The Virtues of Unprincipled Constitutional Compromises: Church and State in the Irish Constitution

David Kenny*

Constitution making – Disagreement – Principled constitutionalism versus unprincipled bargaining – Pragmatism – Church and state – Separation of religion and law – Maintaining religious peace – Drafting of the Irish Constitution of 1937 – Placating Irish Catholicism – Accommodation of protestant religious minority – Balancing religious freedom and religiosity – Balancing fundamental rights and religious influence – Flexibility and adaptability – Pragmatic assessment of constitutions and constitution making

Introduction

Constitutions present the opportunity to set out, in a clear and lasting way, social compromises that attempt to mediate between conflicting social groups and political goals. If constitutional settlements do not make such compromises – or protect compromises that may informally already exist – then they may undo the consensus that underwrites their making, and frustrate their fundamental aim of establishing ordered government.[1] It is challenging to create workable measures that mitigate disagreement while maintaining the level of principled consistency that constitutionalism is said to require. Accommodating such social disagreements can make constitutions appear incoherent or unprincipled, because they often require recognition or protection of ambiguous, conflicting, or seemingly-contradictory principles and values, or the omission of seemingly-essential matters.

*PhD, Assistant Professor of Law, Trinity College Dublin. I would like to thank Andrea Pin for very helpful comments on an earlier draft, and an anonymous reviewer for insightful suggestions.

[1] *See* generally, on constitutionalism and its aims, N. Barber, *The Principles of Constitutionalism* (Oxford University Press 2018).

European Constitutional Law Review, 16: 417–439, 2020

doi:10.1017/S1574019620000218

The idea of constitutions as principled is so baked into the contemporary account of constitutionalism that it probably *is* the contemporary account of constitutionalism. But it is my case that, when making constitutions, we should be unprincipled: that the compromises made in constitutions should be made purely pragmatically, not guided by any set of general or generalisable theories or principles, but by local, contingent, functional considerations. Constitutional compromises are shaped to achieve a result, and any means that do not undermine the core goals of the constitutional project can be adopted to temper potentially problematic disagreement, even if they do not all cohere, or introduce contradictions into the constitution. We hope that these conflicts can be deferred, avoided, or minimised in time. This has an important consequence for how we assess constitutional compromises: their merit lies in their practical ability to temper and defuse disagreement, rather than in any abstract or principled assessment of their quality or conceptual coherence. The best approaches in practice may be inconsistent and unprincipled.

This is a large thesis, and I advance it here with theory and a case study. In the first section I advance this proposition about constitutions and disagreement in general, and with particular regard to the case of church-state separation. Accommodating deep disagreement may require recognising divergent values, and obfuscating (and thus deferring decision about) how they will interact. Church-state arrangements are one good example of this, where flexibility and adaptability can be crucial to compromise. In the second section, I present the case study of religion in the Irish Constitution of 1937. While it is said to be a highly Catholic document, reading the Constitution presents contradictions and seeming incoherence: it is, in its language and articulated values, very religious, but it is pluralistic in its protection of religious rights; it declined to establish any state religion, yet implicitly and explicitly proclaimed the religiosity of the state; it protected personal rights without any clarification as to how these would interact with the religious-inspired governance that would likely prevail under the Constitution.

It is my case that the Irish Constitution was in fact a good pragmatic compromise to mediate between two deeply divided religious groups: an overwhelmingly Catholic and very pious population would not ratify any constitution that gave insufficient respect to religion and would obstruct the pursuit of Catholic values; and a population of protestants, north and south of the Irish-UK border, would threaten religious peace and cooperation in the new state and frustrate unification of the island if they felt the Constitution did not protect them to some degree from Catholic majoritarianism. The Constitution's unprincipled compromise aimed to placate each group to create a workable social order. It should be judged not by reference to an abstract standard of optimal interaction between church and state, but by its success or failure in mediating this conflict and advancing

the goals of the constitutional project. The paper concludes with a call to embrace unprincipled compromises in constitutions to mediate disagreement, and write, judge, and reform constitutions on this basis.

A limitation of this paper is that, by virtue of space, it relies on a single case study to illustrate its argument. Other examples would strenthen it further. But the example tries to illustrate and persuade the reader of the theoretical argument, to show that unprincipled compromises can be workable and worthwhile. If this is shown in even one example, then this evidences the theory and bolsters its persuasiveness.

The case for inconsistency and unprincipled compromise

Constitutionalism and principles

Disagreement is one of the core problems that besets any social project, because, as Waldron pithily summarises the problem, '[t]here are many of us, and we disagree about justice',[2] or as Stanley Fish more starkly puts it, 'conflict is the name of our condition'.[3] Constitutions are central in the effort to mitigate and overcome difference, as they are – and also create in legislatures and political institutions – the spaces or theatres 'in which we negotiate the differences that would, if they were given full sway, prevent us from living together in what we are pleased to call civilisation'.[4]

But constitutions are, in their presentation in contemporary political discourse, consistent, coherent, and principled documents. It is now 'axiomatic'[5] that that 'the Constitution is in some sense a repository of principles'. Rawls says there must be agreement on coherent principles of justice before constitutional design can begin: 'If there is no such standard, the problem of constitutional design is not well posed'.[6] Speaking of the US Constitution, Perry says that the 'fundamental reason any part of the Constitution ... was ratified is that the ratifiers wanted to establish ... a particular principle or principles'.[7]

[2]J. Waldron, *Law and Disagreement* (Oxford University Press 1999) p. 1.

[3]S. Fish, 'Mission Impossible: Settling the Just Bounds Between Church and State', 97(8) *Columbia Law Review* (1997) p. 2255 at p. 2332.

[4]S. Fish, 'The Law Wishes to Have a Formal Existence', in S. Fish, *There's No Such Thing as Free Speech* (Oxford University Press 1994) p. 141 at p. 179.

[5]S.D. Smith, 'Idolatry in Constitutional Interpretation', in P. Campos et al. (eds.) *Against the Law* (Duke University Press 1996) p. 157 at p. 180.

[6]J. Rawls, *A Theory of Justice* (Harvard 1971) p. 198.

[7]M. Perry, 'The Legitimacy of Particular Conceptions of Constitutional Interpretation', 77 *Virginia Law Review* (1991) p. 669 at p. 690.

Ackerman describes 'a rich lode of principles' that animate the US Constitution.[8] This underwrites most theories of constitutional interpretation: the document should be interpreted by reference to a body of principles.[9] Contemporary constitutional thought, then, is bound up with an assumption of principled consistency, and has an attendant fear of contradiction, which might reveal the Constitution to be unprincipled. Such a revelation, on this view, would be deeply problematic for the legitimacy and even the functioning of constitutionalism.

Any compromises and measures to offset disagreement must, then, be consistent with the other principles in the constitution. As Rawls recommends, we would have to solve at least the most fundamental disagreements in advance so that they do not compromise the integrity of the constitutional project.[10] This has a certain appeal, and makes intuitive sense, but I wish to argue for a different understanding. In constitution-making (and everything else) we must 'proceed in the face of conflict and disagreement on the most fundamental matters',[11] even if this means compromising principled consistency.

There are two ways of making this argument: a softer way, and a harder way. The softer way is to say that even if we accept that principles are static and firm, disagreement presents a situation where we cannot agree on matters of principle in advance of concluding a constitutional document because of insufficient time to reason out our differences, or epistemological challenges in working out the content of principles. Rawls' suggestion is to defer the project until we solve this log jam, but the more pragmatically-minded reader might concede that, in real world conditions, this may not be practical. There are limits to public reason, and either an agreement cannot be reached in practice, or we do not have the time to work out our differences in the manner Rawls suggests. If we take Holmes' famous warning seriously – 'between two groups of people who want to make inconsistent kinds of worlds, I see no remedy but force'[12] – we might choose, rather than resorting to force or domination, to attempt some functional compromise in the hope that either these differences fade – or can be cabined, managed, or mitigated – over time. In long run, an ultimate resolution – a principled compromise – should take shape. I take this to be Sunstein's case when he argues for 'incompletely theorized agreements' in constitutions: where we can agree on practice even if not on broader theories (and thus cannot agree on all the specifics

[8]B. Ackerman, 'Constitutional Politics/Constitutional Law', 99 *Yale Law Journal* (1989) p. 453 at p. 525.

[9]Even textualism implicitly relies on a principled understanding of constitutions. *See* S. Fish, 'There is No Textualist Position', 42(2) *San Diego Law Review* (2005) p. 629.

[10]Rawls, *supra* n. 6, p. 197-200.

[11]C. Sunstein, *Designing Democracy* (Oxford University Press 2001) p. 49.

[12]M. DeWolfe Howe (ed.), *The Holmes-Pollock Letters*, 2nd edn. (Harvard University Press 1961) p. 36. Holmes also noted that 'force, mitigated so far as may be by good manners, is the *ultima ratio*'.

or future developments of these practices, as we do not have a unified vision of why they exist).[13] These, Sunstein says, are a 'pervasive phenomenon' and have 'special virtues', as they can operate as foundations for constitutional decisions and act as a check on intractability.[14] But Sunstein does believe that such a theoretical, coherent approach is preferable, if sometimes unavailable.

The harder version of this case – to which I would subscribe – is to say that principles are no more than the rhetorical tools of constitutional argument and persuasion, and consistency is no more than a temporary interpretive achievement.[15] To have as an end adherence to principle is to confuse your means with your end and elevate a tool of argument into a goal in itself.

The directions and principles we derive from constitutions are not consistent, stable, nor a function of the linguistic or abstract qualities of the constitution. Rather, these are achievements of interpretation. Since, in times of dispute, '[n]obody can agree on what the Constitution means',[16] the store of principles in a constitution are not final and self-evident, but created by an interpretive community of readers when they come to interpret the constitution with a sense of purpose, with a sense of what the constitution set out to do.[17] Constitutions are ultimately purposive and practical documents, and exist to achieve some social end: to set up a functioning state, to avoid social unrest, etc. In order to fulfil this sense of purpose (which can change between readers and communities, and change over time, with experience) in a particular context, different principles will become apparent, or the meaning of principles will change; some principles or understandings will come to the fore as others fade away to fit with the community's evolving understanding and changing circumstances, to make the constitution serve the grand purpose being pursued by its interpreters. We come to the constitution with a goal in mind, and find there the principles we need to serve that goal in context.

This is a narrative or rhetorical understanding of constitutions and principles: principles do not have fixed meaning, but are a rhetorical tool we use in telling a story about the Constitution's true meaning in order to persuade others to act or

[13]Sunstein, *supra* n. 11, p. 50. My argument goes further, suggesting something like what he calls 'full particularity', where functionality is all that matters, regardless of the theory or principle underlying it.

[14]Sunstein, *supra* n. 11, p. 52.

[15]This could be because principles are purely rhetorical, or because the content of principles is epistemologically unknowable to the point where they create fundamental contest as to their character not resolvable by reference to the principles themselves.

[16]P. Campos, 'Against Constitutional Theory', in Campos et al., *supra* n. 5, p. 116.

[17]*See* D. Kenny, 'Merit, Diversity, and Interpretive Communities: the (Non-Party) Politics of Judicial Appointments and Constitutional Adjudication', inL. Cahillane et al. (eds.) *Judges, Politics and the Irish Constitution* (Manchester University Press 2017) p. 136.

refrain from acting in a certain way.[18] If we do this successfully, we can co-opt the authority of the constitution to our end, and this is often a powerful tool in political discourse. This helps us achieve one of the goals of constitutions: 'to make it possible to obtain agreement where agreement is necessary and to make it unnecessary to obtain agreement where agreement is impossible'.[19] The circumstances that advance this goal – that make agreement possible or defer the need for agreement – are not static, and we must adapt to successfully pursue it. Principles are, in Larry Alexander's words, 'an empty vessel for substantive norms'.[20]

The power of constitutions, on this account, comes in part from the fact that they are *perceived* as static and consistent, but in fact are not. Consistency, as Fish argues, is not a feature of text but rather a temporary and 'always precarious . . . achievement' resulting from the fact that some interpretation of the constitution's principles has prevailed for the time being. But it is always possible to retell the story of the constitution and its principles in a new way, and maintaining a vision of consistency 'depends on not resolving the conflicts' and inconsistencies that might later arise and be contested.[21] This helps to explain inconsistency and perceived hypocrisy in constitutional argument, particularly in times of significant change or contestation. Brexit provides many examples: say, when Brexit supporters who have long proclaimed the importance of parliamentary sovereignty in the UK suddenly adopt a theory of the supremacy of popular sovereignty as instantiated in an advisory referendum.[22] As our requirements change, our principles change with them. In hindsight, we can weave narratives that will rationalise or explain our inconsistency, creating new (rhetorical) principles to justify our pragmatic compromises to others, or even to ourselves.

Inconsistency in constitutions can arise intentionally or inadvertently. Values may be protected in the constitution that, unbeknownst to those deciding to include them, conflict with each other in a zero-sum way under a certain set of facts. This can occur even under a situation of agreement of interpretive

[18]*See* P. Brooks, 'The Rhetoric of Constitutional Narratives', 2 *Yale Journal of Law and the Humanities* (1990) p. 129 at p. 130: 'the true mechanism of narrative . . . really starts from the desired or presumed end, and works backwards, deriving beginnings, origins, and the events of the middle, from the end'.

[19]Sunstein, *supra* n. 11, p. 53.

[20]L. Alexander, 'Liberalism, Religion, and the Unity of Epistemology', 30 *San Diego Law Review* (1993) p. 763 at p. 776.

[21]Fish, *supra* n. 4, p. 161. Fish argues that attempts to demystify the law may be 'unworkable', and mystification may a core part of the law's function.

[22]Another example that Brexit provided was the emergence of somewhat fringe theories that the monarch has functional veto power over Bills by denying royal assents from quarters where this would have been unlikely to emerge in other times. For a summary of this controversy, *see* J. King, 'Can Royal Assent to a Bill Be Withheld If So Advised by Ministers?', *UKCLA Blog*, 5 April 2019, ⟨https://wp.me/p1cVqo-1FY⟩, visited 7 October 2020.

premises, due to a lack of foresight of the situation which brings this to light. This might be resolved either by reinterpretation (a change of interpretive premise) or a more contextual balancing of principles that happens when push comes to shove. Alternatively, there may be a difference in interpretive premise, or a change in interpretive premise over time, that creates a clash that was not in existence at the time of the constitution's drafting. Finally, the constitution may be silent on a particular matter. Silence could be deliberate, or an oversight. A matter might have been omitted from the constitution in order to defer a decision,[23] as making any constitutional statement on the point might be more divisive than none, or it might be a form of oversight or failure to anticipate a particular circumstance.[24] Even with the most carefully-written text, circumstances can arise that show the constitution is silent or ambiguous or contains conflicting principles. Inconsistency, on this account, is not something that we can necessarily avoid.

This is problematic if principles are abstract entities that must maintain fixed identity and meaning across contexts. But if understood in a rhetorical way, the potential inconsistencies in the constitution become a tool we can use. The 'spaces opened by the juxtaposition of apparently irreconcilable impulses'[25] in reading the constitution 'provides occasions for misreadings and reauthoring' – that is, departures from previously established principles or readings – in order to become 'whatever we need [it] to be'.[26] On Fish's and Campos' accounts, it is this property of legal texts that enable them to fulfil their functional roles; they would otherwise be too rigid to meet the contextual and changing needs of our ends.[27]

Recent scholarship on constitutional silence lauds the potential benefits of omission in allowing flexibility and adaptation.[28] Taking this argument one step further, we should embrace the idea of unprincipled compromise in constitutions, by silence and omission or by inclusion of textual inconsistencies, as a way to accommodate and offset disagreement. (In practice, all contradictions create a silence as to how the contradiction will be resolved, and in that sense, are silences

[23]*See* R. Dixon and T. Ginsburg, 'Deciding Not to Decide: Deferral in Constitutional Design', 9 *International Journal of Constitutional Law* (2011) p. 636; M. Loughlin, 'The Silences of Constitutions', 16(3) *International Journal of Constitutional Law* (2018) p. 922.

[24]Silence is only noticed – perhaps it only comes into being – where something thought certain or not thought of at all is later opened to question and rendered uncertain: 'the text ends where one's full confidence in the surrounding suppositions begins': R. Albert and D. Kenny, 'The Challenges of Constitutional Silence: Doctrine, Theory, and Applications', 16(3) *International Journal of Constitutional Law* (2018) p. 880 at p. 885.

[25]Fish, *supra* n. 4, p. 161.

[26]Campos, *supra* n. 16, p. 135.

[27]Fish, *supra* n. 4, p. 171.

[28]*See* Albert and Kenny, *supra* n. 24; Loughlin, *supra* n. 23; M. Fadel, 'The Sounds of Silence: The Supreme Constitutional Court of Egypt, Constitutional Crisis, and Constitutional Silence', 16(3) *International Journal of Constitutional Law* (2018) p. 936.

in themselves.) In trying to create a functional compromise, it may be necessary to hedge between positions that cannot be reconciled in a coherent way, to recognise two propositions that are in tension. Doing this might defer the clash, allowing the constitutional project to start, while over a longer timeline we can try to resolve it. We can leave the constitution in a kind of quantum state – with the potential to be one thing or another, but as yet neither, awaiting resolution later in time. Achieving a potentially workable compromise affords us these opportunities and possibilities that continued conflict and intractable disagreement does not, and is worth doing, even if it requires us to be incoherent or inconsistent at the level of principle.

A few clarifications need to be made about this argument. First, this is not an active suggestion – let's be unprincipled and see what happens – but a more passive one: when we are deciding what steps to take to try to mitigate disagreement in constitutions, arguments of principled inconsistency should have no force per se. Second, this is a case for philosophical pragmatism to guide us in these decisions[29]: that we make these compromises because we believe they present the best practical possibility for mitigating and controlling disagreement in the long run while achieving the other goals of the constitutional project. Third, and relatedly, there are of course compromises that we should not pursue. One should only make an unprincipled compromise (or any compromise) when one believes it is the best option available to achieve one's objectives. If an unprincipled compromise will pragmatically undermine the objectives of constitutional project – say, if the constitution seeming inconsistent will cause a critical loss of support – then it should not be pursued. For example, if the constitution is criticised for being unprincipled, it might be difficult to persuade people to adopt it, given the centrality of principles to liberal constitutionalism. These are local, contingent, functional considerations about the goals we seek to achieve and the best means of achieving them. Fourth, this approach might create uncertainty in the constitution, as it will leave the constitution's final meaning unclear until inconsistencies and ambiguities are resolved. This is true, as far as it goes. But certainty is vulnerable to the same critiques as inconsistency – its importance is pragmatic, not intrinsic – and certainty is probably not achievable in the case of intractable disagreement: you will either be uncertain as to the unprincipled constitution's true meaning/consequences, or uncertain as to whether the principled constitutional project will be sustainable in the face of disagreement.

[29] *See* generally W. James, *Pragmatism* (Dover 1995) (first published 1907); R. Rorty, *The Consequences of Pragmatism* (University of Minnesota Press 1982); D. Kenny, 'The Human Pared Away: Hilary Mantel's Thomas Cromwell as an Archetype of Legal Pragmatism', *Law and Literature* (2021) (forthcoming).

Fifth, many will feel that the legal system has to present itself as coherent even if it is not, that there is value in the appearance of coherence in maintaining authority and legitimating function. The case made here in no way stands against this position. Fish, while arguing against a principled understanding of law, argues that general attempts to demystify the law may be 'unworkable', and the presentation of coherence may necessary for the law to function.[30] The case made here is that we should not insist on *actual* coherence in practice. The perception of coherence, and the effects this will have in practice and on the legitimacy of the Constitution, remain relevant pragmatic considerations.

Finally, the fact that this approach is conceptually simple – advance your goals, without concern for principle – does not mean that this is easy to execute. It is, in fact, extremely difficult, because there is often no way of knowing how particular courses of action will fare; how disagreements will play out; whether your attempts to mitigate disagreement will make them worse rather than better. All these risks are real, but none of them are mitigated by adherence to principle, which merely clouds these risks, obfuscates our true goals, and takes away tools that we could use to solve the problem.[31]

Church/state compromises and the need for unprincipled bargains

Almost any area of the constitution could be the site of disagreement, but few issues can divide people as fundamentally and entirely as religion. Religions are often 'comprehensive doctrines'[32], involving broad and thick conceptions of the good, fundamental and exclusive claims about truth. In speaking to the meaning and purpose of life for adherents, it often creates groups of people that want to make inconsistent kinds of worlds. The role that the state plays in respect of the religion, along two related axes – freedom of religion practice, and the entanglement of religion and the state – are likely to be highly contentious in anything but a religiously-homogenous society, or a society where the predominant religions do not seek any role in public life or encourage public profession of faith.[33]

[30]Fish, *supra* n. 4, p. 179.

[31]*See* Kenny, *supra* n. 29, for more detailed argument on these points. Moreover, if certainty is unavailable to us, that cannot be a reason for paralysis; we need a willingness to act without warrant – that is, a willingness to act as best we can, knowing that we may be wrong. I borrow this phrase from P. Schlag, 'The De-differentiation Problem', 41 *Continental Philosophy Review* (2009) p. 35, who borrowed it from Duncan Kennedy.

[32]*See* generally J. Rawls, *Political Liberalism* (Columbia University Press 1993).

[33]This views religion as something that is all in the head, which work for some faiths, but for others 'treats religion as a hobby'. *See* S.L. Carter, 'Evolution, Creationism, and Treating Religion as a Hobby', *Duke Law Journal* (1987) p. 997.

Despite the grander promises of theory and principle[34] (and various courts[35]), state neutrality in matters of religion – being neither religious or irreligious, but in a place between – is impossible.[36] Haupt's comparison of Germany and the US illustrates increasing reliance neutrality as a solution to very different church/state contexts, but shows also that the term can connote different things, and it 'cannot be clearly defined but only approximated'.[37] In fact, none of the various of meanings of neutrality can solve church-state questions.

Neutrality could be taken to mean ignoring religion:[38] that a religious distinction is simply not to be regarded either to benefit religion or to its detriment. But, as has been frequently pointed out, this is not neutral, but disfavours religion in prohibiting exemptions from general laws to enable freedom of religious practice.[39] It gives no special position to religious claims,[40] but it also denies religious groups a benefit that no other group is per se denied: the ability to be treated differently in law when the context suggests that this is appropriate due to a legitimate difference in the way that group will suffer under the law. It treats unalike circumstances alike. At the same time, it could create entanglements of church and state, as state funding for religious institutions could not be denied where funding was offered to similar non-religious institutions.

On the other hand, if we attempt to create a more substantive neutrality, and say that the state should minimise legal interference with religion – treat religion equally *unless* it is particularly affected by a measure, say – then we have favoured religion. A religion claiming an exemption from a law in the name of free practice is treated as in some way special as against a secular group's claim, even their desired exemptions are identical. Moreover, this approach will invariably not be neutral even between religions. There is no limit to the sort of groups that could claim to be religious, or the conduct that they could claim to be part of religious practice. If we accommodate them all, religious freedom becomes simply

[34]On the large role played by 'neutrality' in constitutional law, and a defence of this, *see* generally J. Kis, 'State Neutrality', in M. Rosenfeld and A. Sajó (eds.), *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) p. 318.

[35]*See* e.g. *Everson v Board of Education of Ewing Township*, 330 U.S. 1 (1947).

[36]*See* S.D. Smith, *Foreordained Failure: the Quest for a Constitutional Principle of Religious Freedom* (Oxford University Press 1995).

[37]C. Haupt, *Religion-State Relations in the US and Germany: the Quest for Neutrality* (Cambridge University Press 2012) p. 168.

[38]M. Tushnet, 'Of Church and State and the Supreme Court: *Kurland* Revisited', *Supreme Court Review* (1989) p. 373.

[39]*See* e.g. Haupt, *supra* n. 37; D. Laycock, 'Substantive Neutrality Revisited', 110 *West Virginia Law Review* (2007-2008) p. 51; Smith, *supra* n. 36; W. Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton 2005).

[40]*See* P.M. Garry, 'Religious Freedom Deserves More than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion', 57 *Florida Law Review* (2005) p. 1.

freedom. We will draw lines to avoid this but, as Fallers Sullivan argues, the way in which these lines are draw will not be neutral as between religions; it will privilege some religious denominations and practices that are culturally dominant or familiar in that place.[41] To use Bicker's striking (if perhaps imperfect) metaphor, something is either a horse or not a horse, and it is not possible to take a position of neutrality as between these states. For the same basic reason, we cannot be neutral as to religion and non-religion: 'a particular government action must be either religious or irreligious'.[42]

Other candidates for an arbitrating principle presented by liberalism – such as 'harm' or 'tolerance' – fail for similar reasons. Harm is not self-defining – which harms are real and which are illusory or must be endured will vary greatly – and definition is coloured by dominant political/religious outlooks. Tolerance cannot be taken seriously without becoming freedom from law in general: we can only be tolerant by reference to an *intolerant* (and partisan/partial) stipulation of what can never be tolerated.[43]

There is no optimal position where the state can oversee a religious situation with perfect detachment. Instead, constitutional church-state settlement are purposive and pragmatic, seeking to achieve something. The goal will of course vary – militant theocracy or militant secularism will seek the dominance of true religion in public life or the extirpation of it – but in general, in contemporary liberal democracies, I think the core purpose is the avoiding of religious division, or the advancement of 'religious peace'. Bickers calls this a 'neglected value'[44] in American jurisprudence, arguing that the first amendment was geared towards avoiding such conflict. The scope for serious religious disagreement in the public sphere is significant, and if it happens, can be extremely damaging for the functioning and continuity of the state. We want to avoid more of, as Locke put it, those 'bustles and wars that have been . . . upon account of religions'.[45]

Religious peace can be disturbed, not always by state action, but it is particularly jeopardised when religion becomes the subject of public and legal controversy and the state is forced to take sides. The priorities of the liberal project rule out some actions at the extremes: we must avoid theocracy on one hand, and full repression of religion by the state on the other. But after that, there is very little certain that can be said about how such peace can be achieved. In some places, the threat to religious peace may be from dissatisfied religious groups,

[41]Sullivan, *supra* n. 39, persuasively argues that you cannot assess the validity of individual religious beliefs without privileging major, institutional religions at the expense those on the fringes.

[42]J.M. Bickers, 'Of Non-Horses, Quantum Mechanics, and the Establishment Clause', 57 *Kansas Law Review* (2009) p. 371 at p. 382.

[43]*See* Alexander, *supra* n. 20, p. 776; Fish, *supra* n. 3, p. 2261.

[44]Bickers, *supra* n. 42, p. 405.

[45]J. Locke, *A Letter Concerning Toleration* (1689).

while in others, irreligious groups might threaten religious peace where they feel their freedom is not accounted for. Some places might seek to avoid religious division by not allowing religion in the public sphere; others might, to the same end, include religion centrally in the public sphere. There is no context-transcendent answer to this question of what will achieve these ends. The religious makeup of that place; the attitudes and views of various religious groups; the history of religious conflict and division, and the depth of the fault lines between particular groups; the likelihood of certain measures creating alienation or division: all of these (and many more) local factors will affect how a religious compromise might play out. A religious practice or state entanglement that might seem tolerable in one place might seem *intolerable* and dangerous in another.

The drafters of a constitution should adopt whatever means – whatever balance of religiosity and irreligiosity – will in their view advance the goal of maintaining religious peace (while not undermining other goals of the constitutional project). Here, the vagueness and obscurity of principles is a resource:[46] it might be possible to recognise potentially incompatible principles or positions or values in order to mediate a religious compromise that allows the constitutional project to get off the ground: e.g. freedom of religious practice alongside non-entanglement; commitments of the state to multiple religious traditions; a public commitment to religion alongside the projection of rights in a liberal tradition or religious non-discrimination; the protection of freedom of conscience and/or homeschooling rights alongside planned mandatory public education.[47] These positions may be in conflict at the time they are recognised, or ambiguous and capable of coming into conflict in certain cases. We may hope the conflicts never come to a head, or, if they do, that they can be solved with a new reading of the principles that defuses the clash and maintains religious peace. The Irish Constitution provides a useful illustration of these points.

The case of religion in the Irish Constitution

Religion and the Irish Constitution

The Irish Constitution of 1937 – *Bunreacht nah Éireann* in Irish – defies simple characterisation of its approach to church-state relations. It begins with a Preamble that is striking in its religiosity:

[46]Fish, *supra* n. 4, p. 161.

[47]Fish notes that because education is inculcation into various ideas and ideals, unless education is from the same religious viewpoint, it will eventually come into conflict with these rights: S. Fish, *The Trouble with Principle* (Harvard University Press 1999) p. 153.

> '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.'

The Most Holy Trinity, our Divine Lord Jesus Christ, and the Christian virtues of Prudence, Justice, and Charity give the impression of a highly religious, highly Catholic, document. Article 6 goes on to say that 'All powers of government, legislative, executive and judicial, derive, under God, from the people'. It provides for a Presidential Oath that begins 'In the presence of Almighty God' and concludes 'May God direct and sustain me'.[48]

Articles 38-44 protect various fundamental rights in a seemingly liberal-democratic tradition. They protect trial in due course of law, equality, liberty, person, good name, property the integrity of the dwelling, free speech and assembly rights, and family and education rights, amongst others. However, they do so in manner that often betrays their religious inspiration. Natural law language is seen in the property rights provision ('man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods') and the family ('a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law'). The rights in respect of property, family, education (and perhaps others) have origins in papal encyclicals,[49] and thus instantiated Catholic versions of these values: primary education is provided for, but only subject to the Family, the 'primary and natural educator of the child' and guaranteeing not to oblige parents to send their

[48]Art. 12.8. Other constitutional oaths – for judges and members of the Council of State – are similar.

[49]These provisions bear striking similarity to the papal encyclicals *Divini Illius Magistri*, *Rerum Novarum, and Quadragesimo Anno. See* D. Keogh and A. McCarthy, *The Making of the Irish Constitution 1937* (Mercier Press 2007) p. 111-210. *See* S. Moyn, 'The Secret History of Constitutional Dignity', 17(1) *Yale Human Rights and Development Journal* (2014) p. 39, speculating about the influence of *Divini Redemptoris* on the protections of dignity and personhood.

children to state schools.[50] The Family protected is the *married* family, and the institution of marriage will be guarded 'with special care' and protected 'against attack'.[51] Free speech is protected, but in the same section, blasphemy was made a constitutional crime (this was removed by referendum in 2018.)

Article 44, entitled 'Religion', contains a series of religious rights and protections. It begins in Article 44.1 by stating: 'The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion'. In the original text, it then recognised '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' while also recognising 'the Church of Ireland, the Presbyterian Church in Ireland, the Methodist Church in Ireland, the Religious Society of Friends in Ireland, as well as the Jewish Congregations and the other religious denominations'. (These references to specific faiths and congretations were removed in 1972). Article 44.2 provides the most important rights in respect of religion, and seems balanced in terms of protecting freedom of religion and separating church and state:

> '1° Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.
>
> 2° The State guarantees not to endow any religion.
>
> 3° The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status.'

The article also provided for religious denominations to have the right to manage their own affairs and have their own property, and for children to attend publicly-funded schools while not taking religious instruction.

This is, in many ways, an admirably balanced set of religious protections – nominally pluralistic in its protection of religious rights; preventing endowment/establishment of an official state religion; preventing religious discrimination; broadly protecting free practice and freedom of conscience. Yet the Constitution implicitly and explicitly proclaimed the religiosity of the state. They followed immediately after a pledge to respect and honour religion and in, as originally written, an acknowledgment of the special position of the Catholic Church. This is ambiguous, potentially contradictory. Religious non-discrimination – protected in near-absolute terms in the text – might be a strong defence for irreligion against a religious state, or might be minimised and marginalised while

[50]Art. 42.1-3.
[51]Art. 41.3.1.

https://doi.org/10.1017/S1574019620000218 Published online by Cambridge University Press

allowing a religious state to thrive. Similarly, the Constitution guaranteed a set of rights that seem torn between liberal enlightenment values and those of Catholic teachings. The rights in Articles 38-44 could be interpreted in light of their religious inspirations, enforcing religiously-inspired governance and values, or be given a liberal meaning, severed from these origins, that might stand against such governance.

The meanings of these ambiguities and contradictions were worked out over time. In the end, the Constitution enabled a state to be created that in practice saw the Catholic Church enjoy extraordinary influence, and de facto preferred Catholic values and views in almost all matters of law and governance – Ireland in the 20th century has been called 'a theocracy in all but name'.[52] But it also strongly protected the liberty of religious minorities; had rights provisions that were exercised in a manner inimical to Catholic teaching; and maintained religious peace in a country where this was an acute concern. It is hard to articulate any consistent, principled rationale for these constitutional provisions, but understood in light of Ireland's particular historical position, they appear to be a sensible attempt at compromise in the face of deep disagreement. The Constitution attempted to placate a Catholic majority that desired religious government, and to placate a protestant population, north and south of the Irish border, that would have to be appeased if the island was ever to be unified.

Ireland's religious and political context

Three elements of Ireland's social context in 1937 must be understood when considering this document. First, Ireland in 1937 was a deeply divided country, having fought a bitter civil war less than 15 years earlier, with the two main political parties on opposing sides. The 1937 Constitution was a project of Éamon de Valera, leader of Fianna Fáil, who was deeply distrusted by Cumann na nGaedheal (later Fine Gael), his political and civil war opponents. It would replace the previous Constitution of the Irish Free State of 1922, disliked for its links to the peace treaty with Britain and systemically dismantled by successive governments. A new constitutional settlement was essential, yet there was deep suspicion about the new Constitution and de Valera's motivations in making it. The Constitution was ratified with only 56.5% of the vote.[53]

Second, Ireland in 1937 was overwhelmingly Catholic – 93.6% according to the Census of 1936 – and extremely devout. Most of Ireland's Catholic population would have desired or happily acquiesced in a very Catholic constitution, with an established Church and formal recognition of Catholic values, such as

[52]J. McGahern, *Memoir*, ebook edition (Faber 2009) p. 64.

[53]For a brief overview of the historical background, *see* G. Hogan et al., *Kelly: the Irish Constitution*, 5th edn. (Bloomsbury Professional 2018) p. 3-9.

prohibitions on contraception. The Catholic Church had already enjoyed very substantial influence over certain aspects of public policy in the Irish Free State from 1922-1937.[54] Catholicism was the 'central characteristic of Irish nationalism'.[55] In practice, Church support – or acquiescence – was seen as crucial in any effort to win a referendum on a new constitutional document. With the Irish Catholic hierarchy unhappy with the draft text, the Constitution, in nearly final form, was sent to the Vatican for comment. The Pope did not fully approve, nor disapprove, and so agreed to stay silent, and the Irish hierarchy followed suit.[56] It was felt by the government that condemnation by the Church would have doomed the endeavour to failure;[57] given the close margin in the vote, this was credible. Practically speaking, there were limitations on how the Constitution could be drafted to avoid losing the favour of the Church, and with it, the support of the Irish people.

Third, however, the document could not be too religious, or it would alienate the protestant minority in Ireland, and with them, the large protestant population in Northern Ireland. Though a small part of the southern population, taken together, protestants constituted about a quarter of the population of the island. These groups feared that in an independent Ireland, Catholic values and morality would be imposed, to their detriment. The drafters of the Irish Constitution dearly hoped for Irish unity.[58] For this to be remotely plausible, it was incumbent that the worst fears of protestants not be confirmed. Writer and then-Senator W.B. Yeats, debating divorce in 1925, warned that '[i]f you show that this country, Southern Ireland, is going to be governed by Catholic Ideas alone, you will never get the North . . . You will not get the North if you impose on the minority what the minority consider to be oppressive laws'.[59] If the Constitution were seen as an entirely Catholic document, this would foreclose any possibility of reuniting South and North.[60]

[54]The Church was vocally critical of declining moral standards in the 1920s/30s, and politicians eagerly responded with legislation on divorce, censorship of publications, regulation of dance halls, and the sale and importation of contraception: M. Nolan,'The Influence of Catholic Nationalism on the Legislature of the Irish Free State', *Irish Jurist* (1975) p. 128; J.H. Whyte, *Church and State in Modern Ireland,* 2nd edn. (Gill and MacMillan 1980) p. 24-61.

[55]D. Keogh, 'Church, State and Society', in B. Farrell (ed.), *De Valera's Constitution and Ours* (RTÉ 1988) p. 103 at p. 105.

[56]Keogh, *supra* n. 55, p. 117. *See generally* I. Milne and I. d'Alton (eds.), *Irish and Protestant* (Cork University Press 2019).

[57]Keogh and McCarthy, *supra* n. 49, p 163; G. Hogan, *The Origins of the Irish Constitution, 1928-1941* (Royal Irish Academy 2012) p. 483-486.

[58]This was expressed in the Preamble, and in the original Arts. 2 and 3.

[59]5 Seanad Debates, 435-36, 11 June 1925.

[60]Keogh and McCarthy, *supra* n. 49, p. 165.

As such, many more overtly Catholic positions that were considered were not adopted in the final text of the Constitution, including declaring the Catholic faith to be 'the true religion' that was 'the Guardian and interpreter of true morality'; a constitutional prohibition on contraception; and various suggestions of the Irish Jesuit communities giving legal authority over marriage to the church and determining church-state relations via an agreement to be entered into with the Holy See.[61] The reason put forward for rejecting these positions was the need to placate protestants, particularly in Northern Ireland, something reluctantly accepted in the Vatican.[62]

Superb recent scholarship, particularly by Hogan and Coffey, on the drafting of the Irish Constitution shows a previously unappreciated influence of trends in European constitutionalism.[63] The drafters of the Constitution drew heavily from the constitutions of continental European countries written earlier in the inter-war period.[64] The Portuguese (1933), Spanish (1931) and Polish (1921) constitutions were all consulted, but perhaps most influential was Weimar German constitution of 1919.[65] The Irish Constitution was in no way insulated from – indeed, it was very much of – the prevailing trend of European constitutionalism in the 1930s. These scholars argue that the drafting was 'characterised by outward-looking drafters but also tempered by Catholicism in certain key dimensions',[66] suggesting – contrary to some long-held popular accounts – that Catholicism was not the *dominant* influence.

The Irish constitution was not coherent or consistent in principle, but it may have been a good pragmatic compromise between these divergent ends. A constitution had to be passed to replace the 1922 constitution, and this endeavour faced scepticism and a strong political opposition. There was an overwhelmingly Catholic and very pious population that would not ratify any constitution that gave insufficient respect to religion and would obstruct the pursuit of Catholic values. There was a population of protestants that would threaten religious peace and cooperation in the new state – and frustrate future

[61] *See* Hogan, *supra* n. 57, p. 247-250; Keogh and McCarthy, *supra* n. 49, p. 105-112.

[62] Hogan, *supra* n. 57, p. 214; Keogh and McCarthy, *supra* n. 49, p. 156 and 162.

[63] Hogan, *supra* n. 57, p. 317; D. Coffey, *Drafting the Irish Constitution, 1935-1937: Transnational Influences in Interwar Europe* (Palgrave 2018); G. Hogan, 'Some Thoughts on the 1937 Constitution', in F. Larkin and N. Dawson (eds.), *Lawyers, the Law, and History* (Four Courts Press 2013).

[64] Ireland's Constitution is the last inter-war European constitution to survive. *See* D. Coffey, *Constitutionalism in Ireland, 1932-1938: National, Commonwealth, and International Perspectives* (Palgrave 2018) p. 120.

[65] Coffey, *supra* n. 63, p. 30; G. Hogan, 'The Influence of Continental Constitutional Tradition on the Drafting of the Constitution', in B. Ruane et al. (eds.), *Law and Government – A Tribute to Rory Brady* (Round Hall 2015).

[66] Coffey, *supra* n. 64, p. 119. *Cf* Hogan, *supra* n. 57, p. 215-222.

unification – if they felt the Constitution did not protect them to some degree from Catholic majoritarianism. The Constitution's unprincipled and contradictory compromise tried to mediate between these two groups – privileging religion generally, and allowing (but not mandating) a Catholic state in practice, while giving some protections for minority religions – to allow the fragile and tentative constitutional project to get off the ground.

In this effort, the Constitution might be said to be largely successful for much of its history: it avoided religion being a divisive issue in public life in a place where religious divides were deep, bitter, and very old. It is not clear that other, more coherent, and more principled solutions would have fared better, or as well.

Conflicts and ambiguities

Throughout the Constitution's history, the fact that the Constitution is in two minds in respect of religion has created contradictions or ambiguities to resolve. The resolution of this has been read as favouring religion over irreligion, trying to ensure all religions are accommodated equally, but generally not preventing the state from being religious in public displays and aligning closely with Catholic values. This has produced relatively functional results.

Both Hogan and White have separately noted that, taken together and on their face, Articles 44.2.2° and 44.2.3° form a rough equivalent to the establishment clause of the US Constitution in preventing direct funding or excessive favouring of one religion over others.[67] But cases involving alleging endowment and non-discrimination have generally not succeeded, because the (textually weaker) free practice of religion is prioritised over it, allowing (and requiring) the state to make any accommodation necessary for religion.[68] These provisions have also never been invoked to challenge state expressions of religion such as broadcast of the Catholic Angelus bells on public broadcasters, or religiously-motivated licencing laws (cases on these issues were never taken, but if they had been, they would have been very unlikely to succeed), and not invoked *successfully* to challenge state funding of religious schools.[69] This is because when read in light of Article 44.1, requiring homage of public worship to Almighty God, any separationist appearance of the clauses has been ignored.

[67] G.W. Hogan, 'Legal Aspects of Church/State Relations In Ireland', 7 *St. Louis University Public Law Review* (1988) p. 275 at p. 278; G. Whyte, 'Religion and the Irish Constitution', 30 *John Marshall Law Review* (1996-1997) p. 725 at p. 735.

[68] *See Quinn's Supermarkets* v *Attorney General* [1972] IR 1. *See* Hogan et al., *supra* n. 53, p. 2457-2509; E. Daly, *Religion, Law and the Irish State* (Clarus Press 2012). In short, unless there is *no* free practice rationale for a discrimination, it will be allowed.

[69] *See Campaign to Separate Church and State* v *Minister for Education* [1998] 3 IR 321, upholding the funding of religious chaplains in schools performing overtly religious roles.

The fundamental rights protections have largely been severed from their religious origins and apply notwithstanding these.[70] They have been used to invalidate laws motivated by Catholic morality, including famously invalidating a criminal prohibition on contraception.[71] The court's use of individual rights in this way was a primary motivation for pro-life advocates to insert by referendum the Eighth Amendment to the Constitution, a constitutional prohibition on abortion, to stop the courts from issuing an Irish *Roe v Wade*.[72] Though in reality this was never very likely to occur, it shows the extent of the perception that the courts and the Constitution had departed from religious values. This trend, and the contraception judgment in particular, was surprising to many; as Whyte put in his landmark work on church and state: 'How was this judgment wrung out of a Constitution so specifically Catholic as the 1937 document had been?'[73] The answer was that judicial interpretation largely severed these rights from their Catholic and natural law origins, to the point that Hogan can credibly say that the 'average litigant could not give two straws as to whether the constitutional right in question was inspired by the writings of Thomas Aquinas on the one hand or by Thomas Paine on the other'.[74]

This liberal interpretation of rights was a credible interpretation of the Constitution, but hardly the only one: it is arguable that these rights should not be severed from their historical origins (and this argument was, on occasion, made successfully in the Irish courts[75]). De Valera was warned about the potential for a liberal interpretation of the rights by a Jesuit priest of his acquaintance, Fr Edward Cahill, who noted the 'real danger' that the rights provision might be read by lawyers – steeped in enlightenment thinking – as being contrary to

[70]Hogan and Coffey also show that these clauses had more inspiration from their European counterparts than is commonly supposed; *see* Hogan, *supra* n. 57, p. 245-254; Coffey, *supra* n. 64, p. 145-146.

[71]*McGee v Attorney General* [1974] IR 284. *See* Whyte, *supra* n. 54, p. 409-414 for an account of the controversy that followed this judgment.

[72]This concern was expressly cited by the government in proposing the abortion amendment as one of the core concerns motivating it: 339 Dáil Debates, col. 1356-7 (9 February 1983). *Cf* Whyte, *supra* n. 54, p. 413.

[73]Whyte, *supra* n. 54, p. 409.

[74]G. Hogan, 'De Valera, The Constitution, and the Historians', 40 *Irish Jurist* (2005) p. 293 at p. 306-307.

[75]*See* the majority judgment of the Chief Justice in *Norris* v *Attorney General* [1984] IR 36 at 64 upholding the criminal prohibition on homosexual sodomy on the basis of the 'purposive Christian ethos of the Constitution' and arguing that the people in 1937 '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'.

religious ends.[76] But de Valera did not follow Cahill's suggestion to add some interpretive statement, instructing the courts to interpret rights in conformity with Catholic values, to try to offset this.

This difficult compromise between competing concerns, unique to Ireland's situation in 1937, is problematic or impossible to defend as a matter of principle. But, from a pragmatic perspective, the judgment is different: broadly speaking, it worked. The Constitution did not aid and abet the oppression of protestants, and generally availed any religious minority that sought accommodation or support.[77] It may not have availed the unification of the island (which was much more problematic and complicated than its drafters foresaw), but it also did not make the situation worse, and allowed change over time to remove certain potentially-sectarian language and provisions.[78] The ambiguities in the fundamental rights provisions were resolved in favour of a liberal outlook on rights, which resisted certain aspects of religious governance and probably advanced, to a small degree, the goal of winning over protestants.[79] Had this effect been known in advance, the enthusiasm for strong rights protections (and the constitutional project in general)

[76]He warned that these provision 'convey different ideas to the student of Catholic social science, and to those (including all or most of our judges, and lawyers, and possibly most of our public men) whose ideas and mentality are much influenced by the individualistic and Liberal principles of English jurisprudence': Hogan, *supra* n. 57, p. 573.

[77]Not every judgment of the Irish courts can be said to be positive from this perspective: *see* in particular *Re Tilson* [1951] IR 1, which upheld the validity of *ne temere* decrees – required by the Catholic Church for 'mixed marriages' between protestants and Catholics – where parents swore to raise their children in the Catholic faith. Such decrees had the effect of reducing the protestant population, and were seen as highly sectarian; the *Irish Times* criticised this judgment as giving 'the impression that the philosophy underlying Irish jurisprudence is tending, slowly but surely, to be informed by the principles of the Roman Catholic Church'. 'Ne Temere' *The Irish Times*, 7 August 1951. There is a nuance here, however. Hogan offers a compelling alternative account of the case, suggesting the interpretation of the law and the Constitution was correct, the context of the case is largely misunderstood, and the criticism the case was subject to in its aftermath was 'downright unfair'. He does, however, think the majority of the Court should have made it clear that no *legal* privilege was being given to Catholics by virtue of the judgment, and that the effect on the protestant community in practice was negative: G. Hogan 'A Fresh Look at Tilson's Case', 33 *Irish Jurist* (1998) p. 311 at p. 329. *Cf* a similar account in G. Hogan, 'Law and Religion: Church-State Relations in Ireland from Independence to the Present Day', 35(1) *American Journal of Comparative Law* (1987) p. 47 at p. 57-60.

[78]The special position of the Catholic Church and recognition of other denominations, though inconsequential in practice as no more than a recognition of social fact (67 Dáil Debates, col. 1890-91, (4 June 1937)) were removed by referendum in 1972. However, the religious language elsewhere remains. The territorial claim in Arts. 2 and 3, removed in 1998, was another major step in this respect, as was, perhaps, the removal of the constitutional ban on divorce in 1995.

[79]The reaction to the *McGee* case legalising contraception was positive in protestant communities; *see* D. Ferriter, *Occasions of Sin* (Profile Books 2009) p. 429.

amongst the Catholic population may have been undermined, but the compromise that emerged over time was accepted. Since Ireland was overwhelmingly religious for most of its history, generally endorsing entanglement of church and state, the Constitution's failure to value irreligion generally did not cause religious division until recently. A religious peace has largely prevailed in the Irish state.

However, this has changed: a leading historian of the Constitution noted that, due to its perceived religiosity, the Constitution has 'enjoyed a very negative press in recent years'.[80] The Constitution did allow – though, again, did not require – an intermingling of church and state that in the early years of the 21st century has been condemned, as various scandals about church conduct and failure of state oversight have come to the fore.[81] Criticism of these entanglements and the conduct they abetted is, of course, legitimate, but it is not clear that the *Constitution* should be blamed. It is not realistic to think that any proposed constitution in 1930s Ireland could have enforced separation of church and state and still been accepted by the people, who believed so fervently in the rightness and righteousness of the Catholic Church.[82] Attempting this almost certainly would have *caused* religious division in alienating the Catholic population from the state, and sinking the constitutional project. The entanglement of church and state was a function of a political and broader culture that saw this as not only tolerable, but just and desirable.[83] No constitution can, by itself, change culture; on the contrary, the constitution is, in text and interpretation, a *product* of culture. If the Irish state and the Catholic church were too entwined in the 20th century, the blame lies not with the constitutional order, but with the Irish people; a fault not in our stars, but in ourselves.

Moreover, when religious peace has been jeopardised by backlash to the religious nature of the state, the Constitution has evidenced the resourceful flexibility of unprincipled compromises in allowing reform. It has allowed for legislative changes – such a reform of admissions to publicly-funded religious schools and reform of religious education[84] – that disentangled church and state. Constitutional changes have also been made by referendum in the past decade to

[80]D. Keogh, 'Address to the Constitutional Convention', Dublin, 1 December 2012.

[81]*See* e.g. N. Sammon, 'Should an Institution that Presided over Child Abuse Control Most Schools?', *The Irish Times*, 9 April 2019.

[82]Hogan also notes that it was the norm in Europe at the time (and even later) to have religious elements not dissimilar to the Irish Constitution's, and argues that the most remarkable aspect of the Constitution is that it 'did not go further' in its religiosity: Hogan, *supra* n. 57, p. 220-222.

[83]*See* generally, Whyte, *supra* n. 54, p. 10-12.

[84]*See* e.g. the Education (Admission to Schools) Act 2018, removing the 'baptism barrier', which had allowed all religiously-funded public schools to discriminate in favour of children of their own religious denomination.

legalise same-sex marriage; liberalise abortion; give stronger protection to children's rights over the family's; and removing the clause prohibiting blasphemy. The Supreme Court noted in 2017 that the constitutional concept of marriage might once have been understood in a Christian or Catholic light, but constitutional changes had made it clear that this was no longer the case.[85] Challenges remain in terms of school patronage, protection for irreligion, and religious constitutional language, oaths and symbols. There may come a point where the Constitution needs to be changed to reform some of its symbolic or practical aspects and/or rebalance certain rights to address new challenges. The Constitution's continued success in maintaining religious peace is not clear, as a less religious population and increased pluralism demand a state which is less publicly religious. But, again, the standard for judging this is pragmatic, not principled: a new assessment of our practical requirements and how they might be achieved – not an attempt to achieve principled consistency – should dictate a new constitutional approach.

Conclusion

When dealing with constitutional disagreement, principle is not helpful, and can in fact cloud our judgment. Mediating disagreement will not be advanced by seeking 'an apolitical principle to which you can be faithful or unfaithful'[86] but rather by finding that which might work in practice to achieve our goals for the constitutional project, and defer or defuse the disagreements that might threaten it. Principles are 'a vocabulary and a set of formulas' we can use to help achieve those goals by accommodating different – even conflicting – views and values to get enough commitment to the constitutional project to initially succeed, in the hope that we can make the project work in the long run. The goals of the constitutional project 'come first and last, and the principles, appropriately tailored, piece out the middle'.[87] Silence, ambiguity, and even inconsistency are not problems to avoid, but opportunities we might seize to overcome, mediate and cabin our disagreements in order to build and maintain constitutional orders in divided societies. It might be that inconsistent or unprincipled compromises will create more problems than they solve, and in such cases they should not be pursued. But we should be clear eyed in assessing their merits, not blinded

[85]'The combination of the introduction of no-fault divorce and, in particular, the amendment of the Constitution providing for the introduction of same-sex marriage have resulted in a legal institution of marriage that cannot be described in terms of traditional Christian doctrine': *HAA v SAA* [2017] IESC 40, at [98], per O'Malley J.

[86]Fish, *supra* n. 47, p. 160.

[87]Fish, *supra* n. 47, p. 161.

https://doi.org/10.1017/S1574019620000218 Published online by Cambridge University Press

by a belief that consistency is an end in itself. We should judge constitutional projects not by any standards of consistency or principled cogency, but on their results. By their fruits we shall know them.

In the end, who is this case directed to? Well, in the first instance, it would counsel scholars of constitutional law, who consider and judge constitutions, to consider effects and consequences rather than principles, last things over first. It would also counsel those making or changing constitutions, and judges interpreting them, to consider purpose and effect over principled consistency in both making and elaborating on constitutional compromises. These actors, whose work has real and immediate consequence, are likely to be making unprincipled compromises in response to real world pressures, though they may be uncomfortable with this or deny it to themselves. The lesson they might draw from this account is largely a negative one: do not be concerned about acting in a pragmatic and unprincipled manner; principles have little to offer.

Difference and disagreement are part of the human condition. They cannot be eliminated because they are, I think, fractal: even if we reach consensus on some great matter, we will then focus on details, where we will always find new things to divide us. We should use every resource at our disposal – including and especially the malleability of principle – to cope with this, so that we can continue, in spite of our differences, to live together.

https://doi.org/10.1017/S1574019620000218 Published online by Cambridge University Press