

# Constitutional Change and Interest Group Politics:

## Ireland's Children's Rights Referendum

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### I. Introduction

Constitutions are subject to both formal and informal change. Whereas comparative constitutional law literature on informal change tends to focus on the relationship between judicial processes and specific doctrinal changes, the literature on formal change tends to focus on general questions about the purposes,<sup>1</sup> modalities,<sup>2</sup> difficulties,<sup>3</sup> and limits of constitutional change.<sup>4</sup> That literature also explores the role of 'the people', perhaps as a bearer of constituent power, in relation to fundamental constitutional change.<sup>5</sup> However, the dynamics of formal change, although studied by political scientists, rarely receive the same doctrinally informed scrutiny as does informal constitutional change. In other words, there is little consideration of how the political processes of formal amendment relate to and are affected by the precise change to constitutional law that they seek to make. In this chapter, we respond to that gap in the literature. Ireland's Children's Rights Amendment, approved by Referendum

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\* [This paper is forthcoming as Chapter 10 in Richard Albert, Xenophon Contiades and Alkmene Fotiadou, *The Foundations and Traditions of Constitutional Amendment* (Oxford: Hart Publishing, 2017). There are references within this paper to other publications from that volume.] We are grateful to the members of the public law discussion group in Trinity College Dublin and to Dr Conor O'Mahony for their comments on earlier drafts of this paper.

<sup>1</sup> See, for instance, R Albert, 'The Expressive Function of Constitutional Amendment Rules' (2013) 59 *McGill LJ* 225.

<sup>2</sup> See, for instance, Sofia Ranchordás's contribution to this volume.

<sup>3</sup> See, for instance, Derek O'Brien's contribution to this volume and also R Albert, 'Constructive Unamendability in Canada and the United States' (2014) 67 *Sup Ct L Rev* (2d) 181.

<sup>4</sup> See, for instance, the contributions of Yaniv Roznai and Oran Doyle to this volume.

<sup>5</sup> See, for instances, the contributions of Juliano Benvindo, Joshua Braver and Thomaz Pereira to this volume.

in November 2012 and upheld by the Supreme Court in April 2015,<sup>6</sup> provides an interesting example of these dynamics for three reasons. First, it involves an understudied topic: formal constitutional change as a means to amend intricate, judicially created doctrine rather than to make foundational constitutional decisions. Secondly, it provides a further insight into the dynamics of referendum campaigns, currently a significant concern in constitutional politics. Thirdly, it focuses attention on the role of constitutional lawyers and interest groups as both framers and agents of formal constitutional change.

We argue that the Children's Rights Referendum was a failure in deliberative democracy, not because of elite control (a common concern over referendums) but rather because constitutional lawyers and public interest groups combined to offer a false diagnosis of a constitutional malaise.<sup>7</sup> This led to calls for reform under the simplistic rubrics of 'children's rights' and 'the best interests of the child.' Ultimately, this confused analysis of constitutional law allowed civil society groups to support a referendum that made minimal change and largely reproduced what those groups had claimed to be a constitutional malaise. Conversely, the referendum was opposed by some religious/conservative voices, notwithstanding that it largely maintained the constitutional *status quo* that they purported to favour. There followed a confused and dispiriting referendum campaign, which included a finding by the Supreme Court days before the referendum that the government had funded an unconstitutionally biased information campaign. The result was a (for many) surprisingly narrow approval of 58 per cent: 42 per cent for 'children's rights', with the third lowest ever turnout for a referendum vote.<sup>8</sup> We argue that four generalisable lessons should be drawn from this

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<sup>6</sup> See *Jordan v Minister for Children and Youth Affairs* [2015] IESC 33. The Supreme Court rejected a challenge claiming the result was influenced by the government's unconstitutional information campaign, discussed below.

<sup>7</sup> For a different, although partially complementary, account of the dynamics of the Children's Rights Amendment, see C O'Mahony, 'Falling Short of Expectations: the 2012 Children Amendment, from Drafting to Referendum' (2016) 31 *Irish Political Studies* 252.

<sup>8</sup> Though this result represented a clear victory for the Yes side, the Referendum had been broadly supported by civil society groups and political parties, and was long desired by many sectors of Irish society. The common expectation was that the referendum would be almost uncontested and would pass with a far more decisive margin. (Three years later, the far more divisive proposal to allow same-sex marriage was approved by 62% of the people.) The poor quality of the campaign, the confusion around

sorry affair. First, where the desire is to change judicially created legal doctrines, only significant change warrants engaging the process of constitutional amendment. Although constitutional changes may be worthwhile for either expressive or functional reasons, we should be prepared to live with sub-optimal constitutional law and not propose trivial changes. Secondly, constitutional lawyers should be wary of legal analysis that lends itself to presentation in terms of political cleavages that exist in society. This can generate calls for totemic change and impede efforts to understand and explain why constitutional change is required. This problem is particularly acute where the constitutional change is intended to alter judge-made rules. Thirdly, much of the academic literature on referendums focuses on the danger of political elites manipulating the populace in order to legitimise their change-projects. The experience of the Children's Rights Referendum suggests the need to pay more academic attention paid to the dangers posed by interest groups securing control of the political agenda. Finally, campaigns for constitutional change that seek to entrench or refine constitutional values should engage directly and clearly with those values; otherwise, the potential for meaningful engagement with voters will be lost.

## II Referendums and Constitutional Change

Referendums have a chequered history as instruments of legal change. Gallagher and Uleri note the 'standard criticism' that 'the general public is simply too ill-informed or irresponsible to be trusted to make decisions on complicated questions.'<sup>9</sup> For some, the deliberative and democratic credentials of referendums are irretrievably undermined by the mismatch between the purity of the democratic claim ('the people have spoken') and the possibility for elite control. Elites can control who votes (either through delineating the territory or the criteria for identifying voters), what is voted on (constructing the question), the flow of information (whether through funding rules,

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the proposal, and the Supreme Court finding against the government information campaign probably all contributed to this. F Sheahan, 'Children's Referendum passed by thin margin of 58pc to 42pc' *The Irish Independent* 3 (11 November 2012); H McGee 'Why the referendum was closer than predicted' *Irish Times* (13 November 2012).

<sup>9</sup> M Gallagher and PV Uleri, *The Referendum Experience in Europe* (Macmillan Press, 1996) 240.

limits on spending or restrictions on free speech), and the amount of time for deliberation.<sup>10</sup> The Summer 2015 referendum in Greece was widely perceived as problematic on account of the short campaign and the opacity, perhaps even pointlessness, of the question asked.<sup>11</sup> These concerns were substantiated by the fact that the Greek Government subsequently signed up to bailout terms that were far harsher even than those apparently rejected in the referendum.<sup>12</sup> Likewise, concerns have been raised over the use of referendums against the backdrop of physical force and secessionist claims.<sup>13</sup>

Even if these complaints turn on the misuse of referendums, referendums can still be problematic in functioning democracies that seek to avoid elite control. The problem of rational ignorance (given the low likelihood that any one vote will affect the outcome) may be even more acute for referendums that decide issues than for elections of representatives.<sup>14</sup> Others accept that these problems may arise, but argue for measures that reduce elite control and increase the possibilities for deliberative engagement. If a referendum process can genuinely be an exercise in deliberative democracy, the authenticity of the people's voice that emerges is a valuable element of a democracy, particularly on questions of constitutional foundation and constitutional change, not attainable in any other way.<sup>15</sup> The Scottish Independence Referendum is generally seen as a positive example of the referendum process.<sup>16</sup>

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<sup>10</sup> See S Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press, 2012) 23–24.

<sup>11</sup> See X Contiades and A Fotiadou, 'The Greek Referendum: Unconstitutional and Undemocratic' (*Constitution Making & Constitutional-Change*, 7 July 2015) <<http://constitutional-change.com/the-greek-referendum-unconstitutional-and-undemocratic/>> accessed 26 July 2015.

<sup>12</sup> S Shuster, 'Greece Agrees to its Third European Bailout after Marathon Talks' (*Time*, 13 July 2015) <<http://time.com/3955221/greece-bailout-marathon/>> accessed 26 July 2015.

<sup>13</sup> See, for instance, S Tierney, 'Sovereignty and Crimea: How Referendum Democracy Complicates Constituent Power in Multinational Societies' (2015) 16 *German Law Journal* 523.

<sup>14</sup> M Setälä, 'Introduction' in M Setälä and T Schiller (eds), *Referendums and Representative Democracy: Responsiveness, accountability and deliberation* (Oxford, 2009) 9, citing A Downs, *An Economic Theory of Democracy* (Harper, 1957).

<sup>15</sup> We take this to be the core argument of Stephen Tierney in his impressive contribution to the debate on the desirability of constitutional referendums. See Tierney (n 10).

<sup>16</sup> See, for instance, S Tierney, 'Reclaiming Politics: Popular Democracy in Britain after the Scottish Referendum' (2015) 86 *The Political Quarterly* 226.

Several features of the Irish referendum process protect against the sort of problems that arose in Crimea and Greece. Since a referendum is required for all constitutional change and referendums can, apart from one never utilised exception, only be used for that purpose, there is little scope for elites to use referendums opportunistically or to skew the wording of referendum proposals.<sup>17</sup> Although the Government controls the drafting and initiation process, it must secure support for its referendum proposal in both Houses of Parliament where amendments can and have been made in response to public disquiet. Judicial decisions prohibit the Government spending money on one side of the referendum campaign and require fair media coverage.<sup>18</sup> An independent Referendum Commission explains referendum proposals to the public and encourages them to vote. Statute requires a campaign period of between 30 and 90 days,<sup>19</sup> although Governments generally allow close to the minimum time for referendum campaigns. Although the short campaign period has been criticised in respect of other referendums,<sup>20</sup> the Children's Rights Referendum was formulated in response to demands from civil society interest groups and followed several other proposals for change that had been periodically discussed for over a decade. In short, the Children's Rights Referendum can fairly be characterised as one where public engagement and deliberation was not crowded out by elite control. Nevertheless, we argue that the Referendum was a failure in deliberative democracy: changes to constitutional doctrines were misleadingly presented through simplified political narratives that reflected a political cleavage in Irish society. Constitutional lawyers and civil society interest groups combined to cause this problem.

### III Political Cleavages and Narratives for Change

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<sup>17</sup> Setälä (n 14) 5.

<sup>18</sup> *McKenna v An Taoiseach* (No 2) [1995] 2 IR 10 and *Coughlan v Broadcasting Complaints Commission* [2000] 3 IR 1, respectively.

<sup>19</sup> The Referendum Act 1994, s 10.

<sup>20</sup> See M Marsh, J Suiter and T Reidy, 'Report on Reasons Behind Voter Behaviour in the Oireachtas Inquiry Referendum 2011' (January 2012).

Richard Sinnott identifies a 'potentially powerful religious-conservative versus secular-liberal cleavage that remains politically subliminal' underlying politics in Ireland.<sup>21</sup> This cleavage manifested itself in constitutional referendums on divorce (1986 and 1995) and abortion (1983, 1992 and 2002) and subsequently in the 2015 marriage referendum. As political parties and interest groups coalesce around cleavages, the support of these groups for a proposal can help voters to reach a decision that reflects their interests, broadly defined.<sup>22</sup> Lupia and Johnston argue, however, that voters can be competent without being fully informed, once they reach the same judgement as they would if fully informed.<sup>23</sup> The Children's Rights Referendum was presented in terms of the cleavage identified by Sinnott.<sup>24</sup> In the years leading up to the referendum proposal, the interest groups supporting the proposal were, broadly speaking, on the secular/liberal side of the political spectrum. More starkly, most of the voices raised against the proposal were from a religious and/or conservative background. Mary O'Rourke, a leading politician who chaired the Oireachtas Committee that formulated one of the reform proposals, characterised opponents of the children's rights referendum as 'an extreme right-wing element in Ireland which—even though the headlines scream of the shameful abuse of children—will regard any such intrusion as being against the Constitution and contrary to the fundamental rights of the family'.<sup>25</sup> According to this narrative for change, conservative forces wanted to maintain a constitutional preference for parental rights over children's rights. However, this depended on a misunderstanding of the constitutional position. The Constitution, as we shall shortly see, did not grant parents *rights* over their children, but rather gave parents considerable *authority* to decide on what was in the best interests of their children and whether to assert their children's rights. Defenders and opponents of this constitutional *status quo* could both legitimately claim to respect a child's best interests and children's rights; they differed

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<sup>21</sup> R Sinnott, 'Cleavages, parties and referendums: Relationships between representative and direct democracy in the Republic of Ireland' (2002) *Eur J Pol Research* 811, 815.

<sup>22</sup> T Christin, S Hugz and P Sciarini, 'Interests and information in referendum voting: An analysis of Swiss voters' (2002) *Eur J Pol Research* 759, 759.

<sup>23</sup> A Lupia and R Johnston, 'Are Voters to Blame? Voter Competence and Elite Maneuvers in Referendums' in M Mandelsohn and A Parkin (eds), *Referendum Democracy* (Palgrave, 2001) 191.

<sup>24</sup> O'Mahony supports this analysis. See O'Mahony (n 7) 256–57.

<sup>25</sup> M O'Rourke, *Just Mary* (Gill & McMillan, 2012) 174.

over the appropriate level of parental authority in respect of those best interests and rights.<sup>26</sup>

Although the pre-amendment Articles 41 and 42 of the Irish Constitution contain one or two references to parental rights, the better characterisation is that they accord a high level of authority to parents in respect of children's rights. The Family is protected 'in its constitution and authority.' Parents have a 'right and duty' to provide for the education of their children. There is one explicit child's right: the right to attend a school receiving public money without attending religious instruction. There is one explicit parents' right: the rights of parents in the matter of religious and moral formation. However, the centrally important provision of Article 42.5 gave a residual power to the State to protect children, framed in terms of the child having rights and parents owing a duty to their children. This is fundamentally inconsistent with a parental rights model. The better reading of the Constitution is therefore that it recognised children's rights and provided that parents were to be the authoritative decision-makers for children, but with a residual power for the State to interfere in the case of parental failure. It could be argued that this gave too much authority to parents, but it did not protect parental rights in opposition to children's rights.

Consistent with this analysis, the courts interpreted Article 42.5 as mandating considerable deference to parents when making joint decisions about their children, unless they had failed in their duty. Decisions made by well-meaning parents to refuse medical treatment or procedures would not be overturned, unless serious consequences were immediately likely.<sup>27</sup> In custody cases, the courts had ordered the return of a child to her parents who married after an adoption process commenced but before it completed. In an early case, the Court ordered the return against what appeared to be in

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<sup>26</sup> There can, in principle, be an objective conception of the child's best interests. It is simply the case that no model of children's rights can secure a child's best interests in all circumstances, because both parents and the state are prone to mistakes. On the general difficulties with a best interests test, see J Herring and C Foster, 'Welfare means relationality, virtue and altruism' (2012) 32 *Legal Studies* 480; S Parker, 'The Best Interests of the Child – Principles and Problems' (1994) 8 *Int'l J of Law and the Family* 26.

<sup>27</sup> See *NWHB v HW* [2001] [2001] 3 IR 622, in which the Supreme Court refused to order that a child undergo the PKU test, and *Temple Street Hospital v D* [2011] IEHC 1, in which the High Court ordered that a child be given a blood transfusion, against the wishes of the parents.

the best interests of the child.<sup>28</sup> In the most recent case, the Court characterised the best interests of the child as being likely served by return to the now married natural parents.<sup>29</sup> The voluntary placement for adoption of marital children was not permissible. Furthermore, the adoption of marital children against their parents' wishes was not legislatively permitted until 1987.<sup>30</sup> All of these are evidence of a high degree of parental authority. The question is how they came to be presented as a rejection of 'children's rights,' making that phrase of totemic importance to a cleavage between conservative and liberal forces.

#### IV Children's Rights: From Lawyers to Interest Groups and Back Again

Academic writing persistently characterised the Constitution as protecting parents' rights. Writing in the late 1970s, William Duncan commented that the Irish courts had privileged too greatly the rights of parents: 'The guarantee of rights to a parent who is fit, willing and able to perform his parental duties, has closed the door on even the most compelling arguments for denying those rights in the best interests of the child.'<sup>31</sup> Duncan later described the Supreme Court judgment in *re JH*,<sup>32</sup> directing the return of a child to its now married parents, as a 'powerful blow' for the rights of married parents. Though 'couched in the language of children's rights', the decision in *JH* was '[i]n reality ... an assertion of parental privilege.'<sup>33</sup> Alan Shatter argued that the courts' interpretation of the rights of the family rendered it 'constitutionally impermissible to regard the welfare of the child as the paramount consideration in any dispute as to its upbringing or custody between parents and third parties.'<sup>34</sup> He characterised this as

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<sup>28</sup> *M v An Bord Uchtála* [1977] IR 287.

<sup>29</sup> *N v Health Services Executive* [2006] IESC 60.

<sup>30</sup> re Art 26 and the Adoption (No 2) Bill 1987 [1989] IR 656.

<sup>31</sup> W Duncan, 'Note' (1978) 2 *Dublin University Law Journal* 67, 70.

<sup>32</sup> [1985] IR 375.

<sup>33</sup> Duncan (n 31) 80.

<sup>34</sup> A Shatter, *Family Law*, 4th edn (Wolfhound, 1997) [1.69].

'placing such other rights of the legitimate child in a constitutionally inferior or subservient position to the rights of the legitimate child's parents.'<sup>35</sup> Gerard Hogan and Gerry Whyte, editors of the leading treatise on Irish constitutional law, contended that, in the specific context of custody disputes, the Constitution had 'engendered an approach which tends to emphasise the rights of adults, on some occasions to the detriment of the rights of the child.'<sup>36</sup> The view that the Constitution prioritised parental rights over children's rights is still prevalent in the work of leading contemporary scholars.<sup>37</sup>

This analysis was flawed in its characterisation of the problem. There is scant evidence that the courts ever understood the Constitution as a charter for parents' rights. Even if the academics' criticism was plausible in the 1970s and 1980s, it was untenable long before the Children's Rights Referendum. Most explicitly, in *N v Health Service Executive Hardiman J* in the Supreme Court observed:

It would be quite untrue to say that the Constitution puts the rights of parents first and those of children second. It fully acknowledges the 'natural and imprescriptible rights' and the human dignity, of children, but equally recognises the inescapable fact that a young child cannot exercise his or her own rights. The Constitution does not prefer parents to children. The preference the Constitution gives is this: it prefers parents to third parties, official or private, priest or social worker, as the enablers and guardians of the child's rights.<sup>38</sup>

Nevertheless, the idea that the Constitution protected parents' rights over children's rights took hold in the public consciousness. This became linked with the idea that the Constitution precluded the effective protection of children from abuse, whether by their parents, the state, or religious clergy.

In 1993, the Kilkenny Incest Report detailed how social services had failed a woman who had been repeatedly raped by her father. Although not identifying any specific way in which the Constitution had impacted negatively on the victim's situation, the Report

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<sup>35</sup> *ibid* [13.117].

<sup>36</sup> G Hogan and G Whyte and JM Kelly: *The Irish Constitution*, 4th edn (Butterworths, 2003) [7.6.198] citing the Kilkenny Incest Report. *cf* [7.6.207] *et seq*.

<sup>37</sup> Ursualla Kilkelly argues that 'children's rights are ignored or underplayed when they come into conflict with those of their parents.' U Kilkelly, *Children's Rights in Ireland: Law, Policy and Practice* (Tottel, 2008) 83.

<sup>38</sup> [2006] IESC 60.

nevertheless called for constitutional change on the ground that the Constitution might consciously or unconsciously have been interpreted as giving a higher value to the rights of parents than to the rights of children. This could be addressed by the Constitution containing 'a specific and overt declaration of the rights of born children.'<sup>39</sup> In 1996, the Constitution Review Group similarly recommended the textual protection of specified children's rights, including those already enumerated by the courts and those protected under the UN Convention on the Rights of the Child, as well as the incorporation of an express obligation to treat the best interests of the child as the paramount consideration in any actions relating to children.<sup>40</sup>

From the outset, therefore, advocates for reform adopted the incorrect view that the Constitution protected parents' rights in opposition to children's rights, loosely blamed this constitutional position for bad outcomes for children, and sought to address the situation by amending the Constitution to protect 'children's rights'. They sought a general declaration of children's rights, the enumeration of specific rights, and the inclusion of a best interests test. For example, Kilkelly and O'Mahony suggested that the Constitution should recognise the independent rights of children and require that a child's best interests be a primary consideration in any dispute affecting the child.<sup>41</sup> However, this proposal would have both under-achieved and over-achieved. Simply enumerating children's rights would make no difference since it would not affect the question of who had authority to assert the child's rights. Making a child's best interests a primary consideration in any dispute affecting the child would require the state (in the form of social workers or the courts) substitute its own judgment for that of the parents whenever there was a dispute, which dispute could itself be triggered by the fact of the state's disagreement with the parents. The state would thereby become the primary decision-maker for the child. 'Children's rights' grabbed attention but achieved little. The 'best interests' test appeared innocuous but achieved too much. This sort of analysis did not address directly and openly the crucial question of how to distribute authority

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<sup>39</sup> 'Kilkenny Incest Investigation' (Government Publications Office 1993) 96 <<http://lenus.ie/hse/bitstream/10147/46278/4/zkilkennyincestinvestigation.pdf>> accessed 16 June 2014.

<sup>40</sup> 'Report of the Constitutional Review Group,' (Government Publications Office, 1996) 328-9.

<sup>41</sup> U Kilkelly and C O'Mahony, 'The Proposed Children's Rights Amendment: Running to Stand Still' (2007) 2 *Irish Journal of Family Law* 19.

between parents and state; it did, however, provide a catchy and capacious political slogan around which interest groups were able to coalesce, leading the campaign for constitutional change.

We do not use the term 'interest group' in a pejorative way.<sup>42</sup> The groups that lobbied for constitutional change in Ireland exhibit the three characteristics suggested by Beyers et al as defining interest groups: some level of organisation, to distinguish them from simple waves of popular opinion or broad social movements; political interests, or particular policy outcomes sought to be achieved; and informality, insofar as they usually do not run candidates for election or seek public office.<sup>43</sup> They included the Children's Rights Alliance, formed in 1995 to secure the rights of children in Ireland through the full implementation of the Convention on the Rights of the Child; Barnardos, a children's charity that also engages in campaigning for children on issues such as housing, public health, education, and child protection; and the Irish Society for the Prevention of Cruelty to Children (ISPCC), a charity that, amongst other things, provides support services for children.

The interest groups secured the commitment of the main political parties to constitutional reform under the slogan of children's rights, perhaps because that slogan could accommodate two completely contradictory answers to the question of the state's responsibility for protecting children. Reflecting this, the various reform proposals differed wildly in content.<sup>44</sup> The Government's proposal in 2007 was minimalist in character.<sup>45</sup> It affirmed the existence of children's rights but did not guarantee to enforce them and provided no new rights. It made little change to the

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<sup>42</sup> Some prefer using terms such as social movement organisation or civil society organisation to define movements not involved in specific sectoral lobbying. J Beyers, R Eising and W Maloney, 'Researching Interest Group Politics in Europe and Elsewhere: Much We Study, Little We Know?' (2008) 31(6) *West European Politics* 1103, 1110.

<sup>43</sup> Beyers et al (n 42) 1106–07. Murphy notes that Irish interests groups have occasionally run candidates for political office. See G Murphy, 'Interests Groups in the Political Process' in J Coakley and M Gallagher (eds), *Politics in the Republic of Ireland*, 5th edn (Routledge, 2010) 328.

<sup>44</sup> For a more detailed comparison of these proposal, see D Kenny, 'The Children's Rights Referendum: A Short History' (*Trinity College Dublin Conference on the Children's Rights Amendment*, 1 November 2012) <[http://www.academia.edu/4744610/The\\_Childrens\\_Rights\\_Referendum\\_A\\_Short\\_History](http://www.academia.edu/4744610/The_Childrens_Rights_Referendum_A_Short_History)> accessed 26 July 2016.

<sup>45</sup> Twenty-Eighth Amendment to the Constitution Bill 2007.

threshold for state intervention in families and gave only limited application to the best interests test. In contrast, the All-Party Oireachtas (Parliament) Committee proposal in 2010 not only acknowledged and affirmed the rights of children but also pledged the protection and vindication of those rights insofar as practicable.<sup>46</sup> It further provided constitutional protection for a range of specific rights, some of a socioeconomic character, and entrenched the best interests principle, thereby substituting court decision-making for parental decision-making.

What finally secured a proposal that would actually be put to the people was the revelation of the scale of child abuse. In 2009, the Commission to Inquire into Child Abuse found that physical, emotional and sexual abuse was widespread in residential institutions and industrial schools in Ireland.<sup>47</sup> These schools were owned and managed by religious congregations but were funded by the state and generally housed children referred there by state authorities, which the Commission found to have a 'deferential and submissive' attitude towards the religious congregations. Complaints made by parents to state authorities were not properly investigated. The same year a statutory Commission concluded that the Archdiocese of Dublin placed its reputation ahead of the protection of children.<sup>48</sup> Senior police officers had seen it as their role to report allegations of abuse by priests to the church authorities rather than carry out their own investigation. In October 2010, a report detailed how social services had failed for 15 years properly to address a case of incest, neglect and rape within a family.<sup>49</sup> Bad systems, a misplaced willingness to believe that the situation would improve and a tardy and misplaced reaction to an interim court order secured by the mother were all identified as contributing to the way in which social services failed the family.

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<sup>46</sup> 'Final Report of the Joint Committee on the Constitutional Amendment on Children' (*Government Publications Office*, 2010).

<sup>47</sup> 'The Report of the Commission to Inquire into Child Abuse', available at <<http://www.childabusecommission.ie/rpt/pdfs/>> accessed 19 March 2013. The following details are taken from the executive summary.

<sup>48</sup> 'Report of the Commission of Investigation into the Catholic Archdiocese of Dublin', available at <<http://www.justice.ie/en/JELR/Pages/PB09000504>> accessed 19 March 2013. The following details are taken from the Overview.

<sup>49</sup> 'Report of the Inquiry Team to the Health Service Executive', available at <<http://www.oneinfour.ie/content/resources/RoscommonChildCareCase.pdf>> accessed 21 March 2013.

Most of the abuse catalogued in these reports was done with the complicity of the state, often as a result of parents being ignored. Where parents were at fault, there is no suggestion that the Constitution actually impeded the state from taking action to protect the children in question. Notwithstanding that the reform campaign had originated in a claim that the Constitution overly protected parents' rights, the 'children's rights' slogan was sufficiently capacious to include the contradictory claim that the Constitution gave too much power to state institutions at the expense of parents. This capaciousness also explains how such widely divergent proposals could be formulated under the rubric of 'children's rights', and equally welcomed by 'children's rights' interest-groups. The phrase 'children's rights' had become totemic for the secular-liberal side of the political cleavage. It was an effective totem because it was agnostic as to the core constitutional issue of parental authority and therefore could plausibly be attached to any reform proposal.

The Amendment that ultimately passed largely preserves the constitutional *status quo*. It retains the preference for parental authority in respect of children's rights. Although replacing Article 42.5, it makes only marginal changes to the threshold at which the state can intervene in families. O'Shea argues, and we agree, that the post-amendment threshold could still 'serve as a significant barrier to State intervention.'<sup>50</sup> It seems to change little, and would not appear to alter the required outcome of the healthcare cases considered above. Article 42A.4 requires that legislation provide that the best interests of the child will be the paramount consideration in proceedings brought by the State to protect child welfare or involving the adoption, guardianship, custody of or access to a child. The legislation must also ensure that the views of the child will be ascertained and given appropriate weight. This use of the 'best interests' test is radically different from that in the 2010 proposal. Here 'best interests' is the criterion to be employed by the court only where it has already deemed that parents have failed in their duty requiring the court to take their place. Under the 2010 proposal, 'best interests' had provided both the threshold for intervention and the criterion to guide intervention.

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<sup>50</sup> N O'Shea, 'Can Ireland's Constitution Remain Premised on the 'Inalienable' Protection of the Marital Family Unit Without Continuing to Fail its International Obligations on the Rights of the Child?' (2012) *Irish Journal of Family Law* 86, 90.

The Amendment allows married parents voluntarily to place their children for adoption. It authorises the legislature to require the application of the best interests test and the giving of weight to the views of the child in adoption, guardianship and custody proceedings. This might allow for a different outcome in those rare but troubling cases, noted above, where unmarried parents marry before an adoption process is completed. These are the only two changes of any significance effected by the Amendment.

O'Shea, a strong advocate of constitutional change to improve child protection, characterised the 2012 changes as 'likely to be minimal', and only a '*small* step in the right direction'; the rights of the child 'would seemingly remain inferior and subordinate to the protection afforded to marital autonomy.'<sup>51</sup> More commonly, however, reform advocates sought to extract from the amendment proposal some constitutional provisions that could be said to amount to significant change. For instance, some pointed to the state's recognition and affirmation of the natural and imprescriptible rights of all children, and more particularly its commitment to 'protect and vindicate' those rights as far as practicable. Kilkelly and Corbett separately argued that this was a 'game-changer,'<sup>52</sup> making it the State's responsibility to uphold the rights rather than leaving it within the private confines of the family. This analysis was incorrect, confusing the notion of the state vindicating children's rights with the notion of the state asserting children's rights. Under the Amendment, it is only children's rights as asserted by parents that the State is under an obligation to defend and vindicate.

Despite retaining the parental authority model of children's rights that initially prompted calls for constitutional reform and despite making almost no change to the threshold at which the state can intervene in families, the referendum proposal received practically unanimous support from major children's rights groups upon its launch.<sup>53</sup> The reasons for this are difficult to discern. There is little research on the relationships between and within interests groups, the reasons for their political action, and the

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<sup>51</sup> O'Shea (n 50) 90–92.

<sup>52</sup> U Kilkelly, 'Yes could be a real game-changer' *The Irish Times* (7 November 2012); cf M Corbett, 'The Children's Referendum is a Game-Changer for Children's Rights in Ireland' (2012) *Irish Journal of Family Law* 94.

<sup>53</sup> C Kenny and M Minihan, 'Referendum Wording Welcomed' *The Irish Times* (19 September 2012).

effect this might have on the tactics they adopt.<sup>54</sup> There is also a significant under-exploration of the role of interest groups in constitutional change, and why interest groups might adopt a strategy focused on constitutional amendment.<sup>55</sup> Nevertheless, it is possible to make some assessment of why interest groups supported the referendum proposal.

Campaigners and interest groups should be slow to pursue constitutional rights protection unless it is truly necessary. Posner and Landes note that constitutional amendment is 'costly and time-consuming'.<sup>56</sup> Waldron notes that the considerable political difficulties involved give reason to hesitate before seeking constitutional protection of one's interests.<sup>57</sup> There are several reasons why an interest group might feel the need to pursue protection at a constitutional level in spite of these difficulties. First, the interest group might only be able to achieve its end through constitutional change, since the constitutional order entrenches something antithetical to their goal. However, the Children's Rights Amendment only made two such changes, in the field of adoption; these were not the focal point of the campaign for change, and do not explain the broader aspects of the proposal. Secondly, Posner and Landes argue that a 'constitutional provision confers more durable protection than is possible by ordinary legislative action' and would thus be more valuable to an interest group.<sup>58</sup> This has the advantage of forcing any interest group pursuing a contrary outcome to operate at the

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<sup>54</sup> Beyers et al (n 42) 1120.

<sup>55</sup> Of the small amount of literature that exists, most of it is found in the Law and Economics movement. The reasons for interest groups to seek constitutional change was briefly discussed by W Landes and R Posner in a landmark paper, 'The Independent Judiciary in an Interest-Group Perspective'(1975) 18(3) *Journal of Law and Economics* 875. Other law and economics scholars continued to apply their work to constitutional amendments, particularly at the State-level in the US; WM Crain and RD Tollison, 'Constitutional Change in an Interest Group Perspective' (1979) 8 *J Legal Stud* 165-75 cf DJ Boudreaux and AC Pritchard, 'Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process' 1993 62 *Fordham L Rev* 111; D Sutter, 'Constitutional Politics Within the Interest Group Model' 1995 6(2) *Constitutional Political Economy* 127.

<sup>56</sup> Landes and Posner (n 55) 892. The extent of the difficulty is greater in the United States, where they were writing, but still true in Ireland. As Dixon puts it, the 'bargaining cost' of seeking constitutional amendments is high. R Dixon, 'Constitutional Amendment Rules: A Comparative Perspective' in T Ginsburg and R Dixon (eds), *Comparative Constitutional Law* (Elgar 2011) 104.

<sup>57</sup> J Waldron 'A Rights-Based Critique of Constitutional Rights' (1993) 13 *Oxford Journal of Legal Studies* 18, 25-26.

<sup>58</sup> Landes and Posner (n 55) 892.

constitutional level in future. It could also answer concerns that a court could dislodge the *status quo* in the interests of vindicating the reputed constitutional rights of other groups. The Pro Life Amendment Campaign (PLAC), which lobbied successive Irish governments for constitutional outlawing of abortion, was probably motivated in part by such considerations.<sup>59</sup> However, this tactic could not have motivated the interest groups to support the children's rights referendum proposal since it presupposes that significant changes to the *status quo* were being made in the first place. These first two explanations could make sense of the attitude adopted by interest groups only if they did not realise that the proposed Amendment would change little. Given the legal-academic misunderstanding of the constitutional position on children's rights, this is quite possible.

Other explanations focus not so much on the content of the proposal but on its symbolism. The third explanation for why the interest groups sought constitutional change is that the Constitution—as a statement of national priorities and values—is one of the most desirable places for interest groups to have their values expressed and affirmed. Referendums on constitutional change, in particular, offer the chance for a strong and clear statement of ideals,<sup>60</sup> and this could be either a way to strengthen a societal ethic, or be a capstone to a process of building that ethic. But this was not the focus of the children's rights campaign. Instead, the interest groups concentrated on specific injustices and apparent failings in the constitutional order, and the need for their rectification. Perhaps there was a dissonance between the narrative around the need for change and the reality of what most campaigners wanted: a statement of constitutional values rather than substantive constitutional alteration. If so, this emphasis on specific constitutional failings was perhaps a mistake: making a statement of values through constitutional change is a risky business, and one can easily fail to achieve this purpose even if a desired amendment is ratified. Clear articulation of the

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<sup>59</sup> B Girvin, 'Social Change and Moral Politics: the Irish Constitutional Referendum 1983' (1986) 34 *Political Studies* 61, 68; 73–74. cf M Gallagher, 'The Constitution and the Judiciary', in Coakley and Gallagher (eds) (n 43) 86.

<sup>60</sup> Of course, other methods of amendment besides referendum have expressive functions; see R Albert, 'The Expressive Function of Constitutional Amendment Rules' (2013) 59(2) *McGill LJ* 225.

values being endorsed is important.<sup>61</sup> It would have been advisable to put this symbolic goal front and centre, and articulate clearly the change in values that was sought, if this were the core reason for change.

The closely related fourth explanation is that the constitutional amendment would represent a political victory for the interest groups, providing a strong statement of the power of the lobby, and the extent to which its views are shared by politicians and the people.<sup>62</sup> This might be seen as worthwhile for intrinsic reasons or for secondary instrumental reasons, such as the dissuasion of opposition.<sup>63</sup> This explanation would characterise the push for constitutional change chiefly as an assertion of political power by the liberal/secular side of the political cleavage identified by Sinnott above. The magnitude of the political victory depends only on the perceived significance of the change, rather than the actual significance, which might explain the groups' ambivalence as to the content of the proposal. Indeed, abandoning substantive changes could be tactically useful in mollifying potential opposition to this flexing of political muscle. Somewhat related to this explanation, O'Mahony suggests that the interest groups supported the proposal in order to 'take what you can get'. It was clear that this was the end-point of a lengthy process and the interest groups had already received a philanthropic donation of €1.7m to fund their campaign.<sup>64</sup> They may therefore have been pre-committed to support whatever the Government proposed.

In all likelihood, some combination of these factors was at play. After many years, a Government had finally published its wording and set a date for holding a referendum claiming to protect children's rights. Any qualms or uncertainties about the wording of a

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<sup>61</sup> Dixon argues that even nominal success in changing a constitution cannot guarantee that a desired shift in norms and values will take place. She cites the example of the 'race power' amendment to the Australian constitution in the 1960s, and hypothesises that an unclear set of priorities about what message to send, along with an equivocal government campaign, contributed significantly to that failure. R Dixon, 'Amending Constituting Identity' (2012) 33 *Cardozo L Rev* 1847.

<sup>62</sup> Schlag describes this as rights becoming end goals of a particular political project. P Schlag, 'Rights in the Postmodern Condition' in A Sarat and TR Kearns, *Legal Rights: Historical and Philosophical Perspectives* (University of Michigan Press, 1996) 294.

<sup>63</sup> Girvin (n 59) 68, suggests that the campaign for a referendum on abortion has to be seen partially in this light - 'as a riposte to the secularizing tendencies which had appeared so strong throughout the 1970s'.

<sup>64</sup> O'Mahony (n 7) 266.

complex and poorly understood legal change might have been overridden by this achievement, which would have been seen as a potential for a symbolic statement of values, or a status-affirming victory for those who had campaigned so long for a children's rights referendum. This would not attribute cynical motives to those campaigning for change: they might have thought that the problems they identified demanded change, but lost sight of these substantive changes and became fixated on rhetorical change, or the appearance of change, instead. Completion of the process, and winning the battle, may have become more important than making particular changes. If a final proposal would make some modest improvement in the constitutional position of children, or was not actively deleterious to that position, then supporting it would make sense regardless of the precise content.

## V The Referendum Campaign

Whatever the explanation, the attitude of the interest groups made it considerably more difficult for the referendum campaign to function in support of a genuine exercise of deliberative democracy. An amendment that largely reproduced the constitutional *status quo* was being presented, through the rubric of children's rights, as addressing a significant constitutional and societal malaise. This made it almost impossible for people to discern precisely what they were being asked to vote on.<sup>65</sup> Tierney, although generally sympathetic to referendums, queries whether a referendum is suitable to determine an issue that is so complicated that a reasonably well informed voter is unlikely to understand it.<sup>66</sup> The Children's Rights Referendum provides an example of this. First, there was a disproportion between the length of the amendment proposal and the significance of the changes. Any explanation faced the difficult task of elaborating why so much text achieved so little. Secondly, the calls for reform that

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<sup>65</sup> A survey after the referendum established that 41% of people felt that they did not understand the referendum either at all or particularly well. Referendum Commission's Report on the Referendum on the 31st Amendment of the Constitution (Children) Bill 2012, available at <<http://www.refcom.ie/en/Past-Referendums/The-Children-Referendum/Report/Report-on-the-Referendum-on-the-31st-Amendment-of-the-Constitution-Children-Bill-2012.pdf>> accessed 27 July 2016. This level of declared misunderstanding is not unusual for recent referendums.

<sup>66</sup> Tierney (n 10) 228.

animated the children's rights movement were based on a fundamental misunderstanding of the Constitution as a charter for parents' rights. This meant that there was no coherent account of how the Constitution should be amended, against which the Government's actual proposal could be measured for effectiveness. Thirdly, these two problems combined in an unusual way. Both sides could claim to protect children's rights, and the proposal made little or no change to what most people would have thought it was intended to address: the state's power to intervene to protect children.

As noted above, voters can be competent without being fully informed, once they reach the same judgement as they would if fully informed. In this regard, cues from political parties and interest groups are essential.<sup>67</sup> Christin, Hug and Sciarini note theoretical models that suggest endorsements by political parties and interest groups can give important information about the issues at stake in a referendum. This is particularly the case since parties and interest groups seldom have any incentive to misinform voters about their own preferences.<sup>68</sup> The Children's Rights Referendum campaign did not reliably provide these cues to voters, however. All political parties lined up in favour of the proposal, which was strongly endorsed by the interest groups that had sought the Referendum.<sup>69</sup> This likely led many voters to believe incorrectly that the proposal took significant steps to improve the ways in which children were treated by the Constitution.

Several opponents of previous children's rights proposals also cautiously welcomed the proposal, apparently satisfied that the proposal did not undermine parental authority within families.<sup>70</sup> The people were therefore presented with most existing protagonists to the debate either supporting or not opposing the proposal. This elite consensus was the likely cause of three features of the subsequent campaign. First, proponents of the referendum suggested that the broad support from political parties and advocacy

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<sup>67</sup> A Lupia and R Johnston, 'Are Voters to Blame? Voter Competence and Elite Maneuvers in Referendums' in M Mandelsohn and A Parkin (eds), *Referendum Democracy* (Palgrave, 2001) 191.

<sup>68</sup> T Christin, S Hugz and P Sciarini, 'Interests and information in referendum voting: An analysis of Swiss voters' (2002) *European Journal of Political Research* 759.

<sup>69</sup> C Kenny and M Minihan, 'Referendum Wording Welcomed' *The Irish Times* (19 September 2012).

<sup>70</sup> M Minihan, 'Who Stands Where on the Children's Amendment' *The Irish Times* (19 September 2012).

groups could lead to difficulties in starting a proper debate on the issues.<sup>71</sup> Secondly, it led the press coverage to suggest that the government would 'secure a comfortable majority' for the proposal because of this support.<sup>72</sup> This may have engendered apathy, the public disengaging from an issue that seemed settled in advance. Thirdly, the elite consensus meant that the people were not being asked to check governmental power but instead to legitimise a conclusion already settled on by the elites in political parties, possibly causing further disengagement from the issues.<sup>73</sup> Though opposition to the amendment did emerge, the small number of prominent No campaigners, the diversity of their views on the issue, and lack of central organisation made fruitful debate between the Yes and No campaigns difficult. As one source put it to the *Irish Times*, the problem was that the No campaign was 'so small and so much on the margins of society'.<sup>74</sup>

All of these features reduced the capacity of the campaign to be a valuable exercise of deliberative democracy. Overall, the arguments advanced for and against the proposal bore little relationship to the actual proposal. The Yes campaign dealt largely in generalities, emphasising the proper place of children in a caring society and the opportunity to right the wrongs of the past. The No Campaign responded with claims that the proposal would undermine the rights of parents. In turn, the Yes Campaign sought to counter these claims, maintaining that the proposal would not undermine parents. This in turn raised the question of whether the referendum would achieve anything.

At the broadest level of generality, the Yes campaign focused on the assertion that the amendment would protect children in a manner more profound than the Constitution did previously. This was put in several different ways. The framing of the proposal as the 'children's rights referendum' implied that constitutional rights of children needed

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<sup>71</sup> A Carr, '50/50 broadcast rule "problematic"' *The Irish Times* (24 September 2012).

<sup>72</sup> D de Bréadún and M Minihan, 'Broad Welcome for wording of proposed children's amendment' *The Irish Times* (20 September 2012).

<sup>73</sup> See B Kissane, 'From People's Veto to Instruments of Elite Consensus: The Referendum Experience in Ireland' in Setälä and Schiller (n 14) 31. This problem is accentuated where civil society groups join that elite consensus.

<sup>74</sup> D de Bréadún, 'RTÉ executives to outline referendum coverage plan' *The Irish Times* (26 September 2012).

alteration or improvement. Campaigners for the proposal suggested that it would right the wrongs of the past,<sup>75</sup> or offer a better level of protection for children generally.<sup>76</sup> On other occasions, it was framed as a referendum on whether children should be both seen and heard.<sup>77</sup> In context, this argument seemed to be more about children being valued in society rather than a specific reference to the voice of the child in judicial proceedings. These sweeping, platitudinous statements were often accompanied in campaign literature and posters with images of smiling children or, in one case, the image of a somewhat scared-looking child clutching a teddy bear.<sup>78</sup> The umbrella group campaigning on behalf of various children's organisations was called 'Yes for Children'. The implicit suggestion was that those in favour of children and child-protection should simply vote Yes. The dominant meme of the Campaign was the incoherent position that 'children's rights' was the way to secure a child's best interests, simultaneously protecting children from their parents and from the state. This amounted to little more than sloganeering. Tierney notes the danger that 'unscrupulous elites can hijack the referendum with simplistic campaign slogans, appealing to populist sentiments which ignore the complexity of the issues involved.'<sup>79</sup> In this referendum, however, the emptiness of the slogan was mirrored by the emptiness of the referendum proposal itself.

The chief allegation of many on the No side was that the amendment was in fact about the state taking children away from parents, resulting in more frequent state intervention in the family after less serious parental failures.<sup>80</sup> This was often framed as

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<sup>75</sup> O O'Leary, 'Today with Pat Kenny', *RTE Radio 1* (10 October 2012); F Fitzgerald, 'Speech at Publication of wording of the Children's Referendum', 19 September 2012, available at <<http://www.fine Gael.ie/our-people/ministers/frances-fitzgerald/speech-by-minister-france/>> accessed 31 January 2015.

<sup>76</sup> Fitzgerald (n 75); F Fitzgerald, 'TV3 Children's Referendum Debate', 31 October 2012.

<sup>77</sup> The Labour Party's poster campaign in favour of the referendum bore this legend; see also A Balbirnie, 'Amendment will enhance child rights, secure those of parents' *The Irish Times* (1 October 2012).

<sup>78</sup> Available at <<http://f1.thejournal.ie/media/2012/10/11102012-childrens-referendum-campaign-posters-318x500.jpg>> accessed 31 January 2015.

<sup>79</sup> See Tierney (n 10) 262.

<sup>80</sup> See, for instance, K Sinnott 'In Your Child's Best Interests', *Alive!*, April 2012 and J Waters, 'Amendment a threat to rights of parents' *The Irish Times* (5 October 2012).

the proposal giving new rights to children that would clash with parental rights.<sup>81</sup> It was also argued that the best interests of the child would lead to the overriding of the wishes and interests of the parents in most or all cases where the state disagreed with them.<sup>82</sup> These arguments relied on precisely the same misconception of children's rights as held by the Yes campaign; they merely differed in normative direction. They exaggerated the scope of the changes proposed, and were sometimes put across in an alarmist fashion.<sup>83</sup> In response, Yes campaigners relied frequently on the fact that Article 41 was not being altered, and thus the rights of parents would remain unaffected.<sup>84</sup> As one commentator put it, since Article 41 remained intact, the amendment would 'not diminish parent's rights; it will enhance children's rights.'<sup>85</sup> Lacking any clear understanding of the constitutional position, this debate between the two sides simply could not be resolved. Instead, it was a case of unverifiable claim and counter-claim, almost calculated to reduce public understanding.

The reassurance about parental authority provided by the Yes campaign invited the charge that the referendum would achieve little.<sup>86</sup> It was frequently said by Yes campaigners that the passage of the referendum would mean that children were given rights in the Constitution for the first time.<sup>87</sup> However, it was pointed out—accurately—that the Constitution already protected the rights of children as implied personal

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<sup>81</sup> K Sinnott, 'State will back kids against parents,' *Alive!*, June 2012; J Waters, 'Say "No" to children's amendment to protect society' *The Irish Times* (2 November 2012).

<sup>82</sup> K Sinnott, 'This is the End of the Family,' *Alive!*, May 2012; *Waters* (n 80).

<sup>83</sup> H O'Connell, 'Sinnott accused of engaging in 'hysterical hyperbole' over referendum' *The Journal* (28 September 2012) <<http://www.thejournal.ie/kathy-sinnott-childrens-referendum-612420-Sep2012/>> accessed 31 January 2015.

<sup>84</sup> See, amongst others, C McGuniness, 'Vote on children's rights a statement of our values' *The Irish Times* (9 October, 2012); Fitzgerald (n 75).

<sup>85</sup> Balbirnie (n 77)

<sup>86</sup> O'Shea (n 50) 91 described the lack of change in Article as 'glaringly avoid[ing] the elephant in the room', and suggested that it resulted in 'an incoherent family policy'. Critics of this sort typically suggested the amendment was either redundant or insufficiently radical, while not calling for a No vote. See V Brown, 'Children's referendum deficient in many ways' *The Irish Times* (26 September 2012).

<sup>87</sup> See for example Fitzgerald (n 75): 'Sub-article 1 will provide, for the first time, a strong affirmation of each individual child's inherent rights'.

rights.<sup>88</sup> When challenged on this point, several variations on this argument were used to defend the novelty and necessity of the proposal.

First, it was said that this was the first time children would receive independent or express recognition,<sup>89</sup> or recognition 'as citizens in their own right'.<sup>90</sup> Sometimes, there were vague suggestions that there would be some marked difference between the sort of personal rights protected by the Constitution before the amendment and the sorts of rights protected after its passage.<sup>91</sup> This was not the case, however, and, for the most part, this collapsed into the second variation, the rhetorical effect of change: the Irish people would show the value placed on child welfare by making a statement about children in the Constitution.<sup>92</sup> Against this, even some supporters of the change pointed out that this rhetorical effect would seem hollow and of small comfort if legislation to enact changes and resource allocation for children were not similarly prioritised.<sup>93</sup> The third variation was to claim that the amendment was needed to give rights to all children equally, and prevent discrimination based on marital status.<sup>94</sup> However, this result had already been achieved in respect of constitutional rights by judicial interpretation over 30 years previously in *G v An Bord Uchtála* while legislative discrimination against non-marital children was a thing of the past.

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<sup>88</sup> H O'Flaherty, 'We don't need a referendum to protect our children's rights' *The Irish Independent* (11 September 2012); V Browne (moderator), TV3 Children's Referendum Debate, 31 October 2012.

<sup>89</sup> Fitzgerald, TV3 Children's Referendum (n 76).

<sup>90</sup> The Taoiseach, Enda Kenny, framed the proposal this way; *de Bréadún and Minihan* (n 72). *cf* O'Rourke (n 25) 174.

<sup>91</sup> When challenged on this point by Vincent Browne, moderator of the TV3 debate, the Minister for Children and Youth Affairs said that when words are put in the Constitution, they have a meaning, and therefore it would make a difference and have consequences. She was not specific as to what these were expected to be. TV3 Children's Referendum Debate, 31 October 2012.

<sup>92</sup> Minister Frances Fitzgerald was keen to frame this amendment as a reflection of the values of the Irish people. She stated in the Second Stage Dáil Debate on the 2012 Amendment Bill that '[t]he question facing us is simple. Do we believe that the way children were treated in this State represents what we believe to be the values, morals, and ethics of the Irish people?' Dáil Éireann Debate, Thirty First Amendment to the Constitution Bill, Second Stage, Vol 773 No 5. *cf* McGuniness (n 84).

<sup>93</sup> See, for instance, K Holland, 'Lonergan says real test will be putting in place necessary resources' *The Irish Times* (20 September 2012).

<sup>94</sup> Fitzgerald (n 75); Balbirnie (n 77); the Taoiseach, Enda Kenny, was also reported as making this point: Holland (n 93).

A fourth version stressed the more specific changes that would be made by the proposal, such as the provision for the voluntary adoption of marital children, and provision for the voice of the child to be heard in judicial proceedings.<sup>95</sup> The adoption changes had some significance but did not speak to the necessity and usefulness of the broader aspects of the amendment, and hearing the voice of the child could have been achieved by legislative change. Fifthly, emphasis was sometimes placed on change in the threshold for State intervention. Some argued that earlier and more effective intervention would be possible.<sup>96</sup> Others stressed that it would allow for the child's best interests to be put first.<sup>97</sup> However, these arguments rarely offered detailed suggestions of how these changes would play out in practice and, based on our analysis of the referendum proposal above, were not supported by the actual text. In political terms, arguments of this type again left the proposal open to the No campaign's allegations that the amendment would subordinate the interests of parents and drastically increase the scope of state intervention, a point strongly denied by the Yes side.

Many have attributed the difficulty of referendum campaigns in Ireland to the *McKenna* principles,<sup>98</sup> which prohibit the Government from spending public money advocating a yes vote in a referendum. There has been political concern, whenever referendum proposals were rejected, that the Government's role was unduly restricted by the *McKenna* decision, engendering a lack of public awareness, leading to proposals being rejected by the people on a precautionary basis. Academics and practising lawyers have also expressed concern about the exclusion of the Government from referendum campaigns.<sup>99</sup> For the children's rights referendum, the Government decided that it should provide its own 'public information campaign', in addition to that provided by the impartial Referendum Commission. The Supreme Court declared this campaign

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<sup>95</sup> McGuniness (n 84); Fitzgerald, TV3 Children's Referendum (n 76).

<sup>96</sup> *ibid.*

<sup>97</sup> Balbirnie (n 77).

<sup>98</sup> *McKenna v An Taoiseach* (No 2) [1995] 2 IR 10.

<sup>99</sup> G Barrett, 'Building a Swiss Chalet in an Irish Legal Landscape? Referendums on European Union Treaties in Ireland & the Impact of Supreme Court Jurisprudence' (2009) 5 *Eur Const L Rev* 32; B Ruane, 'The Doherty Case and Issues Regarding the Provision of Information and Funding for Constitutional Referenda' in E Carolan (ed), *The Constitution of Ireland: Perspectives and Prospects* (Bloomsbury Professional Press, 2012) 239.

unconstitutional in *McCrystal v Minister for Children and Youth Affairs*, shortly before polling day.<sup>100</sup> That the Government felt the need to fund its own information campaign and the Supreme Court's conclusion that the information campaign was unbalanced both indicate the difficulties that the Government faced in campaigning to persuade people to vote yes. However, even with the benefit of its unconstitutional campaign, the vote carried by a less than impressive margin of 58 per cent: 42 per cent. The difficult campaign stemmed far more from the confusion over the proposal and what it would achieve than it did from any restrictions imposed by the *McKenna* principles.

## VI Conclusion

The failure of Ireland's Children's Rights Amendment as an exercise in deliberative democracy cannot be attributed to elite control. Rather, it illustrates more generally the difficulties of achieving formal constitutional change to judicial doctrines, particularly through a referendum process, and offers several lessons about how to approach this type of constitutional change.

A flawed analysis of the Constitution generated the appealing slogan of children's rights. This became totemic for the secular-liberal side of the political cleavage, with people lining up to support or oppose it depending on where they stood in respect of that cleavage, rather than their attitude to the underlying constitutional issues. The difficulty of amending the Constitution in order to change judicial doctrine contributed to this failure. Law—particularly judge-made law—is complicated. Formulating new laws to adjust judge-made law is even more complicated. The law rarely, if ever, perfectly addresses the social problem that it is intended to solve, and using constitutional amendment to tinker with judicial interpretations is extremely difficult.<sup>101</sup> These

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<sup>100</sup> [2012] IESC 53. The Supreme Court subsequently rejected a challenge to the referendum on this basis. *Jordan v Minister for Children and Youth Affairs* [2015] IESC 33.

<sup>101</sup> Dixon is more sanguine than some about the possibility of changing judge made law through formal amendment; *Dixon* (n 61). Ackerman similarly believes that any desired change in constitutional law can be brought about using formal amendment rules. B Ackerman, 'Transformative Appointments' (1987–1988) 101 *Harv L Rev* 1164, 1180. We do not argue that textual amendments are irrelevant or entirely without use in changing judicial interpretations. We only contend that this is often difficult to achieve,

difficulties are accentuated where the constitutional legislator is the people. Although formalised consultation processes can enhance the ability of the general population to grapple with constitutional problems (and the Irish Referendum Commission makes a significant contribution in this regard), there are limits to the ability of people to reach considered conclusions where the very meaning of judicial doctrines is itself hotly contested. This is particularly so where the incentive of political actors is not to educate the public on constitutional law, but rather to win the referendum campaign. If the need for and effect of changes cannot be explained to the people in a straightforward way, it is questionable whether constitutional change is worth seeking given the uncertainty about its ultimate efficacy. A lesson we might draw from this is that, sometimes at least, we should be prepared to live with constitutional laws that we regard as sub-optimal rather than engaging in long and protracted campaigns for changes that ultimately achieve little. To be clear, we are not suggesting that it is improper or illegitimate for legislatures or the people to seek to overturn or nuance judicial interpretations of the Constitution. It is rather that when the desired changes require alteration of minute points of judge-made constitutional doctrine, this may be very difficult in practice, and thus may—on balance—not be worth pursuing.<sup>102</sup>

The problems of public understanding were considerably exacerbated by the misunderstanding of the Constitution's position on children's rights that took hold in Irish civic society. By the time of the referendum, it was too firmly embedded to be overcome. The proper place for legal academics in the constitutional reform process is open for debate, but this particular referendum—dealing as it did with a complex area of constitutional law, which required broad understanding of the constitutional framework and constitutional case law to grasp—surely needed expert input. Despite efforts made by many constitutional lawyers—including the authors of this article—to weigh in on aspects of this issue in the media, this failed to clarify issues in the public mind. Rather, it likely fed a narrative of claim and counter-claim about the effects of the

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and there may be no way to ensure one's textual changes will achieve the desired result. This is not an argument in favour of informal change, however, which may suffer from similar difficulties.

<sup>102</sup> Different considerations pertain where the change is to the detail of clearly posited rules in the constitutional text, such as the referendum in Ireland in 2011 to allow reductions in judicial salaries. In those circumstances, the challenge of public explanation is far smaller.

referendum, further clouding public understanding. A second lesson is for legal academics to be careful in their analysis of areas of constitutional law where change is being debated or considered, while being resolute and timely in correcting misunderstandings, and not overestimating their ability to make a helpful contribution to public debate during the campaign proper.

The political cleavage was a crucial component in determining the attitude of interest groups to the referendum proposal. They were too quick to support a proposal that, even adopting the flawed antithesis between parents' and children's rights, made very little change. A fundamentally misleading signal was thus sent to voters about what the proposal would achieve. In reality, the fact that the proposal was a compromise between competing interest groups—trying to satisfy children's rights campaigners while not alienating conservative interests—meant that it was difficult to sell convincingly to the public. In trying to please both sides, the government's proposal ended up confusing people as to what, if anything, was actually being achieved. A third lesson we might draw from this experience is that more attention needs to be paid to the role of interest groups in advocating and promoting constitutional change, and the motivations for those groups seeking change on a constitutional level.

It may be that the true purpose of many of those who supported the Children's Rights Amendment was to effect a symbolic change in the way that children are viewed and valued. There can be no objection to constitutional amendments advancing symbolic aims or seeking to enshrine values in a constitution; constitutions are important sites of national symbolism. However, for symbolic change to happen, it must be understood, and meaningfully deliberated upon. Political actors must be prepared to engage in real debates about values. Instead of framing the amendment as being about symbolism, identity, and values, campaigners for the children's rights referendum focused on the minutiae of alleged practical changes that were often elusive. Even when symbolism was discussed, it was dwarfed by the focus on micro-management of legal outcomes promised by the referendum. Instead of embracing the fact that issues underlying the referendum were part of a significant and hotly contested debate about values, the value reductionism that was seen in the referendum campaign—that we should vote Yes if we were in favour of Children—avoided any meaningful engagement with exactly

what values we should be trying to prioritise and defend. The final lesson of this experience is that when constitutional changes speak to matters of societal values, they should be debated as such, with an open acknowledgement that not all possible interpretations of those values can be foreseen. Without this, that which is perhaps most important will be talked around and lost in the minutiae of policy debate, and the potential for referendums to engage voters with what the Constitution means, and should mean, will be lost.