.* at 623.

106. *Id.* at 739.

107. *Id.*

108. *Id.* at 623.

Constitution which relegate the State to a subordinate and subsidiary role.¹⁰⁹

A contemporary demonstration of the vibrancy of natural law reasoning in the domain of Familial-State relations can be found in *Gorry v. Minister for Justice*.¹¹⁰ *Gorry* concerned the interaction between the state's laws on deportation of migrants and the Constitution's protection of the family.¹¹¹ The plaintiffs were a married family, one of whom was an Irish citizen and the other a non-national who was served with a deportation order.¹¹² The core issue in contention was whether Article 41 — which refers to the “inalienable and imprescriptible” rights of the Family, and which command the State to protect its “constitution and authority”—included a right to cohabit together as a Family in the jurisdiction of their choosing, in this case Ireland.¹¹³ If this was the case, then the Minister for Justice would have to offer exceptional justification for deciding to deport the plaintiff.¹¹⁴

The Supreme Court began by stating that notwithstanding amendments permitting divorce and introducing provision for same-sex marriage, the text of Article 41 and the juridical status of the Family it posits still fell to be understood with reference to principles of the natural law tradition.¹¹⁵ Thus understood, the Family had to be conceived consistent with that tradition as a “moral institution, with which the institution of the State could not readily interfere, at least within the area of authority of the Family.”¹¹⁶ For Justice O'Donnell, areas within the authority of the Family were largely those concerned with “home/life” decisions, including:

109. *Id.* at 732.

110. *Gorry v. Minister for Justice* [2020] IESC 55 [2020].

111. *See id.* ¶¶ 1, 11 – 13, 16–17.

112. *Id.* ¶ 1.

113. *Id.* ¶¶ 13, 15.

114. *Id.* ¶ 26.

115. *Id.* ¶¶ 38–43.

116. *Id.* ¶ 43.

how property will be held within the family . . . how tasks will be allocated between spouses; whether both spouses will work or only one, and if so which, and whether fulltime or part-time; how children will grow up and, in that regard, can make decisions which society more generally may consider foolish about, for example, the length of a child's hair, the time at which they may go to bed, whether they should drink alcohol at home, whether and when they should learn to ride a bicycle, what time to come home at, and even whether a child should avail of standard health screening procedures... and the State is obliged to protect the Family's authority in that regard unless and until the separate rights of the children are jeopardised.¹¹⁷

Justice O'Donnell went on to point out that there was a conceptual point where decisions the family wish to undertake start to move outside the natural authority the Family enjoys as an institution and begin to engage issues that are more properly within the domain of the State, and where the State is not obliged to defer to the Family.¹¹⁸

Justice O'Donnell considered that entry and removal from the political community as a core competence of the State as an institution, and not a matter within the Family's authority.¹¹⁹ As such, it could not be said that a decision to reside and cohabit within the State was one squarely within the authority of the Family to make, such that the State would require very compelling reasons to countermand it. Rather, it was an area that the State had considerable autonomy and authority to organize as it was fit. Nonetheless, Justice O'Donnell went on to conclude that because a decision to deport a member of a Family would have a large impact on that Family and their marriage—perhaps preventing a couple from living together *tout court*—the Minister did still have an obligation to reasonably consider and give weight to the interests and well-being of that Family, alongside other relevant considerations like upholding the integrity

117. *Id.* ¶ 51.

118. *Id.* ¶ 53.

119. *Id.* ¶ 54.

of the immigration system or suppressing crime, when exercising their statutory discretion to remove a non-national.¹²⁰

B. *Contemporary Caselaw: Classical Approach Endures*

As I will discuss more in Part III, since the late 1990s, explicit judicial invocation of natural law terminology has declined. But while *explicit* reference to natural law has become more sparse in recent years, in constitutional adjudication judges still regularly have recourse to the Preamble and principles of substantive legal morality it is taken to reflect.¹²¹ In other words, while explicit reference to natural law might be more rare, Irish legal practice still retains a robustly classical flavor in understanding the relationship between *lex* and *ius*.

This is particularly evident in cases concerning the interpretation of Article 40.3 and the previously underexplored right to the protection of one's person. Judicial engagement with this right was kick-started by Justice Gerard Hogan, one of the foremost constitutional scholars of his generation, who was appointed to the High Court in 2010 and the Supreme Court in 2021.¹²² In *Kinsella v. Governor of Mountjoy Prison*¹²³ and *Connolly v. Governor of Wheatfield Prison*,¹²⁴ two cases concerning the constitutionality of prison conditions and use of solitary confinement, Justice Hogan expanded the scope of Article 40.3's right to protection of the person.¹²⁵ Common to both cases was the interpretive approach taken to the pithy

120. *Id.* ¶¶ 53–54.

121. I am not the first to identify this element of continuity. See Aileen Kavanagh, *The Irish Constitution at 75 Years: Natural Law, Christian Values and the Ideal of Justice*, 48 IRISH JURIST (N.S.) 71, 99–100 (2012).

122. Mary Carolan, *New Chief Justice Takes Over at an Exciting Time for Supreme Court*, IRISH TIMES (Oct. 18, 2021), <https://www.irishtimes.com/news/crime-and-law/new-chief-justice-takes-over-at-an-exciting-time-for-supreme-court-1.4703067> [<https://perma.cc/VF22-UZEV>].

123. [2011] IEHC 236 [2012] 1 IR 467 (H. Ct.).

124. [2013] IEHC 334 (H. Ct.).

125. See David Kenny, *Recent Developments in the Right of the Person in Article 40.3: Fleming v Ireland and the Spectre of Unenumerated Rights* 36 DUBLIN UNIVERSITY L.J. 322 (2013).

and under-determinate text of Article 40.3's guarantee to protect "the person" from "unjust attack".¹²⁶ Justice Hogan read the text consistent with the background principles of political morality prominently on display in the preamble, including dedication to the dignity and freedom of the individual.¹²⁷ Trying to harmonize the posited text of Article 40.3 and these preambular principles appear to have led Justice Hogan to understand the right to protection of the person as setting a constitutionally mandated floor of respect for human flourishing which the State could not breach.¹²⁸ For Justice Hogan, this constitutional baseline not only included protection of the person from physical harm or molestation, but an entitlement to have one's psychological integrity respected as well.¹²⁹ Justice Hogan found that respecting the person meant practices like solitary confinement for anything beyond a very short period and for pressing reasons would unconstitutionally breach this floor, as the practice placed prisoners at risk of both serious psychological anguish and psychiatric disturbance.¹³⁰ It certainly ruled *extensive* use of solitary confinement as beyond the constitutional pale as inconsistent with basic human flourishing.¹³¹

This invigoration of the right to protection for the person was eventually matched by the Supreme Court's own efforts. In a series of cases, the Supreme Court—like Justice Hogan—read the under-determinate text of Article 40.3 harmoniously with the Constitution's underlying moral principles, such as those found in the preamble. In *Fleming v. Ireland*, for instance, the Supreme Court invoked the preamble's reference to the dignity of the individual to disarm arguments that the right to life and person protected by Article 40.3, extended to determining the timing of one's life, including ending it via assisted suicide.¹³²

126. CONSTITUTION OF IRELAND 1937 art. 40.

127. *Connolly*, [2013] IEHC 334 ¶ 14.

128. *See id.*

129. *See id.* ¶ 20. *See also Kinsella*, [2011] IEHC 236 ¶ 9.

130. *See Conolly*, [2013] IEHC 334 ¶¶ 20, 22.

131. *See id.*

132. [2013] IESC 19 [2013] 2 IR 417 ¶¶ 111–113.

Chief Justice Denham noted that it might be possible to construct a “libertarian argument” that the State is prima facie not “entitled to interfere with the decisions made by a person in respect of his or her own life up to and including a decision to terminate it” by reading the text at a high level of generality and understanding dignity in an autonomy-centric fashion.¹³³ But Chief Justice Denham went on to emphatically reject this approach.¹³⁴ While Chief Justice Denham did not explicitly invoke natural law principles, she went on to implicitly acknowledge their relevance to the Constitution’s understanding of what dignity means, as she concluded its moral understanding of the concept ensured it was not possible to invoke it to support a libertarian approach to the right to life or person “without imposing upon it a philosophy and values not detectable from it.”¹³⁵ In other words, the Constitution’s understanding of the basis for human dignity was not an autonomy-centric account, but one anchored on the intrinsic value of the human person and life.¹³⁶ This meant the right to person and life could not, consistent with the value placed on the inviolability of human life, be construed in light of this principle to as permitting their intentional destruction.

Simpson v. Governor of Mountjoy Prison concerned a challenge by a prisoner to his detention conditions, particularly his lack of access to very basic hygiene and sanitary facilities, which were caused by overcrowding.¹³⁷ Building on cases like *Kinsella* and *Connolly*, in *Simpson*, the Supreme Court held that when one took Article 40.3’s explicit protection of the person and read it in light of the preamble’s emphasis on the importance of individual dignity, it meant “each individual has an intrinsic worth which is to be respected and protected” by the State and its officials.¹³⁸ The respect owed to a person’s intrinsic worth included the right to be treated with a

133. *Id.* ¶ 113.

134. *Id.*

135. *Id.*

136. *Id.*

137. [2019] IESC 81 [2020] 3 IR 113, ¶ 22.

138. *Id.* ¶ 89.

minimal level of decent treatment when in the care and custody of state authorities.¹³⁹ For the Supreme Court, respect for the person and basic human flourishing clearly ruled out subjection of the plaintiff to humiliations and degradations like being locked in a cell twenty-three hours a day, having inadequate access to hygiene facilities, and having to defecate or urinate without any privacy.¹⁴⁰ The plaintiff was awarded damages for this breach of rights.¹⁴¹

Finally, in *NHV v. Minister for Justice* the Supreme Court considered a challenge to an absolute statutory ban on asylum-seekers entering the labor market.¹⁴² Given the frequency of delays in the asylum process, the statutory ban ensured that in practice many asylum seekers remained unemployed for several years, being maintained by the State through a small weekly stipend and provision of bed & board accommodation.¹⁴³ The plaintiff challenged this as a breach of the right to seek employment protected by Article 40.3.¹⁴⁴ Although this case did not concern the rights claims which attached to protection for the person, it thematically echoed the above cases. The Supreme Court accepted that some rights in the Constitution are reserved exclusively to citizens, particularly those concerning political rights like voting or standing for election.¹⁴⁵ The key question in *NHV* was whether the right to seek employment was similarly reserved to citizens.¹⁴⁶ In finding that the plaintiff, a non-citizen, could also invoke the right to seek work, Justice O'Donnell held that the Constitution fixed the 'essential equality of the human person' as the baseline for political life.¹⁴⁷ This essential equality ensured all persons in the State—not just citizens—were

139. *Id.*

140. *See id.* at ¶ 42.

141. *Id.* ¶ 131.

142. [2017] IESC 82 ¶ 1.

143. *Id.* ¶ 3.

144. *Id.* ¶ 12. This right was first considered by the Irish High Court in the case of *Murtagh Properties v. Cleary*, [1972] IR 330 (H. Ct.).

145. *NHV*, [2017] IESC 82 ¶ 11.

146. *Id.*

147. *Id.* ¶ 15.

entitled to a minimum set of rights and entitlements closely linked to their dignity, intrinsic worth, and basic flourishing.¹⁴⁸ The Supreme Court held that the ability to seek employment was closely connected to these values, providing as it does a critical sense of purpose, self-reliance, and self-worth.¹⁴⁹ In contrast, the Supreme Court noted that the denial of access to employment for long periods of time could cause aimlessness, demoralization and, ultimately, psychological difficulties and, in some instances, psychiatric disturbance destructive to human flourishing. Because of its close connection to basic human flourishing, the ability to seek employment was a constitutional right applicable to all persons, one that could be regulated but not be withheld in *absolute* terms from asylum seekers.¹⁵⁰

The Article 40.3 line of jurisprudence I have outlined has at its heart a unifying constitutional and moral vision: that the text and structure of the Irish Constitution, when read against its background principles of political morality, envisage and demand a specific kind of political order and moral relationship between the State and individual. It specifies that securing the true social order and common good mentioned in the preamble hinges, in large part, on the State protecting each person's intrinsic dignity and worth from the kind of legal and socio-economic degradations and humiliations, injuries and omissions, that seriously impede human flourishing in both its physical and psychological dimensions.

III. DECLINE OF NATURAL LAW REASONING AND THE FUTURE OF IRISH PUBLIC LAW

In his lauded 1992 work *A Short History of Western Legal Theory*,¹⁵¹ the leading Irish scholar of constitutional law and jurisprudence Professor John Maurice Kelly could justly observe with confidence

148. *Id.*

149. *Id.* ¶¶ 16, 20.

150. *Id.* ¶ 21.

151. JOHN MAURICE KELLY, *A SHORT HISTORY OF WESTERN LEGAL THEORY* 42 (1992).

that Ireland was the only place in the Western world where natural law thinking was thriving in legal practice.¹⁵² Thirty years on, however, the picture looks quite different, with Irish law seeing a weakening of the grip of the natural law tradition on mainstream legal thinking in law faculties, the bar, and the bench.¹⁵³

Assenting to this description is not to deny that natural law reasoning retains a sizeable level of vibrancy, especially in jurisprudence concerning parental autonomy and the rights of the Family vis-à-vis the State. Moreover, there is no denying that considerations of background principles of legal justice and political morality still regularly factor into constitutional interpretation, which is partly why I maintain that a classical flavor remains in Irish adjudication even as use of explicitly natural law terminology has dwindled. Doctrines giving the State ample authority to pursue the common good and which regard legitimate exercises of public power as purposive and reasoned also clearly bear classical hallmarks. However, *it is to say* that below the surface of Irish public law doctrine lies an increasingly deep uncertainty about its ultimate normative foundations.

By the late 1990s, many Irish jurists had undoubtedly come to accept the argument that the natural law tradition was *inextricably* linked with a very strong form of judicial supremacy. This made many people deeply uncomfortable because they felt it prompted judges to overstep the kind of appropriate institutional role of morality suitable in a constitutional democracy.¹⁵⁴

It is beyond the scope of this essay, and indeed my competence as a public lawyer, to offer fulsome or causal explanations of how, in addition to internal legal reasons related to fears of judicial overreach, external socio-economic factors may have impacted judicial reliance on natural law reasoning. But I think it should be uncontroversial to suggest, in broad terms, that it cannot be a coincidence that judicial skepticism about use of natural law principles began

152. *Id.* at 424–25.

153. HOGAN ET AL., *supra* note 32, at 44–45.

154. Lewis, *supra* note 24, at 142.

to spike roughly around the same time as the ascent of economic and social liberalism in Irish politics and culture became increasingly rapid. It is likely that several interlocking factors played a role in the rapid erosion of the central role played by the natural law tradition in legal and political life, including rapid secularization, the near-total collapse of the Catholic Church's moral authority because of several appalling scandals, Ireland's deep reliance on global—especially American—corporate investment and goodwill, and the State's increasingly deep integration into the European Union's liberal legal order. All of these developments no doubt also fed into judicial discomfort about having recourse to principles of legal justice they, and other elites, understood had strong historical and intellectual links to Catholic juristic and social thought. As of 2023, then, the precise future of the natural law tradition in Irish jurisprudence remains uncertain.

IV. INSIGHT FOR CONTEMPORARY DEBATE

How might this case study add to our current debates about the revival of classical approaches to public law? My position, perhaps unsurprisingly, is that Ireland's experience should offer considerable encouragement to proponents of common good constitutionalism, by offering cogent examples of how precepts of the classical tradition might be adapted and translated across several domains of public law.

I think the Irish example is a robust and normatively justifiable example of how actors in a political regime and legal system might translate and specify the basic principles of the classical tradition, and that it contains useful lessons, rules of thumb, and conceptual heuristics for jurists interested in how to do so in respect of their own regime. But I do not here claim the Irish experience is, for instance, a uniquely compelling example of how to institutionally concretize the operative principles of the classical tradition, such that other regimes should uncritically seek to ape it. Common good constitutionalism is ultimately an intellectual and theoretical

framework of justification for understanding the point and purpose of public law, whose basic precepts require a great deal of discretionary and prudential specification in light of concrete social, political, and economic circumstances and are compatible with a wide range of regime types.

I also hope this case-study will help take the air out of some overheated critiques of the classical tradition, which misfire from the outset by misidentifying it as a form of authoritarian legalism. The Irish example highlights the banal reality that it is perfectly possible to have a legal system dedicated to central elements of common good constitutionalism within an institutional framework with considerable democratic elements, a strong State, prudent checks and balances and division of institutional functions, respect for subsidiarity and autonomy of the Family, and respect for the dignity of individuals and their flourishing.

The Irish example also shows that embrace of common good constitutionalism cannot be equated with a collapse into judicial supremacy, where judges can willy-nilly invoke natural law principles directly to overturn legislative determinations. Recognizing this fact is certainly not to uncritically endorse how Irish judges have worked within the broad framework of the classical tradition, but it is to say that judges have largely invoked principles of *ius* and legal justice *not* to displace positive law, but precisely to understand its meaning—the reasoned choice of the lawmaker—where it is otherwise ambiguous, uncertain, or admits of several alternative readings.

Now for the cautionary element of my case study for proponents of common good constitutionalism: Ireland's experience should render sharper the potential scale of the challenge for those of us aiming for a revival of the classical tradition in legal systems where there is marked skepticism about the natural law. Current judicial skepticism of natural law jurisprudence in Ireland has doubtless walked hand in hand with the more widespread embrace of liberalism as the State's ideological lodestar by political and social elites like academics, lawyers, politicians, and civil servants. There is thus

no avoiding the reality that promoting, reviving, and maintaining a classical legal approach to public law in countries like Ireland and the United States will inevitably be a long-term multi-front engagement. Any sustainable classical revival will require careful study and rigorous articulation of the classical tradition in the scholarly arena—recovering its core concepts and working through their application to contemporary legal questions; its promotion in political and bureaucratic forums as a legitimate and compelling theory for approaching questions of public law; and its diffusion in law schools so that it becomes the default orienting vision and worldview of future jurists. This is to name just a few possible lines of necessary engagement.

While a profound challenge for classical lawyers in constitutional systems where the natural law tradition is in retreat, or endures as a minority insurgent faction, this should not necessarily be cause for despondency. History has frequently shown us—including the Irish legal system's own remarkable and rapid transformation in the mid-twentieth Century—that natural law theory and the classical legal tradition have an enduring capacity to bury their undertakers time and again and reemerge with renewed vigor.¹⁵⁵

155. HEINRICH ROMMEN, *THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY* 236–37 (1998).