

The Secret History of Constitutional Dignity

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*In the Name of the Most Holy Trinity, from Whom 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.

— Preamble, Irish Constitution of 1937

1. INTRODUCTION

“Dignity” is suddenly everywhere in law and philosophy, even though it has long been in decline in general usage.¹ In a popular view, this promi-

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nence is essentially due to World War II's aftermath, when in the shadow of genocide the light of human dignity shone forth. More specifically, it is dignitarian constitutionalism that re-founded public law for our time. The concept of dignitarian constitutionalism channeled Immanuel Kant's pioneering Enlightenment insistence on inherent human worth into the UN Charter (1945), the Universal Declaration of Human Rights (1948), and the German Basic Law (1949), all three of which begin with the dignity of the individual as basic principle. In this conventional wisdom, Germans after the Holocaust went furthest to rethink constitutionalism, and their example of how to defend human dignity was later taken up in South Africa and beyond.² Though it took some time, dignity has since proceeded in the last few decades, in tandem with the larger fortunes of international human rights law, to become a crucial watchword, going global in various constitutions and international treaties, and offering judicial guidance for the protection of basic values.³ Certainly it is true that interest in dignity swarms in legal cases and philosophical discussions today in ways that demand explanation, and the current dispute among judges and commentators about how to interpret dignity provisions is not uninteresting. But is the conventional wisdom about where dignity came from correct in the first place?

The notion of dignity was not necessary to constitutionalize rights, either in 1776 in Virginia or in 1789 in France—or again in 1946 in France, when the country not only relit its constitutional torch but drew on the flame of constitutional rights guarded by Central and Eastern Europeans in the 1920s.⁴ Conversely, West Germans writing the Basic Law weren't yet concerned by the Jewish tragedy. And while it is certainly true that Kant occasionally referenced dignity, none of his political disciples have made anything of this fact—and his current philosophical disciples have only started highlighting dignity in the last few years. For that matter, there were no Kantians in Germany of note after World War II (including in the rooms where the Basic Law was prepared and debated), nor really anywhere else. And actually, contrary to familiar beliefs, it was not West Germany that first constitutionalized dignity as a leading principle anyway.

In this essay, I show that individual human dignity entered global constitutional history in an unexpected place and at a surprising time: Ireland

version of some of the arguments, see Samuel Moyn, *Dignity's Due*, THE NATION, November 4, 2013, reprinted in SAMUEL MOYN, HUMAN RIGHTS AND THE USES OF HISTORY (2014).

1. See Appendix for usage charts in ordinary language. For recent spikes in law and philosophy, see *infra* Part 8.

2. To take one of sundry examples of this conventional wisdom, Thomas A. Howard writes: "In 1949, with the Holocaust and the Nuremberg trials fresh in mind, the drafters of the new West German constitution, or *Grundgesetz*, included in its opening article the statement that 'the dignity of man is inviolable.'" THOMAS A. HOWARD, IMAGO DEI: HUMAN DIGNITY IN ECUMENICAL PERSPECTIVE 1 (2013).

3. SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010).

4. Jürgen Habermas addresses the significant problem of dignity's surprisingly belated discovery, given the historical grounds of rights. JÜRGEN HABERMAS, THE CRISIS OF THE EUROPEAN UNION: A RESPONSE, ch. 2 (Ciaran Cronin trans., 2012). I reject his solution, which claims that dignity must have been there implicitly all along.

in 1937. It risked—and often still risks—transforming the tradition of rights. After all, 1789 and the liberal secular values for which that date stood in European and world history were not popular in the 1930s or even 1940s, and may not have survived the coming of dignity unscathed. More specifically, what first canonized dignity was what I call “religious constitutionalism”: a new form of constitutionalism navigating between the vehement rejection of the secular liberal state long associated with the French Revolution and the widespread demand for an integrally religious social order. To the extent Europeans did not vote with their feet for fascist regimes in an era when most concluded that secular liberalism had failed, it was religious politics that beckoned, indeed almost everywhere at a time of profound intersection of Christian faith and nationalist sentiment. Outside the Iberian peninsula the new Christian states of the time did not survive the political ecology of either the 1930s, when fascism triumphed, or the 1940s, when fascism died. But, despite the demise of the Christian States, Christian Democracy, when it arose after World War II to decades-long dominance in Western Europe, conserved a surprising amount of what came before—notably the central place of religious teachings in public life, including constitutional law. Ireland’s early move to Christian Democracy portended the framework that several other Western European countries would take up, which were un-coincidentally the only ones in which dignity had a constitutional presence for a long time.

History matters to the current enthusiasm over human dignity, because while all political and legal concepts are elastic, none ever proves to be exactly as malleable as any other. All bear the marks of their special historical trajectories, so long as partisans of some continuity in their meaning remain to fight on its behalf. This is certainly true of dignity, which emerged as part of an attempt to find a new form of democracy—one that in Europe today, and now many other places too, attracts considerable support. Even when not welcomed precisely because it promises faith a central public role, religious constitutionalism is sometimes justified as a lesser evil—or, even more boldly, as a transitional device for liberals who surmise that there is no alternative for the moment to integral religious politics except a constitutional regime with strong religious features that might later become increasingly peripheral.⁵ But while this last approach is understandable, it is little more than a bet. There is no reason to believe that such an intermediate constitutional stratagem itself either staves off the feared alternative, or promotes the desired outcome, even in the long run.

Dignity’s origins hardly rule out conceptual evolution thanks to new forces. Yet if dignity’s trajectory also suggests that such forces can unexpectedly arise to mobilize constitutional or otherwise fundamental terms and concepts in different directions than at the start, long into the history of

5. Consider Jan-Werner Mueller, who explicitly foresees a model in the history of Christian politics for a Muslim turn away from extremism. Jan-Werner Mueller, *From Christian Democracy to Muslim Democracy?*, PROJECT SYNDICATE (Oct. 13, 2008), <http://www.project-syndicate.org/commentary/from-christian-democracy-to-muslim-democracy->.

their interpretation, it provides no extra solace to the betting man. To be sure, there is no theoretical reason to deny the possibility that these forces can entirely transform the semantic meaning, and political uses, of a concept (or the larger constitution in which it figures) in a spirit they prefer. But the case of human dignity shows that it is equally possible that the results will be an essentially contested notion of little use to further debate and a possible distraction from it—except insofar as judges are successfully assigned the task of interpreting it, at the price of democratic legitimacy, and then only to the extent they do not themselves reproduce the public divisions that the irresolution at the heart of the now disputed concept reflects.

2. TRADITIONS OF CONSTITUTIONALISM: OLD, NEW, AND RELIGIOUS

Boris Mirkine-Guetzévitch was the obvious person—the right man in the right place at the right time—to have the most developed insight available into the trajectory of constitutionally declared rights and their fledgling post-World War II internationalization. But he did not mention human dignity, let alone celebrate it.

A Russian-Jewish émigré in Paris and later New York, Mirkine-Guetzévitch (1892-1955) was a founder of the now prestigious discipline of comparative constitutional law.⁶ In the 1920s, Mirkine-Guetzévitch had been premier analyst and proponent of “the new constitutionalism”—as he influentially dubbed it. In his view, the vogue of the rights of man in constitutions had primarily come about as a result of World War I, notably in the constitutions of the eastern European states that arose on the ruins of fallen empires. When he published his analytical study of postwar European constitutions in the early 1950s, he registered the restoration of European democracy after World War II but also the return of the progressive tendency to enthrone the rights of man as the first principles of political order. For Mirkine-Guetzévitch, the victory of Allied arms in World War II allowed not for the invention but for the revival of the new constitutionalism he had first identified and justified.⁷

6. Born in Kiev, from a highly Russified family, he was a liberal who sympathized with Alexander Kerensky until the Bolsheviks took power. After holding on for two years trying to foment opposition, he fled to Paris, ascending to some prominence as a law professor. Compelled to leave France in 1940, he survived World War II in the United States, where he helped found the famous *École libre des hautes études*. Thereafter he split his time in between the two cities that sheltered him. For a vivid portrait of his cohort, see Dvozinar Kévonian, *Les juristes juifs russes en France et l'action internationale dans les années vingt*, 34 *ARCHIVES JUIVES* 72, 72-94 (2001) (Fr.). For his legal thought, see Stéphane Pinon, *Les idées constitutionnelles de Boris Mirkine-Guetzévitch*, in CARLOS MIGUEL HERRERA, 2 *LES JURISTES FACE AU POLITIQUE: LE DROIT, LA GAUCHE, LA DOCTRINE SOUS LA TROISIÈME RÉPUBLIQUE* 61-123 (2005) (Fr.).

7. See generally BORIS MIRKINE-GUETZÉVITCH, *LES CONSTITUTIONS DE L'EUROPE NOUVELLE* (1928, 1930, 1938) and *LES CONSTITUTIONS EUROPÉENNES*, 2 vols. (1951) (Fr.) [hereinafter *LES*].

The old constitutionalism, even when it involved a written constitution, didn't typically proceed from the rights of man. The French tradition from 1789 took the Virginian example of 1776 to the national level where the Americans that same year had decided not to proceed (the framers had merely appended a bill of privileges to their federal constitution under pressure). But this 1789 tradition was spurned when it came time to found the French Third Republic in 1870-77. Through modern times, and indeed long after World War II, the British were proud of disdaining written constitutionalism, to say nothing of the constitutionalization of rights. Notwithstanding some Latin American ventures, the end of World War I, therefore, was the true inflection point for the global ascendancy of constitutionally announced rights; and for Mirkine-Guetzévitch it always seemed as if constitutionalism based on *les droits de l'homme* succeeded by easternizing. The best, albeit short-lived, example remained the Weimar constitution, but in fact all of the post-imperial states from the Rhine to the Urals had enshrined rights in a similar manner.⁸ After the retrieval of this tradition by the Resistance, the post-World War II consensus about human rights, as signaled by the United Nations Charter and made concrete in the Universal Declaration of Human Rights of 1948, finally swept the European continent. It took the truly pioneering interwar breakthrough to a new stage. Given the precedent of the Weimar Constitution, he hoped West Germany's *Grundgesetz* or Basic Law (1949) was part of this trajectory.⁹

Though it has much to recommend it, no one follows Mirkine-Guetzévitch's presentation of the progress of rights-based constitutionalism today.¹⁰ Present at the creation of dignitarian constitutionalism, Mirkine-

CONSTITUTIONS EUROPÉENNES]. See also generally his most important theoretical works, LES NOUVELLES TENDANCES DU DROIT CONSTITUTIONNEL (1933, 1936) (Fr.) [hereinafter LES NOUVELLES TENDANCES] and DROIT CONSTITUTIONNEL INTERNATIONAL, ch. 6 § 2 (1933) (Fr.).

8. See generally BORIS MIRKINE-GUETZÉVITCH WITH ALPHONSE AULARD, LES DÉCLARATIONS DES DROITS DE L'HOMME: TEXTES CONSTITUTIONNELS CONCERNANT LES DROITS DE L'HOMME ET LES GARANTIES DES LIBERTÉS INDIVIDUELLES DANS TOUS LES PAYS (1929) (Fr.); LES NOUVELLES TENDANCES, *supra* note 7, at ch. 3. After first making himself Paris's expert in Soviet law, Mirkine-Guetzévitch became a scholar of the French Revolution under the tutelage of the famous Aulard, linking it with his work in comparative and international constitutionalism. See, e.g., Boris Mirkine-Guetzévitch, *L'influence de la Révolution française sur le développement du Droit international dans l'Europe orientale*, 22 RECUEIL DES COURS DE L'ACADÉMIE DE LA HAYE 299, 299-458 (1928) (Fr.).

9. On the Resistance, see LES CONSTITUTIONS EUROPÉENNES, *supra* note 7, at ch. 4; BORIS MIRKINE-GUETZÉVITCH WITH HENRI MICHEL LES IDÉES POLITIQUES ET SOCIALES DE LA RÉSISTANCE (1954) (Fr.). On rights after World War II, see LES CONSTITUTIONS EUROPÉENNES, *supra* note 7, at ch. 8. His immediate postwar writings on international human rights are *La protection internationale des droits de l'homme*, REVUE POLITIQUE ET PARLEMENTAIRE (Oct. 1946) (Fr.); *La défense des Droits de l'homme et la charte des Nations unies*, in LA BATAILLE DE LA PAIX (1946) (Fr.); and *L'O.N.U. et la doctrine moderne des droits de l'homme*, 55 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 161, 161-98 (1951) (Fr.). At the behest of Henri Laugier, he also provided the UN's nuclear commission on human rights, charged with drafting the Universal Declaration, with his expertise, editing the first ANNUAIRE DES DROITS DE L'HOMME (1946). See René Cassin, *Souvenirs sur B. Mirkine-Guetzévitch*, in HOMMAGE À B. MIRKINE-GUETZÉVITCH, 1892-1955, at 31 (1955) (Fr.).

10. See, e.g., OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW (Michel Rosenfeld

Guetzévitch may simply have been blind to the era's true breakthrough. Perhaps he didn't—more generously, couldn't—understand in real time what has proven to be a considerable step forward in retrospect. It may be, however, that Mirkine-Guetzévitch is a better guide to what mattered just after war and genocide, since he did not make the mistake of connecting rights with dignity.

After all, for a long time, including in the 1940s, dignity was most strongly correlated with religious constitutions in general – of which the German was merely one among others—and Christian Democratic constitutions in particular. Those constitutions as much broke with 1789 as safeguarded it, let alone rehabilitated it after disaster. The Irish were the true pioneers both in the development of religious constitutionalism and in symbolizing its project through appeals to human dignity. In their 1937 constitution, they gave dignity foundational placement, as a religiously-inspired root concept connected (as in the later West German case) to the subordination of the otherwise sovereign democratic polity to God, and for many to the moral constraints of his natural law. This essay takes up this neglected but revealing fact. I contend that it is critical that dignity came to the world as part of the establishment of an alternative constitutionalism—let's call it “the newer constitutionalism” of Christian Democracy. So far as I know there is no general historical study of its emergence, and though Ran Hirschl has contributed a valuable overview of what he provocatively calls “constitutional theocracy”¹¹ today, there is so far no recognition that religious constitutionalism is the framework in which human dignity first became canonized. This newer constitutionalism crystallized precisely in the 1930s when it seemed to so many as if secular liberalism had no future. It was initially part of a replacement package for that secular liberalism, and it remained so in Germany in 1949. The conventional wisdom about the inception of constitutional dignity, in other words, is by and large false.

It then makes more sense that Mirkine-Guetzévitch found nothing of value in dignity. Indeed, as the 1930s passed, when dignity made its constitutional entry, his liberal trend based on the rights of man was heartbreakingly cut off by different modes of dictatorial rule, both pagan and religious. Every tragedy needs a chorus: “The Spanish Constitution of 1931 was the last act of the new constitutional law of Europe,” he recalled grimly twenty years later.¹² “[W]ell before 1939, one after another, the countries of Central and Eastern Europe abandoned their democratic constitutions to become totalitarian.”¹³ It is therefore both crucial and mysterious that, thanks to the Irish, dignitarian constitutionalism also came about in this

and András Sajó eds. 2012), though the editors do acknowledge that the field “became established as a separate scholarly discipline thanks to the scholarship of Boris Mirkine-Guetzévitch.” *Id.* at 5.

11. See generally RAN HIRSCHL, CONSTITUTIONAL THEOCRACY (2010).

12. LES CONSTITUTIONS EUROPÉENNES, *supra* note 7, at 42.

13. *Id.* See also Mirkine-Guetzévitch, *La Constitution Espagnole de 1931*, 2 REVUE D'HISTOIRE POLITIQUE ET CONSTITUTIONNELLE 258, 258-64 (1938) (author's translation).

very period. If dignitarian constitutionalism is a bequest from history that we have learned to use for our own ends, it is interesting all the same—and perhaps disturbing—that it came from a different place and time than we thought.

To understand the original meaning of constitutional dignity, I propose, it is necessary to plunge into the confusing years just before war and genocide, for dignity was a response to different circumstances. The most decisive and illuminating context for the move to constitutional dignity, it turns out, is not in the shocked conscience “after Auschwitz” but in political Catholicism before it. Political Catholicism remained dignity’s dominant framework for decades thereafter, when the Holocaust still did not figure in moral consciousness.¹⁴

3. MARCH 1937: CATHOLIC DIGNITY BETWEEN CORPORATISM AND CIVIL SOCIETY

Anyone interested in “human dignity” as we know it should be interested in March 1937, when it made its spectacular entry into world politics—including, thanks to the Irish, constitutional politics.

Prior scholarship has already established that dignity long ago originated as one status word among others in a universe of aristocratic and hierarchical values. It originated as the literal notion of “rank”—above all high rank *above other humans*. James Q. Whitman has argued, following Alexis de Tocqueville, that high status was “democratized” over time.¹⁵ But for all its plausibility this thesis about long-term social relations does nothing to explain the specifics of dignity’s ideological trajectory in the 1930s and 1940s—let alone since. As late as the 1930s, in tune with its millennial prior trajectory, dignity attached to a huge range of objects, humanity rare, and individual humanity extremely rare, among them. There was thus little prior precedent for the novelty of Ireland’s constitutional preamble, although the word “dignity” had previously circulated in world affairs, in-

14. The present essay applies prior findings about the mid-century relevance of Christian personalism to the topic of human dignity (and Ireland) on which I had not focused before. For background on Christian personalism, see *THE LAST UTOPIA*, *supra* note 3, at 64-66, 191-92, 209-10; Samuel Moyn, *Personalism, Community, and the Origins of Human Rights*, in *HUMAN RIGHTS IN THE TWENTIETH CENTURY* (Stefan-Ludwig Hoffmann ed., 2011). In many pioneering writings, Mary Ann Glendon has asserted the intersection of Catholic social thought and post-World War II human rights, an approach I supplement mainly by restoring interwar context and highlighting how this essential relationship could emerge due to very contingent and short-term developments (who won the war, for instance). Most recently, see Mary Ann Glendon, *The Influence of Catholic Social Doctrine on Human Rights*, in *CATHOLIC SOCIAL DOCTRINE AND HUMAN RIGHTS* (Roland Minnerath, et al. eds., 2010).

15. See, e.g., James Q. Whitman, ‘Human Dignity’ in *Europe and the United States: The Social Foundations*, 25 *HUM. RIGHTS L.J.* 17, 17-23 (2004); Jeremy Waldron, *Dignity, Rank, and Rights* (Meir Dan-Cohen ed. 2012) (discussing Whitman’s themes). For further remarks on Whitman’s historical claims, see *infra* note 59.

cluding one or two constitutional articles.¹⁶ Then events in international Catholicism intervened, with the Irish constitutionalization of individual dignity as one consequence.

In fact, in March 1937 dignity already had an important place in Catholic politics, but it was radically different than the one it has had since then, thanks to the epoch-making reassignment of the concept from *groups* to *individuals*. At the beginning of the month, thanks to Pope Pius XI's encyclicals *Casti connubi* (1930) and *Quadragesimo anno* (1931), dignity still attached primarily to collective entities like workers and religious sacraments like marriage. Though not utterly without precedent, it was in March 1937 that dignity attaching to individuals (more precisely, persons) crystallized as a visible ideological option. In the 1930s, no one could have guessed what would become of this option, in large part because the Irish Constitution's version of dignity reflected such a minority political choice in the landscape of political Catholicism. The years during which it was framed were the period in which Catholic states were rising, typically based on corporatist rather than supplementary individualist notions.

In these states, it was family or labor that was dignified, not persons (and thus not persons with rights).¹⁷ Preceded by a year by António Salazar's Portuguese constitution, the purest move to a constitution integrating corporatism occurred in Austria in 1934, which "Austro-fascist" Catholic leader Engelbert Dollfuss consciously announced as enacting *Quadragesimo anno's* economic and social principles. Mirkine-Guetzévitch, that fan of the French Revolution, denounced these as perverse revivals of the Old Regime in constitutionalist disguise. But it surely mattered that these were not only pseudo-constitutional regimes but also ones sometimes echoing the pervasive corporatist assignment of "dignity" to groups.¹⁸ Not long after, Spain with its secular and indeed anticlerical constitution of 1931, fell prey to war and dictatorship, and Francisco Franco introduced dignity to the quasi-constitutional documents of his regime in allegiance to reigning corporatist orthodoxy.¹⁹ In the international Catholic context, the Irish constitution's framing occurred in the shadow of this trend-setting wave of dignitarian corporatism.

Yet it took place at a time of novel and at first brief and modest availability of a dignitarian alternative based on persons—an alternative it happened to encode. The central source of the conceptual work to make possi-

16. The most important of these is a subsidiary article in the Mexican Constitution of 1917 that already shows the importance of Catholic social thought. For a valuable survey of different uses of human dignity in chiefly philosophical sources, see MICHAEL ROSEN, *DIGNITY: ITS HISTORY AND MEANING* (2012). However, Rosen dwells neither on precisely when various meanings were culturally, politically, or legally salient—lacking tools besides clarification of isolated quotations—nor on why the competition between different conceptions of dignity went in one direction or another over modern history.

17. For the best survey of these years, see POLITICAL CATHOLICISM IN EUROPE, 1918-1965 (Tom Buchanan and Martin Conway eds., 1996).

18. Boris Mirkine-Guetzévitch, *Le néo-absolutisme corporatif (Autriche et Portugal)*, *L'ANNÉE POLITIQUE ET ÉCONOMIQUE* 251, 251-72 (1934) (Fr.).

19. See LEY ORGÁNICA DEL ESTADO [ORGANIC LAW OF SPAIN], Jan. 11, 1967.

ble the Irish Constitution's assignment of "dignity" to the individual was in a raucous French dispute of the mid-1930s around the nature of Catholic politics, among those recovering from an earlier flirtation with far right politics and in a dispute with persisting reactionaries about what sort of response to offer to the secular liberalism everyone thought on its deathbed.

The leading historian of this dispute, James Chappel, has dubbed this conflict one between corporatists (who in France would ultimately support the Vichy regime in the name of Christian principle) and "civil society Catholics." The intellectual debate and political controversy between these two groups assumed its classic form as a response to the Popular Front, for the dispute raging in 1934-36 was about what sort of response to offer to the frightening alliance of communists and socialists of the era.

These two groups of Catholics agreed on the rejection of the modern, liberal secular republic, which they viewed as immoral and individualistic. Instead, they favored the dispersal of authority to the "natural" social hierarchy established by God and descending through religious institutions, local communities, and patriarchal families. This agreement was perfectly obvious to contemporary witnesses, such as celebrated political theorist Michael Oakeshott, who in this era offered readers a conspectus of European political thought in which "Catholicism" was a possible option alongside "representative democracy," "communism," "fascism," and "National Socialism."²⁰ Catholic social theory, rooted in God's natural law, opposed liberalism out of its historical associations with individualism, secularism, and relativism.²¹ But where the civil society Catholics distinguished themselves was in their assignment of importance to what they called "the human person" as an alternative to the dissolute individualism they agreed with other Catholics in stigmatizing. The human person, a central icon of civil society Catholicism transnationally starting in 1934, would become the bearer of "dignity." Corporatists themselves, Chappel shows, referred to the human person too; just as some of their civil society foes ended up supporting the Vichy regime. But it seems clear that "the dignity of the human person" mainly became one slogan for civil society Catholics attempting to stave off both secular liberalism, with its destitute atomism, and corporatist reaction, with its demand for clerical forms of authoritarianism or flirtation with Nazi Germany and other fascist regimes that were viewed as fit for support in spite of the fact that they were "pagan."²²

In spite of the emergence of the civil society option, corporatist ideology was the dominant version of political Catholicism until the outcome of World War II made the religious authoritarianism in Spain and Portugal or

20. THE SOCIAL AND POLITICAL DOCTRINES OF CONTEMPORARY EUROPE xii (Michael Oakeshott ed., 1939).

21. *Id.*

22. See James Chappel, *Slaying the Leviathan: Catholicism and the Rebirth of European Conservatism, 1920-1950* (2012) (unpublished Ph.D. dissertation, Columbia University) (on file with author). See also James Chappel, *The Catholic Origins of Totalitarianism Theory in Interwar Europe*, 8 MODERN INTELLECTUAL HISTORY 561, 561-90 (2011).

even National Socialism in Germany seem not like the wave of an exciting future but a relic of past mistakes. Seriously outnumbered in spite of sharing many premises with their corporatist foes, civil society Catholics opened another path in the 1930s, which few took until later. Individual dignity emerged, essentially, as a marker on that path.

Consider as an example of civil society dissidence Joseph Vialatoux's speech to the *Semaines Sociales* in Lyon (an annual summer meeting of this faction), just at the time of the finalization of the Irish Constitution. It was titled "Dignity of the Group? Or of the Human Person?"²³ "It may not be excessive," Vialatoux commented, "to say that this very question defines the historical moment in which we live."²⁴ He inveighed against specifically biological and generally naturalistic approaches, which tended to view the human group as the locus of significance, arguing instead that Christianity brought the metaphysics of spirituality—which made the human person the site of dignity. Yet Vialatoux's preference for individual dignity, it bears noting, did not at all connote the corollary of "human rights." That revolutionary concept, in spite of its ostensible priority of persons, remained in what Vialatoux called "bastard union" with "naturalist philosophy." For this reason, it had elicited the equally erroneous sequels: the secular temptation of liberal nationalism had swept Europe in the nineteenth century and now counterrevolution racism in the form of National Socialism had extended it in the twentieth. The "dignity of the human person" was to be a response to all these mistakes. It was now critical to assert dignity against the "depersonalized individual" of the secular liberalism associated with the French Revolution and the equally secular racist extremism that now sought to overturn it. Dignity would save the "person" buried in secular, and later revolutionary, politics from its own misguided proponents, and make it the foundation stone of a spiritual community rather than the materialist totalitarianism of communism and fascism alike.²⁵

Vialatoux posed his question whether to give individual or group dignity priority in early 1937, but far from crying in the wilderness against totalitarianism, by summertime when he gave his lecture, it must have seemed like the individualist option had garnered the highest possible support: from the Pope himself. It was for this reason above all—and not because of the Irish constitution—that March 1937 was a great month for civil society Catholics. That month, stung by the failure of earlier overtures towards and negotiations with Nazi Germany, Pope Pius XI condemned German incursion on church rights in "Mit brennender Sorge," and a week later issued his stirring encyclical letter *Divini redemptoris* "on atheistic communism." The dignity of the individual surged in world public dis-

23. Joseph Vialatoux, *Dignité du groupe? Ou de la personne humaine?: Physique et métaphysique de l'ordre des valeurs*, in *LA PERSONNE HUMAINE EN PÉRIL* (*Semaines Sociales de France*, 1932) (Fr.). On Vialatoux, see Emmanuel Gabelieri, *Catholicisme social et 'métaphysique en action': La pensée de J. Vialatoux*, 10 *THEOPHYLON* 2, 9, 9-43 (2004) (Fr.).

24. Vialatoux, *supra* note 23.

25. *Id.* at 123, 132-33.

course essentially due to *Divini redemptoris*. Interestingly, however, “dignity” was basic only in the second, anticommunist encyclical letter. (Within Catholicism, encyclicals are major events, rooted in papal infallibility since its nineteenth century annunciation; they are always touchstones of Catholic thought and widely received and discussed.)

In fact, the failure to respect the dignity of the human person was repeatedly identified as communism’s central error for decades starting in March 1937. Communism, the text reads, “strips man of his liberty, robs human personality of all its dignity, and removes all the moral restraints that check the eruptions of blind impulse.”²⁶ Simultaneously too authoritarian and too liberatory, communism reduced man to matter and thus also interfered with the source of moral agency. That communism “denies the rights, dignity and liberty of human personality” thus mainly made it an affront to moral norms.²⁷ Put differently, dignity offered an individualism that, far from atomizing humanity, offered the true first principle of community and society, for “each individual man in the dignity of his human personality ... is supplied with all that is necessary for the exercise of his social functions.”²⁸ It was thus not strange that in Irish hands, individual dignity connected with the common good and the theological virtues (likewise constitutionalized), since it shared in the consensus phobia of basing politics on an apparently destitute secular individualism.

Ignored in the contemporary literature on “human dignity,” *Divini redemptoris* was epoch-making, for it gave the concept as an incident of individuals or persons by far its highest profile entry in world politics to that date. It also gave a lift to the civil society Catholics’ insistence that dignity did not exclusively attach to groups. And the crucial revisions of the Irish Constitution that led to the appearance of individual dignity in its preamble also occurred in this period—very precisely, in the immediate aftermath of the encyclical. This accidental coincidence forms the basis of my case about what dignity meant when it became an Irish touchstone, anticipating many later developments.

4. IRELAND AND THE COMING OF RELIGIOUS CONSTITUTIONALISM

The many historians of Ireland’s Constitution, notably the accomplished Dermot Keogh, have simply missed the relevance of its dignitarian turn. Unaware of Ireland’s comparative priority when it comes to dignity, they have therefore failed to place the document in international context to

26. POPE PIUS XI, *DIVINI REDEMPTORIS* (1937).

27. *Id.*

28. *Id.* On the encyclical in the larger context of the Church’s anticommunist politics, see Giuliana Chamedes, *Reinventing Christian Europe: Vatican Diplomacy, Transnational Anticommunism, and the Erosion of the Church-State Divide*, ch. 6 (2012) (unpublished Ph.D. dissertation, Columbia University) (on file with author).

explain this priority.²⁹ The Irish Constitution, of course, needs to be read in a number of contexts, of which international Catholic thought and politics, my focus, is merely one. But this context matters because the Irish Constitution registered an international development that would later mark the UN Charter and the Basic Law—and thus make possible everything that followed based on their language.

Éamon de Valera, Fianna Fáil party leader and, from 1932, new Irish prime minister, wrote the Irish Constitution. After brief and informal consultation with a tiny group of advisers, he unveiled his handiwork in April 1937 for approval. Though the wave of the Catholic future may well have seemed to be corporatist constitutionalism on the European Continent at this moment, the Irish Constitution clearly could not go there, in spite of the hopes of some Irish Catholic integralists consulted during the process. De Valera was not an enemy of democracy (and in any case it is doubtful Great Britain would allowed him to take Ireland down the Spanish and Portuguese road), but he did help bring about a new kind of democracy. An evanescent movement of Irish fascists trumpeting Catholic principle, known as the Blueshirts, rose and fell in the mid-1930s, and around the same time as the Constitution was in preparation, Paddy Belton's fearsomely reactionary militant group, the Irish Christian Front, emerged.³⁰ But de Valera had no truck with these groups, nor with any other version of undemocratic corporatism.

Indeed, the primary impulse for engineering a new constitutional process was a negative one. De Valera had long since committed himself to scuttling the Constitution of the Irish Free State of 1922 in the name of a new order. That the Anglo-Irish treaty of 1921 had not allowed Ireland full sovereignty, and that the first Irish constitution imposed a galling loyalty oath to the British crown (which de Valera deleted immediately in 1933), gave them so repulsive a stigma as to make them unsalvageable.³¹ The happenstance that the drafting of de Valera's long-sought replacement of the unacceptable text with a new one occurred in the winter and spring of 1936-37 proved consequential for the history of dignity, however. The process replaced a document of the "new constitutionalism" (and the earlier era of progress Mirkin-Guetzévitch celebrated) with a very different constitutional affair.

The Irish Constitution was not just a "negative" success after all. The country's move beyond its prior dominion constitution to assert its "rightful independence" reflected Catholic social thought in its positive outlook in a series of ways, and not surprising given the centrality of Catholicism to

29. See, e.g., DERMOT KEOGH AND ANDREW J. MCCARTHY, *THE MAKING OF THE IRISH CONSTITUTION 1937: BUNREACTH NA HÉIREANN* (1997) (striking for its inattention to the preamble). See also V.T.H. Delaney, *The Constitution of Ireland: Its Origins and Development*, 12 U. TORONTO L.J. 1, 1-26 (1957).

30. FEARGHAL MCGARRY, *IRISH POLITICS AND THE SPANISH CIVIL WAR* ch. 4 (1999).

31. See generally LEO KOHN, *THE CONSTITUTION OF THE IRISH FREE STATE* (1934). For de Valera's views, see, for example, Ronan Fanning, *Mr. De Valera Drafts a Constitution*, in *DE VALERA'S CONSTITUTION AND OURS* 34 (Brian Farrell ed., 1988).

Irish nationalism in the 1930s and long after.³² A devoted Catholic passionately committed to the greater presence of the country's dominant religion in the constitution, de Valera was above all a politician. He deftly maneuvered to take account of the views of the episcopacy and various Catholic authorities while also assuming final control of the details of drafting. In particular, de Valera saw the preamble as the place to achieve symbolic Christianization of the document, while specific articles—notably on church and state, family, and property—would offer a considerable incorporation (though not total lock) of Catholic social thought into Irish politics. In this approach, de Valera may have been more canny than most comparative scholars of constitutions, who regularly slight preambles, though they are the most meaningful and memorable parts of founding texts to citizens.³³

In the preamble and in general, de Valera never wanted to go, nor could go, as far as reactionary or even doctrinally conservative Catholics desired.³⁴ The constitutionalization of the freedom and dignity of the individual, in short, can be taken above all as a symbol of de Valera's larger balancing act crafting a Christian Democratic synthesis throughout the document. In an era of the victory of Catholic corporatism or outright fascism, Ireland proved a peripheral laboratory of civil society Catholicism or

32. In a recent piece on another subject, historian Perry Anderson makes the following pertinent (though perhaps outrageous) comparative remarks:

In the history of 20th-century nationalism, there is a distinct sub-group in which religion played a central organising role from the start, providing so to speak the genetic code of the movement. The most significant cases are those which eventually founded stable parliamentary democracies. The three leading states of this type in the world today are Ireland, Israel and India. In all three, the nationalist party that came to power after independence—Fine Gael, Mapai, Congress—distanced itself from the confessional undertow of the struggle without ever being able to tackle its legacy head-on. In each case, as the ruling party gradually lost its lustre, it was outflanked by a more extreme rival that had fewer inhibitions about appealing directly to the theological passions aroused by the original struggle: Fianna Fail, Likud, BJP. The success of these parties was due not just to the faltering of the first wave of office-holders, but to their ability to articulate openly what had always been latent in the national movement, but neither candidly acknowledged nor consistently repudiated. They could claim, with a certain justice, to be legitimate heirs of the original cause. In each case, the setting was a parliamentary system, in which they operated constitutionally, if in each case with certain prewar sympathies for European fascism. . . . The Irish reversion came within a decade of independence—its carrier was the genuinely more popular and radical wing of the national movement, with the greatest anti-colonial legitimacy—and enjoyed the longest ascendancy, only finally collapsing last year.

Perry Anderson, *After Nehru*, 34 LONDON REV. BOOKS 21 (2012).

33. In an exception to this generalization, Mark Tushnet in fact mentions the Irish preamble as a good example of "expressive constitutionalism." See Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 106 YALE L.J. 1225, 1273 (1999).

34. "De Valera had little to nothing in common with the authoritarian Catholic leaders of the 1930s," Keogh remarks, a bit apologetically. 'He did not make a fetish out of religion like the 'monkish' Salazar of Portugal. He was repelled by the extremism of General Francisco Franco's *crusada*. De Valera exhibited none of the demagoguery practised by the Central European Catholic dictators of the 1930s. . . . [He was] both patriotic and loyally Roman Catholic, but in a very independent way.'" Dermot Keogh, *Church, State, and Society, in DE VALERA'S CONSTITUTION*, *supra* note 31, at 104. But he had even less in common with socialists and communists, who offered the main alternative in many Catholic countries to religious authoritarianism, until they were brutally suppressed.

even post-World War II Christian Democracy. Dignity now meant more than the anticommunist politics of *Divini redemptoris*, for de Valera's registration of the dignitarian individualist, rather than simply the dignitarian corporatist strand of political Catholicism of the moment, encapsulated this broader stance towards the place of religion in politics and the availability of a third-way religious constitutionalism. Negotiating between forsaken secular liberalism and ascendant Catholic reaction, it offered religiously-inflected conservative democracy. This project powerfully marked the emergence of constitutional dignity. Illustratively, when Oakeshott concluded his compilation of sources on "Catholicism" as a free-standing option in European political thought in 1939, he reprinted the Irish Constitution's preamble and most revealing articles.³⁵

Comparing de Valera's constitution with the 1922 predecessor he patriotically scuttled makes this graphically clear. The earlier document had very much been in the spirit of the liberal "new constitutionalism" of the immediate moment after World War I in its attitudes to church and state, religious pluralism, and gender. Its 1937 replacement was a Christianizing document of a "newer" constitutionalism of religious democracy.³⁶ Its approach to property, for example, drew substantially on *Quadragesimo anno*, while its article on religion acknowledged the Catholic Church's "special position." Its article on family and gender perhaps went furthest in qualifying the secular liberalism of the prior constitutional exercise.

Irish feminists, agitating for the group most obviously affected by such changes, responded to its consequences immediately and with outrage. The new draft constitution deleted the existing constitution's promise of equal rights without distinction to sex, which feminists feared might even strip women of the hard-won vote. (They succeeded in restoring the clause in ratification debates.) And as ratified, the constitution's controversial Article 41 enshrined a traditionalist vision of the family. On a symbolic level, the article made clear that whatever the dignity of persons meant, it was inseparable from the natural priority and social centrality of families, which in turn depended on women's "life within the home." More substantively, the article constitutionally prohibited divorce, a prohibition lifted only six decades later in the constitution's fifteenth amendment.³⁷

35. Oakeshott, *supra* note 20, at 72-77.

36. Noel Browne, *Church and State in Modern Ireland*, in *IRELAND'S EVOLVING CONSTITUTION, 1937-97: COLLECTED ESSAYS 46-47* (Tim Murphy & Patrick Twomey eds., 1998).

37. See Maria Luddy, *A 'Sinister and Retrogressive' Proposal: Irish Women's Opposition to the 1937 Draft Constitution*, 15 *TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY* 175-95 (2005). We are not far here from the Universal Declaration of Human Rights: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." Universal Declaration of Human Rights, art. 16(3), UN Doc. A1810 at 71 (Dec. 10, 1948). It is true that Ireland never took up the fully maternalist turn of other places where Catholic social thought was enacted as authoritarian policy in the era. For comparison's sake, see FRANCINE MUEL-DREYFUS, *VICHY AND THE ETERNAL FEMININE: A CONTRIBUTION TO THE POLITICAL SOCIOLOGY OF GENDER* part 3 (Kathleen A. Johnson, trans., 2001). For how de Valera and others squared these views with the immediately preceding provision on equality, Art. 40(1), with its allusion to equality of "human persons" drawn from contemporary Catholic social thought,

5. RELIGIOUS CONSTITUTIONALISM BETWEEN DRAFTING AND RATIFICATION

Thanks to recent publications, it is relatively easy to chart the formation of the preamble's allusion to "the dignity and freedom of the individual."³⁸ De Valera clearly saw the preamble doing essentially symbolic work, unlike the body of articles potentially justiciable in courts (including in constitutional review).³⁹ The comparatively uncontroversial preamble nonetheless underwent its own evolution.

A Jesuit Committee set up in late 1936 with de Valera's permission, led intellectually by Father Edward Cahill and basing its text primarily on the 1921 Polish Constitution, offered large parts of the surviving preamble.⁴⁰ Cahill, founder of the modest Irish branch of Catholic Action (An Ríoghacht) that elsewhere became strongly linked to civil society Catholicism, had definite views about the dominant role Catholicism should play in the drafting process and threw himself into his task. For him and his yet more conservative colleague Dennis Fahey, the Catholic prophylaxis against modern evils—from liberalism to communism, spread by Protestants, Jews, and freemasons—needed to provide the packaging and the details of the new document. In his own social thought, Cahill promoted *Quadragesimo anno* and adopted a version of corporatism known as vocationalism.⁴¹ However, even as late as the close of 1936, his main contribution occurred too early for him to inject individual dignity into the proceedings, and he did not mention it in his many communications with de Valera; moreover, the Polish document that provided a template for the Jesuits didn't affiliate with the concept.

As the process went on in spring, the draft constitutions that de Valera circulated to various circles from March 16, 1937 didn't yet include the preamble—with which de Valera and his staff appear, on the basis on the original Jesuit suggestions, to have tinkered on their own throughout the peri-

see ORAN DOYLE, CONSTITUTIONAL EQUALITY LAW 56-60 (2004).

38. IRISH CONSTITUTION (1937). I rely largely here on the new archival compilation, THE ORIGINS OF THE IRISH CONSTITUTION 1928-1941 (Gerard Hogan ed., 2012), along with the Royal Irish Academy website at <http://www.ria.ie/research/oic.aspx> for further documents.

39. For the original absence and later rise in enforceability of preambular language, see Teresa Iglesias, *The Dignity of the Individual in the Irish Constitution: The Importance of the Preamble*, 89 STUDIES: IRISH Q. REV. 19, 19-34 (2000).

40. Hogan, *supra* note 38, at 247. I note in passing that the Polish document does have a potential claim to be the first example of religious constitutionalism, especially given its role as Irish template fifteen years later, though there are arguments on the other side, making it more part of Boris Mirkine-Guetzévitch's picture of a wave of liberal constitutionalism in the east after World War I.

41. For his views in the early 1930s, which occasionally referenced dignity, see EDWARD CAHILL, THE FRAMEWORK OF A CHRISTIAN STATE: AN INTRODUCTION TO SOCIAL SCIENCE 278-82, 288, 455-56 (1932); THE SOCIAL RIGHTS OF OUR DIVINE LORD JESUS CHRIST, THE KING (Dennis Fahey, trans., 1932). Both are highly critical of "liberalism" in the name of Catholic politics. See also Seán Faughnan, *The Jesuits and the Drafting of the Irish Constitution of 1937*, 26 IRISH HISTORICAL STUDIES 79, 101 (1988).

od. Three days after the first rough draft, *Divini redemptoris* was issued to wide global reception, including in Ireland, and especially in *The Irish Press*, the newspaper de Valera had helped found.⁴² There is no better evidence than this matter of timing that the encyclical inspired the insertion of dignity. At this point, de Valera may have made the crucial revisions on his own, or with the advice of John Charles McQuaid, then president of Blackrock College (later Dublin's archbishop), and de Valera's close contact in this decisive period.⁴³ In any event, when de Valera met on April 3, 1937 with the Pope's ambassador or nuncio, he showed him a draft of a preamble invoking "the dignity and freedom of the citizens."⁴⁴ By April 11, in new documents sent to the papal nuncio, the preamble's phrase had assumed its final form—an important revision since to restrict dignity to "citizens" might seem to ignore its natural foundations and thus its role in constraining the state.⁴⁵

No evidence I have seen contains any discussion of, let alone dispute around, these changes—an unsurprising fact given that the dignity clause is much more important in retrospect than it was at the time. (Often what later seems like an extraordinary departure occurs without fanfare.) But the documentation is rich enough to provide a clear sense of the timing of the constitutionalization of dignity, in the immediate aftermath of *Divini redemptoris*, and thus provides the clue to what it meant. Its linkage with constitutionalism, however, could not help but associate individual dignity with a new sort of political enterprise. Religious change in recent decades has left de Valera open to constant and severe criticism for how far Catholic social thought about the role and rights of families, education, property, and the Church itself impacted his vision. At the time, however, de Valera worried most—and rightly so—about disappointing his most fervent Catholic advisers.

In particular, even as feminist complaints were marginalized, a huge dispute swirled throughout this period (and indeed long after) around the wording of Article 44, which Cahill and others wanted to name "the Catholic Church as the true Christian Church." But in spite of his own apparent

42. The Press was also the paper closest to de Valera's *Fianna Fáil*, and covered the encyclical on its front page. *Deceived into Aiding Communism – These Will Be Its First Victims, Says the Supreme Pontiff*, IRISH PRESS, Mar. 19, 1937; see also *Holy Father Denounces Communism*, IRISH INDEPENDENT, Mar. 19, 1937; *Communism Assailed*, IRISH TIMES, Mar. 19, 1937.

43. JOHN COONEY, JOHN CHARLES MCQUAID: RULER OF CATHOLIC IRELAND 96-97 (2000). See generally *id.* at ch. 8, which overstates McQuaid's role generally but rightly gives him special importance with respect to the preamble. McQuaid also gave de Valera a copy (which he read) of the summary of Catholic social teaching originating from the neo-Scholastic circles around Belgian Cardinal Désiré-Joseph Mercier, which invokes "the eminent dignity of the human person," but this appears to have occurred somewhat earlier, so the preambular changes seem to me best explained by the timing and prominence of the encyclical. See UNION INTERNATIONALE D'ÉTUDES SOCIALES, LE CODE SOCIAL: ESSAI D'UNE SYNTHÈSE SOCIALE CATHOLIQUE 30 (1927, 1934) (Fr.); cf. FRANK LONGFORD & THOMAS O'NEILL, EAMON DE VALERA 296 (1971).

44. Hogan, *supra* note 38, at 449 (Document 123, April 3, 1937).

45. *Id.* at 462 (Document 135, April 11, 1937).

sympathies, de Valera ultimately understood he could not do so, setting out to balance Catholicism's preeminence with acknowledgment of minority faiths and religious freedom.⁴⁶ It was, after all, a country with a Protestant population of twenty-five percent (if one included the contested north, which the constitution claimed as part of the nation). Article 44 illustrated, once again, that the larger constitutional effort balanced between competing extremes of secular liberalism and religious authoritarianism.

It also caused no little difficulty for de Valera in his search for ecclesiastical imprimatur. In mid-April, two weeks before unveiling his handiwork to the public, he sent his emissary Joseph Walshe to Rome for endorsement. But Eugenio Pacelli, then-Vatican Secretary of State communicating for the already sick pontiff whom he would succeed two years later, refused to comply. Pacelli reminded Walshe that failure to acknowledge the Catholic Church as the true one was technically heretical, though Pacelli said he grasped that de Valera felt his situation forced him into theological error. "*Ni approvo ni non disapprovo; taceremo*" (I don't approve, but I also don't disapprove; I will remain silent), Pacelli told Walshe in the Pope's name. This was nonetheless a crushing result for de Valera, who had striven to explain to Rome that he was constrained by the fact of his Protestant minority from the more full-blown Catholic ideal he personally desired for the document. "It did not shake him when I contrasted the expressly Christian character of our new Constitution with the liberalism (continental sense) of the old," Walshe reported back glumly.⁴⁷

De Valera thus didn't go as far as some of his Catholic advisers and ecclesiastical authorities desired. But he did intend the Irish Constitution to mark the appearance of a new sort of Christian state, and the preamble in which dignity now appeared had a special role here. In the pained negotiations with the Vatican, dignity didn't come up and wasn't enough to convince Pius XI (or the future Pius XII, speaking in his name) to sign off. Nonetheless, when in the ratification process some months later de Valera faced unexpected opposition to the constitution for its excessive secularism (rather than its excessive confessionalism), the Christian credentials of dignity proved helpful. In spite of the Pope's earlier reluctance, the Vatican newspaper, *L'Osservatore Romano*, providentially seemed to endorse the constitution. "It differs from other constitutions," it noted, in an affirmation reported by the *Irish Press* that had a large impact in satisfying the religious

46. No anti-Semite, unlike a great many Catholics at the time, de Valera was in fact on exceptionally friendly terms with Ireland's chief rabbi through 1936, Isaac Herzog, who once sheltered the future statesman when he was being pursued by authorities as a terrorist. Herzog, who then became the chief rabbi of Palestine (and later Israel), so admired de Valera's religious nationalism — including his 1937 constitution — that he often cited both as potential models for Jews in the face of a then-dominant secular nationalism. See SHULAMIT ELIASH, *THE HARP AND THE SHIELD OF DAVID: IRELAND, ZIONISM AND THE STATE OF ISRAEL* 49-70 (2007); DERMOT KEOGH, *JEWS IN TWENTIETH-CENTURY IRELAND: REFUGEES, ANTISEMITISM, AND THE HOLOCAUST* 77, 110 (1998). For the latest word on the startling contiguity of Catholicism and racism in the era, see JOHN CONNELLY, *FROM ENEMY TO BROTHER: THE REVOLUTION IN CATHOLIC TEACHING ON THE JEWS, 1933-1965* ch. 1-3 (2012).

47. Hogan, *supra* note 38, at 506 (Document 155, April 22, 1937).

vote, “because it is inspired by respect for the faith of the people, the dignity of the person, the sanctity of the family, of private property, and of social democracy. These principles are applied in a unique religious spirit, which animates the whole constitution.”⁴⁸ It seems that Ireland’s pioneering venture in a newer constitutionalism, in which individual dignity came to the fore, was generally understood in these terms by its friends as well as by its critics.⁴⁹

6. FROM THE IRISH CONSTITUTION TO THE BASIC LAW

That some Catholics sought an alternative to authoritarian and fascist solutions by appealing to individual human dignity in these years, of course, doesn’t at all mean that the faltering republics of Europe were generally defended in their terms. It simply means that some Catholics hewed out a conceptual possibility that was to have an unlikely fate in later history (up to and including our era). Liberals like Mirkine-Guetzévitch didn’t frame their republicanism in dignitarian terms, either before or after World War II. Further, through the war just a few Catholics believed that allegiance to “human dignity” entailed allegiance to “human rights,” which most Catholics following modern popes still considered the baleful child of the French Revolution and secularist evil, and which Catholics under authoritarian regimes were commanded to spurn. Indeed Catholic thinker Jacques Maritain, chief theoretician of civil society Catholicism and later premier interpreter of the Universal Declaration, didn’t connect dignity to “human rights” until 1942 at the earliest.⁵⁰

But between 1942 and 1945, as the Allied war effort after Stalingrad looked forward to its ultimate triumph, more and more Catholics in general linked “the dignity of the human person” hewed out in the prior decade to “human rights.” Pius XI had not ceased the rhetoric of dignity before his death. “Christian teaching alone gives full meaning to the demands of human rights and liberty because it alone gives worth and dignity to human personality,” the *New York Times* reported him saying in late 1938—a nearly

48. See DERMOT KEOGH, *THE VATICAN, THE BISHOPS, AND IRISH POLITICS 1919-1939* at 219 (1986) (quoting an *Irish Press* article from May 17, 1937).

49. Cf. Arthur W. Bromage & Mary C. Bromage, *The Irish Constitution: A Discussion of Its Theoretical Aspects*, 2 *REV. POLITICS* 145, 145-66 (1940). Certainly the document went far enough as to allow disputes to swirl for many decades around the degree to which Ireland had made natural law a constraint on democratic choices as well as judicial interpretation. Consider Vincent Grogan, *The Constitution and the Natural Law*, 7 *CHRISTUS REX* 201, 201-18 (1954); Declan Costello, *The Natural Law and the Irish Constitution*, 45 *STUDIES* 403, 403-14 (1956); JOHN MAURICE KELLY, *FUNDAMENTAL RIGHTS IN THE IRISH LAW AND CONSTITUTION* 38-45 (1961).

50. See DANIELE LORENZINI, *JACQUES MARITAIN E I DIRITTE UMANI: FRA TOTALITARISMO, ANTISEMITISMO, E DEMOCRAZIA (1936-1951)* (2012) (Ital.). Incidentally, in wartime exile Maritain and Mirkine-Guetzévitch became friends in New York City, and the former even claimed at the latter’s memorial to have sponsored his conversion. See Maritain, *Ceux qui nous consolent d’appartenir à la race humaine*, in *HOMMAGE À B. MIRKINE-GUETZÉVITCH*, *supra* note 9, at 99 (Fr.).

exact anticipation of the Universal Declaration's formula ten years later.⁵¹ Even while remaining publicly silent on de Valera's constitution, Pius XII said similar things, in tune with *Divini redemptoris*, both before and after his election as Pope.⁵² But in wartime, his public claims about human dignity accelerated to a striking degree. In his high-profile Christmas message to the world for 1942, Pius XII offered five principles to inform a future peace, of which "the dignity of the human person" was the very first. Such wartime invocations provided a bridge between what might otherwise have been a passing peculiarity of a few dissident theorists, along with the Irish Constitution, and the postwar trajectory of the concept.

Thanks to Pius XII, in fact, individual dignity became incredibly common stuff across the Atlantic during the later phases of World War II, though much more work remains to be done to excavate wartime percolation. Heroically, those few who joined French Resistance on Catholic principle to criticize the Vichy regime's popular claim to restore religious morality and civilization found in human dignity authority for human rights.⁵³ To take another of sundry examples, Edmund A. Walsh, American Jesuit (and founder of the Georgetown University School of Foreign Service that still bears his name), wrote in 1942:

The conflict is between the rights of individual men, endowed with the dignity of the human personality and elevated to the adopted sonship of God, on the one side, and the dehumanized, totalitarian state of Fichte, Hegel, Treitschke, Nietzsche, Hitler and the Tanaka Memorial of Japan on the other. This means not a world campaign of conventional belligerents [but] a World Revolution seeking to capture the soul of humanity.⁵⁴

How many people understood the global conflict as a crusade for dignity is unclear, but Catholics on the right side often did.

As in interwar debates, dignity in such usages carried with it a communitarian and religious streak intended to distinguish it from the secularism of nineteenth-century liberalism. Writing in *Fortune* magazine shortly after discovering the contiguity of dignity and rights, Maritain castigated

51. *Pope Bids Church to Guard Man's Rights*, N.Y. TIMES, Oct. 13, 1938.

52. See *Lettre de S. Ém. le Cardinal Pacelli*, in *LA PERSONNE HUMAINE EN PÉRIL*, *supra* note 23, which has a section on the "Natural Dignity of the Person." He also connected the notion with rights: "a vast and dangerous conspiracy," he insisted, threatens unlike any prior occasion "the inviolability of the human person that, in his sovereign wisdom and infinite goodness, the Creator has honored with an incomparable dignity. ... [I]f a society adopted the pretense that it could diminish the dignity of the human person in refusing it all or some of the rights that come to it from God, it would miss its goal." *Id.* at 5-8.

53. See Renée Bédarida, *Dans la tourmente 1940-1944: Des droits de la personne aux droits de l'homme*, in *LES CATHOLIQUES FRANÇAIS ET L'HÉRITAGE DE 1789* at 206-10 (Pierre Colin ed., 1989) (Fr.) (noting that the concrete difficulty for Catholics in the Resistance was alliance with the dominant communists which "human dignity" had meant condemning shortly before).

54. See PATRICK MCNAMARA, *A CATHOLIC COLD WAR: EDMUND A. WALSH, S.J., AND THE POLITICS OF AMERICAN ANTICOMMUNISM* 114 (2005).

modern man for “claim[ing] human rights and dignity—without God, for his ideology grounded human rights and human dignity in a godlike, infinite autonomy of human will.”⁵⁵ But he now referred to the apparently alternative “concept of, and devotion to, the rights of the human person” as “the most significant political improvement of modern times.”⁵⁶ By the time of Pius XII’s exceptionally influential Christmas message to the world in 1944, human dignity in a similarly invidious conception teemed to a degree completely unprecedented even by prior papal exhortation.

A telos for and check on democracy, and a commitment that would save it from leveling equality and secularizing materialism, the dignity of the human person in fact became one of Pius XII’s key slogans for good. By late wartime, with authoritarian corporatism (or outright fascism) both outmoded, dignity for Pius XII implied conservative democracy to keep communist or even liberal politics at bay and to make Christian moral norms central. “The holy story of Christmas proclaims this inviolable dignity of man with a vigor and authority that cannot be gainsaid—an authority and vigor that infinitely transcends that which all possible declarations of the rights of man could achieve,” the Pope observed.⁵⁷ True Christian democracy would protect human dignity, he warned. False democracy, by contrast, would sacrifice it on the profane altar of secularism, materialism, and relativism, subordinating the natural law and common good to the whims of the masses, exaggerating defensible liberty into appetitive license, and accelerating acceptable equality into colorless uniformity—all travesties of human dignity rather than its enthronement. Continental Western Europe followed this advice after World War II, with re-stabilization occurring under the auspices of conservative democracy, supervised by a new sort of Christian political party, with Catholics in the lead.⁵⁸ For a long time, dignity summarized these developments in a single term. The Irish Constitution, in spite of its initially accidental and local breakthrough, was thus a premonitory document of the direction political Catholicism would eventually take after guns decided the larger direction of history.⁵⁹

55. Jacques Maritain, *Christian Humanism*, FORTUNE 106 (Apr. 1942).

56. *Id.*

57. Pius XII, *True and False Democracy*, MAJOR ADDRESSES 88 (Vincent Yzermans ed., 2d vol. 1961). Pius XII’s further comment that “democracy, taken in the broad sense, admits of various forms, and can be realized in monarchies as well as in republics,” *id.* at 80, might suggest a somewhat idiosyncratic understanding of the term, except that political theorists like Maritain agreed that what made a regime democratic was not formal structure but whether the natural law was respected and the common good achieved through it.

58. For the best general account, see Martin Conway, *Democracy in Postwar Western Europe: The Triumph of a Political Model*, 32 EUROPEAN HISTORY Q. 59-84 (2002); JAN-WERNER MUELLER, *CONTESTING DEMOCRACY: POLITICAL IDEAS IN TWENTIETH-CENTURY EUROPE* ch. 4 (2011).

59. The continuity or “transwar” thesis I offer is thus radically different from Whitman’s unconvincing proposal that the Nazi concern with honor flowed into post-World War II appeals to human dignity. Allowing a more plausible view about long-term social trends in status to explain specific events and short-term political and legal phenomena it doesn’t fit. Whitman also neglects the rather important fact that the Nazis had no actual discourse of human dignity, where transnational Christians did, and massively so, across the same era. James Q. Whitman, *On Nazi ‘Honour’ and the New European ‘Dignity’*, in DARKER LEGACIES OF LAW IN EUROPE:

It was mainly papal usage that proved of most direct relevance to postwar affairs—the bridge from the late 1930s to the late 1940s. Arguably, even the U.N. Charter registered the papal usage, for there is no other obvious source. As political theorist Charles Beitz has lately discovered, it was Barnard College dean Virginia Gildersleeve, in her cosmetic changes made to South African politician Jan Smuts’s draft of the preamble to the U.N. Charter in 1945, who singlehandedly introduced the allusion to “the dignity and worth of the human person.” But it is self-evident that the prominence of this notion in wartime, including its connection to rights, was due to the Pope more than all others.⁶⁰

Not surprisingly, when conservative democracy came to postwar Germany and elsewhere, dignity could now have a crucial role in constitutions that—like Ireland’s before them—were grounded on the Christian God and human dignity together, as first principles of a new sort of constitutional regime. This gesture occurred in Germany in the form of the several sub-federal *Länder* constitutions before it was repeated in the Basic Law of the new federal republic. Unlike Austria, which restored the post-World War I liberal constitution Hans Kelsen had drafted, West Germany and Western Europe generally were allowed by the Allies (especially the Americans) to go another way. First both in time and significance was the absolutely critical Bavarian Constitution of 1946, whose preamble, written personally by Christian Democrat Alois Hundhammer, began as follows: “Mindful of the physical devastation which the survivors of the 2nd World War were led into by a godless state and social order lacking in all conscience or respect for human dignity. . . .”⁶¹ The conflict was clearly the immediate background in the mind of framers of the German documents—even if the Holocaust of European Jewry was clearly not. But constitutions are always also prospective blueprints for rule, and in the Bavarian Constitution, God, dig-

THE SHADOW OF NATIONAL SOCIALISM OVER EUROPE AND ITS LEGAL TRADITIONS 243 (Christian Joerges & Navraj Singh Ghaleigh eds., 2003). See also Gerald Neuman, *On Fascist Honour and European Dignity: A Sceptical Response*, in *id.* at 264 (a brief rejoinder to Whitman).

60. Charles Beitz, *Human Dignity and Human Rights* (manuscript on file with author); see also Christopher McCrudden, *Dignity and the Judicial Interpretation of Rights*, 19 EUROPEAN J. INT’L L. 655, 675-78 (2008). No American sources, in particular, conjoin human dignity and human rights earlier than or outside the framework of the Catholic sources mentioned above, and in the Pope’s widely circulating language above all. For documentation of Gildersleeve’s deep-seated anti-Semitism, defeating initial intuitions about why she might have thought it important to add dignity at the end of World War II, see STEPHEN H. NORWOOD, *THE THIRD REICH IN THE IVORY TOWER: COMPLICITY AND CONFLICT ON AMERICAN CAMPUSES* 104-05, 130, 236 (2009).

61. VERFASSUNG DES FREISTAATES BAYERN, Dec. 2, 1946, available in English at www.bayern.landtag.de/fileadmin/scripts/get_file/Bavarian_Const_2003_13F.pdf. On Hundhammer’s role, and his participation in then dominant religious appeals to natural law, see OLIVER BRAUN, *KONSERVATIVES EXISTENZ IN DER MODERNE: DAS POLITISCHE WELTBILD ALOIS HUNDHAMMERS, 1900-1974* at 318-20, 282-310 (2006) (Ger.). For a more general picture of the impact of Catholicism on constitutional origins, see BURKHARD VON SCHEWICK, *DIE KATHOLISCHE KIRCHE UND DIE ENTSTEHUNG DER VERFASSUNGEN IN WESTDEUTSCHLAND 1945-1950* (1980) (Ger.). I reserve further writing on the origins of the *Grundgesetz* for later. See, e.g., CHRISTOPH GOOS, “INNERE FREIHEIT”: EINE REKONSTRUKTION DES GRUNDGESETZLICHEN WÜRDEBEGRIFFS (2012) (Ger.).

nity, and morality were intended to play a special role, much like in Ireland before. As much or more influenced by Christian Democratic thinking, the Italian Constitution (1947)—before the *Grundgesetz* and Universal Declaration—likewise includes both dignity and “the human person,” though not in its preamble or as its first article. It also constitutionally preserved the fascist-era Lateran Treaty with the Holy See, whose provisions concerning religion and public life continue to be at stake in current controversy.⁶² Germany in 1949 was part of a trend, found wherever Christian Democracy was strong (and exclusively there for a long time), to found new republics on—and limit them through—the morality of dignity. (Mirkin-Guetzévitch did not note it, but the strong presence of Christian Democrats in the French constituent assembly allowed the preamble of both the abortive April and final November 1946 constitutions of the new Fourth Republic to begin with the human person. The constitutions, however, did not allude to God or dignity, and the country’s Christian Democrats, through their *Mouvement républicain populaire* party, did not take power as they had in the rest of Continental Western Europe.)⁶³

All things considered, the framework that human dignity provided human rights and liberal constitutionalism in and through the war is hard to greet as an uncomplicated breakthrough—if it was not a retrograde concession. Human dignity mainly helped wrest both rights and constitutionalism from the heritage of the French Revolution specifically and from political secularism generally, with which they had hitherto been associated in European history. Now the latter were represented in transatlantic public culture as easy stepping stones to totalitarianism. Just as World War II had seen strange bedfellows in a popular front to defeat fascism, after that alliance fractured the Cold War united one-time enemies against a new threat, with fateful consequences for all concerned.⁶⁴

62. See, e.g., *Lautsi v. Italy*, Eur. Ct. H.R. (2011) (holding that state-mandated crucifixes in public school classrooms were not in violation of the right to freedom of conscience).

63. It begins: “Au lendemain de la victoire remportée par les peuples libres sur les régimes qui ont tenté d’asservir et de dégrader la personne humaine . . .” (In the aftermath of the victory won by the free peoples over the regimes that strove to subjugate and degrade the human person . . .”) (translation by author). RÉPUBLIQUE FRANÇAISE, CONSTITUTION DU 27 OCTOBRE 1946, Préambule. For the MRP’s role, see, e.g., ANDREW SHENNAN, *RETHINKING FRANCE: PLANS FOR RENEWAL, 1940-1946* ch. 4-5 (1989). Also worth a look, though a more complicated case, is the South Korean constitution of 1948, in which dignity figures as well.

64. Dignity’s main role for a long time remained public and private Cold War rhetoric, not constitutionalism, as Westerners generally adopted Catholicism’s understanding of the central failing of communism. A founding document of the American Cold War, NSC-68, states that the point of the struggle is the defense of human dignity. NAT’L SEC. COUNCIL, NSC-68: UNITED STATES OBJECTIVES AND PROGRAMS FOR NATIONAL SECURITY (Apr. 14, 1950). Harry S Truman agreed that “[b]oth religion and democracy are founded on one basic principle, the worth and dignity of the individual man and woman.” See WILLIAM INBODEN, *RELIGION AND AMERICAN FOREIGN POLICY, 1945-1960: THE SOUL OF CONTAINMENT* 109, *passim* (2010) (detailing wide-ranging evidence of human dignity in American Cold War discourse). For further details, see Giuliana Chamedes, *Pius XII, Rights Talk, and the Dawn of the Religious Cold War*, in *RELIGION AND HUMAN RIGHTS* (Devin O. Pendas ed., 2013).

7. DID THE IRISH SAVE CIVILIZATION? THE CONTINUITY OF DIGNITY

It's not my claim that the Irish Constitution is important in itself. Indeed, when Boris Mirkine-Guetzévitch put out the forlorn 1938 revision of his handbook of European constitutions, he took the corporatist Austrian and Portuguese constitutions to be much more significant, since they broke fundamentally (rather than, as in the Irish compromise, partially) with secular and liberal democracy.⁶⁵ The Irish Constitution matters not intrinsically but instrumentally: in the current enthusiasm over human dignity, it decisively establishes both the right chronology and the "original meaning" of its constitutionalization in the circumstances of religious democracy. It is, as it were, like a tape recorder that, because it was on at the right time, captures the moment in which an accident happened that still determines our discourse.

Needless to say, for the Catholic world and European politics generally, the Irish assignment of dignity to the individual human being in 1937—like the other tentative proposals of Christian Democracy at the time—certainly didn't settle matters. That took a war, in which illiberal corporatism was taken off the table as an option for political Catholicism, with much blood spilled in the process. Though the survival of "clerico-fascist" Spain and Portugal for many decades allowed some diehards to cherish the flame of reactionary dignity. Dermot Keogh long ago proposed seeing de Valera as a pioneering "Christian Democrat."⁶⁶ The trouble with this otherwise illuminating interpretation is that there was no Christian Democratic hegemony in Europe until after World War II—whose violence was required to open the possibility for its decades-long reign. But after it, de Valera's originally eccentric and peripheral synthesis of Catholicism and democracy suddenly became modish, and individualist dignity became a more prevalent foundation stone, in the West German Basic Law not least. Constitutional dignity entered history as part of what became the unanticipated post-World War II supremacy of Christian Democracy—and more broadly as an aspect of the earliest version of religious constitutionalism since gone global.

For looking around the world, no one could say that religious constitutionalism is a thing of the past. Indeed, the Irish case, in which constitutional dignity was born, might cast troubling light on this now familiar phenomenon. Some, it is true, laud religious constitutionalism on the grounds that it is an alternative to even less liberal politics as well as a transitional device towards even more liberal politics. Consider, for example, Jan-Werner Müller's suggestion that radical Islamism might follow the same path reactionary Catholicism once did thanks to Christian Democracy in theory and practice.⁶⁷ In the European history from which such general principles are extrapolated, however, religious constitutionalism *followed*

65. BORIS MIRKINE-GUETZÉVITCH, *LES CONSTITUTIONS DE L'EUROPE NOUVELLE* 49-54 (1938).

66. DERMOT KEOGH, *IRELAND AND EUROPE, 1918-1948 passim* (1988).

67. Jan-Werner Müller, *Making Muslim Democracies*, *BOSTON REV.*, Nov. 2010.

and *replaced* secular constitutionalism; and it ultimately prospered compared to fascist and authoritarian options thanks to the force of (somebody else's) arms. More theoretically, it is difficult to contend that formal constitutionalism is itself a causal factor of liberalization. When it comes to survival in the tempests of economic and political crisis, the twentieth-century record of constitutions—as Mirkine-Guetzévitch already knew—is definitely mixed.⁶⁸ And as the text of the new Hungarian constitutional preamble suggests, it is still the case that religious constitutionalism is a response to crisis: to this day one of its main functions is as a successor rather than a bridge to a more liberal regime.⁶⁹ As for religious constitutionalism as a transitional device, the Christian Democratic examples suggest that it can work to stabilize “constitutional theocracy” for a long time.⁷⁰ And if the passing of the Christian Democratic era of the post-World War II decades is a model (to the extent it has passed), it is one in which cultural secularization, not constitutional politics, did the trick.⁷¹

The crucible for human dignity that religious constitutionalism provided thus establishes a potentially troubling starting point. And starting points sometimes remain relevant—as the starting point of individual human dignity most certainly does, since the moralistic alternative it implies to secular freedom undoubtedly retains its salience in various quarters. (In U.S. history, for example, consider the uses of “dignity” in the Republican Party platform of 2012.)⁷² More generally, the functions and fate of the religious constitutionalism of the 1930s and since inspire little confidence that there is anything more to say for it than that there are worse alternatives.

68. See generally ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009).

69. *CONSTITUTION OF HUNGARY* (2011), preamble (structurally very similar to the Irish case discussed here in its conjunction of Christianity and dignity). It is all there: the centrality of human dignity, acknowledgment of “the role of Christianity in preserving nationhood,” along with the larger significance of “Christian Europe,” in a history back to St. Stephen. Most revealingly, there is a call for a return to morality after secularist (including in this case communist) incursion: “after the decades of the twentieth century which led to a state of moral decay, we have an abiding need for spiritual and intellectual renewal.” *Id.* Dignity also occurs in Iraq’s 2005 constitution and Libya’s interim constitution (in the preamble), likewise good examples of religious constitutionalism, though admittedly dignity is now part of the constitutional state of the art and one may infer little from its presence.

70. As religious constitutionalism is not in current atlases of global constitutionalism, further work would clearly be needed to frame any general theory of it. Compare David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. 1163, 1163-1257 (2011) and *THE SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* (Denis Galligan & Mila Versteeg eds., 2013).

71. See Hugh McLeod, *The Religious Crisis of the 1960s* (New York, 2007) for a start.

72. In this document, dignity is used five times, twice in relation to abortion and why it is wrong (including because the practice offends “the dignity of women”), once in relation to heterosexual marriage and why it must remain exclusive, once in relation to the military and why it should not be the site of “social experimentation,” and once in relation to veterans. See REPUBLICAN NATIONAL COMMITTEE, *WE BELIEVE IN AMERICA* 13, 31, 33, 42, 44, available at <http://www.gop.com/wp-content/uploads/2012/08/2012GOPPlatform.pdf>. For some thoughts on Anthony Kennedy’s allusions to the “dignity of marriage” in the recent case of *Windsor v. United States*, see Samuel Moyn, *Dignity in General and in American Constitutional Law*, HUMANITY (Oct. 22, 2013), <http://www.humanityjournal.org/blog/2013/10/dignity-general-and-american-constitutional-law>.

To the extent human dignity still remains continuous with its origins, and one can endorse religious constitutionalism only *faute de mieux*, both should be treated with caution. As Mirkine-Guetzévitch might have contended, constitutional freedom and constitutional dignity have mostly had separate trajectories in history. In spite of their happenstance entanglement in the middle of the twentieth century, perhaps they could again.

8. CONCEPTS AND CONTESTATION: THE DISCONTINUITY OF DIGNITY

But what about the rather different connotations human dignity has come to have and thus the different role that it can play? For it is also true that, both in theory and practice, starting points explain less and less as time passes about the course of the struggles that occur in their terms, whether at the level of constitutional keywords or in politics generally. In the history of words and concepts, including constitutional ones, genesis certainly doesn't account for use (let alone validity). And more than a half-century on, dignity's functions today are no longer fully controlled by its original deployments.

It was unexpected secularization that ultimately occurred in Ireland (and Germany), which also had the tributary effect of making human dignity open to new understandings. Those living under the regimes of the "newer constitutionalism" of Christian Democracy surely could depart from original meanings, and unquestionably did so as the post-World War II era wore on. In fact, in both Ireland and Germany, the huge influence of Catholicism on constitutional theory and practice has waned so substantially over the intervening decades that its founding centrality risks being forgotten or suppressed.⁷³ In any event, it is fair to say that human dignity is no longer tightly, let alone exclusively, tethered to the framework of religious constitutionalism.

In the end, therefore, my emphasis on religious constitutionalism not only acknowledges, but even insists that some rather recent account is required for the salience today of a very different version of human dignity.⁷⁴ In law, no doubt the wave of recent constitutions invoking human dignity, above all the South African constitution, is the main factor in the current preeminence of the concept. Famously, dignity in Germany was initially a *nicht interpretierte These* or strictly symbolic provision but German judges departed from this original understanding long ago, and the Irish story is

73. For the Irish case, see, for example, JOHN HENRY WHYTE, *CHURCH AND STATE IN MODERN IRELAND, 1923-1970* ch. 11 (1971). For Catholicism in the early years of the Basic Law, see Hans Maier, *Katholische Sozial- und Staatslehre und neuere deutsche Staatslehre*, 93 *ARCHIV DES ÖFFENTLICHEN RECHTS* 1, 1-36; FRIEDER GÜNTHER, *DENKEN VOM STAAT HER: DIE BUNDESDEUTSCHE STAATSRECHTSLEHRE ZWISCHEN DEZISION UND INTEGRATION 1949-1970* (2004) (Ger.).

74. For a good place to start on this problem, see Oliver Sensen, *Human Dignity in Historical Perspective: The Contemporary and Traditional Paradigms*, 10 *EUROPEAN J. OF POL. THEORY* 71, 71-91 (2006).

roughly similar.⁷⁵ Its role in judicial interpretation of old and new constitutional law in turn excites considerable attention today. Connected with the sudden relevance of, and commentary on, international human rights law, dignity is much more free-floating and contested than at the start. Its almost required status in constitutions in the last two decades means that dignity opens up specific fora for interpretation around the world, even if this process is potentially (though not necessarily) kept in boundaries by its concurrent interpretation in international human rights law.

In the academy, the belated and surprising return of Kantianism to prestige contributed a great deal, to be sure, with the proviso that contemporary secular liberals claiming Kant's mantle didn't turn to the touchstone of dignity until very late in their revivalism. Kant accorded individual dignity importance in his moral philosophy, but few of his followers have until recently. For most of the period since the 1940s, dignity was something like a proprietary Catholic concept, generally restricted to natural law circles.⁷⁶ Kantians before the recent present, both in their late nineteenth century guise with Hermann Cohen or late twentieth century guise with John Rawls, have not focused on it. Of the preeminent philosophers who have published a book, chapter, or article in the last few years on dignity, none featured or in most cases even mentioned it before then; the common assertion of dignity's immemorial theoretical presence simply does not fit with its strikingly meteoric rise. Preceded by Avishai Margalit (in *The Decent Society*), interventions by Seyla Benhabib (in *Dignity in Adversity*), Ronald Dworkin (in *Justice for Hedgehogs*, in which a central chapter is entitled "Dignity," and the epilogue, "Dignity Indivisible"), Jürgen Habermas (in "The Concept of Human Dignity..."), George Kateb (in *Human Dignity*), Michael Rosen (in *Dignity*) and Jeremy Waldron (in *Dignity, Rank, and Rights*) all date from 2010-12.⁷⁷ In international law, for a long time it was exclusively conservative naturalists in the guild, like Myres McDougal and especially Alfred Verdross (by far its most prominent promoter in Cold War international law anywhere), who organized their thought around

75. For judicial interpretation, see Iglesias, *supra* note 39; William Binchy, *Dignity as a Constitutional Concept*, in *THE IRISH CONSTITUTION: GOVERNANCE AND VALUES* (Eoin Carolan and Oran Doyle eds., 2008). More broadly, see, for example, Paolo G. Carozza, *Human Dignity in Constitutional Adjudication*, in *COMPARATIVE CONSTITUTIONAL LAW* (Tom Ginsburg and Rosalind Dixon eds., 2011).

76. Before recently, the main thinkers of note to explore (let alone advocate) dignity were conservatives. See, e.g., Aurel Kolnai, *Dignity*, 51 *PHILOSOPHY* 251-71 (1976); Robert Spaemann, *Über den Begriff der Menschenwürde*, in *MENSCHENRECHTE UND MENSCHENWÜRDE: HISTORISCHE VORAUSSETZUNGEN, SÄKULARE GESTALT, CHRISTLICHES VERSTÄNDNIS* (Ernst-Wolfgang Böckenförde and Robert Spaemann eds., 1987) (Ger.); Hans-Georg Gadamer, *Die Menschenwürde auf ihrem Weg von der Antike bis heute*, 12 *HUMANISTISCHE BILDUNG* 95-107 (1988) (Ger.).

77. Aside from already cited sources, see SEYLA BENHABIB, *DIGNITY IN ADVERSITY: HUMAN RIGHTS IN TROUBLED TIMES* (2011); RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (2011); GEORGE KATEB, *HUMAN DIGNITY* (2011); and, most stylishly, AVISHAI MARGALIT, *THE DECENT SOCIETY* (1996); Avishai Margalit, *Human Dignity between Kitsch and Deification*, 9 *HEDGEHOG REVIEW* 7-19 (2007). Apparently the crucial pioneer in contemporary Anglo-American philosophical discussion is THOMAS E. HILL, JR., *DIGNITY AND PRACTICAL REASON IN KANT'S MORAL THEORY* (1992).

human dignity.⁷⁸ In great numbers, since then, liberal international lawyers have now turned to it, generally concurring in the same move that philosophers have made towards Kantian thought as basic framework.⁷⁹

The priority that Kantianism has today in sometimes overlapping academic and legal circles occasionally prompts a wishful assumption about the constitutional presence of dignity. But just as the Fourteenth Amendment did not enact Herbert Spencer's *Social Statics*, as Justice Oliver Wendell Holmes famously put it, none of the early or perhaps even later constitutions featuring human dignity incorporate Kant's *Groundwork of the Metaphysics of Morals* by reference—especially on a contemporary, secular interpretation of Kant that gives individuals strong autonomy and trumping rights against state prerogative and collective goods. More generally, there is no historical evidence to support the proposition that constitutional dignity in its Christian Democratic guise reflects a commitment to deontology in ethics. If it originally posed a bar, it was much more to democracy in the name of a posited anterior morality, to stave off the risk of the secular incursion or “totalitarian” expansion of the state. It is true that in Catholic social thought a utilitarian basis for policy calling for hedonic calculation was also anathema, but not because it preferred the autonomy of Kantian persons. It insisted on *constraint* on autonomy, individual as well as collective. Dignity thus did not originally portend now-current debates concerning individual prerogatives versus collective goods—the distinction between which the notion of the “human person” was supposed to overcome.

Though it certainly illustrates the plasticity of words and concepts, human dignity's later trajectory in law and philosophy in a radically new direction is not necessarily a satisfying one. For redeployment of words and concepts occurs through the muddying of multifarious contestation rather than the simplicity of first coinage. The struggle to redefine may make spe-

78. See Myres S. McDougal, *Perspectives for an International Law of Human Dignity*, 53 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 107-36 (1959); Alfred Verdross, *Die Würde des Menschen in der abendländischen Rechtsphilosophie*, in NATURORDNUNG IN GESELLSCHAFT, STAAT, WIRTSCHAFT: FESTSCHRIFT FÜR JOHANNES MESSNER (Joseph Höffner et al. eds., 1961) (Ger.); *Die Würde des Menschen als Grundlage der Menschenrechte*, in RENÉ CASSIN: AMICORUM DISCIPULORUMQUE LIBER (1969) (Ger.); DIE WÜRDE DES MENSCHEN UND IHR VÖLKERRECHTLICHE SCHUTZ (1975) (Ger.). Verdross, a Viennese pupil of Kelsen's who turned to Catholic natural law, had been a loyal admirer of Dollfuss and ardent supporter of his regime before becoming postwar Austria's greatest international lawyer. For how he overlooked the differences between his Christian nationalism and National Socialism in 1938, see Anthony Carty, *Alfred Verdross & Othmar Spann: German Romantic Nationalism, National Socialism and International Law*, 6 EUROPEAN J. INT'L L. 78-97 (1995).

79. The exploding literature is too vast to cite. Louis Henkin didn't yet mention Kant or dignity in *THE RIGHTS OF MAN TODAY* (1978). The next year, his partner Alice Henkin edited a volume of Aspen Institute proceedings entitled *HUMAN DIGNITY: THE INTERNATIONALIZATION OF HUMAN RIGHTS* (1979), but no contributors mentioned dignity (or invoked Kant, except Judge Charles Wyzanski, Jr., who dismissed him as a statist proponent of positive liberty, *id.* at 13). Just a few years later, see Oscar Schachter's pioneering *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 77, 848-54 (1983). Later, Henkin's co-edited casebook *HUMAN RIGHTS* (1999, 2009) makes both Kant and dignity central to the emergence of human rights in its historical section.

cial sense or even count as a requirement, of course, when keywords happen to have been embedded in authoritative legal documents like national constitutions and international treaties. Most notably, redefinition may be appropriate to the extent courts are willing to interpret key terms as of independent legal significance. Continuing redefinition of existing words as partisan struggle continues is a main business of politics and law. (After looking at the meanings of dignity on the Republican side, consider the alternative uses in the Democratic Party platform for the 2012 American elections.)⁸⁰

It is true that stabilization of meaning can occur at any point but, especially when it comes to an open-textured term like “human dignity,” stabilization is normally a partial and temporary achievement. And it is presumably easiest at the beginning rather than in an ongoing struggle for redefinition, for the same reason it is simplest to start with a blank canvas rather than attempt to alter an existing picture. The constitutional beginnings of individual human dignity were rather distinctive compared to the present time. At a very different historical moment than ours, it originally entered the world and constitutional politics as some Catholic actors struggled to establish it as a valuable tool. The Irish Constitution, like the German Basic Law that later followed it, seems to have been a moment of relative success in this regard. But such moments in which new words are constitutionalized, and with generally consensual implications, are rare.

If so, then contestation is the bittersweet fate of all of the concepts and values that matter to us. And yet not all words and concepts are created equal in the *sorts* of disagreement that is their common lot. The inevitable process of dispute to which each word and concept must play host leads to different results, much like in Leo Tolstoy’s unhappy families. For often purely accidental reasons some concepts are open to moving in specific new directions, as when a mutation from one era of evolution happens connects to another at a later stage. Dignity, clearly, was open to specific reappropriation in part because of a new kind of international human rights law and an entirely unexpected academic Kantianism could make use of it. Further, for conceptual and historical reasons in different combinations, some words and concepts are very hard to move away from their inherited moorings, others very easy. But finally, some dissensus is so profound that it transcends ordinary disagreement, and the premise that the same concept is still under debate on different sides becomes a fiction obscuring the reality that interlocutors have simply parted ways.

I myself worry that this last syndrome now besets “human dignity,” since given the facts of continuity with its origins and reappropriation of its

80. In this document, dignity is used six times, four times in relation to the universal human rights on which the United States (it says) was founded, including emphasis on global women’s rights and global development, as well as twice in relation to liberal social policy like health care that affords all (and especially elderly) citizens dignity. See DEMOCRATIC NATIONAL COMMITTEE, MOVING AMERICA FORWARD 1, 2, 28, 29, 30, available at <http://assets.dstatic.org/dnc-platform/2012-National-Platform.pdf>.

meaning since (along with its migration into domains from bioethics to counterterrorism), it is too controverted to be available not simply for pristine use but even for useful invocation. Surprisingly given its constitutional origins as I have sketched them, Bruce Ackerman has recently elevated human dignity to a core principle of American constitutional law – surprisingly, given that the first reference to it in any American jurisdiction occurred in summer 1937 and in direct response to papal innovations.⁸¹ Any “stress” on “human dignity may surprise American constitutional lawyers,” Ackerman acknowledges, going on nevertheless to claim its centrality to *Brown v. Board of Education* and the civil rights revolution as a whole:

While the idea of dignity serves as the foundation of constitutional rights in Europe and elsewhere, American lawyers generally derive their basic principles from the ideas of equal protection and due process. [But t]his is a misconception—based on a failure to appreciate how *Brown’s* lost logic was reinforced during the struggle for the landmark statutes of the 1960s.⁸²

Similarly, Reva Siegel contends that dignity briefly served as a tool to advance the autonomy and equality of women in the domain of sexuality, by making claims to it in the 1960s and 1970s in America and Germany to seek the decriminalization of abortion from judges.⁸³ But whatever the historical plausibility of these suggestions—and they are powerful—it is insufficient simply to pluck the version of dignity one prefers from the past as if others did not exist. For example, Ackerman offers a few examples of human dignity from popular and judicial arguments while failing to note the large avalanche of uses in Cold War discourse. And whatever is true about the past, controversy about the meaning of dignity rules now. For her part, Siegel helpfully acknowledges that the theoretical disarray and political dispute around human dignity today is so intense that the sole defense of its role available currently is on the slender grounds that it “keeps agonists in conversation.”⁸⁴ Most obviously, both sides in ongoing abortion disputes invoke it. Yet if the common ground that dignity is supposed to provide them turns out to mean something completely different on inspection for each side, what exactly do they have to talk about? As Ackerman also right-

81. *Zurbrick v. Woodhead*, 90 F.2d 991 (6th Cir. 1937). The next reference, four years later, even more revealingly shows the antitotalitarian connotations of the phrase; see *Laage v. Laage*, 26 N.Y.S.2d 874 (1941). There are a small handful of earlier cases mentioning the “dignity of man.”

82. BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 137 (vol. 3, 2013). See also Bruce Ackerman, *Dignity Is a Constitutional Principle*, N.Y. TIMES, Mar. 29, 2014.

83. Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions under Casey/Carhart*, 117 YALE L.J. 1694 (2008); Reva B. Siegel, *Dignity and Sexuality: Claims on Dignity in Transnational Debates over Abortion and Same-Sex Marriage*, INT’L J. CONST. L. 355-79 (2012).

84. For these issues, see the crosstalk in UNDERSTANDING HUMAN DIGNITY (Christopher McCrudden ed., 2014), where a shorter version of the present essay also appears.

ly concludes, “Dignity is a notoriously protean notion.”⁸⁵

Like an over-squeezed orange, the appeal to dignity may have no more to give to any side in struggle any longer. No concept is useful or useless until someone tries to use it and succeeds or fails; the trouble with dignity is not that it is useless in theory but that the practice of political combat has made it much more so.⁸⁶ We can never know in advance, of course, who will win in politics, including the creative politics of constitutional or other legal interpretation. But we can worry that a word or principle seems to have no likely future except for that of fueling repetitious and redundant conflict.

To the powerful objection that further mobilizations of dignity are inevitable—if only in order to push back against other interpretations of what it is said to require—any response has to concede that there is no alternative to living with some disagreement, and not least with respect to constitutional terms, values, and precepts. It is not as if simply omitting dignity, were that possible, would leave utter agreement around some *other* words and values.⁸⁷ But while it is true that each constitutional concept and provision is to some degree contested, if only by dint of its sheer presence and the passage of time, essentially contested concepts can give rise to pointless debate because they are based not on incompletely theorized agreement, which would allow continuing renegotiation, but are instead based on entirely un-theorized disagreement concealing implacable antagonism. And not infrequently, in an era when the play of political forces is sometimes not mirrored precisely in the composition of legal or academic elites, such unviability is an invitation to struggle not for democratic victory but for apparently easier control of judicial and theoretical meanings. To the extent more immediate results seem available at those levels, it is tempting to transfer politics there with little legitimacy and often only temporary success.

The worry is that “human dignity” is too frequently a depoliticizing concept, which risks obfuscating programmatic divergence under the pretense of convergence. If an incompletely theorized agreement often turns out to be little more than agreement to disagree, an entirely un-theorized disagreement is a matter of simple confusion only making discord less apparent and less articulate. And in potentially troubling ways in the contemporary world, it abets the transfer of power to judges as an alternative to the more open contest of clashing political visions.⁸⁸ In this regard, of

85. ACKERMAN, *WE THE PEOPLE*, *supra* note 82, at 137.

86. See Ruth Macklin, *Dignity Is a Useless Concept*, 237 *BRITISH MED. J.* 1419-20 (2003).

87. Jeremy Waldron makes this point frequently, most recently in his paper *Is Dignity the Foundation of Human Rights?* (2013), available at <http://www.ucl.ac.uk/laws/jurisprudence/docs/2013/Waldron.pdf>. But the real question is not whether other concepts involve disagreement but whether human dignity involves too much of it.

88. Consider the writings (including a forthcoming book on human dignity) of former Israeli Supreme Court Justice Aharon Barak for a specimen of exceptionally high confidence in the constitutional judge’s ability to correctly deploy various interpretive techniques—most famously, proportionality balancing supposed to honor human dignity as one factor in a mix of

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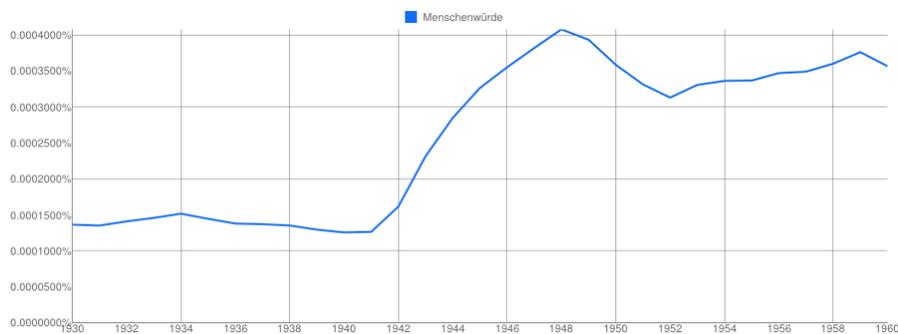
course, the contemporary judicialization of dignity—itsself foreseen by no one involved in its 1930s and 1940s constitutionalization—is a case in point of a much larger development. And that is another story.

various others. *See also* ERIN DALY, *DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON* (2012).

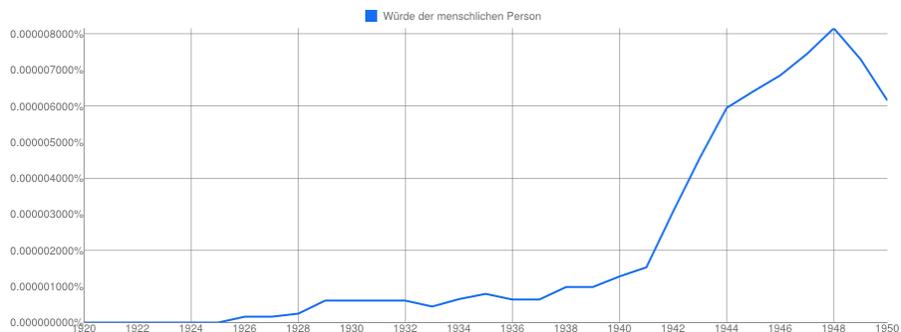
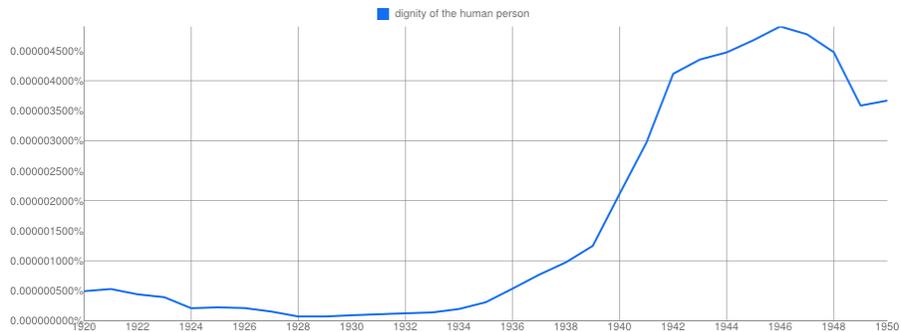
APPENDIX: GOOGLING DIGNITY

Google Ngrams (<http://books.google.com/ngrams>) chart natural language trends through scanned books in various languages, with the incidence of surveyed words or phrases compared across time, as a percentage of the number of books for each year.

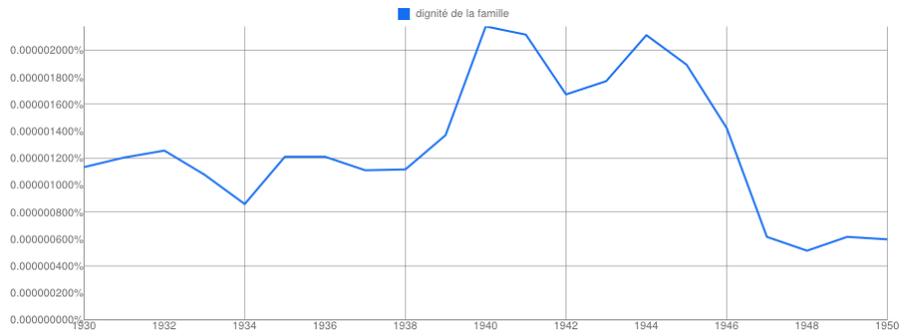
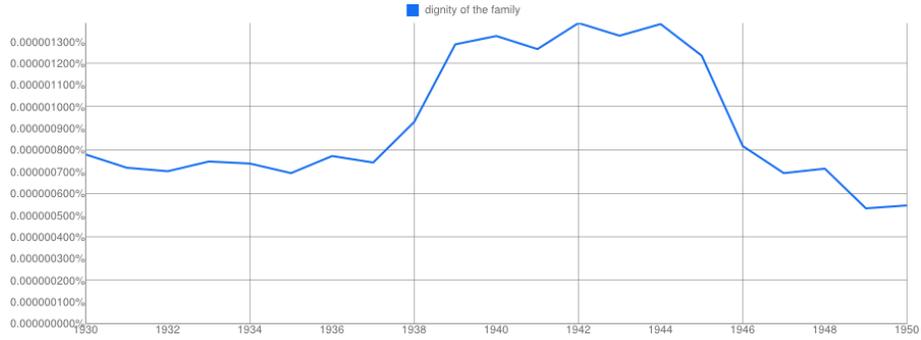
1. Human dignity ascends in German during World War II, not because of the West German constitution.



2. The notion of the “dignity of the human person” (the standard Catholic formula in the era) ascends in the mid-1930s and first in French—not surprisingly given that its principal theorists were operating in that language. Note the belated German story.



3. It was only the resolution of war that cut off the alternative proposal (central to corporatist approaches) that dignity attaches mainly to the family.



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4. By and large, “dignity” (perhaps along with aristocratic value frameworks generally) is in decline. A recent rather than long-term explanation is therefore required for contemporary (post-2000) increases in the percolation of dignity.

