



## Contesting a World-Constitution?

### Anti-systemic movements and constitutional forms in Ireland, 1848-2008

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#### Abstract

*Recent accounts of constitutional development have emphasised commonalities among diverse constitutions in terms of the transnational migration of legal institutions and ideas. World-systems analysis gives critical expression to this emergent intellectual trajectory. Since the late 18<sup>th</sup> century, successive, international waves of constitution-making have tended to correspond with decisive turning points in the contested formation of the historical capitalist world-system. The present article attempts to think through the nature of this correspondence in the Irish context. Changes to the Irish constitution, I suggest, owed to certain local manifestations of anti-systemic movements within the historical capitalist world-system and to constitution-makers' attempts to contain—militarily, politically and ideologically—these movements' democratic and egalitarian ideals and practices. Various configurations of the balance of power in Irish society between “national” (core-peripheral) and “social” (capital-labor/“other”) forces crystallised in constitutional form. Thus far, conservative and nationalist constitutional projects have tended to either dominate or incorporate social democratic and radical ones, albeit a process continually contested at critical junctures by civil society and by the organized left, both old and new.*

**Keywords:** Constitution-making; Ireland; Globalization; Anti-Systemic Movements



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Constitutions feature prominently in the struggle between the “spirits” of Davos and Porto Alegre over the future of the capitalist world-system (See Wallerstein, 2011).<sup>1</sup> The strengthening of non-majoritarian decision-making arenas, notably constitutional and treaty-based courts, is a function of the former spirit. From *Laval* in the European Court of Justice to *Citizens United* in the U.S. Supreme Court and beyond, judicial activism in the service of corporate power proliferates (Ewing 2012; Hirschl 2007).<sup>2</sup> Conversely, those movements seeking to make the world more democratic and egalitarian have turned to popular constitution-making assemblies to institute alternatives to neoliberalism, including socio-economic rights, ecological protections and decentralized decision-making. Initiatives along these lines in Bolivia and Ecuador were repeated in Iceland following the 2007 financial crisis (King 2013; Meuwese 2013).

The contemporary prominence of constitutions is unsurprising. Historically, new constitutional forms have emerged in the wake of exceptional circumstances, their framers generally seeking to endow newly emergent regimes with authority (Elkins, Ginsburg and Melton 2009). The world’s earliest written constitutions, such as those documented by Aristotle in Greece in the 4<sup>th</sup> century B.C., typically delineated the distribution of authority within a political community. Although sometimes misleading as a guide to practice, these “power maps” broadly set out the formal rules, functions and institutions of government (Duchacek 1973: 1). From the 17<sup>th</sup> century onwards, as the Age of Revolutions swept Europe and the Americas, constitutions were re-imagined to act as a limit to the arbitrary power of rulers, thereby substituting “a government of laws” for “a government of men” (Thornhill 2013: 196).

Considering the ensuing era, Jon Elster (1995: 368) has described seven “waves” of constitution-making emanating from a number of seismic, sometimes widely experienced, crises. These include: (1) the late eighteenth century constitutions of the post-revolutionary United States, Poland, and France; (2) the 1848 revolutionary constitutions of Europe; (3) the post-World War One constitutions of “new” European nation-states; (4) the post-World War Two constitutions of Japan, Germany and Italy; (5) the post-decolonization constitutions of Africa, Asia and South America; (6) the mid-1970s constitutions of newly democratized Southern Europe and (7) the post-1989 constitutions of post-communist Central and Eastern Europe. Remarkably, these constitutional waves correspond with significant turning points in the contested formation of the

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<sup>1</sup> For further development of the ideas presented here, see Thomas Murray, 2016. *Contesting Economic and Social Rights in Ireland: Constitution, State, and Society 1848-2016*. Cambridge: Cambridge University Press.

<sup>2</sup> *Laval Un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2008] IRLR 160; *Citizens United v. Federal Election Commission*, 558 U.S. (2010).

historical capitalist world-system (Arrighi 1994; Wallerstein 2004). This article attempts to think through the nature of this correspondence in Ireland.<sup>3</sup>

The work falls into three parts. Part one theorizes the relationship between constitutional development and the world-system. Key changes in the world's constitutions, coinciding with what Duncan Kennedy (2006) has periodized as the globalization of "classic" (1850-1930), "social" (1900-c.1970) and "neoformal" (c.1945 onwards) legal thought, are traced to the shifting fortunes of anti-systemic movements from 1848 onwards. *Bunreacht na hÉireann* (Irish: the Constitution of Ireland), I suggest, had a dialectical relationship to Ireland's incorporation into the historical capitalist world-system and to concomitant socio-political struggles over this evolving process. Various configurations of the balance of power in Irish society between "national" (core-peripheral) and "social" (capital-labor, but also inclusive of "other" feminist, youth, anti-racist and anti-homophobic currents) forces crystalized in different constitutional forms at different times (See Arrighi, Hopkins and Wallerstein 2011). Constitutional change or stasis resulted from established elites' attempts to contain—militarily, politically and ideologically—anti-systemic movements' ideals and practices.

Part two outlines Ireland's semi-peripheral constitutional development between 1848 and 1945. Over this period, Ireland resembled postcolonial peripheries insofar as popular, anti-systemic mobilizations adopted "national" rather than "social" trajectories. Constitution-makers in 1922 were thus free to reproduce "classic" political and market institutions inherited from the British Empire, including an enlightened conservative mode of conceding reforms to preserve a semi-peripheral economy from its worst excesses. Similarly, in 1937, the "social" form of constitutionalism adopted did not fundamentally change inherited political or market institutions, but instead prioritized creating a "native" or Catholic family law regime (See Chatterjee 1994; Lentin 1998). In 1922 and 1937, constitution makers registered and reproduced this conservative balance of core-peripheral and capital-labor relations, most notably in their determined exclusion of social constitutional forms that envisaged direct state intervention in economic production and welfare redistribution.

Part three traces Ireland's semi-peripheral constitutional development between 1945 and 2008. The country re-incorporated into a now U.S.-led world-system, advancing a state developmental project dependent on attracting multinational capital flows from the 1960s onwards before increasingly abandoning that project's social or redistributive content after the neoliberal turn of the 1980s. Anti-systemic struggles transformed and fragmented. Post-68 social, youth and feminist movements' rejection of Catholic social norms governing family and sexuality occurred

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<sup>3</sup> "Ireland" is generally used here to refer to the twenty-six counties of the Republic of Ireland. Depending on the political context, this territory has also been designated the Irish Free State, Eire, the Irish Republic and Ireland.

alongside organized labor-led conflicts over the expansion and subsequent removal of “social” limits to the market. Elite political actors negotiated Ireland’s transformation by relocating both market and family law conflicts to the non-majoritarian, expert domain of judicial review and EU treaty formation. Neoformal modes of legal thought, invoking abstract but positively enacted values embedded in domestic constitutions and international treaties, helped to legitimate this process and its results.

Diverse but limited changes to the Irish Constitution occurred through amendment via popular referendum and through judicial review. The Irish Courts generally reproduced “classic” constitutional forms, emphasising individualism, anti-statism, and “negative liberties” (including private property rights) ahead of communitarian norms, the interests of the “common good” or “positive” rights to welfare. Nevertheless, neoformal “human rights” conflicts have been fought in Irish and European courts by or on behalf of women, children, prisoners, gays, Travellers, asylum seekers, the disabled and the transgendered among others. These groups have successfully combined litigation with civil society activism to challenge repressive norms and expand collective freedoms. After the 2007 crisis, neoliberalism and associated modes of legal thought remain hegemonic. Their rapidly reduced and declining legitimacy, however, presents opportunities for anti-systemic movements as well as for more democratic, more egalitarian constitutional projects.

### **Co-constitutive Transformation: Law, Society and History**

We might divide the numerous works addressing constitutional development into “formalist” and “instrumentalist” accounts (Bourdieu 1987). Towards the formalist pole are those who consider constitutions to be autonomous from society and see in constitutional law self-contained principles developed through formal reasoning. Such jurisprudential analyses comprise the majority of recently published research on constitutions (Stone Sweet 2011). Towards the instrumentalist pole, conversely, are those who view constitutional law as registering and reproducing society’s prevailing values, institutions or interests. Cultural contextualists examine whether constitutions are congruent with broader social norms. Functionalist accounts emphasize how constitutions relate to a wider, often pre-existing institutional context and underline the relationship between constitutions, state-building and state legitimacy. Finally, interest-based accounts emphasize the wider social relations or constellations of power that determine constitutional development.

Collectively, this body of scholarship’s theoretical assumptions are questionable. On the one hand, formalist and culturalist accounts often accord the law primacy to other social phenomena and assume the state to be a neutral site of contestation between competing interests, thereby misrecognising the violent, “de-sacralised” nature of state practices (Congost 2003). On the other, in dismissing as “ideological,” “superstructural” or otherwise “epiphenomenal” the

structure of constitutional forms, functionalist and interest-based accounts risk emptying their analyses of the specific role of the legal field in the reproduction of those power relations that they claim to reveal (Fine 1985). Ultimately, the central point of contention here — the law’s autonomy within society — cannot be resolved *a priori* but must itself be interrogated in terms of its emergence from particular historical conditions and previous social struggles (Bourdieu 1987: 815).

The field’s dominant methodologies are also problematic. Traditionally, constitutional studies used single-country case-studies to the detriment of wider comparison (Hirschl 2007). While comparative constitutional studies are now resurgent, the problem with both single and multiple case-study approaches is that the hermetic isolation of nation-states remains assumed. Scholars thus tend to attribute to internal dynamics changes happening in strictly analogous ways in other jurisdictions (Kennedy 2006: 25). Recently, alternative “global” accounts of constitutional development have emerged, emphasising commonalities among diverse constitutions in terms of the transnational migration of constitutional ideas (Tushnet 2009: 3-17). A world-systems analysis of constitutional development gives critical expression to this emergent intellectual trajectory, potentially resolving its outstanding theoretical and methodological problems in a more coherent analytic synthesis.

The present analysis thus accords constitutions neither primacy nor epiphenomenality. Rather, by critiquing and synthesising the various insights of both formalist and instrumentalist analyses, it seeks to account for the development of constitutional forms in terms of their forming part of “a rich totality of many determinations and relations” (Marx 1996a: 146). Specifically, it is considered possible here to acknowledge the production of constitutional norms and discourses as part and parcel of wider legal and cultural transformations, while nevertheless insisting on understanding these developments within an overall frame of world-systemic inquiry, emphasising the development of the economic and inter-state world-system and anti-systemic politics (Arrighi, Hopkins and Wallerstein 2011: 30; see also Harvey, 1989: 355).

When considering this connection, it seems necessary to emphasize the manner in which the world-system of historical capitalism combined two key processes: the formation of an economic world-system and the formation of an inter-state world-system (Arrighi, Hopkins and Wallerstein 2011: 30-3).<sup>4</sup> This world-system produced a number of crucial antagonisms and corresponding anti-systemic movements, which may be divided, for analytical purposes only, into

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<sup>4</sup> In terms of the former, “core” regions of world capitalism, characterised by skilled, capital-intensive production, came to subordinate the economies of “peripheral” regions. Concomitantly, the inter-state system’s emergence was central to these processes, providing security of labor-power, property and trade as well as opening up new markets, colonies and ecologies to exploitation.

“social” and “national” tendencies.<sup>5</sup> Over the nineteenth and early twentieth centuries, rulers’ concessions to and, later, the triumph of popular, organized social and national movements underpinned the emergence of the modern nation-state, combining representative democracy with social reforms. Similarly, this shifting balance of core-periphery and anti-systemic relations crystallized in the various constitutional forms emerging in the course of successive waves of constitution-making.

In this regard, the critical legal studies scholar, Duncan Kennedy (2006), has forwarded an important periodization and geographical understanding of three overlapping “globalizations” of “classic” (1850-1930), “social” (1900-c.1970) and “neoformal” (c.1945 onwards) law and legal thought, each globalization understood as providing a broadly shared conceptual or justificatory vocabulary of socio-legal change (and not a one-size-fits-all model of law reform). Here, we might similarly distinguish the contested development of classic, social and neoformal forms of constitutionalism. In contrast to Kennedy’s emphasis on Weberian rationalization processes, however, I wish to foreground the importance of anti-systemic struggles and movements to socio-legal transformation. In this manner, world-systems analysis not only incorporates the transnational nature of nation-states’ constitutional transformations but more usefully accounts for their timing as well.

### **Constitutional Forms in the World-System: Classic, Social and Neoformal**

Briefly stated, “classic” constitutional forms (1850-1930) co-emerged with the rapid development of the British Free Trade cycle of accumulation. In the wake of the 1848 Revolutions, classic constitutions registered wider “national” movement influences and claimed an organic unity between the state’s fundamental law and the nation’s essence or *geist*. Independence movements in the Habsburg, Ottoman, French and British Empires as well as unification advocates in Italy and Germany explicitly identified constitution-making with nation-state building (Thornhill 2013: 250). Concomitantly, the widespread emergence of new forms of labor, factory workers in newly industrialising cores and farm workers in cash-cropping peripheries, stimulated the development of particular legal forms, notably the prioritization of contract law as well as of the individual as the central juristic subject (Kennedy 2006: 36). Classic constitutions thus tended to register the primacy of private over public law and of property and contract. Politically, the democratic component of “national sovereignty” and “basic rights” forwarded in these constitutional projects

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<sup>5</sup> “Social” antagonisms emerged between landed and landless in predominantly agrarian, peripheral societies and between capital and wage-labor in predominantly industrial, core societies. Concomitantly, a series of “national” antagonisms emerged in the course of inter-state contestations, principally between a national bourgeoisie and the imperial metropole.

was strictly limited. The French Constituent Assembly of 1848 most clearly illustrated this (Marx 1996b). Initial drafts fused classic, liberal rights of property, free belief, education, and equality of access to public office with material rights to employment and decent living conditions. The “Party of Order’s” brutal suppression of the Parisien workers, however, dictated the latter provisions’ eradication.

Social constitutionalism (1900-1970) coincided with the decline of British hegemony, the ascent of anti-systemic movements and the associated development of state capacities. Proponents of “social legal thought” redefined law as a purposive activity, thereby providing a justificatory vocabulary for state intervention to meet societal needs and to respond to collective, interdependent problems, including war, mass unemployment, urbanization, as well as financial regulation (Kennedy 2006: 48). Public law now came to delimit private law while both international and domestic law regimes provided for increasing state intervention. In core countries, this took the form of legalising universal social insurance and need-based entitlements; in peripheries, labor and land reforms. Importantly, social constitutions retained classic constitutional rights, including guarantees of property and contract. Politically, the overarching goal was “class-abatement,” limiting the appeal of revolutionary groups, particularly in the wake of the 1917 Russian Revolution, and preserving class-rule by means of limiting social polarization and ensuring social mobility (Marshall 1950: 32). Comparable strategies underpinned the social provisions of the Mexican constitution (1917), the *Wohlfahrtstaat* principles of Germany’s Weimar constitution (1919) and Roosevelt’s proposals to introduce a second bill of socio-economic rights to the U.S. constitution in the early 1940s (Sunstein 2004; Thornhill 2013: 287).

Post-World War Two, the emergent U.S. Free Enterprise cycle of accumulation era occasioned the globalization of a third, hybrid mode of law and legal thought, “public law neoformalism” (1945 - ). For three decades, core countries witnessed unprecedented levels of economic and social development, a phenomenon commonly attributed to diverse forms of state intervention to ensure full employment, growth and citizens’ welfare, founded on the class compromise between capital and organized labor (Harvey 2007: 10). In both cores and peripheries, political elites faced with conflicting pressures of tradition and of modernization—in both market and family law—shifted resulting disputes away from the domain of electoral politics and turned to the judiciary to resolve them instead (Kennedy 2006: 70). Constitutional courts’ case-loads increasingly shifted from traditional business and property disputes towards important civil, political and socio-economic rights conflicts. In the United States, for instance, the Warren and Burger Supreme Courts introduced significant precedents concerning race and gender equality as well as criminal due process and electoral fairness (McKay 2009: 343-50). Public law neoformalism offered a justificatory discourse for this disruptive mode of juridical activity,

enabling actors to invoke “supposedly transcendent but also positively enacted values in constitutions or treaties,” whether classic or social norms, to justify changing the status quo (Kennedy 2006: 64).

The role of constitutional courts became even more significant as the U.S.-led cycle of accumulation underwent a profound crisis in the mid-1970s. Given the associated transformation of class forces, particularly the decomposition of organized labor as a class for itself and the ascendancy of corporate and financial power, a specifically “new” or neoliberal constitutionalism came to prominence within the broader “neoformal” mode of law and legal thought. In the post-1989 era of globalization, a robust, anti-majoritarian logic of property rights entrenchment, redefining the public sphere in more privatized and more commodified ways, has accompanied the expansion and deepening of international trade and investment rules (Gill 1995). The European Court of Justice, for example, has been both neo-formalist and neo-liberal in its interpretation of the canonical “freedoms” of goods and persons in a single market, “pushing the project further and faster than the Member States had been prepared to go on their own” (Sweet Stone 2010: 5). This logic has shaped the legal infrastructure of the WTO, EU and NAFTA as well as a range of national constitutions, notably those recently created in Eastern Europe and the Middle East but also, through judicial activism, those of much older standing (Peebles 1997; Go 2003; Walker 2013).

### **Ireland’s Constitutions in the World-System**

Ireland makes for a particularly useful country case-study of these socio-legal transformations. Its constitutional development blends a mix of socio-legal cultures—including a common law tradition in the Atlantic English-speaking orbit; a wider European or continental law tradition mediated by its legal intelligentsia and by the dominant position of the Catholic Church; and a semi-peripheral and post-colonial heritage that, notwithstanding its relative economic wealth and liberal democratic development, suggests commonalities with the experience of states in today’s Global South. Comparatively speaking, however, the 1922 Irish Free State Constitution showed little trace of the robust social constitutionalism that characterized contemporary constitution-making in Mexico and Weimar Germany. Similarly, while the 1937 Irish Constitution incorporated a pronounced Catholic social discourse, it did so without expanding welfare rights or significantly altering the state’s institutional make-up. Clarifying Irish exceptionalism here is a useful step towards understanding the subsequent reception and development of neoformal constitutionalism.

Scholarship on the Irish constitution, however, has yet to consider its development critically, specifically how it intersects with long-term structures, class interests or popular movements. The first wave of Irish constitutional studies, led by John Kelly (1967), Brian Farrell (1988) and Basil Chubb (1991), concentrated on the Irish “state tradition” as a liberal legacy of



British rule as well as on the nationalist and/or confessional aspects of the 1922 and 1937 constitutions. While recent scholarship, notably by Gerard Hogan (2005) and Bill Kissane (2011), has usefully contextualized Irish constitutionalism within wider European and Transatlantic traditions of constitution-making, the focus of this research continues to centre on the shifting intersection of liberal institutions and norms with nationalist and Catholic ones. In comparative constitutional studies, similarly, the Irish case is most readily forwarded as an example of a socio-legal order deeply expressive of and divided by questions of national identity (Tushnet 2009: 12). Chubb's thesis on the "normative force" of the Irish constitutional tradition, a basic law gradually adjusting to changing societal norms, remains the standard explanatory account of change (1991:117; Kissane 2011: xii). Unlike existing studies, the key unit of analysis adopted here is not the Irish state or its constitution *per se* but rather the historical capitalist world-system.

The present survey attempts to synthesize existing studies of Irish constitutionalism into a more coherent whole. In places, this has necessitated original analysis of archives and jurisprudence. The specific method of inquiry has been to analyse and contextualize within the world-system the actions and discourses of actors involved in creating the 1922 Irish Free State Constitution and the 1937 Irish Constitution as well as those involved in referendums and judicial review cases important to the constitution's subsequent development (See Fairclough 2003). Hence, the Irish "case" is not explained in terms of "internal" factors such as constitution makers' "innate conservatism" (See Farrell 1988: 18) but rather understood dialectically in terms of its semi-peripheral relations within the world-system and how this conditioned popular anti-systemic struggles and discourses as well as governance strategies to contain them, coercively, politically and ideologically. What follows is less a final account than a challenging invitation. Adhering to a spirit of dialectical inquiry, the reader is encouraged to think through this argument's implications "critically and querulously" (See Bookchin 2005: 77).

### **Containing Anti-Systemic Movements:**

#### **Classic and Social Constitutionalism in Ireland**

Emerging in 16<sup>th</sup> century Europe, the capitalist world-system gradually incorporated Ireland as a semi-periphery within Britain's regional economy (Crotty 1986; O'Hearn 2001). The late 17<sup>th</sup> century settlement imposed by England established a propertied Protestant minority as rulers, with core support, over the mainly un-propertied Catholic majority, among whom the folk memory of illegitimate land confiscations remained potent. Incorporation aided England's drive toward hegemony in the 19<sup>th</sup> century, but at the cost of eliminating indigenous Irish production and thereby limiting capacities for future industrialization. The process transformed the countryside,

occasioning land clearances for a peripheral mode of agricultural production centred on the export of food and primary commodities to the core (O’Hearn 2001: xi, 104-14). For the immense majority, impoverished conditions ensured persistent emigration and periodic famine. The island’s population declined from 8 million in 1800 to 4 million in 1900, a figure which remained unchanged until the late 20<sup>th</sup> century.

Core-periphery relations were subject to intense contestation. The landlords and their agents emerged as a powerful and relatively autonomous part of the colonising regime, protecting their interests from tenants (and the landless) primarily through their control of the colonial administration at Dublin Castle as well as political alliances at Westminster (Slater and McDonough 2008: 18). Ensuing “anti-systemic” conflict took both “social” and “national” forms, with the latter proving dominant. While “social” resistance to landlordism took the form of diffuse secret society traditions in the countryside, “national” advocates in urban areas, drawn from both an Anglo-Irish patrician class and an emergent indigenous petty bourgeoisie, adopted more centralized organizational forms, notably the mass party, to promote Irish variations on the nationalist ideologies flourishing in the wake of the 1789 and 1848 European Revolutions (See Garvin 1986).

Within the “national” anti-systemic movement, the Irish Republican Brotherhood adopted clandestine, militant and illegal means to advance independent statehood for Ireland, at times identifying this goal with a radical social programme. The IRB were central to landless laborers’ and tenants’ organizing in the Irish National Land League to wage “land wars,” mass direct actions for land ownership and redistribution. Conversely, “constitutional nationalists” represented a small though growing male, property-owning franchise and parleyed militant resistance into concessions on a strictly limited form of independence (or “Home Rule”). Of these reforms, Daniel O’Connell’s securing of Catholic enfranchisement in the 1820s was essential to establishing a nationalist, mass party and electoralist tradition in Ireland. Moreover, between 1880 and 1910, the Irish Parliamentary Party, a disciplined, electoral machine under the leadership of Charles Stewart Parnell and later John Redmond, negotiated successive Liberal and Conservative governments’ abolition of the established Anglo-Irish landlord caste. A mass transfer of land ownership, overseen by a Land Commission, occurred.

A number of features distinguish the Irish case as a semi-periphery, including its comparative wealth, industrialization, educational levels and religious homogeneity. The prominent role of the Catholic Church in 19<sup>th</sup> and 20<sup>th</sup> century Ireland is particularly striking. Unlike in Southern Europe and the Spanish or Portuguese colonies, the Church in Ireland was not closely linked to the ruling class. On the contrary, the Catholic Church’s episcopal hierarchy, typically drawn from the more affluent farming strata, aligned itself with constitutional nationalism

and asserted its authority to intervene in the colonial administration and nationalist politics on behalf of the native population. In return for their support, the bishops expected deference to their “moral monopoly” and, in particular, control over the material means of producing that monopoly among the poor, specifically education, health and charitable services (Inglis 1998: 57). For the recently created petite bourgeoisie, leaving such services under church control was both pious and cost-effective.

By the 1900s then, the country’s major property interests, including banks, graziers, railway companies, breweries and dairies, as well as a newly emerged middle stratum of “native” owners of medium-sized farms, supported reproducing, deepening and accelerating core-periphery linkages within the British regional economy. Meanwhile, the mass of the working population, consisting of small farmers and landless laborers, emigrated or remained “land hungry” in the countryside while a smaller, politically conscious proletariat emerged in the slums of Ireland’s main cities. Worker-syndicalist and republican-insurrectionary challenges to these capital-labor and core-peripheral relations occurred in 1913 and 1916 respectively.<sup>6</sup> Their containment suggests that the subsequent emergence of a popular anti-systemic movement was far from inevitable. Just as it had taken a moment of world-systemic rupture, the French Revolution and Napoleonic Wars, to form the Act of Union between Great Britain and Ireland in 1800, another such moment of global upheaval, World War One and the Russian Revolution, would be central to its breaking. The 1922 and 1937 Irish constitutions owed directly to and would be shaped by the mass, anti-systemic forces temporarily unleashed.

### **Popular Anti-Systemic Movements and the “Classic” Constitution of 1922**

A global wave of working class unrest and militancy emerged between 1917 and 1923, involving general strikes in the United States and Europe, as well as worker uprisings in Austria, Hungary, Germany, Italy and Spain. Concomitantly, war weakened or destroyed the multinational European empires, replacing them with a patchwork of nation-states carved out from their territory (Hobsbawm 1994: 85-109). In Ireland too, “national” and “social” anti-systemic struggles overlapped, sometimes uneasily. A rapid escalation in labor and agrarian militancy coincided with the Irish Republican Army’s pursuit of an anti-colonial struggle. Meanwhile, Sinn Féin, the nationalist party identified with the republican insurrection of 1916, won a decisive electoral victory in 1918, abstained from taking seats at Westminster and formed an underground

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<sup>6</sup> In 1913-14, some 20,000 workers, organized on the basis of syndicalist ideas and forms, engaged in an unsuccessful five-month battle with the country’s 300 primary employers for the right to unionise. In 1916, the IRB (acting through the Irish Volunteers) and Irish Citizen Army (a revolutionary workers’ militia) seized the difficulty presented to England by World War One to launch a week-long insurrection in Dublin.

government in Dublin instead. The manner in which Sinn Féin substituted a mass party for a mass movement ensured the victory of conservative forms of classic constitutionalism, acutely defensive of church, state and capital (Murray, 2015a).

This outcome was not inevitable. For a brief period, direct democracy in workplaces and communities flourished. Between August 1918 and August 1923, there were five general strikes, and eighteen local strikes, twelve of these in 1919. Workers took over and ran more than eighty workplaces, establishing “soviets” at the Cleeves factory in Limerick, the foundry in Drogheda, Co. Louth and the coal mines of Arigna, Co. Roscommon and Castlecomer, Co. Kilkenny. Trade union membership rose dramatically, from 100,000 in 1916 to 255,000 in 1920, and transport unions’ refusal to handle British military equipment was crucial to the IRA’s success (Ferriter 2005: 210-1; Kostick 2009: 5, 148). Concomitantly, as the IRA forced the retreat of law enforcement to cities, rural communities created a network of local militias and arbitration courts (Kotsonouris 1994). The challenge to classic legal institutions and norms mounted. Small farmers and landless laborers, concentrated in Connaught and along the Western seaboard, escalated local rent-strikes into widespread cattle-driving and land-grabbing. Graziers favoured the creation of a “White Army” to combat “agrarian Bolshevism” (Lee 1989: 181).

During the ensuing military conflict with Great Britain (1919-21), social polarization and popular democracy posed a decisive threat to Sinn Féin’s capacity to govern. Class conflict, particularly agrarian agitation, threatened to split the IRA’s rank and file (Laffan 1995: 253). The party responded with a mixture of conciliation and coercion. In early 1919, Sinn Féin, with the support of the trade unions and Labor party, announced a radical form of “social” legal thought.<sup>7</sup> The Democratic Programme (1919) declared all rights of private property to be subordinated to the public welfare, assured Irish citizens of “an adequate share of the produce of the Nation’s labor” in return for serving the public welfare, and further outlined commitments to welfare state initiatives (*Dáil Debates*, 21.01.1919). In practice, however, Sinn Féin insisted on private property rights. Crucially, the party centralized the organic courts and banned their hearing of land disputes. Property-owners now looked to Dublin, not Westminster, to report expropriation (Casey 1970: 321).

Westminster, meanwhile, reinforced classic legal institutions and norms. The Anglo-Irish Treaty (1921), concluded at the cessation of armed hostilities between British and Irish forces, represented a classic negotiation of sovereignty between an imperial metropole and national jurists (Kennedy 2006: 50-4). The Treaty denoted sovereignty in classic legal terms, providing for a state-form with a monopoly on the right to command in its territory (See Lerner 2011: 169). It further

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<sup>7</sup> The Labor party did not contest the 1918 or 1921 elections, acquiescing in Sinn Féin’s demand for national plebiscites on leaving the Empire.

envisaged the reproduction of existing rights of private property and free trade in the Irish Free State, retaining national debt repayments while remaining silent on social issues such as land purchase or the redistribution of large untenanted estates (Dooley 2004: 42). Under the terms of the Treaty, Sinn Féin would form a Provisional Government, empowered to create a constitution for the new Irish Free State.

Throughout 1922, constitution making occurred as a split in the “national” movement over the Treaty led to civil war. Here too, “social” concerns overlapped. Opposition to the Treaty strongly correlated with poorer areas of high emigration and agrarian radicalism (Pyne 1970). In addition to Westminster, Irish society’s established interests, notably the country’s large land and business owners, as well as the Catholic hierarchy and media, supported “constitutional government” and pressed for the re-imposition of “law and order” (Kostick 2009: 180). Class conflict, including “the recent revival of cattle-driving,” and intra-nationalist violence loomed large in constitution makers’ minds (UCDA P4/320). In addition to immediate coercive measures, institutional design was deemed crucial to countering revolutionary groups.

Insofar as the Treaty permitted, the government-appointed drafting committee and subsequent Constituent Assembly broadly advocated a conservative, classic nationalist constitution. A generation previously, the British constitutional theorist, AV Dicey, claimed that established elites could best retain their power in the face of mass electoral politics through executive dominance of parliament, bicameralism and a written constitution setting out rights for minorities, notably property rights (Tulloch 1980: 23). Initially, the Irish Free State adopted the Westminster model of parliamentary sovereignty; ultimately, it incorporated all three checks. For national constitution-makers, however, the legitimacy of these institutions was now based on the will of the Irish people under God (See Kohn 1932: 81). Notwithstanding the “artificial” fostering of the “English Common Law,” the state’s system of law would reflect the nation’s “organic” normative order or national spirit (UCDA P4/352), a disposition entirely characteristic of classic legal design.

Two distinct forms of social constitutionalism also emerged, challenging laissez-faire constitutionalism and financier-grazier control of Irish political economy. Clement France, a visiting American labor lawyer, proposed provisions to regulate property rights and ensure that the state captured the “unearned increment” arising from land value increases, thereby checking speculation in land and incentivising industrial investment (UCDA P4/308; 325; 339). Concomitantly, Catholic proponents of social legal thought such as Alfred O’Rahilly (UCDA P4/309; 328) or Labor TDs Tom Johnson and T.J. O’Connell, fearful of the Catholic hierarchy and of alienating farm-owners, supported a less interventionist state (Dáil Debates, Vol. 1, Col. 494-5, 708; 20.09.1922; Col. 755, 26.09.1922; Col. 697, 25.09.1922). Their proposals, emphasising the

rights and duties of property and including modest welfare measures and children's rights, were a pale shadow of the Democratic Programme. Nevertheless, they encountered strong opposition.

Classic liberal market advocates such as the economist, George O'Brien (UCDA P4/339), or Archbishop Harty (UCDA P178/24), questioned the social provisions' economic viability in a free market economy as well as their political viability given their potential to alienate conservative, land-owning supporters of the Treaty. When British law officers objected to the "Soviet character" of the constitution's declaration of "economic sovereignty," the offending provisions were quietly dropped (UCDA P4/362-3; Mohr 2008: 72-3). Finally, during the Constituent Assembly debates that autumn, the Provisional Government, having won the 1922 general election and having secured an effective military victory over anti-treatyites, eliminated any vestiges of a social constitutionalism in favour of state power ("law and order") and economic necessity ("national economy") (Dáil Debates, Vol. 1. Col. 707; 25.09.1922).

Ultimately, the 1922 Constitution was limited to two "programmatic declarations" only, one specifying a pre-existing right to elementary education and the other providing for state ownership of national resources (Kohn, 1932: 174). The debates and their outcome anticipated the manner in which the Provisional Government party, later Cumman na nGaedheal (Irish: Society of the Gaels), would defend financier-grazier interests throughout the 1920s (O'Hearn 2001; McCabe 2011). A large cohort of society, however, including republicans defeated in the civil war, organized labor, and small farmers, remained alienated from the Irish Free State.

### **Incorporating Anti-Systemic Movements in the 1937 Catholic Social Constitution**

Ireland's second constitution making episode occurred during the Great Depression (Arrighi 1994: 277-285; Hobsbawm 1994: 85-109). Internationally, the decade was characterized by rethinking forms of state or "social" control of the *laissez-faire* market, primarily in response to mass unemployment (Kennedy 2006: 21-2; Thornhill 2013: 301-3, 317-23). Among liberal democracies, the social took the form of the Matignon Agreements in France or the New Deal in the United States. Nationalists in Poland, Austria, Hungary, Spain and Portugal used a highly selective form of Catholic corporatist constitutionalism to justify more authoritarian government. In Italy and Germany, fascist movements introduced a highly coercive system of corporate societal management, achieving full employment while leaving intact the "classic" freedoms of capital. In all cases, social legal thought was proposed to prevent communist alternatives, whether supported by Stalinist Russia or autonomous such as occurred in Republican Spain (Kennedy 2006: 38).

Ireland did not experience the same extremes of mass unemployment and polarization as in the rest of Europe. Social forms of constitutionalism, however, similarly depended on a politics of "class-abatement" (Marshall 1950: 32). A range of "national and social" antagonisms

proliferated in 1930s Ireland, ranging from a boycott campaign of land annuities to Great Britain through agrarian and republican agitation over the Irish Land Commission's slow rate of land redistribution to the Irish Women Workers' Union's campaign against slum landlordism in the cities (Dooley 2004: 104; Murray 2000: 317-22). Moreover, a strike against Dublin Tramways occurred in 1935 while the subsequent building sector strike of 1937 was the largest since the foundation of the state (Ferriter 2005: 373). The broader mass of Irish society, however, including its "national" and "social" anti-systemic movements, adhered to liberal democratic, representative politics.

The newly formed Fianna Fáil (Irish: Soldiers of Destiny), whose leadership comprised of anti-treaty republicans, was central to the incorporation of civil society energies into a mass party and, ultimately, the state. While Cumman na nGaedheal remained a classic cadre party committed to law and order and free trade, Fianna Fáil created a populist, cross-class base of support for national independence, self-sufficiency and social equality. Built on a mushrooming network of local branches, the party would prove one of the most successful in Europe, forming a single party government for all but ten years between 1932 and 1981. Notwithstanding increased manufacturing, accelerated land redistribution and a modest expansion of welfare spending, however, Fianna Fáil governments did not fundamentally up-root core-peripheral dependency (O'Hearn 2001). Irish banks continued to invest the proceeds of the UK-centred cattle trade in the City of London until the late 1950s while mass unemployment and emigration persisted (O'Connor 2011: 144).

The 1937 Irish Constitution's classic form registered and reproduced precisely this balance of core-peripheral and capital-labor forces. Fianna Fáil Taoiseach Éamon de Valera, secure as the "chief" of a nationalist mass party, correctly believed a unilateral rejection of the Treaty possible. Drafted primarily by de Valera with the aid of a select committee of civil servants, the constitution redefined the territory of the new state of "Eire" to include the island of Ireland, asserted the state's legitimacy on the basis of popular sovereignty, removed inherited monarchical legal symbols and emphasized "national" traits such as the Irish language and Christianity. The 1937 Constitution retained its predecessor's conservative institutional design, centralising authority in the executive and representative party at the expense of local government or more direct forms of popular autonomy. Similarly, the text provided for a Supreme Court to interpret its provisions, including a list of classic civil-political rights, notably that of private property.

At the same time, the prominence of conflicts over credit, land, and living standards ensured a much greater crystallization of social constitutional forms than had occurred in 1922 (Murray, 2015b). The primary conflict resided between civil servants, notably John Hearne and JJ McElligott, who advocated continuity and clericalist advisors to de Valera, such as the Jesuits of

Milltown Park or the Holy Ghost Father, John Charles McQuaid, who desired a much stronger recognition of Catholic doctrine (UCDA P150/2393-5). The fundamental rights provisions took a Catholic social form. They acknowledged the “special position” of the Catholic Church (article 44.1.2) and entrenched the Church’s interests in property (article 44.2.6), education (article 42) and social policy, most notably in the constitution’s recognition of the family unit and of woman’s special contribution in the home as well as its comparatively exceptional prohibition of divorce (article 41).

The Bunreacht’s affirming of Irish national identity, most apparent in the Preamble and Articles 40–45, appealed to and helped reproduce ethnically narrow and patriarchal norms (Lentin, 1998). Family law proved more amenable to Catholic social influence, however, than market law. Primarily at the behest of the Department of Finance, who feared such rights would inspire rather than satisfy agitators, Catholic social proposals for land redistribution, welfare provision and social credit were relegated to “directive principles” (article 45) unenforceable in court (UCDA P150/2416). The text framed the state’s duty to the “weaker sections” of Irish society in terms of “charity” not justice or equality.

In the subsequent plebiscite, the 1937 Irish Constitution was accepted by a narrow majority of some 56% to 43% (Coakley and Gallagher 2010: 75). The balance of contending core-peripheral and capital-labor relations occasioned a conservative consolidation of existing state and market institutions. The Catholic social provisions that constitution-makers thought necessary to isolate revolutionary agitators intervened in family, not market law. Voting for the Bunreacht thus endorsed what the *Irish Press* (16.06.37) described as “hallowed traditions”: the institution of the family, the indissolubility of marriage and, naturally, the right of private ownership. What was new, however, was the 1937 Constitution’s increased legitimacy based on a nationalist mass party incorporating residual and emergent anti-systemic opposition. The new basic law’s rhetorical qualities thus cohered with broader subjective understandings of a small-holding, agrarian, Catholic and nationalist Ireland (See Kissane, 2011). By prioritising capital flows over welfare and by outsourcing welfare provision to the Catholic Church, however, the constitution protected and legitimated the particular interests of those financiers, graziers and assorted professions who benefitted from economic peripheralization.

### **Neoformal Constitutionalism in Ireland and the European Union**

The politics of contesting the Irish Constitution thereafter was inextricably world-systemic. Post-World War Two, Ireland broadly functioned as a semi-periphery, one in which “national” forms of anti-systemic politics took precedence over “social” alternatives, and the population’s welfare remained subordinate to the needs of stable, increasingly global capital flows (O’Hearn 2001;



O'Connor, 2011). We might distinguish, however, two periods in which these tendencies operated to lesser and greater effect. During the expansionary phase of the U.S. Free Enterprise cycle of accumulation, between 1945 and 1973, the Irish economic model collapsed and reformed. Successive Fianna Fáil governments abandoned protectionism for free trade and the emergent European common market. During the 1960s, export-led industrialization, centred on attracting multinational corporations and incentivising foreign direct investment, notably from the industrial cores of Germany, Japan and the United States, brought about comparatively modest growth rates and increased welfare expenditure.

The second period, from 1973 to the economic crisis of 2008, came about following a signal crisis of the U.S.-led accumulation cycle. During this period, Irish economic development took an increasingly neoliberal form as successive governments prioritized securing global capital flows and integration into the global economy ahead of national developmental goals such as domestic employment or living standards. Ostensibly, the goal was to boost employment in the short term and to build local capacities to support indigenous industrialization in the long run. In reality, the primary beneficiaries of the subsequent Irish boom were multinationals engaged in tax avoidance and indigenous “middle-men” specialising in property, transport, legal, financial and accounting services (McCabe 2011; McGee, 2012; McDonald, 2014). In particular, the dominance of financier-property speculators within Irish political economy remained unchallenged: property bubbles occurred periodically prior to the most recent crash of 2007 (MacLaran, Attuyer and Williams 2010).

Politically, the pronounced disarticulation of a “social” alternative in Ireland, whether social democratic or more radically anti-systemic, requires attention. Between 1945 and 1968, Old Left movements had achieved their historic goal of state power almost everywhere, including both the Communist parties of the Eastern bloc and the social democratic parties in power, or alternating power, in the pan-European world. In the latter instance, welfare state expansion, the principal policy of the social-democratic parties, was accepted and practiced by their conservative opponents (Arrighi, Hopkins and Wallerstein 2011). In Ireland, mirroring other postcolonial contexts, a nationalist mass party, Fianna Fáil, successfully incorporated organized labor into informal consultations (as opposed to formal negotiations) on economic development and wage-bargaining from the 1960s onwards, an alliance that would persist until the 2007 crisis. Unlike their European counterparts, Irish trade unions did not successfully articulate (or form the central group within) a cross-class, “social” form of national economic development or solidaristic welfare state expansion (Cousins, 2005).

Ireland’s semi-peripheral trajectory deeply conditioned its experience of the 1968 anti-systemic rupture. Notwithstanding dramatic changes wrought by industrialization, urbanization,

new media and improved living standards, the possibility of a stronger left-right alignment of Irish politics floundered on core-peripheral relations. Following British repression of the civil rights movement in Northern Ireland in the early 1970s, the increased role of paramilitarism and state coercion on the island of Ireland split left-leaning nationalist and social tendencies in the south, and, in particular, reversed Labor's stance on refusing coalition with Fine Gael (O'Connor 2011: 220). In subsequent decades, Fianna Fáil, Fine Gael, and Labor gradually redefined the coordinates of nationalism from irredentism towards the principle of unification by popular consent in Northern Ireland, from national-cultural revival to liberal economic growth. Successive Irish governments proposed changes to the Constitution, particularly its national sovereignty and Catholic social provisions, in response to the conflict and to the demands of European integration (Chubb 1991: 85).

Without achieving state power, post-68 social movements in Ireland, as in core countries, reduced the capacity of older generations, men and "majorities" to subordinate youth, women and "minorities" (See Arrighi, Wallerstein and Hopkins 2011). Successive campaigns challenged the ideological hegemony of the Catholic Church, winning key battles concerning women's equality in the workplace, censorship, adoption, illegitimacy, divorce, homosexuality, civil partnerships and marriage equality. "Social" advocates were notably less successful, however, in challenging neoliberal development. From the late 1980s onward, the Labor party joined Fianna Fáil, Fine Gael, and the emergent Progressive Democrats in supporting further rounds of European integration, a process that necessitated and furthered acceptance of neoliberal norms. In association with autonomous elements from social movements and community groups, Sinn Féin, the Greens and various Trotskyist formations have since dominated opposition to welfare state retrenchment and EU integration (O'Connor 2011: 262). Crucially, the priorities of Sinn Féin, the largest party mobilising anti-systemic resistance, remain more "national" than "social" (See Maillot 2005: 103). An increasingly popular rejection of Catholic social norms governing family and sexuality thus coincided with successive nationalist-led governments' removal of "social" limits to the market.

The Irish Constitution both registered and reproduced this local manifestation of world-systemic politics in a series of seminal referendums and cases. Before looking at particular conflicts, however, an outline of the twin mechanisms for constitutional change is necessary. In terms of referendums, government parties, notably Fianna Fáil and Fine Gael, have dominated decision-making concerning their necessity, timing and wording. Ireland's history of referendums thus reflects their priorities. There have been three distinct categories of referendum: those that pertain to comparatively minor institutional changes (such as the lowering of voting age limits or the regularization of local government elections), those that pertain to significant changes to the state (such as European integration or the territorial claim over Northern Ireland) and those that

pertain to significant changes to the law's Catholic social nature. Use of the referendum to change the constitution has increased over time: six occurred between 1937 and 1972 while a further twenty-three took place between 1973 and 2008 (Coakley and Gallagher 2010: 445-6).

In terms of judicial review, a U.S.-style Supreme Court emerged in Ireland. Constitutional cases are heard through the ordinary courts and the Supreme Court remains the final court of appeal.<sup>8</sup> Broadly speaking, the judicial appointment process, dominated by Fianna Fáil and Fine Gael, has ensured the selection of conservative supporters of existing regime norms from among dominant status groups (white, male, upper class and Christian if not Catholic). "Traditional" norms in common law regimes include a strong defence of individual and property rights as well as "judicial restraint" or "deference" to parliament in constitutional cases (See Morgan 2001: 105). In law schools and the wider public sphere, social legal thought remained comparatively underdeveloped. Changing constitutional norms thus depended vitally on citizens taking new rights claims to court and on supportive networks of barristers and civil society groups (Hogan, Barrington and McEntee 1985: 107; Sturgess and Chubb 1988: 420). Support structures for taking such cases, mirroring the state's low welfare effort, were poorly financed, ensuring advantages to those able to fund cases (O'Morain 2003). Unsurprisingly, Ireland's "rights revolution" was a comparatively conservative one (See Epp 1998).

### **Farewell to the Catholic Social Constitution**

The conservative, nationalist dominated stasis of core-peripheral and anti-systemic relations in the 1950s and 60s occasioned comparatively few changes to the 1937 Irish Constitution, or indeed proposals for amendment (See McMahon 1979). A contemporary report of a cross-party Constitution Review Committee (1967: 8), created by Taoiseach Seán Lemass (Fianna Fáil), stated that the group was "not aware of any public demand for a change in the basic structure of the Constitution." The committee did, however, recommend removing certain Catholic confessional provisions, partly in response to changing social mores and partly with a view to furthering diplomatic relations with Northern Ireland's Unionist administration. To this end, in 1972, the government proposed and a majority voted to remove the constitutional provision outlining the "special position" of the Catholic Church. At the same time, faced with the conflicting pressures of tradition and modernization, Lemass privately encouraged liberal judicial appointees to emulate the activist U.S. Supreme Court under Earl Warren (Sturgess and Chubb 1988: 144).

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<sup>8</sup> European integration further occasioned the emergence of supra-national court structures, notably the European Court of Justice and the European Court of Human Rights, where EU statutes and case-law take precedence over national law.

Constitutional change in Ireland, as in the United States, owed partly to an empowered judiciary. Chief Justice Cearbhall Ó'Dálaigh's court of the 1960s newly interpreted the constitution so as to acknowledge the existence of rights not explicitly listed in the constitution (*Ryan v Attorney General* [1965]). At least eighteen such "un-enumerated" rights would be identified over the following three decades (Coakley and Gallagher, 2010: 87). The Supreme Court proved particularly activist regarding the preservation and enlargement of civil liberties, emphasising limits to police powers and rights of due process as well as expanding the private sphere, most notably with regard to the liberalization of Catholic social or family law. In the celebrated *McGee* [1974] case, the Supreme Court acknowledged an "unenumerated" constitutional right to marital privacy and thereby struck down Catholic "social" laws banning the importation of contraceptives. Thereafter, the spectre of an Irish judge following American precedents to liberalize divorce or abortion legislation mobilized conservative Catholic groups into action.

In market law, the judges retained a classic liberal view of individual rights trumping collective rights or social justice concerns. Judge Hanna's expressed inability to comprehend the meaning of such social constitutional terms as the "common good" or "social justice" would remain the traditional response of jurists trained in the canons of positive law (*Pigs Marketing Board v. Donnelly* [1939]). This classic disposition was most apparent in the judiciary's interpretation of the 1937 Constitution's trade union provisions. In *NUR* [1947], *Educational Company* [1961] and *Meskill* [1973], the courts prohibited picketing to obtain "closed shop" agreements and further established a low threshold for employers to obtain injunctions to restrain workers' collective action. Thus, while other European countries' legally entrenched corporatist bargaining models over this period the Irish Constitution was used to reverse inherited common law immunities for industrial action (Wilkinson 1989). Among other factors, the strength of this Anglo-American constitutional model induced trade unions' subsequent acceptance of FF-led social partnership and a restrictive Industrial Relations Act (1990).

From the 1970s onwards, however, as the crisis of the U.S.-led accumulation cycle deepened, neo-formal fixes increasingly involved national governments relocating majoritarian decision-making to international treaty-based institutions. As neoliberal elites sought to restore profitability by disembedding social reforms, successive Irish governments proved complicit by removing key policy-making instruments, notably monetary policy, from industrial relations and parliamentary arenas in order to insulate these decisions from majoritarian pressures (Hirschl 2007; Mair 2013). This shifting balance of core-peripheral and anti-systemic relations crystallized in a series of particular changes to the 1937 Irish Constitution. The contested removal of capital from the constraints of "social" development in market law and of society from the "Catholic

social” in family law animated each of the seven referendums on EU treaties occurring between 1972 and 2008.<sup>9</sup> From a peak of 80 per cent approval for EEC membership in 1972, majority support for EU integration has declined steadily in line with its increasingly neoliberal form since Maastricht (Anderson, 2007).

The size of EU-critical opposition in Ireland is remarkable given that proponents of EU integration encompass the state’s three largest political parties (Fianna Fáil, Fine Gael and, from the 1980s onwards, Labor) combined with the Irish Farmers’ Association, the Irish Business Employers’ Confederation, the American Chamber of Commerce, and both state and private media. Multinational corporations intervened directly in the Lisbon (2009) referendum to advocate a “yes” vote (Kennedy, 2009). Conversely, both “national” (Sinn Féin, the Irish Sovereignty Movement as well as Catholic conservatives) and “social” (Trotskyite Parties and social movements) advocates have helped organize anti-systemic opposition. Remarkably, in the Nice (2001) and Lisbon (2008) referendums support fell below 50 per cent, pronouncedly so in working class constituencies. On both occasions the treaties were rejected, modified, and approved at a second referendum (Table 1). Social partnership inhibited effective anti-systemic resistance. Notably, having remained neutral in 2008, SIPTU, the country’s largest trade union, opted to support the 2009 Lisbon Treaty.

**Table 1. European Treaty Referendum Results: 1972-2012**

	<b>Turnout</b>	<b>Yes</b>	<b>No</b>
Accession to the European Communities (May 1972)	71	<b>83</b>	17
Single European Act (May 1978)	44	<b>70</b>	30
Maastricht Treaty (June 1992)	57	<b>69</b>	31
Amsterdam Treaty (May 1998)	56	<b>62</b>	38
Nice Treaty I (June 2001)	35	46	<b>54</b>
Nice Treaty II (October 2002)	49	<b>63</b>	37
Lisbon Treaty I (June 2008)	53	47	<b>53</b>
Lisbon Treaty II (October 2009)	59	<b>67</b>	33
Stability, Co-ordination and Governance (May 2012)	50	<b>60</b>	40

*Sources: Coakley and Gallagher, 2010: 445-6; www.environ.ie.*

<sup>9</sup> Ireland’s comparatively unusual use of the referendum stemmed from a constitutional challenge to the government’s ratifying the Single European Act in 1987. The Supreme Court ruled that those treaties affecting competences of the Irish constitution required approval by referendum (Crotty v. An Taoiseach [1987]; Crotty 1988).

Over the same period, youth, feminist and “minority”-led attempts to remove the Catholic social imprimatur on constitutional issues such as abortion, divorce, homosexuality, adoption and illegitimacy proceeded haltingly. Attempting to win over unionist opinion to improve North-South relations, Fine Gael Taoiseach Garrett FitzGerald proclaimed a “crusade” to remove sectarianism from the Irish Constitution, before bowing to Catholic pressure groups and holding a referendum to prohibit abortion in 1983 (Ferriter 2005: 717-9). The Fine Gael-Labor government also failed to carry a referendum to legalise divorce in 1986. By the 1990s, however, the counter-mobilizations of students, feminists, liberals and the wider Left had grown to a majority. In 1992, referendums prompted by court cases constitutionalized a right to leave the state for and to obtain information on abortion. In 1995, the constitutional ban on divorce was narrowly overturned (Table 2).

**Table 2. Catholic Social Referendum Results: 1972-2015**

	<b>Turnout</b>	<b>Yes</b>	<b>No</b>
Remove “special position’ of Catholic Church (1972)	50	<b>84</b>	16
Abortion: right to life of the unborn (1983)	54	<b>66.9</b>	33.1
Right to Divorce (1986)	61	36.5	<b>63.5</b>
Abortion (1992)			
- exclude suicide as permissible grounds for termination	68	<b>65.4</b>	34.6
- right to travel	68	<b>62.4</b>	37.6
- right to information	68	<b>59.9</b>	40.1
Right to Divorce (1996)	62	<b>50.3</b>	49.7
Abortion: exclusion of suicide (2002)	50	49.6	<b>50.4</b>
Children’s Rights (2012)	34	<b>58</b>	42
Marriage Equality (2015)	60	<b>62</b>	38

Sources: Coakley and Gallagher, 2010: 445-6; [www.environ.ie](http://www.environ.ie).

The judiciary’s progressive liberalization of Catholic social family law was similarly interrupted. Judicial activism prompted successive Irish governments in the 1970s to make conservative (as opposed to liberal) appointments to the bench, primarily to ensure a tough line on IRA paramilitaries through the Special Criminal Court (Sturgess and Chubb 1988). During the 1980s, conservative appointees tended to preserve the “Catholic social” constitution, notably

defending challenged laws criminalising homosexuality (*Norris v. Ireland* [1988]). In the *X-case* [1993], however, the Supreme Court acknowledged a right to pursue an abortion in strictly limited circumstances where a mother's life was at risk. From that point onwards, possibly in response to the very public contestation of the *X-case* ruling, the Supreme Court has no longer proved particularly "activist" regarding constitutional interpretation. Strict, literal interpretations of the Constitution, not unlike the emergent "originalist" legal culture in the United States, gained greater support (Coakley and Gallagher 2010: 88). Groups for choice regarding abortion and for the decriminalization of homosexuality subsequently pursued successful legal actions to the ECHR.

In terms of market law, the Irish Supreme Court continued to strike down social legislation in defence of negative liberties or property rights. Special interest groups, including employers, landlords and farming associations, successfully used the constitution to challenge state regulation of the market place. These cases included successful constitutional challenges to rent restrictions and land taxation measures (*Blake* [1981]; *Brennan* [1983]; see Keane 1983). Conversely, responding to claimed socio-economic or "positive" rights, the Supreme Court proved reluctant to impose additional economic costs on the state. Judges, ostensibly distinguishing between "distributive" and "commutative" justice as well as claiming a commitment to the principle of the separation of powers, have characteristically refrained from challenging duly enacted legislation or issuing compulsory injunctions to the government in the realm of social expenditure (*O'Reilly* [1989]; *Sinnott* [2001]; *T.D.* [2001]). Seminal cases concerning court-ordered public expenditure, notably the introduction of free legal aid and the payment of welfare arrears, have instead been fought and won at the ECHR (*Airey* [1979]; O'Morain 2003: 13).

Both of the trajectories of Irish constitutional development outlined here - the disembedding of the (Catholic) social in market and family law - have featured prominently in the state's neoliberal response to the global economic crisis of 2007. On the one hand, constitutional referendums on children's rights (2012) and on marriage equality (2015) have further eroded residual Catholic social norms. Similarly, the recent Constitutional Convention (2011-13) considered further referendums along these lines, including the removal of confessional and gender-biased provisions. Moreover, after numerous critical judgments in the ECHR, protests following the death of a woman denied a termination in an Irish hospital compelled the Fine-Gael-Labor coalition government to legislate for the *X-case*. Campaigns for the repeal of the 8<sup>th</sup> amendment and for a woman's right to choose continue. On the other hand, constitutional referendums on Lisbon (2009) and on the so-called Fiscal Compact (2011), campaigned for and won by traditional proponents, have entrenched austerity and completed the project for a neoliberal European Constitution, albeit without its more symbolic features. The challenge for those creating (or defending what is left of) a "social" state is stark. While the Constitutional Convention also

proposed a referendum to constitutionalize socio-economic rights, the government retained and exercised its veto over this proposal. Social movements, however, notably those currently involved in housing and water privatization struggles, continue to demand socio-economic rights and, in the case of the trade union-led Right2Water (2015), to demand their constitutionalization.

### Conclusion

In sum, *Bunreacht na hÉireann* merits understanding as a world-constitution. Specifically, Ireland's constitutional development had a dialectical relationship to its incorporation into the historical capitalist world-system and to concomitant socio-political struggles over this evolving process. In the period between 1848 and 1945, Ireland resembled postcolonial peripheries insofar as popular, anti-systemic mobilizations adopted "national" rather than "social" trajectories. Following the world-systemic rupture of 1917, the manner in which Sinn Féin, a disciplined nationalist mass party, substituted itself for a popular anti-colonial movement and associated class conflicts ensured that conservative forms of classic constitutionalism triumphed over both social democratic and radical alternatives. In the 1920s and 1930s, the comparative weakness of social democratic or communist forms of anti-systemic resistance resulted from their internal fragmentation over national and social priorities and to their respective reliance on parliamentary-clientelism or paramilitary-vanguardism. Equally important, Fianna Fáil, a national-populist mass party, conceded reforms to co-opt small farmers and organized labor while targeting coercive measures, including censorship, at rival republican, communist and feminist groups.

In 1922 and 1937, constitution makers registered and reproduced this conservative balance of core-peripheral and capital-labor relations, most notably in their determined exclusion of social constitutional forms that envisaged direct state intervention in economic production and welfare redistribution. The 1922 Irish Free State Constitution thus reproduced political institutions and norms inherited from the British or Westminster model, notably those concerning electoral democracy and centralized executive-administrative authority. It also reproduced an enlightened conservative mode of conceding reforms, notably land redistribution, to preserve the inherited peripheral economy from its worst excesses. Again, similar to other postcolonial peripheries, the "Catholic social" form of constitutionalism adopted in 1937 did not fundamentally change these inherited political institutions, or classic laws of property and contract, but instead prioritized creating a "native" or Catholic family law regime. The *Bunreacht* similarly envisaged a model of welfare provision based on paternalist charity rather than justice or solidarity.

Ireland's contested incorporation into the historical capitalist world-system and associated constitutional forms, however, depart from a strictly postcolonial interpretation of Irish peripheralization. First, membership of the white, English-speaking Atlantic economy facilitated



Ireland's integration into the world-system on increasingly better economic and political terms than other peripheries, particularly from the late 19<sup>th</sup> century onwards. Second, to a more pronounced degree than elsewhere, the conciliatory redesign of British-Irish relations, specifically the adoption of electoral and land reforms, created a residual Anglo-Irish and emergent Catholic Irish middle class of sizeable land-owners, professionals and administrators by the early 20<sup>th</sup> century, thoroughly integrated into the "national" (peripheral) economy and, to varying degrees, the state apparatus. Third, unlike in Spanish or French colonies, the Catholic Church had not been popularly identified with the colonising regime, thereby strengthening its moral monopoly throughout the 20<sup>th</sup> century, marginalising rival ideologies and legitimating the independent state on the basis of supernatural authority more than popular reason. Together, these long-term factors facilitated a particular form of political stability or quietism unknown to poorer peripheries.

In the period between 1945 and 2008, Ireland's changing constitutional forms registered and reproduced more widely experienced, transnational developments. Semi-peripheral re-incorporation into a U.S.-led world-system, driven by the expansion of multinational corporations, prompted economic growth, limited industrialization, and fostered an increasingly suburban, consumerist and mass society. An emergent nationalist-populist consensus on liberal economic growth and more liberal values displaced a residual nationalist project of territorial reunification and cultural revival. As in the pre-war era, nationalist dominance owed to the capacities of a reformed comprador class— now centred on multinational service provision, the professions, government and administration—to advance a programme of "national interest" still capable of co-opting small farmers, organized labor and community groups. "Growth" accompanied comparatively modest levels of redistribution through EU-subsidized mass agricultural production, voluntary wage bargaining and gradual welfare state expansion. Anti-systemic movements fragmented. With rapidity from the 1980s onwards, post-68 social, youth and feminist movements' rejection of Catholic social norms governing family and sexuality coalesced with neoliberal governments' removal of "social" limits to the market.

While these developments form part of a more widely shared experience in the world-system, certain dynamics or historically specific legacies colored emergent constitutional forms in Ireland. From the 1970s onwards, the outbreak of violence in Northern Ireland split the left and reanimated nationalist-confessional politics against the encroaching "liberal agenda." Moreover, the moral authority of the Catholic Church, albeit gradually diminishing, endured into the 1990s, its influence still apparent in the *Bunreacht*'s religious-gendered language and, in particular, the retention of highly restrictive provisions concerning abortion. Nevertheless, in Ireland, as elsewhere, the "national" bourgeoisie, faced with competing pressures of tradition and modernization in market and family law, relocated contentious political issues to the non-

majoritarian, expert domains of treaty formation and judicial review, notably those of the European Union.

Emergent neo-formal constitutional forms incorporated legacies of both domination and freedom. The Irish courts generally reproduced classic constitutional forms, emphasising individualism, anti-statism, and “negative liberties” (including private property rights) ahead of communitarian norms, the interests of the “common good” or “positive” rights to welfare. Concomitantly, numerous minoritarian “human rights” conflicts—fought by or on behalf of women, children, prisoners, gays, Travellers, asylum seekers, the disabled and the transgendered among others— have successfully challenged repressive constitutional norms and expanded formal and substantive freedoms. Importantly, the displacement of politics to technocratic legal domains was and remains legitimated by popular actions, not just by majoritarian referendums but also by periodic and significant citizen-initiated court cases.

Today, as the spirit of Davos ushers in a return to classic, laissez-faire jurisprudence in the service of corporate power, it is impossible to tell whether an alternative spirit of Porto Alegre may succeed in creating a more democratic, more egalitarian world. The present analysis suggests three insights for movements acting in the latter spirit. First, it underlines the deep-rooted relationship between state formations, constitutionalism and anti-majoritarian politics, specifically the defence of the rights of propertied minorities from mob-rule or, as the Greeks defined it, “democracy.” Second, it cautions social movements against expecting too much from state forms such as constituent assemblies or public interest litigation strategies as a means of challenging systemic priorities. Progressives cannot abandon political politics for judicial politics (Unger 2009: 111). Third and finally, this analysis highlights instead the potentialities of organized movements, premised on direct democracy and direct action, to effect systemic transformations (See Graeber 2013). If pre-existing institutional legacies, including state, constitutional and proto-state formations, may limit or contain these potentialities, moments of world-systemic rupture, such as occurred in 1917 or 1968, can enhance them in altogether new, unexpected and inspiring ways. The possibility of moving against and beyond anti-democratic constitutionalism, as ever, depends on us.

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