

Constitutional Referendums in Ireland: Sovereignty, Democracy, and Popular Engagement

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A thesis submitted to the School of Law in the Faculty of Arts,
Humanities and Social Sciences at the University of Dublin in
partial fulfilment of the requirements of the degree of Doctor in
Philosophy

Trinity Term 2026

Word Count: 91,314



Trinity College Dublin
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DECLARATION

I declare that this thesis has not been submitted as an exercise for a degree at this or any other university and it is entirely my own work.

I confirm that the work has been completed in full compliance with relevant university policies, including the Academic Integrity policy, the Trinity Policy on Good Research Practice, and the guidance on AI and GenAI in Teaching, Learning, Assessment and Research.

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Adam Elebert

A handwritten signature in black ink that reads "Adam Elebert". The signature is written in a cursive, flowing style with a horizontal line underneath the text.

ABSTRACT

This thesis examines the success of constitutional referendums in Ireland. The central research question of this thesis is are Irish referendums successful, and in what way can they be successful? I argue that Irish referendums have been successful where democratic engagement has been maximised, and I establish a set of criteria for measuring that success: information sufficiency, engagement, and citizen participation. Those criteria provide a blueprint for how Irish referendums should be designed so as to maximise their democratic potential. I also argue that various institutions have played a central role in achieving these criteria, including the Referendum/Electoral Commission and deliberative institutions like the 2012 Convention on the Constitution and the Citizens' Assemblies. I argue that the design of those institutions has a significant bearing on their impact on the referendum. In the final two chapters of this thesis, I analyse the case-law on referendums in Ireland and identify popular sovereignty and strong notions of democracy as the principal values underlying the adoption of the referendum. Building on this, I argue that the best conception of the referendum's value is as a method of balancing the competing interests of constitutionalism and democracy. I argue that the value of Irish referendums should be measured according to that purpose.

While it has become a familiar feature of Irish democracy, internationally there is a considerable degree of anxiety about the use of referendums to amend constitutions. For some, it is a device which leads inevitably to populist backsliding and majoritarian tyranny. For others, it is open to manipulation by political elites and cannot live up to its promise as a democratic device. Despite this, Ireland continues to use the referendum, and in recent years has garnered much international acclaim as emblematic of how referendums can work well. This thesis shows how some Irish referendums have been successful, and therefore offers lessons for how their democratic potential can be realised.

SUMMARY

Articles 46 and 47 of the Irish Constitution (Bunreacht na hÉireann) provide that the only way the Constitution may be amended is by referendum. The constitutional referendum has become one of the defining features of the Irish legal system and has attracted considerable domestic and international attention over the last number of years. In particular, the positive sentiment surrounding Irish referendums contrasts significantly with recent examples elsewhere – from Brexit and the 2017 Catalan referendum, to recent annexation referendums in Russian-occupied Ukraine – which brought perennial questions of populist backsliding and majoritarian tyranny to the forefront of public debate. Given Ireland’s success with holding constitutional referendums, and the likelihood of further contentious referendums in the near future, it is essential that Ireland’s experience be analysed in depth so that lessons can be learned for future referendums. This thesis undertakes that task. The central research question of this thesis is are Irish referendums successful, and in what way can they be successful?

The thesis takes the first step towards answering how Irish referendums work in practice by examining the framework for constitutional referendums in Ireland. This establishes a comprehensive foundation for understanding how the referendum operates under the law in Ireland by outlining the legal and political norms which govern the referendum. It argues that legal regulation of the referendum in Ireland has traditionally been light-touch, and that much of the substantive rules have derived from judicial decisions rather than legislation or specific constitutional rules. In this regard the thesis also analyses the impact of the Electoral Reform Act 2022 and argues that it represents a significant overhaul of regulation in this area.

Through a contextual analysis of all Irish referendums to date, this thesis highlights the sort of factors which have contributed to referendums going well or poorly in the past. It argues that the drivers behind referendums in Ireland are multi-factorial and that referendums often come about for various different reasons. It argues that many Irish referendums have been successful, but that the same issues can plague referendums on all topics. The analysis in this chapter identifies what those issues are, and how they have

been overcome. It argues that these issues can be overcome through good institutional design, involving institutions like the Referendum Commission, Citizens' Assemblies and similar deliberative institutions. These institutions are examined in turn in chapters 4 and 5 of this thesis. There, I argue that they each play a significant role in ensuring that voters in referendums are informed and engaged. I also argue that the recent experiments in deliberative democracy have demonstrated the potential for certain institutions (like Citizens' Assemblies) to remedy the most common issues which plague Irish referendums, but only where their work is connected in a substantial way to referendum proposals.

This thesis offers a set of criteria for successful referendums. Accepting the position that the referendum is a democratic device, it proceeds from the premise that the democratic potential of each referendum should be maximised. In order to achieve this, referendums must adhere to a basic set of criteria: information sufficiency, engagement, and citizen participation must all be maximised. I argue that successful Irish referendums have complied with these criteria, and that the system of referendums can be measured against them. By offering a metric for measuring success, the thesis offers an answer to the second part of the central research question: in what way can they be successful?

In the final two chapters of this thesis, I examine the case-law on Irish referendums. This analysis both demonstrates the role of the judiciary in referendums, and also uncovers the core rationale underlying the referendum's inclusion as the method of amendment. It argues that a strong notion of democracy and popular sovereignty are the key principles at the heart of Irish referendums, and that the purpose of the referendum is to give life to the ideals of democratic ownership and control. On foot of this, in the final two chapters of the thesis I argue that the value of Irish referendums should be measured according to their own purpose. In the final chapter of the thesis I argue that the best way to understand the value of the Irish referendum is via the competing concepts of constitutionalism and democracy. I argue that this is a more coherent and constructive means of understanding the referendum's value than attempts to unravel the idea of popular sovereignty. I argue that the referendum is the clearest and most significant example of how Ireland balances its commitments to both constitutionalism and democracy, and that the balance struck explains the relative health of Irish referendums.

ACKNOWLEDGMENTS

If raising a child takes a village, writing a thesis should surely take just a handful of people. Yet I have relied on much more than that. I would not have been able to write this thesis without the support, kindness, and patience of countless friends, family, and colleagues. To capture the full extent of their support would require the thesis to be twice as long. These acknowledgments merely scratch the surface of the debt I owe to each and every one.

The first thanks must go to my supervisor Professor Aileen Kavanagh. It should be no surprise to say that this thesis would not be half as good or half as complete without her invaluable guidance, dependable support, and razor-sharp insights. All of its virtues are owed to her.

Second, to all of the staff in the School of Law, Trinity College Dublin for their guidance and assistance over the last four years and the transition from first beginnings to submission: Catherine Finnegan, Kelley McCabe, Trish McCorry, Mairead Morrissey, and Natalie Wynn. To those colleagues who so generously discussed my work with me and who welcomed me to the Law School: Oran Doyle, Sarah Hamill, David Kenny, David Prendergast, Rachael Walsh, and Gerry Whyte.

Third, to friends from the King's Inns for their vital company, and to colleagues at the Law Library for their patience over the last year as I finished this thesis. A special thanks must go to Desmond Ryan in this regard, whose support and guidance over this last year made completing this thesis possible.

Fourth, I have been tremendously fortunate to be surrounded by friends old and new for these last four years. To my oldest friends, who listened patiently while I explained that yes, I am still writing that book, and who reminded me that there are much more interesting ways to spend your weekends than in the library: Hugh Buckley, Chris Butler, James Cronin, Philip Donnelly, Amie Hogan, Niall Horan, Jean McCarthy, Celia Reynolds, Aoife

Shanahan, and Darren (Cheddar) Woods. To those friends I have made during the course of this PhD, a far more important outcome than any fancy title: Alan Eustace, Philip Gavin, Michael Gilna, Aishling Kinsella, Christopher McMahon, and James Rooney. There are many more friends besides these who could be named: they know who they are, and I hope they know how grateful I am.

Fifth, to the constituent members of our weekly 5-a-side football, for providing the best possible distraction from finishing a doctorate.

Sixth, to Jonathon Boylan and Daniel Gilligan for their company at every restaurant and café serving lunch in the greater D2 area, and for their ever-entertaining conversation. In particular, a special thanks to Daniel Gilligan who has been with me on this journey every step of the way since undergrad. From Trinity to Oxford, Oxford to Trinity, and Trinity to The Jessop (and back to Trinity), I have benefitted enormously from his encyclopaedic knowledge of the law, of jazz, and of the participants in every Champions League final since 1990. For his friendship I am a better lawyer, better person, and better FIFA player.

Seventh, a special thanks must be reserved for my parents Eamonn and Annette, my sister Alexandra, and for my soon-to-be brother-in-law Luke Duffy. Their unwavering support has manifested in countless ways – most important of all, over the past nine years of legal education they have never once suggested that maybe, now, it's time to get a job. Weekends at home, weekly lunches, and a steady stream of dinners sent in by train have kept me sane, kept me functioning, and reminded me of the most important things in life. It is no exaggeration to say that without them, I could not and would not be who I am today.

Eighth, to the extended Elebert and Gorman families, all of my aunts, uncles, and (many) cousins. In particular to my grandmother Eileen Gorman, and to the memories of Shay Gorman, Fergus Elebert, and Nelly Elebert. My only regret is that they did not see this thesis completed, and I hope that it justifies the pride and confidence in me they always expressed so openly, to everyone they met.

Ninth and finally, to Síona Molony. It is only right that as the culmination of my legal studies, this thesis should be dedicated to something representative of the value, the good,

and the importance of studying law that I have discovered. For that reason this thesis is dedicated to her. The decision to study law at university has led my life down a particular path. The sum of my time here in Trinity will not, however, be measured in degrees or in grades, but only by the fact that this is where I met her. Whatever good has come from that decision professionally or personally, none is as important as that. Nothing has impacted this thesis more, because nothing has impacted my life more than meeting her.

Adam Elebert
Trinity College Dublin
September 2025

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1. INTRODUCTION

‘The introduction of the machinery of direct legislation into the structure of the Irish Constitution reflects the democratic radicalism of its framers. The records of the constituent Assembly, indeed, throw little light on the notice underlying the innovation. The desirability, especially under Irish conditions, of an active association of the people with the function of law making was the only argument adduced in its support; yet its place in the general design of the Constitution leaves little doubt as to its inspiration and purpose. Its model is to be found less in the older American, Australian and Swiss precedents than in the post-War Constitutions of the new continental republics. In the latter, democratic zeal, political doctrinairism and distrust of the mechanism of parties and parliaments had combined to produce a highly involved design of direct legislation interwoven with the fabric of representative institutions. On that elaborate pattern the Irish system was framed.’¹

Leo Kohn

‘The role of the People in amending the Constitution cannot be overemphasized. It is solely their prerogative to amend any provision thereof by way of variation, addition or repeal or to refuse to amend. The decision is theirs and theirs alone. Having regard to the importance of the Constitution as the fundamental law of the State and the crucial role of the People in the adoption and enactment thereof, any amendment thereof must be in accordance with the constitutional process and no interference with that process can be permitted because, as stated by Walsh J. in Crotty v. An Taoiseach [1987] I.R. 713, "it is the people themselves who are the guardians of the Constitution". [...] As the guardians of the Constitution and in taking a direct role in government either by amending the Constitution or by refusing to amend, the People, by virtue of the democratic nature of the State enshrined in the Constitution, are entitled to be permitted to reach their decision free from unauthorised interference by any of the organs of State that they, the People, have created by the enactment of the Constitution.’²

Hamilton CJ

¹ Leo Kohn, *The Constitution of the Irish Free State* (Allen & Unwin 1932) 44.

² *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10 (SC) 41-42 (Hamilton CJ).

1.1 – Introduction

The constitutional referendum is one of the defining features of the Irish legal system in at least two senses. First, because it is the sole method by which Bunreacht na hÉireann may be amended, and because amendment has become a relatively regular occurrence in Ireland, the constitutional referendum has become as tangible a part of Irish political life as any election.³ Second, owing to its connection to the grand ideals of popular sovereignty and direct democracy, the referendum has served as the fulcrum about which much of Irish constitutional theory revolves.⁴ As a consequence, the referendum attracts interest from almost all corners of society. More than that, over the last decade or so Ireland has attracted significant international attention as a paradigm of how to make referendums work.⁵

This thesis closely examines the question of whether constitutional referendums in Ireland ‘work’ in some significant sense. In order to answer that, it poses the following central research question: are Irish referendums successful, and in what way can they be successful? The argument of my thesis is that Irish constitutional referendums are successful when democratic engagement with the referendum is maximised and, drawing on precedent, I offer a blueprint for how that can be achieved. I also offer a set of criteria for success to which any referendum should adhere. Moreover, I argue that the best conception of the referendum’s rationale is as a method of balancing the competing interests of constitutionalism and democracy, and that its value should be understood according to that purpose.

This Introduction proceeds in three parts. First, I set out some important contextual detail about how referendums fit into discussions about democratic devices and why they have always attracted debate. Second, I lay out the main questions and controversies which surround Irish referendums, and which this thesis aims to address. Third and finally, I establish the manner in which this thesis answers those questions through its structure and its methodology.

³ There have been forty-three referendums since 1959 – equating to one referendum every eighteen months.

⁴ As per the above quoted passage of Hamilton CJ in *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10 (SC) 41-42.

⁵ See generally the discussion in David Kenny and Aileen Kavanagh, ‘Are the People the Masters? Constitutional Referendums in Ireland’ in Albert and Stacey (eds) *The Limits and Legitimacy of Referendums* (OUP 2021) 264-291.

At the outset, however, we must be clear about what we are discussing when we discuss referendums. Speaking too broadly about referendums can lead to conceptual confusion, and misrepresent the reality that referendums differ enormously across time and place. Leah Trueblood, for example, defines referendums broadly as ‘those processes that refer questions back to voters’.⁶ This thesis concerns a very specific form of referendum: constitutional amendment referendums in the Irish context. For the purposes of this thesis, therefore, referendums are defined as an electoral instrument where citizens vote on a specific constitutional amendment proposal (usually a binary yes/no), the result of which is legally binding. Referendums under this definition require only a simple majority for a proposal to pass. Analogous cases might allow non-citizens to vote, might use non-binary proposals, and might be recommendatory rather than binding.⁷ The core features of the referendum, however, remain the same.

One note on terminology. In this thesis, I will use the plural form ‘referendums’. Nowhere in this thesis is the word *referenda* used outside of direct quotation. *Pace* Latin enthusiasts, members of the Irish judiciary,⁸ and indeed State officials.⁹ While referendum does have its roots in Latin, the modern usage of the word traces its origins to Nineteenth Century Switzerland, where the Swiss Confederation adopted *referendum* from *ad referendum*, meaning ‘for bringing it back’.¹⁰ Referendum is therefore the *gerund* of *refero* (‘to bring back’), and is thus best translated as ‘a referring’.¹¹ Since the Latin *gerund* has no plural form, when we pluralise referendum we are no longer using Latin but rather an anglicized

⁶ Leah Trueblood, ‘Are Referendums Directly Democratic?’ (2020) 40(3) Oxford Journal of Legal Studies 425, 425 fn 1, citing Matt Qvortrup (ed), *Referendums Around the World: The Continued Growth of Direct Democracy* (Palgrave MacMillan 2014) 2.

⁷ e.g. the 2016 Brexit referendum.

⁸ *Referenda* is the preferred term in many of the most important cases in this jurisdiction. See for egregious example the judgments of the majority in *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10, [1996] ILRM 81.

⁹ For example, the 2016 Fine-Gael programme for government *A Programme for Partnership Government* (May 2016); or the 2016-18 Citizens’ Assembly, Citizens’ Assembly, *Report and Recommendations of the Citizens’ Assembly On the fourth and fifth topics: The Manner in Which Referenda Are Held & Fixed Term Parliaments* (21 June 2018).

¹⁰ J Tobin Grant and Yasuko Taoka, ‘The Referendum Conundrum: Referenda or Referendums?’ (2011) 44(3) PS: Political Science & Politics 563-564, 563.

¹¹ J Tobin Grant and Yasuko Taoka, ‘The Referendum Conundrum: Referenda or Referendums?’ (2011) 44(3) PS: Political Science & Politics 563-564, 564.

term.¹² The proper plural of referendum, therefore, is referendums.¹³ As the editor of the Oxford English Dictionary said to Butler and Ranney, ‘by preferring Referendums as your title you have the angels of Rome and the O.E.D. on your side’.¹⁴

1.2 – Context and Controversies

1.2.1 – Context

Before examining Irish constitutional referendums specifically, it is necessary to set out some important context. The referendum is an ancient and oft-disputed device which has attracted considerable interest from constitutional and political theorists for generations. Cicero,¹⁵ Rousseau,¹⁶ Mill,¹⁷ and Arendt,¹⁸ to name just a few authors, all thought direct government by the people was the theoretically preferable form of democracy but practically unworkable, and all sought to identify possible solutions to this puzzle –

¹² J Tobin Grant and Yasuko Taoka, ‘The Referendum Conundrum: Referenda or Referendums?’ (2011) 44(3) PS: Political Science & Politics 563-564, 564.

¹³ Note that there is an argument for using *referenda* to refer to multiple votes during one referendum, i.e. on multiple ballots at the same time. J Tobin Grant and Yasuko Taoka, ‘The Referendum Conundrum: Referenda or Referendums?’ (2011) 44(3) PS: Political Science & Politics 563-564, 564.

¹⁴ J Tobin Grant and Yasuko Taoka, ‘The Referendum Conundrum: Referenda or Referendums?’ (2011) 44(3) PS: Political Science & Politics 563-564, 564 citing David Butler & Austin Ranney, *Referendums – A Comparative Study of Practice and Theory* (American Enterprise Institute for Public Policy Research 1978) 5.

¹⁵ In his *Republic* Cicero has Scipio and Laelius discuss how a state cannot be justly called the ideal ‘republic’ if it is entirely controlled by a clique, nor equally if it is enslaved by the mob. Cicero, *The Republic & The Laws* (Niall Rudd tr, OUP 2008) 44.

¹⁶ Rousseau was pessimistic about the compatibility of democracy with representative institutions, and questioned whether popular sovereignty – his ultimate democratic norm – could ever be realised in a representative system. Jean Jacques Rousseau, *The Social Contract* (HJ Tozer tr, Wordsworth Editions Limited 1998); Bertram, Christopher, “Jean Jacques Rousseau”, *The Stanford Encyclopaedia of Philosophy* (Summer 2024 Edition), Edward N. Zalta & Uri Nodelman (eds.), URL = <<https://plato.stanford.edu/archives/sum2024/entries/rousseau/>>.

¹⁷ Mill said that ‘the only government which can fully satisfy all the exigencies of the social state is one in which the whole people participate’ and that ‘participation should every where be as great as the general degree of improvement of the community will allow’. However, he also said that ‘since all can not, in a community exceeding a single small town, participate personally in any but some very minor portions of the public business, it follows that the ideal type of a perfect government must be representative.’ John Stuart Mill, *Considerations on Representative Government* (CUP 2010).

¹⁸ Arendt saw representative government as merely a ‘substitute for the direct involvement of the citizens’ and militated in favour of citizen participation via a federated system of councils. Tömmel, Tatjana and Maurizio Passerin d’Entreves, “Hannah Arendt”, *The Stanford Encyclopedia of Philosophy* (Spring 2025 Edition), Edward N. Zalta & Uri Nodelman (eds.), URL = <<https://plato.stanford.edu/archives/spr2025/entries/arendt/>>.

finding some balance between the exigencies of the modern state and the ideal of democracy. It is in this context that referendums appear.

Referendums have been around in crude form since as far back as Ancient Athens, and in a more recognisable form since, roughly, after the French revolution.¹⁹ As one might expect, over such a long period of time plenty of different arguments have been advanced to justify the referendum's use.²⁰ In a more modern context, referendums have been implemented in states in order to reflect a basic (but contested) sentiment that some form of direct democracy can imbue burgeoning states with a more modern, direct democratic character, thus insulating them from some of representative democracy's pitfalls.²¹ That sentiment has continued to exercise democrats of all kinds – politicians, academics, citizens – to this day. Crucially, it has informed the drafters of many constitutions as they have tried to establish states and find some way to make them as democratically accountable as possible while at the same time efficient and practicable. In Ireland's case, that saw the referendum included as the method of constitutional amendment.²²

Referendums are a source of global interest in contemporary times because the use of referendums has increased consistently since the 1970s.²³ As such, referendums are now a significant feature of democratic practice worldwide, and are unlikely to go away any

¹⁹ Matt Qvortrup, *Government by Referendum* (Manchester University Press 2018), esp Chapter 1.

²⁰ AV Dicey, for example, saw the referendum as a tool to allow the electorate to veto legislative proposals going against the will of a clear majority of voters. He therefore saw it as a remedy to the crucial weakness in the British system of government: 'the possibility ... which no one can dispute of a fundamental change passing into law which the mass of the nation do not desire.' Vernon Bogdanor, 'Western Europe' in David Butler & Austin Ranney (eds), *Referendums Around The World: The Growing Use Of Direct Democracy* (American Enterprise Institute 1994) 34, citing Letter from Albert Venn Dicey to James Bryce, 23 March 1891, Bryce Papers, Bodleian Library, MS 3 fo. 83; Matt Qvortrup, 'A.V Dicey: The Referendum as the People's Veto' (1999) 20 *History of Political Thought* 531. It is worth remembering that Dicey was advocating for the referendum as a veto in the context of Gladstone's policy of Irish Home Rule, which Dicey believed would lead to the dissolution of the United Kingdom.

²¹ Leo Kohn, *The Constitution of the Irish Free State* (Allen & Unwin 1932) 44.

²² Leo Kohn, *The Constitution of the Irish Free State* (Allen & Unwin 1932) 44.

²³ Qvortrup suggests it may be due to the failure of political parties to represent voters: referendums thus serve as institutionalised, sporadic safety valves of political pressure. Matt Qvortrup, 'The History of Referendums and Direct Democracy' in Laurence Morel and Matt Qvortrup (eds) *The Routledge Handbook to Referendums and Direct Democracy* (Routledge 2018) 24, citing David Altman, *Direct Democracy Worldwide* (CUP 2011). Qvortrup's 2018 study notes that 'the number of referendums in Free states has grown consistently since the 1970s [...] which is in contrast to the modest use of referendums from the 1920s until the 1960s'. He notes further that constitutional referendums have consistently outnumbered ad-hoc referendums over this time, that the number of plebiscites in dictatorships has fallen, and that ad-hoc referendums called by 'populists' have fared badly for them in recent years. Matt Qvortrup, *Government by Referendum* (Manchester University Press 2018) 69-77.

time soon.²⁴ And yet, the modern experience with referendums is not a universally happy one. As is the case with all democratic mechanisms, the referendum is not immune to distortion and abuse. Referendums have been criticised by some for being a device of populist abuse,²⁵ and by others as subject to elite capture and manipulation.²⁶ Some recent examples demonstrate the referendum's imperfections in this regard. The 1995 referendum on whether Quebec should secede from Canada is a notable example: the narrow margin of defeat for secession,²⁷ and the various controversies that plagued the referendum's aftermath²⁸ all contributed to a general sense that the referendum had fractured Quebecois society both internally and in its relations with the rest of Canada.²⁹ Similarly, the 2017 Catalan independence referendum, in which a majority of voters supported independence, resulted in a ruling that the vote itself was unconstitutional,³⁰ the arrest of many senior officials involved in the referendum,³¹ and ongoing political controversy.³² Even more extreme are the examples of votes held in Russian-occupied Ukraine, the results of which were used by Russia to justify its illegal invasion and occupation of Ukrainian territory.³³ Closer to home, in the wake of the 2016 Brexit referendum, one commentator wrote that 'referendums are the nuclear weapons of democracy', that in 'parliamentary systems they are redundant' and that in 'seeking a simplistic binary yes/no answer to complex questions, they succumb to emotion and run

²⁴ Ireland's own experience accords with this general trend, with thirty-one of the total forty-three referendums taking place since 1992.

²⁵ See generally Simone Chambers, 'Constitutional Referendums and Democratic Deliberation' in Matthew Mendelsohn & Andrew Parkin (eds), *Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns* (Palgrave, 2001) 231.

²⁶ Stephen Tierney, *Constitutional Referendums: the Theory and Practice of Republican Deliberation* (OUP 2014) 23.

²⁷ The margin of defeat was 54,288 votes (50.58% No; 49.42% Yes) on a turnout of 93.52% (4,757,509 votes cast).

²⁸ See generally Simone Chambers, 'Constitutional Referendums and Democratic Deliberation' in Matthew Mendelsohn & Andrew Parkin (eds), *Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns* (Palgrave, 2001) 231.

²⁹ Simone Chambers, 'Constitutional Referendums and Democratic Deliberation' in Matthew Mendelsohn & Andrew Parkin (eds), *Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns* (Palgrave, 2001) 231.

³⁰ Matt Qvortrup, 'The 2017 Catalan Referendum in Comparative Perspective' in Julie Smith (ed) *The Palgrave Handbook of European Referendums* (Palgrave Macmillan Cham 2021) 307-324.

³¹ Matt Qvortrup, 'The 2017 Catalan Referendum in Comparative Perspective' in Julie Smith (ed) *The Palgrave Handbook of European Referendums* (Palgrave Macmillan Cham 2021) 307-324.

³² Rachel Chaundler, 'Spain Approves Amnesty for Separatists in 2017 Catalan Independence Vote' *The New York Times* (New York, 30 May 2024); Selen Öner, 'The Relations Between Catalonia and the European Union and Catalan Independence Referendum' (2019) 27 *Marmara Journal of European Studies* 29-51.

³³ Mark Trevelyan, 'Moscow's proxies in occupied Ukraine regions report big votes to join Russia' *Reuters* (London 28 September 2022). This tactic was also employed following the occupation of Crimea in 2014.

amok'.³⁴ Regardless of the global relevance of these claims, there is a sense since Brexit that another UK-wide referendum is unlikely to materialise in the near future.³⁵

1.2.2 – Ireland as a Case Study

Due to the increasing use of referendums across the world, it has been suggested that we are living in 'the age of the referendums'.³⁶ In the age of the referendum, Ireland has emerged as a case study of how a small nation can use referendums on controversial political issues. While the first Irish constitutional referendum was held in 1959,³⁷ the process began to be used with increasing frequency from the early 1990s as successive governments sought to tackle a rapidly changing social environment: economic growth, EU membership, and increased secularisation all chafed with the more traditional, Catholic elements of the Constitution. Two referendums in particular capture the significance of the process in recent times: the 2015 Marriage Equality referendum which provided for same-sex marriage,³⁸ and the 2018 Abortion referendum.³⁹

The result of the 2015 referendum was notable for a few reasons. First, it was one of the first instances of same-sex marriage passing into law by popular vote.⁴⁰ Second, divorce had been legalised in Ireland only twenty years earlier.⁴¹ Third, as recently as 2002, Ireland had been one of the most homophobic countries in the Western World.⁴² That such a massive shift in attitude had taken place over such a short period of time in Ireland of all

³⁴ William Keegan, 'What Whitehall Farce' *The Observer* (London, 24 July 2016), quoted in Matt Qvortrup, *Government by Referendum* (Manchester University Press 2018) 1.

³⁵ Although Brexit did increase calls from Scotland for a second Independence referendum.

³⁶ Stephen Tierney, 'Europe Is Entering the "Age of the Referendum", but There Is Nothing to Fear for European Democracy If Referendums Are Properly Regulated' *Democratic Audit* (22 October 2014) available at <<http://www.democraticaudit.com/2014/10/22/europe-is-entering-the-age-of-the-referendum-but-there-is-nothing-to-fear-for-european-democracy-if-referendums-are-properly-regulated/>>; Silvia Suteu, 'The Scottish Independence Referendum and the Participatory Turn in UK Constitution-Making: The Move towards a Constitutional Convention' (2017) 6 *Global Constitutionalism* 184, 187.

³⁷ On the 3rd Amendment Bill 1959 (First Past the Post).

³⁸ 34th Amendment 2015 (Marriage Equality).

³⁹ 36th Amendment 2018 (Repeal of the 8th).

⁴⁰ Éanna Ó Caollaí, Mark Hilliard, 'Ireland becomes first country to approve same-sex marriage by popular vote' *The Irish Times* (Dublin 24 May 2015).

⁴¹ Also by referendum, 15th Amendment 1995 (Divorce II).

⁴² David Kenny and Aileen Kavanagh, 'Are the People the Masters? Constitutional Referendums in Ireland' in Albert and Stacey (eds) *The Limits and Legitimacy of Referendums* (OUP 2021) 264-291, 271 citing Diarmaid Ferriter, *Occasions of Sin: Sex and Society in Modern Ireland* (Profile Books, 2009) 509, citing the *Evening Herald* (Dublin 24 April 2007).

places, and that this change was enacted through a popular vote with a civil, reasonable campaign attracted widespread attention. In the 2018 Abortion referendum, the 8th Amendment to the Constitution⁴³ was removed from the Constitution and replaced with a provision explicitly permitting the legislature to provide for abortion.⁴⁴ Again, the shift in the Irish population's attitude was significant; abortion has been one of the most controversial issues in Ireland for decades and formed the basis of multiple referendums⁴⁵ as well as exceptions from EU agreements.⁴⁶

Perhaps unsurprisingly, then, the successive referendums caused quite a stir in discussions of popular and deliberative democracy across the world.⁴⁷ Politicians from across Europe,⁴⁸ the UK,⁴⁹ and the US⁵⁰ issued public statements praising the result of the 2015 Marriage Equality referendum, and it led to intensified calls for similar plebiscites abroad.⁵¹ After the 2018 Abortion referendum, international attention was particularly focused on the use of deliberative fora in the design of the referendum proposal.⁵² Simon Hix compared Ireland's experience of those referendums with that of Brexit, and suggested that Ireland 'seems to have developed a maturity in how it holds and deals with the outcome of referendums' which is unmatched in many other jurisdictions.⁵³ That general sentiment is present in much of the literature at that time.⁵⁴

However, there has always been pushback against this rosy picture of Irish referendums, with some suggestions that the deliberative experiments were not as successful as

⁴³ Which had prohibited abortion on grounds other than risk to the life of the mother.

⁴⁴ Article 40.3.3.

⁴⁵ Before 2018, the 8th Amendment 1983, the 12th Amendment Bill 1992 (rejected), the 13th Amendment 1992, the 14th Amendment 1992, and the 25th Amendment Bill 2002 (rejected) all concerned abortion.

⁴⁶ The Maastricht Protocol Number 17 protected the 8th Amendment from challenge in the European Courts.

⁴⁷ See generally, David Kenny and Aileen Kavanagh, 'Are the People the Masters? Constitutional Referendums in Ireland' in Albert and Stacey (eds) *The Limits and Legitimacy of Referendums* (OUP 2021) 264-291.

⁴⁸ Derek Scally, 'Angela Merkel urged to follow Ireland's lead on same-sex marriage' *The Irish Times* (Dublin 24 May 2015); 'Ban Ki-moon praises 'truly historic' referendum result' *RTE* (Dublin, 24 May 2015).

⁴⁹ Prime Minister's Office, 'PM statement: Ireland vote to legalise same-sex marriage' (23 May 2015) <<https://www.gov.uk/government/news/pm-statement-ireland-vote-to-legalise-same-sex-marriage>> accessed 26 August 2025.

⁵⁰ Simon Carswell, 'US politicians pay tribute to Ireland's vote on same-sex marriage' *The Irish Times* (Dublin, 24 May 2015).

⁵¹ 'Gay marriage referendum in Australia dismissed by Tony Abbott, Bill Shorten as Ireland votes for change' *ABC News, Australia* (Ultimo, 24 May 2015).

⁵² The 2016-18 Citizens' Assembly.

⁵³ Simon Hix, 'Remaking Democracy: Ireland as a Role Model' (2020) 35(4) *Irish Political Studies* 585-601.

⁵⁴ See generally, David Kenny 'The Risks of Referendums: 'Referendum Culture' in Ireland as a Solution?' in Cahill, Ó Cinnéide, Ó Conaill, and O'Mahony (eds) *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland* (Routledge 2021).

claimed.⁵⁵ Eoin Carolan, for example, was sceptical of the 2012 Convention's impact and questioned the deliberative character of a forum which was operated within narrow, legalistic constraints.⁵⁶ Fiona de Londras has also argued that the deliberative fora were overly-legal and precluded radical recommendations.⁵⁷ On a different note, Hilary Hogan's examination of the 2004 Birthright Citizenship referendum suggests that referendums in this jurisdiction *can* be subject to the sort of inflammatory, populist rhetoric much derided in the Brexit referendum and elsewhere.⁵⁸ More recent and more pressing, however, is the defeat of the 2024 Family and Care amendment proposals.⁵⁹ Despite the proposals arising out of a deliberative forum,⁶⁰ and a general expectation that the proposals were in line with the trend of constitutional liberalisation, both proposals were roundly rejected at referendum. In fact, the Care referendum suffered the largest margin of defeat of any referendum proposal in the history of the State.⁶¹ The referendum campaigns themselves were plagued with confusion, dissatisfaction, and an unhealthy dose of apathy.⁶² The fallout since those referendums has involved a lot of political soul-searching, and various suggestions that Ireland's golden age of referendums has come to an end.⁶³

On foot of this, a few questions arise. First, how can we accurately characterise Ireland's experience with constitutional referendums? While the 2015 and 2018 referendums were undoubtedly successful in some ways, they represent only two of forty-three referendums held to date. Is it possible to replicate that positive spirit of deliberation for issues that do

⁵⁵ Cf. Simon Hix, 'Remaking Democracy: Ireland as a Role Model' (2020) 35(4) *Irish Political Studies* 585; Eoin Carolan, 'Ireland's Constitutional Convention: Behind the Hype About Citizen-Led Constitutional Change' (2015) 13(3) *International Journal of Constitutional Law* 733.

⁵⁶ Eoin Carolan, 'Ireland's Constitutional Convention: Behind the Hype About Citizen-Led Constitutional Change' (2015) 13(3) *International Journal of Constitutional Law* 733-748.

⁵⁷ Fiona de Londras, 'The Citizens' Assembly and the Disciplining of Activist Demands' (26 November 2018) <<https://blog-iacl-aidc.org/debate-the-citizens-assembly-in-ireland/2018/11/26/the-citizens-assembly-and-the-disciplining-of-activist-demands>> accessed 14 June 2023; Máiréad Enright, 'Abortion and the Citizens' Assembly: Agonist Futures?' IACL-AIDC Blog (5 December 2018) <<https://blog-iacl-aidc.org/debate-the-citizens-assembly-in-ireland/2018/12/5/abortion-and-the-citizens-assembly-agonist-futures>> accessed 12 June 2023.

⁵⁸ Hilary Hogan, 'Democratic Constitutionalism or Elite Control? Revisiting the 2004 Irish Citizenship Referendum' in Cahill, Ó Cinnéide, Ó Conaill, and O'Mahony (eds) *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland* (Routledge 2021).

⁵⁹ The 39th Amendment Bill 2024 (Family) referendum, and the 40th Amendment Bill 2024 (Care).

⁶⁰ The 2020-21 Citizens' Assembly on Gender Equality.

⁶¹ It was rejected by 73.9% of voters.

⁶² David Kenny, 'How to Lose a Referendum (in Ireland) – Challenges of practical and Symbolic Constitutional Change' (2025) 3(2) *Comparative Constitutional Studies* 1-29.

⁶³ David Kenny, 'How to Lose a Referendum (in Ireland) – Challenges of practical and Symbolic Constitutional Change' (2025) 3(2) *Comparative Constitutional Studies* 1-29.

not spark as much interest in the general public? More than that, do the 2024 referendums prove that the successes of 2015 to 2018 – whatever they may be – were mere accidents? In other words, do Irish referendums in general actually work, or did lightning strike twice in three years? Underlying all of these questions is a much more fundamental query: by what metric do we measure whether Irish referendums work? It cannot just be whether or not a referendum secures the result we support. We need context-independent criteria for success. Since the Constitution prescribes the referendum as the method by which amendment occurs, it is essential that these questions are taken seriously. It is inevitable that more referendums are to come.⁶⁴ Understanding what factors contribute to the success of one referendum and the failures of another is vital in order to ensure the democratic potential of the referendum is realised.

1.3 – Central Research Questions

The central research question of this thesis is: are Irish referendums successful, and in what way can they be successful? This breaks down into a number of further questions.

The first question is: are Irish constitutional referendums successful? This requires an analysis of a few things. In the first instance, it requires a good understanding of what the Irish experience with referendums actually is. A comprehensive and context-sensitive analysis of all Irish referendums is necessary to give a full account of the Irish experience – this thesis seeks to look beyond the most recent referendums in order to characterise its nature more fully. From there, we need to establish the factors which contribute to some referendums going well, and other going poorly. What tends to go right and/or wrong in referendums? This element of the thesis drives at the fundamental question mentioned at the beginning of this Introduction: are we right to look to Ireland for lessons on how to design referendums? I ultimately argue that we are, with some important caveats.

⁶⁴ Gavin Barrett suggests that the increase in referendums has led to most issues being ‘de-constitutionalised’ which means the likelihood of further referendums is decreased: there are fewer issues in the Constitution to debate. Gavin Barrett, ‘Modalities, Political Practices and the Law on Referendums in Ireland’ in Cahill, Ó Cinnéide, Ó Conaill, and O’Mahony (eds) *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland* (Routledge 2021).

The second question arising from the central research question is: what do we mean by success? This thesis analyses success in a number of ways. In the main, I adopt the position that an individual referendum is successful when democratic engagement is maximised. By this I mean voter turnout is maximised, and citizens are as engaged with the *substantive* issue as possible. It also seeks to maximise first-order preference voting: that is, the proportion of voters who make their decision on the basis of the proposal's merits, rather than other issues like their view on the government etc. I also look to examine the success of the referendum system as a whole: a state does referendums well when democratic engagement is consistently and repeatedly maximised through its institutional design. In that regard, it is necessary to closely examine how the referendum is regulated in law. This includes regulation through legislation, case-law, and any other political or legal norm having a bearing on the referendum. It is also necessary to examine what sort of institutions exist to supplement that regulation, and the factors contributing to their success. All of this combines to provide a basis for a set of minimum success criteria against which any referendum should be measured.

After analysing the success of individual referendums according to democratic engagement, this thesis then seeks to explain the value of the referendum as a method of constitutional amendment. Understanding the purpose for which the referendum is adopted in Bunreacht na hÉireann allows us to examine whether or not the reality of Irish referendums lives up to that ideal. In other words, this thesis seeks to understand the value of the referendum for Ireland in light of its ultimate underlying purpose. To do this, the thesis examines the referendum's place in the Constitution and its connection with the fundamental ideals of democracy and popular sovereignty, and from there seeks to understand the purpose of adopting the referendum as the method of constitutional amendment. When combined with the earlier parts, this part of the thesis offers a full assessment of the nature and value of the referendum for Ireland.

1.4 – Argument, Methodology, and Structure

1.4.1 – Argument

This thesis has two overarching answers to the above questions. First, I argue that Irish referendums have suffered from a discrete set of problems since the first plebiscite, but that common threads of success can be seen from that time which have justified their continuing use, bolstered by more recent evolutions in their institutional design. Across sixty-seven years of referendums, the general picture is one of fluctuating engagement but, crucially, something of a consensus that it is a useful and appropriate tool for Irish democracy. Citizens are positive about the referendum, and thus far it has not been abused by populists to unravel the basic liberal-democratic character of the Constitution. In that context the idea that Ireland has developed a referendum ‘culture’ seems significant – the State has become accustomed to referendums.⁶⁵ I argue that in some ways, this culture and positive sentiment has arisen despite a lack of regulation (§2.5). I then demonstrate that the Irish referendums which have attracted criticism, charges of abuse, and sometimes acrimony all tend to suffer from the same issues (§3.5), and that the best remedy for those malaises is good institutional design (§4.5).

In Chapters 4 and 5 of this thesis, I argue that recent experiments with deliberative fora demonstrate the virtues of good institutional design, and how the work done by those bodies can ensure that no referendum campaign falls below a minimum threshold of information sufficiency, engagement, and citizen participation (§5.1). I defend those three criteria as an appropriate formula for ensuring any referendum enjoys sufficient substantive engagement by comparing four specific referendums, and from there offer a blueprint for designing an Irish referendum which ensures democratic engagement is maximised (§5.8). In the past, high democratic engagement has often been the result of variable and varied social factors. Securing the consistent success of future referendums, I argue, requires that the lessons of good institutional design are heeded.

Second, this thesis evaluates Irish referendums in two separate but importantly related ways. The first part of the thesis is concerned with assessing the success of Irish referendums according to general democratic principles which can be identified in the Constitution: does the referendum live up to its billing as a method of *democratic* decision-making? Success in this sense means maximisation of democratic engagement according

⁶⁵ David Kenny ‘The Risks of Referendums: ‘Referendum Culture’ in Ireland as a Solution?’ in Cahill, Ó Cinnéide, Ó Conaill, and O’Mahony (eds) *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland* (Routledge 2021).

to turnout, engagement with the campaign, and first-order preference voting (§5.8). This can be used to evaluate the success of individual referendums, as well as the legal and political framework within which these individual referendums operate. The latter stages of this thesis are concerned more with the value of the referendum as the method of constitutional amendment adopted by the Constitution. This part of the thesis operates from the premise that Bunreacht na hÉireann adopts the referendum as the method of constitutional amendment for a particular purpose. Through an analysis of the case-law on referendums (§6), this part of the thesis identifies popular sovereignty and strong notions of democracy as the principal values underlying the adoption of the referendum (§6.9). With that in mind, I argue that the purpose of the referendum is to balance these principles with the competing requirements of constitutionalism present in the Constitution (§7.6). The final chapter of the thesis then seeks to analyse the value of Irish referendums according to that purpose (§7.7). I ultimately argue that this balancing exercise is largely successful and demonstrates Ireland's answer to the core debate in constitutional design.

1.4.2 – Methodology

This thesis adopts a mixed methodological approach. This follows from the nature of the subject-matter: since referendums cut across law, politics, and society, this thesis must adopt an interdisciplinary and mixed methodological approach to capture the essence of Irish constitutional referendums. As Coomans et al suggest, the choice of methodology 'should flow logically from the project's research question'⁶⁶

This thesis is primarily a work in traditional legal and doctrinal analysis, focusing on how referendums work in the context of Irish constitutional law. However, by looking at the lived experience of referendums, I seek to understand the law in context.⁶⁷ This requires the adoption of different methodologies at different stages.

⁶⁶ Fons Coomans, Fred Grünfeld, Menno Kamminga, 'Methods of Human Rights Research' (2010) 32 *Human Rights Quarterly* 179-186, 184.

⁶⁷ For more on the law in context approach, see Gary Watt, *The Making Sense of Politics, Media, and Law* (CUP 2023).

The first part of this thesis comprises constitutional, legal, and political analysis of Irish referendums. The goal of this part of the thesis is to set out the framework for referendums in Ireland and a clear, coherent account of how Irish referendums are regulated by law. In order to do this, the thesis analyses not only the constitutional provisions relevant to the referendum, but also regulation through legislation, case-law, and political conventions. This part of the thesis undertakes a traditional doctrinal analysis of these legal norms. At a general level, this involves the identification, analysis, and synthesis of law's content.⁶⁸ The goal of this part of the thesis is to gather all relevant legal rules relevant to Irish referendums, and from there to evaluate the efficacy of the framework of regulation. While it has its detractors,⁶⁹ doctrinal analysis is the most appropriate methodology for this section since 'the lawyer needs to commence any legal discussion by using this method to critically determine 'what the law is'.'⁷⁰ This is the first step in understanding what the practice of constitutional referendums in Ireland is.

This part of the thesis also seeks to situate the law in its broader social and political landscape and as such engages in a doctrinal legal method in context. A purely doctrinal analysis blind to the social and political context of Irish referendums would overlook some of the most significant defining features of this area. Such context is particularly relevant in the sphere of constitutional referendums: more than any other legal phenomenon, constitutional amendment by referendum lays bare the multifaceted social causes and consequences of law. As Allott states:

'Law seems to have a special status among social phenomena by reason of its forms, its rituals, its specialized language, its special rationality even, and its specific social effects. But on the other hand, law is clearly embedded in the totality of the social process which is its cause, and on which it has a substantial determinative effect, not least in providing the continuing structure of society, its hard programme.'⁷¹

Many Irish referendums have been called with the express or implicit intention of responding to changes in political or social attitudes towards certain issues. Referendums

⁶⁸ Terry Hutchinson, 'Doctrinal Research: Researching the jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2018) 8-39, 13.

⁶⁹ See generally Susan Bartie, 'The Lingering Core of Legal Scholarship' (2010) 30 *Legal Studies* 345; Edward L Rubin, 'The Practice and Discourse of Legal Scholarship' (1988) 86 *Michigan Law Review* 1835.

⁷⁰ Terry Hutchinson, 'Doctrinal Research: Researching the jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2018) 8-39, 26.

⁷¹ Philip Allott, *The Health of Nations: Society and Law Beyond the State* (CUP 2002) 36.

are therefore a meeting point for law, politics, and social mores. They are instances of non-legal social values *becoming law* by election through a legally established mechanism. As such, understanding Irish referendums requires one to understand the context in which they arise, and the non-legal factors which contribute to a referendum's success or failure.

The discussion of Irish referendums in Chapter 3 also engages in this context-sensitive analysis so that the whole picture of their causes, significance and legal consequences can be understood. Given the limited space available, a fully detailed examination of all forty-three Irish referendums is beyond the scope of this thesis. However, in order to give a detailed overview and ensure that the thesis captures their full context, Chapter 3 undertakes to pick out the most salient features of each referendum and from there to identify significant trends across all. This is done initially through categorisation of Irish referendums by type. These categories are then arranged further according to their most important characteristics. In doing this, Chapter 3 synthesises the raw data of Irish referendums (voting data, turnout, other factors) so that a clear and easily digestible contextual account of Irish referendums is presented. While this work is in a way descriptive, identifying the most relevant aspects of each referendum involves a significant degree of evaluation. As Kavanagh notes, this is a feature of much 'descriptive' legal analysis:

'Making sense of [a] complex, multi-faceted terrain inevitably requires the [author] to make difficult judgment-calls about which features of the practice are most salient and significant, and which should be given explanatory priority and normative weight. If this process is 'descriptive', then it is a form of deep description and acute analysis which goes far beyond a regurgitative rendering in the passive voice.'⁷²

Chapter 3 therefore builds on this deep description and analysis to offer an evaluative account of what trends cut across all Irish referendums, and the reasons for those trends. This part of the thesis is therefore building a bottom-up account of Irish referendums: it is concerned principally with how the practice *actually* operates, so that any account of how it *should* operate is grounded in reality.

⁷² Aileen Kavanagh, 'Keeping it Real in Constitutional Theory' (2023) 1(2) Comparative Constitutional Studies 224-266, 259.

In the third chapter of this thesis, the above contextual methodology is enhanced through a combination of archival and historical research. As Mohr notes, legal scholars ‘cannot avoid some engagement with historical research methodologies, however hard they might try.’⁷³ They are of particular relevance to this thesis, however, specifically its first part. Any evaluation of the success of Irish referendums requires a contextual analysis of its actual operation, and any account of its operation must be grounded in reality. Archival research was therefore vital in obtaining a clear picture of Ireland’s experience with referendums since 1959 which was alive to the social, political, economic, and legal context of the time. The methods employed involved consulting with newspaper archives for the relevant periods around each referendum, as well as relevant contemporary sources including political publications, referendum materials, and Referendum Commission studies. The primary sources from this time were complemented by consultation with appropriate secondary literature on political and legal trends from that time. As Cahillane has noted, the use of historical materials in this way offers particular benefits for legal analysis:

‘[History] can be used to demonstrate the conditions of emergence of a particular law or practice, in order to better understand it. It can also be used to demonstrate how thinking might have changed on an issue or even to highlight an injustice.’⁷⁴

Since constitutional amendment in Ireland is an ongoing process involving the constant review of Bunreacht na hÉireann, such historical analysis is necessary when constructing a coherent and comprehensive account of Ireland’s experience with referendums.

The goal of Chapters 4 and 5 is to use the trends identified in the previous chapters as a means of evaluating the role and value of supplementary institutions in Irish referendums. That is, building on the identification of trends which cause problems for Irish referendums, Chapter 4 assesses how ‘supplementary institutions’ (like the Referendum Commission) can remedy those malaises.⁷⁵ Chapter 4 is therefore both descriptive and prescriptive. First, it is descriptive in the sense that it describes and analyses the role and significance of supplementary institutions in Irish referendums. However, as Kavanagh notes, the word ‘descriptive’ is a misleading misnomer ‘because all inquiries the nature of

⁷³ Thomas Mohr, ‘Legal Material and Historical Research’ in Laura Cahillane and Jennifer Schweppe (eds) *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) 71.

⁷⁴ Laura Cahillane, ‘The Use of History in Law: Avoiding the Pitfalls’ in Laura Cahillane and Jennifer Schweppe (eds) *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) 68.

⁷⁵ A definition of supplementary institutions is provided in Chapter 4.

legal phenomena are evaluative in character, at least in the sense of requiring us to evaluate which features of the practice are important, significant, or morally relevant.’⁷⁶ In reality, then, this part of the thesis seeks to go beyond simply explaining the nature of these institutions and to analyse and evaluate their practice in order to make sense of them ‘in all of their complexity’.⁷⁷ To do so, this part of the thesis relies on a wide array of literature from the fields of constitutional law and political science. Political science literature in particular offers insights into the impact of the supplementary institutions on political actors as well as citizens: polling and survey data is relied on to support the claims that certain institutions were successful at informing citizens about amendment proposals, for example.⁷⁸ This accords with one of the central aims of this thesis, namely, explaining whether, and in what way, the examined supplementary institutions influenced the political environment of Irish constitutional referendums.

Chapter 5 establishes a set of criteria to which any Irish referendum should adhere in order to maximise democratic engagement. The prescriptive criteria are established on the basis of the preceding chapters: the trends identified in Chapter 3 are tested further in Chapter 4, where the impact of supplementary institutions on those trends is evaluated. From that evaluation, it becomes clear that certain factors have a highly significant bearing on the democratic character of individual referendums; these become the basis of the prescribed criteria in Chapter 5. The approach in this part of the thesis, then, accords with a ‘phenomenological’ methodology which ‘cuts across the supposed divide between ‘descriptive’ and ‘normative’ scholarship’.⁷⁹ Chapters 3 and 4 undertake the first part of this approach by describing how referendums in Ireland actually operate and what the supplementary institutions can and cannot do. These chapters then evaluate how well those institutions carry out their role, in order to make it clear what can and should be done to maximise democratic engagement. This part of the thesis lays the foundation for Chapter 5’s account of the criteria for a successful referendum. In this sense, then, my thesis makes

⁷⁶ Aileen Kavanagh, ‘Keeping it Real in Constitutional Theory’ (2023) 1(2) *Comparative Constitutional Studies* 224-266, 255 citing Joseph Raz, *Ethics in the Public Domain* (OUP 1994) 44.

⁷⁷ Aileen Kavanagh, ‘Keeping it Real in Constitutional Theory’ (2023) 1(2) *Comparative Constitutional Studies* 224-266, 259.

⁷⁸ e.g. Richard Sinnott, ‘Attitudes and Behaviour of the Irish Electorate in the Referendum on the Treaty of Nice’ (2002) Institute for the Study of Social Change, University College Dublin, 10; Johan Elkink, David Farrell, Theresa Reidy, Jane Suiter ‘Understanding the 2015 Marriage Equality Referendum in Ireland: Context, Campaign and Conservative Ireland’ (2017) 32(3) *Irish Political Studies* 361–381.

⁷⁹ Aileen Kavanagh, ‘Keeping it Real in Constitutional Theory’ (2023) 1(2) *Comparative Constitutional Studies* 224-266, 258.

a normative, as well as an analytical and explanatory, claim about how referendums should be organised.

In Chapter 5 I set out and defend a set of basic criteria for success in Irish referendums. These criteria are established in the preceding chapters through the evaluation of the identified trends. The approach of Chapter 5 is therefore twofold: first, to prescribe a set of minimum criteria for success; and second, to demonstrate through an in-depth examination of four referendums that meeting those criteria maximises the democratic character of any referendum by maximising substantive engagement. Chapter 5 adopts the position that success in any given referendum should be measured according to engagement which goes beyond turnout: it presumes that, since the referendum is a pointedly democratic mechanism, a successful referendum is one in which voter turnout, engagement with the campaign, and first-order preference voting are all maximised. Implicit in the referendum – an instrument of ‘modern mass participation democracy’ – is the idea that the decision should be made by the highest number of voters possible, all of whom are sufficiently informed and are voting according to the substantive merits of the proposal.⁸⁰

Chapter 5 is not an exercise in defending the democratic credentials of referendums in the abstract. Nor does it seek to evaluate the normative claims that the referendum is the best or most democratic form of decision-making. In other words, the thesis does not undertake the same sort of normative political endeavour as Rousseau, Mill, or Tierney.⁸¹ I am not attempting to provide an account of the normative attractiveness of referendums from first principles. Rather, this thesis takes as its starting point the fact that Bunreacht na hÉireann adopts the referendum as the mechanism for constitutional amendment. It also takes seriously the connection emphasised by the judiciary between the referendum and the nature of democracy in the Constitution.⁸² The goal of this part of the thesis, then, is to prescribe a blueprint for how substantive democratic engagement with a referendum can be maximised – how it can achieve its own stated purpose.

⁸⁰ *Jordan v Minister for Children and Youth Affairs* [2015] IESC 33 (SC) [53] (O'Donnell J).

⁸¹ Stephen Tierney, *Constitutional Referendums: the Theory and Practice of Republican Deliberation* (OUP 2014).

⁸² See Chapter 6.

Chapters 6 and 7 employ a doctrinal analysis of relevant case law in order to understand the place of the referendum in the overall architecture of Bunreacht na hÉireann. Doctrinal analysis, often referred to ‘black-letterism’, is traditionally considered the orthodox legal methodology⁸³ and

‘[emphasises] coherence and unity. It involves the search for a ‘system’ of general, logically consistent principles, built up from the study of particular instances. This system is built on empirical and rational foundations. It is loosely empirical, in that lawyers work with the raw data of cases and other legal provisions. It is rationalist, because it presupposes that the system is logical and internally coherent.’⁸⁴

The objective of doctrinal analysis is ‘to state what the law is and to understand the law on its own terms.’⁸⁵ It therefore adopts an internal point of view⁸⁶ and implicitly accepts ‘the rationality of the subject area, its location within an institutional context, its internal epistemology, its hierarchical and coordinated features, its encompassing and authoritative embrace, and its pragmatic utility.’⁸⁷

While doctrinal analysis has been subjected to push-back from some in the field of methodology,⁸⁸ it has enjoyed something of a renaissance recently with leading scholars emphasising the importance of traditional doctrinal analysis.⁸⁹ Not only is doctrinal analysis necessary in order for scholars to make sense of complex areas of the law, it also has obvious practical, pragmatic value.⁹⁰ First, doctrinal analysis is necessary to ground

⁸³ Rónán Kennedy, ‘Doctrinal Analysis: The Real “Law in Action”’ in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) 21-38, 22; Terry Hutchinson, ‘Doctrinal Research: Researching the jury’ in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2018) 8-39, 13.

⁸⁴ Shane Kilcommins, ‘Doctrinal Legal Method (Black-Letterism): Assumptions, Commitments and Shortcomings’ in Laura Cahillane and Jennifer Schweppe (eds) *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) 7-20, 9.

⁸⁵ Jason N E Varuhas, ‘Mapping Doctrinal Methods’, in Daly and Tomlinson (eds), *Researching Public Law in Common Law Systems* (Edward Elgar, 2022).

⁸⁶ Shane Kilcommins, ‘Doctrinal Legal Method (Black-Letterism): Assumptions, Commitments and Shortcomings’ in Laura Cahillane and Jennifer Schweppe (eds) *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) 7-20, 10.

⁸⁷ Shane Kilcommins, ‘Doctrinal Legal Method (Black-Letterism): Assumptions, Commitments and Shortcomings’ in Laura Cahillane and Jennifer Schweppe (eds) *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) 7-20, 11.

⁸⁸ Susan Bartie, ‘The Lingering Core of Legal Scholarship’ (2010) 30 *Legal Studies* 345; Edward L Rubin, ‘The Practice and Discourse of Legal Scholarship’ (1988) 86 *Michigan Law Review* 1835.

⁸⁹ Alan Bogg, ‘Doctrinal method in labour law in common law systems: potential, problems, prospects’ in A Blackham, & S Cooney (eds), *Research Methods in Labour Law* (1st edn, Edward Edgar Publishing 2024) 186-216.

⁹⁰ Shane Kilcommins, ‘Doctrinal Legal Method (Black-Letterism): Assumptions, Commitments and Shortcomings’ in Laura Cahillane and Jennifer Schweppe (eds) *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) 7-20, 13.

any loftier normative accounts of law: without ‘knowledge of technical rules, no one can gain a proper understanding of the specific operations of the legal order, let alone change them’.⁹¹ In other words, ‘we need to lay down firm factual foundations before embarking on grand constitutional designs.’⁹² Second, it is appropriate for the task undertaken in this part of the thesis. Judicial decisions have established rules regarding the referendum and offer an authoritative account of how the referendum fits into the broader constitutional architecture of the State.

Chapter 6 aims to analyse these cases so that the role of the judiciary in the referendum can be assessed. Since doctrinal analysis ‘mirrors the analytical decisions of the judges’, doctrinal analysis is particularly useful for examining and explaining judicial decisions here.⁹³ Moreover, by analysing judicial decisions in this way, a set of values underlying the referendum can be identified. The chapter therefore adopts an internal point of view, evaluating the cases against their own metrics: according to their own internal logic, do the judicial decisions form a coherent account of the values underlying the referendum?

The final two chapters of this thesis seek to analyse the consequences of adopting the referendum to amend a constitution, as well as offer an explanation of the value of the constitutional referendum for Ireland’s constitutional stability. In this way, this project operates under the aegis of constitutional theory. Tierney describes constitutional theory as ‘an attempt both to understand constitutionalism as a form of political practice, and to frame evaluations of how this practice works against its own internal logic.’⁹⁴ The final two chapters of this thesis follow that approach: they attempt to understand the constitutional referendum as a form of political practice, and to evaluate how this practice works against its own internal logic. Chapter 6 complements earlier aspects of the thesis by furthering our understanding of the referendum as a political practice, and then identifies the referendum’s own ‘internal logic’ – that is, the principles underlying the

⁹¹ John Goldring, ‘Babies and Bathwater: Tradition or Progress in Legal Scholarship and Legal Education?’ (1987) 17 *University of Western Australia Law Review* 216, 219.

⁹² Aileen Kavanagh, ‘Keeping it Real in Constitutional Theory’ (2023) 1(2) *Comparative Constitutional Studies* 224-266, 246.

⁹³ Terry Hutchinson, ‘Doctrinal Research: Researching the jury’ in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2018) 8-39, 26.

⁹⁴ Stephen Tierney, *Constitutional Referendums: the Theory and Practice of Republican Deliberation* (OUP 2014) 2, citing Martin Loughlin, ‘Constitutional Theory: A 25th Anniversary Essay’ (2005) 25 *OJLS* 183.

referendum.⁹⁵ This is done by ‘examining the behaviour of constitutional actors, looking at their deeds and decisions, their actions and words, to see what this reveals about the values, principles, norms and ideals which motivate their behaviour.’⁹⁶ Chapter 7 then evaluates whether Irish referendums realise those underlying principles. The purpose of such evaluation is to offer an explanation of the value of the Irish referendum. Being both grounded in practice and oriented toward principle,⁹⁷ this part of the thesis aims to assess how ‘abstract propositions square with familiar features of constitutional practice’.⁹⁸

Chapter 7 goes some way to explaining the methodological approach of this thesis as a whole. It is, in effect, a bottom-up justification of the Irish referendum as the mechanism for constitutional amendment. Rather than abstracting a possible justification for the referendum from a normative account of direct democracy or popular sovereignty,⁹⁹ this thesis commences from a perspective grounded in practice, oriented towards principle. It accepts that Bunreacht na hÉireann has adopted a particular form of referendum as the method of amendment. It therefore seeks first to give a coherent and comprehensive account of that form, and to evaluate the operation of individual referendums. This evaluation is based on the premise that the referendum is a pointedly democratic device, and the middle part of this thesis assesses how effective the framework for referendums in Ireland maximises their substantive engagement from citizens. On the basis of that evaluation, I propose a set of criteria around which referendums should be designed so that engagement can be repeatedly and consistently maximised. Having established how well the referendum lives up to its billing as a democratic device, this thesis then moves on to consider their value.

Chapter 7 argues that the value of Irish referendums is best understood according to their underlying purpose which I argue is to balance the competing principles of constitutionalism and democracy. In this way, this thesis assesses Irish referendums in two ways: according to the how well engagement is fostered with individual referendums; and

⁹⁵ Stephen Tierney, *Constitutional Referendums: the Theory and Practice of Republican Deliberation* (OUP 2014) 2.

⁹⁶ Aileen Kavanagh, ‘Keeping it Real in Constitutional Theory’ (2023) 1(2) *Comparative Constitutional Studies* 224-266, 259.

⁹⁷ Aileen Kavanagh, ‘Keeping it Real in Constitutional Theory’ (2023) 1(2) *Comparative Constitutional Studies* 224-266, 255.

⁹⁸ Aileen Kavanagh, ‘Keeping it Real in Constitutional Theory’ (2023) 1(2) *Comparative Constitutional Studies* 224-266, 262.

⁹⁹ e.g. Leah Trueblood, *Referendums as Representative Democracy* (Hart Publishing 2024).

according to their contribution to the overall balance struck in Bunreacht na hÉireann. This account of the referendum is reached by analysing its practice first, because any attempt to ‘understand, explain, illuminate, critique and prescribe constitutional behaviour’ must be rest on ‘descriptively adequate foundations’.¹⁰⁰

1.4.3 – Structure

In order to answer its central research question (‘Are Irish referendums successful, and in what way can they be successful?’), this thesis proceeds in the following way.

Chapter 2 examines the framework for constitutional referendums in Ireland. In this Chapter, I outline the legal and political norms which govern the referendum so as to establish a comprehensive foundation for understanding how the referendum operates under the law in Ireland. By establishing how they operate, this chapter takes the first step in understanding whether Irish referendums are successful – we need to know first how they actually work. Over the course of the chapter, I argue that legal regulation of the referendum was light-touch for a very long time, and that much of the substantive rules derived from judicial decisions rather than legislation or the text of the Constitution itself. I further argue that the recent changes brought about by the Electoral Act 2022 represent a significant overhaul of regulation in this area.

In Chapter 3, I offer a contextual analysis of Irish referendums. Through an examination of all forty-three referendums held to date, this chapter gives a full and detailed analysis of what referendums actually look like in Ireland. It provides an analysis of how amendment proposals arise, why some referendums are more engaging for voters than others, the sorts of factors that contribute to a referendum result and what happens after a referendum is run. In doing so, the chapter undertakes the important task of identifying the most common issues arising in Irish referendums. Here I argue that the drivers behind referendums in Ireland are multi-factorial and that they often have more than one reason for coming into existence. Further, I provide insights into issues that arise across all

¹⁰⁰ Aileen Kavanagh, ‘Keeping it Real in Constitutional Theory’ (2023) 1(2) Comparative Constitutional Studies 224-266, 261.

referendums. I argue that many of these issues come about due to issues with the referendum's design rather than abstract, unmanageable factors. By establishing a real, warts-and-all analysis of Irish referendums, this chapter tackles the question of whether they actually are successful in the way envisioned by their most ardent supporters.

Chapter 4 analyses the role of supplementary institutions in Irish referendums.¹⁰¹ Here I build on the work of the previous chapter of identifying the importance of institutional design, and analyse the institutions most involved in the referendum. This involves an analysis of the Referendum/Electoral Commission, the 2012 Constitutional Convention, the Citizens' Assemblies, and the Housing Commission. In this chapter I argue that good institutional design is vital to the success of a referendum system, and that the recent experiments in democratic deliberation demonstrate their potential to remedy the most common issues in Irish referendums which were identified in Chapter 3. I also demonstrate that the value of these institutions can be undermined without formal connection to the referendum process. This chapter goes some way to demonstrating what factors contribute to some referendums enjoying high levels of democratic engagement and others less.

The following chapter, Chapter 5, offers a set of criteria for successful referendums. This chapter is both descriptive and prescriptive. In the first regard, the chapter provides an objective, neutral set of criteria for determining what a successful referendum looks like. These criteria are the benchmark against which both an individual referendum and a broader referendum system should be measured. The criteria are derived from the premise that the referendum is pointedly democratic and therefore substantive engagement by citizens should be maximised. It is prescriptive in the sense that, by identifying a set of criteria, it sets a blueprint for the design of future referendums to ensure that they reach a minimum standard of success. The criteria identified are: information sufficiency, engagement, citizen-involvement, and clarity of consequence. This chapter offers an answer both to how Irish referendums have been successful (i.e. through compliance with my criteria) as well as the way in which can be successful (by maximising democratic engagement).

¹⁰¹ See Chapter 4 for a definition.

In Chapter 6, I analyse the role of the Judiciary in Irish referendums through an examination of the case-law on referendums. This has a number of purposes. First, it helps to supplement our understanding of referendum regulation by clarifying how the judicial rules came to be. Second, it demonstrates how and in what way the Judiciary interact with the referendum. Because the Judiciary are granted the power of ultimate interpretation of the Constitution, their comments on the referendum are useful for establishing its purpose and underlying rationale. Over the course of this chapter, I demonstrate that the role of the Judiciary in the referendum accords with their constitutional function more generally. More than that, I explain and rationalise the jurisprudence in this area by demonstrating that the different strands of cases can all be explained by reference to the Judiciary's understanding of the values underpinning the referendum. This Chapter provides the first part of an answer to the value of Irish referendums. Any answer to that question requires an analysis of that purpose, and this chapter's examination of the case-law lays this bare. In short, this chapter shows that the referendum is inextricably bound up with the principles of popular sovereignty and democracy inherent in the Constitution.

In Chapter 7, I argue that the best way to understand the value of the Irish referendum is via the competing concepts of constitutionalism and democracy. I argue that this is a more coherent and constructive means of understanding the referendum's value than attempts to unravel the normative ends of popular sovereignty. While I acknowledge that the referendum is based on the principles of popular sovereignty and direct democracy, I demonstrate that one need not wade into the debate on those perennial issues in order to see the value which accrues to Ireland by virtue of the referendum. I argue that the referendum is the clearest and most significant paradigm of how Ireland balances its commitments to both constitutionalism and democracy, and that the balance struck explains the relative health of Irish referendums.

Finally, in the Conclusion I summarise the main contours of this thesis, and provide a summary of the arguments put forth. I reiterate how this thesis answers the central research question and the consequences for our understanding of the Irish constitutional referendum. I also set out some of the principal lessons which can be drawn from Ireland's experience with referendums.

1.5 – Conclusion

Referendums have been the subject of intense, protracted, and fundamental debate for centuries. Wherever and whenever the nature of democratic government is discussed, the benefits and drawbacks of referendums quickly enter the frame. Whatever approach one takes toward referendums is predicated on one's approach to democracy more generally. Nowhere is this more evident than when referendums are used for constitutional amendment. In this context, Irish constitutional referendums have, for some, become a 'cause célèbre' in recent years, in part due to momentous social change reflected through particular referendums.¹⁰²

And yet, the veneer of popular positivity about Irish referendums has started to wear, in particular following the 2024 Family and Care referendums, which demonstrated significant levels of confusion on the rationale behind the proposals, and after which voters expressed high levels of dissatisfaction with the referendums.¹⁰³ Questions now abound about whether Ireland is insulated from the dangers which have befallen other jurisdictions where referendums have been a central part of populist and authoritarian rollbacks on fundamental pillars like the rule of law, the separation of powers, and human rights. In that context, the factors contributing to the success of some Irish constitutional referendums is a topic of immense importance both for domestic actors seeking to consistently maximise engagement with Irish referendums, and also for anyone interested in designing referendums anywhere such that they can fulfil their potential. Any account of Irish referendums must be alive to the full social context in which they operate, as well as the constitutional architecture of which they form a central part. This thesis therefore endeavours to answer comprehensively whether Irish constitutional referendums are successful, and in what way they can be successful.

¹⁰² David Kenny, 'How to Lose a Referendum (in Ireland) – Challenges of practical and Symbolic Constitutional Change' (2025) 3(2) Comparative Constitutional Studies 1-29, 1.

¹⁰³ David Kenny, 'How to Lose a Referendum (in Ireland) – Challenges of practical and Symbolic Constitutional Change' (2025) 3(2) Comparative Constitutional Studies 1-29, 1.

2. THE FRAMEWORK FOR CONSTITUTIONAL REFERENDUMS IN IRELAND

2.1 – Introduction

The Irish Constitution (Bunreacht na hÉireann) expressly provides for its own amendment. The prescribed method of amendment is set out in Articles 46 and 47: the referendum. In particular, Article 46.1 states that any provision of the ‘Constitution may be amended, whether by way of variation, addition, or repeal, in the manner provided’.¹ The Articles work in tandem – all five sections in Article 46 relate to procedures for constitutional referendum, and Article 47.1 specifies that such a referendum will be deemed to have passed if a simple majority votes in favour of it. Since the enactment of the Constitution in 1937 the referendum has been used with gradually increasing frequency, so that it is now a familiar feature of Irish political life. At the time of writing, there have been forty-three constitutional referendums called since 1937, thirty of which were approved by voters. While the text of Articles 46 and 47 clearly forms the basis for these referendums, the manner in which they are initiated, regulated, and adjudicated on derives from a much richer tapestry of legal and political norms. In this chapter I will identify and analyse this legal and political framework for constitutional referendums in Ireland. This framework is made up of not only the constitutional text, but also legislation, ministerial orders, political conventions, and judicial dicta. The objective of this chapter is therefore to compile all relevant norms and from there assess the cogency and effectiveness of Ireland’s regulation of constitutional referendums.

This chapter is divided into five parts. Section 2.2 examines Articles 46 and 47 by looking to the referendum provisions in the 1922 Constitution and the subsequent drafting of the 1937 document. In Section 2.3 I examine the key statutes regulating the referendum including the recent Electoral Reform Act 2022. This also entails an examination of the Electoral Commission’s main functions. Section 2.4 is an overview of the relevant case law. In particular, this section details the consequences of the *McKenna* judgment on

¹ Bunreacht na hÉireann, Article 46.1.

government funding of referendum campaigns.² Section 2.5 details the life cycle of a referendum, with particular focus on the process for initiating a referendum. This section explains the role of legislative committees in identifying possible amendments. Finally, in Section 2.6 I conclude with an overall assessment of the framework for referendums in Ireland. There I will make the case that while the regulation of referendums in this jurisdiction has traditionally been light-touch, recent developments have given more substance to the framework.

2.2 – The Referendum in the Constitution

2.2.1 – 1922 Constitution of the Irish Free State

Any examination of Articles 46 and 47 must be informed by an analysis of their predecessors in the 1922 Constitution of the Irish Free State. Drafted and enacted in the wake of Ireland's War of Independence with the United Kingdom, the 1922 Constitution contained quite radical democratic provisions, drawing on contemporary European trends in democratic experimentation.³ As just one example, while the 1922 Constitution relied significantly on the British Westminster model in its design of the State,⁴ it broke with that model by expressly providing for referendums as the method for constitutional amendment.⁵ Part of the rationale behind this was the desire for Ireland to assert its own sovereignty apart from the United Kingdom by appealing to notions of 'the People' for its authority rather than the British Crown or a foreign parliament.⁶ Articles 47, 48, and 50 contained the relevant referendum provisions in the 1922 Constitution. Article 47 provided for popular referendums on controversial bills, and Article 48 contained a mechanism for citizen-led initiation of bills or constitutional amendments.⁷ Article 50 laid the foundation for amending the Constitution by way of popular referendum. It also contained a provision

² *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10.

³ Leo Kohn, *The Constitution of the Irish Free State* (George Allen and Unwin 1932) 238. See also Paul Brady, 'Social, Political and Philosophical Foundations of the Irish Constitutional Order', in Denis J Galligan and Mila Versteeg (eds.), *Social and Political Foundations of Constitutions* (Cambridge University Press 2013). O'Neill notes that the '22 referendum procedure was almost identical to that of the 1920 Constitution of Estonia, Bairbre O'Neill, 'The Referendum Process in Ireland' (2000) 35 Irish Jurist 305.

⁴ E.g. by including a bicameral legislature where the members of Government sit in the Lower House.

⁵ Bairbre O'Neill, 'The Referendum Process in Ireland' (2000) 35 Irish Jurist 305.

⁶ Leo Kohn, *The Constitution of the Irish Free State* (George Allen and Unwin 1932) 238.

⁷ Both of these provisions were soon repealed by the Constitution (Amendment No. 10) Act 1928.

which made the referendum a requirement for constitutional amendment only after the Constitution had been in force for eight years; before that time elapsed, amendments could be made by ordinary legislation passed by the Oireachtas.

Rather infamously, the provision in Article 50 allowing for amendment by ordinary legislation was itself amended by the Oireachtas in 1929 to extend the period by a further eight years.⁸ The constitutionality of this move was eventually the subject of a challenge in the Supreme Court in *State (Ryan) v Lennon*.⁹ That case arose out of the establishment of military tribunals on foot of Article 2A of the 1922 Constitution, which had been inserted via ordinary legislation in compliance with Article 50.¹⁰ Article 2A contained many draconian measures which clearly ran up against the fundamental freedoms enshrined in the Constitution (such as the ability of the Tribunal to impose the death penalty for crimes committed which, at the time of commission, were not illegal) and contained a clause which made it superior to all other provisions of the 1922 Constitution.¹¹ Four men due to be tried in such a military tribunal on terrorism-related charges challenged the constitutionality of Article 50 and thus the legality of the tribunal. In the Supreme Court, the central thrust of the case was whether the amendment of the Constitution by ordinary legislation in 1929 was a valid act, and consequently whether the insertion of Article 2A was a legitimate constitutional amendment.¹² In a 2-1 majority, the Supreme Court, per Fitzgibbon J, upheld the constitutionality of Article 50 and, therefore, Article 2A.¹³ When tasked with deciding between the plain text of the Constitution (which clearly permitted the amendment by ordinary legislation) and the assault on natural rights pleaded by the applicants, Fitzgibbon J held that it was not for the Supreme Court to intervene in the actions of the Legislature or the Executive by reading substantive limits into the Constitution's amendment power.¹⁴ Absent any textual prohibition on the sorts of

⁸ Constitution (Amendment No. 16) Act 1929. Tom Hickey, 'Revisiting Ryan v Lennon to Make the Case Against Judicial Supremacy (And For a New Model of Constitutionalism in Ireland)' (2015) 53 Irish Jurist 125.

⁹ *State (Ryan) v Lennon* [1935] IR 170.

¹⁰ Constitution (Amendment No. 17) Act 1931.

¹¹ Tom Hickey, 'Revisiting Ryan v Lennon to Make the Case Against Judicial Supremacy (And For a New Model of Constitutionalism in Ireland)' (2015) 53 Irish Jurist 125, 129.

¹² *ibid.*

¹³ *State (Ryan) v Lennon* [1935] IR 170 (SC) 230-231 (Fitzgibbon J); Tom Hickey, 'Revisiting Ryan v Lennon to Make the Case Against Judicial Supremacy (And For a New Model of Constitutionalism in Ireland)' (2015) 53 Irish Jurist 125, 130.

¹⁴ *State (Ryan) v Lennon* [1935] IR 170 (SC) 236 (Fitzgibbon J); Tom Hickey, 'Revisiting Ryan v Lennon to Make the Case Against Judicial Supremacy (And For a New Model of Constitutionalism in Ireland)' (2015) 53 Irish Jurist 125, 130.

actions undertaken by the Oireachtas, Fitzgibbon J felt that natural rights could not justify an intervention by the Courts, particularly, he said, because of the widespread disagreement about what exactly natural rights entailed.¹⁵

In his now famous dissent, Kennedy CJ decried the actions of the Oireachtas as contrary to natural law principles, stating that the Constituent Assembly had deemed certain principles to be immutable and absolute, unamenable to constitutional amendment.¹⁶ It was a necessary consequence of this, he said, that the Oireachtas could not have been intended to have a power to violate these principles.¹⁷ In making this point, Kennedy CJ emphasised the notion of popular sovereignty underlying the Constitution and the Supreme Court's role as the People's watchdog – it was in their name that the Court must invalidate such unconstitutional action by the State. Kennedy CJ said that the removal of the popular referendum as a safety-valve against legislation amending the Constitution constituted an attempt to arrogate ultimate power over the Constitution and was thus a usurpation done without lawful authority.¹⁸ Despite Kennedy CJ's emphatic dissent, *State (Ryan)* proved to be the death knell for the 1922 Constitution as the Oireachtas set about dismantling it by ordinary legislation,¹⁹ eventually leading to the drafting and adoption of the current 1937 Constitution.²⁰

2.2.2 – Drafting the Referendum Articles 1937

The current Constitution – Bunreacht na hÉireann – was the creation of Eamon de Valera's Fianna Fáil government with significant input from figures such as John Hearne and Archbishop John Charles McQuaid, among others.²¹ The document was initially approved

¹⁵ *State (Ryan) v Lennon* [1935] IR 170 (SC) 230-231 (Fitzgibbon J); Tom Hickey, 'Revisiting Ryan v Lennon to Make the Case Against Judicial Supremacy (And For a New Model of Constitutionalism in Ireland)' (2015) 53 Irish Jurist 125, 130.

¹⁶ *State (Ryan) v Lennon* [1935] IR 170 (SC) (Kennedy CJ).

¹⁷ *State (Ryan) v Lennon* [1935] IR 170 (SC) 209 (Kennedy CJ).

¹⁸ *State (Ryan) v Lennon* [1935] IR 170 (SC) 217 (Kennedy CJ); Tom Hickey, 'Revisiting Ryan v Lennon to Make the Case Against Judicial Supremacy (And For a New Model of Constitutionalism in Ireland)' (2015) 53 Irish Jurist 125, 130.

¹⁹ The reasons for this are more historical and political than legal in nature – removal of references to the British King and the role of the Governor General, and the abolition of the Upper House were broadly consequences of Fianna Fáil coming to power and seeking to further distance Ireland from Britain.

²⁰ On the drafting, see Gerard Hogan, *The Origins of the Irish Constitution, 1928-1941* (Royal Irish Academy 2012).

²¹ Gerard Hogan, *The Origins of the Irish Constitution, 1928-1941* (Royal Irish Academy 2012).

in the Dáil (lower house of parliament), and on July 1st, 1937, it was approved by 56.5% of voters at referendum and thus adopted. While a comprehensive account of the Constitution's nature and drafting history is beyond the scope of this chapter, there are some broad characteristics worth noting. First, Bunreacht na hÉireann is modelled closely off the historically relevant Westminster system, with a bicameral legislature,²² and an executive cabinet whose members sit in parliament.²³ It establishes a tripartite separation of powers²⁴ between the legislature,²⁵ the executive,²⁶ and the judiciary.²⁷ It contains a substantial number of rights provisions and, unlike the UK constitution, empowers the judiciary with the authority to strike down acts of the other branches for failure to adhere to these rights.²⁸

Most pertinent for my purposes here, the 1937 Constitution retains the referendum as the method of constitutional amendment from the 1922 document.²⁹ As noted, Articles 46 and 47 establish that the only method by which the Constitution can be amended is the referendum. As with the 1922 Constitution, for an initial period the 1937 Constitution could be amended by ordinary legislation, however Article 51 explicitly prohibited this period being amended so as to prolong the period from the initial three years.³⁰ During this time, the First and Second Amendments were passed – the former altered the definition of ‘time of war’³¹ while the latter was an omnibus of minor textual adjustments.³² Thereafter all amendments have been made through the procedure laid down in Articles 46 and 47: an amendment Bill is passed by both Houses of the Oireachtas and then sent to referendum. Referendums have been held on a wide variety of topics and can be loosely categorised according to their subject matter: 18 referendums dealt with social/moral issues or constitutional rights; 11 concerned international treaties and

²² Articles 16-19°, the Dáil and Seanad are together known as the Oireachtas.

²³ Article 28.7°.

²⁴ Article 6°.

²⁵ Articles 16-19°.

²⁶ Article 28°.

²⁷ Articles 34-37°.

²⁸ Article 34.3.2°.

²⁹ While there is a provision for referendums on ordinary legislative bills contained in Article 27, this has never been utilised.

³⁰ Article 51° is the first of the thirteen ‘Transitory Provisions’ in the Constitution. They are not included in the official text of the Constitution and deal mostly, perhaps unsurprisingly, with the transition of government from the 1922 Constitution to the 1937 Constitution. For more see Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2018).

³¹ First Amendment of the Constitution Act 1939.

³² Second Amendment of the Constitution Act 1941.

obligations; 8 related to the system of voting and voting entitlements; and 6 were about the structure of the State or the internal delegation of powers. These categories will be examined more closely in Chapter 3.

The decision to retain the referendum in the 1937 Constitution can be attributed to a number of factors. For one, the 1937 Constitution similarly emphasises the idea of popular sovereignty as the source of constitutional authority.³³ This continued the trend from 1922 of intentionally shirking the British model of parliamentary sovereignty in order to more forcefully assert Ireland's independence from Britain.³⁴ The Constitution thus identifies 'the People' as the ultimate arbiters of the Constitution's content.³⁵ The referendum flows naturally from that position: if the Constitution explicitly recognises the People as those with sole authority over its content, then the referendum's appeal to the People is a direct manifestation of that idea of popular sovereignty.³⁶ The inclusion of the referendum qualifies the form of democracy established in the 1937 Constitution – a predominantly representative system is endowed with a slightly more direct quality. While this retains an element of the radical democratic thinking from the 1922 Constitution, it is more restricted, in particular by leaving out the popular initiative for referendums.³⁷ What consequences flow from that more mediated form is a question dealt with later in this thesis (§7.6). For now, suffice it to say that the constitutional referendum has become a cornerstone of Irish constitutional law and political life. While the text of Articles 46 and 47 establishes its fundamental features, Article 47 also provides that subject to the aforesaid, the referendum shall be regulated by law. It is now worth looking to that regulation.

2.3 – The Referendum in Legislation

³³ Articles 1^o and 6^o.

³⁴ Gerard Hogan, *The Origins of the Irish Constitution, 1928-1941* (Royal Irish Academy 2012) 37.

³⁵ Article 6^o.

³⁶ On popular sovereignty in the Irish Constitution see Tom Hickey, 'Popular Sovereignty in Irish Constitutional Law' (2017) 40(2) DULJ 147; Colm Ó Cinnéide, "'The People Are the Masters' The Paradox of Constitutionalism and the Uncertain Status of Popular Sovereignty Within the Irish Constitutional Order' (2012) 48 Irish Jurist, 249; David Kenny and Aileen Kavanagh, 'Are the People the Masters? Constitutional Referendums in Ireland' in Richard Albert, Richard Stacey (eds) *The Limits and Legitimacy of Referendums* (OUP, 2021).

³⁷ Articles 47 and 48 of the 1922 Free State Constitution.

2.3.1 – Referendum Acts

The primary pieces of legislation regulating the referendum are the Referendum Act 1994 ('the 1994 Act') and the Referendum Act 1998 ('the 1998 Act'), complemented by the more recent omnibus Electoral Reform Act 2022 ('the 2022 Act').³⁸ As set out by the long title, the primary function of the 1994 Act is to 'provide for the reference to the people under Article 47 of the Constitution of bills containing proposals for the amendment of the Constitution'. In doing so, the Act delegates authority for the referendum to the Department of Housing, Local Government and Heritage.³⁹ The Minister of that Department is responsible for the law relating to registering electors and conducting elections and referendums. In particular, section 10 establishes that once a referendum bill is passed in the Oireachtas, the Minister is required to appoint a polling day which shall be no less than thirty days and no more than ninety days after the date of the order.⁴⁰ The Minister is required to set a polling time, which must take place between 8am at the earliest and 10:30pm at the latest and continue for at least 12 hours.⁴¹ Section 14 of the 1994 Act provides that on the day a polling date is set, the Minister shall appoint a referendum returning officer, whose role is to conduct the referendum, declare the results, and do anything else required for the referendum to be carried out.⁴² The running of the referendum in each constituency is entrusted to local returning officers, who are those persons already chosen as returning officers for general elections.⁴³ Statements informing voters of the referendum may be sent to every elector.⁴⁴ There are provisions relating to postal voting,⁴⁵ special voting,⁴⁶ polling on the islands off Ireland,⁴⁷ and the requirements for taking a poll.⁴⁸ The 1994 Act also specifies that referendum ballots are to be secret.⁴⁹

³⁸ Which replaced the Electoral Act 1992

³⁹ It was originally the remit of the Minister for Environment. The relevant Minister is updated in Electoral Reform Act 2022, s 2.

⁴⁰ Referendum Act, 1994, s 10.

⁴¹ Referendum Act 1994, s 13 as amended by s 202 of the Electoral Reform Act 2022.

⁴² Referendum Act 1994, s 14 as amended by ss. 1, 6, and 75 of the Ministers and Secretaries (Amendment) Act 2011.

⁴³ Referendum Act 1994, s 15.

⁴⁴ Referendum Act 1994, s 23.

⁴⁵ Referendum Act 1994, s 28 as amended.

⁴⁶ Referendum Act 1994, s 29 as amended by s 117(a) of the Electoral Reform Act 2022.

⁴⁷ Referendum Act 1994, s 30 as amended by s 202(c) of the Electoral Reform Act 2022.

⁴⁸ Referendum Act 1994, s 32.

⁴⁹ Referendum Act 1994, s 7.

Part IV of the 1994 Act sets out the procedure for challenging a referendum result. The result of a referendum, once passed, can only be challenged by bringing a referendum petition to the High Court within 7 days of the referendum certificate (official result) being published in *Iris Oifigiúil* (the official Irish State gazette).⁵⁰ The High Court shall not grant leave to challenge the result unless it is satisfied that there is *prima facie* evidence that the result was materially affected by a matter proscribed in section 43. These grounds for challenge include: offences established by Part XXII of the Electoral Act 1992,⁵¹ obstruction of or interference with or other hindrance to the conduct of the referendum, a failure to complete or otherwise conduct the referendum in accordance with the Act, or mistake or other irregularity in the conduct of the referendum or in the particulars stated in the provisional referendum certificate.⁵² The High Court is required to hear the petition as expediently as possible, and can order a recount of votes,⁵³ that the referendum be retaken in a certain constituency,⁵⁴ confirm the certificate without amendment, or direct that the certificate be amended in accordance with its findings.⁵⁵ The Supreme Court may be asked for its opinion on a petition.⁵⁶ Petitions under this process have been a regular occurrence, and have spawned a number of cases on the place and character of referendums in Ireland.⁵⁷

Donations to referendum campaigns are regulated by Electoral Act 1997, as amended by the Electoral (Amendment) (Political Funding) Act 2012 and Part 7 of the Electoral Reform Act 2022. Through a combination of these acts, a corporate donor intending to donate to a political cause (including a referendum) must apply to the Public Office Commission to be entered onto the Register of Corporate Donors. If done, that body can donate up to €2,500. Otherwise, the limits for donations are: €100 for anonymous donations, €200 for individual donations, and €200 for non-registered corporate donations. Foreign donations are prohibited unless from an Irish citizen.⁵⁸ There are,

⁵⁰ Referendum Act 1994, s 42.

⁵¹ As applied by s 6 of the 1994 Act. These offences include personation, bribery, interference with ballots, breach of secrecy, and others.

⁵² Referendum Act 1994, s 43.

⁵³ In a particular constituency or ballot box, s 47.

⁵⁴ Referendum Act 1994, s 48.

⁵⁵ Referendum Act, 1994, s 57.

⁵⁶ Referendum Act, 1994, s 55.

⁵⁷ See Chapter 6 for further discussion of these cases.

⁵⁸ Conor O'Mahony, 'Legal Regulation of Referendum Campaigns', paper delivered to the Citizen's Assembly, January 13th, 2018.

however, no limits to spending in a campaign. The Electoral Act 1997 (as amended) establishes a number of rules about the disclosure of donations, and the Standards in Public Office Commission oversees the administration of legislation in this regard.

2.3.2 – Electoral Reform Act 2022

Commenced between October 2022 and February 2023, the Electoral Reform Act 2022 is a significant overhaul of electoral law in this jurisdiction. The Act covers topics such as the registration of political parties,⁵⁹ constituency review,⁶⁰ facilitation of elections during the Covid-19 pandemic,⁶¹ political messaging,⁶² and online advertising.⁶³ The most salient aspect of the 2022 Act for my purposes, however, is Part 2 which established a permanent Electoral Commission. The Electoral Commission takes over the functions of the previous Referendum Commissions as established in the Referendum Act 1998. In the past, a Referendum Commission was an independent body tasked with communicating factual information about upcoming referendums to the public.⁶⁴ It was an ad-hoc body set up by Ministerial Order which then dissolved after the referendum. These Commissions were made up of 5 members: the chairperson (either a former judge of the Supreme or High Court, or a sitting High Court judge); the Comptroller and Auditor General; the Ombudsman, the Clerk of Dáil Éireann, and the Clerk of Seanad Éireann.⁶⁵ At one stage the Commission's role included drawing up lists of arguments for and against the proposal and distributing these to the public.⁶⁶ However, this function was repealed by the Referendum Act 2001, and thereafter the Commission's task was threefold: to promote awareness of the referendum, to encourage voting, and to explain the proposal.⁶⁷

Finally succumbing to overwhelming appeals for a permanent body to carry out the functions of the Referendum Commission, the 2022 Act established the permanent

⁵⁹ Electoral Reform Act, 2022, Part 2 Chapter 6.

⁶⁰ Electoral Reform Act, 2022, Part 2 Chapter 7.

⁶¹ Electoral Reform Act, 2022, Part 6.

⁶² Electoral Reform Act, 2022, Part 5.

⁶³ Electoral Reform Act, 2022, Part 4.

⁶⁴ Referendum Act 1998, s.2(1).

⁶⁵ Referendum Act 1998, s. 2(6).

⁶⁶ Referendum Act 1998, s. 6.

⁶⁷ Referendum Commission, *Report of the Referendum on the Regulation of Divorce* (2019).

Electoral Commission.⁶⁸ The Electoral Commission takes over all of the Referendum Commissions' functions relating to referendums and does so without the requirement for a Ministerial Order to establish it at each referendum.⁶⁹ The Electoral Commission will be examined in full in Chapter 4, so there is no need for close scrutiny at the moment. That said, some examples of its responsibilities include: publication of referendum notices;⁷⁰ the provision of information regarding the referendum;⁷¹ declarations of 'approved bodies' for the purpose of referendums;⁷² and self-performance reporting requirements.⁷³ As will be shown in Chapter 4, the Electoral Commission has a vital informative and engaging role in each and every referendum, and the quality of its work can significantly alter the character of a referendum campaign.⁷⁴

2.4 – The Referendum in Case-Law

2.4.1 – Content of Proposal

While the above legislation accords with the requirement in Article 47.3 that the referendum be regulated by law, the other aspects of the referendum provisions have been explored mainly through judicial decisions. For example, the exact requirements of Article 46.4 are not entirely clear from the wording of the Constitution – 'A Bill containing a proposal or proposals for the amendment of this Constitution shall not contain any other proposal' – and on a number of occasions the courts have commented on how it might be properly interpreted. In *Finn v Minister for the Environment*, Barrington J in the High Court was asked to intervene in the upcoming referendum to amend the Constitution on the grounds that the proposed insertion of a right to life for the unborn was superfluous.⁷⁵ The petitioner argued that such a right was already implicitly protected by certain other

⁶⁸ E.g. the 2016-19 Citizens' Assembly see <<https://2016-2018.citizensassembly.ie/en/Manner-in-which-referenda-are-held/Recommendations/>> accessed on 8 December 2021; comments from the Chief Justice *McCrystal v The Minister for Children and Youth Affairs* [2012] IESC 53 [90] (Denham CJ); and, as discussed in Chapter 4, the recommendations of each Referendum Commission before 2022.

⁶⁹ Electoral Reform Act 2022, s 30.

⁷⁰ Electoral Reform Act 2022, s 34.

⁷¹ Electoral Reform Act 2022, s 35.

⁷² Electoral Reform Act 2022, s 37.

⁷³ Electoral Reform Act 2022, s 39.

⁷⁴ See §4.2.3 and §4.6.

⁷⁵ *Finn v Minister for the Environment* [1983] IR 154.

provisions of the Constitution and that the proposed amendment was therefore in contravention of Articles 46.1 and 46.4 since it did not amend anything by ‘variation, addition, or repeal’, in the language of 46.1. Barrington J ultimately dismissed the case on its merits, including a rejection that Article 46.1 limited the type of amendment that can be made. In addressing the arguments on Article 46.4, however, he left open the possibility that if the Oireachtas were to attempt to incorporate some other *legislative* proposal with a proposal to amend the Constitution, it might be open to review by the courts or the President.⁷⁶ A similar line of reasoning was espoused by Kelly J in the High Court decision of *Riordan (No. 2)*.⁷⁷ In a complex case involving a litany of claims made against the State and in particular the Fifteenth Amendment to the Constitution Act, Kelly J was asked to consider the courts’ remit under 46.4. He here expressed the view that he had no reason to interfere with that referendum since ‘the appropriate procedure prescribed under Article 46 [had] been complied with in respect of this Bill.’⁷⁸ This seems to leave open the possibility that Article 46.4 can justify interference with a referendum Bill if it is not created under the proper procedure. However, despite the statements by Barrington and Kelly JJ, in no case have the courts held that a constitutional referendum proposal violated Article 46.4.

2.4.2 – The Limit and Extent of the Amendment Power

The courts have also been asked to determine whether Articles 46 and 47 – or any other provisions of the Constitution – place substantive limits on the amendment power. The seminal case on this question is *Re Article 26 and the Regulation of Information (Termination of Pregnancies) Bill 1995*.⁷⁹ Here, legislation created on foot of the 14th Amendment, which had legalised the dissemination of information about abortion services outside of Ireland, was tested for its constitutionality in accordance with Article 26 of the Constitution.⁸⁰ One of the arguments run by counsel challenging the bill was that the 14th Amendment was invalid as it was contrary to the right to life of the unborn which was

⁷⁶ *ibid.* However, this doesn’t seem to preclude multi-faceted amendments; see Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2018) 2547.

⁷⁷ *Riordan v An Taoiseach (No. 2)* [1998] IEHC 77.

⁷⁸ *ibid* 348.

⁷⁹ *Re Article 26 and the Information (Termination of Pregnancies) Bill 1995* [1995] 1 IR 1.

⁸⁰ Article 26 contains a procedure whereby the President, before signing a Bill into law, can refer it to the Supreme Court to test its constitutionality.

present in the Constitution. Counsel was arguing, therefore, that amendments to the Constitution can be invalid for failure to adhere to the tenets of natural law. The Supreme Court rejected this argument, and expressed the view that Article 46.1 permitted any provision to be amended, since the people were ‘entitled to amend the Constitution in accordance with the provisions of Article 46 of the Constitution and the Constitution as so amended by the Fourteenth Amendment is the fundamental and supreme law of the State representing as it does the will of the people.’⁸¹ This approach aligned with a previous judgment in which Barrington J had said that by Article 46.1 ‘the people intended to give themselves full power to amend any provision of the Constitution and that this power includes a power to clarify or make more explicit anything already in the Constitution.’⁸² Other cases have affirmed that there are no substantive limits on the amendment power.⁸³

2.4.3 – McKenna and Government Spending in Campaigns

The most significant contribution the judiciary have made to the regulation of referendums concerns the rules of partisan campaigning by the Government. In *McKenna v An Taoiseach (No. 1)*, the petitioner challenged the Government’s nation-wide advertising campaign for a ‘Yes’ vote on the upcoming referendum on the Maastricht Treaty.⁸⁴ The petitioner insisted that it would be ‘impermissible conduct’ for the Government to undertake a partisan campaign financed by public funds, and that such a campaign would be in breach of her constitutional rights including the rights to equality, to communicate, and to fair procedures. In dismissing the claim, Costello J remarked that the issue was essentially one of political misconduct, and that it would be improper for the judiciary to wander into ‘areas calling for adjudication on [...] non-justiciable issues.’⁸⁵ Not every grievance, he explained, can be remedied by the courts.⁸⁶ The funding of the campaign was therefore a legitimate exercise of the Executive power, into which the courts would not venture. This approach, and the insistence that the courts would not intervene in the

⁸¹ *Re Article 26 and the Information (Termination of Pregnancies) Bill 1995* [1995] 1 IR 1 43.

⁸² *Finn v Minister for the Environment* [1983] IR 154.

⁸³ *Hanafin v Minister for Environment* [1996] 2 IR 321; *Riordan v An Taoiseach (No 1)* [1998] IEHC 77; *Morris v Minister for the Environment* [2002] IEHC 5.

⁸⁴ *McKenna v An Taoiseach (No 1)* [1992] 2 IR 1.

⁸⁵ *ibid* 5.

⁸⁶ *ibid*.

funding and running of a referendum campaign, was endorsed in *Slattery v An Taoiseach* the very next year.⁸⁷

However, this was reversed in *McKenna v An Taoiseach (No. 2)*.⁸⁸ The Government had given IR£500,000 of public money to campaign for a ‘Yes’ vote in the upcoming referendum asking whether the constitutional ban on divorce should be removed. The Supreme Court, with Egan J dissenting, held that by spending public funds in favour of one result only the Government had acted unconstitutionally. Over the course of their respective judgments, the majority found that the Government had breached the right to equality,⁸⁹ the democratic process for amendment,⁹⁰ fair procedures,⁹¹ and freedom of expression.⁹² The Court did, however, clarify that this did not prohibit the Government from campaigning for a particular result in a way *otherwise* than by spending public money. Finally, Hamilton CJ expressed the view that while the courts usually enjoyed no power of supervision of or interference with the Executive power, in situations where there is a clear disregard by the Executive of the Constitution, the Court would be not only entitled but obliged to intervene.⁹³ In *Hanafin v Minister for the Environment*, Barrington J emphasised that it was only the use of public monies that made Government campaigning unconstitutional; members of Government are otherwise permitted to campaign in their individual capacity or as a political party.⁹⁴ This has been restated more recently in *Jordan v Ireland*, wherein the Court of Appeal found no constitutional objection to a Minister engaging in campaign for change, so long as there was no partisan expenditure.⁹⁵ That case also saw the Court reject the argument that Ministers were prohibited from campaigning to change a constitutional right which they were obliged to protect – the case concerned the Minister for Health and the repeal of the constitutional right to life of the unborn.⁹⁶

⁸⁷ *Slattery v An Taoiseach* [1993] 1 IR 286.

⁸⁸ *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10.

⁸⁹ *ibid* per Hamilton CJ, O’Flaherty and Denham JJ.

⁹⁰ *ibid* (Hamilton CJ) and (Denham J).

⁹¹ *ibid* (Hamilton CJ).

⁹² *ibid* (Denham J).

⁹³ *ibid*, 32 (Hamilton CJ).

⁹⁴ *Hanafin v Minister for Environment* [1996] 2 IR 321 at 455.

⁹⁵ *Jordan v Ireland* [2018] IECA 291.

⁹⁶ *ibid*.

This requirement for parity was extended to statutory bodies in *Coughlan v Broadcasting Complaints Commission*.⁹⁷ Here the plaintiff was challenging broadcasts made by RTÉ (Ireland's national broadcaster) during the run-up to 1995 divorce referendum. In particular, it was contended that by allocating more broadcasting time to those campaigning for a 'Yes' vote, RTÉ had breached its constitutional duties, including regard for fair procedures.⁹⁸ The majority of the Supreme Court applied the *McKenna* principles and held that since RTÉ was a statutory body, it was to be held to the same standards. Thus, the unequal broadcasting time was held to be unconstitutional. The experience post *Coughlan* has shown that broadcasters have been cautious to stringently adhere to these requirements, even going so far as to use stopwatches in debates to ensure exactly equal speaking time. Conor O'Mahony has been critical of this overly rigid application of the *McKenna* principles and has expressed the view that the ultimate concern of fairness is much more flexible than has been understood.⁹⁹ A number of statutory changes in recent years have altered the landscape around broadcasting regulations. In particular, the legislation relied on in *Coughlan* – the Broadcasting Act 1960 – was overhauled by the Broadcasting Act 2009. The 2009 Act itself was significantly amended by the Electoral Reform Act 2022 and the Online Safety and Media Regulation Act 2022. While there is still a requirement that broadcaster present the news 'impartially' (as was the requirement under the 1960 Act cited in *Coughlan*), there is also a new statutory body – Coimisiún na Meán – with the remit of regulating broadcasters. It remains to be seen if this will alter the adherence to the *Coughlan* rules of strict time limits.

The *McKenna* ruling and subsequent cases have had a tremendous impact on how referendum campaigns have been run in this jurisdiction over the last 30 years. Leaving aside controversy around the reasoning employed in those cases, the upshot has been an enormous restriction on a government's ability to advocate for change at referendum. When one considers that a government by default has a majority in the Dáil, and therefore has near-absolute discretion over what amendment proposals go to referendum, there is a sense of artificiality in restricting its spending power in this way.¹⁰⁰ The *McKenna* rules

⁹⁷ *Coughlan v Broadcasting Complaints Commission* [2000] 3 IR 1.

⁹⁸ RTE had broadcast political party messages (all of whom supported 'Yes') and two non-party messages (one for 'Yes' and the other 'No').

⁹⁹ See Conor O'Mahony, 'Legal Regulation of Referendum Campaigns', paper delivered to the Citizen's Assembly, January 13th 2018; and Conor O'Mahony, 'Of Constitutions and Cookery Shows' *Constitution Project @ UCC*, <<http://constitutionproject.ie/?p=647>> accessed on 8 December 2021.

¹⁰⁰ Since, presumably, the Government would not put forward a proposal which it does not support.

have been regularly vilified, often in the wake of results going against the government parties in referendums or where No campaigns are granted coverage disproportionate to their support.¹⁰¹ Calls for a reconsideration of the rules have come from politicians,¹⁰² academics,¹⁰³ judges,¹⁰⁴ and others. Regardless, the rules continue to hold force and, given the case's grounding in fundamental concepts like equality, any change is likely to be fraught with constitutional challenge.

2.4.4 – Crotty and Mandatory Referendums

Another case which has had a significant impact on referendums in Ireland is *Crotty v An Taoiseach*.¹⁰⁵ Here the Supreme Court was asked two questions: whether the legislation purporting to incorporate the Single European Act was unconstitutional; and whether the Government could be enjoined from ratifying the Single European Act. First, the Supreme Court declared that the legislation was not invalid as the amendments involved in the Single European Act did not go beyond 'the essential scope or objectives of the original treaties'. On the second question, however, the Supreme Court held that Title III of the SEA (which provided for co-operate in foreign policy) was outside the scope of the original treaties.¹⁰⁶ The Supreme Court held that this was, in effect, a new treaty, the ratification of which would be thus be unconstitutional without an amendment by referendum since it infringed a particular understanding of sovereignty in the Constitution.¹⁰⁷ In coming to its conclusion, the Supreme Court placed significant

¹⁰¹ Bláthna Ruane, 'Reflections on Procedural Rights in Constitutional Referenda' (2012) 48 Irish Jurist 1; Maria Scott, 'The House that the Supreme Court Built: The Rulings in Coughlan and McKenna, the Lisbon Treaty and the Constitutional Referendum in Ireland' (2010) 9 Hibernia Law Review 219.

¹⁰² Bláthna Ruane, 'Reflections on Procedural Rights in Constitutional Referenda' (2012) 48 Irish Jurist 1, 41.

¹⁰³ Bláthna Ruane, 'Reflections on Procedural Rights in Constitutional Referenda' (2012) 48 Irish Jurist 1; Gavin Barrett, 'A Road Less Travelled - Reflections on the Supreme Court Rulings in Crotty, Coughlan and McKenna (No. 2)' (2011) Institute of International and European Affairs 1-30.

¹⁰⁴ Thomas O'Higgins, 'McKenna Judgment was Mistaken and was also central to Nice Rejection' *The Irish Times* (Dublin, 19 November 2001).

¹⁰⁵ *Crotty v An Taoiseach* [1987] IESC 4. On *Crotty* generally see Gavin 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 European Constitutional Law Review 32.

¹⁰⁶ Gavin 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 European Constitutional Law Review 32, 39-40.

¹⁰⁷ Gavin 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 European Constitutional Law Review 32, 40-43.

emphasis on the fact that any constitutional power enjoyed by the Government was granted to it by the People. As a result, only the People themselves could agree to impose restrictions on the exercise of such powers. Walsh J put it thus:

‘To acquire the power to do so would, in my opinion, require a recourse to the people “whose right it is” in the words of Article 6, “in final appeal, to decide all questions of national policy, according to the requirements of the common good.” In the last analysis it is the people themselves who are the guardians of the Constitution ... the assent of the people is a necessary prerequisite to ... ratification.’¹⁰⁸

The upshot of the *Crotty* decision was that numerous EU Treaties were put to referendum rather than being ratified by the Government alone.¹⁰⁹ This led to both the Nice Treaty and the Lisbon Treaty being rejected at referendum before eventually being ratified at referendum after some concessions were acquired.¹¹⁰ As one might expect, the judgment garnered a significant amount of attention both domestically and in Europe.¹¹¹

The Supreme Court later interpreted the principles identified in *Crotty* as slightly narrower in their application in *Pringle v Ireland*.¹¹² While an in-depth examination of the Court’s approach to sovereignty and the underlying rationale in the decisions is beyond the scope of this chapter, it is sufficient to note that *Pringle* established that approval by the People is not needed every time the Government seeks to ratify an international treaty, only where there is an abdication of power delegated to the Government in the Constitution.¹¹³ A cautious approach to international treaties, however, has persisted and has seen ratification of the Rome Statute (International Criminal Court) put to referendum,¹¹⁴ as well as challenges to Ireland’s ratification of the Canadian-European Trade Agreement.¹¹⁵

¹⁰⁸ *Crotty v An Taoiseach* [1987] IESC 4 [62] (Walsh J). The most notable consequence of this case is that 9 referendums have been called to ratify European Treaties.

¹⁰⁹ Including the Single European Act, the Maastricht Treaty, the Amsterdam Treaty, the Nice Treaty, the Lisbon Treaty, and the European Fiscal Compact.

¹¹⁰ See generally Maria Cahill, ‘Ireland’s Constitutional Amendability and Europe’s Constitutional Ambition: the Lisbon Referendum in Context’ (2008) 9(10) German Law Journal 1191.

¹¹¹ *ibid.*

¹¹² *Pringle v Government of Ireland* [2012] IESC 47.

¹¹³ See the judgments of Denham CJ and O’Donnell J for views as to how it can be determined if powers are in fact abdicated in any given treaty.

¹¹⁴ 23rd Amendment.

¹¹⁵ *Costello v Government of Ireland* [2022] IESC 44.

2.5 – The Life Cycle of a Referendum

2.5.1 – Recommendations for Amendment

While Article 46.2 declares that it is solely the Oireachtas' prerogative to introduce a Bill and set in motion the process of amending the Constitution, a significant number of proposals have been based on recommendations from statutory bodies. Rather than having a standing body which makes regular recommendations to the government about potential amendments, there have been a number of ad-hoc or temporary bodies established by various governments to do so. While these recommended proposals have never been binding, many have gone on to form the basis for referendums. It is therefore worth looking at the history of such bodies. In this section I will briefly examine the 1966 Committee on the Constitution, the Constitution Review Group, the 2012 Constitutional Convention, and the Citizens' Assemblies. Chapter 4 will look in greater detail at the 2012 Constitutional Convention (§4.3) and Citizens' Assemblies (§4.4), and so only a few words will be said about them here.

2.5.1.1 – 1966 Informal Committee on the Constitution

The Informal Committee on the Constitution was formed in 1966 by Taoiseach Seán Lemass and was given the task of reviewing the Constitution in full.¹¹⁶ The first full review of its kind,¹¹⁷ the Committee owes its existence and much of its character to the founder, Seán Lemass. As Brian Girvin notes, while Lemass was aware that there was little criticism of the Constitution and no demand for a review, he was convinced that this widespread satisfaction would continue only if it was looked at 'every now and again to

¹¹⁶ Comprised of 11 sitting TDs.

¹¹⁷ The Committee was established during a time in which more and more committees were formed to look at various constitutional issues, such as: Ireland's possible accession to the European Economic Communities (The 1961 Attorney General's Legal Committee on E.E.C. Problems, as cited in Brian Girvin, "Lemass's Brainchild": The 1966 Informal Committee on the Constitution and Change in Ireland, 1965-73' (2013) 38 Irish Historical Studies 406); Irish unity in the wake of the Sunningdale Agreement's collapse (The 1972 All Party Committee on the Implications of Irish Unity; Bill Kissane, *New Beginnings: Constitutionalism & Democracy in Modern Ireland* (University College Dublin Press 2011) 91.), and the status of women in Irish society (The 1969 Commission on the Status of Women, established on foot of pressure by the Irish Housewives Association and the National Federation of Business and Professional Women's Clubs in light of a 1967 UN directive; Bill Kissane, *New Beginnings: Constitutionalism & Democracy in Modern Ireland* (University College Dublin Press 2011) 93).

consider whether any improvement is possible or desirable’, suggesting that a review take place every twenty-five years or so.¹¹⁸ The Report, published on 22nd December 1967 examined issues under twenty-six headings, covering topics such as the name of the State (Article 4),¹¹⁹ the nomination for presidential elections (Article 12.4),¹²⁰ divorce (Articles 41.3 and 44.2),¹²¹ and the recognition of religions (Article 44.1).¹²² There was considerable attention upon its completion and release, however Girvin describes the Report as ‘effectively stillborn’ as Taoiseach Jack Lynch’s government immediately announced the 3rd Amendment Bill and 4th Amendment Bill referendums – changes which the Report had recommended against and which had already been rejected at referendum in 1959.¹²³

Of the issues discussed in the Report, at least five have been the subject of referendum. First, the Report made a recommendation to amend the wording around a United Ireland in Article 3, which at the time made reference to the impending ‘re-integration of the national territory’ and to the territories of Saorstát Éireann.¹²⁴ While this amendment proposal was obviously not as detailed, and proposed for different reasons, Article 3 was eventually amended in the 19th Amendment 1998 (Good Friday Agreement) referendum.¹²⁵ Further, the Committee’s recommendation that the special position of the

¹¹⁸ Brian Girvin, “‘Lemass’s Brainchild’: The 1966 Informal Committee on the Constitution and Change in Ireland, 1965-73’ (2013) 38 Irish Historical Studies 406, 407-409. This position, combined with Lemass’ own views on the Constitution (including the widely-held view that it was ‘de Valera’s Constitution’ and also that the Church’s position was over-emphasised) and some changes in Irish life – not least the liberalising effect of the Second Vatican Council – led to the formation of the Committee.

¹¹⁹ The Report recommended changing the English text so that ‘Ireland’ as opposed to ‘Éire’ was recognised as the English language name of the State. Informal Committee on the Constitution, *Report* (PR 9817, 1967), 6.

¹²⁰ Recommended that 12.4.4. be changed so that former or retiring Presidents could not nominate themselves. *ibid*, 11.

¹²¹ It was recommended that provision be made for divorce for those whose religion permitted it. *ibid*, 43-46.

¹²² The Report recommended that the special position of the Catholic Church be removed. *ibid*, 47-48

¹²³ Brian Girvin, “‘Lemass’s Brainchild’: The 1966 Informal Committee on the Constitution and Change in Ireland, 1965-73’ (2013) 38 Irish Historical Studies 406, 418-419.

¹²⁴ The suggested amendment removed the explicit reference to Saorstát Éireann and altered the wording on the possibility of a United Ireland: ‘The Irish nation hereby proclaims its firm will that its territory be reunited in harmony and brotherly affection between all Irishmen.’ Informal Committee on the Constitution, *Report* (PR 9817, 1967), 4. The reason given by the Committee was that the State should use the opportunity to avail of the provisions of the 1958 Geneva Convention on the Continental Shelf and claim areas surrounding the coasts.

¹²⁵ It is worth acknowledging that the ‘firm will’ wording from the Committee’s recommendation is seen in the 19th Amendment, and the ‘harmony and brotherly affection’ accords with the rest of the language of what is now Article 3. Article 3.1 Bunreacht na hÉireann ‘It is the firm will of the Irish nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognising that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island.

Catholic Church be removed was acted on in the 5th Amendment 1972 referendum.¹²⁶ The Report detailed possible changes to the Seanad, including that Article 18.4 be changed to remove the specific references to particular universities – a change along these lines was made in the 7th Amendment 1979 (Seanad Franchise) referendum – and arguments were given about whether to abolish the Seanad or reform it, a precursor to debates eventually culminating in the 32nd Amendment Bill 2013 (Abolition of Seanad).¹²⁷ Divorce has been at issue in referendum three times, although it was not exactly aligned with the Committee’s recommendations that it only be available for those whose religion permitted it.¹²⁸ Finally, the Committee’s deliberation on reducing the voting age to 18 came to a head in the 4th Amendment 1972 (Age of Voting) referendum.¹²⁹ The 1966 Committee was explicitly mentioned in the debates around the 4th Amendment 1972 (Age of Voting)¹³⁰ and the 5th Amendment 1972 (Removal of Special Position of Catholic Church),¹³¹ and it is clear that the Report influenced a number of other referendums as mentioned above. While the 1966 Committee’s record has been criticised,¹³² it clearly influenced at least some constitutional change, and identified issues that would need amendment at one stage or another – which is perhaps more than might have been expected from the first committee to undertake this kind of review.

2.5.1.2 – Constitution Review Group

Established in 1995 to undertake a comprehensive review of the entire Constitution, the Constitution Review Group (“CRG”) was made up of fifteen members, predominantly lawyers but also including experts in economics, education, political science, and sociology. In 1996 the Review Group published its Report spanning over 700 pages, covering everything from the Preamble to the Transitory Provisions. In a testament to the

Until then, the laws enacted by the Parliament established by this Constitution shall have the like area and extent of application as the laws enacted by the Parliament that existed immediately before the coming into operation of this Constitution.’

¹²⁶ Informal Committee on the Constitution, *Report* (PR 9817, 1967), 47-48.

¹²⁷ Informal Committee on the Constitution, *Report* (PR 9817, 1967), 26-34.

¹²⁸ 10th Amendment Bill 1986 (Divorce), 15th Amendment 1995 (Divorce II).

¹²⁹ Informal Committee on the Constitution, *Report* (PR 9817, 1967), 16.

¹³⁰ See the debates at Fourth Amendment of the Constitution Bill, 1972: Second Stage, Dáil Deb, 5 July 1972, Vol 262, No 5.

¹³¹ Comments of An Taoiseach at Fifth Amendment of the Constitution Bill, 1972: Second Stage, Dáil Deb, 2 Nov 1972, Vol 263, No 3.

¹³² Brian Girvin, “‘Lemass’s Brainchild’: The 1966 Informal Committee on the Constitution and Change in Ireland, 1965-73’ (2013) 38 Irish Historical Studies 406, 418-419.

breadth of the Review Group's work, the section summarising the recommendations itself runs to thirty pages long.¹³³ Included in the recommendations are proposals that four new sections be inserted by amendment: one establishing the Office of the Ombudsman, one recognising the importance of Local Government, one concerning the State's duty to protect the environment, and finally a section establishing a Human Rights Commission.¹³⁴ Interestingly, after considering Article 46 and the method of initiating constitutional amendment, the Report recommended that it should *not* be amended to include a provision for citizen-led initiation.¹³⁵ This Report formed the basis for the All-Party Oireachtas Committee on the Constitution, which itself went on to publish ten progress reports over ten years.¹³⁶

In the twenty-nine years since the CRG released its report, there have been twenty-five referendums to amend the Constitution. Of those proposals, twelve have related to provisions which the CRG examined for amendment. Of the other thirteen referendums, seven have related to the ratification of international treaties,¹³⁷ and three were issues intentionally left out of the review since they were already under examination.¹³⁸ Of course, with a review as comprehensive as the CRG's this is to be expected: by covering every article in the Constitution there was little room for amendments on anything else. That said, the issues which went to referendum accord quite closely to the recommendations. For example, the CRG recommended that a provision be inserted into the Constitution as a 'form of recognition in principle of local government'.¹³⁹ The 20th Amendment 1999 (Local Government) did exactly this. The CRG's recommendation on the death penalty was that the Constitution should expressly prohibit it.¹⁴⁰ The 21st Amendment 2001 (Removal of Death Penalty) did this. This close match between recommendation and amendment is visible also in relation to children's rights and

¹³³ Constitution Review Group, *Report* (PN 2632, 1996) 441 – 472.

¹³⁴ *ibid.* To date, none of these recommendations have gone to referendum.

¹³⁵ *ibid.*, p 401.

¹³⁶ All ten reports of this Committee can be found on the Oireachtas Library Digital Collections, < https://opac.oireachtas.ie/knowvation/app/consolidatedSearch/#search/v=list,c=1,sm=s,l=library3_lib%2Clibrary7_lib,a=t > accessed 20 January 2022.

¹³⁷ Including the 19th Amendment 1998 (Good Friday Agreement) which was explicitly outside of the CRG's remit (Articles 2 and 3).

¹³⁸ The 16th Amendment 1996 (Bail), 17th Amendment 1997 (Cabinet Confidentiality), and 38th Amendment 2019 (Divorce III). The remaining three referendums are 29th Amendment 2011 (Judges' Remuneration), 34th Amendment 2015 (Marriage Equality), and 36th Amendment 2018 (Repeal of 8th Amendment).

¹³⁹ Constitution Review Group, *Report* (PN 2632, 1996) 431.

¹⁴⁰ Constitution Review Group, *Report* (PN 2632, 1996) 264.

blasphemy.¹⁴¹ Interestingly, on four occasions referendums were held on issues where the CRG recommended no change to the Constitution.¹⁴² In three of these referendums, the amendment proposal was defeated.¹⁴³ The CRG's is still the most comprehensive review of the Constitution, and offered nuanced discussion of some difficult constitutional issues. Its recommendations were often prescient and ambitious, although it failed to bring about the systemic overhaul of the Constitution which was recommended.

2.5.1.3 – 2012 Constitutional Convention and Citizens' Assemblies

A more recent and narrowly tailored example of such bodies is the Constitutional Convention 2012. Established by the Oireachtas, the Convention was made up of 100 people: a chairman appointed by Government;¹⁴⁴ 33 legislators (29 from the Oireachtas and 4 from the Northern Ireland Assembly); and 66 randomly selected ordinary citizens. In total, the Convention made recommendations on ten issues – eight of which were mandated by the Oireachtas, the final two were chosen by the Convention. The issues concerned the office of the Presidency and its term,¹⁴⁵ the minimum voting age, clauses in the Constitution relating to women and the home, same-sex marriage, the Dáil electoral system, non-resident voting in Presidential elections, blasphemy, Dáil reform, and economic, social, and cultural rights.¹⁴⁶ The Convention is the most notable development in this area of constitutional review, reflecting contemporary trends in deliberative democracy and attracting widespread acclaim. While the Convention will be examined in full detail in Chapter 4, it is apposite to say here that it has brought about an expectation that constitutional amendments are first filtered through citizen-oriented discussion.

¹⁴¹ An express provision for children's rights was recommended in line with the UN Convention on the Rights of the Child, Constitution Review Group, *Report* (PN 2632, 1996) 329. The total removal of the offence of blasphemy was recommended; Constitution Review Group, *Report* (PN 2632, 1996) 297.

¹⁴² These are the 25th Amendment Bill 2002 (Abortion); 27th Amendment 2004 (*Jus Soli*); 30th Amendment Bill 2011 (Oireachtas Inquiries); and 35th Amendment Bill 2015 (Age of Presidency) referendums.

¹⁴³ The only one to pass was the 27th Amendment 2004 (*Jus Soli*), which arguably was different to the recommendation by the CRG since the Good Friday Agreement (passed after the Report) had inserted into the Constitution a clause regarding citizenship by birth on the island.

¹⁴⁴ The chosen candidate was Tom Arnold, an economist by trade.

¹⁴⁵ The Convention made supplementary recommendations concerning the age of candidacy.

¹⁴⁶ For more see David Farrell, Clodagh Harris and Jane Suiter, 'Bringing People into the Heart of Constitutional Design: The Irish Constitutional Convention of 2012-14' in Xenophon Contiades and Alkmene Fotiadou (eds), *Participatory Constitutional Change: The People as Amenders of the Constitution* (Routledge 2017).

Finally, the most recent example of statutory bodies making recommendations to Government for constitutional amendment is the Citizens' Assemblies. The 2016- '18 Citizen's Assembly, made up of 99 randomly selected citizens and one chairperson,¹⁴⁷ tackled issues such as climate change, the manner in which referendums are held, fixed term parliaments, population ageing, and abortion. The Assembly met regularly over 18 months and heard submissions from interest groups and legal experts. The recommendations of the Assembly regarding abortion under the Eighth Amendment influenced the eventual wording of a referendum called on the issue in the summer of 2018.¹⁴⁸ Much has been written about this Citizens' Assembly and its impact on citizen-led involvement in constitutional referendums and direct democracy, and it was largely considered a success in the aftermath of the referendum.¹⁴⁹ As a result, subsequent Citizens' Assemblies were established on Gender Equality, Drug Policy, Biodiversity, and local governance in Dublin. The Assemblies have so far been considered a success by many, although questions remain about the bindingness of their recommendations and whether they have become a way of kicking the political can down the road.¹⁵⁰ Again, these bodies are considered in full in Chapter 4 (§4.4).

2.5.1.4 – Some Comments on Review Committees

Despite their (mostly) ad-hoc and discretionary nature, the above bodies have played an important role in the decision to hold referendums and the wording of possible amendments, so it is worth mentioning a few things regarding their successes and failures. First, it is clear that these bodies can have an important role to play in giving life to the referendum articles: the establishment of a body to review the Constitution with the intention of identifying necessary or desirable reform develops the formal requirements of Article 46 by ensuring that any proposed amendment is reasoned and viable after careful examination. Further, these committees facilitate the role of the government in initiating

¹⁴⁷ A retired Supreme Court judge, Ms Justice Mary Laffoy.

¹⁴⁸ 36th Amendment.

¹⁴⁹ Laura Cahillane, 'Ireland as a Learning Experience for the Scottish Citizens' Assembly' (2020) 24 *Edinburgh Law Review* 95; David Farrell, Jane Suiter and Clodagh Harris, "Systematizing' Constitutional Deliberation: the 2016–18 Citizens' Assembly in Ireland' 34 *Irish Political Studies* 113; Oran Doyle and Rachel Walsh, 'Constitutional Amendment And Public Will Formation: Deliberative Mini-Publics As A Tool For Consensus Democracy' (2022) 20 *International Journal of Constitutional Law* 398.

¹⁵⁰ Eoin Carolan, 'Ireland's Constitutional Convention: Behind the Hype About Citizen-Led Constitutional Change' (2015) 13 *International Journal of Constitutional Law* 733.

reform by providing recommendations which detail the strengths and weaknesses of proposals. In this way, review committees go some way to ensuring that amendment is taken seriously and discourage flippant amendment on the whim of political actors without an analysis of the likely impact and significance of that amendment (both legally and politically). This role is discharged either by responding to specific amendment proposals or by offering a total constitutional review so that any future amendment proposal might be informed by a detailed analysis.

Second, from the above analysis it is clear that review committees in Ireland have been constrained in their ability to regulate the referendum process by virtue of the absolute discretion enjoyed by Government for amendment proposals.¹⁵¹ The fact that the CRG (and subsequent All-Party Oireachtas Committee on the Constitution) reports covered the entire Constitution means that any potential amendment proposal is likely to be informed by the work of those bodies. However, the experience of their success in bringing issues to referendum shows that even with reasoned analysis available about why an amendment should or should not be made, successive Governments have often taken their own views about what amendments should be made. That the 1966 Committee's report was undercut by the 3rd and 4th Amendment Bill referendums in 1968, and that four referendums were taken on issues for which the CRG recommended no change shows that the ability of these review committees to constrain government amendment proposals is seriously limited. Further, the poor track record for initiation of constitutional reform shows that the weightiness of recommendations by review committees in Ireland is also limited. Whether or not the alternative is desirable – that recommendations from these bodies be binding on Government – is not clear cut. Clearly there are good reasons for not tying the hands of government in this way; not least of all because it would likely reduce the occurrence of such reviews. One might also argue that to make the recommendations binding would run up against the principles of popular sovereignty and democracy underpinning the referendum – that a committee of ten to fifteen (perhaps unelected) people would have such power to determine the direction of constitutional reform seems problematic in this light. That said, it is clear that the situation of absolute discretion is equally unsatisfactory.

¹⁵¹ That is, the Government has discretion regarding whether or not an amendment proposal becomes a bill to amend the Constitution; the passing of a bill to referendum and the subsequent success of that referendum is constrained by other actors, namely TDs and voters.

While the experiments since 2012 have been more successful in bridging the gap between the review recommendations and the ultimate proposal, the same issues remain regarding bindingness and political discretion. While Article 46 contains no obligation that amendment proposals be reached through a process of reasoned deliberation, the benefits of doing so are clear, especially in light of the formally unfettered power of amendment. As such, there is good reason to believe that review bodies have an important function of ensuring amendment proposals are reasoned, and therefore tempering the ability of governments to propose flippant, potentially harmful amendments. For this to be given more substantive reality, some level of accountability to these reviews is desirable beyond the current political convention.

2.5.2 – The Proposal in the Oireachtas

Once it is decided that an amendment will be proposed, Article 46.2 requires that every proposal must be initiated in Dáil Éireann as a Bill. It must then be passed by both Houses of the Oireachtas before it can be sent to referendum.¹⁵² Article 46.3 requires that the Bill be titled ‘An Act to amend the Constitution’. While ostensibly not requiring government support, the Westminster system in place has the effect of almost making government support a pre-requisite, since it typically controls a majority in the Dáil. The 8th Amendment is a notable exception to this point – a number of Fine Gael TDs defected on the issue – yet the point still stands that in the vast majority of instances, a Bill cannot get to referendum without support of the largest party. Bills are introduced in the ordinary legislative way; as a Private Members’ Bill or by a member of the Government.¹⁵³ Without any explicit statutory basis, there is a convention in place whereby it is the relevant Government Minister who introduces the amendment bill.¹⁵⁴ The Thirty-Sixth Amendment (removing the constitutional ban on abortion) is an illuminating example of the life cycle of a Bill. The Bill to amend the Constitution was introduced in the Dáil by then Minister for Health, Simon Harris, on 7th March 2018 (First Stage). At the Second

¹⁵² Article 46.2°.

¹⁵³ A Private Members’ Bill is any Bill introduced by a TD or Senator not in Government.

¹⁵⁴ For example, the Minister for Justice and Equality introduced the 34th Amendment Bill to allow same-sex marriage in 2015. See comments made to this effect by the then Referendum Returning Officer in an official video from the Department: < <https://www.youtube.com/watch?v=7sy8kxacq6s&list=WL&index=20> > accessed 20 January 2022. See also comment by Denham CJ in *McCrystal v The Minister for Children and Youth Affairs* [2012] IESC 53 [24] (Denham CJ).

Stage, the general principles of the Bill were debated by TDs (*Teachtaí Dála*; members of parliament) before moving on to the Third Stage, also known as the Committee Stage. At this point, the Bill was examined section by section and any amendments to the Bill were welcomed. There being no amendments suggested, it was voted on as it was and passed on to the Fourth, or Report Stage. This stage is set aside for considering any proposed amendments, but since there were none for this Bill it moved immediately to the Fifth and Final Stage. Here, the Bill was voted on a final time. A majority of 97 to 25 voted in favour of the Bill passing, with the result that it moved to the Seanad (Upper House). The Seanad went through the same 5 Stages with the Bill, eventually passing it by 40 to 10 with no amendments. From there, the proposed amendment was sent to referendum.

2.5.3 – The Campaign

Once a referendum is announced, the campaign begins. While there is limited constitutional regulation of what goes on during a referendum campaign,¹⁵⁵ it is worth explaining the usual course of events. In much the same way as in elections, political parties have an enormous role to play in a referendum campaign. Parties and politicians will usually take official stances (or publicly remain neutral) on the amendment proposal, hang posters around the country encouraging people to vote one way or the other, and engage in debates on radio and television. Other bodies have also been central to referendums in this jurisdiction. In the past, the Catholic Church was a key player, taking public stances, engaging in debate, and exercising enormous influence over huge swathes of the population. In more recent years, as the influence of the Church has waned, civil society groups have grown in stature. It is now common to see groups specifically established for a referendum campaign, such as Yes Equality, which was established for the 2015 Marriage Equality referendum.¹⁵⁶ These organisations can function as the locus of funding and strategizing for campaigns. As one might expect, the energy and interest in each referendum campaign varies depending on, for example, the salience of the topic or the perceived importance of the change. The factors that contribute to a ‘good campaign’ will be discussed in later chapters.

¹⁵⁵ Other than the *McKenna* rules and related restrictions.

¹⁵⁶ Gráinne Healy, Brian Sheehan, and Noel Whelan, *Ireland Says Yes: The Inside Story of How the Vote for Marriage Equality Was Won* (Merrion Press 2016).

2.5.4 – Challenging a Result

Not all referendum results are well-received by all voters. As discussed above (§2.3.1), section 43 of the 1994 Act specifies the procedure for challenging a provisional referendum result. The contours of that procedure have been fleshed out in a number of cases, particularly the burden of establishing that the referendum was materially affected. A brief overview is necessary to establish what the process now looks like for a prospective challenger.

In *Hanafin*, the plaintiff argued that the result of a referendum had been materially affected by breaches of the *McKenna* spending rules and should therefore be set aside.¹⁵⁷ The Supreme Court dismissed the case, with Barrington J remarking that unless there was an express and obvious constitutional abuse, the petitioner's onus of proof was a heavy one indeed.¹⁵⁸ He went on further to state that there was practically no way of knowing why people voted the way they did, and no evidence was forwarded to the effect that the Government's campaign had led people to vote in a certain way.¹⁵⁹ He suggested that secondary evidence from experts could not be sufficient to establish a *prima facie* case, and that only primary evidence would suffice.¹⁶⁰ However, since voting takes place in secret, and since no-one can be compelled to reveal their vote, it would seem that the burden for establishing a case set here is extraordinarily onerous.

The petitioner in *Jordan v Minister for Children and Youth Affairs* raised a challenge to s.43 and the material affect test.¹⁶¹ As with the above case, at issue here was the outcome of a referendum in which the Government had acted unconstitutionally by providing information that was not fair, equal, impartial or neutral – a finding that had been upheld by the Supreme Court in *McCrystal*.¹⁶² The petitioner, therefore, argued that (a) the outcome of the referendum had been materially affected by the Government's information campaign, and (b) that the judgment in *Hanafin* had the effect of making section 43 of the

¹⁵⁷ *Hanafin v Minister for Environment* [1996] 2 IR 321.

¹⁵⁸ *Hanafin v Minister for Environment* [1996] 2 IR 321 (SC) 457 (Barrington J).

¹⁵⁹ *ibid* 457 (Barrington J).

¹⁶⁰ *ibid* 457 (Barrington J).

¹⁶¹ *Jordan v Minister for Children and Youth Affairs* [2015] IESC 33.

¹⁶² *McCrystal v The Minister for Children and Youth Affairs* [2012] IESC 53.

1994 Act unconstitutional, since it made it impossible to show that a referendum had been affected and thus the burden in section 43 was impossible to discharge. O'Donnell J considered what exactly the content of the material affect test might be and concluded that it must be reasonably possible that the irregularity or interference affected the result, and that the test should identify the point at which a 'reasonable person would be in doubt about, and no longer trust, the provisional outcome of the election campaign'.¹⁶³ O'Donnell J set out some principles to be considered when assessing the possible impact on a result which he deemed to be matters of 'common sense', and ultimately rejected the plaintiff's case on the basis that there had not been a 'serious interference with the conduct of the referendum' since the majority of the impugned statements were unobjectionable.¹⁶⁴ These principles included evidence from experts and political scientists, and the numbers potentially misled by the impropriety.¹⁶⁵ The principles also require the court to have regard to the nature of interfering in a referendum result.¹⁶⁶

Any case alleging material affect in line with section 43 must therefore grapple with the courts' reluctance to interfere with 'a decision made by the People whose right it is in final appeal to decide all questions of national policy.'¹⁶⁷ For O'Donnell J, the People's ultimate authority is what justifies the high standard applicable when seeking to set aside the decision of the People.¹⁶⁸ The primary rationale behind this approach is the promise of popular sovereignty established in the Constitution. Hogan J, then in the High Court, referred to this doctrine as the 'very cornerstone on which the entire referendum edifice is constructed.'¹⁶⁹ The special place of popular sovereignty, and by consequence the referendum process, is drawn out clearly in judicial dicta on the extent of the amendment power. The reverence with which the referendum is treated by judges is captured further in O'Flaherty J's comments in *Hanafin*, where he described an order to set aside a referendum as an 'awesome undertaking'.¹⁷⁰ At the time of writing, no challenge under section 43 has ever been successful. While the wording of section 43 suggests that obtaining a remedy is a burdensome task, the above cases make it abundantly clear that it

¹⁶³ *McCrystal v The Minister for Children and Youth Affairs* [2012] IESC 53 [85] (O'Donnell J).

¹⁶⁴ *McCrystal v The Minister for Children and Youth Affairs* [2012] IESC 53 [87]-[88] (O'Donnell J).

¹⁶⁵ *ibid.*

¹⁶⁶ *ibid.*

¹⁶⁷ *McCrystal v The Minister for Children and Youth Affairs* [2012] IESC 53 [40] (O'Donnell J).

¹⁶⁸ *ibid.*

¹⁶⁹ *Doherty v Referendum Commission* [2012] IEHC 211 [23] (Hogan J).

¹⁷⁰ *Hanafin v Minister for Environment* [1996] 2 IR 321.

will only be in the most extreme cases that a referendum result can be successfully challenged.

2.5.5 – After the Challenge

Article 46.5 provides the next step: once a constitutional amendment has been passed at referendum the Bill then goes to the President who shall sign the proposal and duly promulgate it as a law. If the referendum was subject to a petition in the High Court, then once that matter is dealt with, the High Court sends the referendum certificate back to the referendum returning officer.¹⁷¹ At this point, the referendum certificate becomes ‘final and incapable of being further questioned in any court’ and is taken as ‘conclusive evidence of the voting at the referendum’ and the ‘result of such referendum’.¹⁷² The certificate, signed by the referendum returning officer, is sent to the Taoiseach and President, and when signed by the President becomes part of the Constitution.

Ireland’s history of amendment is evidence enough that nothing in the Constitution precludes the same constitutional provision being subject to more than one referendum, nor an amendment being amended again. The various referendums on abortion show this clearly. The Eighth Amendment, passed in 1983, inserted a right to life of the unborn into Article 40.3.3. On the 25th of November 1992, this provision was subject to three separate referendum questions; two of which passed and one (the exclusion of suicide as a ground for abortion) was rejected. This same amendment (exclusion of suicide) was put to referendum again in 2002, and again it was rejected. Finally, in 2018 the Eighth Amendment was repealed by referendum, and the existing Article 40.3.3 was substituted for a new provision, stating that provision may be made by law for the regulation of termination of pregnancy.¹⁷³ Two EU treaties have also been subject to this referendum re-run. The 2001 Treaty of Nice was rejected first in the 24th Amendment Bill referendum, before being passed (with minor changes) by referendum just over a year later in October 2002.¹⁷⁴ This happened again in 2008 with the Treaty of Lisbon, initially being rejected

¹⁷¹ Referendum Act 1994 s 57(5).

¹⁷² *ibid.*

¹⁷³ Which was followed by the enactment of the Health (Regulation of Termination of Pregnancy) Act 2018.

¹⁷⁴ 26th Amendment.

before passing just over a year later.¹⁷⁵ Revisiting issues is a common theme for referendums in Ireland; a theme indicative of how constitutional referendums have been used to alter the Constitution so as to better reflect contemporary social values and respond to the demands of international obligations.

2.6 – Assessing the Framework for Referendums in Ireland

2.6.1 – Recommendations and Recent Developments

The Citizens' Assembly established in 2016 was asked to consider what changes, if any, might be made to the manner in which referendums are held in Ireland. The Assembly's report made a number of recommendations.¹⁷⁶ Of the participants, 94% voted in favour of establishing a standing Electoral Commission to take over the functions of the Referendum Commission.¹⁷⁷ 94% similarly voted to oblige that Commission to give its view on significant matters of factual or legal dispute that arise during a referendum campaign in the public domain.¹⁷⁸ 87% voted in agreement with the current prohibition on Government spending public money to favour one side, but 68% voted in favour of the Government providing equal funding to both sides.¹⁷⁹ 98% recommended that the Oireachtas develop and implement spending limits for political parties, campaign groups, and individuals in referendums, with 72% then voting to prohibit anonymous donations.¹⁸⁰ 80% favoured allowing more than one referendum at a time, with 41.7% establishing a maximum of two at the same time.¹⁸¹ In respect of multi-option voting, 76% were in favour of allowing more than two options on a ballot paper, with 52% further recommending that any such vote should be counted by a single-transferable vote system.¹⁸² 89% recommended that the Oireachtas and Government should give effect to a

¹⁷⁵ 28th Amendment Bill 2008 was rejected, the 28th Amendment 2009 was passed, again with minor concessions made.

¹⁷⁶ Citizens' Assembly, *Report and Recommendations of the Citizens' Assembly On the fourth and fifth topics: The Manner in Which Referenda Are Held & Fixed Term Parliaments* (21 June 2018) 11.

¹⁷⁷ *ibid* 10.

¹⁷⁸ *ibid* 10.

¹⁷⁹ *ibid* 10.

¹⁸⁰ *ibid* 10.

¹⁸¹ *ibid* 10.

¹⁸² *ibid* 11-12.

referendum result within 5 years of the vote.¹⁸³ The Assembly made various recommendations on how to increase voter turnout, such as having votes on the weekend, online voting, early voting, and more.¹⁸⁴ Finally, a majority (69-83%) of the Assembly recommended a number of proposals for citizen initiatives, including citizen initiation of constitutional referendums, and citizen initiation of legislative change.¹⁸⁵

Overall, the Citizens' Assembly was broadly positive about the manner in which referendums are held in Ireland. The changes, where recommended, for the most part called for a clearer establishment (and slight extension) of rules that are already in place. For example, the *McKenna* principles would be unchanged by the Assembly's recommendations, but it might be codified in legislation that equal funding must be given to both sides.¹⁸⁶ The Electoral Reform Act 2022 has delivered on a number of the recommendations made by the Assembly, most notably the establishment of a permanent Electoral Commission. The 2022 Act's other significant change in line with the Assembly's recommendations is the regulation of information and disinformation online during campaigns, which is covered in Part 5 of the Act. This includes a newly created offences of making or publishing disinformation with the intention of influencing referendum results,¹⁸⁷ using bots to mislead or influence a referendum,¹⁸⁸ and failing to comply with obligations on online platforms.¹⁸⁹ These offences are prosecuted by the Electoral Commission.¹⁹⁰ The Act also amends the law relating to political donations, with a view toward making it more transparent.¹⁹¹

2.6.2 – The Framework

From the foregoing analysis a number of points can be made. First, the text of Articles 46 and 47 set out clearly that the Constitution may only be amended by referendum and the

¹⁸³ *ibid* 10.

¹⁸⁴ *ibid* 10.

¹⁸⁵ *ibid* 11.

¹⁸⁶ There is a perennial difficulty here (acknowledged in the case law) of how to decide who counts as a legitimate 'side' in a referendum, especially where issues are disparate and controversial.

¹⁸⁷ Electoral Reform Act 2022, s 166.

¹⁸⁸ Electoral Reform Act 2022, s 167.

¹⁸⁹ Electoral Reform Act 2022, s 168. The obligations are contained in ss 148 and 149.

¹⁹⁰ Electoral Reform Act 2022, s 169.

¹⁹¹ Electoral Reform Act 2022, Part 7.

process by which that referendum should be held. The language of the Articles and the choice of the referendum as the mechanism for amendment reflect the underlying appeals to nationalism, democracy, and popular sovereignty endorsed by the drafters in 1922 and subsequently 1937.¹⁹²

Second, before the Electoral Reform Act 2022, legislative regulation of the referendum in Ireland was relatively scant and diffuse. While the Referendum Acts 1994 and 1998 established the cogs by which the referendum machine operated – the rules for polling, the method for challenging a result – they failed to engender a systematic approach to referendum campaigning. This is best encapsulated by the experience of the Referendum Commissions; despite calls for permanency by each and every respective Chairperson, the Commissions remained ad hoc and consequently fell short in their ability to counter misinformation and encourage participation. The Electoral Act 2022 represents an opportunity for this malaise (and others) to be corrected, although it is too soon to determine its success.

Third, the 2022 Act notwithstanding, the bulk of substantive regulation regarding referendums has derived from judicial dicta. The *McKenna* and *Crotty* judgments, for all their detractors, stand as the most comprehensive accounts by any of the branches of government of what the Constitution requires at referendum. While much of the judiciary's comments on referendums have concerned their reluctance to interfere too much in the process, given the close links between constitutional referendums, popular sovereignty, and the separation of powers, it is likely that the judiciary will continue to comment on and develop the norms in this area.

Fourth and finally, even considering the historically uncoordinated framework for referendums in Ireland, it is undeniable that referendums are a familiar feature of Irish constitutional life and are looked upon favourably by most in the jurisdiction. The constitutional culture, as it were, has developed such that the Irish political and legal system is well-versed in the holding of referendums and has enjoyed considerable success

¹⁹² Leo Kohn, *The Constitution of the Irish Free State* (George Allen and Unwin 1932) 238.

over recent decades.¹⁹³ This culture, combined with the text of the Constitution, statutes, judicial comment, and political convention form the framework by which the referendum in Ireland is regulated and through which it has succeeded.

2.7 – Conclusion

The goal of this chapter was to establish and analyse the framework for constitutional referendums in Ireland. The purpose of doing so was to give any further analysis of Irish referendums' success a solid foundation in the legal and political regulations that are currently in force. Since the goal of this thesis is to assess whether Irish referendums are successful and the ways they can be successful, it is vital to first understand how they operate. What this chapter has shown is that constitutional referendums in this jurisdiction are regulated through a combination of constitutional provisions, legislation, case-law, and political convention. This goes some way to providing an answer to how Irish referendums work in practice. This chapter has also argued that the legal regulation of referendums here has historically been light touch, and that the judiciary have stepped in to set particular rules for how referendum campaigns must be conducted.¹⁹⁴ These rules can be understood partly as responses to perceived failures in previous referendum campaigns, and partly as an attempt by the judiciary to ensure that future campaigns align with the fundamental principles underlying the referendum. This overview of the judiciary's role in the referendum is built on later in this thesis (§6), where, in particular, the rationale underlying those judgments is examined. For now, the fact that the courts have been asked to intervene in referendum campaigns at all is itself a sign that not everyone agrees that referendums here are regulated properly, or that the regulation is always complied with. The question that arises from there is what the *full* experience of referendums in Ireland is; after forty-three separate campaigns, what is the overarching assessment of Irish constitutional referendums? That is the question addressed in the next chapter.

¹⁹³ David Kenny, 'The Risks of Referendums: 'Referendum Culture' in Ireland as a Solution?' in Maria Cahill, Colm Ó Cinnéide, Sean Ó Conaill, Conor O'Mahony (eds) *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland* (Routledge 2021).

¹⁹⁴ *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10.

3. A CONTEXTUAL ANALYSIS OF IRISH REFERENDUMS

3.1 – Introduction

In the previous chapter, I established the legal framework for constitutional referendums in Ireland. The purpose of this chapter is to supplement that analysis by providing a more nuanced account of the practical experience of referendums, combined with a contextualisation of individual referendums. The purpose of the chapter is therefore twofold. First, the chapter will offer a broad overview of Ireland's experience with constitutional referendums. By doing so, this chapter builds on Chapter 2's account of the legal experience with referendums, adding the political and public experience into the fold. Second, the chapter will identify and distil some of the trends across referendums and identify the key aspects which contribute to a successful referendum. However, there are limitations to this task. While an in-depth analysis of every single referendum is beyond the limits of this thesis, this chapter nonetheless offers important insights into the context of referendums in Ireland.

In order to make the subject-matter tractable, I will categorise referendums according to their subject-matter. These categories are Social/Moral, International Relations, Voting, and State Structure/Powers. Each category of referendum will then be analysed under four headings: Impetus for Change; Level of Engagement; Factors Contributing to the Result; and Responses. These headings are designed to filter the most relevant aspects of each referendum, and grouping by subject-matter affords an opportunity to see how similar referendums can be run either more or less successfully depending on those aspects.

Before continuing, it is worth briefly explaining the sub-headings used in analysing the categories. Under the heading 'Impetus for Change', what is important is the source of the referendum proposal – whether it came from a government programme, a committee report, or something else. Also significant here is the reason the referendum was called at that time; whether or not some event triggered the need for a referendum is worth considering. Under 'Engagement', I am referring to how vigorously the topic was debated in the Oireachtas, as well as how engaged the public were with the issue throughout the

campaign. This can be measured using opinion polls, media coverage, and turnout. ‘Factors Contributing to Result’ seeks to establish what led to the result in question, i.e., was the outcome perceived to be a sure thing from the start? Or was it achieved through strong, strategic campaigning? This also looks for unique aspects of certain campaigns which affected the outcome. Finally, the ‘Responses’ heading looks at the post-referendum context, inquiring into how it was addressed after the fact – for example, by looking at whether it was revisited in another referendum, or if legislation was passed on foot of the result.

The chapter proceeds in the following way: §3.2 looks at referendums on Social/Moral issues; §3.3 deals with those relevant to International Relations; §3.4 those related to Voting; and §3.5 at those impacting State Structure and the division of power. Each part will be sub-categorised accordingly. The chapter will conclude with §3.6 where the trends identified throughout the preceding sections will be analysed together.

3.2 – Social / Moral and Constitutional Rights Referendums

Of the four categories proposed, the social/moral and rights heading encompasses the largest number of referendums, with eighteen in total. The common theme among them is that the issue up for debate concerns, in some respect, the status of a (prospective) right in the Constitution which attracts reasonable disagreement based on social or moral positions. In practice, these referendums have centred *mostly* on individual rights in the Constitution which owed their existence to Catholic teaching prevalent at the time of drafting.¹ The most notable examples here are the various referendums on abortion and marriage.² While some of the abortion referendums were held on the same day, for the purposes of this chapter I will deal with them as individual referendums, although there will of course be some overlap in the experience.³

¹ For more on this influence, see generally Gerard Hogan, *The Origins of the Irish Constitution, 1928-1941* (Royal Irish Academy 2012). The 16th Amendment 1996 (Bail) is an example of a referendum in this category not connected to Catholic social teaching.

² Abortion examined through Article 40.3.3 (as it then was) which was inserted by the 8th Amendment 1983; marriage is mentioned explicitly in Article 41.3, and has been impacted by various amendments, as will be seen below.

³ The 12th Amendment Bill 1992, the 13th Amendment 1992, and the 14th Amendment 1992 were all held on 25th November 1992.

While this category covers votes from as far back as 1972,⁴ it is notable that (at the time of writing) twelve of the eighteen have taken place in the last thirty years, with six of those in the last ten. The referendums here cover the issues of abortion,⁵ divorce,⁶ the special position of the Catholic Church,⁷ the death penalty,⁸ children's rights,⁹ same-sex marriage,¹⁰ blasphemy,¹¹ *jus soli* citizenship,¹² bail rights,¹³ the definition of the family,¹⁴ and the recognition of caring responsibilities.¹⁵

3.2.1 – Impetus for Change

3.2.1.1 – Committee Recommendations

The first thing to note regarding this category is that 13 of the 18 relevant referendums here were called with explicit reference to recommendations from a body tasked with examining the Constitution. In particular, the 5th Amendment 1972 referendum (Removed Special Position of the Catholic Church) was based on a unanimous recommendation made by the 1966 Committee on the Constitution, to the effect that the provisions in question had no practical effect, and were offensive to Non-Catholics in the State, as well as an obstacle to greater integration with Northern Unionists.¹⁶ Other referendums were based on the findings of such bodies as the New Ireland Forum,¹⁷ Government White

⁴ The 5th Amendment 1972.

⁵ The 8th Amendment 1983, the 12th Amendment Bill 1992 (rejected), the 13th Amendment 1992, the 14th Amendment 1992, the 25th Amendment Bill 2002 (rejected), and the 36th Amendment 2018.

⁶ 10th Amendment Bill 1986 (rejected), 15th Amendment 1995, and the 38th Amendment 2019.

⁷ 5th Amendment 1972.

⁸ 21st Amendment 2001.

⁹ 31st Amendment 2012.

¹⁰ 34th Amendment 2015.

¹¹ 37th Amendment 2018.

¹² 27th Amendment 2004.

¹³ 16th Amendment 1996.

¹⁴ 39th Amendment Bill 2024 (rejected).

¹⁵ 40th Amendment Bill 2024 (rejected).

¹⁶ See the Committee on the Constitution, *Report* (Pr 9817, 1967) paras 135-139.

¹⁷ The 10th Amendment Bill 1986 (Divorce); this was also based on findings of an Oireachtas Joint Committee on Marriage Breakdown and the 1967 Informal Committee. The New Ireland Forum was established in 1983 by then Taoiseach Garrett Fitzgerald as a response to violence in Northern Ireland and the perceived move to more violent forms of nationalism. The Forum was made up of members of nationalist political parties from the Republic of Ireland (Fine Gael, Fianna Fáil, Labour) as well Northern Ireland (Social Democratic and Labour Party). Broadly speaking, the Forum was intended to address continuing problems of Irish partition, and look at issues pertaining to the nationalist / unionist divide. For a contemporaneous overview see Oliver MacDonagh, 'What Was New in the New Ireland Forum?' (1985) 9(2) *The Crane Bag, Irish Ideologies* 166.

Papers,¹⁸ and various Joint Oireachtas and All-Party Committees.¹⁹ The findings of the 1996 Constitution Review Group formed the basis for four separate referendums over 15 years, covering topics of bail, the death penalty, citizenship, and children's rights.²⁰ The 2012 Convention on the Constitution and the Citizens' Assembly 2016-18 are also relevant here, having led directly to at least one referendum each.²¹ The two most recent referendums, on Family and Care, both derived from the 2020-2021 Citizens' Assembly on Gender Equality,²² although the ultimate proposals were much changed from the original recommendations.²³

3.2.1.2 – *Evolving Social Norms*

A commonly touted reason for amendment proposals in this category is the desire to 'modernise' the Constitution so that it better reflects the prevailing social attitude towards an issue.²⁴ For the most part, this has involved removing specific provisions of the Constitution which entrenched (usually Catholic) conservative values, for example the removal of a prohibition on divorce,²⁵ the repeal of the 8th Amendment prohibiting abortion,²⁶ and the extension of marriage to same-sex couples.²⁷ This rhetoric arose regularly throughout the debate on the 36th Amendment 2018 (Repeal of the 8th Amendment) in particular. At the second stage of the debate, the Minister for Health Simon Harris (introducing the Bill) referred to the need to give voice to those 'who never had a say', 'who have changed their mind', and 'who wish to strongly reaffirm their deeply

¹⁸ The 15th Amendment 1995 (Divorce II).

¹⁹ For example, the All-Party Oireachtas Committee on the Constitution. These Committees are made up of members of numerous parties, across the Dáil and the Seanad. Their recommendations are not binding.

²⁰ Respectively, the 16th, 21st, 27th, and 31st Amendments.

²¹ The 34th Amendment 2015 (Marriage Equality) and 36th Amendment 2018 (Repeal of 8th Amendment) referendums respectively.

²² Citizens' Assembly on Gender Equality, *Report* (June 2021) 12.

²³ David Kenny, 'How to Lose a Referendum (in Ireland) – Challenges of Practical and Symbolic Constitutional Change' (2025) 3(2) Comparative Constitutional Studies 1.

²⁴ For an explicit example, see the comments of Minister for Justice Charles Flanagan introducing the Bill to remove blasphemy from the Constitution: '[The Constitution] is a document which has withstood the test of time but, as time has passed, it has also gradually evolved to reflect our country and its people as together we have moved from the 20th into the 21st century. Fundamental values are timeless, but some concepts are deeply rooted in a particular time and a particular view of what is socially appropriate. Blasphemy is one such concept, and it is with the removal of the reference to blasphemy from our Constitution that we are concerned this evening.' Deputy Charles Flanagan, Thirty-seventh Amendment of the Constitution (Repeal of offence of publication or utterance of blasphemous matter) Bill 2018: Second Stage, Dáil Deb 18 September 2018, vol 972 no 1.

²⁵ 15th Amendment 1995.

²⁶ 36th Amendment 2018.

²⁷ 34th Amendment 2015.

held views’.²⁸ This view was echoed by others in the same debate, arguing that the referendum would ‘bring us into the modern world’.²⁹ Similar language was used in the debate on the 34th Amendment 2015 (Marriage Equality) referendum, with Minister for Health Leo Varadkar arguing in favour of a Yes vote by appealing to the argument that the Constitution needed to be amended to reflect a more modern ideal of marriage.³⁰ The desire for modernisation, or the removal of traditional Catholic conservative values, is also seen in all three divorce referendums, and the more recent referendum on blasphemy. In each of these referendums, there is a sense that the Constitution no longer reflected what people felt on those issues. This is reflected also in the 39th Amendment Bill 2024 (Family) referendum, and to a lesser extent in the 40th Amendment Bill 2024 (Care) referendum.³¹ The Family proposal would have broadened the constitutional definition of family to include non-marital families,³² in line with a recent Supreme Court judgment,³³ which was understood to better embrace the concept of modern families.³⁴ It was, however, rejected.³⁵

3.2.1.3 – Addressing Judicial Decisions

Specific decisions of the Irish courts have acted as a driver behind a number of referendums in this category. For example, the proposal for the 8th Amendment (to insert a provision protecting the right to life of the unborn and therefore prohibiting abortion) was brought about on foot of fears of judicial activity in the wake of *Roe v Wade*.³⁶ Since in the US the right to abortion came about as a development of the right to privacy from *Griswold v Connecticut*,³⁷ there were fears that such an extension could happen in Ireland, with the Supreme Court developing on the right to marital privacy from *McGee*.³⁸ This

²⁸ Minister for Health Simon Harris, Thirty-sixth Amendment of the Constitution Bill 2018: Second Stage, Dáil Deb, 9 March 2018, vol 966, no 6.

²⁹ Deputy Aengus Ó Snodaigh, Thirty-sixth Amendment of the Constitution Bill 2018: Second Stage, Dáil Deb, 9 March 2018, vol 966, no 6.

³⁰ Deputy Leo Varadkar, Thirty-fourth Amendment of the Constitution (Marriage Equality) Bill 2015: Second Stage, Dáil Deb, 10 March 2015, vol 871, no 1.

³¹ Both of which were, notably, roundly rejected.

³² The proposed wording included those families based on ‘durable relationships’.

³³ *O’Meara v Minister for Social Protection* [2024] IESC 1.

³⁴ i.e. single-parent families or families not based on marriage. The vagueness inherent in ‘durable relationships’ was seized upon by No advocates as potentially including polyamorous relationships such as ‘throuples’. See Michael McDowell, ‘It’s not fanciful or contrived to ask questions about “throuples” in referendum debate’ *The Irish Times*, (Dublin 31 January 2024).

³⁵ With a majority of 67.7% to 32.3%.

³⁶ *Roe v Wade* (1973) 410 US 113.

³⁷ *Griswold v Connecticut* (1965) 381 US 479.

³⁸ *McGee v Attorney General* [1973] IR 284.

fear is reflected in the opening speech of Minister for Justice Michael Noonan introducing the bill:

‘In this context, it is necessary to think of the United States Supreme Court decision on marital privacy. That proved to be the first step on the road to what has become something very close to abortion on demand. Such changes could come about in disregard of deeply-felt convictions of the majority, even the great majority, of the general public. These were the considerations that led my party [...] to agree to propose a constitutional amendment...’³⁹

In 1992, a similar sentiment motivated the 12th Amendment Bill 1992, which aimed to reverse the *X* case and exclude risk of suicide as a ground for abortion.⁴⁰ Immediately upon the judgment being handed down, the Government indicated that there would be a referendum to reverse it, as seen in the opening line of Minister for Justice Pádraig Flynn’s speech at the second stage of debate (‘[t]he Government took immediate action to address the issues raised by the decision in the *X* case’) as well as in press reports from the time.⁴¹

The 13th Amendment 1992 (Permitting Travel for Abortion), which took place on the same day, was also motivated by the *X* case, while the 14th Amendment 1992 (Dissemination of Information re Abortion) (again, same day) was motivated by a combination of the *X* case and two other cases on the dissemination of information about abortion, including one handed down by the ECJ.⁴² The *X* case formed the basis for the 25th Amendment Bill 2002, which again proposed to reverse the judgment.⁴³ It too failed. This reactive approach can also be seen as a driver behind the 34th Amendment 2015 (Marriage Equality): the requirement that the Constitution be amended to enact this change was made clear in the *Zappone* decision some years previous.⁴⁴ While there was a gap of thirty years between decision and referendum, the *AG v O’Callaghan* decision of the Supreme Court was cited

³⁹ Deputy Michael Noonan, Eighth Amendment of the Constitution Bill, 1982: Second Stage, Dáil Deb 9 February 1983, vol 339, no 10.

⁴⁰ *X v Attorney General* [1992] IESC 1, [1992] 1 IR 1.

⁴¹ Deputy Pádraig Flynn, Twelfth Amendment of the Constitution Bill, 1992: Second Stage, Dáil Deb 20 October 1992, vol 423, no 8. *The Irish Times* reported that the Taoiseach, upon hearing of the decision of the Supreme Court, ‘fear[ed] that it could require constitutional or legislative amendments.’ ‘Split expected in abortion judgment’ *The Irish Times* (Dublin 5 March 1992) 1.

⁴² These are Case C-159/90 *SPUC v Grogan & Ors* (1991), and *The Attorney General (Society for the Protection of Unborn Children (Ireland) Ltd) v Open Door Counselling Ltd* [1988] IR 593.

⁴³ Also cited in the Dáil debates is the case of *A and B v Eastern Health Board and C* [1997] IEHC 176, which examined an issue similar to the *X* case.

⁴⁴ *Zappone & Gilligan v Revenue Commissioners & Ors* [2006] IEHC 404. The length of time between decision and referendum is explained by the proposal being examined by the Constitutional Convention before being considered for amendment.

as the background for the proposal leading to the 16th Amendment 1996 (Bail).⁴⁵ Finally, the 31st Amendment 2012 (Children's Rights) was called in part to respond to a number of judgments on the topic which were looked at unfavourably.⁴⁶

On a slightly different note, the necessity of the 39th Amendment Bill 2024 (Family) referendum was undermined somewhat by the Supreme Court decision in *O'Meara v Minister for Social Protection* which itself held that non-marital families could not be discriminated against in relation to widower's pension entitlements.⁴⁷ The judgment, handed down less than two months before the referendum, raised questions about the amendment's necessity. David Kenny in particular has argued that this contributed to the proposal's defeat.⁴⁸

3.2.1.4 – High-Profile Incidents

Some of these referendums were called following high-profile incidents. Relevant here is the 27th Amendment 2004 (*Jus Soli*) referendum, which was called at a time when the media was filled with stories about so-called 'passport tourism' active in Irish hospitals, whereby mothers from foreign countries arrived in Ireland to give birth so that their child would be an Irish citizen.⁴⁹ While not the exclusive reason for proposing the amendment, this rationale took up a significant portion of the debate.⁵⁰ The 31st Amendment 2012 (Children's Rights) originated in the 1996 Constitution Review Group,⁵¹ and was included

⁴⁵ *Attorney General v O'Callaghan* [1966] IR 501. See Minister for Justice Mrs Nora Owen at Second Stage: 'As the House is aware, the amendment arises against the background of the Supreme Court decision in the O'Callaghan case in 1965. Following that decision, bail can be refused by our courts on only two grounds, the likelihood that an accused will not turn up for trial or will interfere with witnesses or evidence.' Deputy Nora Owen, Sixteenth Amendment of the Constitution Bill, 1996: Second Stage, Dáil Deb 15 October 1996, vol 470 no 1.

⁴⁶ Most notably, the 'Baby Ann' case – *N v HSE* [2006] 4 IR 375; see generally Oran Doyle and David Kenny, 'Constitutional Change and Interest Group Politics: Ireland's Children's Rights Referendum' in Contiades and Fotiadou (eds.) *The Foundations and Traditions of Constitutional Amendment* (Hart 2017).

⁴⁷ [2024] IESC 1.

⁴⁸ David Kenny, 'How to Lose a Referendum (in Ireland) – Challenges of Practical and Symbolic Constitutional Change' (2025) 3(2) *Comparative Constitutional Studies* 1.

⁴⁹ The veracity of these claims was hotly contested at the time and is still a matter of controversy. For a comprehensive account of this referendum see Hilary Hogan, 'Democratic Constitutionalism or Elite Control? Revisiting the 2004 Irish Citizenship Referendum' in Cahill, Ó Cinnéide, Ó Conaill, and O'Mahony (eds) *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland* (Routledge 2021).

⁵⁰ Hilary Hogan, 'Democratic Constitutionalism or Elite Control? Revisiting the 2004 Irish Citizenship Referendum' in Cahill, Ó Cinnéide, Ó Conaill, and O'Mahony (eds) *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland* (Routledge 2021).

⁵¹ Constitution Review Group, *Report* (PN 2632, 1996) 319.

as an issue primarily because of the high-profile South Eastern Health Board's Report of the Kilkenny Incest Investigation from three years earlier, which described serious failings in the law relating to children suffering from abuse.⁵² This report fed directly into the proposed amendment. Also relevant here is the 37th Amendment 2018 (Blasphemy) which removed the offence of blasphemy from the Constitution. Despite being a dead-letter, the provision attracted national and international criticism after the British public figure Stephen Fry was investigated by Gardaí on foot of comments he made on Gay Byrne's television show.⁵³ Fry publicised the incident, and a year later the amendment proposal was before the Dáil. Minister for Justice Charles Flanagan made explicit reference to the incident as a reason for holding the referendum in his speech at the Second Stage of the debate.⁵⁴

3.2.1.5 – *Dead-Letters*

Finally, the 37th Amendment 2018 (Blasphemy) also points to another category of reason for amendment: the removal of dead-letter provisions. The rationale of removing provisions which were defunct or unnecessary was offered for the removal of blasphemy as well as the death penalty and the special position of the Catholic Church.⁵⁵ The statement in Article 41.2 that the State recognised woman's life 'within the home' was another dead-letter provision which had never been of any legal significance.⁵⁶ After countless proposals to simply remove the provision from the Constitution,⁵⁷ it was proposed to be replaced in the 40th Amendment Bill 2024 (Care) referendum, which would replace it with an obligation on the State to 'strive' to support carers.⁵⁸ That proposal was defeated, in part because some voters feared it would negatively impact women's place in

⁵² South Eastern Healthboard, *Kilkenny Incest Investigation* (Pl 9812, 1993), presented to Minister for Health Brendan Howlin TD May 1993.

⁵³ In 2017 Fry was (briefly) investigated under section 37 of the Defamation Act 2009 which allowed for such investigation in relation to blasphemous material, after an individual complained about his comments.

⁵⁴ Deputy Charles Flanagan, Thirty-seventh Amendment of the Constitution (Repeal of offence of publication or utterance of blasphemous matter) Bill 2018: Second Stage, Dáil Deb, 18 September 2018, vol 972 no 1.

⁵⁵ The 37th, 21st and 5th Amendments respectively.

⁵⁶ Laura Cahillane, 'Revisiting Article 41.2' (2017) 40(2) Dublin University Law Journal 107.

⁵⁷ See The Commission of the Status of Women, 1993; the Constitutional Review Group, 1996; the All-Party Oireachtas Committee on the Constitution in 1997 and 2006.

⁵⁸ The proposed Article 42A would read: 'The State recognises that the provision of care, by members of a family to one another by reason of the bonds that exist among them, gives to Society a support without which the common good cannot be achieved, and shall strive to support such provision.'

the Constitution, but predominantly because the proposed change was unclear and seemed to allow the State to wash its hands of any responsibility in relation to caring responsibilities.⁵⁹

3.2.2 – Engagement

3.2.2.1 – Turnout

Turning now to examine the level of engagement with referendums taken in this category, it is perhaps unsurprising that turnout for some of these referendums is among the highest across all four categories. However, the average turnout across the eighteen referendums relevant here is just 51.87%.⁶⁰ While not a low figure – and in fact above the average across all referendums (50.30%) – it serves as evidence that turnout is not always as high as might be expected given the subject matter. The two referendums that have attracted the most attention in recent years – Marriage Equality in 2015 and Repeal of the 8th in 2018 – both attracted high turnout of above 60% (60.5% and 64.1% respectively). Similarly high turnout can be seen in the 1992 abortion referendums – the three (taken at the same time) attracted 68% of voters. However, the 8th Amendment 1983 (Abortion Ban) attracted only 53.7%, and the 25th Amendment 2002 (Reversal of *X* Case) just 42.9%. This same fluctuation is seen in relation to the rest of the referendums in this category. While the first two divorce referendums both attracted over 60%, the bail referendum in 1996 saw only 29.2% vote, and in 2012 just 33.5% of the electorate turned out to vote on the children’s rights referendum.⁶¹ The two most recent referendums, taken together, attracted only 44.4%.⁶² For every example of high turnout, there is a counter-example with disappointingly low numbers. While the perceived importance of the right in question undoubtedly impacts turnout, it is clear that it is not the only, nor the determinative, factor contributing to high engagement.

⁵⁹ David Kenny, ‘How to Lose a Referendum (in Ireland) – Challenges of Practical and Symbolic Constitutional Change’ (2025) 3(2) Comparative Constitutional Studies 1.

⁶⁰ Average here is the mean average.

⁶¹ For coverage of this referendum, see Oran Doyle and David Kenny Oran Doyle and David Kenny, ‘Constitutional Change and Interest Group Politics: Ireland’s Children’s Rights Referendum’ in Contiades and Fotiadou (eds.) *The Foundations and Traditions of Constitutional Amendment* (Hart 2017).

⁶² 39th Amendment Bill 2024 (Family) and 40th Amendment Bill 2024 (Care).

3.2.2.2 – Level of Campaigning

One factor which can further explain and contextualise engagement is the level of campaigning in a given referendum. That is, how much time, money, and space is devoted to raising awareness of the referendum and pleading for a particular result. While difficult to measure precisely, certain referendums demonstrate that low-energy, unenthusiastic campaigning leads to popular apathy among voters. The 16th Amendment 1996 (Bail) is a good example of this. With broad cross-party support and a topic (bail rights) that did little to spark the public imagination, there was little impetus on the Government to make its case on the national stage. Reporting just two days before the referendum was held, Michael Foley wrote in *The Irish Times* that '[w]ithout the constant flow of press releases, without the lobbying by TDs and party press officers trying to get their party's point of view across, the media has simply found other issues to cover' and that there were 'few posters, little or no leafletting, no politicians seeking your support'.⁶³ The result was perhaps inevitable then – the amendment passed with 74.8% on an abysmal 29.2% turnout. The same can be seen in relation to the Children's Rights referendum in 2012. After what was described as a 'dull', 'fairly lacklustre' campaign, just 33% of voters came out to vote.⁶⁴ In their report on this campaign the Referendum Commission noted that the amount of material available and the 'quality and amount of general media' on the issue were key factors for turnout and the result.⁶⁵ In this instance, they found a lack of material had contributed to a large number of people being disinterested and ill-informed, leading them to abstain from voting.⁶⁶

Those referendums which experienced the highest level of campaigning attracted considerably more coverage in the media, and generally higher turnout. The Marriage Equality 2015 and Repeal of 8th Amendment 2018 referendums each consisted of vigorous campaigns on both sides of the issue, and coverage began well in advance of the date of referendum. In particular, these referendums exemplify parties making use of new means of campaigning – the Marriage Equality vote is noted as the first time parties made use of

⁶³ Michael Foley, 'Media coverage flagging as public interest wanes in the face of political unity' *The Irish Times* (Dublin 26 November 1996) 6.

⁶⁴ Mary Minihan, 'Dull campaigns failed to engage voters' *The Irish Times* (Dublin 12 November 2012) 5.

⁶⁵ Referendum Commission, *The Referendum Commission Report on the Referendum on the 31st Amendment of the Constitution (Children) Bill 2012* (2012).

⁶⁶ Referendum Commission, *The Referendum Commission Report on the Referendum on the 31st Amendment of the Constitution (Children) Bill 2012* (2012).

social media as a primary form of campaigning,⁶⁷ and was celebrated for its sophisticated use of analytics to campaign more effectively to those that were most likely to be swayed.⁶⁸ Similarly, the Repeal of the 8th 2018 referendum attracted significant coverage on social media,⁶⁹ including a drive by Yes groups to get young emigrants to return to Ireland to vote.⁷⁰

It is important to note that more vigorous campaigning is often a feature of referendums that address more controversial or divisive topics, so it is difficult to separate the two in order to determine which has the bigger impact on engagement: strong campaigning or a divisive topic. However, regardless of which is *more* influential, it seems that strong campaigning has a considerable impact on engagement. Indeed, some controversial topics have attracted lower turnout where the campaign is lacklustre. For example, take the 25th Amendment Bill 2002 (Reversal of *X* Case) referendum on abortion which attracted a considerable degree of apathy and only 42.9% turnout. Ultimately it seems that engagement with a referendum in the social/moral category is influenced by two things: the pre-existing interest in the issue or the perceived significance of the vote; and the level of campaigning by both sides in the lead up to the referendum. Engagement is difficult to gauge after the fact, where the only reliable metrics available are voter turnout and media coverage. While there is a strong correlation between media coverage and turnout or engagement, it is unclear which is causing which. That is, whether there is a lot of media coverage because people are engaged, or people are engaged because there is a lot of media coverage. In reality, it is probably somewhere between these two positions – the media tends to both reflect and foster interest. Other intangible factors can be determinative in a given referendum, as will be seen below.

3.2.3 – Factors Contributing to Result

⁶⁷ Harry McGee, ‘Social media plays major role in Irish poll for first time’ *The Irish Times* (Dublin 23 May 2015) 5.

⁶⁸ See generally, Gráinne Healy, Brian Sheehan and Nel Whelan, *Ireland Says Yes: The Inside Story of How the Vote for Marriage Equality Was Won* (Merrion Press 2015).

⁶⁹ The use of social media as a campaign platform was foreseen by platforms, leading Facebook and Google to impose bans on advertising from international bodies in relation to the campaign.

⁷⁰ The #HomeToVote campaign drive was in place for the 2015 referendum as well and in both instances was credited with influencing a large number of people to return to vote in 2018. The website is still in existence and can be accessed at <www.hometovote.com> accessed on 29th November 2022.

3.2.3.1 – Information Availability

One of the most significant factors contributing to the result of a referendum in this category is the quality and quantity of information which was available to the public. To again return to the 2012 Children’s referendum, what can be seen there is the impact of a lacklustre campaign combined with a confusing amendment proposal. According to the Referendum Commission’s polls after the vote, 41% of respondents who had voted indicated that they did not understand the issue at referendum.⁷¹ Of those respondents who did not vote, 34% indicated that they did not vote because they did not understand the referendum or did not know enough about it.⁷² From this, the Commission concluded that there is a ‘strong direct relationship between the level of understanding ... and the propensity to vote.’⁷³ Other referendums in which a lack of information was significant include the 16th Amendment 1996 (Bail) and the 25th Amendment Bill 2002 (Reversal of *X* Case). In particular, the Referendum Commission in 2002 noted that while all respondents were aware that there was a referendum, ‘there was considerable confusion in all groups about the issues involved’, and that ‘the main confusion was caused by the uncertainty about what a yes or no vote actually meant’.⁷⁴ The report is damning in its portrayal of the public’s awareness of the amendment proposal. Perhaps it is unsurprising that few voted. The 2024 Family and Care referendums similarly suffered from a lack of information availability and a particular lack of clarity on the nature of the proposed changes.⁷⁵ The low turnout (44.4%) and huge No vote (67.7% for Family and 73.9% for Care) are at least partially reflective of this.⁷⁶

However, for the most part referendums in this category show a high level of awareness regarding the issue. This is perhaps down to the fact that most of the referendums here concern issues which do not require specific expertise to understand, and often touched

⁷¹ 20% indicated that they ‘did not understand it at all’ and 21% that they ‘did not understand it particularly well’. Referendum Commission, *The Referendum Commission Report on the Referendum on the 31st Amendment of the Constitution (Children) Bill 2012* (2012) 7.

⁷² *ibid* 8.

⁷³ *ibid*.

⁷⁴ Referendum Commission, *Report of the Referendum Commission on the Protection of Human Life in Pregnancy Referendum 2002* (2002) 12.

⁷⁵ David Kenny, ‘How to Lose a Referendum (in Ireland) – Challenges of Practical and Symbolic Constitutional Change’ (2025) 3(2) *Comparative Constitutional Studies* 1.

⁷⁶ David Kenny, ‘How to Lose a Referendum (in Ireland) – Challenges of Practical and Symbolic Constitutional Change’ (2025) 3(2) *Comparative Constitutional Studies* 1.

on issues fundamental to the lives of ordinary people. The abortion referendums in 1992 and in 2018 demonstrate a high level of understanding reflective of its status as a controversial, sensitive topic regularly covered in media, which was of peculiar importance for Irish people.⁷⁷ The same can be said of divorce,⁷⁸ the death penalty, and marriage.

3.2.3.2 – *Influential Bodies*

Another factor which contributed significantly to the outcome of referendums here is the influence of certain bodies and their stance on the issue. The most illustrative, and obvious, example here is the Catholic Church. The earliest three referendums in this category demonstrate this – the 5th Amendment 1972 (Removal of the Special Position of the Church), the 8th Amendment 1983 (Abortion), and the 10th Amendment Bill 1986 (Divorce I). The results of each of these three aligned with the Church's position on the matter, and media coverage at the time focused intensely on statements by the Church.⁷⁹ Unsurprisingly, at a time when the Catholic Church exerted substantial influence over every aspect of the Irish state, referendums were no different. What is interesting, then, is the waning over time of this influence.⁸⁰ The three 1992 referendums on abortion show the beginning of a move away from the Church's influence, although the Church itself was uncertain in its stance there. The second divorce referendum in 1995 is a more explicit break from the Church. By the barest of margins (some 9,000 votes in the difference, out of 1,633,942 cast), the amendment was passed and divorce was legalised. While an extremely vigorous campaign from the Church had come close to defeating the proposal, ultimately the result reflected a shift in public attitudes.⁸¹ Since then, the Catholic Church's

⁷⁷ In one way or the other.

⁷⁸ It is worth noting that in the first divorce referendum (1986), one of the factors which contributed to the Bill's defeat was confusion around succession and property rights which might have flowed from the amendment.

⁷⁹ Take, as an example, page 9 of *The Irish Times* on Monday 9 June 1986, in the run-up to the divorce referendum. On this page alone the following headlines appear: 'Divorce and "that fellow with squeaky boots"' (that fellow is the Devil); 'Bishops meet to review divorce poll campaign'; 'Priest argues case for "yes" vote'; 'Does "yes" vote defy Catholic teaching?'. Similar headlines appeared practically every day before the referendum, and the same can be said for the other two mentioned above.

⁸⁰ The reasons behind this are innumerable and have been explored in great depth by others much more capable than the author. Suffice it to say that from the latter stages of the twentieth century, Ireland has gradually shifted to the position of one of the more socially liberal, secular societies in Europe.

⁸¹ The campaign included statements against the proposal from no less than Mother Teresa and the Pope. For more on the Church's campaign, and the referendum generally, see Brian Girvin, 'The Irish Divorce Referendum, November 1995' (1996) 11(1) *Irish Political Studies* 174-181.

position has been far from determinative in referendums, often times on the losing side of votes by a considerable margin. Indeed, many of the referendums in this category from the last 15 years can be characterised as conscious decisions to remove the Church's fingerprints from the Constitution.⁸²

Also relevant here is the support of opposition political parties. As has been noted previously, no referendum has passed without the support of both the Government parties and the major opposition party.⁸³ In this category of referendums, the point can be extended further. Bar the 2024 referendums, all of the relevant referendums here that were rejected by voters were opposed by the opposition party. The first divorce referendum is an example of this – while the party was not against the holding of a referendum, the stance of the opposition Fianna Fáil deputies was de facto in favour of a No vote.⁸⁴ The 12th Amendment 1992 (Reversal of *X* Case) was opposed by Fine Gael, Labour, the Democratic Left, and the Green Party. Further, the 25th Amendment Bill 2002 (another attempt at the reversal of *X* case) was opposed by all of the major opposition parties: Fine Gael, Labour, the Green Party, and Sinn Féin. The 2024 Family and Care referendums were rejected despite enjoying opposition support from Labour, the Social Democrats, and eventually Sinn Féin. As the largest opposition party, Sinn Féin did advocate for a 'Yes' vote but expressed concerns about the wording of both proposals, and took a considerably long time to express their support.⁸⁵ So while they did support it, it came with a degree of public reticence.

3.2.4 – Responses

3.2.4.1 – Re-Running the Referendum

⁸² The extent of the Church's downfall here can be seen in the 2019 referendum on divorce, where the main opposition came from groups aligned with Catholic teachings and the Church itself (including the Irish Catholic Bishop's Conference), yet the amendment passed with 82% of the vote.

⁸³ Subject to the exception given at §2.5.2 regarding the 8th Amendment.

⁸⁴ John Cooney, 'Voters reject divorce by massive majority' *The Irish Times* (Dublin 28 June 1986), page 1. Fianna Fáil were ostensibly neutral, but individual TDs campaigned against the amendment. See Francis X Clines, 'The Irish Uphold Ban on Divorce by 3-to-2 Margin' *The New York Times* (New York 28 June 1986), available at <<https://www.nytimes.com/1986/06/28/world/the-irish-uphold-ban-on-divorce-by-3-to-2-margin.html>> accessed on November 29 2022.

⁸⁵ Mary Regan, 'Sinn Féin would re-run care referendum if rejected on 8 March' *RTE* (Dublin 21 February 2024).

Three issues in this category were explicitly revisited in subsequent referendums. The 8th Amendment, which enshrined the right to life of the unborn, was revisited in substance through all of the subsequent referendums on abortion: each of the 12th Bill, 13th, 14th, and 25th were called to amend the provision that had been placed in the Constitution by the 8th Amendment, with a view to either developing it or clarifying its meaning. More pointedly, the 36th Amendment 2018 was a specific response to the 8th Amendment (and the others mentioned). The whole purpose of that proposal was to remove the 8th Amendment from the Constitution. The 10th Amendment Bill 1985 (Divorce I) was essentially re-run a decade later in the 15th Amendment 1996 (Divorce II) referendum.⁸⁶ The result was changed this time. And finally, the 12th Amendment Bill (Reversal of *X* case) was re-run ten years later in the 25th Amendment Bill 2002 (Reversal of *X* Case). In this instance, the result remained the same.⁸⁷

3.2.4.2 – Legislative Response

Many more of the referendums elicited a legislative response. For some referendums, this was a necessary next-step, since the amendment proposed to allow for legislation on an area. For example, the passing of the 15th Amendment 1995 (Divorce I) required the Oireachtas to enact legislation, ultimately leading to the Family Law (Divorce) Act 1996. The same is true of the 16th Amendment 1996 (Bail),⁸⁸ 34th Amendment 2015 (Marriage Equality),⁸⁹ 36th Amendment 2018 (Repeal of 8th),⁹⁰ 37th Amendment 2018 (Blasphemy),⁹¹ and 38th Amendment 2019 (Divorce III).⁹² Unique here is the response to the 14th Amendment 1992. Once the amendment, which provided that the right to life of the unborn did not prohibit the dissemination of information about abortion services abroad, was approved at referendum, enacting legislation was passed through the Oireachtas.⁹³ Before being signed, however, the President referred the Bill to the Supreme Court in

⁸⁶ With minor changes to the proposed amendment. There had been legislation (Judicial Separation and Family Law and Reform Act 1989) and case-law on the matter in the intervening period.

⁸⁷ Implicit in the re-running of these referendums is the point that various committees and government papers were established to examine the possibility of holding the second referendum.

⁸⁸ Bail Act 1997.

⁸⁹ Marriage Act 2015.

⁹⁰ Health (Regulation of Termination of Pregnancy) Act 2018.

⁹¹ Blasphemy Act 2019.

⁹² Family Law Act 2019.

⁹³ Regulation of Information (Services outside the State for the Termination of Pregnancies) Act 1995.

accordance with Article 26 of the Constitution in order to determine its constitutionality.⁹⁴ One of the central issues was whether a constitutional amendment could be limited by natural law, such that the 14th Amendment might be invalid because of its impact on the right to life of the unborn.⁹⁵ Ultimately, the Supreme Court held in favour of the Bill's constitutionality, and determined that the principle of popular sovereignty meant that the People could decide to amend the Constitution in any way they saw fit.⁹⁶

3.3 – International Relations Referendums

International relations covers a total of eleven referendums, making this the second largest category. As the heading suggests, the common theme across these referendums is that each concerned a constitutional amendment which would allow the State to sign up to or ratify an international treaty or agreement. This category therefore covers all of the referendums required to ratify European Union treaties, which, as will be seen, have attracted no small amount of controversy. The relevant referendums here are not confined to one period of time, stretching from 1972 to 2012. A timely and compelling example of the relevance of this category of referendums is the (relatively) recent Supreme Court decision in *Costello v Ireland*, whereby the Court established that a referendum might be required in order for Ireland to ratify the Comprehensive Economic and Trade Agreement (CETA).⁹⁷

3.3.1 – Impetus for Change

⁹⁴ *In the matter of Article 26 of the Constitution and in the matter of the Regulation of Information (Services out-side the State for Termination of Pregnancies) Bill, 1995* [1995] IESC 9; [1995] 1 IR 1.

⁹⁵ Also at issue was the alleged contradiction between the right to life of the unborn and the newly inserted provision for dissemination of information.

⁹⁶ A point returned to elsewhere in this thesis (§6.6). Note that the reasoning adopted by the Court (specifically in relation to how the contradiction should be interpreted) has been criticised: see, Neville Cox 'Judicial Activism, Constitutional Interpretation and the Problem of Abortion: *Roe v Wade* (1973) and *X v AG* (1992)' in O'Dell (ed) *Leading Cases of the Twentieth Century* (Dublin, 2000).

⁹⁷ *Costello v Ireland* [2022] IESC 44. The Comprehensive Economic and Trade Agreement (CETA) is a trade agreement between Canada and the EU which was challenged here by Mr Patrick Costello TD because of potential infringements on Irish state sovereignty. The Court did hold that a referendum might be avoided if certain relevant pieces of legislation are amended.

3.3.1.1 – *Crotty and the Constitutional Requirement*

This category of referendums is unlike the others in this chapter for two main reasons. First, referendums here are the final stage in a much longer process of engagement by the Executive branch with foreign and international powers; amendment by the electorate is the final stamp of approval. Referendums here essentially act as a check on the Executive power in relation to foreign affairs. Second, for the majority of these referendums, the principle from *Crotty v An Taoiseach* applied such that a referendum was constitutionally required in order for the State to ratify any agreement and continue updating membership of the EU.⁹⁸ Given the importance of *Crotty* here, it is worth briefly explaining it.

In 1972 Ireland's request to join the European Communities was accepted and the Government of the day held a referendum to amend the Constitution in order to ratify membership. Introducing the amendment bill, Taoiseach Jack Lynch explained that a constitutional amendment was needed for three reasons: the primacy of the ECJ might run up against Article 34 of the Constitution; the power in the EEC Treaties afforded to the Council regarding international agreements 'could be held to be incompatible with Article 29'; and the referendum allowed the Irish people to 'pronounce in a clear-cut way and on the specific issue of membership for Ireland of the European Communities.'⁹⁹ He went on to say that it was

'not the Government's intention, nor [was] the proposed Constitutional amendment designed to cover, any possible incompatibility with the present Constitution which might arise [...] if we wished to become a member of any political community in Europe which may eventually be created and evolving from the present Communities. ... The question of Ireland's adherence to such a treaty [...] might well require a separate Constitutional amendment.'¹⁰⁰

The proposal of EC membership was put to referendum and was passed by a large majority.¹⁰¹

The situation foreseen by Jack Lynch arose in 1987 when the Treaty of Rome was amended by way of the Single European Act ("SEA"). Ratification of the SEA was

⁹⁸ *Crotty v An Taoiseach* [1987] IESC 4.

⁹⁹ Jack Lynch, Third Amendment of the Constitution Bill, 1971: Second Stage, Dáil Deb 2 December 1971, vol 257 no 6.

¹⁰⁰ *ibid.*

¹⁰¹ 83.1% approval.

challenged by Raymond Crotty TD on a number of bases. The Supreme Court ultimately determined that

‘any attempt by the Government to make a binding commitment to alienate in whole or in part to other States the conduct of foreign relations would be inconsistent with the Government’s duty to conduct those relations in accordance with the Constitution.’¹⁰²

As such, the Government was precluded from ratifying the SEA without first amending the Constitution to allow them to do so.¹⁰³ Ratification was therefore put to referendum and approved by a considerable margin. It is on this basis that each of the European Treaty referendums have been held since 1987. The *Crotty* principle therefore explains the impetus for all of the European Union referendums.

It is of course necessary here to mention the Nice and Lisbon referendums. Each of these referendums resulted in an initial ‘No’ vote before being put to another referendum, where the outcome was reversed. *Crotty* is still the impetus for holding a referendum here.¹⁰⁴ The fact that the Irish government felt compelled to ratify the Treaties, and therefore hold a second referendum, is more a matter of substantive international relations than a matter relevant here.

3.3.1.2 – Non-EU International Treaty Referendums

There are three referendums in the International Relations category that do not concern the ratification of EU Treaties post-*Crotty*. These are: the 3rd Amendment 1972 (Joining the EC); the 19th Amendment 1998 (Good Friday Agreement); and the 23rd Amendment 2001 (Rome Statute Establishing the International Criminal Court). The driver behind the 3rd Amendment 1972 has been explored above; signing up to the primacy of EU law

¹⁰² *Crotty v An Taoiseach* [1987] IESC 4.

¹⁰³ It is essential to flag here another case: *Pringle v Government of Ireland* [2012] IESC 47. Here, the ratification of the European Stability Mechanism Treaty without amendment was challenged. However the Supreme Court found in favour of the Government, specifying that there was no abdication of constitutional power here.

¹⁰⁴ *Crotty v An Taoiseach* [1987] IESC 4. For more on these, see Maria Cahill, ‘Ireland’s Constitutional Amendability and Europe’s Constitutional Ambition: the Lisbon Referendum in Context’ (2008) 9(10) German Law Journal 1191; Gavin Barrett, ‘Building a Swiss Chalet in an Irish Legal Landscape? Referendums on European Union Treaties in Ireland and the Impact of Supreme Court Jurisprudence’ (2009) 5(1) European Constitutional Law Review 32.

required constitutional amendment in order to be workable.¹⁰⁵ The ICC referendum falls along similar lines: Minister for Foreign Affairs Brian Cowen indicated that the Attorney General had advised the Government that ratification required an amendment since the ICC would provide ‘administration of justice’ outside the scope of Article 34.1 of the Constitution.¹⁰⁶ The driving impetus behind the 19th Amendment 1998, which ratified the Good Friday Agreement, is much more complicated. The Agreement constituted the culmination of decades of work in the peace process by community leaders and politicians from Northern Ireland and members of the Irish and United Kingdom governments, among others. The Agreement required considerable change to the Constitution, including removing the territorial claim to Northern Ireland, and establishing a basis for power-sharing institutions. A full account of the impetus behind the Good Friday Agreement requires space and nuance which are beyond the scope of this chapter and indeed this thesis.¹⁰⁷ Suffice it to say that the impetus for the 19th Amendment referendum was to enshrine the peace process in the Constitution.

3.3.2 – Engagement

3.3.2.1 – Turnout

The mean turnout across the eleven referendums in this category is 44.93%. This is the second-lowest of the four categories of referendums, with less than one percent difference between it and last place. While the 3rd Amendment 1972 (Joining the EC) referendum attracted the highest turnout of all – 70.9% – the 23rd Amendment 2001 (ICC) and 24th Amendment Bill 2001 (Nice I) referendums taken together pulled only 34.8% of voters. A notable aspect of turnout here is that the second referendum on the Nice Treaty attracted 14.7% higher turnout than the first,¹⁰⁸ and the second Lisbon referendum saw a 5% increase in turnout.¹⁰⁹ While turnout is limited in its use as a metric, it is worth digging into that example a bit more. In relation to the Nice referendums, the increase in number

¹⁰⁵ Acknowledgment of the primacy of EC law was a requirement of accession to the Community, as established in C-6/64 *Flaminio Costa v ENEL*.

¹⁰⁶ Editorial, ‘“Omnibus” referendum considered by Cabinet’ *The Irish Times* (Dublin 8 March 2001) 10.

¹⁰⁷ See generally Siobhán Fenton, *The Good Friday Agreement* (Biteback Publishing 2018).

¹⁰⁸ From 34.8% in 2001 to 49.5% in 2002.

¹⁰⁹ From 53.1% to 58%.

of voters from the first to the second was just under 450,000.¹¹⁰ The raw numbers suggest that practically all of these new votes went to the Yes side: the number of Yes votes increased by just over 450,000,¹¹¹ while the number of No votes increased by only around 5,000.¹¹² This suggests that what caused the shift in result was not a change in attitude towards the Treaty but rather more people in favour actually showing up to vote. The same cannot be said of the Lisbon referendums. While turnout increased by just under 200,000,¹¹³ the Yes vote increased by nearly 500,000.¹¹⁴ Clearly there was a shift in attitude by at least some of the voters here, which will be examined below. What these examples illustrate is that turnout cannot tell the whole story regarding a referendum's result. For one, low turnout can lead to fringe positions being over-represented in some cases. However, for a more nuanced understanding of the causes of referendum results, we first need to understand the engagement with the issue.

3.3.2.2 – *Level of Campaigning*

The impact of strong campaigns is clearly demonstrated in this category. Looking to the Nice I referendum, in the immediate aftermath of the shock rejection the blame was attributed first and foremost to the Government. Taoiseach Bertie Ahern almost went so far as to accept the blame, saying a few days after the result that the Government recognised that they had not done enough to overcome the No anxieties and persuade people to vote.¹¹⁵ While some politicians blamed the public's preference for *Fair City* over political affairs,¹¹⁶ most blamed the Government's 'incompetent and inept' handling of the referendum.¹¹⁷ Indeed, it was reported that the sentiment in Brussels was the same.¹¹⁸ Broadly, political commentators put the result down to a vigorous, ardent No campaign and

¹¹⁰ 448,762 to be exact. Note that the turnout numbers include those whose votes were spoiled or otherwise invalid. Interestingly, the number of invalid votes in the second Nice referendum was only about one-third that from the first (from 14,887 dropped to 5,384).

¹¹¹ 452,856.

¹¹² 5,409.

¹¹³ 195,061.

¹¹⁴ 461,871.

¹¹⁵ Editorial 'Statement of An Taoiseach' *The Irish Times* (Dublin 9 June 2001) 7.

¹¹⁶ Fine Gael TD for Louth Brenadan McGahon said the No vote showed that 'people are totally politically unaware and are more interested in watching *Coronation Street* or *Fair City* and are not living in the real world.' Reported in Mark Hennessy, 'Yes side is stunned and baffled by voters' decision' *The Irish Times* (Dublin 9 June 2001) 7.

¹¹⁷ Ruairí Quinn, reported *ibid*.

¹¹⁸ Denis Staunton 'EU leaders will see No vote as failure on Government's part' *The Irish Times* (Dublin 9 June 2001) 7.

a comparatively lacklustre Yes campaign. Claims of arrogance abounded and it seemed the Government thought the referendum would be a walkover in their favour, thus doing little positive campaigning.¹¹⁹ Compare that with the second Nice referendum and the conclusions are obvious. There is ample evidence that in the second running Government parties were anxious to campaign more forcefully, and devoted considerable time and money to addressing the claims of the No side.¹²⁰ The most telling evidence of this comes from the Referendum Commission's report on Nice II, where they say that it 'was clear, at this final stage, that there had been a marked increase in the level of knowledge of the issues involved in the referendum.'¹²¹ Richard Sinnott came to the same conclusion, attributing the huge increase in grasp of the issues across the two referendums to the Yes side's uptick in campaigning.¹²² The rerunning of the second Lisbon referendum saw similar changes made to approach: the High Court Judge (later Chief Justice) Frank Clarke, considered media-savvy and able to engage the public, was made Chair of the Referendum Commission and Fine Gael set aside €300,000 for campaigning.¹²³

Campaigning stands out as an issue across this category of referendums. Early EU referendums relied quite heavily on a combination of a generally positive public opinion toward the European Communities and practically no organised No campaign to get ratification across the line. Later referendums suffered as a result of this attitude; in Nice I and Lisbon I that lack of Yes campaigning, and the strong No campaign, contributed to an over-representation of fringe opinions and the promulgation of unfounded anxieties.¹²⁴ Given the complex nature of international agreements, and the relative disconnect to most voters, perhaps this is unsurprising.

¹¹⁹ See Drapier, *An Insider's Guide to Politics*, 'Political establishment must stop sulking and start listening' *The Irish Times* (Dublin 9 June 2001) 5; and Deaglán de Bréadún, 'Seven deadly sins that sank the Yes campaign' *The Irish Times* (Dublin 9 June 2001) 6.

¹²⁰ See Minister for Foreign Affairs Brian Cowen's statements when introducing the Bill for the second Nice referendum: 'However, we as political leaders bear a particular responsibility. If we are honest, we failed collectively last time to energise and enthuse the public, with a turnout of barely more than one third of the electorate.' Deputy Brian Cowen, Twenty-sixth Amendment of the Constitution Bill 2002: Second Stage, Dáil Deb, 4 September 2002 vol 554 no 1.

¹²¹ Referendum Commission, *Report of the Referendum Commission on the Nice Treaty 2002*, 12.

¹²² Richard Sinnott, 'No vote stagnated while Yes side gained hugely', *The Irish Times* (Dublin 21 October 2002) 6. The Irish Times/MRBI poll showed that the electorate's grasp of the issues 'went from 37 per cent at the beginning of the Nice I campaign to 47 per cent at the end of that first campaign, to 53 per cent at the beginning of the Nice II campaign and to 64 per cent a few days before the vote.'

¹²³ 'Party set to spend over €300,000 on Lisbon campaign' *The Irish Times* (Dublin 4 September 2009) 7.

¹²⁴ Theories unconnected to the Treaties about nuclear war and the militarisation of the EU, abortion, immigration, and citizenship featured prominently in the various No campaigns.

3.3.3 – Factors Contributing to Result

3.3.3.1 – EU Attitude and Economics

It is uncontroversial to say that a key factor in many of the referendums in this category is economics. The roaring success of the 3rd Amendment 1972 (Joining the EC) can be attributed in no small part to the economic benefits that Ireland stood to gain from membership of the EEC. The results on other early EU treaties can also be seen in this light. By the time the Single European Act (10th Amendment 1987), the Maastricht Treaty (11th Amendment 1992), and the Treaty of Amsterdam (18th Amendment 1998) rolled around, the economic benefits of EU membership were clear, and opposition was splintered and idiosyncratic.¹²⁵ Traditional opposition from trade unions and left-wing groups declined and by the Maastricht Treaty both the Irish Congress of Trade Unions and the Labour party were actively campaigning for ratification. Given the increase in economic prosperity Ireland experienced by virtue of EU membership, it is unsurprising that the general sentiment, and therefore the referendum results, were positive.

However, in later EU referendums the economic concerns take on a different character. It must not be ignored that in the period between the first and second Lisbon referendums, the economic climate in Ireland changed drastically. By the time of the vote for Lisbon II, it was clear that the global economy was suffering from a generational recession, with Ireland one of the worst hit states in Europe. This inevitably had an impact on voters.¹²⁶ The same sort of concerns fed into the referendum on the European Fiscal Compact three years later, with talk of the bailout and recovery relying on the EU and the Treaty. In one episode which quickly gained notoriety, Minister for Finance Michael Noonan warned that rejection of the Treaty would lead to a much harsher budget the following year.¹²⁷ In this category, the potential economic implications of a vote were front and centre in each

¹²⁵ Opposition in early EU referendums often came from groups concerned with Irish sovereignty, anti-abortion campaigners, and those who saw European militarisation on the horizon.

¹²⁶ Deaglán de Bréadún, 'Economic adversity a key player for Yes campaign' *The Irish Times* (Dublin 5 October 2009) 7.

¹²⁷ Stephen Collins, 'Anger of Noonan's budget warning' *The Irish Times* (Dublin 2 May 2012) 7. He said "If there's a No vote, the budget I'll be planning for later in the year will be dramatically more difficult than if there's a Yes vote. If people think that by voting No they'll avoid further tax cuts and increases, actually a No vote will do the opposite." In the same article, Eamon Gilmore (leader of the Labour Party) stated that rejection would plunge Ireland into unknown territory, and couldn't guarantee that the IMF would continue to provide funding.

referendum, with proponents and opponents both arguing that their side would lead to greater prosperity.¹²⁸

3.3.3.2 – *Level of Understanding*

As with the above category, the level of understanding among the voting public had considerable impact on the results here. Closely connected with the level of campaigning and engagement mentioned above, the two failed referendums can be explained in part by a serious lack of information about the issues.¹²⁹ The Referendum Commission's report following the second Lisbon referendum placed particular emphasis on this point, indicating that the increase in understanding was a key factor in overturning the result. Their report shows that between April 2008 (two months before the first referendum) and October 2009 (just after the second), the percentage of people responding that they did not understand the Treaty at all fell from 62% to 11%.¹³⁰ However, a lack of information has not always proven determinative in the negative sense. The 18th Amendment 1998 (Treaty of Amsterdam) and 23rd Amendment 2001 (International Criminal Court) referendums each passed with no difficulty, despite a lack of substantial engagement and relatively little awareness of the issues.¹³¹ What this shows is perhaps that a lack of understanding of the issues *combined with general anxieties* around those issues can lead to a default No vote. Information and campaigning therefore go hand-in-hand as factors contributing to the results of a referendum.

3.3.3.3 – *Other Factors*

¹²⁸ The involvement of the Irish Farmers' Association in each of the EU Treaty referendums is worth acknowledging here, in particular their opposition to the Lisbon Treaty.

¹²⁹ Deaglán de Bréadún, 'Seven deadly sins that sank the Yes campaign' *The Irish Times* (Dublin 9 June 2001) 6.

¹³⁰ Referendum Commission, *Report of the Referendum Commission on the Lisbon Treaty 2009* (2009) 14. The percentage of people who understood the referendum (either very well, quite well, or to some extent) rose from 20% to 72% across the same period). See also the report of an Irish Times/MRBI poll, where the most common reason (30%) for voting No was 'I don't know what I'm voting for/don't understand it' – reported in Stephen Collins, 'Lisbon Treaty faces rejection as No vote doubles in latest poll' *The Irish Times* (Dublin 6 June 2008) 9.

¹³¹ The Amsterdam Treaty referendum was overshadowed to a large extent by the Good Friday Agreement referendum on the same day. A poll carried near the day of the vote showed that many people had not even been aware that there was a second referendum. See Róisín Ingle, 'Belfast eclipses Amsterdam for Dubliners' *The Irish Times* (Dublin 23 May 1998) 6: one officer reported that "when we gave them the two slips, some people came back and thought we had given them one too many".

Another category of factors must be addressed. In three of the EU referendums, specific concessions or clarifications played a role in securing a Yes vote. In relation to the 11th Amendment 1992 (Maastricht Treaty) referendum, a considerable amount of attention was devoted to the possible implications for abortion rights. With the vote coming not long after the *X* case,¹³² general fears about EU-mandated liberalisation on this issue stirred up some opposition to the Treaty early on. In anticipation of this, the Government of the day secured the Maastricht Protocol, which protected the 8th Amendment from challenge by European courts and clarified that the status of abortion in Irish law would not be changed by the Treaty.¹³³ Similarly, the Seville Declaration 2002 was attained after the failed Nice I referendum in 2001. This declaration from the European Council affirmed Ireland's neutrality and recognised the right to decide itself how to participate in any activities relating to the European Security and Defence Policy.¹³⁴ Given that fears of EU militarisation had been a considerable factor in the failure of Nice I, the impact of the Declaration on Nice II should be acknowledged. Finally, after Lisbon I, Brian Cowen presented Irish concerns to the European Commission and received a number of specific clarifications regarding the Treaty before it went to a second referendum. These clarifications again affirmed Irish neutrality, and touched on the interaction of the Treaty with constitutional rights, and acknowledging Ireland's commitment to workers' rights.¹³⁵ It was also agreed that Ireland would retain its Commissioner.

3.3.4 – Responses

3.3.4.1 – Another Referendum

The most obvious response to referendums here is of course the re-running of the Nice and Lisbon referendums. While this has been covered already in this section, there are a few more things worth noting. Immediately after the Nice I vote, it was clear that the Government was preparing for another referendum. Taoiseach Bertie Ahern, speaking just two days after the vote, repeated that 'the Government remain[ed] firmly committed to

¹³² *X v Attorney General* [1992] IESC 1, [1992] 1 IR 1.

¹³³ Maastricht Protocol Number 17.

¹³⁴ Seville Declaration of 21st June 2002.

¹³⁵ For more see European Commission, *Presidency Conclusions, Council of the European Union* Brussels, 11-12 December 2008.

achieving enlargement on schedule’ and that he personally remained ‘convinced of the case for the Nice Treaty.’¹³⁶ Introducing the Bill for the second Nice referendum, Minister for Foreign Affairs Brian Cowen noted the ‘major steps’ the Government had taken to address concerns: The National Forum on Europe was established to provide a venue for debate on European issues between politicians, interest groups, and citizens;¹³⁷ and a ‘rigorous new system of Oireachtas scrutiny of EU business’ was also put in place.¹³⁸ It was established above that the Government also committed a great deal more energy to campaigning here.

The same sort of response can be seen in the Lisbon II referendum. From the moment the result was clear Taoiseach Brian Cowen refused to rule out another referendum.¹³⁹ This is no surprise – there was little room in the EU for Ireland to refuse to ratify the treaty, as is clear from Micheál Martin’s speech introducing the second referendum Bill:

‘In respecting the will of the people, the Government has also had regard to the desire of other member states, our European partners, to see the Lisbon treaty enter into force. As members of the Union, we could not just walk away from the treaty as some would have us do. That is not the way the Union works.’¹⁴⁰

An All-Party Oireachtas Sub-Committee on Ireland’s Future in the European Union was established and delivered a report to the Government on 27th November of that year. Delivering the findings of the report, Taoiseach Brian Cowen noted with optimism that a majority of the population favoured continued membership of the EU, and promised to use the findings to inform his deliberations with the European Council that week.¹⁴¹ The Government had also commissioned independent research into the reasons for the No vote, which it claimed influenced the approach to Lisbon II.¹⁴²

3.3.4.1 – Other Responses

¹³⁶ Editorial ‘Statement of An Taoiseach’ *The Irish Times* (Dublin 9 June 2001) 7.

¹³⁷ The forum was closed in the aftermath of the second Lisbon referendum.

¹³⁸ It is unclear exactly what this entailed, and the impact it had on the referendums.

¹³⁹ Stephen Collins, Jamie Smyth, and Derek Scally, ‘Crisis for EU as Lisbon Treaty is decisively rejected by voters’ *The Irish Times* (Dublin 14 June 2008) 1.

¹⁴⁰ Minister for Foreign Affairs Micheál Martin, Twenty-Eighth Amendment of the Constitution (Treaty of Lisbon) Bill 2009: Second Stage, Dáil Deb 8 July 2009, vol 687 no 4.

¹⁴¹ Which ultimately led to the clarifications noted above. Taoiseach Brian Cowen, Report of Sub-Committee on Ireland’s Future in the EU: Statements, Dáil Deb 9 December 2008, vol 670, no 1.

¹⁴² *ibid.*

Other than those two referendums, there is little by way of responses in this category. Given that all of the other referendums here were votes about whether or not to ratify international treaties, it is no surprise that the only response was to ratify those treaties. However, the 19th Amendment 1998 (Good Friday Agreement) does require some comment. What is unique about this referendum is that even after approval by the electorate, the constitutional amendment was provisional. That is, the amendment inserted by the referendum stated ‘[i]f the Government declare that the State has become obliged, pursuant to the Agreement, to give effect to the amendment of this Constitution referred to therein, then, notwithstanding Article 46 hereof, this Constitution shall be amended as follows...’¹⁴³ An initial twelve-month grace period was provided for in the amendment, whereby if the appropriate declaration was made, then the amendments contained in an extraneous document would then come into force.¹⁴⁴ This declaration was only to be made by the Government once appropriate measures had been taken in the UK. This unusual mechanism reflected the tripartite nature of the Agreement and the fact that it all depended first on the Agreement being approved in the Northern Ireland referendum. The declaration was made on 2nd December 1999, after the UK officially commenced the Northern Ireland Act 1998.¹⁴⁵ On that date, the Constitution was amended further, a singularly unique method of amendment so far.

3.4 – Voting Referendums

Moving to the third category of referendums, I am concerned here with referendums relating to voting rights and the electoral process more generally. There are eight referendums relevant to this category, again spanning decades. The first three referendums in the State (other than to ratify the Constitution) fall under this heading, as does the more recent 35th Amendment Bill 2015 (Lowering Age of Presidency). The referendums under this heading could variously have been examined under the Social/Moral Constitutional rights or State Structures categories, however there is a value to analysing them in their

¹⁴³ This was done by having two documents – the amendment to the Constitution inserted by referendum took force immediately, but made reference to an external document (The Nineteenth Amendment of the Constitution Act, 1998) which contained other conditional amendments, which would only be inserted into the Constitution once the appropriate declaration had been made. This mechanism of amending the Constitution by reference to an external document was challenged in *Morris v Minister for the Environment* [2002] IEHC 5, and was upheld as legitimate.

¹⁴⁴ This period could be extended, and was.

¹⁴⁵ Commenced by The Northern Ireland Act 1998 (Commencement No. 5) Order 1999.

own right. For one, understanding them in this way exposes a stronger relation between them than would be seen between, say, the minimum age of voting and the social rights examined above. Second, they are unique in that they have something of a reflexive character; a democratic mechanism is used to calibrate the State's other mechanisms of democracy. Understanding these referendums together offers a more targeted insight into Ireland's attitude toward the referendum as a method of democratic decision-making. One thing to note about this category of referendums is that it has the highest proportion of rejections – four of the eight called have been rejected.

3.4.1 – Impetus for Change

3.4.1.1 – Committee Recommendations

Of the eight referendums here, six were called on foot of or with reference to a recommendation by a committee established to examine the Constitution. The only two which were not based on recommendations are the 3rd Amendment Bill 1959 (FPTP) and the 9th Amendment 1984 (Non-Citizen Franchise). The 1966 Committee on the Constitution was used as support for change in relation to the 3rd Amendment Bill 1968 (Dáil Constituency Boundaries),¹⁴⁶ the 4th Amendment Bill 1968 (FPTP II),¹⁴⁷ the 4th Amendment 1972 (Age of Voting),¹⁴⁸ and the 7th Amendment 1979 (Seanad Franchise).¹⁴⁹ The 20th Amendment 1999 (Local Government) was based on recommendations from the Constitution Review Group 1996,¹⁵⁰ as well as a Joint Committee on the Environment and Local Government and the Chambers of Commerce Ireland. Finally, the 35th Amendment Bill 2015 (Lowering Age of Presidency) had its origin in the 2012 Constitutional Convention,¹⁵¹ and the subsequent All-Party Oireachtas Committee on the Constitution.¹⁵²

¹⁴⁶ Informal Committee on the Constitution, *Report* (PR 9817, 1967) 19.

¹⁴⁷ *ibid* 21-25.

¹⁴⁸ *ibid*; see also the debates at Fourth Amendment of the Constitution Bill, 1972: Second Stage, Dáil Deb, 5 July 1972, Vol 262, No 5.

¹⁴⁹ Informal Committee on the Constitution, *Report* (PR 9817, 1967) 28-33.

¹⁵⁰ Constitution Review Group, *Report* (PN 2632, 1996), 396.

¹⁵¹ Convention on the Constitution, *First Report* (March 2013) section 2.1.

¹⁵² All-Party Oireachtas Committee on the Constitution, *Third Progress Report* (Pn 6250, 1998) 13.

It is worth pausing here to dig deeper into the 1966 Committee's recommendations. In particular the relation to the two referendums in 1968, the 3rd Amendment Bill 1968 and the 4th Amendment Bill 1968. The latter of these concerned a proposal to move the electoral system from PR-STV to FPTP.¹⁵³ This exact proposal had been put before the people at referendum in 1959 by Taoiseach Éamon de Valera and rejected; condemned by opponents as an attempt to consolidate power in the ruling Fianna Fáil party. In its report, the 1966 Committee never even examined the possibility of moving to FPTP, instead only examining the possibility of moving to an Alternative Vote system.¹⁵⁴ They went so far as to say that if 'the Oireachtas decides now to reject P.R. it will, in effect, be going against the decision of the people as indicated in the 1959 Referendum.'¹⁵⁵ The 3rd Amendment Bill 1968 is a similar story: the 1966 Committee examined the area but did not recommend the kind of change put forward by Fianna Fáil in the referendum. Despite this, and despite vigorous opposition at every stage of the Oireachtas debate, the amendment proposal passed through the Oireachtas and went to referendum. Both amendments were rejected by a significant margin.

In fact this loose basis in recommendations – that is, the recommendations do not explicitly call for a change, and if they do then it is not the same as the change subsequently proposed by Government – is a feature of a few more of the referendums here. The 1966 Committee, which formed the basis for the 1972 referendum to reduce voting age from 21 to 18, and the 1979 referendum to extend Seanad franchise to other universities, refrained from forwarding explicit recommendations and instead adduced arguments both for and against changes. However, the two most recent referendums here have their bases in explicit recommendations to this effect by the 1996 Constitution Review Group. These are the 1999 referendum to amend the term length for local government elections and in 2015 to reduce age of presidency from 35 to 21.

3.4.1.2 – Other Sources of Change

To briefly return to the 1968 referendums mentioned above, these two referendums combined with the 3rd Amendment Bill 1959 (FPTP) have more self-serving political

¹⁵³ That is, Proportional-Representation Single-Transferable Vote, to First-Past-the-Post.

¹⁵⁴ Informal Committee on the Constitution, *Report* (Pr 9817, 1967).

¹⁵⁵ Informal Committee on the Constitution, *Report* (Pr 9817, 1967).

origins. In each of these referendums, the ruling Fianna Fáil party stood to gain the most from the proposed changes. A move from PR-STV to FPTP (the 3rd Amendment Bill 1959 and 4th Amendment Bill 1968) would have benefited Fianna Fáil as the largest party by allowing them to increase their majority.¹⁵⁶ Similarly, the proposal in the 3rd Amendment Bill 1968 to redraw constituency boundaries and give greater weight to rural constituencies can be seen in the same light; Fianna Fáil at the time was the dominant party in rural Ireland and so stood to gain the most from overrepresentation of these constituencies. Of course, it would be an oversimplification to assert that these referendums were for the sole purpose of entrenching power in the dominant political party calling them.¹⁵⁷ However, the vociferous opposition from Fine Gael, Labour, trade unions, students, and other groups centred on this point, and to a degree it is compelling.¹⁵⁸

Finally, then, the 9th Amendment 1984 stands alone when considering the impetus for change. This amendment proposed to allow non-Irish citizens to vote in Dáil elections, and reciprocate the corresponding legislation in the UK.¹⁵⁹ This was first attempted through ordinary legislation, but the Bill was referred by the President to the Supreme Court under Article 26 of the Constitution.¹⁶⁰ In their ruling, the Supreme Court concluded that the Constitution provided that only Irish citizens were eligible to vote in these elections.¹⁶¹ Accordingly, the matter was put to referendum, and passed without much controversy.

3.4.2 – Engagement

3.4.2.1 – Turnout

¹⁵⁶ One of the key characteristics of PR-STV is that it favours multi-party outcomes. That is, it leads to more parties being represented in parliament and prevents the sort of huge majority elections seen in FPTP systems.

¹⁵⁷ For example, increased representation for rural constituencies had the benefit of eschewing the dominance of urban concerns in the Dáil, and was thought to possibly remedy the decline of rural Ireland.

¹⁵⁸ It must be noted that at the time of the 1968 referendums, a significant number of the parliamentarians in the Dáil had either been part of, or were closely associated with, the Civil War and subsequent policy of abstentionism in the 1920s and 30s. As a result there was still a huge amount of acrimony between Fianna Fáil and Fine Gael.

¹⁵⁹ The Ireland Act 1949 granted Irish citizens resident in the UK the right to vote in elections to Westminster.

¹⁶⁰ *In Re Article 26 and the Electoral (Amendment) Bill 1983* [1984] 1 IR 268.

¹⁶¹ *In Re Article 26 and the Electoral (Amendment) Bill 1983* [1984] 1 IR 268.

Looking at turnout in this category, the average across the eight referendums is 53.55%. Looked at individually, however, there is a wide discrepancy. The first three referendums here, examined in detail above, attracted high turnout: 58.4% in 1959 and a very high 65.8% for the two in 1968. However, the 7th Amendment 1979 (Seanad Franchise) attracted a miserable 28.6% of the electorate, while only 47.5% showed up for the 9th Amendment 1984 (Non-Citizen Franchise). Also, while turnout was high for the 35th Amendment 2015 (Lowering Age of Presidency), most of this can be attributed to the coeval same-sex marriage referendum, as the result (a resounding 73.1% against) and engagement testifies.¹⁶² The high turnout in the early referendums can be attributed to the incredibly divisive campaigns and the perception of the issues being of high importance. Also relevant here might be that the Constitution was just barely 30 years old by the time of the 1968 referendums, which may have contributed to the populace's engagement with its amendment. Another relevant, albeit less sophisticated, factor on turnout is that many of the referendums were dry, technical, and unexciting. It is no surprise that fewer people were motivated to vote for the term length of local government councils than, say, any of fundamental rights mentioned above.

3.4.2.2 – *Level of Campaigning*

The level of campaigning on the first three referendums here was very high. Given the clear division between the main political parties, and that they saw the potential move to FPTP as an existential threat, vigorous campaigning was no surprise. Speaking at a rally outside the GPO the night before the vote on the 1968 referendums, Mr James Dillon TD of Fine Gael described the referendum as a watershed moment in Irish political history, saying it was to be 'more important than any general election' and that a Yes vote would lead to 'many years of Fianna Fáil rule, even though they will have received only a minority of the votes cast'.¹⁶³ He urged people to vote No, saying that if they did not, they may never get the chance again, and drew comparisons to Hitler's consolidation of power in Germany.¹⁶⁴ The high level of campaigning throughout these referendums can be

¹⁶² Examined below.

¹⁶³ 'Today's your chance – Dillon' *The Irish Times* (Dublin, 16 October 1968) 10. Present at the rally were prominent FG TDs, including Liam Cosgrave and Declan Costello, as well as some Labour TDs, such as Paddy Belton.

¹⁶⁴ *ibid*; he also mentioned Stalin and Brezhnev.

summed up by a statistic published in *The Irish Times* on the eve of the referendum – in the month since September 10th, the paper had received 321,881 words in scripts from the various parties.¹⁶⁵ Fianna Fáil contributed the most (130,344) with Fine Gael (88,922) and Labour (78,355) close behind.

Later referendums in this category do not show the same passionate campaigning. For the most part, this can be attributed to the fact that very few of the issues provoked opposition. The 4th Amendment 1972 to reduce the age of voting to 18 attracted cross-party support and no significant opposition campaign got off the ground. Most of the campaigning for that referendum concentrated on the simultaneous 5th Amendment vote, to remove the special position of the Catholic Church. The Seanad referendum in 1979 is the same story; the only opposition recorded on the day of the vote came from Senator Trevor West, who opposed it only on the grounds that the implementing legislation had not yet been drawn up.¹⁶⁶ The 35th Amendment Bill 2015 (Lowering Age of Presidency) is an interesting standout here. It suffered from the same lack of campaigning, yet while in others this led to easy adoption, here it led to rejection by a huge margin.¹⁶⁷ Again, the reason this vote attracted so little attention is because it was side-lined by the Marriage Equality referendum on the same day. Writing soon after the result, Colum Kenny noted the distinct lack of coverage on the vote; how a week before the vote an RTÉ radio programme on young people's needs had not mentioned the referendum, and that when time was set aside for input from politicians on the vote, the line-up was one Fine Gael TD and a comedian.¹⁶⁸ Tánaiste Joan Burton attributed the result to the same factors, saying that this referendum 'had not generated anything like a similar level of interest'.¹⁶⁹

3.4.3 – Factors Contributing to Result

¹⁶⁵ '321,800 words' *The Irish Times* (Dublin, 16 October 1968) 1.

¹⁶⁶ Olivia O'Leary, 'Referendums poll likely to be low' *The Irish Times* (Dublin, 5 July 1979) 1. As well as some opposition in principle that the proposal did not go far enough.

¹⁶⁷ It was rejected by 60.5%.

¹⁶⁸ Colum Kenny, 'Young people deserve better than a failed presidency referendum' *The Irish Times* (Dublin 24 May 2015).

¹⁶⁹ Reported by Mary Minihan and Mark Hilliard, 'Presidential age vote defeated by three to one margin' *The Irish Times* (Dublin, 23 May 2015).

3.4.3.1 – Apathy

Continuing the theme from the last section, one of the main contributing factors in many of the referendums here is apathy. After the fiery first few issues, referendums on voting matters concerned relatively uninspiring and uncontroversial topics. This was felt particularly strongly in relation to the 20th Amendment 1999 (Local Government). Mark Brennock reported that politicians had encountered ‘more voter apathy in the run-up to [these] polls than on any previous occasion.’¹⁷⁰ Just a day later, *The Irish Times* again commented that the ‘referendum probably broke all records for public indifference.’¹⁷¹ The referendum was conspicuous in the absence of media coverage. Returning to the 1979 Seanad referendum, the exact same picture emerges. Describing the proposal as ‘obscure in its intent’, Olivia O’Leary reported disinterest and confusion about the amendments.¹⁷² The historically-low turnout is no surprise then. One last example confirms this general trend. Reports on the 9th Amendment 1984 (Non-Citizen Franchise) referendum read the same way. One commenter claimed that the campaign about the referendum was stuck in only as an afterthought, to accompany the European Parliament and Dáil bye-election votes taking place on that day.¹⁷³ Another pointed to the number of spoiled ballots, reflective of confusion and the lack of publicity given to the matter.¹⁷⁴ While apathy can be put down to a lack of campaigning, it can also be seen that the proposals which attracted such apathy were uncontroversial. With fairly sensible changes proposed, engagement was never likely to be high, and the results were a near certainty.

3.4.3.2 – Other Factors

A lack of understanding goes hand-in-hand with the sort of low-level campaigning that is seen above. However, there is little point in re-covering this old ground. Instead, it is worth digging a little deeper into what factors contributed to the failure of the first three

¹⁷⁰ Mark Brennock, ‘Low poll turnout feared as politicians encounter apathy’ *The Irish Times* (Dublin, 11 June 1999) 1.

¹⁷¹ Drapier, An Insider’s Guide to Politics, ‘Battles are done with voter apathy a clear winner’ *The Irish Times* (Dublin, 12 June 1999) 8.

¹⁷² Olivia O’Leary, ‘Referendums poll likely to be low’ *The Irish Times* (Dublin, 5 July 1979) 1.

¹⁷³ ‘Post-mortem underway before counting began’ *The Irish Times* (Dublin, 15 June 1984).

¹⁷⁴ ‘3-1 in favour of vote change’ *The Irish Times* (Dublin, 16 June 1984).

referendums in this category – the 1959 (FPTP),¹⁷⁵ 1968 (FPTP II), and 1968 (Constituency Boundaries) referendums. While at first blush it appears the divide can be drawn along party line (Fianna Fáil campaigned for Yes, Fine Gael No), this would be mistaken. First, at the 1959 (FPTP) referendum Taoiseach and leader of Fianna Fáil Éamon de Valera (who had proposed the amendment) was elected President while his proposal was rejected, a point which militates against a conclusion of simple party alliance being the main factor. Second, in 1968 Fianna Fáil enjoyed a significant majority in the Dáil, and just a few months after the referendum secured another term as the majority party.¹⁷⁶ Clearly the referendum result was not a straight reflection of the population's attitude toward Fianna Fáil, and equally clearly, plenty of Fianna Fáil voters rejected the proposals. Without sophisticated analysis or exit polls from the time, it would be unwise to speculate on the reasons that led to the result. However, it is possible at least to say that the arguments of the No campaign must have taken hold to some degree. Proportional representation had been working, and it seems the people had no appetite for change.

3.4.4 – Responses

3.4.4.1 – Another Referendum

Finally, then, what responses have come from referendums in this category? Most obvious here is that the 3rd Amendment Bill 1959 (FPTP) referendum was run again in 1968; the 1968 referendum was a straightforward re-running of the 1959 proposal. The other 1968 referendum, to amend the process for constituency boundaries, was closely connected to some of the proposals from 1959, but was also a more explicit response to the latter. After the result was clear in 1959, Seán Lemass (soon to be leader of Fianna Fáil) said it showed that rural voters preferred FPTP, and so there must be changes made to the constituency boundaries,¹⁷⁷ explicitly laying the groundwork for the 1968 referendums. The opposite effect may have accrued from the 35th Amendment Bill 2015 (Lowering Age of Presidency). The stark defeat of the proposal seems to have poured cold water on the

¹⁷⁵ This proposal contained a wide range of different changes, among them amendments to the constituency proportions and the establishment of a Constituency Commission. However, the switch to FPTP is the most significant among them.

¹⁷⁶ In the 1969 General Election, Fianna Fáil lost no seats, and retained a majority of 25 TDs over Fine Gael.

¹⁷⁷ “‘Inestimable honour,” says de Valera’ *The Irish Times* (Dublin, 20 June 1959) 1.

potential referendum to reduce the age of voting from 18 to 16/17. Such a referendum has been in the works for a long time, and was explicitly committed to by Fine Gael in their 2011 election manifesto.¹⁷⁸ Again, it is difficult to draw too much from Fine Gael's silence on the matter, but it is undoubtedly a factor they must consider.

3.4.4.2 – Other Responses

One notable response, or rather lack of response, relates to the 7th Amendment 1979 (Seanad Franchise). The amendment enacted by that referendum gave the Dáil the power to legislate and extend Seanad franchise to members of other universities outside those named in the Constitution.¹⁷⁹ From 1979 until 2023, no such legislation appeared. This lack of action was challenged in the High Court and ultimately the Supreme Court in *Heneghan v Minister for Housing, Planning & Local Government*.¹⁸⁰ The plaintiff there argued that, since the changes envisioned by the 1979 Amendment had not been implemented, the electoral system was operating unconstitutionally. More specifically, he argued that the 7th Amendment 1979 *mandated* the Government to legislate for changes to Seanad franchise, despite the wording being discretionary.¹⁸¹ The case was dismissed by the High Court,¹⁸² but successful on appeal to the Supreme Court.¹⁸³ Murray J (for the majority) held that the effect of the 7th Amendment was to make aspects of Article 18 constitutionally unworkable unless the relevant provision was construed as imposing a duty to legislate for such a change in franchise.¹⁸⁴ Particularly interesting here is the fact that, in coming to his conclusion, Murray J took into account the polling cards sent to voters in 1979 when determining what the intention of the amendment was, and what people thought they were voting for.¹⁸⁵ Finally, the 1969 General Election can be seen as

¹⁷⁸ Page 7 of the manifesto states 'Fine Gael will reduce the voting age to 17 and give eligible citizens the right to vote at Irish embassies in the Presidential election.'

¹⁷⁹ The only members of the public who can vote in Seanad elections are graduates of certain universities in Ireland.

¹⁸⁰ *Heneghan v Minister for Housing, Planning & Local Government, Government of Ireland, Attorney General* [2023] IESC 7.

¹⁸¹ The inserted provision reads 'Provision may be made...'. Article 18.4.2°.

¹⁸² *Heneghan v Minister for Housing, Planning & Local Government, Government of Ireland, Attorney General* [2021] IEHC 716.

¹⁸³ *Heneghan v Minister for Housing, Planning & Local Government, Government of Ireland, Attorney General* [2023] IESC 7.

¹⁸⁴ *Heneghan v Minister for Housing, Planning & Local Government, Government of Ireland, Attorney General* [2023] IESC 7 (Murray J).

¹⁸⁵ *ibid* [100]-[107] (Murray J).

a response to the defeat of the 1968 referendums. The continued support for Fianna Fáil mentioned above indicates a separation between party and issue at the referendum.

3.5 – State Structures / Powers Referendums

The final category of referendums concerns those related to the structures of the State or the division of powers within the State. The six referendums here concern the powers of the Adoption Board,¹⁸⁶ Cabinet confidentiality,¹⁸⁷ constitutional provisions on judicial remuneration,¹⁸⁸ Oireachtas inquiries powers,¹⁸⁹ the existence of the Seanad,¹⁹⁰ and the establishment of the Court of Appeal.¹⁹¹ Of these six, the 30th Amendment Bill 2011 (Oireachtas Inquiries) and 32nd Amendment Bill 2013 (Abolition of Seanad) referendums were rejected, while the rest were passed. The majority of these are relatively recent – four of the six have taken place since 2011 – and those same four were taken within two years of each other. What differentiates this category from the others (particularly the voting category) is that they are concerned with delineating what the branches of Government can and cannot do, and how they relate to one another. In some ways these referendums come closest to reframing the separation of powers in the State

3.5.1 – Impetus for Change

3.5.1.1 – Committee Recommendations

A few of the issues at referendum in this category had been considered by relevant bodies prior to the vote. The 17th Amendment 1997, which would alter the rules around Cabinet confidentiality so that the High Court could order certain information be disclosed when it was in the public interest, had originated in the Constitution Review Group's 1996 report. The report urged caution, but did recommend that the relevant articles of the

¹⁸⁶ 6th Amendment 1979.

¹⁸⁷ 17th Amendment 1997.

¹⁸⁸ 29th Amendment 2011.

¹⁸⁹ 30th Amendment Bill 2011.

¹⁹⁰ 32nd Amendment Bill 2013.

¹⁹¹ 33rd Amendment 2013.

Constitution could be amended to allow such disclosure in the public interest.¹⁹² The proposal put forward in the 30th Amendment Bill 2011 (Oireachtas Inquiries) had been considered by a Joint Committee on the Constitution shortly beforehand.¹⁹³ This Committee had recommended that a referendum be held. Additionally, the 33rd Amendment 2013 to establish a new Court of Appeal had been recommended by a working group chaired by (then) Chief Justice Murray from 2006 to 2009.¹⁹⁴ This working group comprised members of the Judiciary, the Bar Council, the Law Society, members of the Department of An Taoiseach, members of the Department of Justice, as well as senior officials from the Attorney General's office.

3.5.1.2 – Judicial Decisions and High-Profile Incidents

An interesting commonality here is that many of the referendums were called as a response to, or with reference to, court decisions and related high-profile incidents. The 6th Amendment 1979, which sought to grant powers to the Adoption Board that were otherwise only exercisable by judges, was based on a decision of the Supreme Court in *McL v An Bord Uchtála* from just three years earlier.¹⁹⁵ The decision there had not explicitly mandated a constitutional amendment, but it raised questions about the constitutionality of powers of the Adoption Board.¹⁹⁶ Introducing the Bill to amend the Constitution, Minister for Justice Gerry Collins noted that the case had a 'bearing on the introduction of the Bill', and it is returned to throughout the debate.¹⁹⁷ Similarly, the 17th Amendment 1997 (Cabinet Confidentiality), flowed directly from the Beef Tribunal and the subsequent case *AG v Hamilton*.¹⁹⁸ The case concerned the ability of the courts to compel members of the Government to disclose information from cabinet meetings in the

¹⁹² Constitution Review Group, *Report* (PN 2632, 1996) 84.

¹⁹³ Joint Committee on the Constitution, *Fifth Report – Article 15 of the Constitution: Review of the Parliamentary Power of Inquiry* (Pn A11/0140, 2011).

¹⁹⁴ See comments of Minister for Justice and Equality Alan Shatter: Thirty-third Amendment of the Constitution (Court of Appeal) Bill 2013: Second Stage, Dáil Deb, 11 July 2013, vol 810, no 3.

¹⁹⁵ *M v An Bord Uchtála* [1977] IR 287.

¹⁹⁶ The Court had avoided making a declaration as to its constitutionality by deciding the case on the narrower ground of non-observance of statutory requirements.

¹⁹⁷ Minister for Justice Gerry Collins, Sixth Amendment of the Constitution (Adoption) Bill, 1978: Second Stage, Dáil Deb, 7 February 1979, vol 311, no. 4.

¹⁹⁸ *Attorney General v Hamilton* [1993] 2 IR 250.

context of an inquiry into possible Government malpractice.¹⁹⁹ The referendum was called with the issue fresh in the public psyche, and more tribunals in the works.

The 30th Amendment Bill 2011 (Oireachtas Inquiries) to grant the Oireachtas explicit powers of inquiry was a direct response to the *Maguire v Ardagh* case.²⁰⁰ This case had been brought on foot of the infamous ‘Abbeylara incident’, where the Gardaí Emergency Response Unit (ERU) had fatally shot a man with bipolar affective disorder who had barricaded himself into a house with a shotgun. The incident gained a huge amount of national attention, and when the family sought an investigation into alleged mishandling of the situation by the ERU, the government of the day set up an Oireachtas inquiry. When this inquiry sought to compel members of the ERU to give evidence, judicial review was sought leading to *Maguire*, wherein the Supreme Court determined that the Oireachtas does not have powers to compel witnesses and declared aspects of the Oireachtas Inquiry to be *ultra vires*.²⁰¹ The referendum was therefore proposed to overturn *Maguire* and grant these powers to the Oireachtas. It was rejected.

3.5.1.3 – Election Manifestos and the 2008 Financial Crash

Finally, then, a recurring driver for amendment here is election manifestos. The 1997 Cabinet Confidentiality referendum was promised in the election manifestos of Fianna Fáil and the Progressive Democrats for the 1997 General Election. Similarly, the four referendums taken after 2011 all find their origin in the Fine Gael election manifesto of the same year. Under the heading ‘A New Politics’, the manifesto laid out FG’s plans to hold a referendum on what they called ‘Constitution Day’, where the people would be ‘asked to approve the abolition of the Seanad and other changes to the articles of the Constitution covering the institutions of the State – principally the Executive, the Dáil, the Presidency and the Judiciary.’²⁰² The overarching approach of the manifesto was to

¹⁹⁹ The Tribunal of Inquiry into the Beef Processing Industry was a politically significant inquiry into malpractice in the beef industry, and accusations of Government interference and favouritism. The Tribunal’s report ultimately brought down the then Government and exposed issues which became national scandals.

²⁰⁰ *Maguire v Ardagh* [2002] IESC 21.

²⁰¹ Leading to the establishment of the Barr Tribunal, which was tasked with carrying out the inquiry. The family impacted by the Abbeylara incident had initially sought this sort of Judicial Tribunal. The Oireachtas Inquiry was preferred for reasons of cost and speed. The Barr Tribunal was criticised for its length and the cost accrued (€18 million).

²⁰² 2011 Fine Gael Manifesto, page 62.

overhaul the political system in the wake of the 2008 financial crisis, at a time where austerity measures and a grim economic outlook had provoked ire against politicians and caused huge swathes of the population to become cynical and jaded with the State's political machinations. While an in-depth analysis of the motivations for this broad overhaul is beyond the remit of this chapter, it is sufficient to say here that the economic crash and the subsequent turn against politics motivated these four referendums.

3.5.2 – Engagement

3.5.2.1 – Turnout

Examining the average turnout in referendums here again reveals something telling. The average across all six votes is 44.33% – the lowest across all four categories. The highest attracted here is 55.9% (for the 29th Amendment 2011 (Judges' Remuneration) and 30th Amendment Bill (Oireachtas inquiries) referendums), while the lowest is a dreadful 28.6% (for the 6th Amendment 1979 (Adoption Board) referendum), joint lowest in the history of the State. In one sense the average turnout here is not as useful as it is in other categories – the fact that there are only six referendums here means that the average is skewed by that exceptionally low turnout in 1979. But in another way it still accurately portrays the sort of engagement with these issues. The six referendums were taken on four separate occasions (two were taken on the same day in 2011,²⁰³ and two on the same day in 2013²⁰⁴), and individual turnout figures are: 28.6% in 1979; 47.2% in 1997; 55.9% in 2011; and 39.2% in 2013. While the 1979 vote does skew the average slightly, the other turnouts tell a similar story. The timing of the last four referendums is important here. As mentioned above, political engagement in the wake of the financial crisis was mired by popular apathy and a general sense of jadedness with political institutions. In that light, the 2013 figure is understandable, and the 2011 figure may even seem relatively high. As with the voting category, it is worth mentioning that these sorts of issues are not the kind to inspire high engagement and interest from the general public, dealing as they often do with the technical internal workings of the State.

²⁰³ 29th Amendment 2011; and 30th Amendment Bill 2011.

²⁰⁴ 32nd Amendment Bill 2013; and 33rd Amendment 2013.

3.5.2.2 – Level of Campaigning

Unsurprisingly, the referendums that attracted low turnout also indicate very low levels of campaigning. In the 6th Amendment 1979 (Adoption Board) referendum, the Government's approach was undersold somewhat when it was described as 'low-key'. Speaking just after the vote, Jack Stakelum, chairman of the only group to campaign for a 'Yes' vote, described how people around the country knew nothing about the referendum, and expressed disappointment that the Government only joined the campaign the Thursday before polling day.²⁰⁵ He put the low turnout down to the fact that the vote was held the day after European and local elections, a decision against which they had (fruitlessly) argued.²⁰⁶ One reason given for this low-key campaign was that those in charge of the official publicity campaign found it difficult to lucidly explain the Government's somewhat vague proposals.²⁰⁷ Cross-party support also contributed to the low-key campaign, as is also seen in the 1997 Cabinet Confidentiality referendum.

The story of the post-2011 referendums is less a story of low- or high-level campaigning, and more a story of voter apathy. In the lead up to the 2013 referendums on the Court of Appeal and Seanad, the Government parties were indeed out campaigning, but the worry was that voters simply did not care enough to actively engage with the issues. An article published in *The Irish Times* a few days before the vote quoted a Fine Gael strategist as saying that the party was wary of being complacent, but that they were aware of a 'high degree of public indifference' regarding the issues.²⁰⁸ Clearly, even decent levels of campaigning can fail to motivate the electorate when other significant factors are at play.

3.5.3 – Factors Contributing to Result

3.5.3.1 – Moderate Changes

²⁰⁵ Reported by Olivia O'Leary, 'Huge 'yes' majority in both referendums' *The Irish Times* (Dublin, 7 July 1979) 1.

²⁰⁶ *ibid.*

²⁰⁷ Olivia O'Leary, 'Referendums poll likely to be low' *The Irish Times* (Dublin, 5 July 1979) 1.

²⁰⁸ Arthur Beesley, 'Fine Gael and Labour warn against complacency over Seanad opinion poll lead' *The Irish Times* (Dublin, 1 October 2013) 2.

One of the key factors contributing to the results of some of the referendums here is the relatively moderate, uncontroversial nature of the amendments. The 6th Amendment 1979 (Adoption Board) is a clear example of this – the amendment made a sensible change which allowed a public body to do its (important) job more easily, and had no ramifications for any other persons. There could hardly be much opposition to such a change, and the result reflected this – it was passed with 99% of the vote. The 33rd Amendment 2013 (Court of Appeal) can be understood in the same way. It was clear that the courts system was unable to cope with the amount of pressure it was experiencing, and the idea of adding a new appellate court had been mooted as far back as 2006.²⁰⁹ Unsurprisingly, this amendment attracted similarly low levels of controversy and was easily passed.

However, moderate change can attract controversy. The 17th Amendment 1997 (Cabinet Confidentiality) can be seen as a relatively minor change to the delegation of powers in the State, and was presented as a sensible, necessary amendment to a technical area. Despite this, the result was much tighter than in the above two referendums (it passed with 52.6% of votes), with a considerable degree of opposition and a huge amount of spoiled ballots.²¹⁰ The difference here can possibly be put down to the fact that the proposed amendment was not actually as straightforward and unobjectionable as it was claimed to be, and in fact there were many groups who had reservations about granting more power to the government.²¹¹ Another contributing factor, however, is lack of information. Regarding the Adoption Board and the new Court of Appeal, the amendments were relatively intuitive and easy to explain. By contrast, the rules around Cabinet confidentiality and the specific, technical change being made was much more difficult to understand and to communicate to voters. Mark Brennock, writing in *The Irish Times* in 1997, addressed this, saying that the Government were ‘lucky to get away with a hollow victory’ despite barely lifting ‘a finger to inform the public about the content of the cabinet

²⁰⁹ A working group on the Court of Appeal had been established in 2006 by then Fianna Fáil government. See comments of Minister for Justice and Equality Alan Shatter: Thirty-third Amendment of the Constitution (Court of Appeal) Bill 2013: Second Stage, Dáil Deb, 11 July 2013, vol 810, no 3.

²¹⁰ On the spoiled ballots see Mark Brennock, ‘Voters spoil ballots in protest over constitutional amendment’ *The Irish Times* (Dublin, 1 November 1997) 8.

²¹¹ Green party TDs Patricia McKenna and John Gormley were particularly opposed to the amendment on this ground. See Michael O’Regan, ‘Green party calls for No to “flawed amendment”’ *The Irish Times* (Dublin, 28 October 1997) 6.

confidentiality referendum.’²¹² The poor turnout and tight margin of victory evidence a lack of communication and a consequent cocktail of apathy and scepticism.

3.5.3.2 – *Post-Crash Attitudes to Politics*

In previous categories the theme of apathy has repeatedly arisen as a factor contributing to results. In this category a similar, yet importantly different, theme emerges: political cynicism. Political cynicism abounded post-financial crash, and was a key factor in four of the six referendums here. By political cynicism, I mean that large swathes of the voting public were jaded with politics, and expressed increased scepticism and distrust toward politicians and the political machine more generally. In relation to the 29th Amendment 2011 (Judges’ Remuneration) this sort of feeling contributed toward a Yes vote in the referendum – given the impact of austerity, it was no surprise that a large majority of the population voted to decrease the high salaries of judges in line with other civil servants and the rest of the country.²¹³ The same sort of considerations can be seen as contributing to the rejection of the 30th Amendment Bill 2011 (Oireachtas Inquiries), run at the same time. Writing just after the vote, Carol Coulter described the unease which had built up around the possibility of granting powers of inquiry to politicians, and concluded that people clearly did not trust them to make decisions about the rights of individuals.²¹⁴ This unease was augmented by criticism from legal academics, including the Irish Council for Civil Liberties, and eight former Attorneys General, all of whom signed a letter opposing the amendment.²¹⁵

The 32nd Amendment Bill 2013 (Seanad Abolition) is an interesting example here. At first blush it seems as though this proposal should have tapped into that mistrust of politicians and passed easily. Indeed, on one reading Fine Gael’s decision to hold the referendum was calculated to make use of that anti-politician rhetoric, and much of their campaigning

²¹² Mark Brennock, ‘Voters spoil ballots in protest over constitutional amendment’ *The Irish Times* (Dublin, 1 November 1997) 8.

²¹³ It is worth pointing out that by the time of the amendment being proposed, most judges had already taken the pay-cut voluntarily.

²¹⁴ Carol Coulter, ‘The people clearly do not trust politicians to be judges’ *The Irish Times* (Dublin, 31 October 2011) 5.

²¹⁵ The Attorneys General expressed concerns about judicial independence being compromised, among issues. See ‘Gilmore defends referendums after AGs urge ‘No’ vote’ *The Journal* (Dublin 24 October 2011) <<https://www.thejournal.ie/gilmore-defends-referendums-after-ag-s-urge-no-vote-261625-Oct2011/>>, accessed 11 January 2023.

demonstrates this position.²¹⁶ However, in analysing the rejection of the amendment, two things become apparent. First, some of the anti-politician sentiment had abated by the time of the referendum, or at least had shifted to a more regular anti-Government sentiment.²¹⁷ Second, people who voted in the referendum were more eager to see substantive reform of the Seanad rather than mere abolition – a point which was emphasised by the impressive No campaign. As is the case in so many referendums analysed so far, a strong No campaign managed to secure a surprising result where the Government was complacent in its campaigning. So, while jadedness and political cynicism played a key role in many of the referendums here, it is clear that it alone cannot be determinative in any given vote. As seen in all other categories, a complex combination of factors determines the result in any given referendum.

3.5.4 – Responses

3.5.4.1 – Lack of Responses

What is striking about this category is the distinct lack of notable responses to the referendums held. None of the issues have been re-run in referendum, either explicitly or through similar issues.²¹⁸ Of course, those amendments that required further action saw some response. In the wake of the 33rd Amendment 2013 (Court of Appeal), the Court of Appeal Act 2014 was enacted, and various appropriate amendments were made to the Rules of the Superior Courts that same year. After that, judges were selected to sit in the Court of Appeal, and by the end of the year the Court was operational as an appellate court. Similarly, after the 29th Amendment 2011 (Judges' Remuneration) referendum, the Financial Emergency Measures in the Public Interest (Amendment) Act 2011 was passed,

²¹⁶ For example, the Fine Gael information booklet referred to the Seanad as a 'rigged, elitist' body, and reports indicate that the campaigning on the ground was pushing the message that 'Yes' would mean fewer politicians. Michael O'Regan, 'Bruton says 1% of population elects Seanad', *The Irish Times* (Dublin, 10 September 2013) 7.

²¹⁷ Figures show that the highest No votes came from parts of the country which recorded the highest levels of dissatisfaction with the Fine Gael government. Harry McGee, 'Kenny factor not the only reason the Seanad referendum was lost' *The Irish Times* (Dublin, 7 October 2013) 4.

²¹⁸ The 6th Amendment 1979 (Adoption Board) was in one way revisited by the 31st Amendment 2012 (Children's Rights) referendum. However, the 2012 amendment made no change to Article 37.2 as inserted by the 6th Amendment.

which amended the Financial Emergency Measures in the Public Interest Act 2009, including judges in the relevant sections.

However, other than those enacting pieces of legislation, the lack of responses here is stark. In particular, the lack of response to the 32nd Amendment Bill 2013 (Seanad Abolition) is notable. As noted above, one of the key factors for the result was that people wanted the Seanad to be reformed, rather than simply abolished. After abolition was rejected, the Government made a commitment to transforming the Seanad, including establishing in 2014 an independent working group on Seanad reform chaired by Dr Maurice Manning. This working group published its report in 2015, with recommendations for considerable reform.²¹⁹ After that, in 2018 Taoiseach Leo Varadkar established a new special working group, chaired by Senator Michael McDowell, to consider the implications of the 2015 report.²²⁰ While this new report is still expected, Senator McDowell indicated that the Government has essentially killed off any possibility of reform, saying that he had been assured ‘it will not happen.’²²¹ Despite explicit promise to reform the Seanad, more than a decade after the vote the chamber remains the same as it always has. Coupled with the aforementioned 1979 Seanad referendum and the lack of response to that (before *Heneghan*), the inaction here is more than merely notable, it is glaring.²²²

3.6 – Trends and Takeaways

3.6.1 – Impetus for Change

3.6.1.1 – Multi-Factorial Nature of Amendment Impetus

²¹⁹ *Report of the Working Group on Seanad Reform* 2015.

²²⁰ ‘Taoiseach says new committee to be set up for Seanad reform’ *RTE* (Dublin, 1 February 2018) accessed at <<https://www.rte.ie/news/2018/0201/937635-seanad-reform/>> on 11 January 2023.

²²¹ Laura Cahillane, ‘Why reform of Seanad Éireann should start with the electorate’ *RTE* (Dublin, 23 February 2022) accessed at <<https://www.rte.ie/brainstorm/2022/0223/966821-seanad-eireann-reform-electorate-7th-amendment/>> on 11 January 2023.

²²² See §3.4.4.2 for discussion of the 1979 Amendment.

The first and most important thing to mention is that across all four categories of referendum, no amendment is motivated by one factor alone. The factors that drive a referendum can include legal considerations in combination with political, cultural, and even international factors. The 5th Amendment 1972 (Removal of Special Position of Catholic Church) is a good example of this. On the one hand, the amendment was motivated by a desire to remove a provision that was no longer reflective of the State's position on religion. On the other hand, the amendment served as an olive branch to members of minority religions, particularly Northern Unionists, some of whom regarded Ireland as a Catholic stronghold unwelcoming to minority religions – all with an eye toward reunification. As well as both of these factors, the amendment was a recognition that the provision was ineffectual and unnecessary; a dead-letter. All of these factors, as well as the decisions of the Second Vatican Council,²²³ were taken into consideration by the 1966 Committee on the Constitution when making their recommendations, which were ultimately accepted by the Government as strong reasons for holding a referendum. This sort of multi-faceted motivation for amendment is illustrative of the impetus behind a huge proportion of referendums held in Ireland so far. Rarely are amendments driven by one factor alone.

3.6.1.2 – Significant Role of Committees

Another notable conclusion across the categories here is that recommendations from committees and other such bodies play an important role in shaping the sort of issues that ultimately go to referendum, and the form in which they appear on the ballot paper. Again, this will be examined in greater detail in another chapter (§4), so suffice it to say this: recommendations of these bodies have proven to be an important driver behind many referendums, regardless of topic.

3.6.1.3 – Reactive Nature

²²³ The influence of which should not be understated. In particular, Seán Lemass was influenced greatly by the Council and the modernising influence on the Church. See Brian Girvin, “‘Lemass’s Brainchild’: The 1966 Informal Committee on the Constitution and Change in Ireland, 1965-73’ (2013) 38 *Irish Historical Studies* 406, 407-8.

Further, from the above we can see that many referendums, regardless of category, are reactive in nature. That is, the impetus for the amendment is a reaction to some external factor, either a judicial decision or a high-profile incident. In particular, holding a referendum as a reaction to a judicial decision is a strong theme in the social/moral category,²²⁴ as well as international relations,²²⁵ and to a slightly lesser degree the structural category.²²⁶ Without delving too much into the literature at this point, this lends some credence to the characterisation of the referendum as a tool for democratic checking of judicial power.²²⁷ Alternatively, we might take this insight and apply it to the referendum as viewed through the prism of the separation of powers: the people (via referendum) act as a check on this power where the Executive or Legislature seeks to overturn a decision of the Judiciary via constitutional amendment.²²⁸

3.6.1.4 – *Categories of Referendums Differ Significantly*

What also becomes clear after this analysis is that the different categories of referendum have important characteristics different from each other. For example, many of the social/moral referendums have been motivated by concerns that the Constitution no longer aligns with fundamental values of the population,²²⁹ and an amendment is therefore sought so that the document more accurately reflects the values of Irish society; an important practical *and* expressive change. This sort of expressive aspect is not as central to the referendums in other categories. While referendums in the other categories can certainly have symbolic or expressive value, it is rarely the core reason for the amendment. This is best illustrated with an example. The 21st Amendment 2001 (to remove the death penalty) was in practical terms unnecessary. By the time the referendum was held capital punishment was already outlawed by statute and by international agreement,²³⁰ and the

²²⁴ The various referendums responding to the *X* case are obvious examples here. Most pointedly the 12th Amendment Bill 1992.

²²⁵ Since each referendum is, in one way, a response to the *Crotty* judgment.

²²⁶ 17th Amendment 1997 (Cabinet Confidentiality) referendum as a response to *Attorney General v Hamilton* [1993] 2 IR 250.

²²⁷ Related is the idea of the referendum put forward by Bruce Ackerman, *We the People: Foundations* (Harvard University Press 1993).

²²⁸ Oran Doyle, *The Constitution of Ireland: A Contextual Analysis* (Hart Publishing 2018) 191-192 citing Eoin Daly and Tom Hickey, *The Political Theory of the Irish Constitution: Republicanism and the Basic Law* (Manchester University Press 2015) ch 1.

²²⁹ The 36th Amendment 2018 (Repeal of 8th Amendment) is a clear, recent example of this.

²³⁰ The Criminal Justice Act 1990; European Convention on Human Rights; and International Covenant on Civil and Political Rights.

last execution had taken place nearly 50 years previous.²³¹ Despite this, an amendment was proposed to insert into the Constitution an explicit prohibition on the death penalty solely to better reflect the reality of the Irish State and its criminal law. This is the principal (arguably the only) reason given for the amendment. Minister for Justice John O'Donoghue made this clear, justifying the amendment by saying that it would send out a 'forceful message to the international community of Ireland's strong stance against the use of the death penalty', a virtue 'of which we as a modern democracy can be rightly proud.'²³² In no other category has an amendment been made *solely* for the purpose of exhibiting some virtue or moral position, with essentially no practical effect.²³³ The blasphemy and children's rights referendums (also in this category) are further evidence for this point: it is arguable that they too only sought to make symbolic changes.

The referendums in the international relations category have a distinction from the rest: external prompting. The fact that they relate to foreign affairs agreements and treaties signed up to by the Executive, and act mainly as a final check on this power is significant, and is apparent from the above discussion. The *Crotty* requirement makes this difference in impetus obvious enough.²³⁴

Overall, then, the sort of drivers behind any given referendum are likely to be contextual. However, what can be said generally is that referendums taken in relation to the social/moral category are more likely to be driven by expressive value and a concern that the Constitution reflects the reality of the Irish polity than any other category. Similarly, there are referendums across all categories that can be described as reactive – responding to a development of the law or an incident in public life.²³⁵ Finally, committees and similar bodies play an important role in driving change for all types of referendum.

²³¹ Michael Manning was executed on April 20th, 1954.

²³² Minister for Justice, Equality and Law Reform, Twenty-first Amendment of the Constitution (No. 2) Bill, 2001: Second Stage, Dáil Deb, 11 April 2001, vol 534 no 4.

²³³ The 40th Amendment Bill 2024 (Care) is another such purely symbolic proposal. That one, however, was rejected.

²³⁴ *Crotty v An Taoiseach* [1987] IESC 4.

²³⁵ This is made out above, in particular see the 8th Amendment 1983 (Abortion), 10th Amendment 1987 (Single European Act), 9th Amendment 1984 (Non-Citizen Franchise), and (30th Amendment Bill 2011 (Oireachtas Inquiries).

3.6.2 – Engagement

3.6.2.1 – Turnout Limited as an Analytical Tool

One thing that is clear from the above overview is that turnout is only one tool for measuring engagement, and is itself affected by so many different variables that require examination in their own right. At first blush, the turnout figures across all referendums paint a bleak picture. The mean turnout across all referendums is 50.3%, which is considerably below usual turnout in general elections, which has only once dropped below 60%,²³⁶ and regularly tops over 70%.²³⁷ However, this comparison is perhaps unfair. Turnout at general elections in Ireland is high, and while the figures for referendums may seem low in comparison, they are skewed somewhat by a number of particularly low-turnout referendums.²³⁸

While on its own turnout can give an indication about how interested the general public were in a referendum topic, these insights are qualified. When combined with post-referendum polls and media coverage, however, turnout can assist in understanding the level of engagement overall. The analysis in this chapter fits with the intuitive position that some issues are simply more engaging than others. The overall turnout numbers across the categories lay clear the obvious fact that people are more likely to show up to vote on things such as fundamental rights than they are for technical issues of state institutions or international agreements. As has become clear, however, strong campaigning can make up for lack of interest.

3.6.2.2 – Level of Campaigning

Related to turnout, the above analysis shows that the level of campaigning by either side in a campaign can have a significant impact on engagement, and consequently the result. As is seen in each of the four categories of referendum, high levels of campaigning usually

²³⁶ The 2024 general election recorded a turnout of 59.7%.

²³⁷ See Oireachtas Library and Research Service, *Election Turnout in Ireland: Measurement, Trends and Policy Implications*.

²³⁸ e.g the 6th and 7th Amendment referendums (28.6%), 16th Amendment referendum (29.2%), and 21st, 23rd, and 24th Bill referendums (34.8%).

lead to a higher degree of engagement, and more often than not a higher turnout. Across all four categories, there are examples of lacklustre Government campaigns leading to popular apathy, poor turnouts, and in some cases shock results.²³⁹ Increased campaigning is one of the main factors contributing to the overturn of both the Nice and Lisbon referendum results, and the recent Marriage Equality and Abortion referendums have been studied for the positive impact their high levels of campaigning had on engagement.²⁴⁰ While in early referendums low engagement meant an easy victory for the Government proposal,²⁴¹ it has been clear since Nice I that large portions of the electorate are likely to reject a proposal as the default position where not enough has been done to engage the public.²⁴² This makes it all the more important for political parties to actively campaign for a result.

3.6.3 – Factors Contributing to Result

3.6.3.1 – Engagement Significant Factor

The factor which most affects the result of a referendum is the level of engagement with the campaign. Looking at what factors contribute to engagement, it is clear from above that information availability and public understanding are two of the most important requirements. Across all four categories a huge number of results have been negatively impacted by a lack of information, and referendums with low turnout tend to be those where information is not adequately understood.²⁴³ In the social/moral category, the narrow running of the 31st Amendment 2012 (Children’s Rights) referendum, the defeat of the 10th Amendment Bill 1986 (Divorce), and the defeat of both amendment proposals

²³⁹ For example, the 30th Amendment 2012 (Children’s Rights), the 24th Amendment Bill 2001 (Nice I), or the 32nd Amendment Bill 2013 (Seanad Abolition) referendums.

²⁴⁰ Gráinne Healy, Brian Sheehan and Nel Whelan, *Ireland Says Yes: The Inside Story of How the Vote for Marriage Equality Was Won* (Merrion Press 2015).

²⁴¹ For example, the 6th Amendment 1979 (Adoption Board) and 7th Amendment 1979 (Seanad Franchise) both passed with over 90% of the vote, on only 28.6% turnout.

²⁴² As seen in the 28th Amendment Bill 2008 (Lisbon I), the 32nd Amendment Bill 2013 (Seanad Abolition), and the 35th Amendment Bill 2015 (Age of Presidency) referendums.

²⁴³ The most notorious example here is the 24th Amendment Bill 2001 (Nice I), where a serious lack of understanding was the key takeaway for the Referendum Commission, contributing to the low turnout (34.8%) and the rejection.

in 2024²⁴⁴ can all be attributed to a lack of accurate information and awareness.²⁴⁵ As already mentioned, the two defeated international relations referendums – Nice I and Lisbon I – showed a serious lack of understanding of the issues which was rectified by the respective re-run of the votes.²⁴⁶ Many, though not all, of the referendums that have been rejected evidence some level of information discrepancy.²⁴⁷ As well as that, lack of information can be seen to seriously impact turnout – if people are unaware of the issue they are less likely to get out and vote.²⁴⁸ If we are to take engagement and turnout as something a referendum should seek to maximise, then clearly there is an issue here.

3.6.3.2 – *Support of Opposition Party*

Looking at what else contributes to the result of a referendum, only one other common factor emerges across all four categories – that every time the main opposition party has opposed an amendment, it has been rejected at referendum. The ramifications of this reality can be viewed in a number of ways. On one view, we might conclude from this that the characterisation of these referendums as a means of direct democracy should be tempered, since political consensus determines whether or not the amendment even reaches the ballot box. On this account, the amendment procedure is as much an exercise in representative democracy as it is direct, perhaps even more so.²⁴⁹ On a slightly different, but related, view, we might understand this phenomenon as a *de facto* supermajority requirement for amendment. We might say that despite the wording of Articles 46 and 47 requiring only a simple majority to pass through the Dáil, a prerequisite has grown up whereby supermajority support is necessary for an amendment Bill to be passed at

²⁴⁴ 39th Amendment Bill 2024 (Family) and 40th Amendment Bill 2024 (Care).

²⁴⁵ See above for more. In particular, the lack of clarity around succession rights played a huge role in the defeat of the Divorce referendum.

²⁴⁶ See §3.3.3.2

²⁴⁷ A good example of a proposal rejected despite high levels of understanding is the 35th Amendment Bill 2015 (Lowering Age of Presidency): while engagement with the issue was low, it is clear that the public understood what the amendment would mean, yet it was roundly rejected.

²⁴⁸ Other referendums which show a serious lack of information include the 16th Amendment 1996 (Bail), the 25th Amendment Bill 2002 (Abortion), the 18th Amendment 1998 (Treaty of Amsterdam), the 23rd Amendment 2001 (ICC), the 6th Amendment 1979 (Adoption Board), and the 7th Amendment 1979 (Seanad franchise).

²⁴⁹ See generally Leah Trueblood, *Referendums as Representative Democracy* (Hart Publishing 2024).

referendum.²⁵⁰ The significance of these points, and their relation to arguments about the democratic nature of these referendums will be discussed further in a later chapter.²⁵¹

Other than that, however, no singular factor can be seen as contributing significantly to the result of referendums across all four categories. What can we say about discernible trends? Perhaps only this: that when information is adequately provided, and engagement is fostered, referendum results are decided by a combination of contextual factors: the general economic climate,²⁵² the sentiment toward government,²⁵³ and the appetite for change in the public,²⁵⁴ to name just a few. At a minimum, then, in order for a referendum campaign to be successful, it must adequately inform the electorate of the proposed amendment, and offer understandable, compelling reasons to vote. After that, the strength of the campaign will often be decisive.

3.6.4 – Responses

3.6.4.1 – Legislation

When analysing takeaways in relation to responses to referendum results, a few things become clear. First, across all categories referendums have been responded to with legislation. That much is obvious – many amendments specifically require legislation for their enactment, and it is almost always in the Government’s interest to pass that legislation, since they proposed the amendment.²⁵⁵

²⁵⁰ This point might not survive sustained pressure. For instance, it is unclear whether the rejection of referendums relevant here is because voters respond negatively to simple majorities in the Dáil, or rather because the major opposition party has traditionally enjoyed a huge amount of influence over a large proportion of the electorate. While either may be true, intuitively the latter explanation is more convincing.

²⁵¹ See §7.6.

²⁵² The 28th Amendment 2009 (Lisbon II) is a good example here – the economic downturn contributed to the result as people feared an even worse recession without EU aid.

²⁵³ 31st Amendment 2012 (Children’s Rights) – a level of protest against the Government is notable in the result here.

²⁵⁴ Practically any referendum that passed is illustrative of this point. However, the rejected 35th Amendment Bill 2015 (Lowering Age of Presidency) is even more telling – despite the change being minor and easy to understand, there was clearly no appetite for change in this way.

²⁵⁵ For examples see §3.4.4.2.

3.6.4.2 – Returning an Issue to Vote

Second, putting an issue to referendum more than once is a common theme across all categories of referendum. This can be seen in the social/moral category's re-running of abortion and divorce referendums,²⁵⁶ and in international relations the Nice and Lisbon referendums were also revisited directly with only minor changes. Finally, the voting category saw two notorious examples of re-running in relation to Dáil boundaries and FPTP.²⁵⁷ The structural category has not yet seen an issue revisited in subsequent referendum. As already mentioned, what is striking about the responses in the structural category is the lack of action on the Seanad reform, despite repeated promises on the matter.

It is interesting to note that in many of these instances of referendum re-running, the result has changed in the later vote. While for some this might be indicative of government dominance and hegemony, in some instances it is more illustrative of the changing attitudes in Ireland toward certain issues. The various referendums on abortion, for example, indicate a slow but steady move towards liberalisation from 1983 to 2018, and the rejection of the referendum in 2002 show that this change was very much in the electorate, not in politicians.²⁵⁸ All in all, the fact that referendums have been revisited on a number of occasions and the changing results are indicative of the referendum's place in the Irish constitutional order: it is an important tool which facilitates the evolution of the Constitution as a living document, reflecting changes in society through a directly democratic channel.

3.7 – Conclusion

The analysis carried out in this chapter was intended to offer a relatively comprehensive and context-sensitive account of Ireland's experience with referendums since 1959. Since this thesis is concerned with providing an accurate and reasoned answer to the question

²⁵⁶ 36th Amendment 2018 (Repeal of 8th Amendment) and 15th Amendment 1995 (Divorce II) are two examples.

²⁵⁷ 3rd Amendment Bill 1968 (FPTP) and 4th Amendment Bill 1968 (Constituency Boundaries), respectively.

²⁵⁸ While government parties sought to increase restrictions on the availability of abortions, clearly the electorate were not of the same mind, and were (very) slowly moving in the direction of liberalisation – a trend not spotted by the Government.

‘are Irish referendums successful’, an in-depth examination of how each of the forty-three referendums fared was necessary. In this way, this chapter ensures that the analysis to follow in the rest of this thesis is not skewed by recency bias, or an overemphasis on more ‘exciting’ referendums. As we have seen, the overall picture of Irish referendums is multifaceted and complicated. Among the general trends identified are that amendment proposals have often and explicitly been put forward to reflect changing social norms, that engagement with a referendum depends significantly on the level of campaigning by political parties and interest groups, and that no result is guaranteed despite how straightforward the proposal may initially seem. Moreover, we have seen plenty of examples of referendums faltering where crucial information is unclear or insufficiently available. These and other trends provide a good, context-sensitive account of Irish referendums from which we can begin to draw conclusions. The next chapters take seriously one of the core trends identified – that engagement and information sufficiency are key factors in how a referendum fares – and examines it in more depth. This forms the beginning of an answer to how a successful referendum can be consistently ensured, and how the common pitfalls identified here can be best avoided.

4. THE ROLE OF SUPPLEMENTARY INSTITUTIONS IN IRISH CONSTITUTIONAL REFERENDUMS

4.1 – Introduction

In an article discussing the intersection of democratic deliberation and referendums, Simone Chambers warns that ‘advocates of direct democracy often fail to see the way in which referendums, if not carefully designed, undermine meaningful participation.’¹ Her position is that the unregulated referendum more often than not falters as a method of legitimate democratic decision-making, instead acting as a vehicle for simple majoritarian decisions based on short-term self-interested reasons rather than principled, substantive deliberation.² In order to prevent this, the referendum must be designed in a way that instantiates real, meaningful democratic participation and engagement. This core implication – that referendums are easily exploited and can lead to undemocratic results – is prevalent in much of the literature, owing to the experiences of high-profile referendums in recent years, for example the 2016 Brexit referendum in the UK.³ While the more general point about the referendum’s strengths and weaknesses is a broader question addressed later (§7.5), in this chapter I want to focus on the more specific point from Chambers’ quote: that careful institutional design is a necessary element of a well-functioning system of referendum. In doing so, I borrow Chambers’ phrase ‘supplementary institutions’ and examine the role these institutions have played in Irish referendums up to this point.⁴

While the definition of ‘supplementary institutions’ may be a question of some dispute, here I draw on Chambers’ use of the phrase where she specifically mentions citizen

¹ Simone Chambers, ‘Constitutional Referendums and Democratic Deliberation’ in Matthew Mendelsohn and Andrew Parkin (eds), *Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns* (Palgrave Macmillan UK 2001) 231, 240.

² The accuracy of this position is contested at a later stage in this thesis.

³ For a similar view on the potential for abuse see generally, Peter Leyland, ‘Referendums, Popular Sovereignty, and the Territorial Constitution’ in Richard Rawlings, Peter Leyland and Alison Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press 2013).

⁴ Simone Chambers, ‘Constitutional Referendums and Democratic Deliberation’ in Matthew Mendelsohn and Andrew Parkin (eds), *Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns* (Palgrave Macmillan UK 2001) 231, 243.

workshops, town hall meetings, and people's conventions as examples.⁵ On this understanding, supplementary institutions are non-partisan state-run bodies with an explicit mandate of buttressing the referendum framework and informing and engaging citizens directly with referendums. The focus here may differ from Chambers' use of the phrase by looking more pointedly at state institutions, however the core of the definition remains consistent. Therefore, the supplementary institutions that are examined in this chapter are as follows: the Referendum/Electoral Commission; the 2012 Constitutional Convention; Citizens' Assemblies; and the Housing Commission. As an example of the work done by these institutions, the 2012 Constitutional Convention made use of innovative deliberative forms to increase popular engagement with the issues in subsequent referendums, and alleviated some concerns of elite manipulation of the constitutional referendum. The goal of this chapter is to demonstrate the role of these bodies *as supplementary institutions* and evaluate how successfully they carried out their functions. This involves identifying what functions these bodies have in regulating referendums and engaging the public, and assessing them according to how well they have fared in light of their own functions.

Section 4.2 examines the Referendum Commission and its role as the independent regulator of referendums. It also discusses the recently established Electoral Commission, which has assumed all of the Referendum Commission's functions into a permanent body chaired by a judge of the Supreme Court.⁶ Section 4.3 focuses on the 2012 Constitutional Convention; in particular, its role in overcoming the popular apathy towards politics generally (and referendums specifically) which was so widespread at that time. Section 4.4 then examines the Citizens' Assemblies, with particular emphasis on the 2016-18 Assembly and its role in the 2018 Abortion referendum. In Section 4.5, I briefly discuss the Housing Commission and its role in assessing the merits of a potential referendum on a right to housing. Finally, Section 4.6 concludes by assessing in full the role of supplementary institutions in the referendum.

⁵ *ibid* 250, Chambers herself never actually defines the term, instead only using it loosely to refer to 'institutions and forums' that promote deliberation in referendums.

⁶ The Electoral Commission's website is available at <<https://www.electoralcommission.ie/>> accessed 6 April 2023. Judge Marie Baker of the Supreme Court was selected as the Chair of the Commission, Jennifer Bray, 'Supreme Court judge Marie Baker nominated to chair Electoral Commission' *The Irish Times* (Dublin 31 January 2023), <<https://www.irishtimes.com/politics/2023/01/31/supreme-court-judge-marie-baker-nominated-to-chair-electoral-commission/>> accessed 6 April 2023.

4.2 – Referendum/Electoral Commission

4.2.1 – Development of the Commission

The first Referendum Commission was created as a statutory body under the Referendum Act 1998 and exercised its functions (laid out in full below, primarily informing the public about the proposal) for the first time during the campaigns on the 18th Amendment 1998 (Treaty of Amsterdam) and 19th Amendment 1998 (Good Friday Agreement) referendums. Previous to the Commission's establishment, there had been three Ad-hoc Commissions on Referendum Information created for the purposes of preparing statements with arguments for and against amendment proposals.⁷ These Ad-hoc Commissions were established for the 15th Amendment 1995 (Divorce II), 16th Amendment 1996 (Bail), and 17th Amendment 1997 (Cabinet Confidentiality) as a response to the *McKenna* judgment which prohibited the Government from spending money in a partisan way in any campaign.⁸ While they succeeded in getting information published without breaching the *McKenna* rules, the Ad-Hoc Commissions came under criticism, particularly for their lacklustre ability to disseminate information quickly and effectively during the 16th and 17th Amendment referendums.⁹ As a response to this criticism, the *McKenna* judgment,¹⁰ and also to recommendations from the 1996 Constitution Review Group and All-Party Oireachtas Committee on the Constitution, the Referendum Act 1998 established the legal framework for a new Referendum Commission.¹¹

⁷ These arguments were set out by two Senior Counsel barristers who had been nominated by the chairman of the Bar Council.

⁸ *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10.

⁹ While in the 1995 Divorce referendum the Ad-hoc Commission had published a leaflet and sent it to each household, in the latter two the Commissions had no time and therefore restricted their campaign to advertisements in newspapers. See the speech of Noel Dempsey, Referendum Bill, 1998, Second Stage, Dáil Deb, 3 February 1998, Vol 486 No 3.

¹⁰ See the speech of Minister of State at the Department of the Environment and Local Government Robert Molloy introducing the Referendum Bill 2001: 'Against the legal backdrop of the McKenna judgments the Referendum Act, 1998, was enacted. It was designed to put the *ad hoc* commissions on a statutory footing and to further advance the issue of providing information to the electorate.' Referendum Bill, 2001, Second Stage, Dáil Deb, 14 December 2001, Vol 546, No 6.

¹¹ The Constitution Review Group 1996 had recommended a change to Article 47 of the Constitution to provide 'that the manner of equitable allotment of such funding is entrusted to an independent body ... Such a constitutional safeguard meets the principal objection to the old funding arrangements identified in the *McKenna* case by ensuring that the Government does not spend public money in a self-interested and unregulated fashion in favour of one side only, thereby distorting the political process.' Constitution Review Group, *Report* (Pn 2632, 1996) 404-405.

The 1998 Act (as amended) granted to the Minister for the Environment and Local Government the power to establish a Referendum Commission, no earlier than the date on which an amendment bill was initiated in the Dáil.¹² Important to stress here is that the legislation granted the Minister the ability to establish *a* Referendum Commission – each Commission was temporary only, coming into existence under the statutory instrument and ceasing to exist once the referendum had been completed.¹³ The Commission would be made up of a Chairperson (either a former judge of the Supreme Court or High Court, or a judge of the High Court) nominated by the Chief Justice, and four ordinary members: the Comptroller and Auditor General, the Ombudsman, the Clerk of Dáil Éireann, and the Clerk of Seanad Éireann.¹⁴ These members were restricted from advocating for a particular result at the relevant referendum.¹⁵ The functions of the Commission were laid out in section 3 of the 1998 Act: to prepare statements explaining the subject matter of the proposal and amendment bill; to publish and distribute these statements; and to promote public awareness of the referendum and encourage the electorate to vote.¹⁶ Previously, the Commission had the further function of setting out arguments for and against the proposal and fostering public debate,¹⁷ however this function was removed by the Referendum Act 2001 following a recommendation in the Sixth Progress Report of the Oireachtas All-Party Committee on the Constitution. This pro/con function had been criticised for offering overly sterile arguments and for giving the impression that there was equal support for both positions, which was often not the case.¹⁸ The rest of the statutory framework provides for things such as the ability of the Commission to make declarations that a body

¹² Referendum Act 1998, s 2(1).

¹³ For ease this section will refer to the collective group of all Commissions as the ‘Referendum Commission’.

¹⁴ Referendum Act 1998, section 2(5) and 2(6). Section 2(6) allows for deviation from these members where the relevant office is vacant: where the office of Comptroller and Auditor General is vacant, the Secretary and Director of Audit of the same office can fill this position; the Director of the Office of the Ombudsman can take the place of the Ombudsman; the Clerk of Dáil Éireann can be substituted by the Clerk Assistant of Dáil Éireann; and the Clerk of Seanad Éireann can be substituted by the Clerk Assistant of Seanad Éireann.

¹⁵ Referendum Act 1998, s 2(11).

¹⁶ Referendum Act 1998, s 3(1)(c), as inserted by s 1(a) of the Referendum Act 2001.

¹⁷ Previously s 3(1)(c) of the Referendum Act 1998.

¹⁸ Citing the Report when introducing the Bill, Minister of State at the Department of the Environment and Local Government Robert Molloy said the primary difficulty with this function was that ‘[t]he alignment of arguments for and against a proposal in an almost sterilised format has not encouraged debate and can result in seemingly equal weightings been given to alternative arguments which do not merit equivalent comparison, in any rational assessment.’ Referendum Bill, 2001, Second Stage, Dáil Deb, 14 December 2001, Vol 546, No 6.

is an approved body for a referendum;¹⁹ the ability to engage consultants in performing its functions;²⁰ and amendments to the 1994 Act.²¹

In February 2023 the relevant sections of the Electoral Reform Act 2022 were commenced, and an Electoral Commission was established which assumed all of the responsibilities of the Referendum Commission.²² This omnibus piece of legislation had been in the pipeline for a long time, with the General Scheme published in early 2021,²³ and heralded significant reform for Ireland's electoral regulation.²⁴ The Electoral Commission is a permanent body and its functions are: to explain referendum proposals; to review constituencies; to review local electoral boundaries; to research on electoral policy and procedure; to provide information on electoral processes and to encourage participation in the democratic processes of the State; to regulate online political advertising, and to 'protect the integrity of elections and referendums against the dissemination or publication of online disinformation, online misinformation and manipulative or inauthentic behaviour online', among others.²⁵ Section 31 details the functions in relation to referendums, which is the same as that contained in the 2001 Act (to prepare statements explaining an amendment proposal, to publish these statements, and to promote awareness) and the remainder of Chapter 5 assigns to the Commission the rest of the statutory functions and abilities of the Referendum Commission.

4.2.1.1 – The Commission and the Constitution

The Referendum Commission's work has been challenged in the courts, most notably in *Doherty v Referendum Commission*.²⁶ Here, Sinn Féin TD Pearse Doherty challenged

¹⁹ Referendum Act 1998, s 7.

²⁰ Referendum Act 1998, s 4.

²¹ Referendum Act 1998, ss 12 and 15 specifically.

²² Electoral Reform Act 2022, ss 7 and 8.

²³ General Scheme of the Electoral Reform Bill 2020, published 8 January 2022. The idea of a permanent Electoral Commission has been around for at least 20 years. See Referendum Commission, *Report of the Referendum Commission on the Referendum on the Twenty Eighth Amendment to the Constitution Bill 2008 (Lisbon Treaty)* (PRN: A8/0899, 2008).

²⁴ It had also been recommended in the report of the Citizens' Assembly on The Manner in Which Referenda are Held, Citizens' Assembly, *Report and Recommendations of the Citizens' Assembly On the fourth and fifth topics: The Manner in Which Referenda Are Held & Fixed Term Parliaments* (21 June 2018) 10.

²⁵ Electoral Reform Act 2022, section 30.

²⁶ *Doherty v Referendum Commission* [2012] IEHC 211. The Commission has also been challenged in referendum petitions taken under section 43 of the Referendum Act 1994. As an example, see *Byrne v Ireland* [2018] IEHC 437.

statements made by the Referendum Commission in relation to the 30th Amendment 2012 (Fiscal Compact) referendum, alleging that they were *ultra vires*. The impugned statements were made by the Chair of the Commission and related to the question of whether Ireland could veto the ratification of a European Council Decision which impacted the Treaty at issue in referendum. On the prior question of whether the Referendum Commission's statements were or were not amenable to judicial review, Hogan J held that the Commission *must* be reviewable by the courts;²⁷ however, it enjoys a 'wide freedom to communicate its message', up to the point that its statements are 'manifestly inaccurate or misleading'.²⁸ This decision was based on two considerations: first, the legislation itself had stipulated that the statements of the Commission must be fair and non-partisan, which presumes jurisdiction to review on these criteria;²⁹ and second, the *McKenna* principles require that the courts intervene in a referendum process where the fundamental value of equality is violated, which could be brought about by partisan or misleading campaigning by the Commission.³⁰

Looking at the second question, whether the statements in this case actually were *ultra vires* or otherwise reviewable, Hogan J found that they were not.³¹ He found instead that the Commission's statements were a 'considered, thoughtful, measured and legitimate analysis of complex legal issues'.³² Most interesting here are the comments to the effect that the Commission must be understood in the context of three fundamental constitutional principles most relevant to the referendum process: popular sovereignty;³³ freedom of speech;³⁴ and equality.³⁵ The manifestation of these principles requires 'robust political debate' to be fostered, protected, and aided.³⁶ This might be understood as the Commission's constitutional function.³⁷

²⁷ *ibid* [38] (Hogan J).

²⁸ *ibid* [27] and [39] (Hogan J). If this prior test is met, the standard for impugning a referendum result is that it must have 'materially affected' the outcome, as seen in §2.5.4.

²⁹ Referendum Act 1998, as amended by the Referendum Act 2001.

³⁰ *Doherty v Referendum Commission* [2012] IEHC 211 [36] (Hogan J).

³¹ *ibid* [43] (Hogan J).

³² *ibid* [66] (Hogan J).

³³ *ibid* [23] (Hogan J).

³⁴ *ibid* [24] (Hogan J).

³⁵ *ibid* [25] (Hogan J).

³⁶ *ibid* [23] (Hogan J).

³⁷ Whether there is any difference between this constitutional function and the functions explicitly contained in the legislation is perhaps a semantic point. At the least, it might be accurate to state that while the functions are the same in practice, the constitutional element imparts a level of gravity that justifies the courts in making the Commission judicially reviewable.

4.2.2 – Effectiveness of the Commission

As seen above, the primary function of the Commission is to prepare statements that explain the amendment proposal.³⁸ Effectiveness here should be understood to mean that the documents actually do explain the amendment proposals and are successful in informing the public about the content of the amendment.

The degree of effectiveness here changes with each given iteration of the Commission. Reports vary widely in their analyses: in relation to the 26th Amendment 2002 (Nice II) referendum, the research found ‘that the campaign created widespread awareness and was positively received’;³⁹ whereas for the 30th Amendment 2012 (Children’s Rights) referendum the Commission considered that, despite the information campaign, ‘the level of public understanding of the proposal, as demonstrated by the research results, was unacceptably low.’⁴⁰ These examples do not skew the picture: the number of reports which concede the campaign was not as effective as it needed to be is almost equal to the number of reports saying otherwise.⁴¹ What causes this discrepancy in effectiveness? According to the Referendum Commission itself, the key factor is time. Every single report drawn up by the Referendum Commission from its inception makes explicit and repeated reference to the time made available to it in order to perform its functions. Since the Referendum Commissions were temporary bodies and only came into being via statutory instrument enacted after the amendment bill was initiated in the Dáil, they were often created very late in the lifecycle of the referendum campaign and thus given very little time to go through all of the necessary steps.

³⁸ In the Electoral Reform Act 2022, this is at s 31(1)(a): ‘to prepare a statement or statements containing a general explanation of the subject matter of the proposal for the referendum concerned and of the text thereof in the relevant Bill and any other information relating to those matters that the Commission considers appropriate...’.

³⁹ Referendum Commission, *Report on the Referendum on the Twenty-Sixth Amendment of the Constitution Bill, 2002* (Pn 12936, 2003).

⁴⁰ Referendum Commission, *Report on the 31st Amendment of the Constitution (Children) Bill 2012* (2013), 12. The report goes on to say that while the information booklet was not criticised, ‘only 48% of voters found it either very or quite helpful.’

⁴¹ For more on campaigns which were not effective, see the reports in relation to 27th Amendment 2004 (*Jus Soli*), 28th Amendment Bill 2008 (Lisbon I), 32nd Amendment Bill 2013 (Abolition of Seanad), and the 35th Amendment Bill 2015 (Lowering Age of Presidency).

As an example of the difficulties faced by the Commission in this regard, take the first Lisbon Treaty referendum. The Referendum Commission, as a public body, was required to abide by EU rules on public procurement and an EU regulation had recently removed the derogation under which the Commission had been exempt. Since this requirement for public procurement sets out various time limits, the Referendum Commission was unable to start its work until very late in the campaign. Despite being established on March 6th 2008 (some 3 months before the polling date in June), after the appropriate time limits were observed, the Commission had a total of 3 weeks to ‘digest the referendum proposal, including the Lisbon Treaty, draft the booklet, have it reviewed by its legal advisers ... have it designed and translated into Irish.’⁴² The later report on the 30th Amendment 2012 (Children’s Rights) referendum emphasised the significance of time allocation:

‘The Commission is strongly of the view that the preparation of an explanation of the subject matter of a Referendum proposal and its incorporation in a guide which a greater number of citizens would find helpful requires more time than was allowed to this Commission.’⁴³

This difficulty is present from the early Commissions, put in very strong terms in 2001:

‘The Commission cannot overstate the importance it attaches to this issue and would wish to underline the recommendations it is making on this point [...] The Commission thinks it unreasonable that its members should be expected to continue to bear the brunt of adverse public criticism for perceived failures in its information campaigns when the root cause of the difficulties is beyond its control.’⁴⁴

Each Commission’s report since the very first has recommended that more time be given for it to do its work by establishing it earlier, and equally as many called for the Commission to be made a permanent body.

⁴² Referendum Commission, *Report on the Referendum on the Twenty-Eighth Amendment of the Constitution Bill 2008 (Lisbon Treaty)* (PRN: A8/0899, 2008) 8.

⁴³ Referendum Commission, *Report on the 31st Amendment of the Constitution (Children) Bill 2012* (2013) 12-13. In this instance, the Commission was established less than two months before polling day (established on 19 September 2012, poll on 10 November), however the wording of the amendment was not finalised until the amendment Bill was approved in the Oireachtas on 3 October, giving the Commission just over a month to do its work with the wording.

⁴⁴ Referendum Commission, *Reports of the Referendum Commission on the Twenty-First Amendment of the Constitution (Abolition of the Death Penalty), Twenty-Third Amendment of the Constitution (Acceptance of the Jurisdiction of the International Criminal Court), and Twenty-Fourth Amendment of the Constitution (Treaty of Nice)* (2001) 14.

Aside from the temporal restrictions, there is evidence of other considerations impacting the effectiveness of the Commission's work. An example of shortcomings here can be seen in the Referendum Commission's report on the three referendums taken in 2001.⁴⁵ Reflecting on a campaign that suffered from poor engagement, high levels of voter confusion, and a higher No vote than expected,⁴⁶ the Commission criticised its own explanatory documents, saying that the

‘content of the publications was generally dry and technical. There was perhaps too much emphasis by the Commission on explaining its role and functions and also on using too much legal terminology rather than taking the risk of paraphrasing and simplifying the language of the proposals.’⁴⁷

The report goes on to accept that there were shortcomings in the Commission's work, but says that ‘[w]hile there is much that can be done to improve the effectiveness of the Commission's approach, it cannot be substituted for a vigorous debate between the political parties and other groups.’⁴⁸ An example of a more effective endeavour is seen in the Report of the Referendum Commission for the 25th Amendment 2002 (Reversal of *X* Case).⁴⁹ Here, the Commission noted that public understanding of the issue increased significantly over the period of campaigning by the Commission, and attributed this in no small part to their own work. Without any explicit research carried out after the referendum, this position was based on the extremely positive reaction to the information booklet,⁵⁰ the Commission's qualitative research during the campaign,⁵¹ anecdotal experience, and the very low number of spoiled ballots.⁵²

⁴⁵ 21st Amendment 2001 (to remove the death penalty), 23rd Amendment 2001 (ICC), and 24th Amendment Bill 2001 (Nice I) referendums.

⁴⁶ Including the shock defeat of the 24th Amendment Bill 2001 (Nice I) proposal. Turnout across all three referendums was just 34.8%.

⁴⁷ Referendum Commission, *Reports of the Referendum Commission on the Twenty-First Amendment of the Constitution (Abolition of the Death Penalty), Twenty-Third Amendment of the Constitution (Acceptance of the Jurisdiction of the International Criminal Court), and Twenty-Fourth Amendment of the Constitution (Treaty of Nice)* (2001) 14.

⁴⁸ *ibid* 16.

⁴⁹ Referendum Commission, *Report on the Twenty-Fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill, 2001* (2002).

⁵⁰ *ibid* 14.

⁵¹ *ibid* 14-15. This research was carried out in two locations (Dublin and Mullingar) on two separate occasions, one at the beginning of the Commission's campaign, and the other 8 days before the polling date. The research, though limited in size and sophistication, indicated a positive effect of the campaign. For more see Referendum Commission, *Report of the Referendum Commission on the Twenty-Fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill, 2001* (PN 11695, 2002) 12-13.

⁵² *ibid* 15. Which is, according to the Report, an indicator of high levels of understanding. The referendum attracted just over 0.5% spoiled ballots – compare that with 2.1% for the previous Treaty of Nice referendum.

4.2.3 – Evaluating the Commission

It is clear that having enough time is a prerequisite to the Commission performing its functions well, and it is equally clear that when the Commission is functioning properly, the impact on a referendum is significant. As noted in the previous chapter, information availability and accessibility is one of the most important aspects of a referendum campaign (§3.6). Confusion about an issue and lack of information leads to poor turnout, and a higher incidence of No votes. As an example of how significant a functioning Referendum Commission can be in this regard, take the Lisbon II referendum. According to the Commission's report, the percentage of voters who expressed that they understood the amendment proposal rose from 44% in June 2008,⁵³ to 72% in October 2009.⁵⁴ While this increase cannot be solely attributed to the Commission's work, the findings also make out that the 'great majority' of respondents had been exposed to the Commission's campaign, including 77% admitting that they had received the written guide in the post.⁵⁵ Another example of the campaign successfully getting the key messages across can be seen in the 37th Amendment 2018 (Blasphemy) referendum. Despite very little media coverage, practically no debate, and little opposition, evidence suggests that voters were aware of the issue and understood it. As the Commission notes in its report, an exit poll showed that 98% of voters were aware of the referendum, and 69% reported understanding the issue.⁵⁶ It is notable that both of these referendums passed with considerable support.

When a Commission is given enough time to do its job, it has the potential to significantly impact a referendum. That said, time is not the only critical factor. Even when enough time is granted, the Commission has found it difficult to get complicated information across in an accessible manner.⁵⁷ On one occasion the Commission was even accused of causing confusion among voters: in the wake of the 30th Amendment Bill 2011 (Oireachtas

⁵³ The month of the first Lisbon Treaty poll.

⁵⁴ The month of the second Lisbon Treaty poll. Referendum Commission, *Report on the Referendum on the Twenty-Eighth Amendment of the Constitution (Treaty of Lisbon) Bill 2009 (Lisbon II)* (PRN A9/1440, 2010) 14.

⁵⁵ *ibid* 15. The *Report* mentions that in fact the guide was sent to every household.

⁵⁶ Referendum Commission, *Report on the Referendum on Blasphemy* (2019) 5.

⁵⁷ For example, in the simultaneous 32nd Amendment Bill 2013 (Abolition of Seanad) and 33rd Amendment 2013 (Court of Appeal) referendums the Commission enjoyed ample time to do its job, and yet struggled to increase awareness because of the technical amendments and the long, complicated ballot papers. Referendum Commission, *Report on the Referendums on the Thirty-Second Amendment of the Constitution (Abolition of Seanad Éireann) Bill 2013 and Thirty-Third Amendment of the Constitution (Court of Appeal) Bill 2013* (2013).

Inquiries) referendum, the Minister for Public Expenditure and Reform publicly criticised the Chairperson of the Commission for causing confusion, and attributed the proposal's defeat to this confusion.⁵⁸ The report subsequently commissioned by that government department found that a lack of accessible public information was one of the contributing factors to the proposal's defeat.⁵⁹

The same lessons can be gleaned from that example as from all above: information accessibility is a vital aspect of a campaign, and the Commission *can* have a positive impact here if it functions properly. More than that, as the comments of Hogan J in *Doherty* indicate, by providing accurate, digestible information about an amendment proposal, a well-functioning Referendum Commission is essential for the realisation of the constitutional principles of popular sovereignty, freedom of speech, and equality.⁶⁰ It is clear that Commissions to this point have done this to an extent, but have at various times been hindered by time constraints and complicated proposals. The long-awaited advent of the permanent Electoral Commission puts the Commission in a better position to live up to its constitutional ideals, although the experience of the 2024 referendums is not so positive. Many of the same issues persisted, with the Electoral Commission finding it difficult to communicate the rationale and impact of the proposals to citizens.⁶¹ However, as discussed later in this thesis, this is primarily down to poor drafting than the Commission.⁶² As yet, more evidence is needed to fully assess the Electoral Commission's ability to overcome its predecessor's issues.

4.3 – 2012 Constitutional Convention

4.3.1 – Overview

As mentioned earlier in this thesis (§2.5.1), the 2012 Constitutional Convention was a body established by the Fine Gael–Labour coalition government, comprised of sitting politicians and ordinary citizens who were tasked with reviewing a discrete list of issues.

⁵⁸ Oran Doyle and Tom Hickey, *Constitutional Law: Text, Cases and Materials* (Clarus Press 2019), [5-49].

⁵⁹ *ibid.*

⁶⁰ *Doherty v Referendum Commission* [2012] IEHC 211.

⁶¹ The Electoral Commission, *Report on the Referendums on Care and Family* (July 2024).

⁶² See §5.6.

The Convention was similar in nature to the legislative committees seen in previous years (§2.5.1), but different in an important respect. The similarities are obvious enough: all were established with the principal aim of evaluating the Constitution and making recommendations for change. The important difference, however, was the mixture of citizens and politicians and the concomitant objective of repairing public attitudes towards politics in the wake of the economic crash. The Convention's emergence cannot be attributed to one object alone, but rather owes its existence to a number of social and political factors. In particular, the 2011 general election manifestos of Fine Gael and Labour had both made proposals for citizen-led constitutional review fora, although they differed in character somewhat. Also influential here, shortly after the election, a movement called We the People was started by a group of academics advocating for a citizen-oriented assembly on constitutional issues.⁶³ This movement, and indeed the election manifestos, were responses to historically low levels of public trust in Government at that time as a consequence of the economic climate since 2008 and the 2011 bailout agreement.⁶⁴ Farrell et al also note that Fine Gael and Labour were under time constraints to come to an agreement and form a government, so it was politically prudent to give some issues of disagreement to an assembly and therefore remove sticking points to government formation.⁶⁵

As noted previously, the Convention was made up of 100 people: a chairperson, 33 legislators,⁶⁶ and 66 randomly selected citizens.⁶⁷ The decision to include sitting politicians in the Convention was, at the time of its establishment, met with considerable opposition. Fears were expressed about politicians dominating the discussion and essentially watering down the whole rationale of the endeavour as a means of increasing

⁶³ Eoin Carolan, 'Ireland's Constitutional Convention: Behind the Hype About Citizen-Led Constitutional Change' (2015) 13 *International Journal of Constitutional Law* 733.

⁶⁴ *ibid*; Siobhan O'Sullivan, Amy Erbe Healy and Michael J Breen, 'Political Legitimacy in Ireland During Economic Crisis' (2014) 29 *Irish Political Studies* 547.

⁶⁵ David Farrell, Clodagh Harris and Jane Suiter, 'Bringing People into the Heart of Constitutional Design: The Irish Constitutional Convention of 2012-14' in Xenophon Contiades and Alkmene Fotiadou (eds), *Participatory Constitutional Change: The People as Amenders of the Constitution* (Routledge 2017); Oran Doyle and Rachael Walsh, 'Constitutional Amendment and Public Will Formation: Deliberative Mini-Publics as a Tool for Consensus Democracy' (2022) 20 *International Journal of Constitutional Law* 398.

⁶⁶ Including 4 from the Northern Ireland Assembly. The politicians were not randomly selected, rather it was up to each political party how to choose their representatives.

⁶⁷ Issues came to light at one stage about the process of citizens being selected: after the identities of the citizens were released, it was shown that two of the participants were a married couple, and their neighbour was also involved. It seems the polling company allowed these parties to suggest other persons to take part. Eoin Carolan, 'Ireland's Constitutional Convention: Behind the Hype About Citizen-Led Constitutional Change' (2015) 13 *International Journal of Constitutional Law* 733.

citizen involvement in politics.⁶⁸ This criticism came from media outlets and also from parliamentarians, including Stephen Donnelly TD who remarked that ‘best international practice’ saw the inclusion of politicians in such bodies as improper.⁶⁹ Regardless, the composition was retained and the Convention sat once a month for nearly eighteen months. Rather than a full review of the Constitution, the Convention was given a list of issues set by Government. These issues were: reducing the Presidential term of office; reducing the voting age to 17; a review of the Dáil electoral system; giving citizens resident outside the State the right to vote in Presidential elections; provision for same-sex marriage; amending the clause on the role of women in the home and encouraging greater participation of women in public life; increasing the participation of women in politics; removal of the offence of blasphemy; and such other relevant constitutional amendments that may be recommended.⁷⁰

4.3.2 – The Functions of the Convention

The Convention had two functions. The first was, as mentioned above, to repair public cynicism in relation to politics and government and increase citizen engagement with the Constitution. This function was served at least minimally by the Convention simply existing; the process of having citizens engage in this sort of endeavour was itself an end. We might call this the process function. The second function was to review the Constitution and offer recommendations for amendment so that change might be brought about. This I will refer to as the outcome function. This dual function is reflected in the speech of the Chairman, Tom Arnold, on the day of the Convention’s first meeting wherein he expressed hope that the Convention might move past the cynicism and alienation that had plagued public discourse which are ‘unhealthy for our society and, ultimately, dangerous for our democracy’, while also going further than previous constitutional committees which had failed to spark ‘systematic or substantial constitutional change.’⁷¹

⁶⁸ David Farrell, Jane Suiter, Clodagh Harris, Kevin Cunningham, ‘The Effects of Mixed Membership in a Deliberative Forum: The Irish Constitutional Convention of 2012–2014’ (2020) 68 *Political Studies* 54.

⁶⁹ *ibid.*

⁷⁰ Terms of Reference for the Constitutional Convention 2012, detailed in the Resolution of the Houses of the Oireachtas of July, 2012, <https://www.constitutionalconvention.ie/Documents/Terms_of_Reference.pdf> accessed 20 July 2023.

⁷¹ Tom Arnold, ‘Address by the Chairman Tom Arnold at the Inaugural Meeting of the Convention on the Constitution 1 December 2012’ (2012).

4.3.2.1 – The Process Function

The process function of the Convention was separate to the specific constitutional issues examined. Rather than working only towards the attainment of one or other amendment, the Convention, by involving citizens in a review of the Constitution, and by establishing some closer links with sitting parliamentarians, sought to engender greater engagement and participation with constitutional issues.⁷² The relevance here for referendums is clear – as seen in previous chapters when citizens are more engaged referendums tend to be better by practically any metric: turnout is higher, debate is more substantial, citizens are more aware and informed, and so on.⁷³ In this sense the Convention acted as a supplementary institution by fostering greater public engagement in order to bolster the democratic character of referendums on any of the proposed amendments.

The Convention's process function can be seen in its composition; the very fact of citizen involvement. And while it might be argued that the inclusion of politicians undermined this function, Farrell et al note that there was little evidence of domination by parliamentarians, and in fact there is evidence of political involvement 'grounding' the process and thus ensuring a fairer hearing in political circles.⁷⁴ More than that, work carried out on a daily basis by the Convention was set up in such a way as to maximise citizen involvement. A typical day included presentations from experts and advocacy groups, closed small-group discussion, open deliberation, feedback from the citizens, and a ballot on the issue.⁷⁵ The participants were arranged in tables of eight, mixed of citizens and politicians, and each had a trained facilitator to ensure all individuals got the chance to speak.⁷⁶

4.3.2.2 – Outcome Function

⁷² As well as the political machinations of the state more generally.

⁷³ We can also link this sort of engagement very easily with the remarks of Hogan J in *Doherty v Referendum Commission* [2012] IEHC 211 [25] (Hogan J) regarding the principles of equality and popular sovereignty at the heart of the referendum.

⁷⁴ David Farrell, Jane Suiter, Clodagh Harris, Kevin Cunningham, 'The Effects of Mixed Membership in a Deliberative Forum: The Irish Constitutional Convention of 2012–2014' (2020) 68 *Political Studies* 54.

⁷⁵ David Farrell, Clodagh Harris and Jane Suiter, 'Bringing People into the Heart of Constitutional Design: The Irish Constitutional Convention of 2012–14' in Xenophon Contiades and Alkmene Fotiadou (eds), *Participatory Constitutional Change: The People as Amenders of the Constitution* (Routledge 2017).

⁷⁶ *ibid.*

The second function of the Convention was to identify aspects of the Constitution in need of reform and offer proposals for amendment. This function was the core of the Convention's work, and it is clear from the Chairman's remarks that there was an appetite for change:

‘It is not just that the current Constitution has attained the venerable status of 75 years [...] It is more that the combination of huge social, economic and cultural change over the decades requires that we look again at the words in our founding document, the Constitution. Our experience of coping with economic recession, and of dealing with some of the scandals which have shocked our society, requires us to ask the most fundamental questions about our values, the way we govern ourselves, and our standards in public life. As we arrive at answers to these questions, they should be reflected in the words of our Constitution.’⁷⁷

In total, the Convention made 40 recommendations, 18 of which would require constitutional amendment.⁷⁸ In many instances the recommendations made by the Convention went beyond the terms of establishment: for example, on the question of whether the age of voting should be reduced to 17, the Convention's conclusion was that it should in fact be lowered to 16, an option not initially available to them.⁷⁹ Once all of the listed issues had been dealt with, the Convention then went on to examine and make recommendations on two further issues: Dáil Reform, and Economic, Social, and Cultural Rights.⁸⁰ While it is beyond the remit of the chapter to examine each recommendation in turn, the volume and breadth of recommendations is significant. Also important to note here is that at the outset, the Government gave specific undertaking to respond ‘in a timely fashion by way of a formal ministerial statement to the Parliament within four months of receipt of a report by the Convention’.⁸¹ The role of the Convention as a supplementary

⁷⁷ Tom Arnold, ‘Address by the Chairman Tom Arnold at the Inaugural Meeting of the Convention on the Constitution 1 December 2012’ (2012).

⁷⁸ David Farrell, Clodagh Harris, and Jane Suiter, ‘Bringing People into the Heart of Constitutional Design: The Irish Constitutional Convention of 2012-14’ in Xenophon Contiades and Alkmene Fotiadou (eds), *Participatory Constitutional Change: The People as Amenders of the Constitution* (Routledge 2017).

⁷⁹ *ibid.*

⁸⁰ Constitutional Convention, *Seventh Report* (March 2014); Constitutional Convention, *Eighth Report* (March 2014).

⁸¹ David Farrell, Clodagh Harris and Jane Suiter, ‘Bringing People into the Heart of Constitutional Design: The Irish Constitutional Convention of 2012-14’ in Xenophon Contiades and Alkmene Fotiadou (eds), *Participatory Constitutional Change: The People as Amenders of the Constitution* (Routledge 2017).

institution in this fashion is clear: this deliberative method of proposing amendment speaks directly to the level of public involvement with constitutional referendums.

4.3.3 – Evaluating Effectiveness

4.3.3.1 – Effectiveness of Process Function

First, how effective was the Convention at engendering greater engagement with constitutional issues? It is clear from the reports that the citizen participants were overwhelmingly positive in their assessment of the process, with many expressing the view that the Convention had increased their interest in and respect for politics,⁸² and 100% of the members balloted agreeing that another Convention should be established.⁸³ While there were some concerns raised that the politicians were too dominant at times, the majority of participants were happy with the format and structure.⁸⁴ Further, academic commentary after the fact has been largely positive about the deliberative character of the Convention and the engagement by the participants.⁸⁵

So it is evident that the process of having citizens participate in this endeavour did increase the engagement of those particular citizens. What is less clear is whether that translated to the public at large – whether the Convention succeeded in repairing popular disillusionment with politics. The Chairman, in the Convention’s final report, indicated that there was some evidence of this, pointing to the ‘significant level of public engagement, as evidenced by the number of submissions, the number of people who

⁸² Convention on the Constitution, *Ninth Report* (March 2014), section 3 ‘Voices of the Convention’, e.g. “I hope that this form of direct democracy will lead to a better opinion of decision-making by members of the public and greater citizen involvement on the political process” and “I enjoyed the experience and it has made me want to get more involved with things rather than being a spectator.”

⁸³ *ibid* Section 2.2.

⁸⁴ *ibid*.

⁸⁵ David Farrell, Clodagh Harris and Jane Suiter, ‘Bringing People into the Heart of Constitutional Design: The Irish Constitutional Convention of 2012-14’ in Xenophon Contiades and Alkmene Fotiadou (eds), *Participatory Constitutional Change: The People as Amenders of the Constitution* (Routledge 2017); David Farrell, Jane Suiter, Clodagh Harris, Kevin Cunningham, ‘The Effects of Mixed Membership in a Deliberative Forum: The Irish Constitutional Convention of 2012–2014’ (2020) 68 *Political Studies* 54; Oran Doyle and Rachael Walsh, ‘Constitutional Amendment and Public Will Formation: Deliberative Mini-Publics as a Tool for Consensus Democracy’ (2022) 20 *International Journal of Constitutional Law* 398; for a more sceptical view, see Eoin Carolan, ‘Ireland’s Constitutional Convention: Behind the Hype About Citizen-Led Constitutional Change’ (2015) 13 *International Journal of Constitutional Law* 733.

followed [the] proceedings and the range of individuals and civil society groups who wished to engage with the Convention.⁸⁶ This was no doubt helped somewhat by the Convention's 'road trips': meetings were held in nine venues throughout the country so that the public could engage with the Convention on the issue of constitutional change.⁸⁷ These road trips were well attended by the public.

Another way of viewing the success of this process function is by the influence the Convention had on later bodies, particularly the Citizens' Assemblies from 2016 onwards. While these Assemblies are dealt with below, the Convention's role here is worth emphasising. Farrell et al note that the success of the Convention as a deliberative forum led directly to the establishment of the Citizens' Assembly in 2016,⁸⁸ which has in turn led to a number of further Assemblies since.⁸⁹ The Assemblies have carried on the process function of the Convention. Persisting with these citizen-led fora continues the function of increasing public engagement with these civic and constitutional issues, and contributes to a better functioning referendum system as a result of a better informed and better engaged public.

Looking at whether this has translated to greater engagement in specific referendums, there is some evidence that the political disillusionment began to wane around the time after the Convention was completed. In the six referendums taken immediately prior to the Convention's establishment or during the course of its work, the turnout figures are very low (with a mean of 44.7% and median of 39.2%),⁹⁰ and much of the campaigns were plagued with low engagement, most notoriously the 31st Amendment 2012 (Children's Rights) referendum.⁹¹ In contrast, the five referendums after the completion of the

⁸⁶ Convention on the Constitution, *Ninth Report* (March 2014), 2.2. For some context, the Convention received 2,500 public submissions, and the website was viewed 350,000 times from 144 countries.

⁸⁷ *ibid* section 1.

⁸⁸ David Farrell, Jane Suiter, Clodagh Harris, Kevin Cunningham, 'The Effects of Mixed Membership in a Deliberative Forum: The Irish Constitutional Convention of 2012–2014' (2020) 68 *Political Studies* 54; David Farrell, Jane Suiter and Clodagh Harris, "'Systematizing" Constitutional Deliberation: The 2016–18 Citizens' Assembly in Ireland' (2019) 34 *Irish Political Studies* 113, 119.

⁸⁹ Including the 2020–21 Assembly on Gender Equality, the 2022 Dublin Citizens' Assembly, the 2022 Assembly on Biodiversity, and the 2023 Assembly on Drug Use.

⁹⁰ The figures here are the 29th Amendment 2011 (Judges' Remuneration) (55.9%); 30th Amendment Bill (Oireachtas inquiries) (55.9%); 30th Amendment 2012 (European Fiscal Compact) (50.6%); 31st Amendment 2012 (Children's Rights) (33.5%); 32nd Amendment Bill 2013 (Abolition of Seanad) (39.2%); and 33rd Amendment 2013 (Court of Appeal) (39.2%).

⁹¹ Oran Doyle and David Kenny, 'Constitutional Change and Interest Group Politics: Ireland's Children's Rights Referendum' in Richard Albert, Xenophon Contiades and Alkmene Fotiadou (eds), *The Foundations and Traditions of Constitutional Amendment* (Hart Publishing 2017).

Convention have a higher average turnout (mean of 56% and median of 60.5%) and generally better engagement.⁹² While these figures cannot be attributed solely to the Convention, it is notable that three of these referendums flowed from recommendations by the Convention. In particular, commentary surrounding the 2015 Marriage and 2018 Abortion referendums attributed a portion of the extremely high engagement there to the fact that the issues had been the subject of considered citizen deliberation in, respectively, the Convention and the 2016-18 Citizens' Assembly.⁹³

4.3.3.2 – *Effectiveness of Outcome Function*

Measuring the effectiveness of the outcome function is a deal easier. Since the function here was to bring about constitutional referendums, effectiveness is determined by whether any referendums actually were taken on the recommendations. The Government's commitment to responding to the recommendations makes this even more explicit. Three of the recommendations for constitutional amendment were put to referendum in the years immediately following the Convention. In 2015 the Convention's recommendations on same-sex marriage and the reduction of the minimum age for presidential candidates were run as referendums.⁹⁴ The former was passed while the latter was rejected. In 2018 a referendum was run to remove the offence of blasphemy from the Constitution, as recommended by the Convention.⁹⁵ This passed.

Referendums were committed to on two other topics discussed by the Convention: gender equality and the right of citizens abroad to vote in presidential elections. Following the Convention's recommendations in relation to Article 41.2 and gender in the Constitution, a Citizens' Assembly on Gender Equality was established to examine the matter further.⁹⁶ As discussed later in this thesis (§5.6), this proposal was eventually subsumed into the 2024 Care referendum which was ultimately rejected. It is questionable whether the 2024

⁹² These are the 34th Amendment 2015 (Marriage Equality) (60.5%); 35th Amendment 2015 (Lowering Age of Presidency) (60.5%); 36th Amendment 2018 (Repeal of 8th Amendment) (64.1%); 37th Amendment 2018 (Blasphemy) (43.9%); and 38th Amendment 2019 (Divorce III) (50.89%).

⁹³ David Farrell, Jane Suiter and Clodagh Harris, "Systematizing" Constitutional Deliberation: The 2016–18 Citizens' Assembly in Ireland' (2019) 34 Irish Political Studies 113, 119.

⁹⁴ The 34th Amendment 2015 and 35th Amendment Bill 2015 respectively.

⁹⁵ 37th Amendment 2018.

⁹⁶ The Citizens' Assembly on Gender Equality, *Report* (June 2021) made similar recommendations to the Convention, including that Article 41.2 should be deleted and replaced with gender-neutral language, as well as broader recommendations including a change to Article 40.1.

referendum was an actual reflection of the recommendations from the 2012 Convention and/or the Assembly, in part due to the specific wording chosen.⁹⁷ In relation to the recommendation on voting for citizens abroad, the Government committed to holding a referendum,⁹⁸ but the proposal has fallen to the wayside over the years.⁹⁹ While debate does resurface occasionally, it is presently unclear whether the proposal is in line to go to referendum.¹⁰⁰ Regardless, ten years on from the Convention's report on this issue, there has yet to be a referendum. While no explicit commitment has been made, the Convention's recommendation to reduce the age of voting to 16 has been the subject of debate in the Seanad through a Bill amending the Electoral Act 1992, initiated in 2016.¹⁰¹ Progress here has been slow, and there is little indication that a referendum is due any time soon on this matter.

Responses to the other issues covered by the Convention have been more mixed. Responding to the 8th Report on Economic, Social, and Cultural Rights, the Government alluded quite vaguely to referring the matter to an Oireachtas committee.¹⁰² In relation to the 7th Report on Dáil Reform, so far we have seen the establishment of a committee in relation to Dáil reform,¹⁰³ and some minor changes which did not require constitutional amendment.¹⁰⁴ Finally, many of the recommendations from the Convention's Fourth

⁹⁷ See §5.6.

⁹⁸ Minister for Housing, Planning, Community and Local Government (as he then was) Simon Coveney published an 'options paper' in March 2017 with the intention of getting further deliberation on the matter; <https://merrionstreet.ie/en/news-room/releases/coveney_publishes_an_options_paper_on_extending_the_eligibility_for_citizens_resident_outside_the_state_to_vote_at_presidential_elections.html> accessed 5 May 2023.

⁹⁹ A Bill to amend the Constitution was initiated in the Dáil on 16 September 2019 but has yet to progress to the Second Stage of debate in the intervening years; Thirty-ninth Amendment of the Constitution (Presidential Elections) Bill 2019 (Bill no 68 of 2019).

¹⁰⁰ Minister of State for Overseas Development Aid and Diaspora Colm Brophy (as he then was) at one stage indicated that a referendum might be held in 2024, but again nothing concrete has materialised. Gabija Gataveckaite, 'Referendum to allow Irish diaspora vote for president to take place before 2024' *Irish Independent* (Dublin 4 April 2022). See also Justine McCarthy, 'Do we really want to give the diaspora a vote on the President?' *The Irish Times* (Dublin 16 December 2022).

¹⁰¹ Electoral (Amendment) (Voting at 16) Bill 2016 (Bill no 63 of 2016),

¹⁰² See remarks of Deputy Paul Kehoe, Minister of State at the Department of the Taoiseach, Convention on the Constitution Final Reports: Statements, Dáil Deb, 14 Jan 2016 (Vol 902, No 2); see also the previous Private Member's Bill on this topic which was defeated, Thirty-fifth Amendment of the Constitution (Economic, Social and Cultural Rights) Bill 2016.

¹⁰³ The Committee on Standing Orders and Dáil Reform was established in March 2020.

¹⁰⁴ They are: the election of the Ceann Comhairle by secret ballot; the proportionate allocation of Oireachtas Committee Chairs under the d'Hondt system; the Taoiseach to appear regularly before the Working Group of Committee Chairs. See press statement by Merrion Street: <https://merrionstreet.ie/en/news-room/news/government%E2%80%99s_response_to_the_constitutional_convention%E2%80%99s_report_on_dail_reform.html> accessed 5 May 2023.

Report, on the Dáil Electoral System, have been incorporated into the Electoral Reform Act 2022, in particular the establishment of the new Electoral Commission.¹⁰⁵

In sum, when examining the Convention's record on constitutional amendment it is clear that Tom Arnold's hope that it might lead to systematic or substantial change was not realised. The fact that, despite the volume and breadth of recommendations, only three constitutional referendums flowed directly from the Convention must be looked at as a very limited degree of success. Given the discretion that the Government retains in initiating a referendum, any body of this sort is inherently limited in how impactful it can be. That said, the fact that such an innovative forum as the Convention led to any change at all is, in its own way, significant. It is important to emphasise the dual function when examining the Convention: the success in terms of outcomes should not be isolated from the success of the body as a forum for increasing public engagement. And while it is difficult to grasp exactly what impact the Convention had in repairing political disillusionment in Ireland, there is evidence to suggest it played some role, and its influence on subsequent bodies is undeniable. As an institution supplementing the referendum process, the Constitutional Convention achieved limited success in affording citizens more input in eventual amendment proposals, but more substantial success in fostering public engagement with the Constitution. The importance of this latter function is becoming increasingly clear.

4.4 – Citizens' Assemblies

4.4.1 – Overview

In its programme for Government published following the formation of a minority government after the 2016 General Election, Fine Gael announced an intention to establish a Citizens' Assembly which would examine key societal and constitutional issues without input from politicians.¹⁰⁶ Following on from the perceived success of the 2012

¹⁰⁵ The Convention's *Fourth Report* recommended the establishment of an Electoral Commission. Another recommendation was to increase the size of constituencies, a matter which is currently being examined by the Electoral Commission.

¹⁰⁶ *A Programme for Partnership Government* (May 2016).

Constitutional Convention, this 2016-18 Citizens' Assembly would be asked to look at a range of issues, including (but not limited to) the Eighth Amendment, fixed term parliaments and 'the manner in which referenda are held'.¹⁰⁷ The question of the Eighth Amendment was unquestionably the main point of interest here and subsequently became practically the only element of the Assembly's work that received significant media attention. Critics at the time of the Assembly's establishment suggested that by delegating the question of the Eighth Amendment to the Assembly, the Government was passing the buck on an extremely contentious issue that was at the forefront of public debate.¹⁰⁸ However, by the time the Assembly had completed its work and the referendum on repealing the Eighth Amendment had passed, the process was looked at favourably by most commentators, particularly those abroad.¹⁰⁹ This positive experience and reaction led to the formation of four more Assemblies over the subsequent five years; on gender equality, local government in Dublin, biodiversity, and drug use, the last of which delivered its report in January 2024.¹¹⁰ For the purposes of this section, the 2016-18 Assembly will be the primary focus as it is led to a constitutional referendum.

Much has been written about the 2016-18 Citizens' Assembly, particularly on the fact that the Assembly's recommendations went further than was anticipated by many, with 87% voting for some constitutional change and 48% voting that abortion should be permitted without restriction up to 12 weeks' gestation.¹¹¹ A full account of the significance (historically, socially) of such a recommendation is beyond the remit of this chapter, but it is worth emphasising the substance of such a marked shift since the Eighth Amendment

¹⁰⁷ *ibid* 153. Other possible constitutional amendments referred to are the 'woman's life within the home' in Article 41.2.1, the removal of the offence of blasphemy, Ireland's participation in the Universal Patent Court and granting the Office of the Ceann Comhairle constitutional standing, as recommended by the Constitutional Convention.

¹⁰⁸ David Kenny and Aileen Kavanagh, 'Are the People the Masters? Constitutional Referendums in Ireland' in Richard Albert and Richard Stacey (eds), *The Limits and Legitimacy of Referendums* (Oxford University Press 2021), citing Gráinne Griffin, Orla O'Connor, Ailbhe Smyth and Alison O'Connor, *It's a Yes!* (Orpen Press, 2019) 41–42.

¹⁰⁹ For example, see, 'How 99 strangers in a Dublin hotel broke Ireland's abortion deadlock' *The Guardian* (8 March 2018) <<https://www.theguardian.com/world/2018/mar/08/how-99-strangers-in-a-dublin-hotel-broke-irelands-abortion-deadlock>> accessed 13 June 2023; Colm O'Cinneide, 'The Citizens' Assembly Viewed in External Perspective: Useful, but not a Deliberative Deus Ex Machina' IACL-AIDC Blog (12 December 2018) <<https://blog-iacl-aidc.org/debate-the-citizens-assembly-in-ireland/2018/12/12/the-citizens-assembly-viewed-in-external-perspective-useful-but-not-a-deliberative-deus-ex-machina>> accessed 13 June 2023.

¹¹⁰ Citizens' Assembly, *Report of the Citizens' Assembly on Drugs Use* (January 2024).

¹¹¹ Citizens' Assembly, *First Report and Recommendations of the Citizens' Assembly: The Eighth Amendment of the Constitution*, (29 June 2017) 12.

was inserted in 1983.¹¹² However, it is also important at this stage to re-emphasise that while Repeal of the Eighth Amendment was the most high-profile aspect of the 2016-18 Assembly's work, it did go on to make recommendations on other issues, some of which included recommendations for constitutional amendment.¹¹³ For the purposes of examining the Citizens' Assembly generally, the other reports must be borne in mind. While the literature on the Citizens' Assembly cuts across disciplines and uses the experience as a foundation to discuss a multitude of topics,¹¹⁴ this section seeks merely to assess the Citizens' Assembly as an institution supplementing the referendum process. That is, to distil the functions of the Assembly in relation to constitutional referendums and to assess its effectiveness in performing these functions.

4.4.2 – The Functions of the Assembly

As noted, the Citizens' Assembly was created on foot of the 2012 Convention's success. In particular, the deliberative nature of the Convention coupled with the high-profile, internationally acclaimed Marriage Equality referendum acted as the impetus for establishing the Citizens' Assembly. As such, the Assembly had a similarly dual function: to make recommendations for change, and to generate these recommendations through citizen-led deliberation.

4.4.2.1 – Process Function

¹¹² For a full account of the historical significance of abortion in Irish constitutional law and the repeal campaign, see Fiona de Londras and Mairead Enright, *Repealing the 8th: Reforming Abortion Law in Ireland* (Policy Press 2018), and for discussion of the Assembly's role here see Fiona de Londras, 'The Citizens' Assembly and the Disciplining of Activist Demands' (26 November 2018) <<https://blog-iacl-aidc.org/debate-the-citizens-assembly-in-ireland/2018/11/26/the-citizens-assembly-and-the-disciplining-of-activist-demands>> accessed 13 June 2023; Oran Doyle, 'Shaping Public Debate: An Introduction to the Citizens' Assembly' IACL-AIDC Blog (19 November 2018) <<https://blog-iacl-aidc.org/debate-the-citizens-assembly-in-ireland/2018/11/19/shaping-public-debate-an-introduction-to-the-citizens-assembly>> accessed 13 June 2023.

¹¹³ The Assembly's Second and Third Reports on the challenges of an aging population and climate change did not make constitutional amendment recommendations.

¹¹⁴ Simone Chambers, 'Democracy and Constitutional Reform: Deliberative Versus Populist Constitutionalism' (2019) 45 *Philosophy and Social Criticism* 1116-1131.

In its own words, the Assembly was ‘first and foremost an exercise in deliberative democracy’.¹¹⁵ This meant the emphasis was shifted from ‘the outcome of the decision to the quality of the process’ so that political decisions might be the product of ‘fair and reasonable discussion and debate among citizens’, rather than private concerns or political power.¹¹⁶ In a very general sense, the benefit of such deliberative democracy is twofold. On the one hand, deliberative democracy instantiates an intrinsic good – reasoned, civil, and representative debate is to be preferred to more cynical, self-interested, and less collaborative methods of democratic decision-making.¹¹⁷ Second, deliberation aids in public will formation and consensus building which is necessary in a constitutional democracy.¹¹⁸ The Citizens’ Assembly is an example of a deliberative mini-public – a microcosm of society intended to engage in the sort of deliberation that is ideal but unworkable at the scale of an entire polity.¹¹⁹ In the realm of constitutional amendment the idea, then, is that the Citizens’ Assembly does this deliberative work on behalf of the polity at large before making recommendations and offering reasons, so that at a referendum¹²⁰ voters can refer to the Assembly’s deliberation when making their own decision. In this way, the deliberation has benefits for all: the citizens from the Assembly benefitted by actually participating in the deliberation, and the citizens who did not participate still benefit from sight of the results of such deliberation, particularly as a result of the Assembly’s work being reported widely in print and broadcast media, becoming itself part of the political debate. This is the process function – the operation of such a deliberative mini-public is itself good for the referendum process for the intrinsic reasons above and also because it grants amendment proposals and the subsequent public deliberation a foundation of reasoned argument from which to begin. Citizens are engaged in the referendum process from the outset in a substantial way.

The composition of the Assembly was designed with deliberation at the forefront. In a break from the 2012 Convention, the 2016-18 Assembly was made up of 99 randomly

¹¹⁵ Citizens’ Assembly, *First Report and Recommendations of the Citizens’ Assembly: The Eighth Amendment of the Constitution* (29 June 2017) 11.

¹¹⁶ *ibid* 41.

¹¹⁷ Of course, this is true only if one accepts the principle of democracy and citizen involvement as a good.

¹¹⁸ Oran Doyle and Rachael Walsh, ‘Constitutional Amendment and Public Will Formation: Deliberative Mini-Publics as a Tool for Consensus Democracy’ (2022) 20 *International Journal of Constitutional Law* 398.

¹¹⁹ *ibid*.

¹²⁰ In the case of Ireland. In a system of governance where amendment is made by more representative methods, politicians and representative decision-makers are to take the deliberation into account.

selected citizens¹²¹ and a chairperson,¹²² with no politicians involved in the process. An Expert Advisory Group composed of experts in the fields of Political/Social Science, Constitutional Law and Theory, Medical Law and Ethics, and Medicine and Obstetrics was appointed to assist the Assembly in its work.¹²³ Across five weekends, the Assembly heard presentations from experts and was given time and space to discuss these presentations and the issues. With an emphasis on deliberation, discussion and engagement was fostered through the use of facilitators and note-takers and the members of the Assembly had input into the direction of the weekends. Members were balloted and at the end of the five weeks the Assembly's report was published with recommendations on possible constitutional change regarding abortion in the Constitution. The composition and operation of the Assembly was the same in each of its sittings.

4.4.2.2 – Outcome Function

The outcome function of the Assembly is more straightforward: the Assembly was tasked with making recommendations for change. Therefore, the Assembly's success can be measured according to the recommendations made and whether they were adopted. Upon completion of its first report, the Assembly returned recommendations regarding a number of ballots. On the primary issue, the recommendations agreed upon by a majority were (i) that Article 40.3.3° should not be retained in full (87%), (ii) that Article 40.3.3° should be replaced or amended (56%), and (iii) that Article 40.3.3° should be replaced with a constitutional provision that explicitly authorises the Oireachtas to legislate to address termination of pregnancy, any rights of the unborn, and any rights of the pregnant woman (57%).¹²⁴ On subsequent ballot papers, the Assembly made recommendations regarding the content of any legislation to follow on from a referendum, and a majority (64%) recommended that the termination of pregnancy without restriction should be lawful.¹²⁵ Finally, the Assembly made recommendations on 12 reasons for which termination of

¹²¹ Chosen in a way so as to maximise the representative nature of the body, according to age, gender, social class, and regional spread.

¹²² Retired Supreme Court judge Mary Laffoy.

¹²³ Different Expert Advisory Groups were constituted for each of the Assembly's topics.

¹²⁴ Citizens' Assembly, *First Report and Recommendations of the Citizens' Assembly: The Eighth Amendment of the Constitution* (29 June 2017) 12.

¹²⁵ *ibid*, the Assembly voted on gestation period limits, with 48% voting for restrictions after 12 weeks, 44% for restrictions after 22 weeks, and 8% voting for no restriction as to gestational age.

pregnancy should be legal.¹²⁶ As per the terms of reference, the recommendations were afterwards considered by a specially established Oireachtas committee which itself made recommendations to the Government regarding any amendment proposal and its wording.¹²⁷ Upon consideration of this report, and after advice from the Attorney General, a referendum to replace the Eighth Amendment and allow the Oireachtas to legislate for abortion was held on May 25th 2018 and passed with over 64% in favour.

In relation to the '16-18 Assembly's other briefs, only the report on 'Fixed Term Parliaments and the Manner in Which Referenda Are Held' made recommendations requiring constitutional amendment. The recommendations therein included reducing the voting age in referendums to 16,¹²⁸ citizen-initiated referendum proposals,¹²⁹ and changes to the constitutional position regarding Dáil dissolution.¹³⁰ Many more recommendations were made which required no change to the Constitution.¹³¹

4.4.3 – Evaluating Effectiveness

4.4.3.1 – Effectiveness of Process Function

The relative merits of deliberative democracy as opposed to other schools of democratic thought is not an issue which can be unravelled in this chapter. However, in order to evaluate the Citizens' Assembly on this basis all that is important is whether the Assembly was successful in fostering and facilitating citizen deliberation in a manner which positively impacted the referendum process.

¹²⁶ *ibid* 13. These reasons include real and substantial risk to the life of the woman (99%), foetal abnormality likely to result in death before or shortly after birth (89%), and socio-economic reasons (72%), among others.

¹²⁷ The possible constitutional implications of a straight repeal of Article 40.3.3 rather than a replacement was the subject of some difficulty and caused some controversy, see David Kenny, 'Repeal or Replace? The Challenge of Debating Complex Legal/Constitutional Questions in the Citizens' Assembly' IACL-AIDC Blog (10 December 2018) <<https://blog-iacl-aidc.org/debate-the-citizens-assembly-in-ireland/2018/12/10/repeal-or-replace-the-challenge-of-debating-complex-legalconstitutional-questions-in-the-citizens-assembly>> accessed 13 June 2023.

¹²⁸ Citizens' Assembly, *Report and Recommendations of the Citizens' Assembly On the fourth and fifth topics: The Manner in Which Referenda Are Held & Fixed Term Parliaments* (21 June 2018) 11.

¹²⁹ *ibid*.

¹³⁰ *ibid* 43.

¹³¹ While this Report contained a huge number of recommendations for maximising engagement with referendums and connected issues, further examination of these issues will be considered at a later stage.

As with the 2012 Convention, reflections by members of the 2016-18 Assembly were very positive about the usefulness of the Assembly, and a vast majority believed it should be used again in the future.¹³² Members indicated that the non-political nature of the Assembly was a strength, and many described the best aspect of their participation as the ability to broaden their own knowledge and understanding of issues.¹³³ This no doubt influenced the decision to continue with Citizens' Assemblies and establish three more. The fact that these Assemblies have continued to discuss topics that do not *require* constitutional reform speaks to the existence and importance of the process function's core – clearly there is a perceived value in having these fora deliberate even where change could be easily enacted without citizen participation. This is in some ways an acceptance of the benefits of deliberative democratic theory.¹³⁴ The positive public reaction to the Assembly has justified the use of deliberative mini-publics even in situations where public consensus on an issue is not a prerequisite to change.¹³⁵

Internationally, the 2016-18 Citizens' Assembly received an unprecedented amount of attention after the referendum to repeal the Eighth Amendment with many media and academics commending the deliberative forum at a time of heightened anxieties about populism and democratic backsliding globally.¹³⁶ More recently, while initial academic reflections were broadly positive, some have suggested that the Assembly's impact as a deliberative forum was limited. For example, Eoin Carolan has commented that the government-controlled composition of the Assembly precluded radical recommendations and that the approach was overly legalistic.¹³⁷ He has also suggested that the Assembly's influence on members of the public was extremely limited, and that rather it was a series of high-profile incidents which had turned the tide towards liberalisation of the abortion regime.¹³⁸ Similarly, de Londras has made the point that the Assembly's work had more

¹³² Citizens' Assembly, *Report and Recommendations of the Citizens' Assembly On the fourth and fifth topics: The Manner in Which Referenda Are Held & Fixed Term Parliaments* (21 June 2018) 99.

¹³³ *ibid* 100.

¹³⁴ For example, Simone Chambers, 'Constitutional Referendums and Democratic Deliberation' in Matthew Mendelsohn and Andrew Parkin (eds), *Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns* (Palgrave Macmillan UK 2001) 231.

¹³⁵ i.e. an issue not requiring a referendum.

¹³⁶ Colm Ó Cinnéide, 'The Citizens' Assembly Viewed in External Perspective: Useful, but not a Deliberative Deus Ex Machina' IACL-AIDC Blog (12 December 2018) <<https://blog-iacl-aidc.org/debate-the-citizens-assembly-in-ireland/2018/12/12/the-citizens-assembly-viewed-in-external-perspective-useful-but-not-a-deliberative-deus-ex-machina>> accessed 13 June 2023.

¹³⁷ Eoin Carolan, 'Constitutional Change Outside the Courts: Citizen Deliberation and Constitutional Narrative(s) in Ireland's Abortion Referendum' (2020) 48 *Federal Law Review* 497.

¹³⁸ *ibid*.

influence over politicians than the public,¹³⁹ and that the Assembly should be properly understood as a vehicle through which the experiences of women could be translated for a system that ‘needed formal reports, numerous parliamentary processes, and the simple good fortune of sticky parliamentary arithmetic at the time of forming the government for a referendum to come about.’¹⁴⁰ de Londras accepts that the Assembly’s work was important, but stresses that we ought to be cautious about ascribing the result – and the high engagement – too eagerly to the forum.¹⁴¹

Doyle and Walsh, conversely, push back against the suggestion that the Assembly did not impact public attitudes, using different polling data to indicate that there had been a significant change in opinion over the course of the campaign.¹⁴² The authors put forward data which suggest the Assembly’s work influenced the public; in particular, the fact that the Assembly became an important part of the broader discursive sphere, and the formal connection between the Assembly’s recommendations and the amendment process.¹⁴³ For the authors, the Assembly was successful in its role to ‘contribute to public will formation in respect of constitutional change’ by eschewing the pitfalls of representative-initiated amendment¹⁴⁴ and ‘ensuring a lengthy pre-initiation phase during which a wide range of voices could be heard and a reform proposal developed that ultimately attracted widespread political and public support.’¹⁴⁵

¹³⁹ A point with which Carolan agrees. The suggestion is that politicians had been operating under the mistaken belief that public attitudes toward abortion were more conservative than was the case in reality. Eoin Carolan, ‘Constitutional Change Outside the Courts: Citizen Deliberation and Constitutional Narrative(s) in Ireland’s Abortion Referendum’ (2020) 48 *Federal Law Review* 497.

¹⁴⁰ Fiona de Londras, ‘The Citizens’ Assembly and the Disciplining of Activist Demands’ (26 November 2018) <<https://blog-iacl-aidc.org/debate-the-citizens-assembly-in-ireland/2018/11/26/the-citizens-assembly-and-the-disciplining-of-activist-demands>> accessed 14 June 2023.

¹⁴¹ *ibid.* For more critique of the Assembly’s design see Máiréad Enright, ‘Abortion and the Citizens’ Assembly: Agonist Futures?’ IACL-AIDC Blog (5 December 2018) <<https://blog-iacl-aidc.org/debate-the-citizens-assembly-in-ireland/2018/12/5/abortion-and-the-citizens-assembly-agonist-futures>> accessed 12 June 2023.

¹⁴² Oran Doyle and Rachael Walsh, ‘Constitutional Amendment and Public Will Formation: Deliberative Mini-Publics as a Tool for Consensus Democracy’ (2022) 20 *International Journal of Constitutional Law* 398.

¹⁴³ *ibid.*

¹⁴⁴ Such as the tendency to respond to single-issue voters, the impact of powerful interest groups, and partisan gamesmanship.

¹⁴⁵ Oran Doyle and Rachael Walsh, ‘Constitutional Amendment and Public Will Formation: Deliberative Mini-Publics as a Tool for Consensus Democracy’ (2022) 20 *International Journal of Constitutional Law* 398.

When evaluating the success of the process function overall, a few things become clear. First, the enthusiasm of the participants and the continued (equally enthusiastic) use of new Assemblies indicates that it enjoyed a degree of success in relation to its intrinsic benefits – quite aside from the acceptance of its recommendations, the Assembly successfully convinced participants and the public that reasoned, civil deliberation is possible and can produce healthy and fruitful citizen involvement in constitutional issues. As seen previously, this sort of citizen involvement in the constitutional sphere often leads to greater engagement and interest in individual referendums, which in turn positively impacts their democratic character.¹⁴⁶ Second, the consensus-building aspect of the deliberation might have two benefits: first, it indicates to politicians the public attitude toward an issue which can make a decision on whether to hold a referendum more straightforward; second, it may temper short-term exploitation of an issue through a referendum by having reasoned debate precede any proposal.¹⁴⁷ Third, accepting Doyle and Walsh’s contention that the Assembly’s deliberation was taken seriously by the public and actually influenced voting behaviour, it is clear that the deliberative experiment was successful in its function to impact the referendum. By impacting the level of voter information and reasoned debate available in the public sphere – issues which plagued numerous referendums in the past – the Assembly successfully carried out its function as a supplementary institution. Even accepting only de Londras and Carolan’s alternative view that the impact was really on politicians rather than the public, the Assembly can still be considered a success because of the hugely significant role political actors play in referendums; increasing their awareness of public attitudes and offering reasons for the amendment might have a significant impact on the level and character of campaigning, for example.

That said, there are some important caveats. First, while the Assembly’s work on the Eighth Amendment undoubtedly played a significant role in that referendum, it remains to be seen if that sort of success can be translated to less prominent social issues.¹⁴⁸ For example, while the Assembly on ‘The Manner in Which Referenda Are Held’ enjoyed

¹⁴⁶ In two senses: the first being simply that referendums with higher citizen deliberation and turnout are perceived as more democratically legitimate; the second referring to the fact that robust political debate is a prerequisite for manifestation of the constitutional principles underlying the referendum, as per the comments of Hogan J in *Doherty v Referendum Commission* [2012] IEHC 211.

¹⁴⁷ Proposing an amendment in contravention to the Assembly’s consensus would be politically unwise. Of course, this relies on the premise that the issue go before an Assembly.

¹⁴⁸ The 2024 Care and Family referendums are particularly relevant here.

success in relation to the intrinsic benefits (the members benefitted from deliberation, etc) it seems clear that this success has not been matched in the public sphere. Very little attention has been paid to it in the media, and it has not sparked anywhere near the same amount of public interest. Further, in the only other Citizens' Assembly recommendation put to referendum (the 2024 Care and Family referendums), the intrinsic benefits reported by the members did not translate to the population at large.¹⁴⁹ That referendum suffered from huge levels of confusion among all groups, citizens, politicians, and experts.¹⁵⁰ However, the wording of the ultimate proposal was so far removed from the actual recommendations that it is difficult to draw any conclusions on the Assembly's impact.¹⁵¹ The issues with those referendums are of a different character, and are discussed later in this thesis (§5.6).

Second, the 2016-18 Assembly's success relies to a significant degree on the formal connection to political consideration and thus the amendment process. The fact that such a connection is purely discretionary on part of the government risks undermining the impact of the deliberation. Leaving aside the fact that the establishment of an Assembly is itself discretionary, there is a risk that more radical or unexpected recommendations (regardless of high levels of consensus) brought about by deliberation are simply ignored. This is true especially where recommendations might run up against the interests of governing parties. In this regard, the value of the Assembly as a means of involving citizens in the constitutional amendment process is weakened considerably. As with the 2012 Convention, the success of the Citizens' Assembly as a supplementary institution relies heavily on its design.

4.4.3.2 – Effectiveness of Outcome Function

Clearly the '16-18 Citizens' Assembly impacted the nature and character of the referendum on the Eighth Amendment.¹⁵² Regardless of its impact on the decision to

¹⁴⁹ Citizens' Assembly on Gender Equality, *Report* (June 2021) 45-46.

¹⁵⁰ David Kenny, 'How to Lose a Referendum (in Ireland) – Challenges of Practical and Symbolic Constitutional Change' (2025) 3(2) *Comparative Constitutional Studies* 1.

¹⁵¹ See §5.6.

¹⁵² On this question specifically see Eoin Carolan, Seána Glennon, 'The consensus-clarifying role of deliberative mini-publics in constitutional amendment: A reply to Oran Doyle and Rachael Walsh' (2024) 22(1) *International Journal of Constitutional Law* 191-203 and Oran Doyle, Rachael Walsh 'Assessing the

actually hold a referendum in the first place, it was taken seriously by the Oireachtas Committee tasked with reviewing its work and it played a significant role in the design of the amendment proposal's wording and the subsequent debate. The fact that the Assembly's recommendations went further than expected and that the amendment proposal matched this is evidence of this impact. On any account the Assembly was successful in this way. In relation to other recommendations for constitutional change from the '16-18 Assembly, the picture is quite different. Of the three changes requiring amendment recommended in its other reports – reduction of voting age to 16, citizen-initiated referendums, and changes regarding Dáil Dissolution – none have led to a referendum. Even more than that, there has been practically no indication that the recommendations are being considered for referendums in the near future.

As discussed, however, the recommendations of the Citizens' Assembly on Gender Equality did lead to a referendum in 2024.¹⁵³ On foot of recommendations from that Assembly that the Constitution be amended to refer explicitly to gender equality and non-discrimination, protect family life not limited to the marital family, and remove the reference to the 'woman in the home' in Article 41.2, the Government held the 2024 Family and Care referendums.¹⁵⁴ The Government had committed, in its programme for Government, to respond to the recommendations of the Assembly and as such an inter-departmental group considered the recommendations.¹⁵⁵ While those referendums suffered from various issues, it is at least noteworthy for our purposes here that Assembly recommendations ultimately reached the referendum stage.¹⁵⁶ The 2022 Citizens' Assembly on biodiversity loss also made recommendations for constitutional change, however there is no indication yet as to whether this will bring about a referendum.

influence and legitimacy of citizen deliberation on abortion: A rejoinder to Eoin Carolan and Seána Glennon' (2024) 22(1) *International Journal of Constitutional Law* 204-208.

¹⁵³ The 39th Amendment of the Constitution (The Family) Bill 2024 and 40th Amendment of the Constitution (Care) Bill 2023 referendums held in March 2024.

¹⁵⁴ This was indicated from early in 2023, although the proposals changed over time. Kitty Holland, 'Up to three gender equality referendums possible to address 'discriminatory' language' *The Irish Times* March 8 2023,

<<https://www.irishtimes.com/ireland/social-affairs/2023/03/08/up-to-three-gender-equality-referendums-possible-to-address-discriminatory-language/>> accessed 15 June 2023; Merriam Street, 'Taoiseach and Minister O'Gorman announce holding of referendum on gender equality' 8 March 2023, <<https://www.gov.ie/en/press-release/534bb-taoiseach-and-minister-ogorman-announce-holding-of-referendum-on-gender-equality/>> accessed 15 June 2023.

¹⁵⁵ It is worth noting here that changes to Article 41.2 have been recommended before, including through the reports of the Constitution Review Group, All-Party Oireachtas Committee on the Constitution, and 2012 Convention.

¹⁵⁶ See §5.6 for more on this.

Summing up the outcome effectiveness of the Citizens' Assemblies as supplementary institutions, the record is mixed. On the one hand, that many Assembly reports have led to no referendums shows that Assemblies are limited in their impact. On the other hand, the direct links to the 2018 Abortion referendum and the connection to the 2024 referendums demonstrate the potential impact of Assemblies. The connection between the Assembly's recommendations and the ultimate proposal in 2018 shows that this sort of forum has the potential to significantly impact not only the holding of a referendum, but also the more detailed aspect of wording. This experience resonates with that of the 2012 Convention in one important way: recommendatory bodies are limited in their impact by Government discretion in responding to their reports. Again, any Assembly can only be expected to have so much impact when they have no power to initiate an amendment proposal. While political and public pressure can make it politically undesirable to ignore a recommendation, in instances of less public interest or controversy it can be all too easy for reports to fall to the wayside in spite of widespread support for particular changes.¹⁵⁷ It remains to be seen whether governments will continue to bind themselves to responding to various reports, but absent such discretionary commitments, the impact of Citizens' Assemblies on referendum proposals relies to a large extent on political goodwill and public pressure.

4.5 – The Housing Commission

While different in character to the institutions examined so far in this chapter, the Housing Commission warrants some brief discussion here. In light of the continuing and seemingly intractable housing crisis which has subsisted in Ireland for more than a decade, the 2020 Programme for Government of the Fine Gael, Fianna Fáil, and Green Party coalition committed to holding a referendum on a potential constitutional right to housing.¹⁵⁸ The Programme further committed to establishing a Commission on Housing which would examine key policy aspects of housing in Ireland.¹⁵⁹ On 21 December 2021, the Housing Commission was established with the task of reviewing the housing system in Ireland, and

¹⁵⁷ But perhaps equally significant constitutional implication, such as the recommendations on the manner in which referenda are held.

¹⁵⁸ *Programme for Government – Our Shared Future* (2020) 120.

¹⁵⁹ *Programme for Government – Our Shared Future* (2020) 58.

of making a recommendation on potential wording for a housing referendum.¹⁶⁰ While the Commission's report was initially due at the end of July 2023, deliberations ultimately took much longer and the final report was not published until 22 May 2024.¹⁶¹ A significant reason for the delay was the serious and protracted issues involved in the Commission's recommendations for a constitutional amendment. While the review of policy questions was 'businesslike', the question of a housing referendum proved fraught and caused a deep division within the Commission.¹⁶² The referendum question is the focus of this section.

The referendum question was ultimately put to a subcommittee of the Commission in January 2022, chaired by Ailbhe O'Neill SC. Apart from the Chair, the subcommittee was comprised of: Sorchá Edwards, Secretary General of Housing Europe; Pat Doyle, former CEO of the Peter McVerry Trust; and Patricia King, former General Secretary of the Irish Congress of Trade Unions (ICTU).¹⁶³ The subcommittee also collaborated with various experts appointed throughout the process.¹⁶⁴ In assessing the referendum question, the subcommittee considered the constitutional implications of an amendment on housing; hosted a conference on a referendum on housing in Ireland; engaged with experts; held a public consultation; conducted an international comparative analysis; reviewed previously proposed wordings; and conducted drafting workshops.¹⁶⁵

The conference on housing rights was hosted by the Centre for Constitutional Studies, University College Dublin, and saw experts from Ireland and abroad offer insights into other jurisdictions' experience with constitutional housing rights, as well as 'a technical

¹⁶⁰ The Housing Commission, *Report and Proposed Wording for an Amendment to Bunreacht na hÉireann* (July 2023) 1.

¹⁶¹ Report of the Housing Commission (May 2024).

¹⁶² Jack Horgan-Jones, 'Housing Commission's effective work on policy stymied by tortured exchanges on referendum' *The Irish Times* (Dublin July 31 2023).

¹⁶³ The Housing Commission, *Report and Proposed Wording for an Amendment to Bunreacht na hÉireann* (July 2023).

¹⁶⁴ Made up of national and international experts, namely: Professor Kate O'Regan, former judge of the Constitutional Court of South Africa and Professor of Human Rights Law at Oxford University; the Hon. Mr Justice Frank Clarke, former Chief Justice of Ireland and a former Referendum Commissioner; Professor Gerry Whyte, Professor of Law at Trinity College Dublin; Professor Rosalind Dixon, Professor of Law at the University of New South Wales; and Madeleine MacKenzie, Parliamentary Counsel in the Scottish government's Parliamentary Counsel Office. In addition, Professor Padraic Kenna, University of Galway, provided advice on the current national housing legislation.

¹⁶⁵ The Housing Commission, *Report and Proposed Wording for an Amendment to Bunreacht na hÉireann* (July 2023) 2.

examination of various proposals.¹⁶⁶ The public consultation lasted for two months,¹⁶⁷ and more than two-thousand submissions were received from the general public and stakeholders.¹⁶⁸ Previous amendment proposals were reviewed with input from the expert panel, and in November and December 2022, the subcommittee took part in drafting workshops. At these workshops, the subcommittee members ‘considered a number of research papers setting out the findings of the Commission’s research and consultations before deliberating on the wording to recommend.’¹⁶⁹ Finally, the subcommittee deliberated before finalising the report and ultimately recommending that a referendum be held to insert a provision guaranteeing ‘a right of access to adequate housing’.¹⁷⁰ However, due to the deep division within the subcommittee, a minority report was published by those who disagreed with the proposed recommendations.¹⁷¹

There are clear similarities between the Housing Commission and the 2012 Convention and Citizens’ Assemblies: all were relatively small committees established for a very particular purpose, and all were tasked with making recommendations about possible amendments on controversial issues. The principal and notable difference, however, is that while the 2012 Convention and Assemblies were pointedly citizen-led bodies, the Housing Commission was an expert committee made up of individuals hand-picked for their experience in the relevant area. This most likely reflects the fact that a possible housing referendum is a means towards solving a complex, multi-faceted, and, crucially, *technical* social and economic problem. The role of the committee was less about deliberating between two reasonable but opposite positions, and more about finding the most effective method for solving a collective and state-wide problem. The subcommittee’s report mirrors this: its recommendations are reasoned and sophisticated and reflect a substantial degree of expert deliberation. On that basis, we might suggest that the Housing

¹⁶⁶ The Housing Commission, *Report and Proposed Wording for an Amendment to Bunreacht na hÉireann* (July 2023) 7.

¹⁶⁷ 1 July 2022 to 2 September 2022.

¹⁶⁸ The Housing Commission, *Report and Proposed Wording for an Amendment to Bunreacht na hÉireann* (July 2023) 9-13.

¹⁶⁹ The Housing Commission, *Report and Proposed Wording for an Amendment to Bunreacht na hÉireann* (July 2023), 19.

¹⁷⁰ The proposed amendment takes the following form: ‘Article 40A – Housing 1° The State recognises that having a home is of fundamental importance to quality of life and that access to adequate housing, by facilitating the development of family, social and community relationships, promotes the common good. 2° The State therefore guarantees to every citizen a right of access to adequate housing and pledges, as far as practicable, by its laws to protect and vindicate that right.’

¹⁷¹ The Housing Commission, *Minority Report on Proposed Wording for an Amendment to Bunreacht na hÉireann* (November 2023).

Commission is a useful example for any future amendments on technical social problems: while it took some time, it did manage to boil a convoluted issue down to a reasonable proposal on wording which reflected a significant proportion of public submissions. Yet at the time of writing, the recommended proposal has not borne fruit. A general election in November 2024 may be partly responsible for this,¹⁷² but the Housing Commission was always in danger of suffering the same fate as the many examples set out above. Without any concrete commitments from Government to enact any recommendations, the work of the Commission might be in vain where other issues take government priority, or where the political upside means a referendum is not worth the associated costs and risk.

4.6 – Evaluating Ireland’s Supplementary Institutions

Chambers’ identification of supplementary institutions provides a valuable insight into how institutional design contributes to the legitimacy of a referendum when viewed from the perspective of deliberative democracy. More than that, her work usefully categorises the types of deliberation that can be engendered by these institutions as either monologic or dialogic.¹⁷³ Monologic deliberation refers to the ‘conception of deliberation that simply means that we want citizens, particularly when they are voting, to be thoughtful and informed’.¹⁷⁴ Dialogic, on the other hand, maintains that the ‘best way to deliberate about issues, especially issues of public policy affecting large numbers of people, is in dialogue and debate with others affected by the policy’.¹⁷⁵ This dichotomy is borne out in the supplementary institutions examined above: on the monologic end sits the Referendum/Electoral Commission, while the 2012 Convention, Citizens’ Assemblies, and Housing Commission align more closely with a dialogic conception of deliberation. The effectiveness of each of these institutions is best evaluated with this dichotomy in mind.

The Referendum/Electoral Commission sits comfortably on the monologic end of this spectrum: its task is simply to make accurate and impartial information easily accessible

¹⁷² Although both Fine Gael and Fianna Fáil remain in power.

¹⁷³ Simone Chambers, ‘Constitutional Referendums and Democratic Deliberation’ in Matthew Mendelsohn and Andrew Parkin (eds), *Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns* (Palgrave Macmillan UK 2001) 231, 232.

¹⁷⁴ *ibid.*

¹⁷⁵ *ibid* 232-233.

and digestible to voters in the lead up to a referendum. The goal here is to bring about well-informed, thoughtful voters through information campaigns, without engaging them directly in debate. The Commission stands alone as the only regulatory institution with this remit and thus shoulders a heavy burden. While there is some legislation enforced by the Standards in Public Office Commission relating to campaign finance, regulation here is otherwise scant which means the Commission also has oversight of a wide range of technical aspects of the referendum, increasing its responsibilities.¹⁷⁶ As seen, early Commissions drew significant criticism when asked to prepare statements for and against referendum proposals. However, even after that function's removal the Commission has endured criticism for its statements on proposals, at various times being accused of an overly generic approach and at others of confusing voters.¹⁷⁷

The Commission's overall record as a supplementary institution therefore is mixed, although it is clear that the potential impact of a good campaign by the Commission is very high. Additionally, given the recent increase in vigilance regarding disinformation and the need for independent verification of information, the Commission's role in clarifying matters of importance throughout a campaign stands out as particularly valuable. Without addressing the relative merits of a monologic approach to deliberation (as opposed to dialogic), it is clear that the Commission is the principal medium through which monologic deliberation occurs in every referendum campaign. This role is of vital significance. Since the primary issue impacting the Commission's ability to carry out its function (time) seems to be addressed with the permanent establishment of the Electoral Commission, there is reason to think its record will improve in the future. However, without further evidence to substantiate this claim, it remains to be seen whether the Electoral Commission will be able to address the shortcomings of previous Commissions.

The 2012 Convention and Citizens' Assemblies can be understood according to the dialogic model of deliberation. The value of both of these bodies as supplementary institutions lies in citizens debating and deliberating *with each other*. Clearly the function here is to try to bring about thoughtful, well-informed citizens and simultaneously build

¹⁷⁶ David Kenny, 'The Risks of Referendums: "Referendum Culture" in Ireland as a Solution?' in Maria Cahill and others (eds), *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland* (Routledge 2021).

¹⁷⁷ *ibid.*

consensus about possible constitutional reform through open, honest, reasonable, and rational debate with a representative sample of the polity. The effectiveness of these bodies in this regard (termed the ‘process function’ above) is considerable. Participants in both institutions responded favourably, and there is reason to believe that the deliberation translated into more reasoned debate in the wider public sphere for high-profile referendums. Further, this sort of citizen engagement with constitutional issues has both intrinsic and instrumental goods. However, while the benefits of greater citizen involvement in constitutional review go beyond the outcomes, there is a risk that these benefits diminish over time where governments do not take the recommendations seriously. The value of these committees relies to a significant extent on the fact that citizens actually *are* engaging with constitutional issues in a substantial way – they must be more than places for idle conversation. Again, while the experience so far has high-profile examples of this holding true, where government discretion remains absolute there exists a possibility that this declines. Good institutional design can reduce this risk significantly; even a broad commitment to ‘consider’ proposals is better than nothing, and a more substantial promise to hold a referendum (if recommended) imbues these mini-publics with greater substance. In short, the process function of these institutions – and related values – cannot be isolated from the outcome function. The value of this dialogic deliberation is in some respects lost without an opportunity to put it into practice.¹⁷⁸

Finally, returning to Chambers’ caution that appropriate supplementary institutions are a prerequisite to a well-functioning referendum system, it is evident that institutional design has contributed to the success of Ireland’s referendum system in some way.¹⁷⁹ However, it is equally clear that before recent experimentations with deliberative mini-publics, the institutional design was quite significantly limited. In particular, from the Referendum Commission’s repeated calls for permanency there is ample evidence to support the proposition that Ireland’s scarce institutional design played a very limited role in supplementing referendums for years. What success (if any) the referendum process

¹⁷⁸ From the perspective of referendum campaigns taken before any experimentation with this sort of deliberative forum, this may seem nothing more than a champagne problem. However, the benefits of this deliberation require that the process be taken seriously and not undermined by endless deliberation with no prospect of action.

¹⁷⁹ Simone Chambers, ‘Constitutional Referendums and Democratic Deliberation’ in Matthew Mendelsohn and Andrew Parkin (eds), *Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns* (Palgrave Macmillan UK 2001) 231, 240.

enjoyed during that period can perhaps be understood as accruing *in spite* of Ireland's institutional design, rather than as a result of it.

However, since the experiments with dialogic deliberation made necessary by the economic crash and collapse in political trust, institutional design has started to take on a more positive, proactive character. The Electoral Commission has the potential to remedy its previous shortcomings. The 2012 Convention assisted in bridging the gap between a cynical public and a chastened political body, leading to improved engagement with constitutional issues and, as a result, greater engagement with referendums. The Citizens' Assemblies have continued in this manner, attempting to foster a more constitutionally engaged citizenry. The subjects of the 2015 Marriage Equality and 2018 Abortion referendums perhaps made this task easier: both amendments were eagerly awaited and inspired public discussion even before a campaign was announced. However, both of these referendums also share a combination of good monologic and dialogic institutional design; it was the combination of the Referendum Commission *and* the 2012 Convention/2018 Citizens' Assembly that provided the foundation for the successes of these referendums. The real task for future campaigns is to continue these successes for other, less socially charged amendments. Whether or not this happens will be down in no small part to the role that supplementary institutions play. In order for these bodies to do their jobs effectively, good institutional design must be made a priority.

4.7 – Conclusion

This chapter's analysis of the Referendum/Electoral Commission, the Housing Commission, the 2012 Convention, and the Citizens' Assemblies demonstrates the importance of good institutional design. As established, these supplementary institutions can play a central role in addressing the sort of issues which have tended to negatively impact Irish referendums identified in the previous chapter. They all have a role to play in overcoming information insufficiency, and the deliberative fora in particular can have an extremely positive bearing on the level of democratic engagement in a referendum. The goal of this chapter was to identify how significantly supplementary institutions can impact individual referendums and address those most serious issues which have arisen in the past. This provides an answer to the central research question in two ways. First, it

further clarifies the way in which some Irish referendums have been successful, and some have not (i.e. some have been successful where, because of these bodies, citizens have been more engaged, and deliberation was to the forefront). Second, it provides a blueprint for how success can be built into the system for constitutional referendums in Ireland: there are important lessons to be learned from the experience of these institutions which suggest that good institutional design can maximise democratic engagement with referendums. The next chapter builds on these answers to suggest a set of criteria for success in Irish referendums.

5. SPECIFYING CRITERIA FOR SUCCESSFUL REFERENDUMS

5.1 – Introduction

Those who claim Irish referendums have been successful have expressed this in various ways. For some, their success lies in the fact that referendums have produced liberal-secular outcomes in recent years.¹ For others it is in the use of innovative deliberative fora.² And for others still any decision reached through a ‘decision of the people’ is simply a success in itself.³ This variance is matched by the difference between individual referendums: each can differ significantly from any other due to myriad factors; social, political, legal, and historical. Much of what is good about one referendum can be entirely absent from the next, and issues that plague campaigns in one category cause no trouble for another. However, as seen from the previous chapters, there are some trends which cut across all referendums regardless of issue or time. The goal of this chapter is to build on the previous chapters’ work of identifying these trends – including the most common problems that arise in referendums – and from there defend a set of basic criteria that any referendum must adhere to in order to be considered successful. The purpose here is to offer a clear and principled analytical tool for measuring the success of Irish referendums which is distinct from its result or the perspective of the observer. This analytical tool can be used to critique the referendum system as a whole, and offers a blueprint for future referendums: these basic criteria should be built into the referendum process so that the democratic engagement with each individual referendum is maximised and the influence of the most common problems is minimised.

In this chapter I submit three initial criteria for a successful referendum. First, there must be sufficient information available to voters on a proposed amendment and it must be easily accessible, understandable, and digestible. Second, there must be substantial engagement – from citizens and also from politicians – with the amendment proposal

¹ E.g. Gráinne Griffin, Orla O’Connor, Ailbhe Smyth, and Alison O’Connor, *It’s a Yes: How Together for Yes Repealed the Eighth and Transformed Irish Society* (Orpen Press 2019).

² Oran Doyle and Rachael Walsh, ‘Deliberative Mini-Publics as a Response to Populist Democratic Backsliding’ in Cahill, Ó’Cinnéide, Ó Conaill, and O’Mahony (eds) *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland* (Routledge 2021).

³ Simon Hix, ‘Remaking Democracy: Ireland as a Role Model’ (2020) 35(4) *Irish Political Studies* 585.

throughout the referendum campaign, with a lively and vigorous public debate. Third, and finally, citizens must have a significant level of input at multiple stages of the referendum, particularly the pre-campaign proposal stage, so that a referendum and its result are imbued with a sense of citizen ownership. The extent to which each of these three criteria are manifested in any referendum is a matter of degree. However, here I make the case that each must be engaged substantially in order for a referendum to be understood as successful. After a review of those three criteria, and their impact on particular referendums, I then discuss a fourth criterion, clarity of consequence. This is a more nuanced criterion that cuts across aspects of information sufficiency and engagement and can be seen clearly in the 2024 referendums.

For clarity, these criteria derive ultimately from the principle that, as a pointedly democratic device, any referendum should enjoy as much democratic engagement as possible. This principle is evident in the Supreme Court decisions on the nature of democracy at the referendum discussed later in this thesis,⁴ but is also a more basic point that a democratic device which is utilised in only a perfunctory way is less desirable than the opposite.⁵ As noted previously, democratic engagement should here be understood as more than mere turnout; I am concerned with *substantive* democratic engagement. That is, rather than seeking only to maximise the number of people who turn up and cast a ballot, I operate from the position that, ideally, voters should be engaged with the proposal in a good-faith manner, should cast their ballot according to their first-order preferences, and should not see the referendum as a vehicle for airing other grievances. While it is impossible to design a system which ensures every citizen votes for the ‘right’ reasons and only counts ‘properly reasoned’ ballots, a referendum system can be designed to minimise the number of people who are accidentally or inadvertently not as democratically engaged as possible – the analysis in Chapter 2 demonstrates how these situations have occurred

⁴ See the comments of O’Donnell J (as he then was) discussing ‘modern mass democracy’ in *Jordan v Minister for Children and Youth Affairs* [2015] IESC 33, [57] (O’Donnell J): ‘Quite apart from the importance in democratic theory of individual participation in elections and referenda, the system of modern mass participation democracy recognises the phenomenon of collective intelligence – the idea recognised many years ago that a collective judgement, if sufficient numbers are involved, will reduce and eventually remove the impact of individual extreme opinions. The immune system of democracy has therefore at least some resistance to individual error.’

⁵ For example, it seems axiomatic that, from the position of a defender of democracy, an election in which people are asked to vote for candidates about whom they know nothing, and about whose policies they are not informed, is not particularly desirable. Since the Irish Constitution certainly adopts a position in support of democracy (see Chapters 6 and 7), this is the starting premise for this thesis.

in Ireland. For example, citizens can be confused, mistaken as to the meaning of a proposal, or simply not aware that a referendum is taking place. The criteria I establish are all aimed at remedying those situations; they are each specifically targeted at maximising democratic engagement in slightly different ways.

In this chapter I contrast four specific referendums to demonstrate two things: first, that my criteria can explain why some referendums enjoy high democratic engagement and others do not; and second, how building these criteria into a referendum system can minimise the sorts of problems that can arise. These referendums are: the 34th Amendment 2015 (Marriage Equality), 36th Amendment 2018 (Repeal of 8th), 24th Amendment Bill 2001 (Nice I), and 31st Amendment 2012 (Children's Rights) referendums. The former two were selected as examples of referendums with high, substantive democratic engagement, while the latter are examples of referendums with low democratic engagement. The 2015 and 2018 referendums usefully demonstrate the sort of factors that contribute to high democratic engagement, as well as the actions that can be taken by government actors and civil-society organisations to increase democratic engagement. They further demonstrate that where certain minimum standards are pursued in a referendum (e.g. making sure citizens are informed about a proposal), democratic engagement is more easily maximised, and particular benefits flow for the referendum.⁶ On a more practical note, these referendums are perhaps the two most discussed in legal and political-science academia in Ireland, and as such there is a wealth of resources (including voting data) which is simply unavailable for other referendums. The importance of this literature to this endeavour should not be understated.⁷ The 2001 and

⁶ On the 2015 referendum: Gráinne Healy, Brian Sheehan, and Noel Whelan, *Ireland Says Yes: The Inside Story of How the Vote for Marriage Equality Was Won* (Merrion Press 2016) 89; Johan Elkink, David Farrell, Theresa Reidy, Jane Suiter 'Understanding the 2015 Marriage Equality Referendum in Ireland: Context, Campaign and Conservative Ireland' (2017) 32(3) *Irish Political Studies* 361, 365; David Farrell, Jane Suiter, Clodagh Harris, Kevin Cunningham, 'The Effects of Mixed Membership in a Deliberative Forum: The Irish Constitutional Convention of 2012–2014' (2020) 68(1) *Political Studies* 54; David Farrell, Clodagh Harris and Jane Suiter, 'Bringing People into the Heart of Constitutional Design: The Irish Constitutional Convention of 2012–14' in Xenophon Contiades and Alkmene Fotiadou (eds), *Participatory Constitutional Change: The People as Amenders of the Constitution* (Routledge 2017); Ruadhán Mac Cormaic, 'In the blink of an eye, a historic shift has taken place' *The Irish Times* (Dublin 24 May 2015) 5; Conor Kane, 'Ban Ki-moon hails 'historic' marriage referendum result' *The Irish Times* (Dublin 25 May 2015). On the 2018 referendum: Eoin Carolan, 'Constitutional Change Outside the Courts: Citizen Deliberation and Constitutional Narrative(s) in Ireland's Abortion Referendum' (2020) 48(4) *Federal Law Review* 497, 507–508; Luke Field, 'The Abortion Referendum of 2018 and a Timeline of Abortion Politics in Ireland to Date' (2018) 33(4) *Irish Political Studies* 612, 612–613; Kimiko de Freytas-Tamura, 'Ireland Votes to End Abortion Ban, in Rebuke to Catholic Conservatism' *The New York Times* (New York 25 May 2018)

⁷ Oran Doyle and Rachael Walsh, 'Constitutional Amendment and Public Will Formation: Deliberative Mini-Publics as a Tool for Consensus Democracy' (2022) 20(1) *International Journal of Constitutional Law*

2012 referendums are referendums where democratic engagement was low, and exemplify the most common issues with referendums which were identified in Chapter 2.⁸ Moreover, both involved the rejection of a proposal which, in the post-referendum data, a large number of No-voters expressed no particular opposition to. The purpose of examining these referendums, then, is to demonstrate how the prevalence of those most common issues can be explained by my criteria. Despite the literature proposing various and varied explanations for why the proposals were rejected I show that low levels of democratic engagement is the best explanation. I demonstrate this through examining the referendums according to my criteria, and show that a failure to meet those criteria resulted in low democratic engagement.. The contrast between the referendums demonstrates that adherence to my criteria can maximise democratic engagement with a referendum, and also how meeting the basic threshold of adherence can prevent the most common problems from arising.

It is noted that the four referendums analysed are relatively recent, and that three of them come from the social/moral category. However, for the purposes of this chapter that is immaterial. The purpose of the chapter is merely to demonstrate how the difference between Irish referendums functioning well (i.e. enjoying high levels of democratic engagement) and not, can be explained by my criteria. What is most important about the referendums analysed is that the level of democratic engagement can be analysed clearly, and that they serve as good stand-ins for Ireland's overall experience by establishing reflecting the trends identified in previous chapters.

This chapter proceeds in the following way: Section 5.2 discusses the Venice Commission's Code of Good Practice in Referendums in order to lay a minimum foundation for any higher criteria; Section 5.3 examines the first criterion, Information

398, 413; 'How 99 strangers in a Dublin hotel broke Ireland's abortion deadlock' *The Guardian* (8 March 2018) <<https://www.theguardian.com/world/2018/mar/08/how-99-strangers-in-a-dublin-hotel-broke-irelands-abortion-deadlock>> accessed 13 June 2023.

⁸ On 2001: Katy Hayward, 'Not a Nice Surprise: An Analysis of the Debate Surrounding the 2001 Referendum on the Treaty of Nice in the Republic of Ireland' (2002) 13 *Irish Studies in International Affairs* 168, 174; Ece Özlem Atikcan, 'The Puzzle of Double Referendums in the European Union' (2015) 53(5) *Journal of Common Market Studies* 937, 943. On 2012: Conor O'Mahony, 'Falling Short of Expectations: the 2012 Children Amendment, from Drafting to Referendum' (2016) 31 *Irish Political Studies* 252, 272; Oran Doyle and David Kenny, 'Constitutional Change and Interest Group Politics: Ireland's Children's Rights Referendum' in Richards, Contiades, and Fotiadou (eds) *The Foundations and Traditions of Constitutional Amendment* (Hart 2017).

Sufficiency; Section 5.4 then analyses the second criterion, Engagement; and Section 5.5 looks at the third and final criterion, Citizen Input. In each of §5.3, §5.4, and §5.5, the criteria will be demonstrated through a comparison of the four referendums mentioned above. In Section 5.6 I demonstrate the continuing relevance of the criteria by using them to analyse the most recent referendums, the 2024 Family and Care referendums. Section 5.7 sets out of the fourth criterion – clarity of consequence – as demonstrated by the preceding sections. The chapter then concludes in Section 5.8 where I defend my criteria for a successful referendum, arguing that the criteria best explain why some referendums enjoy high democratic engagement and others do not. Further, I demonstrate that building these criteria into the design of a referendum system can held to consistently maximise democratic engagement.

5.2 – Venice Commission’s Code of Good Practice in Referendums

Before moving on to discuss my criteria, it is worth taking some time to discuss certain conditions which must be in place in any state to hold democratic referendums. It is clear that in order for a referendum system to be democratically legitimate, it must be embedded in a democracy capable of holding a free and open vote. While it is beyond the scope of this chapter to discuss in detail the conditions for democracy and how one might measure the level of democracy in any given example,⁹ the European Commission for Democracy Through Law (Venice Commission) – an advisory arm of the Council of Europe – usefully lays down a set of basic rules for the minimum standards here.¹⁰ The Code of Good Practice in Referendums (‘the Code’) sets out a number of conditions on which any referendum system must be based under three broad headings: principles of Europe’s electoral heritage; conditions for implementing these principles; and specific rules. Each heading is broken down further into sub-headings and sub-rules. It is worth briefly examining these requirements and how they are reflected in the Irish context.

⁹ For discussion on democracy here generally see Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* (University of California Press 1984); Niko Koldony, ‘Rule Over None I: What Justifies Democracy?’ (2014) 42(3) *Philosophy and Public Affairs* 195; on the interaction between referendums and democracy see Leah Trueblood, ‘Are Referendums Directly Democratic?’ (2020) OJLS 40(3).

¹⁰ Venice Commission, *Revised Code of Good Practice on Referendums* (Strasbourg 2022).

Under the first heading, the Code requires that there be universal suffrage for all, with exceptions permitted for age, nationality, residence and other practical deprivations.¹¹ It also requires that the electoral register be permanent, public, and reliable. All of these conditions so far are met in the Irish context. The second rule under the first heading is that there must be equal suffrage.¹² Ireland meets the first part of this requirement – that each voter gets one vote. However, under the sub-rule ‘equality of opportunity’, the Code lays out requirements such as a neutral administrative authority (observing the referendum campaign, media coverage, public funding, advertising, and the right to demonstrate), equal access to public broadcasts, balanced media coverage, equality in public subsidies and transparent public funding, among others.¹³ Here we find the first matter of interest for Ireland’s referendum system: the *McKenna* principles do address all of these issues, but whether or not they do so in a manner entirely consistent with the Code is unclear.¹⁴ While *McKenna* is dealt with fully elsewhere,¹⁵ it is worth noting that the Code seems to grant more leeway for public funding than the Supreme Court decided in that case, and that, similarly, the Code is more permissive than the ruling in *Coughlan* regarding the division of airtime on media.¹⁶ The final sub-rule under equal suffrage provides for the possibility of differently weighted votes in cases of national minorities: the Irish Constitution does not provide for this and it seems contrary to the judgments of the Supreme Court on this matter.¹⁷ The sub-rules under ‘free suffrage’ in the Code encounter the same difficulties as above regarding the *McKenna* rules and the regulation of funding in campaigns; in particular regarding the prohibition of public funds being used.

Other elements of this rule – that voters be informed of the proposal, that an impartial body provides balanced information, and that it is available in all official languages – are met in the Irish context, although in varying ways. The Electoral Commission undertakes these duties and, as seen, has struggled at times to provide balanced information and

¹¹ Such as mental incapacity or conviction of a serious criminal offence; *ibid* 7.

¹² *ibid* 8.

¹³ *ibid*.

¹⁴ *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10.

¹⁵ For an overview see §2.4.2, and for a more detailed discussion see §6.3.

¹⁶ *Coughlan v Broadcasting Complaints Commission* [2000] 3 IR 1 (as interpreted by various media bodies) does not allow for airtime to be divided between political parties according to their parliamentary share, but rather divides equally between proponents of Yes and No.

¹⁷ In particular the references to political equality at the heart of the referendum/amendment procedure as mentioned in *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10, and *McCrystal v Minister for Children and Youth Affairs* [2012] IESC 53.

adequately inform voters.¹⁸ Also required here is that the question be clear and comprehensible: this is not explicitly provided for in Irish law, but on almost every occasion the question has met these standards.¹⁹ Another notable element of this requirement is that an impartial body must exercise prior scrutiny of the clarity of the question.²⁰ Arguably, this is done by the Houses of the Oireachtas when passing the referendum bill, but while the Electoral Commission exists as the impartial body in the Irish context, it has no power to review the wording of the proposal. The rest of the requirements for free suffrage covering the voting procedure are met. The conditions for secret suffrage are also present in Ireland's referendum and electoral laws.²¹

Under the second heading, 'conditions for implementing these principles', the first rule is that the referendum must comply with the rule of law.²² This means the referendum must conform to the constitutional or superior law of the country. Clearly this is met in the Irish constitutional referendum system – it is designed according to the Constitution's own requirements, complies with all judicial decisions on this issue and the relevant legislation governing referendums. The second rule here concerns respect for fundamental rights; that referendums are not democratic without respect for human rights such as freedom of expression, of movement, of assembly, and association.²³ Bunreacht na hÉireann establishes these rights and the referendum has been analysed by the courts in the context of fundamental rights.²⁴ Interesting here is the question of Ireland's attitude toward referendums *on* fundamental human rights. By law there is no limit on holding a referendum to alter a right or to remove it altogether from the Constitution.²⁵ It is unclear whether the Code implicitly prohibits this sort of referendum. The third rule here – stability of referendum law – is met in Ireland.²⁶ The fourth and final rule under this heading concerns procedural guarantees.²⁷ What is required here is that the referendum is organised and supervised by impartial bodies. The requirements concerning organisation

¹⁸ See §4.2.

¹⁹ Notably not in the Children's Rights referendum examined below.

²⁰ Venice Commission, *Revised Code of Good Practice on Referendums* (Strasbourg 2022) 10.

²¹ *ibid* 11.

²² *ibid*.

²³ *ibid* 11-12.

²⁴ *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10.

²⁵ *Finn v Minister for the Environment* [1983] IR 154; *Re Article 26 and the Information (Termination of Pregnancies) Bill 1995* [1995] 1 IR 1.

²⁶ Venice Commission, *Revised Code of Good Practice on Referendums* (Strasbourg 2022) 12.

²⁷ *ibid* 12-14.

by an impartial body are, for the most part, reflected in the work of the Referendum and Electoral Commissions, but it is interesting to note the reappearance in the Code of the power to check the validity of and approve the wording. This is not a power granted to the Electoral Commission and the constitutional rules suggest no limits on the wording that goes before a referendum. Other conditions like the provision of official impartial information, its composition including a judge, and neutral observers are met. The effective system of appeal criterion at 4.3 is also present in the Irish context.²⁸

Under the third heading, ‘specific rules’, only some of the rules are relevant in the Irish constitutional context. The first two rules concern the substantive and procedural validity of texts submitted to referendum: that they comply with superior law, are not contradictory to international law, and respect unity of form, content, and hierarchical level.²⁹ These are reflected in Ireland’s laws, however it is again worth mentioning that Ireland’s unfettered amendment power regarding rights might run up against the requirement that the referendum laws not be contrary to international law (including the Council of Europe’s principle of human rights). Other relevant rules here include that proposal questions should preferably be binary, that quorums should be avoided but are acceptable for matters of constitutional significance, that the effect of a referendum is clearly specified, and that there should be a minimum of four weeks between the announcement of a referendum and the polling date.³⁰

The Code is comprehensive and covers matters ranging from the technical to the abstract. For the most part, Ireland’s system of constitutional referendum and the laws that govern it are in line with the Code. While there may be some arguments about how well the system reflects every single rule and sub-rule, what is more interesting to observe is that the area of most contention in the Irish context (the *McKenna* rules and broadcasting regulation) is reflected often in the Code. The Code certainly requires that something like the *McKenna* rules exist, but seems to suggest that the rules might be arranged in a different, more pragmatic and permissive way. The Code’s conditions are useful for this preliminary examination, but it is important at this stage to stress the difference in task that I am undertaking in this chapter. The Code aims to establish the absolute minimum threshold

²⁸ *ibid* 13.

²⁹ *ibid* 14-15

³⁰ *ibid* 14-17.

for a referendum to be deemed valid according to international standards of democracy; in this chapter I am aiming to establish a set of criteria for a *good* or *successful* referendum. That is, having established that the Irish referendum system is (for the most part) valid according to the Commission's standards, I am interested in distinguishing between referendums which meet these bare minimums but are otherwise unsatisfactory for some reason (perhaps those which give credence to criticisms of it being elite-controlled, unreasoned, and unduly majoritarian) and those which make the most of the referendum's potential for substantive, citizen-oriented democratic decision-making. In other words, I am identifying what characteristics a referendum must have in order to maximise democratic engagement in the referendum. As such, my standard of review is different to that of the Venice Commission.

5.3 – Information Sufficiency

The first criterion is information sufficiency. This covers a range of requirements related to the information provided to the public during a referendum campaign about the amendment proposal. While it certainly covers the general requirement that the public be informed about what an amendment proposal means, it also includes more specific requirements like a clearly posed question, a good Referendum Commission campaign, and success in raising public awareness of the referendum and its content. In sum, it refers to the requirement that information is sufficient both in terms of accuracy *and* availability. As seen in previous chapters, the adequacy of information made available to voters in a referendum has proven to be one of the most significant factors in how a campaign plays out. It is worth demonstrating this significance in greater detail. This is best done through some contrasting examples.

5.3.1 – Impact of Sufficient Information

5.3.1.1 – 2015 Marriage Equality Referendum

The first thing to mention here is that the 2015 Marriage Equality referendum had a significant advantage over others in relation to information sufficiency: the proposed

amendment was straightforward and easily understandable. The wording of the amendment (‘marriage may be contracted in accordance with law by two persons without distinction as to their sex’) is clear and left little room for misunderstanding about what was being asked. The consequences of the referendum were therefore clear. As a result, none of the parties to the referendum campaign were required to expend considerable energy or resources explaining what the referendum was about at its core, as was the case in others.³¹

That said, one issue arose which needed clarification. During the campaign the issue of surrogacy became a regular point of emphasis for the No campaign, in part because of legislation regulating surrogacy for same-sex couples which was passing through the Oireachtas at the same time as the campaign.³² Voters were encouraged to vote No in the referendum on the basis that it would lead to greater access to surrogacy for same-sex couples and therefore more same-sex parents, which the No campaign argued would deprive children of a ‘right to a mother and father’ and ultimately harm children.³³ The amendment in fact said nothing about surrogacy or adoption. The Referendum Commission’s guide did not mention the issue of surrogacy or adoption, and only alluded to the fact that the amendment, if passed, would entitle same-sex couples to the same protection under the definition of family in the Constitution.³⁴ One point of emphasis in the information campaign (particularly by the main group advocating for Yes – ‘Yes Equality’) was thus to remove this issue from the sphere of public deliberation and bring home to voters that the referendum was about the discrete issue of marriage alone.³⁵ However, the issue remained a concern for voters as reflected in opinion polls,³⁶ and eventually required interventions from the Commission’s Chairman – Judge Kevin Cross – in which he reiterated that surrogacy was not relevant to the referendum.³⁷ Yes Equality

³¹ Specifically the 2012 Children’s Referendum discussed below.

³² Children and Family Relationships Act 2015; Oran Doyle, ‘Minority Rights and Democratic Consensus: The Irish Same-Sex Marriage Referendum’ (2020) 15 NTU Law Review 21, 31.

³³ Gráinne Healy, Brian Sheehan, and Noel Whelan, *Ireland Says Yes: The Inside Story of How the Vote for Marriage Equality Was Won* (Merrion Press 2016) 89.

³⁴ Referendum Commission, *Marriage Referendum and Age of Presidential Candidates Referendum: Independent Guide* (2015).

³⁵ Referendum Commission, *Marriage Referendum and Age of Presidential Candidates Referendum: Independent Guide* (2015) 5.

³⁶ Johan Elkind, David Farrell, Theresa Reidy, Jane Suiter ‘Understanding the 2015 Marriage Equality Referendum in Ireland: Context, Campaign and Conservative Ireland’ (2017) 32(3) Irish Political Studies 361, 365.

³⁷ Gráinne Healy, Brian Sheehan, and Noel Whelan, *Ireland Says Yes: The Inside Story of How the Vote for Marriage Equality Was Won* (Merrion Press 2016) 98.

had been putting forward this position themselves consistently.³⁸ Removing that issue from the debate was an attempt to clarify for voters the effect of the proposed amendment and allow campaigning to focus on the core issue of marriage equality on its own merits.

A second significant aspect of information sufficiency in this referendum is the novel and sophisticated nature of the information campaigns by both the Referendum Commission and Yes Equality. The Referendum Commission's report explains that their approach differed from previous campaigns in two main respects: first, the primary emphasis on this occasion was on their website and social media, and; second, the Commission engaged more with the media through, for example, interviews with the Chairman.³⁹ Social media accounts on Facebook and Twitter were used to direct the public to the Commission's website, encourage people to register and vote, and answer individual queries.⁴⁰ The report goes on to state that the website saw more than twice the number of visits than previous referendums,⁴¹ and the Facebook account's reach spiked at 600,000 at one stage.⁴² This was combined with regular interviews with representatives of the Commission on local and national radio, television and in print media where they explained the Commission's role and the content of the proposal.⁴³ Yes Equality also engaged significantly with traditional media, regularly partaking in interviews and debates on television and radio. However, Yes Equality placed particular emphasis on a combination of ground-level campaigning and social media presence. While much of the campaigning by Yes Equality was focused on the merits of the amendment proposal, a significant portion of it was aimed at informing voters of when the referendum would take place and dispelling misinformation about the proposal's content.⁴⁴

The final point worth mentioning here is the influence of the 2012 Constitutional Convention. As the referendum was a direct result of the Convention's deliberation, it had been reported in the media for a length of time before the campaign had even begun, and

³⁸ *ibid.*

³⁹ Referendum Commission, *Report on the Referendums on Marriage and on the Age of Presidential Candidates* (2015) 6.

⁴⁰ *ibid.* 8.

⁴¹ *ibid.* 15.

⁴² *ibid.* 8.

⁴³ *ibid.* 7.

⁴⁴ Johan Elkink, David Farrell, Theresa Reidy, Jane Suiter 'Understanding the 2015 Marriage Equality Referendum in Ireland: Context, Campaign and Conservative Ireland' (2017) 32(3) *Irish Political Studies* 361, 365.

there is evidence to suggest that voters who were aware of the Convention were more likely to vote Yes.⁴⁵ The findings of Elkind et al concluded that while voters who knew about the Convention were not necessarily more likely to vote, there was ‘a positive and statistically significant effect on the probability of voting yes’ which they suggest reflected the Convention’s ‘impact on the deliberative nature of the referendum in the wider community.’⁴⁶ The findings also suggested a very strong positive impact on knowledge, whereby those who were more informed about the referendum were more likely to vote, and more likely to vote Yes.⁴⁷

All of the above factors combined to bring about a referendum where accurate, easily-digestible information was readily available to the public which in turn led to high levels of understanding of its content. The high turnout and high engagement demonstrate this at a base level, and the study by Elkind et al reflects it further: when respondents were asked four questions about the referendum, results indicated a high level of understanding of the key aspects of the referendum.⁴⁸ The percentage of correct answers for the respective questions were 93%, 75%, 64%, and 48%.⁴⁹ Interestingly, the question about which voters were most confused was the question of surrogacy, demonstrating how pervasive the misinformation on this issue proved. Nonetheless, the other figures show impressively high levels of public understanding. While information sufficiency is only one aspect of a successful referendum, the research above demonstrates that it is an important first hurdle for every referendum. Taking as given the position that turnout and knowledge are both to be maximised in a successful referendum, the 2015 Marriage Equality referendum exhibits the significant role information sufficiency plays in achieving this.

5.3.1.2 – 2018 Abortion Referendum

⁴⁵ *ibid* 371.

⁴⁶ *ibid* 372.

⁴⁷ *ibid* 372-373.

⁴⁸ *ibid* 372.

⁴⁹ *ibid*. The questions were ‘As a result of the Yes vote, same-sex marriage will be protected by the constitution’ (93%); ‘As a result of the Yes vote, clergy will be obliged to perform same-sex marriage’ (75%); ‘Regardless of the Yes vote, the surrogacy rights for both same-sex and heterosexual couples will not change’ (64%); and ‘As a result of the Yes vote, it will be easier for couples in same-sex marriage to adopt children’ (48%).

As with the above Marriage Equality referendum, the 2018 Abortion referendum benefitted from being in the public consciousness for a considerable time before the campaign began. As has been discussed already, abortion had been considered at referendum on three previous occasions,⁵⁰ and a number of high-profile tragic incidents had brought it to national attention in the years preceding 2018.⁵¹ As a result, the campaign started from a high base level of public understanding of the specific issue and how it might be decided at referendum. One slight difference from the Marriage Equality referendum, however, lies in the wording of the amendment. While in 2015 the choice of wording had been relatively straightforward and uncontroversial, in 2018 it was a matter of debate for both the Citizens' Assembly and the Oireachtas Committee, and subsequently the Attorney General.⁵² This debate was centred on two things in particular: first, whether there was an appetite for total legalisation or rather for abortion in limited circumstances only, and; second, what the different ramifications might be for a simple repeal of the 8th amendment or replacement with a new provision.⁵³ So, while there was a high level of understanding of abortion in the Constitution before the campaign, once it was decided to replace the 8th Amendment rather than simply repeal it, some work was needed in order to inform voters about what exactly a Yes/No vote would mean.⁵⁴

The Referendum Commission's information campaign here made use of the lessons learned in 2015: the campaign had a strong focus on social media and online advertising, as well as greater engagement with national media. The Chairperson of the Commission

⁵⁰ In 1983, 1992, and 2002.

⁵¹ In particular, the stories of Savita Halappanavar and the mother in *PP v Health Service Executive* [2014] IEHC 622. Carolan and Field mention these two incidents as particularly influential on the subsequent debate about abortion; Eoin Carolan, 'Constitutional Change Outside the Courts: Citizen Deliberation and Constitutional Narrative(s) in Ireland's Abortion Referendum' (2020) 48(4) *Federal Law Review* 497, 507-508; Luke Field, 'The Abortion Referendum of 2018 and a Timeline of Abortion Politics in Ireland to Date' (2018) 33(4) *Irish Political Studies* 612, 612-613.

⁵² David Kenny, 'Repeal or Replace? The Challenge of Debating Complex Legal/Constitutional Questions in the Citizens' Assembly' IACL-AIDC Blog (10 December 2018) <<https://blog-iacl-aidc.org/debate-the-citizens-assembly-in-ireland/2018/12/10/repeal-or-replace-the-challenge-of-debating-complex-legalconstitutional-questions-in-the-citizens-assembly>> accessed 13 June 2023.

⁵³ Which was a point of contention for elements of the pro-choice campaign as the grassroots movement had historically banded together under the slogan of 'Repeal'. There was also some legal opinion that a simple repeal might allow the Courts to interpret the Constitution as protecting the life of the unborn; David Kenny, 'Repeal or Replace? The Challenge of Debating Complex Legal/Constitutional Questions in the Citizens' Assembly' IACL-AIDC Blog (10 December 2018) <<https://blog-iacl-aidc.org/debate-the-citizens-assembly-in-ireland/2018/12/10/repeal-or-replace-the-challenge-of-debating-complex-legalconstitutional-questions-in-the-citizens-assembly>> accessed 13 June 2023.

⁵⁴ The amendment inserted the following into Article 40.3.3: 'Provision may be made by law for the regulation of termination of pregnancy.'

gave interviews on the content of the amendment proposal on RTÉ, Newstalk radio, TheJournal.ie through Facebook Live, and around 20 local radio stations.⁵⁵ Another similarity with the experience from 2015 was the presence of a particularly active Yes campaign, this time under the umbrella of ‘Together For Yes’. This movement encompassed over 100 groups with a strong core of civic society organisations, and included political parties and trade unions.⁵⁶ Together For Yes contributed hugely to the national debate on the issue and undertook its own campaign to inform voters about the content of the proposal and the date of the referendum, as well as encouraging people to vote.⁵⁷ The No campaign was smaller and less co-ordinated but similarly vocal and energetic throughout the campaign.⁵⁸ The vigorous debate on the issue meant the referendum was in the public conscience on a daily basis from very early on in the campaign, and the presence of highly vocal Yes and No civic society groups contributed significantly to the public’s awareness of the referendum.

The 2016-18 Citizens’ Assembly’s work on the Eighth Amendment had a significant role regarding information sufficiency. First, the Citizens’ Assembly received substantial media coverage during the period of its deliberation and the subsequent campaign, providing a repository of publicly accessible knowledge. The Assembly’s report was viewed over 50,000 times with over 280,000 page views during the period of its work,⁵⁹ and Suiter and Reidy found 642 mentions of the Assembly’s work in print media during the same period.⁶⁰ Arguing that the Assembly’s work continued to have an informative impact after the completion of its report, Doyle and Walsh draw on exit polls which showed a high level of awareness among the public: 66% of respondents were aware of the Assembly, and of that 66%, ‘nearly three quarters correctly answered questions about how the Assembly functioned.’⁶¹ The polls also indicated a higher level of trust in the

⁵⁵ Referendum Commission, *Report on the Referendum on the Regulation of the Termination of Pregnancy* (2018) 6.

⁵⁶ Luke Field, ‘The Abortion Referendum of 2018 and a Timeline of Abortion Politics in Ireland to Date’ (2018) 33(4) *Irish Political Studies* 612, 618-620.

⁵⁷ *ibid*; including encouraging people living abroad to return home to vote.

⁵⁸ *ibid* 620-621.

⁵⁹ Oran Doyle and Rachael Walsh, ‘Constitutional Amendment and Public Will Formation: Deliberative Mini-Publics as a Tool for Consensus Democracy’ (2022) 20(1) *International Journal of Constitutional Law* 398, 413.

⁶⁰ Jane Suiter, Theresa Reidy, ‘Does Deliberation Help Deliver Informed Electorates Evidence from Irish Referendum Votes’ (2020) 56(4) *Representation* 539, 543.

⁶¹ Oran Doyle and Rachael Walsh, ‘Constitutional Amendment and Public Will Formation: Deliberative Mini-Publics as a Tool for Consensus Democracy’ (2022) 20(1) *International Journal of Constitutional Law* 398, 414.

Assembly than in politicians.⁶² The authors conclude that voters who were aware of the Assembly were more likely to vote yes; it enhanced the ‘information environment’ of the referendum.⁶³

Second, through its deliberative process the Citizens’ Assembly provided the public with information that was more substantively engaged with the issue. Rather than simply encouraging people to vote (like the Referendum Commission) the Assembly provided the public with details of reasoned deliberation between citizens, informed by experts and undertaken by ordinary citizens. Suiter and Reidy find that this sort of deliberation led to a higher incidence of subjective and objective knowledge among voters, which allowed them to vote in line with their fundamental values in a way that is hampered in referendums where information is not sufficiently accurate and accessible.⁶⁴ That is, because voters were sufficiently informed, they could vote according to their beliefs on the substantive merits of the amendment, rather than being mistaken as to the content of the proposal or succumbing to second-order voting preferences.⁶⁵ The Citizens’ Assembly – combined with the vigorous campaign from both the Yes and No sides and the Referendum Commission’s information campaign – therefore resulted in a referendum with an admirably high level of information sufficiency and, consequently, higher turnout.

5.3.2 – Impact of Insufficient Information

5.3.2.1 – 2001 Nice Treaty Referendum

Standing in stark contrast to the above two referendums, the 2001 Nice I referendum usefully exemplifies the effect of insufficient information on a referendum. The first and most obvious difference between this referendum and the previous two is the content. Whereas in 2015 and 2018 the referendums concerned social issues that were, for the most

⁶² *ibid* citing Jane Suiter, Theresa Reidy, ‘Does Deliberation Help Deliver Informed Electorates Evidence from Irish Referendum Votes’ (2020) 56(4) Representation 539, 543.

⁶³ Oran Doyle and Rachael Walsh, ‘Constitutional Amendment and Public Will Formation: Deliberative Mini-Publics as a Tool for Consensus Democracy (2022) 20(1) International Journal of Constitutional Law 398, 414 citing Johan A Elkink, David M Farrell, Sofie Marien, Theresa Reidy, Jane Suiter, ‘The Death of Conservative Ireland?: The 2018 Abortion Referendum’ (2020) 65 Electoral Studies.

⁶⁴ Jane Suiter, Theresa Reidy, ‘Does Deliberation Help Deliver Informed Electorates Evidence from Irish Referendum Votes’ (2020) 56(4) Representation 539, 551.

⁶⁵ e.g. voting against the measure as a protest against the government.

part, easy to understand and engage with, the Nice Treaty was an impenetrable legal document whose content was a matter of disagreement even between experts.⁶⁶ The Treaty therefore did not lend itself easily to referendum campaigning. However, as a result of the *Crotty* decision, ratification required that it be passed by a majority of voters, and so the public needed to be informed about the amendment.⁶⁷ This task seems all the more daunting when one considers how poor the Irish public's knowledge of European Union affairs was around that time: 65% of respondents to a 1995 poll were 'not well informed' about the EU,⁶⁸ and in a later study testing political knowledge of the EU's institutions 63% of those polled answered zero questions correctly.⁶⁹ The referendum started from a position of seriously insufficient public knowledge.

The Government's approach to information campaigning in this referendum did not serve to effectively tackle this lack of information, and instead relied on 'rhetoric' rather than information to try to win over a majority of the electorate.⁷⁰ Katy Hayward characterises the Government's campaign as lacking information as to 'the purpose, implications and likely impact of the Treaty' and notes that 'no press release, speech or statement by government ministers in the course of the referendum debate specifically outlined the actual terms of the Treaty of Nice.'⁷¹ It is perhaps no surprise, then, that the No campaign were able to capitalise on the fact that 85% of the electorate admitted to not fully comprehending the Treaty and raise anxieties about its impact on Irish neutrality and militarisation,⁷² sovereignty, independence, and other issues like abortion.⁷³ While a main point of emphasis for the Yes campaign was that the Treaty was necessary for enlargement of the EU, there was confusion – even among members of government – about whether the Treaty actually *was* necessary for enlargement to go ahead, and the Referendum

⁶⁶ Eithne Murphy, 'The Nice Treaty and the Irish Referendum: What Values Are at Stake?' (2002) 91(362) *Studies: An Irish Quarterly Review* 114, 115.

⁶⁷ *Crotty v An Taoiseach* [1987] IESC 4, [1987] IR 713.

⁶⁸ Katy Hayward, 'Not a Nice Surprise: An Analysis of the Debate Surrounding the 2001 Referendum on the Treaty of Nice in the Republic of Ireland' (2002) 13 *Irish Studies in International Affairs* 168 citing Richard Sinnott, 'Knowledge of the European Union in Irish Public Opinion: Sources and Implications' (Dublin, 1995) Institute of European Affairs Occasional Paper 5, 4-5.

⁶⁹ Three questions were asked in total: 63% scored zero, 25% scored 1, 10% scored 2 and 2% scored 3; Richard Sinnott, 'Attitudes and Behaviour of the Irish Electorate in the Referendum on the Treaty of Nice' (2002) Institute for the Study of Social Change, University College Dublin, 4.

⁷⁰ Katy Hayward, 'Not a Nice Surprise: An Analysis of the Debate Surrounding the 2001 Referendum on the Treaty of Nice in the Republic of Ireland' (2002) 13 *Irish Studies in International Affairs* 168, 169.

⁷¹ *ibid* 173.

⁷² *ibid* 172.

⁷³ Richard Sinnott, 'Attitudes and Behaviour of the Irish Electorate in the Referendum on the Treaty of Nice' (2002) Institute for the Study of Social Change, University College Dublin, 19.

Commission's guide made no reference to enlargement at all.⁷⁴ Amongst all this confusion, No campaign arguments which had no basis in the Treaty found purchase with voters, and the Government found it increasingly difficult to present positive reasons for voting Yes when the No campaign was so much more evocative.⁷⁵ Without sufficient information to critique the accuracy of either side's campaign, it is no surprise that so few people voted and that a majority of those who did voted No.⁷⁶

Post-referendum analysis demonstrates that the Referendum Commission failed to adequately inform voters about the nature of the amendment and the Treaty. When asked to assess their knowledge of the issues at referendum at the time of the vote, only 8% of respondents to Richard Sinnott's survey indicated that they had a good understanding of what the Treaty was about, and just 28% said they understood some of the issues; two-thirds of the respondents were either only vaguely aware or were not at all aware of what the Treaty was about.⁷⁷ Sinnott attributes the low levels of understanding to 'the way in which information and arguments about the issues were communicated in the course of the referendum campaign', indicating that no one official source of information was deemed valuable by even half of the respondents.⁷⁸ In particular, the Referendum Commission attracted a positive rating from only about 30% of people, which is on par with the Yes and No campaigns.⁷⁹ The primary consequence of this information deficit is twofold. First, a lack of sufficient information led to huge numbers of people abstaining from voting.⁸⁰ This abstention, according to Sinnott, was the key feature of the swing from Yes (in all previous EU referendums) to No.⁸¹ 44% of abstainers indicated that lack of

⁷⁴ Eithne Murphy, 'The Nice Treaty and the Irish Referendum: What Values Are at Stake?' (2002) 91(362) *Studies: An Irish Quarterly Review* 115, 119.

⁷⁵ Ece Özlem Atıkan, 'The Puzzle of Double Referendums in the European Union' (2015) 53(5) *Journal of Common Market Studies* 937, 945.

⁷⁶ Katy Hayward, 'Not a Nice Surprise: An Analysis of the Debate Surrounding the 2001 Referendum on the Treaty of Nice in the Republic of Ireland' (2002) 13 *Irish Studies in International Affairs* 168, 174.

⁷⁷ Richard Sinnott, 'Attitudes and Behaviour of the Irish Electorate in the Referendum on the Treaty of Nice' (2002) Institute for the Study of Social Change, University College Dublin, 10.

⁷⁸ *ibid* 10-11.

⁷⁹ *ibid* 10-11. Given its role as the independent information repository, this figure should be much higher. It is interesting to note that this was the last referendum where the Referendum Commission was asked to present arguments for and against the proposal.

⁸⁰ Turnout was just 34.8%.

⁸¹ *ibid* 23. While there was some suggestion at the time that the referendum indicated a souring of Irish attitudes toward the EU, Sinnott's study shows that while 'No' votes in EU referendums had increased over time, as a proportion of the electorate it was only a modest increase and had in fact fallen in Nice I to just 18.1% of the electorate. The higher 'No' vote percentage in each EU referendum was actually the result of more and more 'Yes' voters abstaining.

information was the reason for their abstention.⁸² Second, even among those who did vote, lack of information was a major contributor to the No vote: 39% of those who voted No said they did so because they were not adequately informed about the issues, by far the most frequently cited reason.⁸³ Only 7% of No votes were based on the premise that the Nice Treaty was a bad idea generally.⁸⁴ Combine all of this together – a pathological lack of information, huge numbers of abstainers, rampant misinformation about the nature of the Treaty, and an ‘if you don’t know, vote no’ attitude – and the referendum’s result is easily explicable. Rather than voting No on foot of first-order preferences, voters were never sufficiently informed such that they could properly make up their minds about the Nice Treaty and its substantive merits.

5.3.2.2 – 2012 Children’s Rights Referendum

The 2012 Children’s Rights referendum concerned an issue that had been in the political consciousness for a number of years prior. In the wake of high-profile controversies around state care and child abuse, an amendment in this area was recommended by an All-Party Oireachtas Committee report in 2006, and a further joint committee discussed potential wording for an amendment before it finally came to pass in 2012.⁸⁵ Despite this, the referendum did not enjoy the high base levels of public information as seen in 2015 and 2018. The primary reason for this is the complex and confusing nature of the amendment. The amendment ostensibly arose as a response to judicial decisions which were unduly weighted in favour of parental authority as against children’s best interests.⁸⁶ However, as Doyle and Kenny make clear, the jurisprudence in this area was much more nuanced, and had in fact been protecting children’s ‘best interests’ as recognised in Article 42.5 of the Constitution.⁸⁷ Further, the amendment proposal which was eventually put forward at referendum largely preserved the status quo, retaining a preference for parental

⁸² *ibid* 13.

⁸³ *ibid* 19.

⁸⁴ *ibid*.

⁸⁵ Oran Doyle and David Kenny, ‘Constitutional Change and Interest Group Politics: Ireland’s Children’s Rights Referendum’ in Richards, Contiades, and Fotiadou (eds) *The Foundations and Traditions of Constitutional Amendment* (Hart 2017).

⁸⁶ Including the ‘baby Ann’ case *N v Health Service Executive* [2006] IESC 60, among others.

⁸⁷ Oran Doyle and David Kenny, ‘Constitutional Change and Interest Group Politics: Ireland’s Children’s Rights Referendum’ in Richards, Contiades, and Fotiadou (eds) *The Foundations and Traditions of Constitutional Amendment* (Hart 2017). The authors contend that Article 42.5 (as it was pre-amendment) recognised children’s rights and gave the State a residual power to interfere in the case of parental failure.

authority and making only marginal changes to the threshold for state intervention in parental authority.⁸⁸ Regardless, the amendment garnered practically unanimous support from interest groups (some of whom had been campaigning for much more substantial amendment) and political parties. The upshot of this was that, despite the widespread support, the precise nature of the change being proposed was technical and difficult to explain without relying on platitudes such as ‘protecting children’s rights’, which did not fare well under sustained pressure. Further, it made expert guidance on the proposal confused and unspecific – too many groups were supporting the amendment for apparently different reasons.⁸⁹

As a result of the widespread confusion about the amendment and its consequences, the Referendum Commission’s task was immense from the outset. This was further compounded by the extremely short period of time which it was granted to prepare its information campaign: just seven weeks.⁹⁰ The Commission’s information campaign also came under criticism for being intensely technical and legalistic, offering little clarity on an already technical amendment.⁹¹ Perhaps sensing the level of public disinformation on the issue, the Government took the unique step of preparing its own information campaign which included advertisements, a website, and its own booklet distributed to households.⁹² There were two main consequences of this campaign. The first is that it undermined the work of the Referendum Commission, providing contradictory information and creating confusion among the public about which source was official and independent.⁹³ The second is that, when challenged in the Supreme Court, the campaign was found to be unconstitutional in that it breached the *McKenna* rules.⁹⁴ Just days before the vote, the campaign was declared unlawful for being overly-partisan in favour of a Yes vote while funded by public monies.⁹⁵

⁸⁸ *ibid.*

⁸⁹ *ibid.*; Conor O’Mahony, ‘Falling Short of Expectations: the 2012 Children Amendment, from Drafting to Referendum’ (2016) 31 *Irish Political Studies* 252, 272.

⁹⁰ Referendum Commission, *Report on the 31st Amendment of the Constitution (Children) Bill 2012* (2013), 12.

⁹¹ Conor O’Mahony, ‘Falling Short of Expectations: the 2012 Children Amendment, from Drafting to Referendum’ (2016) 31 *Irish Political Studies* 252, 268.

⁹² *ibid.*

⁹³ *ibid.* 269 citing Referendum Commission, *Report on the 31st Amendment of the Constitution (Children) Bill 2012* (2013), 8.

⁹⁴ *McCrystal v Minister for Children and Youth Affairs* [2012] IESC 53.

⁹⁵ *ibid.*

While the direct impact of this court decision on voter intention is likely minimal (79% of No voters who were aware of the decision said it had no effect on their voting preference),⁹⁶ it highlights the difficulty that the Government had in informing the public about the proposal in neutral terms.⁹⁷ Further exacerbating these issues was the impact of misinformation. Due to a dearth of an organised No campaign, many of the arguments put forward in the media for No came from fringe voices who claimed that the amendment would, for example, bring about enforced vaccinations or allow state provision of contraceptives to children.⁹⁸ Significantly, the Referendum Commission took no active role in assessing the validity of either side's claims, allowing these claims to go unchallenged by an impartial body.⁹⁹ Coupled with the inability of the Yes campaign to effectively and precisely state what the impact of the amendment would be, these unsubstantiated claims gained more traction than they might otherwise have, and contributed to the overall confusion in the campaign.

As with the 2001 Nice referendum, the primary consequence of poor information availability was low turnout and high levels of abstention: just 33.5% of the electorate voted. And while the amendment did pass with 58% of the vote, this number was significantly lower than had been anticipated, especially considering it had the support of all major political parties and practically all relevant interest groups. 41% of respondents to a poll suggested that they did not understand the referendum well or did not understand it at all, with only 13% saying they understood it very well.¹⁰⁰ Of those who did not vote, 34% stated that their reason for not voting was a lack of adequate information on the amendment.¹⁰¹ Of those who voted No, 22% based it on the fact that they did not understand the referendum.¹⁰² Some 53% of voters indicated that they thought neither side

⁹⁶ Conor O'Mahony, 'Falling Short of Expectations: the 2012 Children Amendment, from Drafting to Referendum' (2016) 31 *Irish Political Studies* 252, 273.

⁹⁷ Oran Doyle and David Kenny, 'Constitutional Change and Interest Group Politics: Ireland's Children's Rights Referendum' in Richards, Contiades, and Fotiadou (eds) *The Foundations and Traditions of Constitutional Amendment* (Hart 2017).

⁹⁸ Neither of which were impacted by the amendment at all; Conor O'Mahony, 'Falling Short of Expectations: the 2012 Children Amendment, from Drafting to Referendum' (2016) 31 *Irish Political Studies* 252, 271.

⁹⁹ *ibid* 272.

¹⁰⁰ Referendum Commission, *Report on the 31st Amendment of the Constitution (Children) Bill 2012* (2013), 7.

¹⁰¹ *ibid* 8.

¹⁰² Conor O'Mahony, 'Falling Short of Expectations: the 2012 Children Amendment, from Drafting to Referendum' (2016) 31 *Irish Political Studies* 252, 273.

put forward clear and balanced arguments.¹⁰³ The Referendum Commission's report shows that voters put a lot of value into clear and sufficient information: key motivating factors on whether/how to vote included 'the amount of explanatory information available, the clarity and simplicity of that information, and particularly, the quality and amount of general media',¹⁰⁴ and nearly 90% stated that impartial information was very or quite important, including the Referendum Commission's role.¹⁰⁵ The 2012 Children's Rights referendum stands as an example of how a confusing amendment, when not properly explained to the public, can be susceptible to high levels of apathy and abstention, while also being vulnerable to misinformation even when the proposed amendment is minor and almost universally accepted by relevant parties.

5.4 – Engagement

The second criterion for a well-run referendum is engagement. Engagement here refers to the requirement that in any referendum, there must be substantial participation in debate and campaigning from political parties and other bodies such as interest groups, but most importantly the public. A referendum with high engagement is one in which the public are actively participating in campaigning and debate, where the campaigns are well-run and successfully encourage people to vote, and where voters recognise the significance of the referendum and vote. As seen in previous chapters, when an amendment proposal fails to attract sufficient engagement from the public, the consequences for the referendum can be disastrous: poor turnout, a lack of quality deliberation, and low levels of first-order preference voting. As a criterion for a successful referendum, engagement has an element of positive obligation: the government and other related bodies must actively generate engagement in the populace where otherwise it might not occur independently, and offer compelling reasons to vote. The four referendum examples demonstrate how this can be done to varying degrees of success, and the consequences that flow thereafter.

¹⁰³ *ibid* 272-273.

¹⁰⁴ Referendum Commission, *Report on the 31st Amendment of the Constitution (Children) Bill 2012* (2013), 8.

¹⁰⁵ *ibid* 9.

5.4.1 – Impact of Engagement

5.4.1.1 – 2015 Marriage Equality Referendum

Engagement with the issue of marriage equality began long before the referendum campaign was initiated, and was particularly heightened by the 2012 Constitutional Convention.¹⁰⁶ Public engagement was high even during its period of deliberation: the Convention Steering Group received a significant number of requests from advocacy and civil society groups wishing to make presentations on the matter to the Convention, and many of those groups attended the Convention in a separate auditorium in order to be involved in the process.¹⁰⁷ Further, during this time a huge volume of public submissions were received and the Convention engaged with members of the public on its ‘road trips’ throughout the country.¹⁰⁸ Also significant, the Convention’s work on marriage equality received intense media coverage both during and after its period of deliberation, and it was clear that its recommendations had a direct impact in bringing about a referendum.¹⁰⁹ The Convention’s deliberation impacted the kind of engagement that would take place in the public sphere – by allowing space and time for ‘careful, measured and informed deliberation’ its significance was in ‘how it informed policy-makers and advocates [...] of the nature of the debate, how it might unfold and, most significant of all, how citizens might react.’¹¹⁰ Its impact on engagement was therefore twofold: on the one hand, it showed campaigners that open, calm, and informed deliberation led to a majority favouring amendment, and; second, as a citizen-oriented deliberative process, it legitimised the amendment proposal as citizen-led, to an extent separate from concerns of elite control and electioneering.¹¹¹

These findings contributed to the type of campaign ultimately run by the Government and particularly by the highly-organised Yes Equality. As noted above, Yes Equality

¹⁰⁶ See generally §4.3.

¹⁰⁷ Convention on the Constitution, *Third Report* (June, 2013).

¹⁰⁸ Convention on the Constitution, *Ninth Report* (March 2014), section 1.

¹⁰⁹ Johan Elkind, David Farrell, Theresa Reidy, Jane Suiter ‘Understanding the 2015 Marriage Equality Referendum in Ireland: Context, Campaign and Conservative Ireland’ (2017) 32(3) *Irish Political Studies* 361, 364.

¹¹⁰ *ibid.*

¹¹¹ The desired effect of which was to reduce the risk of the vote turning into a referendum on satisfaction with the government.

emphasised a combination of ground-level canvassing and social media presence. Taking its cue from the Convention and also from previous referendum experiences,¹¹² the campaign was focused on the ‘simple but powerful argument’ that the amendment was about equality for couples.¹¹³ This message was pushed vigorously for the whole length of a very active campaign: extensive door-to-door canvassing was utilised;¹¹⁴ a novel social media presence reminded people to vote and also organised carpools to polling stations;¹¹⁵ a particularly memorable ‘I’m Voting Yes, Ask Me Why’ street campaign was used throughout the country; and other innovative tactics all combined for an energetic campaign.¹¹⁶ The approach to the campaign was soft. Rather than creating a confrontational atmosphere, Yes Equality opted for a warmer, more inclusive approach, aimed not at their own support base but at specifically targeted groups identified through focus groups and demographic analysis.¹¹⁷ The No side, on the other hand, ran a more traditional referendum campaign focused on broadcast media and paid-for online advertising.¹¹⁸ As already mentioned, this campaign was particularly focused on the issues of surrogacy and adoption which were not directly in question, and while the Referendum Commission did eventually intervene, the campaign was nonetheless effective at sowing doubt and confusion about the consequences of a Yes vote, though ultimately not enough to impact the result.¹¹⁹ Though not as strongly-organised as Yes Equality, the No side was notably visible throughout the campaign, owing to a number of high-profile advocates and the broadcasting requirements that each side get equal airtime.¹²⁰

¹¹² In particular through working with campaigners from the Divorce referendums in the 1980s and 90s such as Anne Connolly, to understand what worked in convincing people to vote Yes; Gráinne Healy, Brian Sheehan, and Noel Whelan, *Ireland Says Yes: The Inside Story of How the Vote for Marriage Equality Was Won* (2016 Merrion Press).

¹¹³ Johan Elkind, David Farrell, Theresa Reidy, Jane Suiter ‘Understanding the 2015 Marriage Equality Referendum in Ireland: Context, Campaign and Conservative Ireland’ (2017) 32(3) *Irish Political Studies* 361, 365.

¹¹⁴ *ibid* 366.

¹¹⁵ *ibid*.

¹¹⁶ Including a sponsored bus visiting urban centres, partnership with Ben & Jerry’s for free ice-cream at events and merchandising such as Tá/Yes badges; *ibid* 365.

¹¹⁷ Gráinne Healy, Brian Sheehan, and Noel Whelan, *Ireland Says Yes: The Inside Story of How the Vote for Marriage Equality Was Won* (2016 Merrion Press).

¹¹⁸ Jane Suiter, ‘Lessons from the Yes and No Campaigns’ *The Irish Times* (Dublin 27 May 2015) 14.

¹¹⁹ *ibid*.

¹²⁰ Flowing from the *Coughlan v Broadcasting Complaints Commission* [2000] 3 IR 1 decision; Conor O’Mahony, ‘Legal Regulation of Referendum Campaigns’, paper delivered to the Citizen’s Assembly, January 13th 2018; and Conor O’Mahony, ‘Of Constitutions and Cookery Shows’ *Constitution Project @ UCC*, <<http://constitutionproject.ie/?p=647>> accessed on 8 December 2021.

With extremely vocal Yes and No campaigns, a topic already salient to the public, intense domestic and international media coverage,¹²¹ and a lively public debate, engagement with this referendum remained high throughout the campaign period.¹²² The consequences of this engagement can be seen most vividly in the youth vote. Where research showed that younger voters were more likely to vote Yes, Yes Equality focused on getting young people out to vote, resulting in upwards of 65,000 new voters being added to the electoral register in the months leading up to the referendum.¹²³ More than that, two social media initiatives encouraged (mostly young) people to return home to Ireland from abroad to vote. The ‘#HomeToVote’ and ‘Get the Boat 2 Vote’ campaigns were reported to have brought thousands of emigrants back to Ireland to vote in the referendum.¹²⁴ The Referendum Commission’s report attributes the high turnout (60.5%) to the ‘engagement by the electorate in general on the marriage referendum’, noting in particular that future referendums should seek to engage young voters in the same way.¹²⁵ While it is true that the issue of marriage equality was of high salience to the public even before any campaigning, the impact of the Yes campaign should not be underestimated. Ultimately, the strong campaign from Yes Equality was successful in getting people to vote – although it is difficult to know how many voters had their opinions changed, Yes was always going to benefit from a higher (and younger) turnout.¹²⁶ While there is evidence of some protest voting (people dissatisfied with the Government were more likely to vote No),¹²⁷ the low-key approach by political parties helped to minimise this, and the vocal Yes and No campaigns did enough to keep the public engaged in the debate.

¹²¹ For example, Hanna Ingber, ‘Soul-Searching as Ireland Prepares to Vote on Same-Sex Marriage’ *The New York Times* (New York 21 May 2015); Danny Hakim and Douglas Dalby, ‘Ireland Votes to Approve Gay Marriage, Putting Country in Vanguard’ *The New York Times* (New York 23 May 2015).

¹²² Doyle describes it as a ‘vigorous campaign’ involving both a public and a private element; Oran Doyle, ‘Minority Rights and Democratic Consensus: The Irish Same-Sex Marriage Referendum’ (2020) 15 *NTU Law Review* 21, 33.

¹²³ Johan Elkink, David Farrell, Theresa Reidy, Jane Suiter ‘Understanding the 2015 Marriage Equality Referendum in Ireland: Context, Campaign and Conservative Ireland’ (2017) 32(3) *Irish Political Studies* 361, 365; Harry McGee, ‘Same-sex vote the moment where social media proved its mettle’ *The Irish Times* (Dublin 23 May 2015).

¹²⁴ Ciara Kenny, ‘Emigrants come home to vote for marriage’ *The Irish Times* (Dublin 23 May 2015) 5; while there was some suggestion that this was illegal, voters are only removed from the register after 18 months of living abroad where they do not intend to return for a further 18 months, ‘Were some voters breaking the law?’ *The Irish Times* (Dublin 23 May 2015) 4.

¹²⁵ Referendum Commission, *Report on the Referendums on Marriage and on the Age of Presidential Candidates* (2015) 16.

¹²⁶ Johan Elkink, David Farrell, Theresa Reidy, Jane Suiter ‘Understanding the 2015 Marriage Equality Referendum in Ireland: Context, Campaign and Conservative Ireland’ (2017) 32(3) *Irish Political Studies* 361, 373.

¹²⁷ *ibid* 377.

5.4.1.2 – 2018 Abortion Referendum

The most significant factor of engagement with this referendum was the decades of engagement by politicians, civil society groups, and the wider public with the abortion issue that long preceded 2018. The 2018 referendum was the product of years of campaigning by various groups which had garnered significant engagement by 2018, such that by ‘the time the Government announced a referendum you couldn’t go anywhere without falling over a Repeal jumper.’¹²⁸ Couple that with the factors mentioned above – high-profile tragic incidents, an unfavourable ECHR ruling,¹²⁹ and recent legislation for abortion in cases of risk of suicide¹³⁰ – and the base level of engagement was almost uniquely high for a referendum. Civil society groups had been at the heart of the abortion debate from the very first referendum,¹³¹ and in the lead up to 2018 both the Yes and No camps had built up strong support bases. The 2016-18 Citizens’ Assembly’s experience similarly demonstrates the pre-existing levels of engagement. The Assembly received over 13,000 submissions from the public and advocacy groups on the issue of abortion during the period of its deliberation.¹³² One specific impact of the Assembly was on politicians: the recommendations went beyond the expectations of many politicians who were unaware of the broad support for abortion liberalisation in the public.¹³³ This in turn impacted the character of the campaign, with many political parties giving their members votes of conscience on the issue, including the main opposition party Fianna Fáil. As a result, the sort of campaigning run by political parties was altered, and civil society groups became the main unified source of public debate and engagement.

¹²⁸ Gráinne Griffin, Orla O’Connor, Ailbhe Smyth and Alison O’Connor, *It’s a Yes: How Together for Yes Repealed the Eighth and Transformed Irish Society* (Orpen Press, 2019) 109.

¹²⁹ *A, B & C v Ireland* [2010] ECHR 2032, (2011) 53 EHRR 13.

¹³⁰ The Protection of Life During Pregnancy Act 2013.

¹³¹ The Pro-Life Amendment Campaign (PLAC) had been the main group seeking a constitutional abortion ban in 1983 and various organisations had campaigned against the 8th thereafter; David Kenny and Aileen Kavanagh, ‘Are the People Masters? Constitutional Referendums in Ireland’ in Richard Albert and Richard Stacey (eds), *The Limits and Legitimacy of Referendums* (OUP 2022) 264-292.

¹³² Oran Doyle, Rachael Walsh, ‘Constitutional Amendment and Public Will Formation: Deliberative Mini-Publics as a Tool for Consensus Democracy (2022) 20(1) International Journal of Constitutional Law 398.

¹³³ *ibid*; Fiona de Londras, ‘The Citizens’ Assembly and the Disciplining of Activist Demands’ November 2018, <https://blog-iacl-aidec.org/debate-the-citizens-assembly-in-ireland/2018/12/10/repeal-or-replace-the-challenge-of-debating-complex-legalconstitutional-questions-in-the-citizens-assembly>.

The approach taken to the campaign by Together For Yes bears strong resemblance to the Yes Equality campaign from 2015, in particular with its dual emphasis on social media and in-person canvassing. Some 19,000 volunteers acted for Together For Yes across the country, directly canvassing to as many as 500,000 households.¹³⁴ The campaign sought to engender a cool-headed ‘national conversation’,¹³⁵ avoiding loaded terms like ‘choice’ and ‘on demand’ while also explaining the rationale behind the term limit promised by Government if the amendment passed: 12-week access without restriction as to reason.¹³⁶ Personal stories of women affected by the 8th Amendment were to the forefront of the Yes campaign’s ‘rational, calm’ messaging,¹³⁷ as were the opinions of medical experts such as Dr Peter Boylan.¹³⁸ Together For Yes also used social media to encourage people to return to Ireland to vote on the issue, a tactic which had proved successful in 2015.¹³⁹

The No campaign was primarily organised by Love Both and Save the 8th, two umbrella civil society groups which similarly made use of a strong social media presence throughout the campaign.¹⁴⁰ The primary messages of the No campaign included not trusting politicians with the ability to legislate for abortion, that the 12-week period would be extended immediately, and that abortion would be allowed on the grounds of non-fatal foetal disability (which was inaccurate and fact-checked by the Referendum Commission and others).¹⁴¹ One notable aspect of the No campaign was the absence of a strong presence by the Catholic Church. While in previous abortion referendums the Church had taken centre stage, here the No campaign actively discouraged the Church’s participation, owing perhaps to the Church’s declining influence in the preceding decades.¹⁴² Posters were a highly-visible aspect of both the Yes and No campaigns, the contents of which were

¹³⁴ David Kenny and Aileen Kavanagh, ‘Are the People Masters? Constitutional Referendums in Ireland’ in Richard Albert and Richard Stacey (eds), *The Limits and Legitimacy of Referendums* (OUP 2022) 264-292.

¹³⁵ Gráinne Griffin, Orla O’Connor, Ailbhe Smyth and Alison O’Connor, *It’s a Yes: How Together for Yes Repealed the Eighth and Transformed Irish Society* (Orpen Press, 2019) 92.

¹³⁶ David Kenny and Aileen Kavanagh, ‘Are the People Masters? Constitutional Referendums in Ireland’ in Richard Albert and Richard Stacey (eds), *The Limits and Legitimacy of Referendums* (OUP 2022) 264-292.

¹³⁷ Gráinne Griffin, Orla O’Connor, Ailbhe Smyth and Alison O’Connor, *It’s a Yes: How Together for Yes Repealed the Eighth and Transformed Irish Society* (Orpen Press 2019) 119.

¹³⁸ Chair of the Institute of Obstetricians and Gynaecologists, *ibid.*

¹³⁹ The #HomeToVote tag was active on twitter during the campaign; Ciara Kenny, ‘Why we’re flying home to vote: ‘I want to be proud of my nation’ *The Irish Times* (Dublin 24 May 2018).

¹⁴⁰ *ibid.*

¹⁴¹ David Kenny and Aileen Kavanagh, ‘Are the People Masters? Constitutional Referendums in Ireland’ in Richard Albert and Richard Stacey (eds), *The Limits and Legitimacy of Referendums* (OUP 2022) 264-292.

¹⁴² Kimiko de Freytas-Tamura, ‘Ireland Votes to End Abortion Ban, in Rebuke to Catholic Conservatism’ *The New York Times* (New York 25 May 2018).

subject to a huge number of complaints to the Referendum Commission.¹⁴³ Complaints were also issued about advertisements on social media and the possibility that they were being funded by foreign organisations. While the State was not in a position to properly rectify this, social media platforms took some initiative in the weeks leading up to the referendum: Facebook and Google both disallowed advertisements on their platform.

The campaigns from both Yes and No were highly visible and vocal, and debate was regularly aired on national media for the duration of the campaigning period. While one of these nationally-televised debates descended into jeering and accusations of lying, for the most part that sort of vitriol ‘never surfaced to the same extent again during the campaign, and was never evident on the ground.’¹⁴⁴ The Referendum Commission’s report posits the extent of this public debate as one of the factors in the high turnout, along with ‘the nature of the campaigns for and against the proposal’.¹⁴⁵ Turnout was very high – 64.13% is the highest since the Referendum Commission was first established in 1998.¹⁴⁶ As with the 2015 Marriage Equality referendum, the turnout included high levels of young voters, the demographic most likely to vote Yes.¹⁴⁷ Considering the difficulty successive Referendum Commissions had with encouraging young people to vote, the significant number of young people engaged with the referendum indicated a welcome development. The issue of repealing the 8th Amendment was always likely to attract significant engagement, but the level of campaigning, the Citizens’ Assembly, and vigorous public debate meant that engagement persisted until the end and that turnout was high.

5.4.2 – Impact of Poor Engagement

5.4.2.1 – 2001 Nice Treaty Referendum

¹⁴³ Referendum Commission, *Report on the Referendum on the Regulation of Termination of Pregnancy* (2019) 2; the Commission had no role in regulating these posters.

¹⁴⁴ Gráinne Griffin, Orla O’Connor, Ailbhe Smyth and Alison O’Connor, *It’s a Yes: How Together for Yes Repealed the Eighth and Transformed Irish Society* (Orpen Press 2019) 155.

¹⁴⁵ Referendum Commission, *Report on the Referendum on the Regulation of Termination of Pregnancy* (2019) 4.

¹⁴⁶ *ibid.*

¹⁴⁷ Johan Elkink, David Farrell, Sofie Marien, Theresa Reidy, and Jane Suiter, ‘The death of conservative Ireland? The 2018 abortion referendum’ (2020) 65 *Electoral Studies*; 87% of respondents under 25 voted Yes.

When examining public and political engagement, the 2001 Nice Treaty referendum pales in comparison with the 2015 and 2018 referendums. In one sense this is inevitable given the source of all three referendums. Whereas the 2015 and 2018 amendment proposals came about as a result of years of campaigning by interest groups and citizens, the Nice Treaty referendum came about because of the *Crotty* decision and the developments of the European Union.¹⁴⁸ As such, there was comparatively little engagement prior to the referendum being announced, and both the Yes and No campaigns had to actively seek to engage voters from that point. However, the spearheads of the Yes campaign – the Government and major opposition parties – operated on the presumption that a Yes vote was virtually guaranteed, therefore doing little to actively engage the public with the referendum. Writing a week before the polling day, Déaglán de Breadún commented in *The Irish Times* that there were two notable aspects of this referendum: first, the ‘near-monolithic support in the political establishment for a Yes vote’; and, second, ‘the relatively low level of activity on the ground in support of a Yes vote.’¹⁴⁹ He went on to say that this presumption was echoed in the media, where turnout at press conferences was poor throughout the campaign.¹⁵⁰ After the amendment was rejected and the presumption proved to be misguided, the Government’s lack of effort to engage the public was castigated by domestic and international media,¹⁵¹ EU officials,¹⁵² and opposition parties.¹⁵³ In contrast to the ‘lackadaisical and lethargic’ Yes campaign,¹⁵⁴ the No side campaigned with ‘verve and zeal’, behaving like it was an election campaign and outspending the Yes parties.¹⁵⁵

As already mentioned, the campaign for a Yes vote run by Government parties focused less on the substantive merits of the Nice Treaty and more on the rhetoric of EU

¹⁴⁸ *Crotty v An Taoiseach* [1987] IESC 4, [1987] IR 713.

¹⁴⁹ Déaglán de Breadún, ‘All kinds of everything in opposition to Nice Treaty’ *The Irish Times* (Dublin 31 May 2001).

¹⁵⁰ *ibid.*

¹⁵¹ Mark Hennessy, ‘Yes side is stunned and baffled by voters’ decision’ *The Irish Times* (Dublin 9 June 2001) 7.

¹⁵² Denis Staunton, ‘EU leaders will see No vote as failure on Government’s part’ *The Irish Times* (Dublin 9 June 2001) 7.

¹⁵³ Mark Hennessy, ‘Yes side is stunned and baffled by voters’ decision’ *The Irish Times* (Dublin 9 June 2001) 7.

¹⁵⁴ Ece Özlem Atikcan, ‘The Puzzle of Double Referendums in the European Union’ (2015) 53(5) *Journal of Common Market Studies* 937, 943.

¹⁵⁵ Drapier, An Insider’s Guide to Politics, ‘Political establishment must stop sulking and start listening’ *The Irish Times* (Dublin 9 June 2001) 5.

enlargement and the positive public attitude towards the EU in previous decades.¹⁵⁶ The campaign was ‘brief and limp’,¹⁵⁷ made up of abstract slogans such as ‘Europe: Let’s be at the Heart of It’ and ‘Good for Ireland, Good for Europe’ which did little to offer the electorate positive reasons to vote in favour of the Treaty.¹⁵⁸ The overwhelming conclusion was that the Yes campaign was ‘incompetent and inept’,¹⁵⁹ and simply did not put enough effort into giving people reasons to vote. In contrast, the No side’s campaign was extremely effective at communicating its message to voters and convincing them that the Treaty was problematic. One particularly notable aspect of the No campaign was the diversity of voices – the informal coalition constituted many contradictory elements making their case on different bases but all united around the word ‘No’.¹⁶⁰ While the Yes side was confined to general arguments about enlargement and a sense of moral responsibility to prospective member states, No campaigners were able to state in much more ardent and clear terms that the Treaty would have serious consequences for, as an example, ‘social and economic protection, democratic accountability and environmental responsibility.’¹⁶¹ Granted, the No side did include groups who put out a significant number of false claims and conspiracy theories, but as a result of the Government’s lacklustre campaign it also offered voters the most ‘consistent and clear impression of what a ‘Yes’ vote would be a vote for.’¹⁶² The No side was able to appeal to different groups with different messages,¹⁶³ at times focusing on Ireland’s ‘neuralgic issues’ like abortion and neutrality.¹⁶⁴

¹⁵⁶ Katy Hayward, ‘Not a Nice Surprise: An Analysis of the Debate Surrounding the 2001 Referendum on the Treaty of Nice in the Republic of Ireland’ (2002) 13 *Irish Studies in International Affairs* 168, 169.

¹⁵⁷ John Garry, Michael Marsh, Richard Sinnott, ‘“Second-order” versus “Issue-voting” Effects in EU Referendums: Evidence from the Irish Nice Treaty Referendums’ (2005) 6(2) *European Union Politics* 201, 216.

¹⁵⁸ Ece Özlem Atikcan, ‘The Puzzle of Double Referendums in the European Union’ (2015) 53(5) *Journal of Common Market Studies* 937, 941.

¹⁵⁹ Mark Hennessy, ‘Yes side is stunned and baffled by voters’ decision’ *The Irish Times* (Dublin 9 June 2001) 7 quoting Ruairí Quinn TD.

¹⁶⁰ Déaglán de Breadún, ‘All kinds of everything in opposition to Nice Treaty’ *The Irish Times* (Dublin 31 May 2001).

¹⁶¹ These were the arguments put forward by Michael O’Reilly, secretary of the Amalgamated Transport and General Workers’ Union; Katy Hayward, ‘Not a Nice Surprise: An Analysis of the Debate Surrounding the 2001 Referendum on the Treaty of Nice in the Republic of Ireland’ (2002) 13 *Irish Studies in International Affairs* 168, 172.

¹⁶² Katy Hayward, ‘Not a Nice Surprise: An Analysis of the Debate Surrounding the 2001 Referendum on the Treaty of Nice in the Republic of Ireland’ (2002) 13 *Irish Studies in International Affairs* 168, 183.

¹⁶³ Ece Özlem Atikcan, ‘The Puzzle of Double Referendums in the European Union’ (2015) 53(5) *Journal of Common Market Studies* 937, 944.

¹⁶⁴ Ece Özlem Atikcan, ‘The Puzzle of Double Referendums in the European Union’ (2015) 53(5) *Journal of Common Market Studies* 937, 945.

Two primary consequences flowed from the Nice I campaign. First, the low-energy approach and lack of engagement from major political parties meant that engagement in the public was strikingly low. As an upshot, turnout was abysmally low – just 34.8%. Richard Sinnott’s study attributes this low turnout and engagement in part to the ineffectiveness of the campaign and communication processes at mobilising voters,¹⁶⁵ and goes on to demonstrate how ineffective the campaigns were even at mobilising voters with strong feelings on certain issues: the only attitude which had a substantial mobilising effect was the belief that ‘current EU developments will make things like divorce and abortion more easily available in Ireland’.¹⁶⁶ The public’s overall experience of the referendum campaign was ‘not a happy one and did very little to increase their propensity to vote.’¹⁶⁷ Second, the discordance between the Yes and No campaigns meant that of those voters who were engaged enough to participate in the referendum, many were engaged not with the substantive merits of the Nice Treaty but rather were voting on the basis of separate issues. Garry, Marsh, and Sinnott summarise the consequences in their findings that ‘the more vigorous the campaign, the greater the effect of the key substantive issue relating to the referendum (in this case attitudes to EU enlargement) and the less the effect of second-order considerations.’¹⁶⁸ In other words, in a campaign such as this which had insufficient public debate and therefore insufficient engagement, it is inevitable that the deciding factors will not be the substantive merits of the amendment but rather other, unconnected issues.¹⁶⁹ The possibility of addressing these issues is borne out in the Nice II referendum – there the same Yes groups and parties ran a ‘very spirited and vigorous campaign emphasizing the advantages of the European Union’ and sought to assuage the fears that had plagued Nice I.¹⁷⁰ The effect was positive, resulting in a much more engaging debate and subsequently a much more engaged – and better informed – electorate.

¹⁶⁵ Richard Sinnott, ‘Attitudes and Behaviour of the Irish Electorate in the Referendum on the Treaty of Nice’ (2002) Institute for the Study of Social Change, University College Dublin, 16.

¹⁶⁶ *ibid* 17.

¹⁶⁷ *ibid* 24.

¹⁶⁸ John Garry, Michael Marsh, Richard Sinnott, ‘“Second-order” versus ‘Issue-voting’ Effects in EU Referendums: Evidence from the Irish Nice Treaty Referendums’ (2005) 6(2) *European Union Politics* 201, 215.

¹⁶⁹ Such as attitudes towards government.

¹⁷⁰ John Garry, Michael Marsh, Richard Sinnott, ‘“Second-order” versus ‘Issue-voting’ Effects in EU Referendums: Evidence from the Irish Nice Treaty Referendums’ (2005) 6(2) *European Union Politics* 201, 206.

5.4.2.2 – 2012 Children’s Rights Referendum

A consequence of the unclear nature of the Children’s Rights proposal was, as mentioned above, a rather ambiguous understanding of the amendment among the political parties and interest groups involved in campaigning. However, rather than leading to lively debate about the amendment, this ambiguity resulted in monolithic support for the amendment.¹⁷¹ The nature of the change was unclear enough that differing parties were able to support it despite disagreeing on why it was an important change. Doyle and Kenny identify three difficulties which flowed from the uniform support of all key political actors: there was difficulty starting a proper debate on the issue; press coverage suggested that there was a comfortable majority secured already for the amendment, bringing about widespread apathy; and the people were not being asked to ‘check governmental power but rather legitimise a conclusion already settled on.’¹⁷² All three of these difficulties impacted the engagement of the public with the referendum: no debate, apathy, and a sense of inevitability all combined to offer citizens little incentive or rationale to actively participate in the debate. As noted earlier, in situations such as this, there is an onus on political parties and other groups to actively create engagement where it does not naturally occur. The campaign here failed to do so.

While engagement with the Nice Treaty campaign struggled because of a low-energy approach to campaigning and an over-reliance on rhetoric, in 2012 the shortfalls of the campaign were more the result of a lack of public interest. Stephen Collins wrote in *The Irish Times* that while the Government and other political parties ran a coherent campaign which seemed to convince voters of their arguments, it was clear from early on that actually getting people out to vote would be a serious challenge.¹⁷³ Even when actively out on the beat canvassing for the amendment, Minister for Children and Youth Affairs Frances Fitzgerald encountered mostly apathetic and uninterested voters.¹⁷⁴ The fact that

¹⁷¹ Some interest groups did criticise the amendment for not going far enough, including the Unmarried and Separated Families of Ireland organisation which withdrew support for the proposal; Mary Miniham, ‘Fathers’ Group Quits Alliance’ *The Irish Times* (Dublin 25 October 2012) 7.

¹⁷² Oran Doyle and David Kenny, ‘Constitutional Change and Interest Group Politics: Ireland’s Children’s Rights Referendum’ in Richards, Contiades, and Fotiadou (eds) *The Foundations and Traditions of Constitutional Amendment* (Hart 2017).

¹⁷³ Stephen Collins, ‘Yes campaign in pole position to carry proposal but turnout concerns persist’ *The Irish Times* (Dublin 17 October 2012).

¹⁷⁴ Kathy Sheridan, ‘Campaign for Yes vote runs into wall of apathy’ *The Irish Times* (Dublin 1 November 2012) 6.

the No campaign was so small and lacked central organisation made fruitful debate between the campaigns difficult.¹⁷⁵ On the one hand, opposition was voiced by some judges and lawyers on the basis that the amendment was unnecessary and unproductive,¹⁷⁶ and yet on the other hand the No campaign included unfounded claims such as that more children died in State care than outside it, or that the State would be taking the place of parents.¹⁷⁷ This incongruence exacerbated the inability to pin down a core debate. Coupled with that was the ever-present possibility that people would see the referendum as an opportunity to voice dissatisfaction with the Government, a danger which became more likely as it became clear that the amendment's significance was minimal.¹⁷⁸ Another result of the disorganised opposition was a lack of jeopardy and incentive to vote. Despite there being a coherent campaign, neither side seemed to generate the kind of substantial engagement appropriate in a referendum.

While it is difficult to pin down one specific reason for the lack of engagement in this referendum, the cocktail of apathy, confusion, and disinterest had clear consequences. For one thing, the extremely low turnout (33.5%) is far below the average turnout for a referendum. The Referendum Commission's report attributes the low turnout to unacceptably low levels of public understanding,¹⁷⁹ but also points to the fact that 51% of their respondents felt that there was less debate than normal¹⁸⁰ and that 19% said they did not vote as they had no interest and were not bothered.¹⁸¹ A further 26% of respondents said they didn't get the chance to vote – so a total of 45% of respondents who did not vote did so because they didn't have the time or they were not bothered.¹⁸² This abstention and lack of engagement was particularly acute in the lower age brackets – 74% of 18-24 year

¹⁷⁵ Oran Doyle and David Kenny, 'Constitutional Change and Interest Group Politics: Ireland's Children's Rights Referendum' in Richards, Contiades, and Fotiadou (eds) *The Foundations and Traditions of Constitutional Amendment* (Hart 2017).

¹⁷⁶ Including former Supreme Court judge Hugh O'Flaherty; Stephen Collins, 'Yes campaign in pole position to carry proposal but turnout concerns persist' *The Irish Times* (Dublin 17 October 2012).

¹⁷⁷ Kathy Sheridan, 'Campaign for Yes vote runs into wall of apathy' *The Irish Times* (Dublin 1 November 2012) 6.

¹⁷⁸ Conor O'Mahony, 'Falling Short of Expectations: the 2012 Children Amendment, from Drafting to Referendum' (2016) 31 *Irish Political Studies* 252, 273.

¹⁷⁹ Referendum Commission, *Report on the 31st Amendment of the Constitution (Children) Bill 2012* (2013), 12.

¹⁸⁰ *ibid* 9.

¹⁸¹ *ibid* 8.

¹⁸² *ibid*. Interesting to note here is that this referendum was held on a Saturday, a move which was intended to offer time for working parents and families to vote, but which was criticised for potentially negatively impacting turnout, see Harry McGee, 'Why the referendum was closer than predicted' *The Irish Times* (Dublin 12 November 2012).

olds did not vote. This is a poor reflection on the public's engagement with the issue and the ability of the Government to incentivise people to vote. O'Mahony concludes that the No campaign was disproportionately effective given that disagreement with the amendment was the biggest reason for voting No,¹⁸³ however in light of how few people were actually aware of the consequences of the referendum,¹⁸⁴ and how prominent misinformation was in the No camp, it is difficult to know exactly how many of those respondents disagreed with the merits of the amendment as they actually existed. That is not to discredit the effectiveness of that campaign, but rather to indicate that when seeking to maximise engagement under my criteria, there is a prior commitment to engaging people with the actual merits of any amendment proposal. In other words, people should not be misled in order to garner engagement – sufficient information should be the basis for engagement. Even still, despite the No campaign's disproportionate impact on voters, engagement in this referendum remained unacceptably low from beginning to end and resulted in low turnout and high levels of voter dissatisfaction with the campaign, as well as disproportionate second-order preference voting.¹⁸⁵

5.5 – Citizen Input

The third = criterion, citizen input, relates to the involvement of citizens at different stages of a referendum. Rather than being simply asked to vote on a proposal after political deliberation has decided a constitutional amendment is necessary, citizens should ideally have a degree of influence and input from the embryonic stages of a referendum. When measuring this criterion, what is most relevant is the level of influence exercised by citizens, citizens' groups, and civil society organisations during the course of the recommendation, proposal, and campaign stages of the relevant referendums. Where a referendum reflects this criterion, it is less susceptible to critiques of elite control and is imbued with a stronger sense of democratic legitimacy and citizen ownership, all of which can have important practical consequences.

¹⁸³ Conor O'Mahony, 'Falling Short of Expectations: the 2012 Children Amendment, from Drafting to Referendum' (2016) 31 Irish Political Studies 252, 273.

¹⁸⁴ Only 13% of respondents to the Referendum Commission indicated that they understood the referendum very well, with a further 21% understanding it quite well. Referendum Commission, *Report on the 31st Amendment of the Constitution (Children) Bill 2012* (2013), 7.

¹⁸⁵ Including protest votes, Harry McGee, 'Why the referendum was closer than predicted' *The Irish Times* (Dublin 12 November 2012).

5.5.1 – Substantial Citizen Input

5.5.1.1 – 2015 Marriage Equality Referendum

As noted in the previous section, public knowledge of and involvement with marriage equality began long before the referendum campaign. Civil society and citizens' groups had been at the heart of the movement for civil partnership in the early 2000s, and the applicants in the *Zappone* case – themselves activists for marriage equality – brought the possibility of constitutional amendment to national attention.¹⁸⁶ However, the central input of citizens in this referendum is seen most clearly in the 2012 Constitutional Convention. While a further analysis of the Convention is undertaken in an earlier chapter (§4.3), there are a few points worth re-emphasising here regarding the place of citizens in the process and the extent of their input. First, the Convention is the first example of citizens being actively engaged in a project of this sort. While in previous referendums civil society organisations had been central to the decision to propose an amendment and its wording, never before had citizens been formally linked to the referendum process in this way.¹⁸⁷ Second, it is clear that the recommendations of the Convention (a majority of whom were ordinary citizens) had a considerable impact on the ultimate decision to hold a referendum on this topic. These recommendations also impacted the attitudes of politicians on this issue, who otherwise might have had little incentive to support an amendment.¹⁸⁸ The other major locus of citizen input in this referendum was demonstrated in the last section – the central place of civil society groups in the campaign, and those groups' emphasis on engagement at grassroots level. The scale of this canvassing, and the ability of Yes Equality in particular to mobilise citizens in support of the amendment was unusual in referendums to that point.¹⁸⁹ With political parties taking a less dominant role in the public debate than ordinary, organised groups of citizen activists were the major contributors to

¹⁸⁶ *Zappone v Revenue Commissioners* [2006] IEHC 404.

¹⁸⁷ Johan Elkink, David Farrell, Theresa Reidy, Jane Suiter 'Understanding the 2015 Marriage Equality Referendum in Ireland: Context, Campaign and Conservative Ireland' (2017) 32(3) Irish Political Studies 361, 362.

¹⁸⁸ Including (then) Taoiseach Enda Kenny; Oran Doyle, 'Minority Rights and Democratic Consensus: The Irish Same-Sex Marriage Referendum' (2020) 15 NTU Law Review 21, 31.

¹⁸⁹ Johan Elkink, David Farrell, Theresa Reidy, Jane Suiter 'Understanding the 2015 Marriage Equality Referendum in Ireland: Context, Campaign and Conservative Ireland' (2017) 32(3) Irish Political Studies 361, 366.

the debate. As a result, the character of the debate was more citizen-oriented and did not appear to be rubber-stamping a political decision.

The consequences of this high level of citizen input are both practical and symbolic. An often-touted benefit of using the referendum to decide these sorts of issues is that it removes the decision from the hands of political parties, thus insulating those parties from the consequences of the ultimate decision.¹⁹⁰ However, the 2015 Marriage Equality referendum demonstrates that by increasing the level of citizen input at various stages of a referendum, this insulation is taken a step further: the amendment proposal itself is insulated from public attitudes toward political parties. While political parties often offer important cues for voters in referendums,¹⁹¹ the converse is that voters at times vote against a referendum on the basis of some grievance with the governing party or those parties supporting the amendment, where otherwise they might support the amendment on its merits. Emphasis on citizen input in the decision to hold the referendum and having the campaign led by citizen groups decreases the likelihood of this sort of second-order preference, ‘protest’ voting having a substantial impact on the referendum. The findings of Elkink et al support this in the 2015 context: the proposal’s origin in the Convention meant that the referendum was not a proxy for government support.¹⁹² The symbolic consequences of substantial citizen input are also significant but more difficult to demonstrate. By involving citizens in every stage of the process, the referendum is imbued with a greater sense of democratic legitimacy aligned with the underlying assumption that it is the people who decide what is in the Constitution. Whether or not this translates into a more palpable sense of ownership and engagement is difficult to assess. However, citizen input can positively impact the referendum by pre-emptively aiding consensus building; through both the Convention and the organised citizen campaigns the marriage equality referendum started from a position whereby consensus among a group of citizens could be demonstrated and built upon.¹⁹³

¹⁹⁰ Conor O’Mahony, ‘Marriage Equality In The United States And Ireland: How History Shaped The Future’ (2017) 2 *University of Illinois Law Review* 681, 699.

¹⁹¹ *ibid* 700.

¹⁹² Johan Elkink, David Farrell, Theresa Reidy, Jane Suiter ‘Understanding the 2015 Marriage Equality Referendum in Ireland: Context, Campaign and Conservative Ireland’ (2017) 32(3) *Irish Political Studies* 361, 373-374.

¹⁹³ On consensus building in Irish referendums, see Oran Doyle, ‘Minority Rights and Democratic Consensus: The Irish Same-Sex Marriage Referendum’ (2020) 15 *NTU Law Review* 21.

5.5.1.2 – 2018 Abortion Referendum

Even more than the 2015 Marriage Equality referendum, the 2018 Abortion referendum was preceded by decades of grassroots activism and citizen deliberation. Before a decision was reached to put the matter to a Citizens' Assembly, there was a huge amount of pressure exerted on politicians and government by activists and civil society organisations so that the Government 'did not have a way out of' the prospect of a referendum.¹⁹⁴ As with 2015, citizen input was included in the formal amendment process at the deliberative phase with the advent of the Citizens' Assembly. Again, there is a fuller discussion of this Assembly and its impact elsewhere (§4.4), so here a brief sketch of the citizen involvement suffices. It is clear that the Assembly did afford more input into the referendum than would ordinarily be the case, and that by excluding politicians the claim of political control could not be levelled as it was in 2015. Moreover, the Assembly's recommendations for abortion up to 12 weeks – which were much more permissive than had been anticipated – had a direct impact on the character of the amendment proposal put to the people. Even accepting de Londras' point that the Assembly's design was such as to exclude radical recommendations, by including citizens at this stage, it did ultimately have an impact on how far the amendment went by indicating to political actors that there was a public appetite for this more far-reaching change.¹⁹⁵ Without such citizen input it is likely that the amendment proposal would have been less ambitious and therefore less aligned with the wishes of a majority of the electorate.

The impact of citizen input in this referendum mirrors that from 2015 in relation to voting behaviour. Again, the benefit of having citizen input at the outset of a referendum (particularly at the proposal stage) is that it decreases the likelihood of voters voting according to second-order preferences like attitudes towards the government. The Citizens' Assembly had a significant impact in this regard. This impact is demonstrated by the interaction of two factors: voters who were aware of the Assembly were significantly more likely to vote yes;¹⁹⁶ and voters' issue positions were fundamental to

¹⁹⁴ Gráinne Griffin, Orla O'Connor, Ailbhe Smyth and Alison O'Connor, *It's a Yes: How Together for Yes Repealed the Eighth and Transformed Irish Society* (Orpen Press 2019) 109.

¹⁹⁵ Fiona de Londras, 'The Citizens' Assembly and the Disciplining of Activist Demands' (26 November 2018) <<https://blog-iacl-aide.org/debate-the-citizens-assembly-in-ireland/2018/11/26/the-citizens-assembly-and-the-disciplining-of-activist-demands>> accessed 14 June 2023.

¹⁹⁶ Johan Elkink, David Farrell, Sofie Marien, Theresa Reidy, and Jane Suiter, 'The death of conservative Ireland? The 2018 abortion referendum' (2020) 65 *Electoral Studies*, 6.

their voting decision.¹⁹⁷ What this means is that the ‘integration of citizen deliberation structures into the pre-referendum phase’ improved the alignment between values and vote.¹⁹⁸ That is, because the pre-referendum stage consisted of citizen deliberation and input, voters were better able to vote according to their actual values regarding abortion, rather than other issues or attitudes. Suiter and Reidy note that there was a jump in the alignment between values and vote over the course of various referendums: around 50% of voters were ‘aligned’ in earlier referendums, whereas 80% were aligned in the 2018 Abortion referendum.¹⁹⁹ For the authors, the scale of this increase cannot be attributed alone to the fact of more compelling proposals, but rather is suggestive of ‘a systemic impact of the deliberative procedures adopted in advance of the referendums on marriage rights and abortion.’²⁰⁰ Perhaps this increase in alignment is a result of pre-amendment deliberation being more public and therefore available for consumption, but the reduction in second-order preference voting indicates that by involving citizens at this stage voters were able to decouple the issue from ordinary politics and consider it on its own merits. In sum, the citizen input instantiated through the Assembly demonstrably increased the democratic character of the referendum by ensuring voters were not unduly influenced by factors irrelevant to the amendment.

5.5.2 – Insufficient Citizen Input

5.5.2.1 – 2001 Nice Treaty Referendum

Whereas the 2015 and 2018 referendums differed in the extent and character of citizen input, the 2001 Nice Treaty referendum differs because citizens simply had no input at all. This is in no small part due to the nature of the amendment: it was not proposed on foot of recommendations of a legislative or citizens’ body, but rather came about because the Government was bound to hold a referendum to ratify the Nice Treaty.²⁰¹ That is, the proposal was not brought about because of a desire to better reflect changing attitudes in

¹⁹⁷ *ibid* 9.

¹⁹⁸ Jane Suiter, Theresa Reidy, ‘Does Deliberation Help Deliver Informed Electorates Evidence from Irish Referendum Votes’ (2020) 56(4) *Representation* 539.

¹⁹⁹ *ibid* 548.

²⁰⁰ *ibid*.

²⁰¹ As per *Crotty v An Taoiseach* [1987] IESC 4, [1987] IR 713.

the population (as was the case in 2015 and 2018) but rather because of changes to the EU's internal structures. There was therefore less impetus to seek citizen involvement with the referendum. Also relevant here is the assumption on part of the Government at this referendum that there was a generally positive public sentiment toward the EU such that engagement with citizens was unnecessary.²⁰² By operating on this assumption and making no effort prior to the referendum to involve citizens with the Nice Treaty and its ratification, the Government failed to properly gauge the level of public anxieties about the Treaty. This in part led to the disastrous campaign discussed above. While it is impossible to state with any certainty that the referendum would have been passed had citizens been consulted before the referendum campaign, there is some evidence for thinking that it would have impacted the campaign run by the Government and allowed them to get on top of the sort of concerns that proved fertile ground for the No campaign. The fact that the second Nice Treaty campaign was so much more successful at addressing citizens' concerns demonstrates this to an extent. In a way the first Nice Treaty referendum served a similar function as the Convention and Assembly did in 2015 and 2018 by informing the Government and other bodies about what the public wanted: the second campaign could therefore be designed to address these. This is demonstrated by the substantial increase in first-order preference voting at the second referendum: while issue voting was important in both campaigns, it was particularly important in the second referendum which indicates the importance and impact of the campaign.²⁰³

5.5.2.2 – 2012 Children's Rights Referendum

The 2012 Children's Rights Referendum was preceded by a significant and confused period of deliberation and consultation by more than one Oireachtas committee. Wording for an amendment had been published in 2006 by an All-Party Oireachtas Committee on the Constitution on foot of consultation with dozens of interest groups in the area of children's rights.²⁰⁴ An amendment bill on this wording eventually fell to the wayside, and

²⁰² Deaglán de Bréadún, 'Seven deadly sins that sank the Yes campaign' *The Irish Times* (Dublin 9 June 2001) 6.

²⁰³ John Garry, Michael Marsh, Richard Sinnott, 'Second-order' versus 'Issue-voting' Effects in EU Referendums: Evidence from the Irish Nice Treaty Referendums' (2005) 6(2) *European Union Politics* 201.

²⁰⁴ Conor O'Mahony, 'Falling Short of Expectations: the 2012 Children Amendment, from Drafting to Referendum' (2016) 31 *Irish Political Studies* 252, 256-257. These groups included the Irish Human Rights Commission (IHRC), the Ombudsman for Children, the Adoption Board, the Health Services Executive, the Conference of the Religious of Ireland, and other Catholic organisations, among others.

over the next six years two different bills arose with different wording which again both lapsed.²⁰⁵ One of the proposals – born of a Joint Oireachtas Committee report on the matter – had proposed a substantive amendment in line with the UN Declaration on the Rights of the Child, and had attracted praise from advocacy groups.²⁰⁶ After that bill was abandoned, another bill with much less substantive wording was put forward without any public consultation or submissions. This again did not progress after the Government’s 2011 general election defeat.²⁰⁷ The proposal which ultimately came to referendum in 2012 was supposedly drawn on the work of the Joint Committee, but bore practically no resemblance to that earlier proposal apart from the fact that it suggested the best interests test should be legislated for.²⁰⁸ What is significant about the final proposal is that, despite years of quite exhaustive consultation with civil society groups in this area (all of which fed directly into the wording of the earlier amendment proposals) the wording of the final amendment was settled upon without consultation, without formal submissions, and without a published explanation of its source and rationale.²⁰⁹ O’Mahony suggests that the lack of a clear record of the process leading to the proposal may have been influenced by the Government’s defeat in the Oireachtas Inquiries referendum in 2011.²¹⁰ He suggests that the defeat of that referendum – which had been championed by two TDs who were members of the aforementioned Joint Committee – led to a more ‘risk-averse’ approach to the children’s amendment.²¹¹ Any possible controversial elements of the amendment were watered down, which in turn led to the strange scenario whereby the amendment was supported both by advocacy groups and by those groups which had opposed the earlier proposals.

Doyle and Kenny suggest that the 2012 referendum demonstrates the dangers posed by interest groups ‘securing control of the political agenda’, since the total support of those groups here made it difficult for the referendum to function in support of a ‘genuine exercise of deliberative democracy.’²¹² They go on to say that formalised consultation

²⁰⁵ *ibid* 263.

²⁰⁶ *ibid* 262.

²⁰⁷ *ibid* 263.

²⁰⁸ *ibid* 264.

²⁰⁹ *ibid* 265.

²¹⁰ *ibid* 265.

²¹¹ *ibid*.

²¹² Oran Doyle and David Kenny, ‘Constitutional Change and Interest Group Politics: Ireland’s Children’s Rights Referendum’ in Richards, Contiades, and Fotiadou (eds) *The Foundations and Traditions of Constitutional Amendment* (Hart 2017).

processes can have limited success in referendums such as this where the amendment is on hotly-contested judicial doctrines, particularly since the incentive of political actors is not to educate the public on constitutional law but rather to win the referendum.²¹³ While the total support of interest groups certainly caused significant issues in the referendum, I would contend that the core failures of this referendum are down to the consultation process being undermined, which itself caused the total, confused support of interest groups. As demonstrated above, the ultimate proposal's origin was formally detached from the consultation process that had taken place, and did not accord with the submissions of either side in that process. Further, the capacious nature of the wording meant that all groups could see a reason to support it based on their own interpretations. The malaise in the campaign was down to the fact that no-one agreed about what the change would do, and that any real change therefore seemed to be very insignificant. This would not have been the case had the proposal made use of the wording from the Joint Committee which clearly took a stance on the core debate identified through the consultation submissions (the best interests test and the role of the family) and therefore created a division in the referendum along the liberal-secular / conservative-religious fault-line.²¹⁴ While the jurisprudence was complicated and nuanced, an amendment proposal which more clearly adopted a position would have been easier to explain to the public by overriding the judicial doctrine rather than trying to fit neatly into it.²¹⁵

Citizen input in a referendum proposal (including through civil society groups) only instantiates benefits when that input is substantial. The input here was far from substantial because instead of making use of the consultation process (which identified a debate between different elements in society), the proposal was such that neither side in the debate benefitted and neither side suffered, which ultimately led to confusion, apathy, and all of the problems identified above. Had citizens been directly involved in the drafting of the ultimate wording – for example through a Citizens' Assembly – the likelihood of this occurring would have been reduced. Nor would the sort of political risk-insulation

²¹³ *ibid.*

²¹⁴ This fault-line is at the heart of a huge number of referendums in Ireland and has tended to elicit the most engagement. Richard Sinnott, 'Cleavages, parties and referendums: Relationships between representative and direct democracy in the Republic of Ireland' (2002) 41(6) *European Journal of Political Research* 811, 815.

²¹⁵ Therefore removing itself from the quagmire of case-law and standing alone as a single question.

mentioned by O'Mahony have occurred.²¹⁶ And while there were other factors at play in the poor engagement and turnout in this referendum, a more substantive, easily-explainable change would certainly have alleviated some of the issues. Further, by more closely and publicly involving citizens and citizen groups in this proposal, there may have been less of a protest vote.²¹⁷ While Doyle and Kenny are right to identify issues with leaving interest groups to run an entire referendum campaign, this referendum also demonstrates that consultation with those interest groups can have significant benefits for a referendum where they are engaged in the proper way and where their value is maximised.²¹⁸ In this case, their value was in identifying a division in society which indicated that a majority of the population wanted a change – something that could have usefully been relied upon to bring about a good referendum campaign. With a proposal for more substantial change, there would have been disagreement between groups, more debate, and therefore more opportunity for citizens to take cues from groups and actively engage with the issue.

5.6 – Criteria in Context: The 2024 Family and Care Referendums

While the referendums examined in the above sections were chosen as the most appropriate for drawing out the significance of my criteria, they are by no means outliers in that regard. A brief analysis of the two most recent referendums demonstrates that these criteria continue to be of utmost relevance. The 39th Amendment of the Constitution (The Family) Bill 2024 proposed to amend the definition of 'family' in Article 41 of the Constitution so as to include not only families based on marriage but also those based on 'durable relationships'.²¹⁹ The 40th Amendment of the Constitution (Care) Bill 2023 proposed to repeal the much maligned Article 41.2 which mentioned the woman's 'life

²¹⁶ Conor O'Mahony, 'Falling Short of Expectations: the 2012 Children Amendment, from Drafting to Referendum' (2016) 31 Irish Political Studies 252, 272.

²¹⁷ A significant (49%) percentage of No voters in this referendum were not 'aligned'; meaning they voted No for reasons other than disagreement with the merits of the proposal. Jane Suiter, Theresa Reidy, 'Does Deliberation Help Deliver Informed Electorates Evidence from Irish Referendum Votes' (2020) 56(4) Representation 539, 548.

²¹⁸ Oran Doyle and David Kenny, 'Constitutional Change and Interest Group Politics: Ireland's Children's Rights Referendum' in Richards, Contiades, and Fotiadou (eds) *The Foundations and Traditions of Constitutional Amendment* (Hart 2017).

²¹⁹ The proposal would have amended Article 41.1 to say that "The State recognises the Family, *whether founded on marriage or on other durable relationships*, as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law."

within the home’ and replace it with a provision stating that the State will ‘strive’ to support the provision of care in the home.²²⁰ Both referendums were held on International Women’s Day, 8th of March 2024. Both were roundly rejected by voters, on a turnout of 44.4%. The Family referendum was rejected by 67.7% of voters, and the Care referendum by 73.9%. The overwhelming rejection of the amendment proposals was something of a shock for the Government, and generated significant criticism from internal and external sources. As I will demonstrate, the defeat of both proposals can be explained by reference to my three criteria for success. First, some overview of the amendments is necessary.

5.6.1 – Family Referendum

The impetus for amending the constitutional definition of family stems initially from the 2012 Constitutional Convention and the subsequent Marriage Equality referendum in 2015.²²¹ A possible amendment was formally considered by the Citizens’ Assembly on Gender Equality convened in 2020, and in its 2021 Report, the Assembly recommended that Article 41 of the Constitution should be amended to protect private and family life not limited to the marital family.²²² This recommendation was followed up by an Oireachtas Joint Committee on Gender Equality which released its report in December 2022, broadly in line with the Assembly’s recommendations.²²³ Rather unusually, the proposals were further discussed by an Interdepartmental Group of the civil service, the minutes of which were only publicised (albeit heavily redacted) after the referendum.²²⁴ By March 2023, the Government had committed to holding a referendum which would alter the definition of family, although initially it was envisaged that the referendum would be on an

²²⁰ The proposed Article 42B read: “The State recognises that the provision of care, by members of a family to one another by reason of the bonds that exist among them, gives to Society a support without which the common good cannot be achieved, and shall strive to support such provision.”

²²¹ Fergus Ryan, ‘Unfinished Business? Equality and Family Diversity in the Wake of the Irish Marriage Referendum’ (2018) 21(3) Irish Journal of Family law 59.

²²² Citizens’ Assembly on Gender Equality, *Report* (June 2021), 12.

²²³ Joint Committee on Gender Equality, *Unfinished Democracy: Achieving Gender Equality* (December 2022); David Kenny ‘How to Lose a Referendum (in Ireland) – Challenges of Practical and Symbolic Constitutional Change’ (2025) 3(2) Comparative Constitutional Studies 1.

²²⁴ IDG minutes, available at: <[https://www.gov.ie/en/publication/ff411-interdepartmental-group-referendum-proposals-on-family-and-care/#:~:text=In%20March%202023%2C%20an%20Interdepartmental,Office%20of%20the%20Aorney%20General](https://www.gov.ie/en/publication/ff411-interdepartmental-group-referendum-proposals-on-family-and-care/#:~:text=In%20March%202023%2C%20an%20Interdepartmental,Office%20of%20the%20Aorney%20General;)>; David Kenny ‘How to Lose a Referendum (in Ireland) – Challenges of Practical and Symbolic Constitutional Change’ (2025) 3(2) Comparative Constitutional Studies 1.

‘omnibus’ equality amendment.²²⁵ Then Taoiseach Leo Varadkar indicated that the amendments would set Ireland on track to be ‘a world leader on gender equality’ and were needed in order to consider a ‘a more inclusive definition of family that goes beyond those solely based on marriage – reflecting what is the reality of modern Irish life.’²²⁶

After numerous delays (discussed below), on 8th March 2024 the proposal to amend the definition of family finally came before the electorate at referendum. One consequence of this long delay was that shortly before the referendum, the Supreme Court handed down its decision in *O’Meara v Minister for Social Protection*,²²⁷ wherein it held that non-marital families enjoyed some protection under the Constitution akin to marital families.²²⁸ The Supreme Court held that Mr O’Meara, a widower, was entitled to receive the widower’s pension despite the fact that he and his long-term partner had never married.²²⁹ The assertion that the referendum was necessary in order to legally protect non-marital families was therefore undermined somewhat even before the campaign began.

5.6.2 – Care Referendum

In a number of ways the origins of the Care referendum are similar to the Family referendum: both were discussed initially by the 2012 Constitutional Convention before attracting more in-depth scrutiny by the Citizens’ Assembly on Gender Equality.²³⁰ However, the Care referendum as voted on in 2024 was something of an amalgamation of various proposals with differing origins. In particular it combined two issues which, up to that point, were treated as discrete: the ‘woman’s place in the home’ provision,²³¹ and the constitutional recognition of ‘care’.²³² The former, the reference to ‘the woman’s place in

²²⁵ Kitty Holland, ‘Up to three gender equality referendums possible to address ‘discriminatory’ language’ *The Irish Times* (Dublin 8 March 2023).

²²⁶ *ibid.*

²²⁷ [2024] IESC 1.

²²⁸ The possibility of the issue being the subject of a referendum was raised by the Attorney General in the course of the case hearing, Ellen O’Riordan, ‘Irish public may soon be asked to vote on definition of the family, AG tells Supreme Court’ *The Irish Times* (Dublin 13 July 2023).

²²⁹ [2024] IESC 1.

²³⁰ Citizens’ Assembly on Gender Equality, *Report* (June 2021).

²³¹ In Article 41.2.1.

²³² In Article 41.2.1.

the home’ in Article 41.2, had been the subject of numerous reports,²³³ and calls for repeal across decades.²³⁴ Despite the provision being a legally-unenforceable dead-letter,²³⁵ its inclusion in the Constitution was viewed as a significant symbolic leftover of more traditional Catholic values which failed to recognise the reality of life in the 21st Century.²³⁶ While many of the proposals for change had simply called for the provision to be removed *simpliciter*, the Citizens’ Assembly’s recommended both that it be deleted *and* that it be replaced with non-gender specific language that obliged the State ‘to take reasonable measures to support care within the home and wider community.’²³⁷ The issue of care in the Constitution had been the subject of reform proposals, but had not always been linked so closely to the ‘woman’s place in the home’ provision. Regardless, the Government ultimately followed the Citizens’ Assembly’s lead and combined the issues into one amendment proposal. This proposal was similarly delayed despite being committed to in March 2023, and was also the subject of multiple rounds of discussion regarding the specific wording. Importantly, the amendment proposal which eventually appeared on the ballot was more watered-down than the Citizens’ Assembly’s recommendation regarding the obligation on the State to support care,²³⁸ and divided opinion among the relevant interest groups.²³⁹ Upon the wording being published, many of these groups expressed disappointment that the wording did not go far enough.²⁴⁰

²³³ e.g. Commission of the Status of Women, 1993, Constitutional Review Group, 1996; the All-Party Oireachtas Committee on the Constitution in 1997. David Kenny ‘How to Lose a Referendum (in Ireland) – Challenges of Practical and Symbolic Constitutional Change’ (2025) 3(2) Comparative Constitutional Studies 1.

²³⁴ Laura Cahillane, ‘Revisiting Article 41.2’ (2017) 40(2) DULJ 107, Deirdre Foley, ‘“Their proper place”: women, work and the marriage bar in independent Ireland’ (2022) 47(1) Social History 60.

²³⁵ Laura Cahillane, ‘Revisiting Article 41.2’ (2017) 40(2) DULJ 107; *L v L* [1992] 2 IR 77.

²³⁶ Kitty Holland, ‘Up to three gender equality referendums possible to address ‘discriminatory’ language’ *The Irish Times* (8 March 2023).

²³⁷ Citizens’ Assembly on Gender Equality, *Report* (June 2021) 12.

²³⁸ Whereas the Citizens’ Assembly recommendation recommended obliging the State to take reasonable measures to support care, the proposed wording said that the State would “strive” to support the provision of care.

²³⁹ Jack Horgan-Jones, Mary Carolan, Pat Leahy, ‘Civil society groups to ‘consider’ approach to referendums over wording on care’ *The Irish Times* (Dublin 6 December 2023), Jennifer Bray, ‘Five reasons why the Yes side failed and the No campaign won the day’ *The Irish Times* (Dublin 9 March 2024).

²⁴⁰ Jack Horgan-Jones, Mary Carolan, Pat Leahy, ‘Civil society groups to ‘consider’ approach to referendums over wording on care’ *The Irish Times* (Dublin 6 December 2023), Conor O’Mahony, ‘Referendum will just replace a sexist dead letter with a gender-neutral dead letter’ *The Irish Times* (Dublin 6 December 2023), Fintan O’Toole, ‘Referendum wording does not remove conservative 1930s doctrine. It reinforces it’ *The Irish Times* (Dublin 12 December 2023).

5.6.3 – Information Sufficiency

Insufficient information stands out as one of the defining features of the 2024 referendums. In particular, both amendment proposals were criticised for their vagueness and the lack of information available about what their impact would be in reality. A joint report from the Electoral Commission and the National Election and Democracy Study released in April 2024 paints this picture clearly.²⁴¹ In relation to the Family referendum, the study found that the most common reason given for voting ‘No’ was dissatisfaction with the wording / vagueness (27%).²⁴² Lack of information was cited by 16% of respondents, and vagueness of ‘durable relationship’ by 5%.²⁴³ In relation to the Care referendum, the most commonly cited reason for voting ‘No’ was lack of clarity / not enough information (25%).²⁴⁴ Further, issues with the wording were cited by 12%.²⁴⁵ When asked to assess their understanding of the issues on a scale of 0-10,²⁴⁶ 37% of respondents scored their knowledge at 8-10; 53% scored themselves at 4-7; and 10% scored their knowledge at 0-3.²⁴⁷ The breakdown of those numbers by vote demonstrates that ‘No’ voters consistently scored their level of understanding lower.²⁴⁸ Further, No voters were more likely to answer questions about the effect of the amendments incorrectly than Yes voters.²⁴⁹

This is not to say that lack of information is the only reason the Family and Care referendums were rejected – there were plenty of substantive reasons given²⁵⁰ – but it is significant that, once again, lack of information is the most common concern for No voters. As already mentioned, this lack of clarity was a concern even among expert groups

²⁴¹ National Election and Democracy Study, *Family & Care Referendums Voter Survey: A Review of Findings* (April 2024).

²⁴² National Election and Democracy Study, *Family & Care Referendums Voter Survey: A Review of Findings* (April 2024) 15.

²⁴³ *ibid.*

²⁴⁴ *ibid.* 16.

²⁴⁵ *ibid.*

²⁴⁶ Where 0 is ‘do not understand at all’ and 10 is ‘fully understand’.

²⁴⁷ National Election and Democracy Study, *Family & Care Referendums Voter Survey: A Review of Findings* (April 2024) 17.

²⁴⁸ *ibid.*

²⁴⁹ National Election and Democracy Study, *Family & Care Referendums Voter Survey: A Review of Findings* (April 2024) 18.

²⁵⁰ Including concerns about the diminishing responsibility of the State, no need for the change, and concerns about disability rights. National Election and Democracy Study, *Family & Care Referendums Voter Survey: A Review of Findings* (April 2024) 15-16.

and those involved in the preparation of the referendums.²⁵¹ While in the other campaigns examined above information insufficiency was the result of deficient campaigning or low interest, much of the issues in the 2024 referendums stemmed from the vague nature of the proposed amendments. In the Family referendum, for example, the question of what exactly qualifies as a ‘durable relationship’ was never adequately answered, and suggestions that it would be left to the courts to determine did not sit well with voters.²⁵² In relation to the Care referendum the possible impact on the State’s responsibilities towards those with disabilities was similarly never explained. This lack of clarity meant that criticisms found traction with voters.²⁵³ As demonstrated by this chapter, when information is so sorely lacking and voters do not feel they understand what they are voting for, the results are predictable: low turnout and a higher No vote.

5.6.4 – Engagement

The level of engagement with the 2024 referendums is tied closely to the matters already discussed. Without a clearly explainable rationale for the amendments, the ability of Government (and other parties supporting amendment) to campaign effectively and generate engagement was seriously hampered. As already mentioned, the *O’Meara* judgment had a significant bearing on what was at stake in the Family referendum.²⁵⁴ Further, the disappointment expressed by civil society groups about the wording of the Care referendum foreshadowed an unenthusiastic campaign on their behalf. The effect of *O’Meara* for the Family referendum and the watered-down wording for the Care referendum is the same: where there is little at stake in a referendum campaign, the level of engagement that one can expect from voters is seriously reduced. This is exacerbated even further when the Government campaign is itself unenergetic and unenthusiastic. Despite being aware from early on that it was up to the Government and civil society groups to ‘mount a campaign’ in favour of the proposal,²⁵⁵ there was significant reluctance

²⁵¹ Mary Carolan, ‘Legal body criticises ‘sexist’ amendment on carers’ *The Irish Times* (Dublin 19 February 2024).

²⁵² Conor O’Mahony, ‘Referendum will just replace a sexist dead letter with a gender-neutral dead letter’ *The Irish Times* (Dublin 6 December 2023).

²⁵³ Senator Tom Clonan’s criticisms were particularly visible on this topic; Jennifer Bray, ‘Five reasons why the Yes side failed and the No campaign won the day’ *The Irish Times* (Dublin 9 March 2024).

²⁵⁴ *O’Meara v Minister for Social Protection* [2024] IESC 1.

²⁵⁵ Pat Leahy, ‘Mounting anxiety in Coalition about fate of proposed referendums’ *The Irish Times* (Dublin 16 January 2024).

even among Government TDs to engage with the issue on the basis that the changes were unnecessary and potentially ‘politically dangerous’.²⁵⁶ One anonymous TD even went as far to say it was better not to campaign and allow voters to reject the amendments as a sort of pressure valve for protest votes,²⁵⁷ although this may go too far in attributing intention to the lacklustre campaign. Regardless, a sense of exasperation pervaded the Government campaign, and eventually the entire referendum.²⁵⁸

With no proactive campaign for amendment, and little reason to believe the amendments would affect any substantial change, it is unsurprising that engagement was low. All of these factors contributed to newspaper reports repeatedly referencing that dreaded word in referendum campaigns: apathy.²⁵⁹ Just the day before the referendum, *The Irish Times* reported from door-to-door canvassing where TDs encountered voters who were unaware that there was a referendum and what it was about.²⁶⁰ Those who were aware of the referendum reported that it was too confusing and too vague to engage with.²⁶¹ Not only did this lack of engagement lead to poor turnout for both referendums (44.4%), it failed to address common misconceptions among voters which in turn lead to decisions being made on the basis of erroneous assumptions. The NEDs survey indicates that 45% of No voters believed that the Care amendment could ‘force women to work outside the home’, and 48% believed the amendment could ‘be used to take away child benefit’, both of which claims were false.²⁶² Once again, information sufficiency and engagement buttress one another: there must be sufficient effort by the Government to engage persons so that they can be better informed about an amendment proposal. When this is not done, voters’ decisions are made according to irrelevant or tangential concerns.

²⁵⁶ Stephen Collins, ‘Politicians do not have much faith the referendums will pass. Shouldn’t they be more worried?’ *The Irish Times* (Dublin 25 January 2024).

²⁵⁷ Stephen Collins, ‘Politicians do not have much faith the referendums will pass. Shouldn’t they be more worried?’ *The Irish Times* (Dublin 25 January 2024).

²⁵⁸ Jennifer Bray, ‘Five reasons why the Yes side failed and the No campaign won the day’ *The Irish Times* (Dublin 9 March 2024) cites a “Not this again” approach among politicians actively tasked with campaigning.

²⁵⁹ Stephen Collins, ‘Politicians do not have much faith the referendums will pass. Shouldn’t they be more worried?’ *The Irish Times* (Dublin 25 January 2024).

²⁶⁰ Jennifer Bray, “It has become too complicated and too confusing’: Voters’ referendums apathy spooks canvassers’ *The Irish Times* (Dublin 7 March 2024).

²⁶¹ Jennifer Bray, “It has become too complicated and too confusing’: Voters’ referendums apathy spooks canvassers’ *The Irish Times* (Dublin 7 March 2024).

²⁶² David Kenny ‘How to Lose a Referendum (in Ireland) – Challenges of Practical and Symbolic Constitutional Change’ (2025) 3(2) *Comparative Constitutional Studies* 1.

5.6.5 – Citizen Input

Finally, the 2024 referendums demonstrate some nuance in the citizen input criterion. Despite both of the proposals being born of the Citizens’ Assembly on Gender Equality, which might suggest that they would enjoy broad support, both were emphatically rejected. However, as with the 2012 Children’s Rights referendum, the 2024 referendums show that for a referendum to function well, is not enough that there is *some* citizen input. Citizen input must be substantial, and, crucially, must actually inform the proposals. In much the same way as in 2012, the Care referendum demonstrates that governments depart from Citizens’ Assembly recommendations at their peril. The disappointment (and opposition) of many NGOs was a result of the proposal not going as far as expected on the basis of the Assembly’s recommendation.²⁶³ This disappointment and opposition contributed to the lacklustre campaign and consequent lack of engagement. That lack of engagement both contributed to and was exacerbated by the environment of insufficient information surrounding the referendums. In the same way that the attainment of each of the three criteria for a well-functioning referendum can create a virtuous cycle, each one buttressing the other, the opposite can be true. Failure in relation to one criterion can impact on the attainment of the other two, creating not a virtuous but a vicious cycle of apathy, misinformation and second-order preference voting. While the Citizens’ Assembly on Gender Equality set down a foundation for the Family and Care referendums, the rushed proposals,²⁶⁴ vague and imprecise wording,²⁶⁵ and unenthusiastic campaign failed to build on that foundation.

5.7 – A More Nuanced Criterion: Clarity of Consequence

Aside from confirming that the above criteria continue to be highly relevant to referendums today, the 2024 referendums also make it clear that clarity of consequence is a fundamental requirement for any amendment proposal. This might be considered a

²⁶³ Mary Carolan, ‘Legal body criticises ‘sexist’ amendment on carers’ *The Irish Times* (Dublin 19 February 2024) regarding FLAC’s opposition to the Care referendum.

²⁶⁴ Jennifer Bray, ‘Five reasons why the Yes side failed and the No campaign won the day’ *The Irish Times* (Dublin 9 March 2024).

²⁶⁵ Arthur Beesley, ‘Referendum wording chosen to ‘avoid a concrete and mandatory obligation’, files suggest’ *The Irish Times* (Dublin 15 March 2024).

fourth criterion, or it might simply be an expansion of the sufficient information criterion. Either way, the 2024 referendums make it abundantly evident that where a referendum is unclear in its purpose, impact, and consequences, serious problems arise. While sufficient information can ensure that citizens understand the issue being debated in a referendum campaign, it can be undermined where the proposed change is unclear in its purpose or consequence.

The 2024 referendums demonstrate that even with a good deal of information available to voters about what political parties and stakeholders think about an amendment, where the proposed wording is simply unclear, any attempt to provide sufficient information is more onerous.²⁶⁶ In that respect, it is clear that voters should and must be clear on the purpose and consequences of a proposed amendment. More than just understanding that there is a desire for change, or what the position is prior to amendment, voters should have a good grasp of what is actually intended by the specific proposal put forward at referendum. So, in the 2024 Family referendum, for example, while it was straightforward enough for voters to understand the prevailing constitutional position of the family, the unclear and unexplained nature of ‘durable relationships’ meant that arguments for the amendment started on shaky ground.²⁶⁷ A lack of clarity regarding the amendment’s consequences is evident also in the 2012 Children’s Rights referendum, as well as the referendum on the 25th Amendment Bill 2002 (Reversal of X Case). In the latter, the Referendum Commission noted that ‘the main confusion was caused by the uncertainty about what a yes or no vote actually meant.’²⁶⁸

While it may be suggested that building a certain level of vagueness into an amendment proposal can help to garner broader support,²⁶⁹ such an approach does not fit the framework for a successful referendum I set out in this chapter. If our goal in designing referendums is to ensure a maximum number of citizens are voting on the substantive merits of the actual amendment proposed, then we should seek to minimise the number of

²⁶⁶ Vagueness and a lack of clarity regarding the wording were among the two most commonly cited reasons for No votes in the Family and Care referendums. National Election and Democracy Study, *Family & Care Referendums Voter Survey: A Review of Findings* (April 2024) 16.

²⁶⁷ In particular in light of the *O’Meara* judgment – the actual consequences of amending the Constitution in the manner proposed was never made clear to voters.

²⁶⁸ Referendum Commission, *Report of the Referendum Commission on the Protection of Human Life in Pregnancy Referendum 2002* (2002) 12.

²⁶⁹ A somewhat cynical approach: a more vague proposal might allow different groups to read into the proposal what they want to see, even if those positions might be incompatible with each other.

people voting in good faith for the same thing but for incompatible reasons.²⁷⁰ In order guard against this, a proposed amendment must be clear in its purpose and consequences. The reason for which the proposal is put forward, and the envisioned outcome of its passing should be explicable. Most significantly, this should be reflected by clarity in the wording of amendment proposal.

5.8 – Criteria for Success

The foregoing sections are intended to offer a set of criteria for a successful Irish constitutional referendum. That is, the fulfilment of these criteria goes some way to maximising the democratic engagement with a particular referendum. Moreover, when a referendum complies with these criteria, the most common issues with this method of constitutional decision-making are minimised. It is important to stress at this stage that the criteria – sufficient information, engagement, citizen input, and clarity of consequence – do not each stand alone but rather buttress one another. The maximisation of one criterion is not sufficient to overcome the malaises that arise as a result of the other two not being met. A referendum should not be characterised as good where only one of the criteria is met, but rather only when all three are met. Each criterion's maximisation also depends to an extent on the maximisation of the others: when one criterion is met, it will often accompany the fulfilment of the other two. As an example, voters who have substantial input in an amendment proposal are more likely to be better informed about the nature of the proposal and are also more likely to be engaged.

When these criteria are met, a referendum will experience greater democratic engagement. In a situation where a referendum demonstrates sufficient public information, high levels of engagement, and a substantial level of citizen input, the result is determined by the substantive merits of the amendment proposal rather than any other factors. This is worth emphasising. A *sufficiently informed* voter should be aware of what the amendment proposal is, what it means, and what the consequences of the vote are. She should be able to differentiate between legitimate and illegitimate arguments and therefore should not be susceptible to misinformation or confusion. A voter who is also *sufficiently engaged* with

²⁷⁰ i.e. two different persons voting for the same amendment where each believes it will bring about different, mutually exclusive consequences.

the referendum campaign is more likely to be better informed and is also more likely to vote – a referendum campaign which maximises informed turnout is preferable to the alternative. A voter in a referendum with *significant citizen input* into the proposal and the campaign is more likely to be informed, more likely to be engaged, and less likely to see it as a rubber-stamping exercise controlled by political elites. She is therefore less likely to cast her vote according to her attitudes toward government (or other, related second-order concerns), and more likely to vote according to her belief on the substantive merits of the amendment.

A referendum in which voters are better informed, better engaged, and had significant input is a referendum in which the result is determined by a maximum number of the people's informed, accurate, and true opinions on the substantive merits of the amendment proposal. The Irish Constitution clearly understands the referendum to be the appropriate method of democratic decision-making on matters of constitutional importance. The above criteria ensure that any decision reached through this means is as reflective of the true will of the majority of citizens as is possible. This is done by minimising the influence of irrelevant considerations and those most common issues that have been shown to arise in Irish constitutional referendums. The Constitution establishes the skeleton of democratic constitutional referendums, these criteria give it more substantive realisation.

5.9 – Conclusion

This chapter sought to provide an answer to the central research question in two ways. First, in order to understand if Irish referendums have been successful, this chapter set out, explained and defended a set of criteria against which any referendum should be measured in order to be considered successful. In short, democratic engagement should be maximised, understood as the outcome of the criteria being met. Second, this chapter addressed the second part of the central research question by providing an answer as to the how Irish referendums can be consistently successful. Irish referendums are successful, I have argued, when they maximise democratic engagement. The criteria offer a blueprint for designing the referendum system such that democratic engagement can be consistently maximised: the above examples show what actions can be taken by government actors and others to ensure sufficient information, engagement, and citizen

input and thus encourage democratic engagement is built into the framework for referendums. As such, the above analysis reiterates the conclusion of Chapter 4 that good institutional design is a necessity for a successful referendum system.

6. JUDGING IRISH REFERENDUMS: THE JUDICIAL ROLE

6.1 – Introduction

Previous chapters have examined the role played in the referendum by various bodies including the Executive and Legislative branches of the State. This chapter aims to complete the trifecta by analysing the role of the Judiciary in the Irish constitutional referendum. Since the courts are designated final arbiters of constitutional interpretation, and since they enjoy a power of strong-form judicial review,¹ there is increased significance attached to this question. The objective of the chapter is therefore to identify and analyse what role the Judiciary actually play in the referendum process. This includes examining the text of the Constitution, and whether (and how) the role has developed over time. Over the course of the chapter, I will demonstrate that the relatively scant guidance in the Constitution's text grants the Judiciary a wide discretion in setting its own role as well as the role of the other branches.

The decision in *McKenna v An Taoiseach (No 2)* marks the most significant development of the Judiciary's role and continues to be the most significant ruling in this area.² As will be shown, *McKenna* and its subsequent developments have drawn much criticism,³ although I will argue that the principles have remained consistent over nearly thirty years, and that the Judiciary have resisted the temptation to develop a practice of intervening in referendums which is itself reflective of the fundamental nature of the referendum in the Constitution.⁴ Further, I argue that by defining the contours of its own role, the courts have brought clarity to the proper role of the Executive and Oireachtas in the referendum. More significantly than that, however, the courts have made it clear that the People enjoy an

¹ That is, the ability to strike down legislation for incompatibility with the Constitution: Article 34.3 Bunreacht na hÉireann. See generally Aileen Kavanagh, *The Collaborative Constitution* (CUP 2022), Aileen Kavanagh, 'What's so Weak about Weak-Form Review? The Case of the UK Human Rights Act' (2016) 13(4) *International Journal of Constitutional Law* 1008, Gerry Whyte, 'Judicial Capacity to Enforce Socio-Economic Rights' (2014) 37 *DULJ* 203. Cf. Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press 1999).

² *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10, [1996] ILRM 81.

³ E.g. Bláthna Ruane, 'Reflections on Procedural Rights in Constitutional Referenda' (2012) 48 *Irish Jurist* 1.

⁴ *ibid.*

important role at referendum akin to the roles of the other branches. In this way, the separation of powers doctrine requires the People's sphere of action at referendum to be shielded from interference by the other branches.

This chapter also seeks to unpack the judicial understanding of democracy and the referendum in the Irish Constitution. As seen most explicitly in the *Coughlan* decision,⁵ many of the decisions in this area expose competing judicial understandings of how the referendum facilitates Irish constitutional democracy, and how the courts should act in order to protect that role. This is important for this thesis in the following way. The thesis operates from the premise that by adopting the referendum as the method of constitutional amendment, Bunreacht na hÉireann implies that there is a virtue in making these decisions by a pointedly democratic mechanism. It is axiomatic, then, that the democratic character of the referendum should be maximised in order to maximise this virtue. This chapter shows that the Judiciary understand that the democratic character of a referendum is maximised when substantive democratic engagement is maximised. This point was made earlier in the thesis, but this chapter makes it clear by reference to the case-law.

The chapter proceeds in the following way. Section 6.2 involves a preliminary discussion of the guidance provided in the Constitution and in statute regarding the judicial role. This section establishes the basis from which the courts have developed their role. In Section 6.3 I examine the *McKenna* judgment.⁶ On foot of its central importance, this section takes an in-depth look at the case and its significance for the judicial role. Section 6.4 then discusses the cases in which the *McKenna* principles have been developed. In Section 6.5 I discuss the power granted to the court to overturn a referendum result where it has been 'materially affected' by constitutional wrongdoing. Section 6.6. examines the judicial role in reviewing the content of an amendment proposal, and Section 6.7 concerns judicial cognisance of the procedure to be followed for passing an amendment bill. Section 6.8 then briefly discusses the *Heneghan* case and its impact on judicial interpretation of amendments.⁷ In Section 6.9 I provide some overall reflections on the judicial role at referendums and offer an explanation for how the courts' jurisprudence should best be understood. Finally, this chapter concludes in Section 6.10.

⁵ *Coughlan v Broadcasting Complaints Commission* [2000] 3 IR 1.

⁶ *ibid.*

⁷ *Heneghan v Minister for Housing, Planning and Local Government* [2022] IESC 7, [2022] 1 ILRM 323.

6.2 – The Constitution and the Judiciary

When determining what the judicial role in referendums is, the first and most important source is the text of the Constitution itself. Articles 46 and 47 set out some procedural requirements which have been adjudicated on. Article 46.2 states that a referendum proposal must be initiated in the Dáil and must be passed by both Houses of the Oireachtas before being put to the people at referendum ‘in accordance with the law for the time being in force relating to the Referendum’.⁸ Article 46.3 requires that every amendment bill be titled “An Act to amend the Constitution”, and Article 46.4 states that a Bill containing an amendment proposal ‘shall not contain any other proposal’.⁹

6.2.1 – ‘Any Other Proposal’

In *Morris v Minister for the Environment*, the plaintiff challenged the compatibility of the Twenty-Fifth Amendment to the Constitution (Protection of Human Life in Pregnancy) Bill 2001 with Article 46.¹⁰ Mr Morris argued that the use of Schedules to the amendment Bill was incompatible with the requirement that an amendment bill contain only one proposal.¹¹ The plaintiff pointed to comments of Barrington J in an earlier case, *Riordan v An Taoiseach*,¹² to the effect that the courts can review a Bill’s compliance with Article 46.¹³ Relying on the judgment of Barrington J in *Riordan*, Kelly J stated that Article 46 does not expressly prohibit ‘an amendment to the Constitution by reference to a document extraneous to it’ nor ‘the making of an amendment which is conditional upon some other event taking place’.¹⁴ Kelly J said further that Article 46.4 should be taken to mean that an amendment bill must not contain any other *legislative* proposal.¹⁵ The use of schedules

⁸ Bunreacht na hÉireann, Article 46.2.

⁹ Bunreacht na hÉireann, Article 46.4.

¹⁰ *Morris v Minister for Environment* [2002] IEHC 5, [2002] 1 IR 326.

¹¹ *ibid*; the Schedule to the Amendment Bill contained a new piece of legislation, the Protection of Human Life in Pregnancy Act, which would be enacted after the referendum passed. The wording of the proposed amendment made reference to this Act in the Constitution itself (e.g. Article 40.3.4 would read ‘In particular the life of the unborn in the womb shall be protected in accordance with the provisions of the Protection of Human Life in Pregnancy Act 2002.’).

¹² *Riordan v An Taoiseach* [1999] 4 IR 343.

¹³ *Morris v Minister for Environment* [2002] IEHC 5, [2002] 1 IR 326.

¹⁴ *ibid*.

¹⁵ *ibid*.

did not affect the constitutionality of the Bill and the case was dismissed. *Morris* makes it clear that the courts have a role to play in ensuring Article 46's procedural requirements are complied with when a referendum is initiated. That role does not, however, extend to reading procedural requirements into the Constitution that are not explicitly there, such as a prohibition on using schedules.

6.2.2 – 'Shall Be Regulated By Law'

Article 47.4 provides that '[s]ubject as aforesaid, the Referendum shall be regulated by law.'¹⁶ On this basis, various pieces of legislation have been enacted over the decades setting out the detail of how referendums must be carried out. The most important of these is the Referendum Act 1994 ("the 1994 Act").¹⁷ A wide-ranging statute, the most relevant aspect for the Judiciary is Part IV relating to referendum petitions.¹⁸ Section 42 of the 1994 Act provides that when someone wishes to challenge the validity of a referendum result, they must do so by way of a specific petition to the High Court.¹⁹ Section 43 permits a challenge to a provisional referendum certificate²⁰ on the grounds that the result of the referendum was 'materially affected' by:

- '(a) the commission of an offence referred to in Part XXII of the [Electoral Act 1992],²¹
- (b) obstruction of or interference with or other hindrance to the conduct of the referendum,
- (c) failure to complete or otherwise conduct the referendum in accordance with this Act, or
- (d) mistake or other irregularity in the conduct of the referendum or in the particulars stated in the provisional referendum certificate.'²²

¹⁶ Bunreacht na hÉireann, Article 46.4.

¹⁷ As amended.

¹⁸ This is ss 42-58 as amended by Referendum Act 1998, s 12, and Electoral Reform Act 2022, s 43.

¹⁹ Referendum Act 1994, s 42. The Supreme Court has held that challenges to referendums *must* utilise the petition procedure in section 42; *Rea v Ireland* [2016] IESC 19. For general commentary on the petition process see Jennifer Kavanagh, 'The Will of the People' in Maria Cahill, Colm Ó Cinnéide, Seán Ó Conaill, and Conor O'Mahony (eds.) *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland* (Routledge 2021).

²⁰ The referendum certificate is the official recording of a referendum result. It is provisional up to the time any challenges are deemed invalid.

²¹ These include various types of electoral offence such as bribery, undue influence, forgery, etc.

²² Referendum Act, 1994 s 43(1).

Section 43(2) emphasises that ‘a referendum petition shall not be dismissed on account of any informality in its contents which does not materially affect its substance’.²³ Section 43(3), as inserted by the Electoral Reform Act 2022,²⁴ says that a provisional certificate shall not be challenged for non-compliance with the 2022 Act, or any mistake by the Electoral Commission, where the High Court is satisfied that it did not materially affect the result of the referendum.²⁵ Section 42(3) states that leave to present a referendum petition will not be granted unless the High Court is satisfied that there is *prima facie* evidence of a matter referred to in section 43(3) and that the matter is such as to affect materially the result of the referendum as a whole.²⁶ Section 47 provides that the High Court can order that votes be counted afresh and section 48 empowers the court to order the retaking of the referendum in a constituency.²⁷

Part IV of the Referendum Act 1994 therefore grants the courts the power and duty of assessing referendums for their compliance with the Act. While not contained in the text of the Constitution, these responsibilities flow from the requirement in Article 47.4 that the referendum be regulated by law. As will be shown below, this role has developed to include a more general supervisory function, in particular where it is alleged that another organ of government has acted in breach of its constitutional duties in the referendum. The central case in this regard is *McKenna v An Taoiseach (No 2)*.²⁸ Given the continuing significance of that case, it is worth discussing it in detail before moving on to consider how the principles have developed over time.

6.3 – McKenna and the Courts’ Role

6.3.1 – McKenna Overview

²³ Referendum Act 1994 s 43(2).

²⁴ Electoral Reform Act 2022 s 38.

²⁵ Referendum Act 1994 s 43(3).

²⁶ Referendum Act 1994 s 42(3).

²⁷ Denham CJ has held that this must include the power to order the retaking of the entire referendum *Jordan v Minister for Children and Youth Affairs* [2015] IESC 33, [2015] 4 IR 232 at [91] (Denham CJ).

²⁸ *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10, [1996] ILRM 81.

Patricia McKenna, Member of the European Parliament for the Green Party, brought a case to the High Court in 1992 seeking to restrain the Government from initiating an advertising campaign for the upcoming Maastricht Treaty referendum.²⁹ The campaign was to be funded using public monies and would advocate for a Yes vote in the referendum. Ms McKenna alleged that the use of public monies to encourage a Yes vote would breach her personal rights, including a right to act in accordance with the Constitution, to communicate, to equality in the exercise of her franchise, and her right to ‘have a decision on such an important constitutional matter arrived at by fair procedures’.³⁰ She argued that while the Government was entitled to provide impartial information, it would be ‘impermissible conduct’ for the Government to indulge in a partisan campaign financed by public funds since such conduct is unconstitutional.³¹ Ms McKenna also argued that public debate in a referendum must be fair and adequate in order for a referendum to comply with the requirement that the People be fully informed when amending the Constitution.³² A partisan campaign by the Government supporting just one side would ‘distort the debate because the proponents of the opposite view would not have the resources to match it’.³³

In the High Court, Costello J dismissed her claim,³⁴ concluding that this was not an area where the courts had any role to play, saying that the ‘extent of the role the Government feels called upon to play to ensure ratification is a matter of concern for the executive arm of government, not the judicial.’³⁵ He said further that the plaintiff’s complaint of misconduct was

‘a complaint of *political* misconduct on which this court can express no view and that she has failed to establish any *constitutional* impropriety in the exercise by the Government of the executive power of government in the conduct of the referendum campaign.’³⁶

²⁹ *McKenna v An Taoiseach (No 1)* [1995] 2 IR 10.

³⁰ *ibid* 1.

³¹ *ibid* 4.

³² *ibid* 5.

³³ *ibid* 5.

³⁴ *ibid* 7-9.

³⁵ *ibid* 6.

³⁶ *ibid* 6.

In essence, Costello J expressed the view that the separation of powers required that expenditure of monies in a referendum campaign was entirely the remit of the Executive.³⁷

The Court had no role to play in supervising this sort of conduct. He concluded that

‘not every grievance can be remedied by the courts. And judges must not allow themselves to be led, or indeed voluntarily wander, into areas calling for adjudication on political and non-justiciable issues. They are charged by the Constitution with exercising the judicial power of government and it would both weaken their important constitutional role as well as amount to an unconstitutional act for judges to adjudicate on such issues.’³⁸

Costello J also rejected Ms McKenna’s arguments relating to her personal rights, stating that the Constitution does not grant to individuals a general right to oblige the Executive to act in accordance with the Constitution where specific duties are not enumerated.³⁹ Her rights to communicate and equality, according to Costello J, had not been infringed in this case.⁴⁰

Ms McKenna ran the same arguments once more when, in 1995, she challenged the decision of the Government to spend IR£500,000 on a campaign encouraging a Yes vote in the upcoming divorce referendum.⁴¹ There she argued that the partisan campaigning funded by public monies was a breach of the Government’s constitutional duty and breached her personal rights to have the Government act in accordance with the Constitution, to communication, to equality, and to fair procedures.⁴² In the High Court, Keane J rejected her arguments,⁴³ and said that the wording of Article 46 provides no guidance

‘as to the role, if any, to be played by the Government by the holding of a referendum, other than what may be gleaned from the requirement that the referendum be held ‘in accordance with the law for the time being in force relating to the referendum’.’⁴⁴

³⁷ *ibid* 6.

³⁸ *ibid* 5-6.

³⁹ *ibid* 7.

⁴⁰ *ibid* 7-9.

⁴¹ *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10.

⁴² *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10, 11.

⁴³ *ibid* 15.

⁴⁴ *ibid* 17.

It would be inappropriate, therefore, for the courts to step in and decide what the Executive can and cannot do in referendums.⁴⁵ He reiterated that for the courts to review behaviour such as this would be for them ‘to assume a role which is exclusively entrusted to those organs of state, and one which the courts are conspicuously ill-quipped to undertake’, and that ‘it is not the function of the courts under the Constitution to enter into, still less, purport to resolve such disputes.’⁴⁶

On appeal to the Supreme Court, a 4-1 majority (Egan J dissenting) found for Ms McKenna and held that the allocation of IR£500,000 for one side only (i.e. partisan campaigning) was unconstitutional.⁴⁷ There were three questions before the Court.⁴⁸ First, whether or not she had standing (the Court was unanimous that she did).⁴⁹ Second, whether the partisan campaign was a breach of the Constitution.⁵⁰ And finally, whether the Court had jurisdiction in relation to the alleged breach of the Constitution.⁵¹ The latter two questions are worth considering in detail.

6.3.2 – Was the Partisan Campaign in Breach of the Constitution?

On this question, Hamilton CJ (writing the lead judgment for the majority) first looked to the text of both the Constitution and the Referendum Act, 1994 (the principal piece of legislation governing referendums) for guidance as to the Government’s role in a referendum.⁵² He found that neither source gives to the Government an explicit role in submitting the proposal for the decision of the People, nor in the provision of information during a campaign, nor in the regulation of the referendum campaign.⁵³ At the same time, neither source explicitly *prohibited* the Government from taking on these roles, including in the manner impugned in this case (i.e. campaigning for one result).⁵⁴ However, Hamilton CJ said that the Government is ‘a creature of the Constitution and cannot act

⁴⁵ *ibid* 17.

⁴⁶ *ibid* 18.

⁴⁷ *ibid* 11.

⁴⁸ *ibid* 11-12.

⁴⁹ *ibid* 11.

⁵⁰ *ibid* 11.

⁵¹ *ibid* 12.

⁵² *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10, 33 (Hamilton CJ).

⁵³ *ibid* 37.

⁵⁴ *ibid* 38.

free from the restraints of the Constitution’, and that therefore in ‘the exercise of the executive power of the State it is subject to the provisions of the Constitution.’⁵⁵ Hamilton CJ found that the actions of the Government in this case were not exercises of the Executive power,⁵⁶ but that even if they had been, they would still be amenable to examination and review by the Court.⁵⁷ Hamilton CJ said that ‘[n]either the powers of the Oireachtas nor of the Government are absolute even within their own domain’.⁵⁸ He decided, therefore, that because the Executive is under a general obligation to act in accordance with the Constitution, and since the courts have a duty to assess the actions of the other branches for compliance with the Constitution, the separation of powers did not preclude the Court reviewing the Executive’s actions in the referendum.

Hamilton CJ then turned to consider what the Constitution requires of the Executive, and whether the Government’s campaigning constituted ‘an interference with the constitutional process of amending the Constitution and the constitutional rights of the plaintiff.’⁵⁹ He held that it did.⁶⁰ He said that regard must be had for the crucial role of the People in the amendment of the Constitution, and that as guardians of the Constitution, the People

‘by virtue of the democratic nature of the State enshrined in the Constitution, are entitled to be permitted to reach their decision free from unauthorised interference by any of the organs of State that they, the People, have created by the enactment of the Constitution.’⁶¹

Therefore, the process to be followed in a constitutional referendum includes not only compliance with Articles 46 and 47 and the Referendum Acts, but also ‘that regard be had for the constitutional rights of the citizens and the adoption of fair procedures.’⁶² On that basis, Hamilton CJ found that the use of public funds to campaign for one side in a referendum was

⁵⁵ *ibid* 38.

⁵⁶ *ibid* 38.

⁵⁷ *ibid* 41.

⁵⁸ *ibid* 39-40, with reference made to *Crotty v An Taoiseach* [1987] IR 713.

⁵⁹ *ibid* 41.

⁶⁰ *ibid* 42.

⁶¹ *ibid* 42.

⁶² *ibid* 42.

‘an interference with the democratic process and the constitutional process for the amendment of the Constitution and infringes the concept of equality which is fundamental to the democratic nature of the State.’⁶³

For Hamilton CJ, the special place of the People in the Constitution and the particularly emphatic language around the referendum justified a higher onus being placed on the Executive to respect certain fundamental rights and principles tied closely to the democratic nature of the State.⁶⁴

Concurring, Denham J (as she then was) agreed with Hamilton CJ to the effect that the Government’s actions were amenable to judicial review and that they were acting in breach of the Constitution.⁶⁵ She said that partisan funding of the campaign would infringe upon at least three constitutional rights: the right of equality, the right to freedom of expression; and the right to a democratic process in referendums.⁶⁶ On equality, Denham J opined that Article 40.1 must require

‘the organs of government in the execution of their powers to have due regard to the right of equality. [...] This includes the concept that in the democratic process, including referenda, neither side of an issue will be favoured, treated unequally, by the government.’⁶⁷

She held that funding one side in a referendum placed the other side at a disadvantage and thus treated them unequally.⁶⁸ Like Hamilton CJ, Denham J linked this to the core concept of democracy in the Constitution, citing with approval comments from Budd J in *O’Donovan v Attorney General*,⁶⁹ where he said that ‘[a] democratic state denotes one in which all citizens have equal political rights.’⁷⁰ For Denham J, this spirit of equality applies to the referendum, and is breached where the Government acts in a partisan way.⁷¹

⁶³ *ibid* 42.

⁶⁴ *ibid* 41-42 where he states that the “role of the people in amending the Constitution cannot be overemphasized” and cites with approval the passage in *Crotty v An Taoiseach* [1987] IR 713 where Walsh J says that “it is the people themselves who are the guardians of the Constitution.”

⁶⁵ *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10, 51 (Denham J).

⁶⁶ *ibid* 52.

⁶⁷ *ibid* 52.

⁶⁸ *ibid* 53.

⁶⁹ *O’Donovan v Attorney General* [1961] IR 114.

⁷⁰ *O’Donovan v Attorney General* [1961] IR 114, 137.

⁷¹ *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10, 53 (Denham J).

Denham J said further that the partisan campaigning breached Ms McKenna's right to freedom of expression on the basis that such a right

'incorporates the corollary right that in the democratic process of free elections, public funds should not be used to fund one side of an electoral process [...] to the detriment of the other side.'⁷²

Denham J again drew a strong link between the concept of democracy in the Constitution and the fundamental rights raised here when discussing Ms McKenna's 'right to a democratic procedure in referenda.'⁷³ For her, this right entitles citizens to a democracy 'free from governmental intercession [...] no matter how well intentioned'⁷⁴ and stems from the core rationale underlying the referendum.⁷⁵ The referendum is best understood as forming part of the system of checks and balances which precludes the growth of autocratic tendencies and invests the claim of popular sovereignty with concrete reality.⁷⁶ As an organ of government, the Executive is an instrument of the People, and so for the Executive to spend public monies in a partisan way would be to intercede with the democratic process which is itself so fundamental and critical to the exercise of power under the Constitution.⁷⁷ What this means, essentially, is that Denham J understands the role of the organs of government in a referendum as facilitative of the People's decision. For the organs themselves to step into the fray would be to sully the process and undermine those fundamental rights which are closely connected to the People's role in the Constitution.⁷⁸ Denham J held that the separation of powers here *required* judicial

⁷² *ibid* 53.

⁷³ *ibid* 53.

⁷⁴ *ibid* 53.

⁷⁵ *ibid* 54; Denham J stated that "Power derives from the People, and is exercised under the Constitution through their organs of government (legislative, executive, judicial). Power and decision-making in referenda is with the People. The organs of government are instruments of the People. Thus, the democratic process is fundamental and critical to the exercise of power under the Constitution."

⁷⁶ *ibid* 54 citing Leo Kohn, *The Constitution of the Irish Free State* (Allen and Unwin 1932) 116: 'A constitution based on wide suffrage, Proportional Representation and a rational distribution of constituencies, embodying an elaborate system of checks and balances designed to preclude the growth of autocratic tendencies in any of its organs, such a framework, whatever might be thought of the practicability of some of these devices, could claim to have not merely proclaimed the sovereignty of the people in the abstract, but to have invested it with concrete reality.'

⁷⁷ *ibid* 54.

⁷⁸ On the basis that expenditure in a referendum was purely the remit of the Executive. Neither judge contemplated the People enjoying an exclusive sphere of influence in the same way the organs of government do.

intervention, because otherwise the Executive would be stepping into the People's sphere of action.⁷⁹

Concurring, O'Flaherty J agreed that the partisan spending breached the principle of equality,⁸⁰ and similarly emphasised the democratic nature of the state.⁸¹ For O'Flaherty J, partisan campaigning would undermine the very purpose of the referendum as an intentional break from the model of parliamentary democracy.⁸² Interestingly, O'Flaherty J expressed some concern that if the Government were allowed to spend money in this way, it might tempt them to stray towards 'further inducements'⁸³ in a referendum campaign, which has some parallels with Denham J's concern that abuse of the referendum could lead to autocratic tendencies.⁸⁴

On the question of whether the Government were acting in breach of the Constitution, Blayney J's concurring judgment focused on the right to fair procedures.⁸⁵ He noted that while there is no guidance in the Constitution nor the 1994 Act as to how the Government's role is to be carried out,

'since it is a role imposed on the executive by the Constitution in connection with the very important constitutional right of the People, that is voting at a referendum, I am satisfied that constitutional justice requires that the executive should act fairly in discharging it, not favouring any section of the People at the expense of any other section. This would seem to be a minimum requirement for the discharge of any constitutional obligation. The people are entitled to be treated equally.'⁸⁶

⁷⁹ On the suggestion that the referendum incorporates the People as a 'fourth branch' of the separation of powers, see generally Oran Doyle, *The Constitution of Ireland: A Contextual Analysis* (Hart 2018) Chapter 10.

⁸⁰ *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10, 43 (O'Flaherty J): he said that partisan spending breached 'the equality rights of the citizen enshrined in the Constitution' and put 'the voting rights of one class of citizen (those in favour of the change) above those of another class of citizen (those against)'.

⁸¹ *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10, 43-44 (O'Flaherty J).

⁸² *ibid* 44 citing Leo Kohn, *The Constitution of the Irish Free State* (Allen and Unwin 1932). It would in effect tie it too closely to the system of representative democracy and thus be anathema to the underlying rationale, in particular in light of the radical democratic thinking of the framers.

⁸³ Presumably monetary or other undemocratic means of swaying people's votes.

⁸⁴ *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10, 45 (O'Flaherty J).

⁸⁵ *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10, 47 (Blayney J).

⁸⁶ *ibid* 49.

Blayney J held that while fair procedures usually apply in respect of individuals who are subject to decisions regarding their rights,⁸⁷ their transposition to the referendum was justified since constitutional amendment is

‘concerned with something of far greater weight and importance than an agreement affecting an individual. It is concerned with the Constitution itself and a decision by way of referendum which could have a profound influence on the whole of society in the State. Can it [thus] be doubted that the requirement that the amendment be submitted to the decision of the People should be construed as providing for fair procedures?’⁸⁸

Expenditure of public monies in favour of one side in a referendum, he held, breached the right to fair procedures.⁸⁹

Finally, Egan J, dissenting, said that the Government *must* be entitled to advocate in favour of a proposed amendment, saying that he could see ‘no harm whatever in the Government expressing strong views in the matter even if the result may be to influence voters’.⁹⁰ He held further that the Government must be permitted to spend money in the pursuit of advocating for a particular result, identifying no specific prohibition either in the Constitution itself or the 1994 Act to prevent this partisan spending.⁹¹ Important for Egan J was the fact that the money was voted to be used in that way by the Oireachtas.⁹² Absent any specific prohibition on this type of behaviour, Egan J determined that the Court had no reason to state that the Government was acting unconstitutionally.⁹³

6.3.3 – Did the Court Have Jurisdiction to Act?

Hamilton CJ gives the fullest account of this question.⁹⁴ He ultimately held that when acting in the course of a referendum the Government must act in accordance with the Constitution.⁹⁵ On whether the Court has jurisdiction to act where the Executive fails in

⁸⁷ On this point he cited the judgment of Walsh J in *Glover v BLN* [1973] IR 388.

⁸⁸ *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10, 50 (Blayney J).

⁸⁹ *ibid* 50-51.

⁹⁰ *ibid*.

⁹¹ *ibid* 47.

⁹² *ibid* 47.

⁹³ *ibid* 47.

⁹⁴ *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10, 36 onwards (Hamilton CJ).

⁹⁵ *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10, 38 (Hamilton CJ).

this obligation, Hamilton CJ relied on the judgment of Walsh J in *Crotty v An Taoiseach*.⁹⁶ There, Walsh J discussed the boundaries of each organ's functions and stated that '[t]o the judicial organ of Government is given the power conclusively to decide if there has been a breach of constitutional restraints.'⁹⁷ On that basis, Hamilton CJ remarked that

'it is the *right and duty* of the Court to examine, and if necessary to review the activities of the Government to ascertain whether its activities are within its permitted areas of activity and function and whether the constitutional rights of the litigant are being invaded by such activity.'⁹⁸ (emphasis added)

The Court's role, therefore, includes a *duty* to examine the constitutionality of the Executive's actions. The next question concerned the test to be applied.

Hamilton CJ remarked that where the Court is asked to intervene and hold unconstitutional the acts of the Executive in cases such as this, the appropriate test to be applied is the 'clear disregard' test.⁹⁹ This test, articulated first in *Boland v An Taoiseach*¹⁰⁰ and later reiterated in *Crotty*,¹⁰¹ says that:

1. The courts have no power, either express or implied, to supervise or interfere with the exercise by the Government of its executive functions provided that it acts within the restraints imposed by the Constitution on the exercise of such powers.
2. If, however, the Government acts otherwise than in accordance with the provisions of the Constitution *and in clear disregard thereof*, the courts are not only entitled but *obliged to intervene*.
3. The courts are only entitled to intervene if the circumstances are such as to amount to a clear disregard by the Government of the powers and duties conferred on it by the Constitution.'¹⁰² (emphasis added)

Hamilton CJ then went on to determine whether or not the Government's partisan funding of the advertising campaign constituted a clear disregard of its constitutional duties.¹⁰³ As demonstrated above, he concluded that the Government had acted in clear disregard of its duties by unconstitutionally breaching Ms McKenna's rights and interfering with the

⁹⁶ *Crotty v An Taoiseach* [1987] IR 713.

⁹⁷ *ibid.*

⁹⁸ *McKenna v An Taoiseach (No 2)* [1995] 2 IR 210, 40 (Hamilton CJ).

⁹⁹ *ibid* 32.

¹⁰⁰ *Boland v An Taoiseach* [1974] IR 338.

¹⁰¹ *Crotty v An Taoiseach* [1987] IR 713.

¹⁰² *McKenna v An Taoiseach (No 2)* [1995] 2 IR 210, 32 (Hamilton CJ).

¹⁰³ *ibid* 32-42.

democratic process for amendment.¹⁰⁴ The Court, therefore, not only had jurisdiction but was *obliged* to intervene and declare the Government's actions unconstitutional.¹⁰⁵ This conclusion was supported by the rest of the majority judges.¹⁰⁶ The Government was therefore required to cease its advertising campaign.

6.3.4 – Summing Up McKenna

McKenna is a particularly significant judgment for a number of reasons. First, the Supreme Court held that the Government's role in referendums must be carried out in accordance with the Constitution, in particular the principles of equality, fair procedures, and democracy which underpin the referendum.¹⁰⁷ In order to justify this decision, reliance was placed on the fact that the referendum grants decision-making power to the People. Denham J is particularly emphatic on this point, expressing the view that it required the Court to restrain the other organs of government from hindering in any way the People's ability to make their decision freely.¹⁰⁸

Second and related, as a consequence of the case, the courts are now very much involved in referendums in a substantive way. Prior to *McKenna*, the role of the courts was limited to assessing procedural validity. *McKenna* saw the Judiciary expand their role to encompass a much broader supervisory power over the campaign process.¹⁰⁹ Needless to say, a power to review referendums for their compliance with general constitutional principles is a much wider power than that established under the 1994 Act.¹¹⁰

¹⁰⁴ *ibid* 42.

¹⁰⁵ *ibid* 40.

¹⁰⁶ *McKenna v An Taoiseach (No 2)* [1995] 2 IR 210, 50-51 (Blayney J), 51 (Denham J).

¹⁰⁷ The authors of *Kelly* argue that the *McKenna* principles are derived from a combination of different rights and values, some of which are used in a very different way to their typical invocation. Gerard Hogan, Gerry Whyte, David Kenny, Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2018) [8.1.48].

¹⁰⁸ *McKenna v An Taoiseach (No 2)* [1995] 2 IR 210, 51-52 (Denham J).

¹⁰⁹ Ann Sherlock, 'Constitutional Change, Referenda and the Courts in Ireland' [1997] Public Law 136.

¹¹⁰ The authors of *Kelly* note that *McKenna* is broadly in line with a general approach of the Supreme Court to not follow High Court decisions which appear to exclude judicial review entirely in certain circumstances; Gerard Hogan, Gerry Whyte, David Kenny, Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2018) [6.1.46].

Third, *McKenna* proved to have extremely significant consequences for the practice of running a referendum campaign.¹¹¹ As has been seen in previous chapters, the requirement that each side in a campaign be funded equally has led to widespread criticism and has been blamed for the failure of certain referendums.¹¹² It seems Denham J foresaw this criticism and cited the following passage in defence of her decision:

‘...such a framework, *whatever might be thought of the practicability* of some of these devices, could claim to have not merely proclaimed the sovereignty of the people in the abstract, but to have invested it with concrete reality.’¹¹³ (emphasis added)

For her, as for the rest of the majority, any practical difficulties pale in comparison to the importance of giving life to the underlying rationale of the referendum: that is, the strong notion of democracy and popular sovereignty.

6.4 – McKenna Developed

6.4.1 – Coughlan

The *McKenna* principles were relied upon by the plaintiff in *Coughlan v Broadcasting Complaints Commission*.¹¹⁴ The plaintiff in this case had made a complaint to the Broadcasting Complaints Commission (“BCC”) regarding the transmission of party-political broadcasts by the national broadcaster (RTÉ) in the lead up to the 1995 Divorce referendum. The plaintiff challenged the division of airtime granted to campaigners on RTÉ, in particular the airtime for party-political broadcasts.¹¹⁵ He argued that the unequal airtime granted to proponents of a ‘Yes’ vote as against proponents of ‘No’ (roughly 40 aggregated minutes for the former and 10 for the latter)¹¹⁶ breached the requirement of

¹¹¹ Ann Sherlock, ‘Constitutional Change, Referenda and the Courts in Ireland’ [1997] Public Law 136. Sherlock discusses how the ruling required the Attorney General to take action in relation to the Electoral (Amendment) Bill which was then before the Dáil, as some of its provisions may have been unconstitutional in light of the *McKenna* principles.

¹¹² Bláthna Ruane, ‘Reflections on Procedural Rights in Constitutional Referenda’ (2012) 48 Irish Jurist 1.

¹¹³ *McKenna v An Taoiseach (No 2)* [1995] 2 IR 210 (SC) 54 (Denham J) citing Leo Kohn, *The Constitution of the Free State* (Allen and Unwin 1932) 116.

¹¹⁴ *Coughlan v Broadcasting Complaints Commission* [2000] 3 IR 1.

¹¹⁵ *ibid* 1-2.

¹¹⁶ This was made up of ‘ten political party broadcasts aggregating 30 minutes which all favoured a ‘Yes’ vote; two uncontested broadcasts from ad hoc campaign groups advocating a ‘yes’ vote aggregating 10

impartiality and balance imposed on RTÉ by section 18 of the Broadcasting Act, 1960.¹¹⁷ The BCC had rejected Mr Coughlan's complaint on the basis that since all political parties were advocating for a Yes vote, it was sufficient to reflect this in the airtime granted to each side.¹¹⁸ The BCC found that RTÉ had accurately reflected the positions of all political parties and had thus acted in line with its statutory requirements.¹¹⁹ Both the High Court,¹²⁰ and the Supreme Court held that RTÉ had breached its obligations.¹²¹ In concluding that RTÉ was required to adhere to the *McKenna* principles, the Supreme Court discussed the contours of those principles and the exact requirements of equality in the referendum.

Giving the lead judgment for the majority, Hamilton CJ held that RTÉ had an obligation to carry out its functions in accordance with the Constitution.¹²² He looked to the judgments of both Walsh J and Henchy J in *The State (Lynch) v Cooney* for guidance,¹²³ and found that while RTÉ was not under any obligation to transmit political broadcasts,¹²⁴ it is a necessary implication of its power to do so that 'it will be exercised in a constitutional manner'.¹²⁵ In *State (Lynch) v Cooney*, Henchy J said that to allow one party to make a political broadcast but deny the opportunity to another would constitute unfair discrimination contrary to Article 40.1 of the Constitution, unless justified under that provision.¹²⁶ For Hamilton CJ, these statements supported

'the proposition that in deciding to transmit political party broadcast and all issues in relation thereto RTÉ in reaching such decision must have regard to fair procedures and the exercise of the power in that regard will be exercised in a constitutional manner.'¹²⁷

In the referendum context, this means that 'the scales should be held equally between those who support and those who oppose the amendment.'¹²⁸ Hamilton CJ therefore found

minutes and two uncontested broadcasts from ad hoc campaign groups advocating a 'no' vote aggregating 10 minutes.'

¹¹⁷ *Coughlan v Broadcasting Complaints Commission* [2000] 3 IR 1, 1-2.

¹¹⁸ The 'No' broadcasts had been made by two ad-hoc groups campaigning against the referendum.

¹¹⁹ *Coughlan v Broadcasting Complaints Commission* [2000] 3 IR 1, 1-2.

¹²⁰ *Coughlan v Broadcasting Complaints Commission* [1998] IEHC 62 (Carney J).

¹²¹ *Coughlan v Broadcasting Complaints Commission* [2000] 3 IR 1, 2.

¹²² *Coughlan v Broadcasting Complaints Commission* [2000] 3 IR 1, 21 (Hamilton CJ).

¹²³ *The State (Lynch) v Cooney* [1982] IR 337.

¹²⁴ *The State (Lynch) v Cooney* [1982] IR 337, 367 (Walsh J).

¹²⁵ *The State (Lynch) v Cooney* [1982] IR 337, 382 (Henchy J).

¹²⁶ *ibid.*

¹²⁷ *Coughlan v Broadcasting Complaints Commission* [2000] 3 IR 1 (SC) 25 (Hamilton CJ).

¹²⁸ *ibid.*

that by providing more airtime to proponents of Yes than No, RTÉ had failed in its obligation to conduct its functions in accordance with the Constitution.¹²⁹

Denham J agreed that the principles of constitutional equality and fairness were applicable to broadcasting and required RTÉ to act impartially.¹³⁰ While the *McKenna* principles do not require ‘mathematical equality’, in situations where all the parties are

‘either in favour of or opposed to a referendum then party political broadcasts become prima facie, unfair and unequal and the issue must be approached from the standpoint of the overall obligations imposed by the legislation and the Constitution.’¹³¹

As in *McKenna*, what is significant about Denham J’s judgment is the emphasis on broad constitutional principles underlying the referendum.¹³² For her, equality and fairness are required in order to vindicate the direct-democratic nature of the referendum.¹³³ For Denham J, the referendum is a ‘tool for direct democracy’ which serves as ‘an alternative to the representative government process’.¹³⁴ So, while in a general election political parties are key players who drive the institution of democracy, in a referendum ‘the process is one of direct legislation’, which means ‘the role of elected representatives is different.’¹³⁵ That role is a more circumscribed one, limited by the principles of equality, fairness, and impartiality as espoused in *McKenna*.¹³⁶ In their concurring judgments, both Keane and Barron JJ took a similar approach to the matter, drawing distinctions between the role of political parties in general elections and in referendums.¹³⁷ The logic of these, and the majority position more generally, is that because referendums deal with issues which do not necessarily fall along party lines, to claim that impartiality is achieved by including all parties is mistaken: impartiality and equality must be maintained by reference to the issue actually up for debate.¹³⁸

¹²⁹ *ibid* 25-26.

¹³⁰ *Coughlan v Broadcasting Complaints Commission* [2000] 3 IR 1 (SC) 30-32 (Denham J).

¹³¹ *ibid* 31-32.

¹³² *ibid* 30.

¹³³ *ibid* 30.

¹³⁴ *ibid* 30.

¹³⁵ *ibid* 30.

¹³⁶ *ibid* 30.

¹³⁷ *Coughlan v Broadcasting Complaints Commission* [2000] 3 IR 1 (SC) 46 (Keane J), 58 (Barron J).

¹³⁸ *ibid* 60 (Barron J).

In his lone dissent, Barrington J similarly based his judgment on the democratic principles underlying the referendum and the way in which RTÉ and other broadcasters can help to achieve them.¹³⁹ For Barrington J, however, political parties have a key role to play in referendums.¹⁴⁰ First, he said that the referendum is the ultimate political act which the People have reserved for themselves, in which a decision is made as to how best to promote the common good.¹⁴¹ In order to carry out this function, he said, the People must be well informed and advised.¹⁴² RTÉ can help to ensure that this is the case in a number of ways, including providing equal access to the airwaves of each side.¹⁴³ However, he said, the ‘principal role in advising the people on a major political decision must rest with their political leaders.’¹⁴⁴ He went on to say that

‘[a] distinguishing feature of a democratic society is that political leadership rests, not on power, but on persuasion. Likewise political authority rests on the consent of the electorate. It is right and appropriate that political leaders should use their authority and the arts of persuasion to lead the people towards the decision which their judgment tells them will best promote the common good. For RTÉ to attempt to neutralise the advice of political leaders would be to subvert the democratic values which it is directed to uphold.’¹⁴⁵

He then went on to say that it is right and proper that this can be justified under Article 40.1 (which provides for differential treatment based on social function),¹⁴⁶ saying that there is

‘in principle, no constitutional inequality or unfairness and no breach of democratic values in allowing political leaders access to the airwaves at referendum time on conditions dissimilar to those granted to private citizens but related to their social function as political leaders of the people.’¹⁴⁷

¹³⁹ *Coughlan v Broadcasting Complaints Commission* [2000] 3 IR 1 (SC) 43-46 (Barrington J).

¹⁴⁰ *ibid* 46.

¹⁴¹ *ibid* 44.

¹⁴² *ibid* 44.

¹⁴³ *ibid* 44.

¹⁴⁴ *ibid* 44.

¹⁴⁵ *ibid* 44.

¹⁴⁶ The text reads: ‘All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.’

¹⁴⁷ *ibid* 46.

While Barrington J agreed that the *McKenna* principles apply to referendums and that RTÉ must act in accordance with them, he disagreed with the majority about what exactly this entails. Both the majority and minority agreed that the referendum must be carried out in a way which vindicates its character as a tool for democracy.¹⁴⁸ The difference, however, lies in how they view the role of political parties in this democratic mechanism.¹⁴⁹ The majority see the referendum as a mechanism specifically designed to reduce the influence of political parties, while Barrington J understands it as more closely associated with, and complementary of, the system of representative government in which political parties are prominent.¹⁵⁰ Instructive for my purposes in this thesis, while the majority and Barrington J disagree about the role of political representatives, all agree that the democratic character of the referendum is its distinctive feature. All agree that the Judiciary have a role to play in ensuring that its democratic character is vindicated, they just disagree about the most effective way of doing so. Vindicating the democratic character of the referendum means maximising democratic engagement. This is evident most evidently in *Coughlan* through Barrington J's recognition that a well-informed electorate is necessary,¹⁵¹ but also in the majority's determination that RTÉ's informative role is of high constitutional importance.¹⁵² In other words, the Judiciary agree that the Constitution, by adopting the referendum, must implicitly take the position that more substantive engagement with a referendum rather than less is desirable, if not ideal. That, as alluded to earlier, explains and justifies my use of democratic engagement as the touchstone for success in preceding chapters.

In terms of the judicial role, *Coughlan* is significant in establishing the following. First, the courts' obligation to review the actions of State bodies for compliance with the *McKenna* principles of equality extends to semi-independent bodies like RTÉ. Second, it clarifies the requirements of *McKenna* equality: while equality here does not mean 'mathematical equality', it did in this case extend to the courts counting the number of

¹⁴⁸ Cf. 44-46 (Barrington J), 30 (Denham J).

¹⁴⁹ *ibid.*

¹⁵⁰ The approach of Barrington J accords with much of the literature in this area which is sceptical of the claims that referendums are 'direct' in a substantive way. See generally Leah Trueblood, 'Are Referendums Directly Democratic?' (2020) 40(3) OJLS 425. Cf. Maija Setälä, 'Introduction' in Maija Setälä and Theo Schiller (eds), *Referendums and Representative Democracy: Responsiveness, Accountability and Deliberation* (Routledge 2009).

¹⁵¹ *Coughlan v Broadcasting Complaints Commission* [2000] 3 IR 1 (SC) 44 (Barrington J).

¹⁵² *Coughlan v Broadcasting Complaints Commission* [2000] 3 IR 1 (SC) 30-32 (Denham J).

aggregated minutes each side received in airtime.¹⁵³ Given how protracted and multifaceted referendum campaigns can be, this is quite an involved responsibility.¹⁵⁴ Finally, the disagreement between the majority and Barrington J brings into stark relief the differing judicial positions on the Government's role at referendum. On the basis that the referendum was intentionally included in the Constitution as a break from the ordinary system of representative (party) politics, the majority understand the role of the Government and representatives as limited. According to the majority, to allow representatives to exercise increased sway would be anathema to the referendum's purpose. Importantly, the majority do not see representatives as playing *no* part in the referendum (clearly they are required to act in some way, for example by initiating a referendum by passing the Bill through the Oireachtas) but it is a more limited role.¹⁵⁵

6.4.2 – Doherty

Another case worth mentioning briefly here is *Doherty v Referendum Commission*.¹⁵⁶ The plaintiff in this case was a Sinn Féin TD whose party was advocating for a No vote in the upcoming referendum on the Fiscal Treaty amendment.¹⁵⁷ Mr Doherty argued that certain statements by the Referendum Commission about the nature of the Treaty were *ultra vires* on the basis that they were not sufficiently informative as is required by section 3 of the Referendum Act, 1998 which established the Commission's functions.¹⁵⁸ Dismissing the case in the High Court, Hogan J held that the rights to equality and freedom of expression

¹⁵³ For commentary on balance in broadcast media relating to *Coughlan*, see Gavin Barret, 'Modalities, Political Practices and the Law on Referendums in Ireland' in Maria Cahill, Colm Ó Cinnéide, Seán Ó Conaill, and Conor O'Mahony (eds.) *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland* (Routledge 2021).

¹⁵⁴ See generally on this Conor O'Mahony, 'Of Constitutions and Cookery Shows' *Constitution Project @ UCC*, <<http://constitutionproject.ie/?p=647>> accessed on 8 December 2021.

¹⁵⁵ On the question of what role the representatives play here, and the significance of that role, see generally David Kenny and Aileen Kavanagh, 'Are the People Masters? Constitutional Referendums in Ireland' in Richard Albert and Richard Stacey (eds) *The Limits and Legitimacy of Referendums* (OUP 2021); Eoin Carolan, 'Constitutional Change Outside the Courts: Citizen Deliberation and Constitutional Narrative(s) in Ireland's Abortion Referendum' (2020) 48(4) *Federal Law Review* 497; Eoin Carolan, 'Ireland's Constitutional Convention: Behind the hype about citizen-led constitutional change' (2015) 13(3) *ICON* 733; Maria Cahill, 'Ireland's Constitutional Amendability and Europe's Constitutional Ambition: the Lisbon Referendum in Context' (2008) 9(10) *German Law Journal* 1191. Oran Doyle has referred to the idea of 'consensus democracy' as a more appropriate description of the mix of direct and representative democratic tools seen in the Irish referendum context, Oran Doyle, 'Minority Rights and Democratic Consensus: The Irish Same-Sex Marriage Referendum' (2020) 15 *NTU Law Review* 21.

¹⁵⁶ *Doherty v Referendum Commission* [2012] IEHC 211, [2012] 2 IR 594.

¹⁵⁷ *ibid* [1].

¹⁵⁸ *ibid* [26]-[27].

are two of the core principles relevant to the referendum.¹⁵⁹ Endorsing earlier comments by Denham CJ to the effect that equality is a core constitutional value,¹⁶⁰ he said that the Referendum Commission's function is to ensure that arguments in a referendum campaign 'are fairly balanced so far as the public institutions of the State are concerned.'¹⁶¹ He went on to say that

'[i]n the referendum context, the value of all votes and each vote and the opinion of all citizens from the most humble to the most exalted are valued equally. It is in that context that, to aid political debate, the Commission was established by the Referendum Act of 1998 ...'¹⁶²

On the basis of how central the rights of equality and freedom of expression are to the referendum, and the Commission's important role in that context, Hogan J concluded that the Referendum Commission *must* be amenable to judicial review. He set the bar for review, however, of 'manifestly inaccurate or misleading' statements.¹⁶³ Subject to

'the parameters of the quite exceptional jurisdiction which I have identified, the courts must otherwise refrain from any involvement in the referendum process other than ensuring and preserving these core constitutional principles of popular sovereignty, freedom of speech and equality in the entire referendum campaign, so far as it concerns the institutions of the State.'¹⁶⁴

Doherty therefore makes clear that the courts' role as set out in *McKenna* extends to supervising the conduct of the Referendum Commission.¹⁶⁵ Hogan J's judgment accords with *McKenna* on the basis that it understands the courts' role as tied fundamentally to the 'core constitutional principles' underlying the referendum.¹⁶⁶ In particular, Hogan J's statement to the effect that judicial interference should be limited solely to ensuring these principles are upheld usefully clarifies what is perhaps implicit in the above judgments. Also significant is the high bar for interference set by Hogan J of 'manifestly inaccurate or misleading'.

¹⁵⁹ *Doherty v Referendum Commission* [2012] IEHC 211, [2012] 2 IR 594 [23] (Hogan J).

¹⁶⁰ *MD v Ireland* [2012] IESC 12.

¹⁶¹ *Doherty v Referendum Commission* [2012] IEHC 211, [2012] 2 IR 594 [25] (Hogan J).

¹⁶² *ibid.*

¹⁶³ *ibid* [38].

¹⁶⁴ *ibid* [39].

¹⁶⁵ *ibid* [31]-[43]. Presumably this extends *a fortiori* to the Electoral Commission.

¹⁶⁶ *ibid* [25].

Bláthna Ruane has suggested that Hogan J's use of 'manifestly inaccurate or misleading' is indicative of a more 'restrictive approach' to the judicial role than that established initially in *McKenna* and *Coughlan*.¹⁶⁷ However, this is not necessarily so. First, it is not clear that 'manifestly inaccurate' is any higher a standard than 'clear disregard'. My position here is supported by quoting more fully Hogan J's decision: he said that interference is justified 'where the statement was *plainly wrong* or, to adopt the words of Woolf J [...], "manifestly inaccurate or misleading".'¹⁶⁸ In both the clear disregard test and Hogan J's judgment in *Doherty*, what is required is that the misconduct can be easily (plainly, manifestly, or clearly) established. Second, Hogan J bases his judgment on the same foundations as the majority in *McKenna* and *Coughlan*: judicial interference should only be in furtherance of the People's ability to make decisions freely. The difference in language is therefore most likely reflective of the Referendum Commission's specific role. Unlike the defendants in *McKenna* and *Coughlan*, the Referendum Commission itself is tasked with carrying out an informative function. The wording of the test can therefore be understood as simply tailoring the standard of review to that context.

6.4.3 – McCrystal

The *McKenna* principles next arose for consideration in *McCrystal v Minister for Children and Youth Affairs*.¹⁶⁹ Here, the plaintiff contended that ostensibly impartial materials published by the Minister during the campaign leading up to the 2012 Children's Referendum breached the *McKenna* principles as they either explicitly or implicitly advocated for a Yes vote.¹⁷⁰ The materials included information leaflets, advertisements, and websites, all of which were funded by public money.¹⁷¹ In the High Court, Kearns P held against Mr McCrystal on the basis that he had failed to meet the standard for interference (the 'clear disregard' test) set out in *McKenna*.¹⁷² Kearns P said that 'the breach complained of must be something blatant and egregious', and not something which would 'mire' the court in exercising excessive scrutiny of 'each and every scrap of

¹⁶⁷ Bláthna Ruane, 'Reflections on Procedural Rights in Constitutional Referenda' (2012) 48 Irish Jurist 1, 42.

¹⁶⁸ *Doherty v Referendum Commission* [2012] IEHC 211, [2012] 2 IR 594 [38].

¹⁶⁹ *McCrystal v Minister for Children and Youth Affairs* [2012] IESC 53.

¹⁷⁰ *ibid* 3-4.

¹⁷¹ *ibid* 3.

¹⁷² *ibid* 4-6.

information disseminated' by the Minister.¹⁷³ On appeal, the Supreme Court unanimously (5-0) allowed the appeal and held that the material did breach the *McKenna* principles.¹⁷⁴

Two questions arose in the Supreme Court. First, what is the appropriate test to be applied to trigger court intervention? Second, did the materials in this case breach the *McKenna* principles?¹⁷⁵ On the first question, the Court unanimously held that Kearns P had erred in finding that the 'clear disregard' test requires something blatant and egregious.¹⁷⁶ Denham CJ said that the test is an objective one, where the intent of the respondents is irrelevant.¹⁷⁷ Further, the burden is on the appellant (i.e. she who alleges that the principles have been breached) to establish on the balance of probabilities that there has been a clear disregard of the principles.¹⁷⁸ O'Donnell J (as he then was) suggested in his judgment that, *contra* Kearns P, the clear disregard standard is appropriate in that it permits the granting of information 'without the type of hyper zealous textual analysis rightly deprecated by the learned President.'¹⁷⁹ The test of 'clear disregard' simply means that any breach can be clearly established.¹⁸⁰

On the second question, each member of the Supreme Court came to the conclusion that the material published by the Minister was clearly in breach of the *McKenna* principles because it implicitly advocated for a Yes vote.¹⁸¹ While there is useful analysis in the case of the specific problems with the material, what is more valuable for my purposes here is the commentary surrounding the *McKenna* principles generally and the purposes they serve. Denham CJ reiterated her position that the main principle from *McKenna* is that public monies cannot be spent in a partisan way in a campaign.¹⁸² This, she said, does not preclude individual members of the Government advocating for change in their personal, party, or Ministerial capacity (which includes the use of State transportation, etc) so long

¹⁷³ *ibid* 6.

¹⁷⁴ *McCrystal v Minister for Children and Youth Affairs* [2012] IESC 53, per Denham CJ, Murray, Fennelly, O'Donnell, and Hardiman JJ.

¹⁷⁵ *McCrystal v Minister for Children and Youth Affairs* [2012] IESC 53 [52] (Denham CJ), [34] (Murray J), [35] (O'Donnell J).

¹⁷⁶ *ibid* [30] (Denham CJ).

¹⁷⁷ *ibid* [30] (Denham CJ).

¹⁷⁸ *ibid* [32]-[33] (Denham CJ).

¹⁷⁹ *McCrystal v Minister for Children and Youth Affairs* [2012] IESC 53 [41] (O'Donnell J).

¹⁸⁰ *ibid* [35] (O'Donnell J).

¹⁸¹ *McCrystal v Minister for Children and Youth Affairs* [2012] IESC 53 [9] (Denham J).

¹⁸² *ibid* [37] (Denham CJ).

as no public monies are spent in favour of one side.¹⁸³ Further, she reaffirmed the central importance of the fundamental rights to equality, to a democratic process, to fair procedures, and to freedom of expression to the referendum.¹⁸⁴

Again, the link to democracy and the People's role in making the decision at referendum is important for Denham CJ.¹⁸⁵ Murray J also drew heavily on these principles, citing the Preamble and Article 6 and drawing analogy with US materials to emphasise that Ireland's constitutional democracy 'owes its legitimacy exclusively to the consent of the people'.¹⁸⁶ For him, as for Denham J and the majority in *McKenna*, the right to a fair and democratic referendum flows from the nature of the referendum and requires the Government to exercise no undue influence by partisan spending.¹⁸⁷ O'Donnell J concurred, but made his point more reservedly, stating simply that

'[i]n any proposal to amend the Constitution it is important that the People are permitted to make their decision on the merits of the proposal in a fashion which is as free from interference and distraction as possible.'¹⁸⁸

While O'Donnell J acknowledged that *McKenna* 'involved the application of broad principles derived from the structure and underlying theory of the Constitution', he did not spend the same time as Denham CJ and Murray J expanding on this, instead focusing on the requirements of the 'clear disregard' test.¹⁸⁹

McCrystal therefore reemphasises the core principles of the *McKenna* judgment and, in particular, highlights their foundation in the democratic nature of the state. One striking element of the judgment is the time spent by numerous judges justifying the prohibition on partisan campaigning with international examples.¹⁹⁰ Denham CJ, for example, suggested that *McKenna* was necessary to bring Ireland's law in line with the Venice Commission's Code of Good Practice and made analogy to other jurisdictions.¹⁹¹ Further, the clarification that the use of incidental aspects of Government like transport, offices, etc, is perhaps a recognition by the Court of the uncertainty created in the wake of

¹⁸³ *ibid* [26] (Murray J).

¹⁸⁴ *ibid* [37] (Denham CJ).

¹⁸⁵ *ibid*, [21] (Denham CJ).

¹⁸⁶ *McCrystal v Minister for Children and Youth Affairs* [2012] IESC 53 [1] (Murray J).

¹⁸⁷ *ibid* [26].

¹⁸⁸ *McCrystal v Minister for Children and Youth Affairs* [2012] IESC 53 [41] (O'Donnell J).

¹⁸⁹ *ibid* [37]-[39] (O'Donnell J).

¹⁹⁰ *ibid* [39] (Murray J), [47]-[51] (Denham CJ).

¹⁹¹ *ibid* [40]-[41] (Denham CJ).

McKenna.¹⁹² In terms of the judicial role, *McCrystal* restates the principle that the courts are obliged to supervise the Executive's role in referendums. It reiterates the position that the referendum is a place for the People to make a decision free from influence by the other organs of government, which in turn grants the courts a significant role in supervising the conduct of those organs by reference to general constitutional principles, all of which buttress one another.¹⁹³ While the impugned conduct in *McKenna* and *McCrystal* is unequal in a broadly intuitive way, by locating its foundation in the abstract and unspecific principle of democracy, there is a remote possibility that more indirect breaches are struck down and the requirements of impartiality become even more onerous.¹⁹⁴ As of yet, however, no such development has occurred.

6.4.4 – *Burke* and the 'Clear Disregard' Test

One final case worth discussing in relation to how the *McKenna* principles have developed is *Burke v Minister for Education*.¹⁹⁵ While this case does not discuss the *McKenna* principles directly, O'Donnell CJ commented on the 'clear disregard' test and, importantly, suggested that the test should be changed when rights are interfered with. Arising out of disruptions to the Leaving Certificate examinations due to the Covid-19 pandemic, the Minister for Education had provided for a calculated grades scheme ("CGS") wherein teachers could provide estimated grades for their students. The plaintiff was prevented from benefitting under this scheme because it precluded the parents of home-schooled children from providing such estimated grades. The plaintiff challenged the scheme as an exercise of the Executive power, alleging that it violated his constitutional rights and was in clear disregard of the Constitution.

The significant holding of *Burke* is O'Donnell CJ's conclusion that judicial interference with Executive action can be justified according to a different standard than 'clear

¹⁹² *ibid* [37] (Denham CJ). ie On a strict reading of *McKenna*, the rules could prohibit members of governing parties from engaging in campaigning in any way that attracts cost to the public purse, such as using their ministerial cars to drive to campaign events, etc.

¹⁹³ Gerard Hogan, Gerry Whyte, David Kenny, Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2018) [8.1.48].

¹⁹⁴ e.g., could a proposal to amend the Constitution to remove voting rights of some class of persons be declared unconstitutional because the Executive, in proposing that amendment, failed to act in accordance with the principles of democracy and equality in the Constitution?

¹⁹⁵ *Burke v Minister for Education* [2022] IESC 1, [2022] 1 ILRM 73.

disregard' where the action interferes with constitutional rights.¹⁹⁶ After examining the history of the clear disregard test,¹⁹⁷ O'Donnell CJ could see no reason why an interference with fundamental rights by the Executive should be reviewed at a higher standard than interference by the Legislature. Accordingly, he held that

'where it is alleged that an executive action infringes the constitutional rights of the citizens [...] there is no reason why the Court should apply a different standard if it is established that the constitutional right is affected.'¹⁹⁸

In short, that standard is closer to a proportionality analysis.¹⁹⁹ However, the clear disregard test is not wholly relegated to history. After a brief discussion of relevant cases, O'Donnell CJ held that

'where the Constitution calls for a broad-based judgment, and does not constrain it by any specific restrictions or standards, [...] the primary accountability for such action lies under Article 28 with the Dáil, and [...] this reinforces the analysis of the judicial role as arising only in the cases of clear disregard.'²⁰⁰

While not explicitly related to referendums, O'Donnell CJ's judgment is significant in its alteration of the test to be applied when assessing Executive compliance with the Constitution. Since the *McKenna* principles are based on fundamental rights such as equality, fair procedures, and expression, any future case in which Government action is impugned will likely be decided according to this standard. Ultimately, this has not altered the judicial role in referendums in any significant way so far: the courts still retain the power and duty to assess Executive action for compliance with the *McKenna* principles. However, the appropriate balance between the emphatic language around democracy and core constitutional principles in *McKenna* and the proportionality analysis in *Burke* remains to be tested in the courts.

6.5 – Overturning a Referendum Result

¹⁹⁶ *Burke v Minister for Education* [2022] IESC 1, [2022] 1 ILRM 73 [61] (O'Donnell CJ).

¹⁹⁷ Including *Boland v An Taoiseach* [1974] IR 338, *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10, [1996] ILRM 81 and *Kavanagh v Government of Ireland* [1996] 1 IR 321.

¹⁹⁸ *Burke v Minister for Education* [2022] IESC 1, [2022] 1 ILRM 73 [61] (O'Donnell CJ).

¹⁹⁹ *ibid* [94] (O'Donnell CJ).

²⁰⁰ *ibid* [60] (O'Donnell CJ).

6.5.1 – Hanafin

As discussed in §6.2.2 above, sections 42 and 43 of the Referendum Act 1994 provide a mechanism for challenging the validity of a referendum result in the High Court. Section 43 specifically grants to the Court the ability to overturn a referendum result in a constituency where it is satisfied the result has been materially affected by one or more instances of misconduct as set out in section 42. The plaintiff in *Hanafin* sought to have the result of the 1995 Divorce referendum set aside on the basis that the Government's advertising campaign had materially affected the result.²⁰¹ When the case came before the Supreme Court, the Court was asked to consider whether sections 42 and 43 permit a petitioner to challenge a referendum certificate on the basis of constitutional wrongdoing in the referendum campaign.²⁰² The Court was also asked to clarify the standard of proof to be met when challenging the impact of the campaign on the decision made at referendum.²⁰³

On the first question, the Supreme Court unanimously (Hamilton CJ, O'Flaherty, Blayney, Denham, Barrington JJ) held that if the Oireachtas had not intended the legislation to cover constitutional wrongdoing, it would have 'failed in its obligation to respect, and so far as practicable, to defend and vindicate the democratic process' and the constitutional rights of the citizen.²⁰⁴ Hamilton CJ said that

'[h]aving regard to the democratic nature of the State [...] and the right of the people to decide in final appeal all questions of national policy [...], the submission to the people of a proposal for the amendment of the Constitution, undoubtedly a question of national policy, *must be in accord with and have due regard to the processes and rights acknowledged by the Constitution*, and inherent in and implied by the democratic nature of the State and the constitutional role of the people therein.'²⁰⁵ (emphasis added)

²⁰¹ Bear in mind that the referendum had passed by a margin of just 9,000 votes with over 1.6 million votes cast.

²⁰² *Hanafin v Minister for Environment* [1996] IESC 6, [1996] 2 IR 321, i.e., whether the phrase 'conduct in the referendum' implicitly provided for this sort of constitutional misconduct.

²⁰³ *ibid.*

²⁰⁴ *Hanafin v Minister for Environment* [1996] 2 IR 321 (SC) 424 (Hamilton CJ).

²⁰⁵ *ibid* 422 (Hamilton CJ). Hamilton CJ identified the following as rights inherent in the democratic nature of the state: "the right of the people to be informed with regard to the nature of the issue involved and its implications; the right of freedom of discussion thereon; the right of people to persuade and to be persuaded; the right of people to campaign, either individually or in association, in favour of or against the proposal;

As such, the meaning of the phrase ‘conduct in the referendum’ in section 43(1)(b) was widened to include unlawful and unconstitutional conduct in the referendum campaign which materially affected the result of the referendum.²⁰⁶ Such conduct can be unconstitutional for failure to have regard ‘for the constitutional rights of the citizens and the adoption of fair procedures.’²⁰⁷

In relation to the second question (the standard of proof to be met) the Supreme Court held that the Act lays the onus of proof on the petitioner to establish that the misconduct materially affected the result.²⁰⁸ Hamilton CJ held that this position is

‘not only required by the Act but is in accord with the constitutional right of the citizens to vote in a constitutional referendum and to have the result thereof accepted, respected and not interfered with unless it is established that such result was materially affected by alleged wrongdoing of such a nature and effect as to vitiate the Referendum.’²⁰⁹

While he acknowledged the difficulties with establishing material affect owing to the secrecy of the ballot and the consequent impossibility of determining exactly why people voted, Hamilton CJ justified his decision by saying that ‘the people are presumed to know what they want, to have understood the proposed amendment submitted to them and all of its implications.’²¹⁰ Dismissing the case, Hamilton CJ held that the High Court was entitled to come to its decision on the merits of expert evidence adduced – that it was not sufficient to establish material affect.²¹¹

In his concurring judgment, Barrington J agreed with Hamilton CJ’s analysis of section 43 and offered further clarification on the requirements of the section.²¹² He rejected the suggestion that the burden should be one of beyond a reasonable doubt, saying that to adopt such a high bar would cause the Court to ‘fall short of its duty as the final defender

the right of the people to vote thereon in the secrecy of the ballot and to have the proposal enacted into law if the majority of the votes cast shall have been cast in favour of the proposal.”

²⁰⁶ *ibid.*

²⁰⁷ *ibid* 422 (Hamilton CJ) citing with approval his judgment in *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10.

²⁰⁸ *Hanafin v Minister for Environment* [1996] 2 IR 321 (SC) 422 (Hamilton CJ).

²⁰⁹ *ibid* 426-427 (Hamilton CJ)

²¹⁰ *ibid* 430 (Hamilton CJ).

²¹¹ *ibid* 431 (Hamilton CJ).

²¹² *Hanafin v Minister for Environment* [1996] 2 IR 321 (SC) 452 (Barrington J).

of the Constitution.’²¹³ He said the petitioner must produce witnesses at trial and that the presumption of constitutionality applied such that the Court ‘will not likely set aside what appears, prima facie, to be an act of the sovereign people.’²¹⁴ The burden on the petitioner is thus a heavy one.²¹⁵ Rejecting the claims of the applicant in this case, Barrington J emphasised that the vital question is what happened on the day of the poll.²¹⁶ The Government ceased its unconstitutional campaigning after *McKenna (No 2)*, and since there was no primary evidence from voters because of the secrecy of ballot, he said the Court could not ‘accept secondary evidence from experts who seek to second guess why the people voted the way they did.’²¹⁷

On the question of whether the *McKenna* decision can really be said to have prevented the unconstitutional campaign from materially affecting the result, Denham J (as she then was) said that since this is a State with an ‘educated and sophisticated electorate who had immediate access to information on the decision and the reaction thereto’ she had no doubt that the voters were aware of the mistake and not unduly influenced by it.²¹⁸ Both Blayney and O’Flaherty JJ agreed that the stopping of the campaign a week short of the referendum date was a significant factor weighing against the petitioner.²¹⁹ Blayney J acknowledged the difficulty for the petitioner in demonstrating material affect, particularly since the Act, he said, was designed to deal mainly with aberrant circumstances in individual constituencies, rather than the entire country.²²⁰

6.5.2 – Jordan

The ability to overturn a referendum result arose for consideration again in *Jordan v Minister for Children and Youth Affairs*,²²¹ where the plaintiff challenged the constitutionality of section 43 in light of the *Hanafin* decision. The petition was originally launched in the High Court in the wake of the *McCrystal* decision in which, as noted

²¹³ *ibid* 456 (Barrington J).

²¹⁴ *ibid* 457 (Barrington J).

²¹⁵ *ibid* 457 (Barrington J).

²¹⁶ *ibid* 457 (Barrington J).

²¹⁷ *ibid* 458 (Barrington J).

²¹⁸ *Hanafin v Minister for Environment* [1996] 2 IR 321(SC) 452 (Denham J).

²¹⁹ *Hanafin v Minister for Environment* [1996] 2 IR 321 (SC) 437 (O’Flaherty J), 444 (Blayney J).

²²⁰ *Hanafin v Minister for Environment* [1996] 2 IR 321 (SC) 443-444 (Blayney J).

²²¹ *Jordan v Minister for Children and Youth Affairs* [2015] IESC 33, [2015] 4 IR 232.

above, the Supreme Court had declared the Minister's information campaign unconstitutional.²²² The plaintiff submitted a number of arguments: that *Hanafin* was wrongly decided and should not be followed; that either the requirements of the material effect test should not be interpreted to mean a different result would have ensued, or that on proof of an unconstitutional interference with a referendum the onus should shift to the State to demonstrate no material effect on the outcome; and that the trial should have been conducted as an inquiry with no onus of proof on the petitioner.²²³

A seven-judge Supreme Court unanimously dismissed all of the submissions.²²⁴ Denham CJ reiterated that to establish 'material affect' under section 42(3)(b) a petitioner must prove that the matter substantially altered or changed the outcome of the entire referendum.²²⁵ She said that the high bar set in *Hanafin* is justified on the basis that 'a decision of the People in a referendum, in light of the Constitution, has a primary position in a hierarchy of rights, but that it should be applied harmoniously.'²²⁶ The suggestion here is that since the Constitution characterises a decision made by the People at referendum as the ultimate political act which is not to be interfered with, it enjoys a presumption of validity which is difficult to dislodge. However, since the Constitution also requires that the core principles at play in referendums (equality, democracy, etc) are vindicated,²²⁷ the courts *must* retain some power to declare a referendum result invalid where those principles are breached. Otherwise, the courts would be unable to remedy breaches and vindicate the fundamental principles underlying the referendum. The Supreme Court suggested that by setting a particularly high bar for overturning a result and therefore granting the People's decision primacy, *Hanafin* and the 1994 Act strike the appropriate balance.

O'Donnell J (as he then was) similarly justified the material affect test according to the balancing act between the *McKenna* principles and the decision of the people.²²⁸ The appropriate standard, he said, involves establishing that 'it is reasonably possible that the

²²² *Re Thirty First Amendment of the Constitution (Children) Bill 2012* [2013] IEHC 458.

²²³ *Jordan v Minister for Children and Youth Affairs* [2015] IESC 33, [2015] 4 IR 232.

²²⁴ Denham CJ, Hardiman, O'Donnell, Clarke, MacMenamin, Laffoy, Dunne JJ.

²²⁵ *Jordan v Minister for Children and Youth Affairs* [2015] IESC 33, [2015] 4 IR 232 [54] (Denham CJ).

²²⁶ *Jordan v Minister for Children and Youth Affairs* [2015] IESC 33, [2015] 4 IR 232 [120] (Denham CJ).

²²⁷ As per the *McKenna* rules.

²²⁸ *Jordan v Minister for Children and Youth Affairs* [2015] IESC 33, [2015] 4 IR 232 [51] (O'Donnell J).

irregularity or interference identified affected the result.’²²⁹ Clarifying, he said that ‘the object of this test is to identify the point at which it can be said that a reasonable person would be in doubt about, and no longer trust, the provisional outcome of the election or referendum.’²³⁰ O’Donnell J then laid out five rules of ‘common sense’ when considering a case on material affect:²³¹

- (a) by the time the test is in play, there will have been a finding of irregularity or interference in conduct of a referendum;
- (b) since these irregularities by their nature have the capacity to distort a referendum result or public perception of it, a petitioner is therefore a long way towards establishing their case;
- (c) evidence of opinion polls, voting trends, and expert opinions are all relevant considerations;²³²
- (d) the court should be mindful of the number (or lack) of people willing to come forward to testify that they were ‘duped’ by the irregularity;
- (e) finally, the court should have particular regard to the margin of the result.²³³

So, while it is one thing to establish some irregularity – even constitutionally impermissible conduct – in a referendum, it is another thing entirely to have the result set aside. This all accords with O’Donnell J’s earlier position in *McCrystal* where he said that there is a

‘large, and constitutional distinction between restraining a breach of the Constitution by the Government (or anyone else) occurring in the course of a referendum campaign, and the interference with and setting aside of, a decision made by the People whose right it is in final appeal to decide all questions of national policy.’²³⁴

The significance of the judiciary’s role here should not be understated. First, the fact that the 1994 Act grants to the courts the ability to overturn a referendum result and order a re-

²²⁹ *Jordan v Minister for Children and Youth Affairs* [2015] IESC 33, [2015] 4 IR 232 [85] (O’Donnell J).

²³⁰ *ibid.* This idea of ‘trust’ or ‘confidence’ in the referendum result is reflected in the judgments of Clarke and MacMenamin JJ as well.

²³¹ The authors of *Kelly* note that this test is more generous to potential applicants than the previous version from *Hanafin* Gerard Hogan, Gerry Whyte, David Kenny, Rachael Walsh, *Kelly: The Irish Constitution* (Bloomsbury Professional 5th edn, 2018) [8.1.55].

²³² Including evidence from experts such as political scientists and commentators on both the progress of a campaign and the impact of the irregularity and any court determination.

²³³ *Jordan v Minister for Children and Youth Affairs* [2015] IESC 33, [2015] 4 IR 232 [87] (O’Donnell J).

²³⁴ *McCrystal v Minister for Children and Youth Affairs* [2012] IESC 53 [40] (O’Donnell J).

run of the vote in a specific constituency is noteworthy but perhaps understandable: rerunning seems the most reasonable remedy where a small enough number of voters have been unlawfully impacted by, say, an electoral offence or an illegal blockade. The development of this role through *Hanafin* and *Jordan* to what is now a general power to overturn a referendum result entirely and order it to be run again nationwide is much more significant. When one considers the courts' repeated and emphatic statements regarding the sacrosanct nature of the People's decision-making power at referendum, this role takes on a profound character.

And yet, it seems inevitable in light of the *McKenna* judgment.²³⁵ It would be peculiar for the courts to draw on such profound ideals as democracy and popular sovereignty as justification for protecting the equality and impartiality of a referendum campaign (as in *McKenna*), and yet refuse to declare a result invalid in cases of clear and unambiguous evidence that the result was affected by constitutional misconduct. If democracy and popular sovereignty require the *campaign* to be closely guarded, then surely they require the *result* to be similarly protected. To allow the Executive to unduly influence the result of a referendum where it might only be discovered after the fact would fail to prevent the Executive from interfering with these core principles.

At the same time, the Supreme Court judgments acknowledge that the 'material affect' test *must* be particularly onerous, stressing that this is justified according to the weight attached to a decision of the People at referendum. Birmingham P captured this in a later case where he decried the suggestion that referendum challenges should become routine.²³⁶ To challenge the result in court, he said, will at minimum 'delay the implementation of the will of the People' and at worst 'amounts to the frustration of the will of the People as envisaged by Article 46 and Article 47 and a frustration of the democratic order envisaged by Article 5.'²³⁷ While the courts have a responsibility to uphold the core principles, their first and foremost duty is to respect the sanctity of the People's decision.

²³⁵ Ann Sherlock, 'Constitutional Change, Referenda and the Courts in Ireland' [1997] Public Law 125, 136.

²³⁶ *Jordan v Ireland* [2018] IECA 291.

²³⁷ *Jordan v Ireland* [2018] IECA 291 [58] (Birmingham P).

6.6 – Reviewing the Content of Referendum Proposals

As established in the preceding sections, the Judiciary have an important role to play in supervising the actions of the other organs of government during the referendum for compliance with core constitutional principles. In exercising that role, the courts can remedy any improper action by requiring certain conduct be ceased,²³⁸ and more significantly by declaring a referendum result invalid and thus requiring the vote to be run again.²³⁹ Aside from that function, the courts have also been asked to take on the role of reviewing the content of amendment proposals for compliance with the Constitution. The courts have consistently refused to entertain the suggestion that they enjoy such a role and have relied heavily on the separation of powers in doing so. It is worth discussing a few of these cases in order to understand why exactly the separation of powers precludes this role.

6.6.1 – Roche

The first relevant case here is *Roche v Ireland*.²⁴⁰ The plaintiff in this case claimed that the proposed 8th Amendment (to insert a protection for the right to life of the unborn) as put before the People was invalid because the wording was ambiguous and therefore, since he could not rationally decide which way to vote, deprived him of his constitutional right to vote.²⁴¹ In the High Court, Carroll J dismissed the case, rejecting outright the suggestion that the courts enjoyed a power to scrutinise the wording of a duly passed amendment bill.²⁴²

Carroll J reiterated that the courts have consistently held that they have no power to examine a bill before it is passed by the Oireachtas and becomes law.²⁴³ The principal case here is *Wireless Dealers Association v Fair Trade Commission*,²⁴⁴ in which Maguire CJ

²³⁸ See generally §6.4.

²³⁹ See generally §6.5.

²⁴⁰ *Roche v Ireland* [1983] 6 JIC 1701 (17 June 1983).

²⁴¹ *ibid.*

²⁴² *ibid.*

²⁴³ *ibid.*

²⁴⁴ *Wireless Dealers Association v Fair Trade Commission* (Supreme Court, No. 16 of 1956, unreported, delivered 7th March 1956).

held that the Constitution does not empower the courts to supervise the legislative process and that they therefore had no power to interfere with a legislative bill.²⁴⁵ Carroll J held that by participating in passing an amendment at referendum, the People ‘are as much part of the legislative process as are the proceedings in the Oireachtas and the signing by the President.’²⁴⁶ To ask the High Court to supervise the content of referendum proposal would, therefore, amount to supervision of the ‘even more solemn process of legislation comprised in a constitutional referendum, as laid down by the Constitution.’²⁴⁷ She said finally that it ‘would be totally opposed to the separation of powers provided by the Constitution that the Courts could prevent any particular wording, duly passed by the Oireachtas, from being put to the people of Ireland.’²⁴⁸ Reviewing the wording of a proposal would see the court interfering not only with the legislative process but also the People’s role as decision-maker at referendum.

6.6.2 – Finn

The very same year, the 8th Amendment proposal was challenged again by the plaintiff in *Finn v Minister for the Environment*.²⁴⁹ The plaintiff in this case alleged that because the right to life of the unborn was already protected in the Constitution,²⁵⁰ the proposed amendment was superfluous and therefore unconstitutional.²⁵¹ In the High Court, Barrington J accepted the defendant’s submission that the Court enjoyed no power to review the content of a proposal, nor any power to restrain the Houses of the Oireachtas from putting a proposal to the People at referendum.²⁵² He further rejected the petitioner’s suggestion that the amendment power is restricted to simple variation, addition or repeal, saying that by Article 46.1 the People ‘intended to give themselves full power to amend any provision of the Constitution and that this power includes a power to clarify or make

²⁴⁵ *Wireless Dealers Association v Fair Trade Commission* (Supreme Court, No. 16 of 1956, unreported, delivered 7th March 1956).

²⁴⁶ *Roche v Ireland* [1983] 6 JIC 1701 (17 June 1983).

²⁴⁷ *ibid.*

²⁴⁸ *ibid.*

²⁴⁹ *Finn v Minister for Environment* [1983] IR 154.

²⁵⁰ Cited in this respect were: *McGee v Attorney General* [1973] IR 284 (SC) 321 (Walsh J) and 335 (Griffin J); *G v An Bord Uchtála* [1980] IR 32 (SC) 69 (Walsh J); and *Norris v Attorney General* [1983] IESC 3; [1984] IR 36 103 (McCarthy J).

²⁵¹ *Finn v Minister for Environment* [1983] IR 154.

²⁵² *Finn v Minister for Environment* [1983] IR 154 (SC) 162 (Barrington J).

more explicit anything already in the Constitution.’²⁵³ The Supreme Court unanimously upheld the judgment of Barrington J.²⁵⁴ O’Higgins CJ commented in support that

‘[t]he judicial power to review legislation on the ground of constitutionality is confined (save in cases to which Article 26 of the Constitution applies) to enacted laws. Save in these excepted cases, there is no jurisdiction to construe or to review the constitutionality of a Bill, whatever its nature. The Courts have no power to interfere with the legislative process.’²⁵⁵

The appeal was dismissed. As in *Roche*, the Supreme Court here was clear that the separation of powers entirely precludes the courts from reviewing the content of a legislative proposal. Referendum proposals enjoy this shielding from scrutiny both because they are legislative proposals themselves and also because the power to decide whether to adopt it is granted exclusively to the People.

6.6.3 – Re Article 26 and the Information (Termination of Pregnancies) Bill 1995

The limits of this doctrine were tested in *Re Article 26 and the Information (Termination of Pregnancies) Bill 1995*.²⁵⁶ The case came about when President Mary Robinson invoked Article 26 to refer a bill prepared on foot of the 14th Amendment (which provided for information about abortion services abroad to be made available) to the Supreme Court to test its constitutionality.²⁵⁷ In the course of the hearing, counsel opposing its constitutionality argued that the provision inserted by the 14th Amendment was invalid in so far as it conflicted with the natural law right to life of the unborn and its corollary rights.²⁵⁸ The consequence of the argument, essentially, would be to place a substantive limit on constitutional amendment. This position drew on a substantial body of precedent in which the superior courts had affirmed that the Constitution does incorporate aspects

²⁵³ *Finn v Minister for Environment* [1983] IR 154 (SC) 163-164 (Barrington J). Barrington J here drew analogy between the wording and arguments run in the case of *State (Ryan) v* [1935] IR 170 regarding the specific wording of the amendment power. See Ann Sherlock, ‘Constitutional Change, Referenda and the Courts in Ireland’ [1997] Public Law 125.

²⁵⁴ *Finn v Minister for Environment* [1983] IR 154 (SC).

²⁵⁵ *Finn v Minister for Environment* [1983] IR 154 (SC) 164 (O’Higgins CJ).

²⁵⁶ *Re Article 26 and the Information (Termination of Pregnancies) Bill 1995* [1995] IESC 9, [1995] 1 IR 1.

²⁵⁷ *ibid.*

²⁵⁸ *ibid.*

of the natural law,²⁵⁹ as well as textual provisions which identify certain rights in natural law language.²⁶⁰

The Supreme Court, in a single judgment, rejected the suggestion that the natural law imposed any substantive limits on the People's power of amendment at referendum,²⁶¹ and upheld the constitutionality of the bill. The Court held that the Constitution is the fundamental law of the State and that the natural law is not superior to the Constitution.²⁶² This was justified in part by citing the decision of Budd J in the earlier *Byrne* case, where he stated that

‘[i]t is the people who are paramount ... The State is not internally Sovereign but, in internal affairs, subject to the Constitution, which limits, confines and restricts its powers.’²⁶³

As such, the People were entitled under Article 46 to amend the Constitution in any way they saw fit.²⁶⁴ Despite the apparent conflict with natural law, the Constitution remained the ‘fundamental and supreme law of the State representing as it does the will of the people.’²⁶⁵

In settling the apparent conflict between the 8th and 14th Amendments, the Supreme Court looked to the intention of the electorate when voting on the 14th Amendment which, they held, was clearly to allow this sort of legislation be enacted.²⁶⁶ The Supreme Court also looked to the Preamble in support of the proposition that the Constitution was designed to change and that this would inevitably bring about conflict from time to time, saying that

‘[t]he preamble envisages a constitution which can absorb or be adapted to such changes. In other words, the Constitution did not seek to impose for all time the

²⁵⁹ e.g. *McGee v Attorney General* [1973] IR 284. See generally Aileen Kavanagh, ‘The Irish Constitution at 75 Years: Natural Law, Christian Values and the Ideal of Justice’ (2012) 48 *Irish Jurist* 71.

²⁶⁰ e.g. ‘imprescriptible’ and ‘inalienable’ Article 41.1.1 *Bunreacht na hÉireann*.

²⁶¹ For critique see, Oran Doyle, ‘Constitutional Identity and Unamendability’ in Ran Hirschl and Yaniv Roznai (eds), *Deciphering the Genome of Constitutionalism: The Foundations and Future of Constitutional Identity* (Cambridge University Press 2024).

²⁶² *Re Article 26 and the Information (Termination of Pregnancies) Bill 1995* [1995] IESC 9, [1995] 1 IR 1; see generally Aileen Kavanagh, ‘The Irish Constitution at 75 Years: Natural Law, Christian Values and the Ideal of Justice’ (2012) 48 *Irish Jurist* 71.

²⁶³ *Byrne v Ireland* (1972) IR 241.

²⁶⁴ *Re Article 26 and the Information (Termination of Pregnancies) Bill 1995* [1995] IESC 9, [1995] 1 IR 1.

²⁶⁵ *ibid.* On the difficulties associated with both natural law and popular sovereignty as underlying principles for the Irish Constitution, see Oran Doyle, ‘Legal Validity: Reflections on the Irish Constitution’ (2003) 25 *DULJ* 56.

²⁶⁶ *ibid.*

ideas prevalent or accepted with regard to these virtues at the time of its enactment.²⁶⁷

While this judgment has been criticised for some inconsistency with precedent,²⁶⁸ the principle that the courts will not read substantive limits into the amendment power is in line with its approach as set out above in *Roche* and *Finn*.²⁶⁹ While the courts are willing to accept a role to supervise referendums where the procedure is flawed or there has been an abuse of process, there has been a consistent line of thinking that the substantive merits of an amendment are off-limits for the Judiciary.²⁷⁰

6.6.4 – *Slattery*

This position is supported further in *Slattery v An Taoiseach*.²⁷¹ In this case, the plaintiff sought to prevent the taking of the referendum on the Maastricht Treaty on the basis that the Government had not adequately informed voters of the benefits and disadvantages of the Treaty.²⁷² The Court rejected the contention that the Government had a positive obligation to provide information about the amendment and unanimously rejected the suggestion that they had any power to intervene here.²⁷³ Hederman J commented that a proposal to amend the Constitution cannot *per se* be unconstitutional, and McCarthy J stated that it would be wholly unwarranted and unwarrantable for the judiciary to intervene.²⁷⁴ McCarthy J said that

‘[a]s the Courts are jealous of their constitutional role and will repel any attempt by legislature or executive to interfere in the judicial domain, so must the Courts be jealous of what lies wholly within the domain of the legislature, the executive,

²⁶⁷ *Re Article 26 and the Information (Termination of Pregnancies) Bill 1995* [1995] IESC 9, [1995] 1 IR 1.

²⁶⁸ In particular see Neville Cox ‘Judicial Activism, Constitutional Interpretation and the Problem of Abortion: *Roe v Wade* (1973) and *X v AG* (1992)’ in O’Dell (ed) *Leading Cases of the Twentieth Century* (Dublin, 2000). Cox argues here that by looking to the intention of voters, the Supreme Court broke with its precedent set in the *X* case.

²⁶⁹ *Roche v Ireland* [1983] 6 JIC 1701 (17 June 1983); *Finn v Minister for Environment* [1983] IR 154.

²⁷⁰ See generally David Kenny and Aileen Kavanagh, ‘Are the People Masters? Constitutional Referendums in Ireland’ in Richard Albert and Richard Stacey (eds) *The Limits and Legitimacy of Referendums* (OUP 2021); Aileen Kavanagh, ‘The Irish Constitution at 75 Years: Natural Law, Christian Values and the Ideal of Justice’ (2012) 48 *Irish Jurist* 71. For a defence of this position see Bairbre O’Neill, ‘The Referendum Process in Ireland’ (2000) 35 *Irish Jurist* 305.

²⁷¹ *Slattery v An Taoiseach* [1993] 1 IR 286.

²⁷² *Slattery v An Taoiseach* [1993] 1 IR 286.

²⁷³ *ibid.*

²⁷⁴ *Slattery v An Taoiseach* [1993] 1 IR 286 (SC) 301 (McCarthy J).

and the people – jealous to ensure that the Courts do not intervene in the constitutional process I have outlined.²⁷⁵

The Court again relied on the decision in *Wireless Dealers Association* to the effect that the Constitution intentionally prohibits the Judiciary from reviewing the constitutionality of a bill, including an amendment proposal.²⁷⁶ This idea – that the separation of powers expressly precludes judicial cognisance of an amendment proposal – fits neatly with the approach taken in *McKenna* and subsequent decisions that the People enjoy an exclusive domain of action in the same way as the three organs of government. Whatever else might be in the People’s domain, the Constitution is explicit that it includes the ability to decide to amend the Constitution with no substantive limits imposed by the Legislature, Executive, or, importantly, the Judiciary.

6.6.5 – Riordan

Barrington J expressly endorsed this approach in the final case relevant to this section, *Riordan v An Taoiseach*.²⁷⁷ The plaintiff here made a number of novel arguments challenging the implementation of the 15th Amendment of the Constitution Act. Dismissing the case, Barrington J emphasised that the courts have no role to play in relation to the content of a proposed referendum, and that there can be no question of a constitutional amendment properly placed before the people and approved by them being unconstitutional.²⁷⁸ The courts’ role is merely to ensure that the proposal is properly before the people in accordance with Article 46.²⁷⁹ The authors of *Kelly* read *Riordan* together with *Hanafin* and *Re Article 26 and the Regulation of Information (Termination of Pregnancies) Bill 1995* as the Supreme Court affirming the ‘supremacy of popular sovereignty by referendum as a key principle of the Constitution’, with the consequence that ‘there are (almost) no limits to the people’s right to amend the Constitution by way of referendum’.²⁸⁰ These cases marked a move away from the position adopted by Kennedy CJ in his dissent in *State (Ryan) v Lennon*²⁸¹ which suggested that amendments may be

²⁷⁵ *ibid* 301 (McCarthy J).

²⁷⁶ *Slattery v An Taoiseach* [1993] 1 IR 286 (SC) 299 (Hederman J).

²⁷⁷ *Riordan v An Taoiseach (No. 1)* [1999] 4 IR 321 (SC) 335 (Barrington J).

²⁷⁸ *ibid* 335 (Barrington J).

²⁷⁹ *ibid*.

²⁸⁰ Gerard Hogan, Gerry Whyte, David Kenny, Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2018) [8.1.17] – [8.1.19].

²⁸¹ [1935] IR 170.

constrained by natural law.²⁸² On the basis of this new approach, then, the Judiciary enjoy no role of supervising the content of an amendment.²⁸³

6.7 – Reviewing the Referendum Procedure

As discussed briefly in Section 6.2, the courts have a role to play in reviewing the process by which a referendum is placed before the people in accordance with Article 46. While the Judiciary have been clear that this role exists and is an important one, cases taken on this basis demonstrate that the bar for compliance with Article 46 is low. As noted above, in *Morris v Minister for the Environment*, Kelly J rejected the suggestion that the use of Schedules to an amendment was prohibited by Article 46.²⁸⁴ Further, Kelly J could find no mandatory obligation in Article 46 that the proposal be contained in the main body of the Constitution.²⁸⁵ Relying on the judgment of Barrington J in *Riordan*, Kelly J stated that Article 46 does not expressly prohibit ‘an amendment to the Constitution by reference to a document extraneous to it’ nor ‘the making of an amendment which is conditional upon some other event taking place’.²⁸⁶ As noted by the authors of *Kelly*, the decisions in *Morris* and *Riordan* accord with the proposition that the content of amendments is unlimited by emphasising that there are no limits to the capacity of the People to amend the Constitution, including by way of conditional amendments or extraneous documents.²⁸⁷

The procedure laid out at Article 46 arose for consideration again in *MFM v MC*.²⁸⁸ The plaintiff in this case argued that Article 29.3 of the Constitution (wherein it is stated that Ireland accepts the generally recognised principles of international law) had the effect of incorporating the European Convention on Human Rights into the Constitution itself.²⁸⁹

²⁸² Gerard Hogan, Gerry Whyte, David Kenny, Rachael Walsh, *Kelly: The Irish Constitution* (5th edn Bloomsbury Professional 2018) [8.1.17] – [8.1.20].

²⁸³ The authors of *Kelly* note the contrast between this position and the views of other constitutional courts, including the German Constitutional Court, the Indian Supreme Court. Gerard Hogan, Gerry Whyte, David Kenny, Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2018) [8.1.17] – [8.1.20].

²⁸⁴ *Morris v Minister for Environment* [2002] IEHC 5, [2002] 1 IR 326.

²⁸⁵ *ibid.*

²⁸⁶ *ibid.*

²⁸⁷ Gerard Hogan, Gerry Whyte, David Kenny, Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2018) [8.1.24].

²⁸⁸ *MFM v MC (Proceeds of Crime)* [2000] IEHC 109, [2001] 2 IR 385.

²⁸⁹ *ibid.*

O’Sullivan J rejected the argument as entirely repugnant to the fundamental principles underpinning the Constitution, in particular the procedure for amendment laid out at Article 46.²⁹⁰ The requirements of that procedure mean that the Constitution cannot be implicitly amended.²⁹¹

When it comes to the content of an amendment proposal, the Judiciary have been clear that they have no supervisory function. Cases like *Finn* and *Slattery* are emphatic in their assertion that an amendment properly placed before the people cannot be declared unconstitutional, and that the courts are prevented from scrutinising an amendment proposal.²⁹² The decision in *Re Article 26 and the Information (Termination of Pregnancies) Bill 1995* is equally emphatic on this point, and the Supreme Court’s decision that the People’s power of amendment cannot be fettered by the tenets of natural law is particularly significant.²⁹³ While the courts have been more open to the prospect of reviewing the process of an amendment being put before the People, it is significant that the bar for compliance with Article 46 has been set very low, and that no case on this point has been successful. This ‘hands-off’ approach at first blush stands in contrast to the more interventionist approach seen in relation to the *McKenna* rules and the derivative requirements of equality and fair procedures. However, the difference in approach is justified when one considers the differing nature of intervention in these two areas.

At all times, the courts’ approach to its role in referendums is directed at compliance with the requirements of the Constitution, both explicit and implicit. *McKenna* and subsequent cases which set the boundaries of the Executive’s role in referendums are all justified according to the principle that the referendum is an exercise of the People’s sovereign power to amend the Constitution at referendum. For all their detractors, the Supreme Court in those cases certainly purports to act only in furtherance of the People’s role.²⁹⁴ In those cases, the People are taken to have a sphere of action into which the Executive cannot stray, lest the principles underlying the referendum (direct democracy, equality, etc) be tarnished. By removing what is deemed improper influence, the prohibition on partisan

²⁹⁰ *ibid.*

²⁹¹ *ibid.*

²⁹² *Finn v Minister for Environment* [1983] IR 154; *Slattery v An Taoiseach* [1993] 1 IR 286.

²⁹³ *Re Article 26 and the Information (Termination of Pregnancies) Bill 1995* [1995] IESC 9, [1995] 1 IR 1.

²⁹⁴ e.g. Bláthna Ruane, ‘Reflections on Procedural Rights in Constitutional Referenda’ (2012) 48 *Irish Jurist* 1.

campaigning is at least *supposed* to reduce the risk that the People's decision-making power is not fully and freely exercised *by the People* alone. On the other hand, in relation to the courts' role in reviewing compliance with Article 46, the low bar set for compliance is reflective of two points. First, while Article 46 does set out a procedure to be followed, it is quite light on detail and grants a deal of latitude to the Oireachtas. Second, an important element of the People's power of amendment is that they can amend the Constitution in any way they see fit. Taking these points together, it would be anathema to the People's wide-ranging power to read strict procedural limits into Article 46 when they are not there; Article 46 sets a procedure but keeps it broad. The courts are therefore entrusted with the role of ensuring it is complied with, but at all times must be cognisant that it should not stand in the way of an otherwise legitimate amendment. In summary, intervention in the *McKenna* type of case and deference in the Article 46 line of cases are both consistent with the idea that the People are given the chance to decide to amend the Constitution without intercession from any other branch; in the former the Executive, and in the latter the Judiciary.

6.8 – Heneghan and Interpreting Amendments

The final development in the judicial role in referendums worth discussing comes from the case of *Heneghan v Minister for Housing, Planning and Local Government*.²⁹⁵ The plaintiff, Mr Tomás Heneghan, argued that the Government had failed in its constitutional obligation to enact legislation in the wake of the 7th Amendment 1979.²⁹⁶ The 7th Amendment altered the text of Article 18.4.2 of the Constitution to allow the Government to extend Seanad franchise beyond graduates of Trinity College Dublin and the National University of Ireland to other institutions of higher education.²⁹⁷ While the 7th Amendment inserted a new provision which was phrased in discretionary language ('Provision *may* be made by law for the election...'), Mr Heneghan argued that in fact the amendment had imposed a mandatory obligation on the Government to enact legislation extending the franchise in this way. By a 6-1 majority (Charleton J dissenting), the Supreme Court found in favour of Mr Heneghan and declared that (i) Article 18.4.2 as inserted by the 7th

²⁹⁵ *Heneghan v Minister for Housing, Planning and Local Government* [2022] IESC 7, [2022] 1 ILRM 323.

²⁹⁶ *ibid.*

²⁹⁷ Which would most likely include the University of Limerick, Mr Heneghan's *alma mater*.

Amendment imposed a mandatory obligation on the Government to enact legislation²⁹⁸ and (ii) the Government had failed in that obligation.²⁹⁹

Article 18.4.1 of the Constitution states that

‘the elected members of Seanad Éireann shall be elected as follows: —

- i Three *shall* be elected by the National University of Ireland.
- ii Three *shall* be elected by the University of Dublin.

[...]’ (emphasis added)

Article 18.4.2 (as inserted by the 7th Amendment) states that

‘Provision *may* be made by law for the election, on a franchise and in the manner to be provided by law, by one or more of the following institutions...’. (emphasis added)

In his judgment for the majority, Murray J noted that there was an apparent conflict in the text.³⁰⁰ As he said, ‘[c]learly, it cannot both be the case that six Senators must be elected by TCD and NUI and that those same members can be elected by other institutions of higher education.’³⁰¹ After assessing the different interpretations open to the Court in relation to Article 18, Murray J concluded that

‘at least in some situations, the ‘may’ in Article 18.4.2 for all practical purposes meant ‘must’, and it is of some considerable significance that the one situation in which that is clearly the case, is the specific circumstance the respondents say the Seventh Amendment was intended to address.’³⁰²

The Supreme Court decided, therefore, that the provisions in Article 18 as inserted by the 7th Amendment must be read as establishing a mandatory obligation to provide for extended Seanad franchise. It is worth turning to the elements of *Heneghan* that are most relevant to the judicial role in referendums.

What is significant about this case for my purposes is the heavy emphasis that the majority placed on the fact that Article 18.4.2 was inserted by referendum. Murray J said

²⁹⁸ *Heneghan v Minister for Housing, Planning and Local Government* [2022] IESC 7 [154] (Murray J).

²⁹⁹ See also here the follow-up case concerning the suspended declaration of unconstitutionality: *Heneghan v Minister for Housing, Planning and Local Government* [2023] IESC 18, [2023] 2 ILRM 97.

³⁰⁰ *Heneghan v Minister for Housing, Planning and Local Government* [2022] IESC 7 [44] (Murray J).

³⁰¹ *ibid* [44] (Murray J).

³⁰² *ibid* [48] (Murray J).

‘It should be again said that the fact that Article 18.4.2 was introduced by way of Amendment to the Constitution is central to this conclusion.’³⁰³

Murray J looked to the historical context of the 7th Amendment in order to determine what the People intended the amendment to do.³⁰⁴ The purpose of this endeavour was to establish the proper interpretation of the provision which, because it was inserted by referendum, must be understood in light of popular intent.³⁰⁵ This entailed looking at material circulated by the State in the run up to the 7th Amendment in order to determine what people may have reasonably believed they were voting for.³⁰⁶ Murray J said that when interpreting amendments which are unclear there is

‘no reason why reliable evidence as to what the Houses of the Oireachtas as institutions (as opposed to the stated positions of individual members) believed they were proposing, or what the People might reasonably have understood they were adopting, cannot be taken into account in the construction of the provision.’³⁰⁷

The difference in approach to interpreting amendments is justified, according to Murray J, because

‘The process whereby the Constitution is amended is underpinned by a pact of sorts between the Houses of the Oireachtas and the People. The People cannot themselves propose an Amendment to the Constitution and, where the Houses of the Oireachtas do so, the People cannot change the wording of the provision so proposed. They can only vote in favour of it or vote to reject it. Where the Houses of the Oireachtas, having proposed an Amendment, tell the People in solemn form and in plain language what the proposal those Houses have themselves devised means, it seems to me to follow from the exclusive role of the Houses in framing and proposing an amendment that the Court – at least in interpreting the resulting Amendment – should hold the Houses to that construction to as great an extent as the language of the provision will allow.’³⁰⁸

³⁰³ *ibid* [141] (Murray J).

³⁰⁴ *ibid* [103]-[109] (Murray J).

³⁰⁵ See Conor Casey and Oran Doyle ‘Foreword: The Constitution under the New Supreme Court’ (2024) 44(1) *Dublin University Law Journal* 5.

³⁰⁶ Including ballot cards and Ministerial statements.

³⁰⁷ *Heneghan v Minister for Housing, Planning and Local Government* [2022] IESC 7 [88] (Murray J).

³⁰⁸ *ibid* [154] (Murray J).

Hogan J came to the same conclusion via a slightly different route.³⁰⁹ For him, the general principle is that because the People's decision at referendum is the ultimate political act, there

‘must at least be a presumption – admittedly a rebuttable one – that every constitutional amendment was intended to be effective and to produce legal or political or symbolic consequences.’³¹⁰

Even Charleton J, in his dissent, commented that a result in a referendum

‘whereby the people have expressed their will is perhaps the most serious, certainly the most fundamental, step which can be taken in our democracy – one whereby the rejection or acceptance of a proposal of Government is voted on as to a change in our fundamental law – and it cannot be ignored.’³¹¹

Heneghan, then, is a significant judgment on constitutional amendments. What is its significance for the judicial role at referendums? While it is unlikely to alter the specific role played by the courts during a referendum campaign, the guidance established in *Heneghan* for interpreting amendments might impact the manner in which referendums are carried out in at least two ways. First, the ‘presumption’ (so named by Hogan J) that amendments are intended to be effective might stymie any intentions of Government to insert purely symbolic provisions, as has happened in the past.³¹² If every provision is intended to be effective and actionable, it is more difficult to design purely symbolic provisions. Second, the fact that the Judiciary will be cognisant of extrinsic material (i.e. explanatory material provided with ballot cards) prepared in a referendum campaign might have consequences for the manner in which those materials are prepared and promulgated in future campaigns.³¹³ Not only will those materials be parsed for their adherence to the *McKenna* principles, they might now be looked to for guidance as to the amendment's meaning. While both of these hypotheticals may be unlikely to materialise immediately, *Heneghan* is undoubtedly a case of significance for referendums. It has potential

³⁰⁹ *Heneghan v Minister for Housing, Planning and Local Government* [2022] IESC 7 [31] (Hogan J).

³¹⁰ *ibid* [31] (Hogan J).

³¹¹ *Heneghan v Minister for Housing, Planning and Local Government* [2022] IESC 7 [34] (Charleton J).

³¹² e.g. the ban on the death penalty introduced in the 21st Amendment 2001, or the recent failed Family and Care provision 40th Amendment Bill 2024. See also the comments of the majority in *In the Matter of JJ* [2021] IESC 1 regarding the interpretation of the Children's Rights Amendment; Finn Keyes, ‘Children's Rights and End Of Life Decision-Making: In The Matter Of JJ’ [2021] 5(1) Irish Judicial Studies Journal 58.

³¹³ There is a danger, for example, that explanatory material becomes overly legalistic and sterile, reducing its usefulness for lay people.

consequences for both the preparation of informative material at the campaign stages of referendums, and also for the interpretation of constitutional provisions inserted by referendum. Finally, *Heneghan* usefully and clearly reiterates the principles set out in almost all referendum cases to this point regarding the sanctity and constitutional significance of the People's decision at referendum.³¹⁴ Placing an amendment proposal before the People is no longer simply a 'solemn legislative process',³¹⁵ it is now also a sacred 'pact' between the Houses of the Oireachtas and the People.³¹⁶ While the contours of the judicial role in referendums have developed, the reverence exhibited by the courts for the referendum has remained constant.

6.9 – The Judicial Role in Referendums

What, then, is the judicial role in referendums? First, the Judiciary are required under Articles 46 and 47 and the Referendum Act 1994 to review compliance with certain procedural requirements.³¹⁷ These procedural requirements are mostly concerned with the method by which an amendment proposal is initiated and placed before the People.³¹⁸ Second, following *McKenna* and subsequent cases, the courts have taken on a role of supervising the conduct of other organs of government at the referendum. In particular, this entails supervising the actions of the Executive in referendum campaigns.³¹⁹ This role is part of a broader responsibility adopted by the courts to define and uphold the core constitutional principles underlying the referendum.³²⁰ This is all done with a view towards giving reality to the constitutional ideals of democracy and popular sovereignty.³²¹ A necessary but implicit role here is the courts' power to define the role of the other organs of government where the Constitution is silent.³²² While this accords with

³¹⁴ e.g. *Heneghan v Minister for Housing, Planning and Local Government* [2022] IESC 7 [34] (Charleton J); *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10 (SC) 54 (Denham J).

³¹⁵ *Roche v Ireland* [1983] 6 JIC 1701 (17 June 1983) (Carroll J).

³¹⁶ *Heneghan v Minister for Housing, Planning and Local Government* [2022] IESC 7 [154] (Murray J).

³¹⁷ See §6.2 and §6.7.

³¹⁸ e.g. *Morris v Minister for Environment* [2002] IEHC 5, [2002] 1 IR 326.

³¹⁹ *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10.

³²⁰ *McKenna v An Taoiseach (No 2)* [1995] 2 IR 210 (SC) 54 (Denham J).

³²¹ *ibid.*

³²² *McKenna v An Taoiseach (No 2)* [1995] 2 IR 210, in particular the conclusions regarding the Executive's duties despite the Constitution being silent. For critique of this position see Bláthna Ruane, 'Reflections on Procedural Rights in Constitutional Referenda' (2012) 48 Irish Jurist 1.

general principles of the judicial power in the Irish Constitution,³²³ its explicit manifestation in *McKenna* is significant.³²⁴ Also clear from the above, the judicial role does not extend to reviewing the content of an amendment proposal³²⁵ nor the legislative process.³²⁶ Further, the courts have refused to take on a role in assessing the specific form which an amendment proposal must take so long as the low bar for compliance with Article 46 is met.³²⁷

Taking these various roles together, some overarching themes emerge. First, the Judiciary's power to determine what the other organs of government can and cannot do in relation to the referendum corresponds to the Judiciary's constitutional role more generally. While a discussion of this more general role is beyond the scope of this chapter, the Irish Constitution specifically entrusts the Judiciary with final interpretative authority.³²⁸ Our jurisprudence on the separation of powers demonstrates that the courts have been willing to make use of this interpretative power to define the contours of each branch's role.³²⁹ While the contours have evolved, and the Judiciary have at various times expressed the view that they should be slow to define the limits too strictly,³³⁰ this power has remained constant.³³¹ Notably, this extends to judicial review of the political process, a topic which courts in other jurisdictions have given a wide berth.³³² It is unsurprising, then, that from *McKenna* onwards the Judiciary have held firm in their conviction that it is appropriate for the courts to play a role in defining acceptable conduct of the Executive at the referendum. To do otherwise would be to break from their own mould.

³²³ e.g. Article 34.3; on judicial cognisance of the separation of powers and the roles of other organs, see generally *Boland v An Taoiseach* [1974] IR 338.; *Burke v Minister for Education* [2022] IESC 1; *Náisiunta Leictreacht Contraitheoir Eireann (NECI) v Labour Court* [2021] IESC 36; *TD v Minister for Education* [2001] 4 IR 247.

³²⁴ Not least because of the practical implications; Bláthna Ruane, 'Reflections on Procedural Rights in Constitutional Referenda' (2012) 48 Irish Jurist 1.

³²⁵ *Finn v Minister for Environment* [1983] IR 154; *Slattery v An Taoiseach* [1992] 6 JIC 1802, [1993] 1 IR 286.

³²⁶ *Riordan v An Taoiseach* [1999] 4 IR 343.

³²⁷ e.g. *Morris v Minister for Environment* [2002] IEHC 5, [2002] 1 IR 326.

³²⁸ O'Donnell CJ has stated that 'The decisions of the Irish courts are final and conclusive, and Ireland has juridical sovereignty, as a matter of Irish law.' *Costello v Government of Ireland* [2022] IESC 44 [112] (O'Donnell CJ).

³²⁹ see generally *Costello v Government of Ireland* [2022] IESC 44.

³³⁰ see e.g. *Zalewski v Workplace Relations Commission* [2021] IESC 24.

³³¹ On the development of the Courts' approach over the last ten years, see Conor Casey and Oran Doyle, 'Foreword: The Constitution under the New Supreme Court' (2024) 44(1) Dublin University Law Journal 5.

³³² see e.g. Mark Tushnet, 'Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine' (2002) 80 NCL Rev 1203.

This position is justified further by reference to another overarching theme: the courts' functions in the referendum are all directed at giving life to the referendum's ideals of direct democracy and popular sovereignty.³³³ Throughout each of the cases analysed in this chapter, the justifications put forward by the courts have all reflected the same underlying rationale. That is, the referendum is the explicit manifestation of the People's sovereign power and is inextricably intertwined with the nature of democracy in the Constitution.³³⁴ The supervisory function taken on by the courts in *McKenna*, *McCrystal*, and *Coughlan* purports to shield the referendum from distortion by the Executive because, in order to manifest those ideals,³³⁵ the referendum must be free from undue influence by another organ of government. In essence, the referendum is within the People's exclusive sphere of action. For the Executive to step in and exercise influence over this decision would be to usurp what is exclusively the People's role. In the same way as the Executive is prevented from usurping the judicial power,³³⁶ so too is it prevented from interfering with the People's power at referendum. Across all other cases this general principle holds true. For example, were the courts themselves to place substantive limits on the amendment power it would be the Judiciary usurping the People's power.

The adoption of the referendum as the method of constitutional amendment is taken by the courts as a deliberate endorsement of the ideals of direct democracy and popular sovereignty.³³⁷ As a consequence, the referendum must be carried out in a way which vindicates those ideals. The Judiciary, therefore, have adopted a general supervisory role in order to ensure those ideals are realised. In order to truly be an exercise in direct democracy, the People must be free to make a decision at referendum freely and fully and without undue interference from other actors.³³⁸ The organs of representative government,

³³³ *McKenna v An Taoiseach (No 2)* [1995] 2 IR 210 (SC) 54 (Denham J). Ann Sherlock, 'Constitutional Change, Referenda and the Courts in Ireland' [1997] Public Law 136.

³³⁴ *McKenna v An Taoiseach (No 2)* [1995] 2 IR 210 (SC) 54 (Denham J); *Doherty v Referendum Commission* [2012] IEHC 211, [2012] 2 IR 594 [23] (Hogan J); *IRM v Minister for Justice and Equality* [2018] IESC 14 [10.48]. See generally, David Kenny and Aileen Kavanagh, 'Are the People Masters? Constitutional Referendums in Ireland' in Richard Albert and Richard Stacey (eds) *The Limits and Legitimacy of Referendums* (OUP 2021); Laura Cahillane, 'Constituting a Polity' in Laura Cahillane and Donal Coffey (eds) *The Centenary of the Irish Free State Constitution: Constituting a Polity?* (Palgrave MacMillan 2024) 13.

³³⁵ At least according to the Judiciary.

³³⁶ *Buckley v Attorney General* [1950] IR 67.

³³⁷ *Coughlan v Broadcasting Complaints Commission* [2000] 3 IR 1 (SC) 30-32 (Denham J).

³³⁸ On this question more generally see Leah Trueblood, 'Are Referendums Directly Democratic?' (2020) 40(3) Oxford Journal of Legal Studies 425-448.

therefore, have a limited role to play. This role, according to the Judiciary, is to facilitate the People's decision, not direct it. It cannot intercede with the substance of the People's power, which is to decide for themselves what the Constitution should say.³³⁹ In order to ensure that this is realised, the Judiciary have developed a consistent line of jurisprudence whereby the central consideration and most important factor in the referendum is the role of the People themselves. The Judiciary's overarching role in the referendum is to ensure that no other branch unconstitutionally interferes with the People's exercise of that role.

This has important consequences for the rest of this thesis. The overall thrust of the jurisprudence in this area, as demonstrated above, is that the referendum is a pointedly and specifically democratic mechanism, and that a decision of the People at referendum must be closely guarded to ensure no undue interference. In other words, the democratic character of the referendum is its defining feature, and that feature is understood as substantive, not just procedural: it is not enough that the People vote, it must be a vote made without interference, and without the People being misled. This both justifies and explains this thesis's adoption of 'substantive democratic engagement' as the measure of a successful referendum in earlier chapters. While that can be justified on its own merits, this chapter demonstrates that this is a consistent theme throughout the Constitution. To reiterate, this thesis is concerned with understanding and analysing Irish referendums according to the Constitution's own internal rationale. This chapter has made clear that adopting democratic engagement as an important touchstone accords with that approach.

6.10 – Conclusion

This chapter has sought to do two things. First, by examining all of the cases relevant to the referendum, it has assessed the judicial role in Irish constitutional referendums. By doing so, it has clarified the manner in which the referendum is regulated in this jurisdiction and therefore augmented our understanding of how Irish constitutional referendums operate. Second, through the analysis of the above judgments, this chapter has established the consistent thread running through all of the decisions on this topic. I

³³⁹ *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10 (SC) 54 (Denham J); *Coughlan v Broadcasting Complaints Commission* [2000] 3 IR 1 (SC) 44 Barrington J; *McCrystal v Minister for Children and Youth Affairs* [2012] IESC 53 [37]-[39] (O'Donnell J); *McCrystal v Minister for Children and Youth Affairs* [2012] IESC 53 [1] (Murray J).

have argued that all of the decisions regarding the judicial role in the referendum can be best explained as oriented toward one goal. That is, giving life to the principles underlying the referendum: popular sovereignty and direct democracy. The Judiciary have repeatedly and emphatically stated that the fundamental purpose of the referendum is to reflect the democratic character of Bunreacht na hÉireann. Implicit here is the fact that the Constitution's adoption of the referendum is based on the concept of popular sovereignty as a conscious and deliberate break from the British model of parliamentary sovereignty under the Crown. The logical consequence of that position is that the People retain a decision-making power which is insulated from the other branches, and which cannot be overruled.³⁴⁰ The referendum is an explicit manifestation of that. As such, the Judiciary have been alert to reducing the influence of the other branches on the referendum where the Constitution does not explicitly provide for it. For the Judiciary, the Constitution clearly envisages a particular value in setting up the balance of powers in this way. The referendum is adopted for a particular purpose. The next chapter seeks to explain that purpose further, and demonstrate the value that accrues for the Irish Constitution.

³⁴⁰ While it is true that the People's power here is reliant on the Executive and Legislative branches carrying out their functions to get a proposal to referendum, the power that is then exercised is still a power reserved to 'the People'.

7. THE VALUE OF THE REFERENDUM: BALANCING CONSTITUTIONALISM AND DEMOCRACY

7.1 – Introduction

So far, this thesis has examined the manner in which constitutional referendums operate in Ireland, the ways in which some have been successful and others not, and how they should operate in order to maximise democratic engagement. More than that, it has sought to uncover how the referendum fits into the broader constitutional architecture of the State: the way the branches of government interact when dealing with referendums and amendment speaks to quite fundamental principles underlying the Constitution. As we have seen, the referendum has grown to be a defining feature of the Irish Constitution. That it has been used so often and with such high-profile outcomes has made it a cornerstone of political life in Ireland; that it has attracted such detailed analysis and emphatic endorsement by the Judiciary has made it something of a fixation for Irish constitutional theory.¹ Moreover, Ireland's particular approach to the referendum has drawn interest internationally where in other places it is rejected as unworkable and fundamentally flawed.² In that light, some fundamental questions arise: what is the rationale for adopting the referendum as the method of constitutional amendment? Flowing from that, what value accrues for Ireland by virtue of the referendum?

This chapter aims to answer these questions by suggesting that the referendum is emblematic of Ireland's attempt to find the appropriate balance between the competing values of constitutionalism and democracy. I argue that the rationale for including the referendum is that it seeks to strike this balance. I show that the tension between the principles is evident throughout the Constitution, and that the referendum is the clearest example of how Bunreacht na hÉireann attempts to resolve this tension. Over the course of the chapter, I argue that understanding the referendum in this light offers a better explanation of its rationale and value than is achieved by analysing it through the lens of

¹ See generally, Cahill, Ó Cinnéide, Ó Conaill, and O'Mahony (eds) *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland* (Routledge 2021).

² On methods of amendment generally, see Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (OUP 2019), Chapter 3.

popular sovereignty and, to a lesser extent, direct democracy. I then go on to argue that by successfully achieving a balance between these principles, the referendum enables the State to enjoy the benefits of both constitutionalism and democracy to a substantial degree. That, I argue, is the value of the Irish constitutional referendum.

The chapter proceeds in the following way. In Section 7.2 I begin by setting out broad definitions of constitutionalism and democracy. Section 7.3 sets out the virtues and vices of both principles in order to demonstrate the tension between them and the trade-offs involved in designing a Constitution. In Section 7.4 I demonstrate how the tension manifests in the Irish Constitution, with reference to its general structure and its underlying principles as identified in the previous chapter (§6.9). In Section 7.5, then, I discuss some persistent questions about how referendums interact with the tension between constitutionalism and democracy. In Section 7.6, I argue that in the Irish constitutional context, the referendum exemplifies the attempt to strike a balance between the two principles. Finally, in Section 7.7 I argue that the referendum's value lies in how it achieves an appropriate balance between constitutionalism and democracy. The chapter then concludes in Section 7.8.

7.2 – Defining Constitutionalism and Democracy

Constitutionalism is a heavily contested term. Its uses are ‘unsystematic, unspecified, and unclear’.³ For some, the term refers simply to adherence to constitutions,⁴ for others it is about the ‘normative and structural premises of political orders.’⁵ It has been used to express the idea that a state must be bound to the rule of law and to popular sovereignty,⁶ or to the separation of powers,⁷ or to a combination of the separation of powers and human

³ Jo Eric Khushal Murkens, ‘The Quest for Constitutionalism in UK Public Law Discourse’ (2009) 29(3) *Oxford Journal of Legal Studies* 427, 428.

⁴ Jeremy Waldron, ‘Constitutionalism: A Skeptical View’ (Public Law & Legal Theory Research Papers Series Working Paper No. 10-87, New York University School of Law, May 2012) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1722771> accessed 16 September 2025, 3-4.

⁵ Nicholas Tsagourias, ‘Introduction – Constitutionalism: a Theoretical Roadmap’ in Tsagourias (ed) *Transnational Constitutionalism: International and European Models* (CUP 2009) 1.

⁶ Gordon J Schochet, ‘Introduction: Constitutionalism, Liberalism and the Study of Politics’ in J Roland Pennock and John W Chapman (eds) *Nomos XX: Constitutionalism* (NYU Press 1979); Jo Erick Khushal Murkens, ‘The Quest for Constitutionalism in Public Law Discourse’ (2009) 29(3) *Oxford Journal of Legal Studies* 427, 444.

⁷ Eric Barendt, ‘Is There a United Kingdom Constitution?’ (1997) 17 *Oxford Journal of Legal Studies* 137, 141.

rights.⁸ Traditionally, constitutionalism has been understood as the idea that government can and should be limited in its powers, typically (as the name suggests) through constitutions.⁹ This understanding of the term traces its origins to Locke and is adopted in much of the most important literature on the subject.¹⁰ Wil Waluchow and Dimitrios Kyritsis give the following definition as an example of the orthodox understanding:

‘Constitutionalism is the idea, often associated with the political theories of John Locke and the founders of the American republic, that government can and should be legally limited in its powers, and that its authority or legitimacy depends on its observing these limitations.’¹¹

More recent work has sought to move away from this negative¹² and restrictive understanding of constitutionalism and to emphasise a more positive definition.¹³ NW Barber in particular has sought to demonstrate that by focusing too much on the notion of *restricting* government, the orthodox understanding is an impoverished doctrine based on an impoverished understanding of the state.¹⁴ For him, constitutionalism requires the creation of ‘an effective and competent set of state institutions’.¹⁵ Jeremy Waldron similarly laments the limiting nature of negative constitutionalism, arguing that it aligns only with *laissez-faire*, conservative government and is hostile to the idea of democratic empowerment.¹⁶

⁸ Jan-Erik Lane, *Constitutions and Political Theory* (Manchester University Press 1996) 25.

⁹ Wil Waluchow, Dimitrios Kyritsis, ‘Constitutionalism’, in Edward N Zalta and Uri Nodelman (eds) *The Stanford Encyclopaedia of Philosophy* (Summer 2023 Edition) <<https://plato.stanford.edu/archives/sum2023/entries/constitutionalism/>> accessed 12 June 2025.

¹⁰ Martin Loughlin, ‘What is Constitutionalisation’ in Petra Dobner and Martin Loughlin (eds) *The Twilight of Constitutionalism?* (OUP 2010), 55; TRS Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press, 1993); CH McIlwain, *Constitutionalism Ancient and Modern* (Cornell University Press 1940); see generally NW Barber, *The Principles of Constitutionalism* (OUP 2018) chapter 1.

¹¹ Wil Waluchow, Dimitrios Kyritsis, ‘Constitutionalism’, in Edward N Zalta and Uri Nodelman (eds) *The Stanford Encyclopaedia of Philosophy* (Summer 2023 Edition) <<https://plato.stanford.edu/archives/sum2023/entries/constitutionalism/>> accessed 12 June 2025.

¹² i.e., limiting. The term is defined as establishing what the state *cannot* or *should not* do.

¹³ Jeremy Waldron, ‘Constitutionalism: A Skeptical View’ (Public Law & Legal Theory Research Papers Series Working Paper No. 10-87, New York University School of Law, May 2012) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1722771> accessed 16 September 2025.

¹⁴ NW Barber, *The Principles of Constitutionalism* (OUP 2018) 19.

¹⁵ NW Barber, *The Principles of Constitutionalism* (OUP 2018) 1.

¹⁶ Jeremy Waldron, ‘Constitutionalism: A Skeptical View’ (Public Law & Legal Theory Research Papers Series Working Paper No. 10-87, New York University School of Law, May 2012) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1722771> accessed 16 September 2025, 16.

These powerful critiques notwithstanding, for the purposes of this chapter I will adopt the orthodox definition of constitutionalism. This is done for two reasons. First, while many of its criticisms are persuasive, the orthodox definition is still the most influential and widely adopted understanding of constitutionalism.¹⁷ Second, it is the most useful definition for eliciting the tension the subject of this chapter – more than any other definition it brings the tension between constitutionalism and democracy into starkest relief. For the purposes of this chapter, then, constitutionalism represents the idea that all government actors in a state should be restricted in what they can do by limiting norms; there should be a set of rules located at a higher order than ordinary politics which cannot be changed via ordinary political decision-making.¹⁸

Democracy is a similarly vague term, referring broadly to ‘a set of rules under which government is selected and operates [...] whereby the governed people enjoy control over the governing authorities.’¹⁹ The scope and type of control envisaged is unspecific, and changes depending on certain perspectives.²⁰ However, with a definition of constitutionalism settled on, the task of defining democracy here becomes much less daunting. Rather than attempting to define the concept from first principles,²¹ or to suggest what values underpin democracy,²² here democracy can be understood by reference to constitutionalism. Where constitutionalism is defined as limited government, democracy refers to the principle that any restriction on democratic government is *prima facie* unjustified. It questions, for example, the democratic legitimacy of a basic structures doctrine.²³ This flows from the premise that there is no obvious answer to how a state committed to the principle of democracy can normatively justify placing limits on

¹⁷ Nicholas Tsagourias, ‘Introduction – Constitutionalism: a Theoretical Roadmap’ in Tsagourias (ed) *Transnational Constitutionalism: International and European Models* (CUP 2009) 1.

¹⁸ ‘Government’ in ‘legally limited government’ refers to all aspects of government power – executive, legislative, and judicial.

¹⁹ Philip Pettit, ‘Democracy, Electoral and Contestatory’ (2000) *Nomos XLII: Designing Democratic Institutions* 105, 106.

²⁰ Philip Pettit, ‘Democracy, Electoral and Contestatory’ (2000) *Nomos XLII: Designing Democratic Institutions* 105, 106.

²¹ Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* (University of California Press, 1984); Robert A Dahl, *Democracy and Its Critics* (Yale University Press, 1989).

²² Niko Koldony, ‘Rule Over None I: What Justifies Democracy’ (2014) 42(3) *Philosophy & Public Affairs* 195; Pettit suggests that it might be that it enables citizens to enjoy security against the discretionary will of those in office, Philip Pettit, *The State* (Princeton University Press, 2023) 221.

²³ On the Indian Basic Structures doctrine, see Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (OUP 2011).

democratic decision-making.²⁴ Democracy in this sense can be either through direct or representative means.²⁵ Therefore, moving forward democracy is understood as the ideal that governed peoples enjoy control of governing authorities, and that any limitation on this control is *prima facie* illegitimate. Constitutionalism places higher-order limits on what democratic government can legitimately do; democracy envisions few or no such limits.

Adopting the above definitions of constitutionalism and democracy shows that there is clearly a tension between the two principles. And yet, almost all liberal-democratic states place constitutionalist limits on government while at the same time claiming to be (and appearing) democratic. The reality is that democracy rarely exists absent some form of constitutionalist limits, and that states must inevitably find a balance between the principles. The methods and success of any such balancing act is a significant insight into what principles are valued most highly in a state, as well as what trade-offs are deemed acceptable. An examination of the tension between constitutionalism and democracy will allow us to better understand the difficult but necessary trade-offs involved in establishing a state. By then examining Ireland's approach to the tension, we can see that the constitutional referendum is central to Bunreacht na hÉireann's answer. This, in turn, reveals the rationale for adopting the referendum as the method of amendment, as well as the value it adds to the State.

7.3 – Constitutionalism and Democracy: Competing Benefits

With a working definition of our two principles, the next step is to establish how the tension between them manifests. What value is sought by placing constitutionalist limits on democratic government, and what risks are assumed in doing so? What of those states which elect to place fewer (or no) restraints on what can be done through democratic

²⁴ Any answer to this question depends to a large extent on one's understanding of what (if anything) makes democracy valuable. See generally Ronald Dworkin, 'Equality, Democracy, and Constitution: We the People in Court' (1990) 28(2) *Alberta Law Review* 324; Niko Koldony, 'Rule Over None I: What Justifies Democracy' (2014) 42(3) *Philosophy & Public Affairs* 195. On the different meanings of constitutionalism and their approach to this question, see Jo Eric Khushf Murkens, 'The Quest for Constitutionalism in UK Public Law Discourse' (2009) 29(3) *Oxford Journal of Legal Studies* 427.

²⁵ Leah Trueblood, *Referendums as Representative Democracy* (Hart Publishing 2024).

means? In this section I set out the most fundamental virtues and vices associated with both constitutionalism and democracy.

7.3.1 – Constitutionalism's Virtues

7.3.1.1 – Stability and Predictability

The first and principal virtue associated with constitutionalism is stability.²⁶ By requiring that norms limiting government be entrenched (i.e., permanent or at least difficult to change), constitutionalism seeks to engender a degree of stability and predictability regarding what the state can and cannot do. In this sense, constitutionalism aligns closely with fundamental principles such as the rule of law. As an example, Joseph Raz's conception of the rule of law posits that the law must be relatively stable, and such that people are able to be guided by it.²⁷ Raz has also referred to stability and predictability of a society's legal norms as essential for the well-being of citizens.²⁸ Waluchow and Kyritsis similarly describe stability and predictability over time as a 'characteristic aspiration of constitutional regimes'.²⁹ Of course, entrenchment, and consequently stability and predictability, are inextricably bound up with the concept of constitutionalism – if limits on government can be changed easily then it is difficult to accept that they are in fact limits.³⁰ Regardless, a high degree of stability is a virtue sought in countless conceptions of the ideal state,³¹ and constitutionalism brings about stability by clearly entrenching certain principles – the fundamental rules of the game, as it were, remain consistent over long stretches of time.

²⁶ That is, stability in a state's laws.

²⁷ Joseph Raz, 'The Rule of Law and its Virtue', *The Authority of Law* (OUP 1979) 210-29.

²⁸ Joseph Raz, 'The Law's Own Virtue' (2019) 39(1) *Legal Studies* 1, 2.

²⁹ Wil Waluchow, Dimitrios Kyritsis, 'Constitutionalism', in Edward N Zalta and Uri Nodelman (eds) *The Stanford Encyclopaedia of Philosophy* (Summer 2023 Edition) <<https://plato.stanford.edu/archives/sum2023/entries/constitutionalism/>> accessed 12 June 2025.

³⁰ Wil Waluchow, Dimitrios Kyritsis, 'Constitutionalism', in Edward N Zalta and Uri Nodelman (eds) *The Stanford Encyclopaedia of Philosophy* (Summer 2023 Edition) <<https://plato.stanford.edu/archives/sum2023/entries/constitutionalism/>> accessed 12 June 2025.

³¹ Barber certainly makes this point, saying that '[f]or the state to undertake any activity at all it must maintain some level of stability and control.' NW Barber, *The Constitutional State* (OUP 2010) 144. See also Michael Bratman, 'Shared Intention' in Michael Bratman, *Faces of Intention* (CUP 1999) 125-9.

7.3.1.2 – *Limiting Despotism*

Another benefit traditionally associated with constitutionalism is that it acts as a bulwark against arbitrary power and the descent into tyranny.³² By establishing the limits of legitimate government, constitutionalism necessarily implies that the exercise of state power must be *intra vires* and that certain acts are thus *ultra vires*. On this account, constitutionalism treats the state as a potential threat to the wellbeing of its citizens and acts as a set of constraints to mitigate that threat.³³ Constitutionalism's function is 'to rein in the power of the state, to limit the dangerous capacities of the executive and legislative branches.'³⁴ While this position clearly stems from a particular perspective on the proper role of the state and the nature of liberty,³⁵ at its most basic it is rooted in an understandable concern that *unconstrained* power can descend rapidly into arbitrariness. Even in democratic states, a constitutionalist might argue, without formal limits on what the government can and cannot legitimately do, there is a real and obvious danger that the state slides into tyranny, perhaps through the (democratically legitimate) election of a populist who distorts the state to consolidate power. When functioning properly, constitutionalism acts to limit the possibility of this happening.³⁶ This is closely connected with the next virtue.

7.3.1.3 – *Rights and Counter-Majoritarianism*

The third and final virtue of constitutionalism worth mentioning is its association with counter-majoritarianism. That is, by setting certain principles above the realm of ordinary political decision-making, constitutionalism seeks to protect those principles from the dangers of simple majoritarianism.³⁷ This virtue is usually articulated most clearly in the realm of fundamental rights. While there is much written on whether or not fundamental

³² This does presume that the state is not tyrannical in the first place, and that arbitrary power is limited.

³³ NW Barber, *The Principles of Constitutionalism* (OUP 2018) 19.

³⁴ NW Barber, *The Principles of Constitutionalism* (OUP 2018) 4.

³⁵ Jeremy Waldron, 'Constitutionalism: A Skeptical View' (Public Law & Legal Theory Research Papers Series Working Paper No. 10-87, New York University School of Law, May 2012) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1722771> accessed 16 September 2025, 27-28.

³⁶ Or at the very least, making it more difficult. The practical reality is that even constitutional rules can be discarded by despots if they are willing to risk a constitutional crisis. On this generally see John Finnis, 'Revolutions and Continuity of Law' in *Philosophy of Law: Collected Essays Volume IV* (OUP 2011).

³⁷ Robert A Schapiro, 'Polyphonic Federalism: State Constitutions in the Federal Courts' (1999) 87 *California Law Review* 1415, 1438. On the distinction between ordinary and constitutional politics, see Bruce Ackerman, *We the People: Foundations* (Harvard University Press, 1993).

rights should be in the realm of ordinary politics,³⁸ the most relevant aspect for my purposes is the argument that constitutionalism protects minorities in particular from persecution at the hands of simple majorities. Since voters are self-interested, the argument goes, and since minorities (by their nature) can never win in a straight shoot-out of interests, minorities' rights are protected only at the whim of the majority. Without some limits, a fleeting or malevolent majority can therefore strip minorities of fundamental rights quite easily. Constitutionalism remedies this problem by entrenching fundamental rights (including those of minorities) and thereby limiting the possibility of a majority voting them away. Rights are entrenched in this way either through judicial enforceability,³⁹ or through more onerous amendment procedures for constitutional rights,⁴⁰ or both.⁴¹ However it is done, constitutionalist limits offer a bulwark against blunt majoritarianism by placing limits on what ordinary, majoritarian democratic decisions can legitimately do.

7.3.2 – Constitutionalism's Vices

7.3.2.1 – Undemocratic

The most prominent trade-off associated with constitutionalism is that it is *prima facie* undemocratic to restrict the ability of democratically elected governments to make certain decisions. This arises most obviously in jurisdictions such as the United Kingdom which place a high intrinsic value on the principle of parliamentary sovereignty,⁴² however, it is

³⁸ Cf. Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 *The Yale Law Journal* 1346; Ronald Dworkin, 'Introduction: The Moral Reading and the Majoritarian Premise' in *Freedom's Law: the Moral Reading of the American Constitution* (Harvard University Press 1996); Aileen Kavanagh, 'What's So Weak about Weak-Form Review: The Case of the UK Human Rights Act 1998' (2015) 13(4) *International Journal of Constitutional Law* 1008; Dimitrios Kyritsis, 'Representation and Waldron's Objection to Judicial Review' (2006) 26 *Oxford Journal of Legal Studies* 733.

³⁹ See generally Aileen Kavanagh, 'What's so Weak about Weak-Form Review? The Case of the UK Human Rights Act' (2016) 13(4) *International Journal of Constitutional Law* 1008, Gerry Whyte, 'Judicial Capacity to Enforce Socio-Economic Rights' (2014) 37 *DULJ* 203. Cf. Mark Tushnet, *Taking the Constitution Away from the Courts* (1999 Princeton University Press).

⁴⁰ Richard Albert, *Constitutional Amendments Making, Breaking, and Changing Constitutions* (OUP 2019). Particularly relevant here are Articles 1 (Human Dignity and Rights) and 20 (Constitutional Principles; Democracy) of the German Basic Law (Grundgesetz für die Bundesrepublik Deutschland), which by virtue of Article 79 are entirely unamendable.

⁴¹ Ireland's system of amendment might fit this description.

⁴² On the interaction between constitutionalism and parliamentary sovereignty see Nicholas Tsagourias, 'Introduction – Constitutionalism: a Theoretical Roadmap' in Tsagourias (ed) *Transnational Constitutionalism: International and European Models* (CUP 2009) 1.

a tension which can arise in any state which calls itself a democracy. Critiques along this line often point to the emphatic democratic language which permeates many constitutions⁴³ and contrast it with, for example, the authority of unelected judges to determine that a particular decision made by a majority is illegitimate and/or unconstitutional.⁴⁴ This critique is particularly strong where constitutions establish strong-form judicial review,⁴⁵ although by no means is it restricted to those jurisdictions.⁴⁶ It is important to note at this stage that there are many powerful arguments for contending that some form of constitutionalism is at least complementary of, if not necessary for the attainment of democracy.⁴⁷ That said, it remains the case that by cordoning off more and more questions from democratic decision-making, a state risks undermining its commitment to self-government. Whatever the limit may be, there is clearly a point at which limiting what democratically elected governments can do calls the democratic character of the state into question.⁴⁸

7.3.2.2 – Citizen Alienation

As discussed in previous chapters, where citizens are excluded from decision-making, the consequences for a state are numerous and, in many ways, harmful. Two particular consequences are relevant here. First, an overemphasis on constitutionalism (thus

⁴³ Bunreacht na hÉireann is a good example of this.

⁴⁴ e.g. Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 *The Yale Law Journal* 1346.

⁴⁵ Cf., Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 *The Yale Law Journal* 1346; Jeremy Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13 *Oxford Journal of Legal Studies* 45; Aileen Kavanagh, 'What's so Weak about Weak-Form Review? The Case of the UK Human Rights Act, (2016) 13(4) *International Journal of Constitutional Law* 1008; Dimitrios Kyritsis, 'Representation and Waldron's Objection to Judicial Review' (2006) 26 *OJLS* 733.

⁴⁶ Waldron asserts that at its base constitutionalism takes 'democracy and the power assigned to ordinary people through elective and representative procedures as its natural enemy'. Jeremy Waldron, 'Constitutionalism: A Skeptical View' (Public Law & Legal Theory Research Papers Series Working Paper No. 10-87, New York University School of Law, May 2012) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1722771> accessed 16 September 2025, 27.

⁴⁷ Ronald Dworkin, 'Equality, Democracy, and Constitution: We the People in Court' (1990) 28(2) *Alberta Law Review* 324.

⁴⁸ Benjamin Barber is not convinced that the protection of fundamental rights is always a legitimate ground for limiting action, saying that 'it would be wrong to limit the democratic process solely on the ground that it might be or is in fact employed to harm fundamental rights and interests. For any such limitation would require an alternative process for making collective decisions, and presumably therefore a nondemocratic process. If it would be wrong for the democratic process to violate a fundamental right or interest, then it would also be wrong for any other process to do so. Therefore the democratic process ought not to be displaced by a nondemocratic process unless (at the very least) a convincing showing is made that over the long run the non-democratic process will be superior to the democratic process.' Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* (University of California Press, 1984) 191-192.

excluding citizens from more areas of decision-making) can bring about popular apathy towards politics generally and constitutional politics more specifically.⁴⁹ Albert and Stacey warn that when ‘members of a political community begin to feel that they do not have a say in the resolution of disputes that matter to them, the political structures that are meant to represent them may begin to leach legitimacy’.⁵⁰ When that point is reached, too many constitutionalist limits leads to charges of elitism and can pave the way for populist backlash under the guise of ‘reclaiming’ democracy.⁵¹ As is apparent in the current political climate, this reaction against elitism is often accompanied by a disdain for limited government more generally, and can include distrust of related principles of legality like the rule of law.⁵² ‘Too much’ constitutionalism, then, can itself lead to instability within a state where citizens start to feel apathetic towards and then alienated from government, thus increasing demand for wholesale reform.

The second way in which constitutionalism can lead to citizen alienation is by its resistance to change. By its nature, constitutionalism is designed to slow down changes to fundamental principles – by limiting government, it seeks to keep some principles in place for long periods of time. In many cases, however, fundamental principles become outdated or unpopular.⁵³ Where that is the case, and where citizens and their representatives are restricted from acting to amend those principles, a gap can emerge between the basic principles on which a state is founded and the desires of its citizens to have more modern values reflected in those principles. The ‘dead hand of the past’ continues to exert influence long past its relevance.⁵⁴ Where change to these fundamental principles is impossible or exceptionally difficult, there is a possibility that the legitimacy of constitutional limits is called into question.⁵⁵

⁴⁹ Barber identifies popular apathy in American politics with liberal democracy’s constitutionalist tendencies, Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* (University of California Press, 1984), xiii-xiv.

⁵⁰ Richard Albert and Richard Stacey, ‘Introduction: Democracy, Liberalism and Constitutional Referendums: When Does Popular Sovereignty Legitimate Constitutional Change?’ in Albert and Stacey (eds) *The Limits and Legitimacy of Referendums* (OUP 2022) 1-33, 9.

⁵¹ See generally Rogers Brubaker, ‘Why Populism?’ (2017) 46 *Theoretical Sociology* 357, 359.

⁵² Aziz Huq and Tom Ginsberg, ‘How to Lose a Constitutional Democracy’ (2018) 65 *UCLA Law Rev* 78; Simon Hix, ‘Remaking Democracy: Ireland as a Role Model’ (2020) 35(4) *Irish Political Studies* 585.

⁵³ As was seen clearly in this jurisdiction during the 2015 Marriage Equality referendum and 2018 Abortion referendum, as discussed in previous chapters (Chapter 5 in particular).

⁵⁴ For a good overview of the ‘dead hand of the past’ critique, see Andrew Coan, ‘The Dead Hand Revisited’ (2020) 70 *Emory Law Journal Online* 1.

⁵⁵ Andrew Coan, ‘The Dead Hand Revisited’ (2020) 70 *Emory Law Journal Online* 1.

7.3.3 – Democracy’s Virtues

7.3.3.1 – Democratic Legitimacy

The principal virtue inherent in a democratic state with fewer limits is the sense that every decision is capable of being made by citizens or their representatives.⁵⁶ Contrary to the above, political power is taken out of the hands of elites,⁵⁷ and ‘broad public participation and deliberation in respect of controversial issues of political morality’ is encouraged.⁵⁸ On some accounts, this has the further aim of empowering and engaging marginalised societal groups in the political process.⁵⁹ Waldron sees this approach as more in line with his egalitarian understanding of democracy.⁶⁰ Addressing one aspect of constitutionalism – judicial review – Waldron says that ‘[b]y privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights.’⁶¹ Democracy is realised far more substantially, according to Waldron, when citizens are free to debate and change their minds on matters about which there is genuine and reasonable disagreement.⁶² Whatever its appropriateness for liberal-democratic states, a democracy unlimited by constitutional constraints at least fits with conceptions of self-government and democracy such as that of Rousseau,⁶³ Mill,⁶⁴ and other proponents of ‘strong’ democracy.⁶⁵ The existence of any

⁵⁶ Or, at least, could be made by citizens or their representatives.

⁵⁷ i.e. judges and other non-elected persons.

⁵⁸ Wil Waluchow, Dimitrios Kyritsis, ‘Constitutionalism’, in Edward N Zalta and Uri Nodelman (eds) *The Stanford Encyclopaedia of Philosophy* (Summer 2023 Edition).

⁵⁹ Wil Waluchow, Dimitrios Kyritsis, ‘Constitutionalism’, in Edward N Zalta and Uri Nodelman (eds) *The Stanford Encyclopaedia of Philosophy* (Summer 2023 Edition), citing Roberto Gargarella, *The Law as a Conversation Among Equals* (Cambridge University Press, 2022).

⁶⁰ Jeremy Waldron, ‘Constitutionalism: A Skeptical View’ (Public Law & Legal Theory Research Papers Series Working Paper No. 10-87, New York University School of Law, May 2012) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1722771> accessed 16 September 2025.

⁶¹ Jeremy Waldron, ‘The Core of the Case against Judicial Review’ (2006) 115 *The Yale Law Journal* 1346.

⁶² Jeremy Waldron, ‘The Core of the Case against Judicial Review’ (2006) 115 *The Yale Law Journal* 1346.

⁶³ Jean-Jacques Rousseau, *The Social Contract* (HJ Tozer tr, Wordsworth Editions Limited 1998).

⁶⁴ Mill said, ‘There is no difficulty in showing that the ideally best form of government is that in which the sovereignty, or supreme controlling power in the last resort, is vested in the entire aggregate of the community; every citizen not only having a voice in the exercise of that ultimate sovereignty, but being, at least occasionally, called on to take an actual part in the government, by the personal discharge of some public function, local or general.’ John Stuart Mill, *Considerations on Representative Government* (CUP 2010).

⁶⁵ e.g. Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* (University of California Press, 1984).

constitutionalist limits encroaches on this ideal in some way, and the more numerous and impactful those limits are, the greater the trade-off.

7.3.3.2 – *Adaptability*

Closely related to democratic legitimacy is the idea that a democratic state which places few to no restrictions on democratic decisions is more adaptable and capable of evolving to reflect the values of a society. Unlike in a state with many constitutionalist limits, there is no formal constraint by the dead hand of the past. Without such limits, any conflict between the state's laws and its social values can be remedied relatively easily. This can contribute to extending the lifetime of a particular constitution,⁶⁶ and is a particularly celebrated feature of the Irish Constitution in recent decades.⁶⁷ Increased adaptability is not seen as a virtue by all, and certainly not by proponents of originalism or strong notions of textualism,⁶⁸ but that is a debate outside the remit of this chapter. At the very least, there are many who view adaptability or flexibility as a virtue for a constitution,⁶⁹ and it usefully demonstrates what sort of value is forfeited by constitutionalism.

7.3.3.3 – *Constitutional Ownership*

Another virtue of a democratic state with fewer constitutionalist limits is that, by entrusting citizens with the authority to answer any question by democratic means – direct or representative – the state takes seriously the idea that the state is a product of the people, owned by people. Richard Kay cautions against ignoring rhetorical flourishes like these,⁷⁰ because they reflect the reality that in order for a state to retain its legitimacy 'some minimum part of the population must find the constitution's substantive rules satisfactory,

⁶⁶ Aileen Kavanagh, 'The Irish Constitution at 75 Years: Natural Law, Christian Values and the Ideal of Justice' (2012) 48 *Irish Jurist* 71.

⁶⁷ See generally Cahill, Ó Cinnéide, Ó Conaill, and O'Mahony (eds) *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland* (Routledge 2021); David Kenny and Aileen Kavanagh, 'Are the People the Masters? Constitutional Referendums in Ireland' in Albert and Stacey (eds) *The Limits and Legitimacy of Referendums* (OUP 2022).

⁶⁸ See generally Jeffrey Goldsworthy, 'The Case for Originalism', in G Huscroft and B Miller (eds), *The Challenge of Originalism* (CUP, 2013); Ronald Dworkin, 'Comment,' in A Scalia, *A Matter of Interpretation* (Princeton University Press 1997) 115-128.

⁶⁹ Aileen Kavanagh, 'The Idea of a Living Constitution', (2003) 16 *Canadian Journal of Law and Jurisprudence* 55.

⁷⁰ Including, for example, 'We the People' and similar rhetoric.

or at least tolerable'.⁷¹ Similarly, Neil MacCormick notes that a state 'cannot live without some minimal law and minimal respect for it, and it cannot thrive without a considerable body of law and considerable respect for it.'⁷² Both authors are driving at the same point: in order to maintain its legitimacy, a state must attract buy-in from those in whose name it purports to rule. A state which places few restrictions on democratic decision-making is in a better position to attract this buy-in because the claim of constitutional ownership is reflected by the fact that citizens, through democratic mechanisms, have authority over the state's fundamental principles. The value of this buy-in should not be underestimated. A state in which citizens feel ownership of, and fealty to, the constitutional order is a state which is less likely to succumb to the malaises affecting liberal democracies around the world like apathy and indifference.⁷³

7.3.3.4 – *Constitutional Literacy*

Finally, it is worth acknowledging that there is a growing body of literature which suggests that involving citizens more in important constitutional decisions leads to increased constitutional literacy. Proponents of this view argue that when citizens in a state are better-informed and engaged, and thus more constitutionally 'literate', democracies are more robust. Moreover, De Visser and Jones argue that engagement with the constitution in ways other than traditional education,⁷⁴ are all aspects of a citizen's constitutional literacy, including the 'act of doing', as well taking part in civic engagement activities and observing political leaders.⁷⁵ While De Visser and Jones acknowledge theoretically-possible downsides to increased literacy, they demonstrate that increased constitutional literacy encourages democratic spirit.⁷⁶ Where citizens are involved in more decisions, then, a population's overall constitutional literacy improves. When a population's

⁷¹ Richard S Kay, 'Constituent Authority' (2011) 59(3) *American Journal of Comparative Law* 715; as cited in David Dyzenhaus, 'Constitutionalism in an Old Key: Legality and Constituent Power' (2012) 1 *Global Constitutionalism* 229.

⁷² Neil MacCormick, 'The State and the Law' in Neil MacCormick, *Questioning Sovereignty* (OUP 1999).

⁷³ Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (OUP 2014).

⁷⁴ i.e. learning about its history and content.

⁷⁵ Maartje De Visser and Brian Christopher Jones, 'Unpacking Constitutional Literacy' (2024) 13(1) *Global Constitutionalism* 29.

⁷⁶ Maartje De Visser and Brian Christopher Jones, 'Unpacking Constitutional Literacy' (2024) 13(1) *Global Constitutionalism* 29.

constitutional literacy is improved, civic engagement in a state is improved, which brings benefits for its democracy.

7.3.4 – Democracy's Vices

7.3.4.1 – Majoritarianism

The obvious corollary to constitutionalism's counter-majoritarianism is that without those limits a democracy, by contrast, enjoys no such safeguards against majoritarian impulses. As made clear by Waldron, it is a necessary logical possibility that commitment to self-government is 'quite compatible with [the] establishment of a non-democratic constitution or a heavily compromised or truncated form of democracy.'⁷⁷ As such, there is always a danger that democratic mechanisms are abused. Some argue that there are other ways of protecting minority rights than taking the decision out of the realm of democratic decision-making.⁷⁸ Others argue that where a state is forced to face up to the reality of majoritarianism, a culture of deep and substantive citizen deliberation can be generated in the state which itself tends to temper majoritarian impulses.⁷⁹ One obvious difficulty with this position is that citizen deliberation is difficult to get right and that in reality, this idealised notion of deliberation is far from being achieved in even the most democratic states.⁸⁰ Simply put, where a state opts to place fewer limits on what sorts of decisions can be made by democratic means, the possibility of majoritarian abuses is heightened.

7.3.4.2 – Instability

The second vice associated with fewer restrictions on democratic decision-making is that the state's laws are less stable. As stability is built into the notion of constitutionalism, so

⁷⁷ Jeremy Waldron, 'Constitutionalism: A Skeptical View' (Public Law & Legal Theory Research Papers Series Working Paper No. 10-87, New York University School of Law, May 2012) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1722771> accessed 16 September 2025, 29-30.

⁷⁸ Waldron in particular is a proponent of this view. Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 The Yale Law Journal 1346.

⁷⁹ Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 The Yale Law Journal 1346.

⁸⁰ For a critique of Ireland's experiments in this field of deliberative democracy, see Eoin Carolan, 'Ireland's Constitutional Convention: Behind the Hype About Citizen-Led Constitutional Change' (2015) 13(3) International Journal of Constitutional Law 733-748.

too is instability built into its corollary. The fact that any and all issues are up for debate at any time, and that even the most fundamental legal principles in a state could be altered relatively easily means that the fundamental rules of the game can be subject to regular change.⁸¹ That in itself is not necessarily an issue. It can become an issue, however, because the state becomes, at least theoretically, open to the whim of fleeting majorities. Apart from the dangers this carries for minorities, the state also suffers from a lack of medium- to long-term certainty regarding its laws. Where fundamental principles are constantly in flux, planning one's life within the law becomes more and more difficult. In states where this occurs, it is difficult to say that Raz's virtues of the rule of law are respected.⁸² Whether or not this is conducive to citizens being able to pursue the good life is a question of significance for proponents of democracy in this sense.⁸³

7.3.5 – Summarising The Tension

The above is a summary of the ways in which constitutionalism and democracy are in tension. Constitutionalism places a high value on increased stability and predictability in the law of a state, maintaining specific bulwarks against the slide into arbitrariness and despotism, and the protection of minority interests against simple majoritarian impulses. Where a state adopts such limits in pursuance of these virtues, it risks sacrificing its commitment to strong notions of self-government and popular democratic control, and further risks alienating citizens. A state with fewer restrictions on democratic decision-making, on the other hand, aligns more closely to strong notions of democratic legitimacy,⁸⁴ is more adaptable to necessary or desirable change, and can engender a strong sense of constitutional ownership. It is, however, open to majoritarian abuses and is less stable. As is clear from the above, when a state strives to maximise one of the virtues of either principle, it is always at the expense of a virtue from the other. Any choice about what ideal a state should pursue involves a trade-off in this regard.

⁸¹ That is, relative to a constitutionalist state.

⁸² Joseph Raz, 'The Rule of Law and its Virtue', *The Authority of Law* (OUP 1979) 210-29.

⁸³ See generally Robert A. Dahl, *Democracy and Its Critics* (Yale University Press, 1989).

⁸⁴ 'Strong' notions of democratic legitimacy are those more aligned with concepts of popular sovereignty, direct democracy, etc. Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* (University of California Press, 1984) esp Chapter 1; Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 *The Yale Law Journal* 1346; Philip Pettit, 'The Power of a Democratic Public' in Reiko Gotoh and Paul Dumouchel (eds), *Against Injustice: The New Economics of Amartya Sen* (Cambridge, 2009) 73.

7.4 – The Debate in Bunreacht na hÉireann

On the basis of the foregoing sections, it is clear that constitutionalism and democracy are in tension. Yet it is also clear that when establishing a constitutional order, a state cannot avoid trying to resolve that tension in some way. Indeed, that is the challenge of designing a constitution – to find the appropriate balance such that, say, the state is stable but not overly rigid, protected from majoritarian impulses but responsive to democratic evolution.⁸⁵ Later on in this chapter, I will demonstrate that the constitutional referendum is emblematic of Ireland's attempts to strike this balance. Before getting to that point, however, it is first necessary to establish how the Irish Constitution reflects both competing principles. Here I examine the tension within Bunreacht na hÉireann.

7.4.1 – The Democratic Features of Bunreacht na hÉireann

7.4.1.1 – Emphasis in the Text

The text of Bunreacht na hÉireann is replete with references to emphatic notions of democracy, self-government, and popular sovereignty. The Preamble invokes these ideals by stating that it is 'We, the people of Éire' who 'adopt, enact, and give to ourselves' the Constitution. Article 5 states that Ireland is a 'sovereign, independent, democratic state'.⁸⁶ Article 6 again invokes the ideal of popular sovereignty, saying that all powers of government derive ultimately from the people (under God), 'whose right it is, in final appeal, to decide all questions of national policy'.⁸⁷ This principle is again reflected in Article 12, which establishes that the President is elected by 'direct vote of the people',⁸⁸ and in Article 27 which provides that Bills of particular national importance can be put to

⁸⁵ Cahill describes it as states engaging in 'the iterative achievement of the correct balance between the success of the constitution as measured by its resilience and the success of the constitution as measured by its legitimacy.' Maria Cahill, 'Ireland's Constitutional Amendability and Europe's Constitutional Ambition: the Lisbon Referendum in Context' (2008) 9(10) German Law Journal 1191.

⁸⁶ Article 5.

⁸⁷ Article 6.1.

⁸⁸ Article 12.2.1.

referendum so that the ‘will of the people thereon’ can be ascertained.⁸⁹ On account of Article 30, all crimes prosecuted in the state ‘shall be prosecuted in the name of the People’,⁹⁰ and Article 49 states that any and all powers of the previous Irish Free State were, on the date of the Constitution’s enactment, ‘declared to belong to the people.’⁹¹ Finally, the most significant endorsement of popular sovereignty is found in Articles 46 and 47 which grant sole (and unlimited) amendment power to the people. The text of the Irish Constitution therefore seems quite emphatic in its embrace of popular sovereignty and, as such, one might assume few to no restrictions on democratic government. ‘The People’ are understood as the source of ultimate authority and enjoy an unfettered power of amendment, all of which suggests that the Constitution seeks to maximise the virtues of democratic legitimacy and constitutional ownership.

7.4.1.2 – *Judicial Emphasis*

Moving away from the text of the Constitution itself, this approach to democracy is also reflected in much of the judicial commentary on the nature of popular sovereignty and democracy in the Constitution. In *Jordan*, O’Donnell J expressed the idea that the exercise of government power derives ultimately from the people, saying that ‘the powers to be exercised in the new polity cannot be traced to any royal concession or to a grant by a legislature considered omnipotent. The sole temporal source of power acknowledged by the Constitution is the people themselves.’⁹² He said further that the ‘decision of the people is the ultimate source of power in this democracy’.⁹³ Hogan J has described popular sovereignty as ‘our own constitutional cornerstone’,⁹⁴ and said the following about the nature of democratic decisions in the Constitution:

‘The Constitution envisaged a plebiscitary as well as a parliamentary democracy and, in doing so, it has created a State which can demonstrate – in both word and deed – that it is a true democracy worthy of the name. By providing in Article 6(1) for popular sovereignty in which the People would “in final appeal...decide all questions of national policy”, it envisaged a society in which all citizens would be

⁸⁹ Article 27.1.

⁹⁰ Article 30.3.

⁹¹ Article 49.1.

⁹² *Jordan v Minister for Children and Youth Affairs* [2015] IESC 33 [2] (O’Donnell J).

⁹³ *Jordan v Minister for Children and Youth Affairs* [2015] IESC 33 [4] (O’Donnell J)

⁹⁴ *Doherty v Referendum Commission* [2012] IEHC 211; [2012] 2 IR 594 (HC) [23] (Hogan J).

called upon from time to time to make critical decisions regarding their future, the future of their neighbourhood and, ultimately, the future of their country.’⁹⁵

Other judges have been similarly emphatic in suggesting that the Irish Constitution, by embracing the ideal of popular sovereignty, has enshrined a strong notion of democracy.⁹⁶ Hogan J summed it up in *Costello v Government of Ireland*, saying that Article 47 gives ‘practical effect to [the] commitment to democratic legitimacy and control.’⁹⁷

The Irish Constitution therefore clearly places a high value on the principles of popular sovereignty and democracy. While there is much to be said about the normative attractiveness and coherency of popular sovereignty,⁹⁸ for my purposes its invocation in the text and judicial commentary is indicative of a few things. First, there is clearly a sense at the heart of the Constitution that the State derives its authority explicitly from the People. Second, its manifestation in the People’s unfettered amendment power (Articles 46 and 47) suggests that adaptability and constitutional ownership are valued more highly than counter-majoritarian limits. Third and finally, it feeds directly into how democracy is understood in the Constitution. That direct democracy is adopted (via the referendum) shows that majoritarianism is accepted not only as a valid method of decision-making, but appropriate for the most significant decisions of all – constitutional amendment.⁹⁹ We might stop there and conclude that the Irish Constitution attaches little significance to constitutionalist limits on government, instead choosing to place the highest value on those

⁹⁵ *Doherty v Referendum Commission* [2012] IEHC 211; [2012] 2 IR 594 (HC) [21] (Hogan J).

⁹⁶ See *Coughlan v Broadcasting Complaints Commission* [2000] 3 IR 1 (Denham J), *McCrystal v Minister for Children and Youth Affairs* [2012] IESC 53 [24] (Denham J); *McCrystal v Minister for Children and Youth Affairs* [2012] IESC 53 [1] (Murray J); *Jordan v Minister for Children and Youth Affairs* [2015] IESC 33, [2015] 4 IR 232 [56]-[58] (O’Donnell J); *Jordan v Ireland* [2018] IECA 291 [34] (Birmingham P); *Costello v Government of Ireland* [2022] IESC 44 [213] (Hogan J).

⁹⁷ *Costello v Government of Ireland* [2022] IESC 44 [213] (Hogan J).

⁹⁸ Cf. H Lindhal, ‘Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood’, in M Loughlin and N Walker (eds), *The Paradox of Constitutionalism* (OUP, 2007) 9-24; R Jackson, *Sovereignty: Evolution of an Idea* (Polity Press 2007) Chapter 4; Lars Vinx, ‘The Incoherence of Strong Popular Sovereignty’ (2013) 11(1) ICON 101; Eoin Daly, ‘Translating Popular Sovereignty as Unfettered Constitutional Amendability’ (2019) 15 European Constitutional Law Review 619; Tom Hickey, ‘Popular Sovereignty in Irish Constitutional Law’ (2017) 40(2) DULJ 147; Eoin Daly and Tom Hickey, *The Political Theory of the Irish Constitution: Republicanism and the Basic Law* (Manchester University Press 2015); Colm O’Cinneide, ‘“The People Are the Masters” The Paradox of Constitutionalism and the Uncertain Status of Popular Sovereignty Within the Irish Constitutional Order’ (2012) 48 Irish Jurist 249; Oran Doyle, ‘Constitutional Identity and Unamendability’ Ran Hirschl and Yaniv Roznai (eds), *Deciphering the Genome of Constitutionalism: The Foundations and Future of Constitutional Identity* (Cambridge University Press 2024).

⁹⁹ For an alternative view of the referendum, see Leah Trueblood, *Referendums as Representative Democracy* (Hart Publishing 2024).

virtues of less limited democracy. However, as the next section demonstrates, that would overlook some of the most fundamental aspects of the Constitution.

7.4.2 – Constitutionalism in Bunreacht na hÉireann

7.4.2.1 – Separation of Powers

The clearest evidence of constitutionalist limits in Bunreacht na hÉireann is the manner in which powers are separated. The Constitution expressly adopts a tripartite separation of powers between the Legislative, Executive, and Judicial branches.¹⁰⁰ More than that, the separation of powers is enforceable by the courts, and has been the subject of extensive litigation. Take, for example, the manner in which the Judiciary have guarded their own power. Article 34.1 establishes that justice shall be administered in public, ‘in courts established by law by judges appointed in the manner provided by this Constitution’. Article 37 provides an exception in relation to ‘the exercise of limited functions and powers of a judicial nature’ by persons not appointed judges under the Constitution. Over the course of a long line of cases, the Judiciary have been tasked with defining what a judicial function is, and whether or not certain bodies/tribunals are exercising ‘judicial functions’ for the purpose of Articles 34 and 37.¹⁰¹ Those cases demonstrate the Judiciary’s authority and willingness to review attempts by either the Legislature or the Executive to encroach on the powers granted to the courts, and have stated clearly that certain functions are reserved exclusively to the courts.

The Judiciary have also taken on the role of determining what powers the Constitution does and, crucially, does not grant to the Legislature¹⁰² and the Executive.¹⁰³ That the courts’ power to strike down actions of the other branches in this way has an explicit basis in the text strongly suggests that the Constitution places a value on notions of limiting government. The Supreme Court affirmed as much in the *Abortion Information* case,

¹⁰⁰ Article 6.

¹⁰¹ The recent case of *Zalewski v Adjudication Officer* [2021] IESC 24 exemplifies the Supreme Court’s approach to this question. Tom Hickey, ‘Zalewski and the Future of Irish Public Law’ (2024) 87(2) *Modern Law Review* 466.

¹⁰² See *Náisiunta Leictreacht Contraitheoir Eireann (NECI) v Labour Court* [2021] IESC 36.

¹⁰³ *Burke v Minister for Education* [2022] IESC 1.

recognising that the ‘Constitution limits, confines and restricts the powers of the State and the organs of State established by the Constitution.’¹⁰⁴ Included in those limits are specific restrictions on actions which infringe any of the extensive number of rights protected (explicitly or implicitly) by the Constitution, as well as limits to what powers the democratically elected branch(es) can assume. So, despite the Constitution’s emphatic language regarding popular sovereignty, in the ordinary course of events particular classes of decisions are taken out of the hands of democratic representatives entirely.¹⁰⁵

7.4.2.2 – Judicial Review

The next obvious limit placed on government by the Irish Constitution is the fact that the superior courts have the authority to strike down legislation as incompatible with the Constitution. As has been written about extensively, strong-form judicial review is very much a feature of the Irish legal system.¹⁰⁶ Declarations of incompatibility are relatively common,¹⁰⁷ and have the effect of rendering a law void *ab initio*.¹⁰⁸ Neither the Executive nor the Legislative branches enjoy authority to overrule the Judiciary in this regard. The area of law in which this power is most prominent is rights review. The mid to late 20th Century saw the Supreme Court significantly expand the breadth of this power through the establishment of the unenumerated rights doctrine, where certain rights were identified as implicit in the Constitution despite having no explicit textual basis.¹⁰⁹ While this practice did come to an end, the doctrine has been revived in a slightly different form more recently.¹¹⁰ Regardless of the status of that precise doctrine, it demonstrates that under

¹⁰⁴ *Re Article 26 and the Information (Termination of Pregnancies) Bill 1995* [1995] IESC 9, [1995] 1 IR 1.

¹⁰⁵ i.e., the Oireachtas and, to a lesser extent, the Executive.

¹⁰⁶ See generally Gerry Whyte, ‘Judicial Capacity to Enforce Socio-Economic Rights’ (2014) 37 DULJ 203; Gerard Hogan, David Kenny, Rachael Walsh ‘An Anthology of Declarations of Unconstitutionality’ (2015) 54 Irish Jurist 1.

¹⁰⁷ Gerard Hogan, David Kenny, Rachael Walsh ‘An Anthology of Declarations of Unconstitutionality’ (2015) 54 Irish Jurist 1.

¹⁰⁸ Notwithstanding a recent increase in the use of suspended declarations of invalidity. See *NVH v Minister for Justice and Equality* [2017] IESC 35; *Heneghan v Minister for Housing and Planning (No 2)* [2023] IESC 18; Eoin Carolan, ‘A Dialogue-Oriented Departure in Constitutional Remedies: The Implications of *NHV v Minister for Justice for Inter-Branch Roles and Relationships*’ (2017) 40 DULJ 191.

¹⁰⁹ Beginning with *Ryan v Attorney General* [1965] IR 294. On the doctrine generally see Conor Casey and Oran Doyle, ‘Foreword: The Constitution under the New Supreme Court’ (2024) 44(1) DULJ 5; Gerard Hogan, ‘Unenumerated Personal Rights: Ryan’s Case Re-evaluated’ (1990-1992) 25-27 Irish Jurist 95; Donal O’Donnell, ‘The Sleep of Reason’ (2017) 40(2) DULJ 3.

¹¹⁰ This has been labelled the ‘derived rights’ doctrine. *NHV v Minister for Justice* [2017] IESC 35; *Friends of the Irish Environment v Government of Ireland* [2020] IESC 49; *Fox v Minister for Justice* [2021] IESC 67; David Kenny, ‘Recent Developments in the Right of the Person in Article 40.3: Fleming v Ireland and the Spectre of Unenumerated Rights’ (2013) 36 *Dublin University Law Journal*, 322.

Bunreacht na hÉireann the Judiciary enjoy a significant power of review and are explicitly granted the final word with regards to legal and constitutional interpretation, which cannot be overridden by the democratically-elected legislature.¹¹¹ Not only does the Constitution grant the Judiciary this power to enforce limits on government, the capacious nature of certain rights has allowed the courts to extend this power further than the text might initially suggest.¹¹²

7.4.2.3 – Natural Law Influence

Further evidence of constitutionalist limits can be found in the text itself. Alongside the emphatic language of popular sovereignty and democracy, the Constitution incorporates a great deal of natural law ideals, in particular where fundamental rights are concerned. For example, Article 41 speaks of the Family's 'inalienable and imprescriptible rights, antecedent and superior to all positive law',¹¹³ and Article 42 describes the 'inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.'¹¹⁴ Article 43, protecting private property, uses similarly absolute language to pronounce man's 'natural right, antecedent to positive law, to the private ownership of external goods.'¹¹⁵ This language is not restricted solely to provisions from the original 1937 text of the Constitution; Article 42A – inserted by referendum in 2012 – refers twice to the 'natural and imprescriptible rights' of the child.¹¹⁶

These provisions were at the heart of a lengthy line of cases in the 20th Century, beginning in *Ryan v Attorney General*,¹¹⁷ which examined the place of natural law in the Irish Constitution. The most noteworthy judgment in this regard is that of Walsh J in *McGee v Attorney General*, in which the Supreme Court struck down a ban on contraceptives as contrary to the unenumerated right to marital privacy.¹¹⁸ On its face, this approach

¹¹¹ On this question of the 'final word' in constitutionalism, see Aileen Kavanagh, 'A Hard Look at the Last Word' (2015) 35 Oxford Journal of Legal Studies 825.

¹¹² e.g. through the unenumerated rights doctrine.

¹¹³ Article 41.1.1.

¹¹⁴ Article 42.1.

¹¹⁵ Article 43.1.1.

¹¹⁶ Article 42A.1 and 42A.2.1.

¹¹⁷ *Ryan v Attorney General* [1965] IR 294.

¹¹⁸ *McGee v Attorney General* [1974] IR 284.

suggests the existence of constitutionalist limits inherent in the Constitution: the existence of ‘rights over which the State has no authority’ implies a limit to what can legitimately be done with regard to those rights.¹¹⁹ This approach, however, ultimately ran aground in the *Abortion Information* case, where the Supreme Court moved away from Walsh J’s reliance on natural law,¹²⁰ and instead emphasised the guidelines as laid down in the Constitution.¹²¹ The Supreme Court recognised the Constitution as the fundamental law of the State and refused to recognise the provisions of the natural law as superior to the Constitution.¹²² While the *Abortion Information* case has drawn criticism for its somewhat lacklustre reasoning when overcoming the natural law arguments, it certainly did signal the end of natural law’s influence on the area of unenumerated rights.¹²³

Despite the demise of this jurisprudence, the tension inherent in the text should not be overlooked; the text seems to embrace both the principles of constitutionalism and democracy, although without offering any solution for how this tension might be resolved. Even in light of the decision in the *Abortion Information* case, the fact remains that certain rights in the Constitution are referred to as ‘anterior to all positive law’, which is at the very least a curiosity for a constitution which otherwise adheres to the concept of unfettered popular sovereignty.¹²⁴

7.4.3 – An Overall Picture

¹¹⁹ *McGee v Attorney General* [1974] IR 284 per Walsh J 310, 317-318.

¹²⁰ *Re Article 26 and the Information (Termination of Pregnancies) Bill 1995* [1995] IESC 9, [1995] 1 IR 1.

¹²¹ Aileen Kavanagh, ‘The Irish Constitution at 75 Years: Natural Law, Christian Values and the Ideal of Justice’ (2012) 48 *Irish Jurist* 71.

¹²² Aileen Kavanagh, ‘The Irish Constitution at 75 Years: Natural Law, Christian Values and the Ideal of Justice’ (2012) 48 *Irish Jurist* 71. Oran Doyle has argued that the Court failed to specifically answer the question of where the Constitution draws its legal validity from, instead choosing to decide the case on the narrower question of whether the State is subject to the Constitution; Oran Doyle, ‘Legal Validity: Reflections on the Irish Constitution’ (2003) 25 *DULJ* 56.

¹²³ Cf. Oran Doyle, ‘Legal Validity: Reflections on the Irish Constitution’ (2003) 25 *DULJ* 56; Aileen Kavanagh, ‘The Irish Constitution at 75 Years: Natural Law, Christian Values and the Ideal of Justice’ (2012) 48 *Irish Jurist* 71; Neville Cox ‘Judicial Activism, Constitutional Interpretation and the Problem of Abortion: *Roe v Wade* (1973) and *X v AG* (1992)’ in O’Dell (ed) *Leading Cases of the Twentieth Century* (Dublin, 2000).

¹²⁴ Doyle presents the tension as concerning the Constitution’s ultimate source of legal validity, but it is as applicable to this constitutionalism and democracy dichotomy – both are concerned (ultimately) with identifying the limits of legitimate legal action. Oran Doyle, ‘Legal Validity: Reflections on the Irish Constitution’ (2003) 25 *DULJ* 56.

The Irish Constitution clearly subscribes to the benefits of constitutionalism. Clear and explicit limits on government form key aspects of the constitutional order, and the manner in which the state is established – a tripartite separation of powers,¹²⁵ strong form judicial review¹²⁶ and a justiciable bill of rights¹²⁷ – closely mirrors the concerns of constitutionalists. Indeed, the everyday running of the state suggests one which is wary of potential majoritarian abuses more than it does a state fearful of losing that sense of constitutional ownership.¹²⁸ At the same time, in its language Bunreacht na hÉireann is particularly emphatic about the ideal of democracy. This in itself might be normal enough: plenty of constitutions make overtures towards lofty notions of self-government and democracy without ever really intending to implement them.¹²⁹ Yet it is curious just how emphatic Bunreacht na hÉireann is on this point. And it is even more curious that the ideals have been taken so seriously by members of the judiciary who might otherwise have little reason to champion notions of popular sovereignty. There is manifestly a tension at the heart of the document: the promises of popular sovereignty seem totally at odds with the idea of strong-form judicial review, and the allusions to direct democracy seem disingenuous where representative government is the *modus operandi*. It seems that Bunreacht na hÉireann establishes a state that in word values strong notions of democratic control, yet in practice values stability, counter-majoritarianism, and predictability. It is not clear exactly how the Constitution manages to realise the benefits of both of these principles. However, one thing in particular is conspicuous by its absence in this discussion so far: the constitutional referendum.

7.5 – Referendums: Persistent Questions

In Sections 7.6 and 7.7 of this chapter, I will set out how the Irish referendum seeks to resolve the tension between constitutionalism and democracy in the specific Irish context. Before doing that, however, it is necessary to say a little about referendums more

¹²⁵ Article 6 Bunreacht na hÉireann.

¹²⁶ Article 34.3.2 Bunreacht na hÉireann.

¹²⁷ Articles 40 – 44 Bunreacht na hÉireann.

¹²⁸ This is in no small part due to the influence of the UK constitutional order on the drafting of the Irish Constitution.

¹²⁹ See Richard Albert, *Constitutional Amendments Making, Breaking, and Changing Constitutions* (OUP 2019) for a discussion of how the reality of constitutional amendment procedures match up with the constitutional language.

generally. Despite its popularity in Ireland and a handful of other jurisdictions,¹³⁰ the referendum is a much-maligned tool.¹³¹ Criticisms are often made on the basis that the referendum is a blunt instrument which is unsuitable as a mechanism for making complex decisions in a modern democracy.¹³² While many of these critiques are beyond the scope of this chapter, some are of particular relevance to the question of balancing constitutionalism and democracy. In particular, if I am to argue that the referendum is an appropriate mechanism for balancing these principles, then it is necessary to address those who insist that it is an instrument of crude populism,¹³³ as well as those which claim it is susceptible to elite capture and thus of no democratic value.¹³⁴ In this section I propose to do this briefly and demonstrate that the referendum is capable of meeting both of those charges.

7.5.1 – Crude Populism

Critiques that the referendum is a vehicle for crude populism are articulated in a number of ways. First, some argue that it is crude in the sense that referendums necessarily involve reducing complex, multi-faceted issues into overly simplistic, binary choices.¹³⁵ Chambers argues that this makes referendums susceptible to the ‘lobster-trap phenomenon’: when a complex issue is boiled down to a choice and put to a vote, people’s positions become hardened and the debate is deemed closed thereafter.¹³⁶ On that basis,

¹³⁰ Switzerland and Italy are particular examples in Europe.

¹³¹ For an overview, see David Kenny, ‘The Risks of Referendums: ‘Referendum Culture’ in Ireland as a Solution?’ in Cahill, Ó Cinnéide, Ó Conaill, and O’Mahony (eds) *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland* (Routledge 2021); Simone Chambers, *Constitutional Referendums and Deliberative Democracy* in Matthew Mendelsohn & Andrew Parkin, *Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns* (Palgrave, 2001) 231.

¹³² David Kenny, ‘The Risks of Referendums: ‘Referendum Culture’ in Ireland as a Solution?’ in Cahill, Ó Cinnéide, Ó Conaill, and O’Mahony (eds) *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland* (Routledge 2021).

¹³³ See generally Shaun Bowler and Todd Donovan, ‘Popular Control of Referendum Agendas: Implications for Democratic Outcomes and Minority Rights’ in Matthew Mendelsohn & Andrew Parkin, *Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns* (Palgrave, 2001) 125.

¹³⁴ David Kenny, ‘The Risks of Referendums: ‘Referendum Culture’ in Ireland as a Solution?’ in Cahill, Ó Cinnéide, Ó Conaill, and O’Mahony (eds) *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland* (Routledge 2021).

¹³⁵ Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (OUP 2014).

¹³⁶ Simone Chambers, *Constitutional Referendums and Deliberative Democracy* in Matthew Mendelsohn & Andrew Parkin, *Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns* (Palgrave, 2001) 231.

deliberation is limited and finite; it is not envisaged that the issue will be revisited.¹³⁷ Referendums are also said to be ‘bad for deliberation’ since they aggregate pre-formed views, rather than allowing for real substantive deliberation.¹³⁸ Second, it is argued that referendums embrace simple majoritarianism and thus pose a danger to minority rights, among other things.¹³⁹ These critiques thus suggest that the referendum begets crude populism and is entirely unsuitable as a mechanism for constitutional amendment.

Tierney rejects the suggestion that referendums are crude or inherently populist in the way set out above.¹⁴⁰ For him, any concerns about deliberative deficits fail to recognise that in order for a voting population to deliberate effectively, they must be given the opportunity to do so.¹⁴¹ Colón-Ríos and Hutchinson make the same argument, saying that the ‘best way to reinvigorate the argumentative dimension of our politics is more democracy, not less.’¹⁴² In respect of the majoritarian concern, Tierney notes that representative politics is also not free from majoritarian decision-making and is not intended to be, and suffers from many of the same ills as referendums.¹⁴³ As such, we should be wary of letting the perfect become the enemy of the good – ‘we should maintain a balanced approach to the possibilities and risks that attend representative democracy, just as we should in respect of those that attach to referendums.’¹⁴⁴ Tierney’s work is useful for demonstrating that many of the strongest critiques of referendums are not pathological, but are symptoms of poor institutional design and practice. That is not to say that the referendum is never a tool for crude populism, it is merely to show that it should not be dismissed out of hand as

¹³⁷ *ibid.*

¹³⁸ David Kenny, ‘The Risks of Referendums: ‘Referendum Culture’ in Ireland as a Solution?’ in Cahill, Ó Cinnéide, Ó Conaill, and O’Mahony (eds) *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland* (Routledge 2021); Simone Chambers, ‘Constitutional Referendums and Deliberative Democracy’ in Matthew Mendelsohn & Andrew Parkin, *Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns* (Palgrave, 2001) 231.

¹³⁹ David Kenny, ‘The Risks of Referendums: ‘Referendum Culture’ in Ireland as a Solution?’ in Cahill, Ó Cinnéide, Ó Conaill, and O’Mahony (eds) *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland* (Routledge 2021).

¹⁴⁰ Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (OUP 2014) Chapter 2.

¹⁴¹ Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (OUP 2014) 34.

¹⁴² Allan Hutchinson and Joel Colón-Ríos, ‘What’s Democracy Got To Do With It? A Critique of Liberal Constitutionalism’ (2007) 3(5) CLPE Research Paper 29/2007, 5 <<http://ssrn.com/abstractid=1017305>> accessed 11 July 2011.

¹⁴³ Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (OUP 2014) 39.

¹⁴⁴ Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (OUP 2014) 42.

unsuitable for constitutional amendment. As demonstrated earlier in this thesis, good institutional design can remedy some of the worst impulses of majoritarianism.¹⁴⁵ In other words, the dangers of majoritarianism in the referendum can be overcome, and there are benefits for a state which does so.

7.5.2 – Elite Capture

The referendum is also subject to critiques which insist that it is liable to elite manipulation and capture: it becomes a tool ‘to enable elite governance masked in the cloak of direct democracy.’¹⁴⁶ Since the content and procedure for a referendum are usually determined by governments, and since party politics tend to take centre stage in campaigns, the argument goes that it is not really an exercise in popular decision-making, and elites can procure a particular desired result.¹⁴⁷ The decision, in effect, is made before citizens even get to a polling station. This critique has been levelled against the Irish referendum in particular, since the government is heavily involved in the initiation, proposal, and campaign stages.¹⁴⁸ These critiques target the democratic credentials of the referendum in two ways. First, it is said that the referendum is more open to elite manipulation than ordinary representative politics and is thus more susceptible to abuse.¹⁴⁹ Second, any claims that the referendum purports to make about unmediated popular choice, and therefore greater democratic legitimacy, are undermined on the basis that the people are not making any substantive choice.¹⁵⁰

Tierney notes that this form of critique is usually based on a contrast: ‘the strength of representative democracy in diluting the power of particular elites, and the weakness of

¹⁴⁵ See §4.6 in particular.

¹⁴⁶ David Kenny, ‘The Risks of Referendums: ‘Referendum Culture’ in Ireland as a Solution?’ in Cahill, Ó Cinnéide, Ó Conaill, and O’Mahony (eds) *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland* (Routledge 2021).

¹⁴⁷ David Kenny, ‘The Risks of Referendums: ‘Referendum Culture’ in Ireland as a Solution?’ in Cahill, Ó Cinnéide, Ó Conaill, and O’Mahony (eds) *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland* (Routledge 2021).

¹⁴⁸ See generally, §2.5.

¹⁴⁹ Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (OUP 2014) 24.

¹⁵⁰ Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (OUP 2014).

referendum democracy is failing to do so.’¹⁵¹ Using the UK as an example, he goes on to demonstrate that, in reality, representative democracy is at least as susceptible to elite capture as referendums on three bases: the weakening of accountability of ministers to parliament; the consolidation of partisan loyalty by the whip system; and the unprecedented level of external influence acting on representatives which diminishes the scope for free deliberation.¹⁵² Once again, the upshot of Tierney’s response here is that we are forced to ask whether the issue of elite capture in referendums is an ‘inherent pathology in the referendum itself or a specific defect of’ design that can be overcome.¹⁵³ For him, and for others, it is clearly the latter. As discussed previously in this thesis (specifically Chapters 4 and 5), appropriate institutional design can remedy many of the malaises which have affected Irish referendums in this regard.

In the same way that representative democracy is not discarded when it occasionally leads to undemocratic or illiberal outcomes, referendums should not be abandoned because they can theoretically be captured by crude populism or elite manipulation. Tierney and others show that the referendum is not *uniquely* susceptible to these dangers any more than another form of democratic decision-making. On that basis, and when we accept that good institutional design can see those obstacles overcome,¹⁵⁴ we should be alive to the possibility that the referendum’s virtues are worth the cost involved. Those virtues, discussed elsewhere, are both inherent and instrumental: greater civic involvement in a democracy is beneficial for its own sake, and at the same time makes a democracy more robust. The referendum is therefore a vehicle for embedding these virtues in a state. In the following sections I will show that it can do this without sacrificing the benefits of constitutionalism in the Irish context.

7.6 – The Irish Referendum: Mediated Democracy

The mechanism for amendment adopted by a constitution says a lot about what its core values are. Moreover, it is often reflective of how it balances constitutionalism and

¹⁵¹ Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (OUP 2014) 23.

¹⁵² *ibid.*

¹⁵³ Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (OUP 2014) 36.

¹⁵⁴ See Chapter 4.

democracy. It might be the aspect of a constitution which is most closely associated with this tension: by setting the boundaries of what can and cannot be changed, the amendment procedure speaks directly to the ideals of stability, predictability, and adaptability. More than this, the specific mechanism by which amendment is effected speaks to how ideals of constitutional ownership, democratic legitimacy, and majoritarianism should be balanced. In the Irish context, the manner in which the constitutional referendum is established is clearly reflective of the Constitution's overall attempts to balance these competing principles: as a mechanism of direct democracy, the referendum emphasises the foundational principles of popular sovereignty and democratic ownership, yet their expression is mediated through particular institutional design in order to mitigate its dangers. Here I demonstrate that the referendum is a clear expression of this balancing act.

7.6.1 – The Referendum's Gestures to Democracy

7.6.1.1 – A Pointedly Democratic Mechanism

The fact that constitutional amendment in Ireland is carried out via the referendum is telling; the referendum is inextricably bound up with strong notions of democracy, and is commonly expressed as a form of direct decision-making.¹⁵⁵ While there is some debate about the normative usefulness of describing referendums as 'directly' democratic,¹⁵⁶ it is clear that there is *some* concrete difference between referendums and other, representative means of democratic decision-making.¹⁵⁷ At a minimum, citizens are more involved in a referendum than in parliamentary debates, for example, since they are actually required to cast a ballot.¹⁵⁸ That is true both for ordinary legislative decisions and for constitutional amendments: citizens are more involved where a constitution is amended via referendum than, say, via a supermajority in parliament.¹⁵⁹

¹⁵⁵ Or at the very least, is contrasted with representative methods.

¹⁵⁶ Leah Trueblood, *Referendums as Representative Democracy* (Hart Publishing 2024).

¹⁵⁷ i.e. legislative decisions.

¹⁵⁸ Even adopting the position that referendums merely rubber-stamp decisions already made by representatives, citizens are at least involved in *some* way – giving final (albeit formalistic) approval to a decision is more than not being consulted at all.

¹⁵⁹ As is the case in the German Basic Law; Article 79 Grundgesetz für die Bundesrepublik Deutschland.

If one accepts that referendums are (or can be) directly democratic in a richer sense, then the democratic character of a referendum is much more substantial.¹⁶⁰ On this understanding, the referendum is the apogee of democratic decision-making; it involves citizens actively coming together to make a collective decision about their constitution.¹⁶¹ Criticisms of this view notwithstanding, this is the impression of the referendum given by the Irish Courts.¹⁶² Hamilton CJ described the People in a referendum as ‘taking a direct role in government either by amending the Constitution or by refusing to amend.’¹⁶³ In the same case, Denham J (as she then was) described the referendum as ‘[t]he most fundamental method by which the People decide all questions of national policy.’¹⁶⁴ In *Coughlan* she described it as

‘an important device in a democracy. It is a tool for direct democracy. It is an alternative to the representative government process. It gives people a method of direct democracy on important issues. It is a contrasting system to that of party political representative democracy. It is the people who legislate.’¹⁶⁵

On the basis of Supreme Court jurisprudence, then, the adoption of the referendum as the method of constitutional amendment reflects the framers’ intent to make it a pointedly democratic exercise. By doing so, it is intended to give life and substance to lofty notions of popular sovereignty and direct democracy.¹⁶⁶ Even if a closer analysis suggested that it could not be normatively justified,¹⁶⁷ the referendum is at the very least *intended* to be a strong endorsement of these democratic principles, and reflects a commitment to realising the ideals of constitutional ownership and authority at the highest level of decision-making in the State.

¹⁶⁰ Colón-Ríos adopts this position in his book in order to examine the question of constituent power; Joel Colón-Ríos, *Constituent Power and the Law* (OUP 2020).

¹⁶¹ For republicans, referendums are a public good in so far as they involve engagement of popular deliberation in democratic decision-making; Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (OUP 2014) 260.

¹⁶² Denham J has made this explicit: she said ‘A referendum is an exercise in direct democracy by the people.’ *Coughlan v Broadcasting Complaints Commission* [2000] 3 IR 1 (SC) [65] (Denham J).

¹⁶³ *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10 (SC) 42 (Hamilton CJ).

¹⁶⁴ *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10 (SC) 51 (Denham J).

¹⁶⁵ *Coughlan v Broadcasting Complaints Commission* [2000] 3 IR 1 (SC) [73] (Denham J).

¹⁶⁶ Kohn notes that the framers of the 1922 Free State Constitution, which was highly influential on the 1937 Constitution, drew inspiration from radical democratic experiments in Europe when settling on the referendum as the method of amendment. Leo Kohn, *The Constitution of the Irish Free State* (George Allen and Unwin 1932) 238.

¹⁶⁷ On this see generally Pavlos Eleftheriadis, ‘Law and Sovereignty’ (2010) 29(5) *Law and Philosophy* 535.

7.6.1.2 – No Substantive Limits

The fact that *any* provision of the Constitution may be amended by referendum is another strong signifier that it is intended to reflect the ideals of constitutional ownership, adaptability and democratic legitimacy.¹⁶⁸ What is relevant in this regard is the referendum's close link to the ideal of popular sovereignty discussed briefly above. As mentioned, popular sovereignty is a difficult concept to define precisely, and its content and implications are notoriously elusive.¹⁶⁹ That said, one feature of popular sovereignty which is clear (at least in the Irish context) is that since the People are the ultimate source of constitutional authority there can be no legitimate limit on what the People can decide. This is plainly reflected in the courts' jurisprudence. Discussing Articles 46 and 47, O'Donnell J in *Jordan* said that a

‘decision of the people is the ultimate source of power in this democracy and the Constitution makes it clear that a decision of the people on a matter consigned to them by the Constitution trumps any governmental decision, legislative enactment or judicial determination.’¹⁷⁰

Since only the People can amend the Constitution, and since the People can amend any part of the Constitution in any way, no limit can be placed on what the People can decide in a constitutional referendum.¹⁷¹ The fact that there are no substantive limits on the amendment power is a very strong indicator Bunreacht na hÉireann places a high value on the principles of adaptability and democratic legitimacy as discussed above.

7.6.2 – Mediated Democracy

The Constitution does, however, explicitly reserve a role for representative institutions in the establishment of any referendum. First, the decision to hold a referendum at all is left with members of the Oireachtas, who must propose it in either the Dáil or the Seanad.¹⁷²

¹⁶⁸ *Re Article 26 and the Information (Termination of Pregnancies) Bill 1995* [1995] IESC 9, [1995] 1 IR 1; On this see Eoin Daly, ‘Translating Popular Sovereignty as Unfettered Constitutional Amendability’ (2019) 15 European Constitutional Law Review 619.

¹⁶⁹ Eoin Daly, ‘Translating Popular Sovereignty as Unfettered Constitutional Amendability’ (2019) 15 European Constitutional Law Review 619.

¹⁷⁰ *Jordan v Minister for Children and Youth Affairs* [2015] IESC 33 [4] (O'Donnell J).

¹⁷¹ Whether or not the People can choose to limit themselves in the manner of Odysseus tying himself to the mast is an interesting but ultimately digressive question.

¹⁷² Article 46.2.

A majority of the members in both Houses must decide to send the issue to referendum before the People are involved in any formal way. In practice, the fact that the government will have a majority in the Dáil means that any decision to hold a referendum lies entirely within its own discretion.¹⁷³ In a similar vein, the Constitution does not provide for citizen-led initiation of referendums and the fact that such provision was not carried over from the 1922 Free State Constitution is noteworthy.¹⁷⁴ Not only that, but the government holds the pen on any referendum proposal: even with recent experiments with deliberative assemblies, ultimately the final say on the wording of a proposal is with the Government.¹⁷⁵ The importance of setting the wording should not be underestimated. Since referendums in this jurisdiction are always a binary Yes/No choice,¹⁷⁶ the wording shapes the nature of the debate and ultimately confines it to a particular question.¹⁷⁷ That question settled on by Government might not always align with how citizens see the debate.¹⁷⁸ In those circumstances, all that citizens can do is accept or reject the amendment proposal before them.

This sort of mediation is at the heart of Trueblood's critique of referendums as directly democratic.¹⁷⁹ She rejects the suggestion that referendums should be understood as instances of direct democracy on the basis that they are mediated in three important ways: first, representatives and elites play a crucial role 'in shaping and aggregating political will'; second, representatives determine what is on the ballot, thus mediating what choice voters can make; and third, referendums require a much broader representative context in order to operate at all.¹⁸⁰ Each of those examples is borne out in the Irish context. Hickey has expressed similar scepticism that, owing to the significant role of representatives, the Irish constitutional referendum can really be said to express popular sovereignty.¹⁸¹ Doyle is also of this view, saying that despite the courts' development of a doctrine of popular

¹⁷³ As has been borne out to this point – while Private Member's Bills have been used to proposed constitutional amendments, all of those which have resulted in a referendum have been introduced by a member of the Governing parties.

¹⁷⁴ Article 48 of the Irish Free State Constitution 1922 provided for citizen initiatives. Leo Kohn, *The Constitution of the Irish Free State* (George Allen and Unwin 1932) 238.

¹⁷⁵ e.g. the Constitutional Convention and Citizens' Assemblies. See Chapter 4.

¹⁷⁶ By convention, there is nothing in the Constitution which prescribes this.

¹⁷⁷ On the potential for this to go wrong, see the discussion of the 2024 Referendums in §5.6.

¹⁷⁸ See the most recent referendums.

¹⁷⁹ Leah Trueblood, *Referendums as Representative Democracy* (Hart Publishing 2024).

¹⁸⁰ Leah Trueblood, *Referendums as Representative Democracy* (Hart Publishing 2024), 54.

¹⁸¹ Tom Hickey, 'Popular Sovereignty in Irish Constitutional Law' (2017) 40(2) *Dublin University Law Journal* 147.

sovereignty, ‘the inability of the people to initiate a constitutional change significantly undermines this characterisation.’¹⁸² For him, the best characterisation of the People’s role in the referendum is as an ‘important constraint in the amendment process’.¹⁸³ Carolan agrees that it is best characterised as a check on government power, not a freestanding expression of popular sovereignty.¹⁸⁴

All of this suggests that the notions of popular sovereignty and direct democracy emphasised so much by the Judiciary are not brought to bear by the reality of referendums. Despite the emphatic language, referendums are so bound up with representative institutions and are so reliant on, and heavily influenced by government actors that it is misleading to say they are clear, unfettered expressions of popular will.¹⁸⁵ Yet this is no accident: the mediation of amendment proposals through representatives reflects the fact that the Constitution is alive to the dangers posed by unchecked majoritarian decision-making, particularly at the constitutional level. As already established, the fact that the State is set up with a tripartite separation of powers, a judicially enforceable bill of rights and a bicameral parliament based on the Westminster model shows that the benefits of constitutionalism were taken seriously by those who drafted the Constitution. It is no stretch, then, to say that the mediation of the referendum is reflective of the same concerns; it is intentional. The inclusion of representatives slows the whole process down somewhat and further acts to temper the worst impulses of majoritarianism by subjecting any amendment proposal to (hopefully) reasoned debate in the Oireachtas.

7.6.3 – Reflecting a Balancing Act

Bunreacht na hÉireann clearly strives for the virtues of both constitutionalism and democracy, and the referendum reflects this. This is borne out in a number of ways. First,

¹⁸² Oran Doyle, *The Constitution of Ireland: A Contextual Analysis* (Hart Publishing 2018) Chapter 10; citing Eoin Daly and Tom Hickey, *The Political Theory of the Irish Constitution: Republicanism and the Basic Law* (Manchester University Press, 2015) Chapter 1.

¹⁸³ Oran Doyle, *The Constitution of Ireland: A Contextual Analysis* (Hart Publishing 2018) Chapter 10.

¹⁸⁴ Eoin Carolan, ‘Leaving Behind the Commonwealth Model of Rights Review: Ireland as an Example of Collaborative Constitutionalism’ in John Bell & Marie-Luce Paris (eds.) *Rights-Based Constitutional Review: Constitutional Courts in a Changing Landscape* (Edward Elgar, 2016) 109-111.

¹⁸⁵ Oran Doyle, *The Constitution of Ireland: A Contextual Analysis* (Hart Publishing 2018) Chapter 10; Eoin Carolan, ‘Leaving Behind the Commonwealth Model of Rights Review: Ireland as an Example of Collaborative Constitutionalism’ in John Bell & Marie-Luce Paris (eds.) *Rights-Based Constitutional Review: Constitutional Courts in a Changing Landscape* (Edward Elgar, 2016) 109-111.

even accepting the critiques that popular sovereignty is not realised by the practice of the referendum, it cannot be ignored that the Constitution explicitly provides for a legally unlimited amendment power. Even when mediated, this is clearly an endorsement of the virtues of democracy identified in Section 7.2: the ideals of constitutional ownership and democratic legitimacy are central here. Second, the role of representatives in the referendum does not necessarily qualify as a strictly constitutionalist limit on the People's power – after all, representatives are democratic actors.¹⁸⁶ The method by which the referendum is mediated, therefore, is via another form of democratic decision-making. As such, in establishing the constitutional referendum as the method of amendment, Bunreacht na hÉireann has opted to emphasise the virtues of democracy: democratic legitimacy, adaptability, and constitutional ownership. The fact that the amendment power is unlimited is a symptom of this. By opting for these virtues, Bunreacht na hÉireann has assumed the risks associated with it, including the possibility of majoritarian abuse.

Crucially, however, the Constitution seeks to engender the benefits of constitutionalism as well. This is done through the establishment of important constraints on the referendum in order to ameliorate the most severe majoritarian vices. While these constraints do not take the form of substantive limits on amendment, the requirement that amendment proposals be mediated through representative institutions before being put before the People at ballot has a significant impact on the manner in which referendums come about. A critic might say that this mediation undermines the commitments to popular sovereignty and direct democracy,¹⁸⁷ and that consequently the referendum cannot instantiate a sense of popular ownership and democratic legitimacy. Yet Trueblood's work is instructive here in demonstrating that, even if referendums are not really *directly* democratic, they are still democratic in an important sense, and can bring about virtues which other methods of amendment cannot.¹⁸⁸ On that basis, then, whether or not referendums are directly democratic and whether or not they are really instantiations of popular sovereignty are secondary considerations only. What is most important is that the referendum is a valuable tool for balancing the commitments to democracy and constitutionalism.

¹⁸⁶ Constitutionalist limits are those which limit democratic decision-making of any form, whether representative or direct.

¹⁸⁷ Eoin Carolan, 'Leaving Behind the Commonwealth Model of Rights Review: Ireland as an Example of Collaborative Constitutionalism' in John Bell & Marie-Luce Paris (eds.) *Rights-Based Constitutional Review: Constitutional Courts in a Changing Landscape* (Edward Elgar, 2016) 109-111.

¹⁸⁸ Leah Trueblood, *Referendums as Representative Democracy* (Hart Publishing 2024).

Bunreacht na hÉireann invokes popular sovereignty as its foundational and guiding principle yet employs constitutionalist limits in relation to all aspects of government power. In this way, the Constitution's everyday operation seeks to maximise the benefits of constitutionalism – any potential consolidation of power is constrained by a strict and enforceable separation of powers, and majoritarian impulses in the legislature are countered by enforceable fundamental rights. Yet when push comes to shove at amendment, Bunreacht na hÉireann concedes those principles in order to maintain its commitment to popular sovereignty and democratic legitimacy.¹⁸⁹ In that way, the Constitution attempts to attract the virtues of both democracy and constitutionalism while tempering the vices of both. The referendum attempts to strike the same balance. It is clearly based on the same strong democratic principles and ultimately does reflect a core commitment to the People's final power of amendment, yet it is mediated. While that mediation does not extend to substantive limits, the involvement of representatives is such that amendment is slowed down, tempered and, ideally, more reasoned.

7.7 – The Virtues of the Referendum

In Homer's *Odyssey*, Odysseus and his crew encounter a difficulty when passing through a strait. On one side is Charybdis, whose whirlpool destroys any ship which sails too close. On the other is Scylla: a six-headed monster who snatches sailors from the deck of any ship within range. In order to pass through the strait, Odysseus must risk losing his entire ship to Charybdis or his men to Scylla.¹⁹⁰ In the end, Odysseus avoids Charybdis but succumbs to Scylla's menace, losing a number of his crew in passing. The Scylla and Charybdis analogy has been employed regularly in discussions of the dangers facing a state, and has been used in the realm of constitutionalism before: Percy Bysshe Shelley famously evoked the image of a state being driven between the Scylla and Charybdis of anarchism and despotism.¹⁹¹ Yet the analogy is particularly apt for describing the dilemma

¹⁸⁹ Again, the nuances of popular sovereignty are unimportant here, the concept is at the very least a cipher for a notion of popular ownership and the truth that the Constitution depends upon popular acceptance for its legitimacy.

¹⁹⁰ As Circe informs him, 'No sailors yet can boast they and their ship sailed past her without disaster'. Circe goes on to say that actually only one ship has every made it through: Jason's *Argo*, which made it through only thanks to the divine intervention of Hera. An analogy could be drawn here between *Argo* and the ideal state, but space confines this thesis to just one foray into Homeric analogies.

¹⁹¹ Percy Bysshe Shelley, *A Defence of Poetry* (1820).

which faces a state trying to balance constitutionalism and democracy. As demonstrated above, where a state seeks to maximise a virtue of constitutionalism, something must be sacrificed in respect of democracy, and *vice versa*. Here I argue that the referendum is what makes Bunreacht na hÉireann's attempt to balance the principles of constitutionalism and democracy successful, such that the state enjoys the benefits of both principles without drifting too far from one or the other. I argue that the success of this balancing act is the value added to the Irish State by the referendum, allowing it to sail through the strait with minimal damage.

7.7.1 – Constitutional Flexibility

Bunreacht na hÉireann is relatively stable, and the legal order it establishes is similarly stable and predictable. The laws of the state are such that people are able to be guided by it,¹⁹² and generally conform to Raz's principles of reasonable clarity, reasonable stability, public availability via general rules that are applied prospectively and not retroactively.¹⁹³ This is achieved primarily through the establishment of a democratically- elected and responsive legislature, a judiciary empowered to enforce the separation of powers, and a constitution which places clear limits on what each branch can legitimately do. Happily, the principles of stability and predictability have been taken seriously by the branches of government over the State's history.¹⁹⁴ This is so despite the presence of an unlimited amendment power, and despite the fact that there have been forty-three referendums held to amend the Constitution. At the same time, one of the defining features of the Irish Constitution over the last number of decades is the radical change that has taken place through referendums.¹⁹⁵ The fact that a constitution which was at one stage marked by its reflection of conservative, Thomistic ideology has evolved to one which reflects a far more liberal, secular ideology is what has made the Irish experience with referendums such a

¹⁹² Joseph Raz, 'The Rule of Law and its Virtue', *The Authority of Law* (OUP 1979) 210-29.

¹⁹³ Joseph Raz, 'The Law's Own Virtue' (2019) 39(1) *Legal Studies* 1.

¹⁹⁴ As an example, the Supreme Court's decision in *In the matter of Article 26 of the Constitution and in the matter of the Health (Amendment) (No. 2) Bill 2004* [2005] 1 IR 105 on retroactivity and constitutional rights.

¹⁹⁵ See generally Cahill, Ó Cinnéide, Ó Conaill, and O'Mahony (eds) *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland* (Routledge 2021).

point of interest.¹⁹⁶ Bunreacht na hÉireann therefore embraces the ideals of adaptability and constitutional ownership, and has been largely successful in achieving these virtues.

The referendum is the method by which the Constitution captures this balance; seeking the virtues of stability and predictability while also being adaptable and responsive enough to give life to the principles of democratic ownership and legitimacy. Through the referendum, the Irish Constitution is easy enough to amend that amendment is a practical reality and that people actually do feel a sense of ownership of the document, such that it retains a strong sense of legitimacy and adaptability.¹⁹⁷ Yet it is difficult enough to amend that amendment is not flippant, and the Constitution retains its authority and its status as a binding, higher-order set of rules over and above ordinary legislation. It is not so easy to amend as to make its content immaterial or insignificant, or to allow a fleeting parliamentary majority to radically alter it unchecked by any other actor.¹⁹⁸ As we have established, the referendum (and therefore the Constitution) ultimately opts to emphasise the benefits of popular control and ownership on foot of its commitment to an unlimited amendment power. The referendum therefore rejects the dead-hand of the past and embraces the risk that ‘desirable’ aspects of the Constitution can be altered. Combined with the mediation mentioned above, the Constitution, via the referendum, is therefore sufficiently stable to engender associated benefits, but flexible enough to adapt to voters’ intentions as and when required. While there are some risks assumed, the method for amendment is designed in such a way as to minimise those risks.

7.7.2 – Counter-majoritarianism and Democratic Legitimacy

In its everyday operation, Bunreacht na hÉireann is very much alive to the dangers of unchecked majoritarianism. The Judiciary’s role in enforcing fundamental rights is evidence enough of this, as is the enforcement of the separation of powers. Yet there is reality to the suggestion that the Constitution owes its legitimacy to the People, and that it takes seriously the notions of popular sovereignty and democracy. Irish citizens are (still)

¹⁹⁶ As seen most obviously in the wake of the 2018 Abortion referendum.

¹⁹⁷ The adaptability of the Constitution is borne out by the number of amendments made since 1937: 31.

¹⁹⁸ Although this is a possibility so long as the referendums pass, the cost and time involved in holding referendums, and the fact that any amendment must be approved by the People is something of a preventative against this.

broadly positive about the state of democracy in this jurisdiction.¹⁹⁹ By committing to the idea of ultimate popular authority, but by restricting the exercise of that power to a constitutional referendum mediated by representatives, the Constitution seeks to balance the protection against majoritarian impulses with the principle of democratic legitimacy. The Constitution does assume some risks by this approach: the fact that constitutionalist limits constrain the everyday running of the state means that apathy and distrust of elites can seep in;²⁰⁰ and the unfettered amendment power leaves the spectre of majoritarian abuses a possibility.²⁰¹ Yet the mediating features – such as Oireachtas approval – slow the process down, as it were, so that majoritarian impulses are tempered. The fact that amendment via referendum is more difficult than a simple-majority vote in parliament prevents majoritarian abuses in that arena. Similarly, where representatives are acting properly, majoritarian impulses in the voting population are constrained since there is no popular initiative. In effect, the People and democratic representatives can check each other at the referendum.²⁰² Again, unlimited amendment power means the state does ultimately accept some risk of majoritarianism. I submit, however, that the mediating principles identified here pull the ship away from those dangers sufficiently, so that Ireland can stand over its commitment to democratic legitimacy without succumbing to majoritarianism wholesale. The significance of achieving this balance should not be underestimated.

7.7.3 – The Value of the Referendum

In summary, Ireland’s mechanism of constitutional referendum attempts to guide the State through the narrow straits between constitutionalism and democracy. On one side of the straits lie the wrecks of states which lost all democratic legitimacy and authority because the malaises of elitism, popular apathy, and citizen alienation became overbearing. On the

¹⁹⁹ The most recent Eurobarometer Report states that 80% of persons over the age of 15 in Ireland are satisfied with the way democracy works in their own country. *Eurobarometer Report* (Spring 2024).

²⁰⁰ Aziz Huq and Tom Ginsberg, ‘How to Lose a Constitutional Democracy’ (2018) 65 *UCLA Law Rev* 78.

²⁰¹ See the 2004 Citizenship referendum; Hilary Hogan, ‘Democratic Constitutionalism or Elite Control? Revisiting the 2004 Irish Citizenship Referendum’ in Cahill, Ó Cinnéide, Ó Conaill, and O’Mahony (eds) *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland* (Routledge 2021).

²⁰² Oran Doyle, *The Constitution of Ireland: A Contextual Analysis* (Hart Publishing 2018) Chapter 10; Eoin Carolan, ‘Leaving Behind the Commonwealth Model of Rights Review: Ireland as an Example of Collaborative Constitutionalism’ in John Bell & Marie-Luce Paris (eds.) *Rights-Based Constitutional Review: Constitutional Courts in a Changing Landscape* (Edward Elgar, 2016) 109-111.

other side are the wrecks of those states which, without any limit on government whatsoever, descended into unchecked populism, majoritarian tyranny, and chaos. The referendum exemplifies Ireland's path: with an unlimited amendment power, the State chooses to take the risk of sailing close to the latter danger. However, the design of the referendum attempts to protect the State from wreckage there: by restricting the exercise of the People's unlimited power to one specific form of expression mediated through representative government, and by placing constitutionalist limits on the everyday running of the State, the risk of damage from Scylla is reduced. So far, this has proven successful. Ireland remains an example of how referendums can be used to give life to lofty ideals of democracy without sacrificing all of constitutionalism's important benefits. Since no other mechanism for amendment has the same innate popular and democratic draw as a referendum, it is unclear if any other form of amendment could tread this path.

7.8 – The Referendum's Value

In this chapter I have attempted to demonstrate the value of the referendum for Ireland's constitutional order. While other work in this area has tried to do this by examining the referendum through the lens of popular sovereignty and/or direct democracy, I have argued that it is unnecessary to unpack those ideals. If our goal is to understand the rationale for including the referendum as the method of amendment in Bunreacht na hÉireann and the value that accrues to the state as a result, then we need not be concerned with fitting the reality of Irish referendums into theory of popular sovereignty. Such an account might help us to understand what the Constitution says about the theories of constituent power, or clarify the normative attractiveness of popular sovereignty, but those are separate questions for separate endeavours.²⁰³ For my purposes, what really matters is understanding what the Constitution is trying to do, and whether it does it successfully. The best way to answer that question, I argue, is by examining the referendum in light of the tension between constitutionalism and democracy.

²⁰³ Yaniv Roznai, 'Towards a Theory of Constitutional Unamendability: On the Nature and Scope of the Constitutional Amendment Powers' (2017) 18 *Jus Politicum: Cours constitutionnelles et révisions de la Constitution*.

This tension represents a basic truth about all democratic constitutional orders: that states must find a way to balance their competing interests or risk succumbing to potentially fatal woes. It further clarifies the centrality of amendment procedures to this debate. I have argued that Ireland's system of constitutional referendum is reflective of a tension at the heart of the Constitution itself between a commitment to popular sovereignty and democracy, and a recognition of the benefits of constitutionalist limits on government. The referendum is the mechanism by which Bunreacht na hÉireann attempts to resolve this tension. It is, I have argued, broadly successful in doing this. While the benefits of constitutionalism are visible throughout the state, Ireland's referendums do give life to the principles of democratic ownership and legitimacy. The fact that Bunreacht na hÉireann has gone through such radical change over its lifespan yet has at all times retained its authority is a testament to its flexibility: it is neither rigid nor pliant. Its responsiveness to democratic requirements without succumbing to unchecked majoritarianism is yet another example of how the referendum aids the Irish State in sailing between Scylla and Charybdis. This is the value added to the State by virtue of the constitutional referendum.

7.9 – Conclusion

In the earlier parts of this thesis I sought to assess whether Irish referendums have been successful, and the ways in which they can be successful. I argued that Ireland's experience with referendums is multifaceted and complex. Through an analysis of various referendums and supplementary institutions, I argued that there are clear trends regarding what makes some referendums successful and others not. That demonstrated that maximising substantive democratic engagement is the best metric of success, and that this can be achieved by adherence to a particular set of criteria. In the last chapter I showed that this accords with the Judiciary's understanding of the purpose of the referendum and its link with democracy in the Constitution. In this chapter, however, I have sought to do something else. Here, I have demonstrated the value of adopting the referendum as the method of constitutional amendment. Quite aside from whether one referendum is successful or not, I have been concerned here with unpacking the virtues behind that initial decision to adopt this mechanism for amendment. I have argued that these virtues are best understood as balancing constitutionalism and democracy, both of which principles feature heavily in the Irish Constitution. As such, I have built on the work of earlier

chapters and shown that where democratic engagement is maximised, this balance is struck in the manner envisaged, and the state enjoys particular virtues. This is the value of the referendum.

8. CONCLUSION

The central research question of this thesis is are Irish referendums successful, and in what way can they be successful? In this thesis I have argued that across seven decades Ireland's experience with constitutional referendums has been mixed, but that there are good, instructive lessons to be taken from the experience and recent experiments with institutional design. Following a full, context-sensitive account of Irish referendums in practice, I showed that referendums are successful when democratic engagement is maximised, and demonstrated the sort of factors that can lead to more or less engagement. While Ireland has so far avoided the sort of abuse of referendums seen in other jurisdictions, good institutional design can ensure a more robust, consistent protection in the future.

In Chapter 2 I established how Irish referendums operate, and sought to provide a foundation for any answer as to whether or not Irish referendums are successful. I argued that it is clear from both the text of the Constitution and from its drafting history that the choice to adopt the referendum was inextricably bound up with the nascent independence of the time. The desire to establish an independent republic separate from the United Kingdom contributed to the endorsement of more radical ideals of democracy and popular sovereignty in the 1922 Free State Constitution, which ultimately influenced the 1937 Constitution. I also argued that outside of the constitutional articles, regulation of the referendum was notably scant until the late 1990s, and even until the Electoral Reform Act 2022. While the 2022 Act has the potential to remedy some of the regulatory defects identified, at the time of writing it is still too early to tell if it will be successful in doing so. In this chapter I also argued that judicial decisions have been absolutely central to regulation of the referendum: the most significant rules regarding what can and cannot be done at the referendum all flow from cases like *McKenna*,¹ *Crotty*,² and *Coughlan*.³ Finally, Chapter 2 made it clear that referendums have become a regular feature of Irish constitutional and political life. In that sense, there is reality to the claims that Ireland has

¹ *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10.

² *Crotty v An Taoiseach* [1987] IESC 4.

³ *Coughlan v Broadcasting Complaints Commission* [2000] 3 IR 1.

developed a ‘constitutional culture’ surrounding referendums – citizens have become used to voting in referendums and the State is relatively well-versed in holding them.⁴

In Chapter 3 I sought to provide a contextual analysis of Irish referendums. By providing a context-sensitive account of the reality of Irish referendums, Chapter 3 identified the most common issues that have arisen and the core factors which impact how individual referendums fare. Here, I argued that Irish referendums have at times been successful over the last sixty-six years, though not universally. There are plenty of examples of referendums with extremely high engagement and civic participation, and equally a number of referendums plagued by apathy and misinformation. My analysis in this chapter also revealed that constitutional amendments come about for various reasons, usually with more than one source per proposal, and that they are often responses to specific incidents or perceived developments in social values. It also argued that a high level of campaigning is a key aspect of high engagement with a referendum, which is in turn a hugely significant factor in how a referendum fares. Where engagement with the proposal is low, second-order preferences, including the economic climate and attitudes towards government, can have an outsized impact on the result of a referendum. The most pressing and common problems therefore become clear: low engagement, low levels of information, and low levels of citizen participation.

Chapter 4 went on to develop the trends identified in the previous chapter and demonstrate how good institutional design is vital for the success of Irish referendums, and that particular supplementary institutions can have a massive impact in this regard. The Referendum/Electoral Commission, the 2012 Constitutional Convention, Citizens’ Assemblies, and the Housing Commission were all examined with a view to evaluating how effectively they have carried out their individual functions. I argued that Referendum Commissions had a uniquely significant role in providing information about referendum proposals which was undermined by their ad-hoc nature and the insufficient time granted to successive Commissions. The establishment of a permanent Electoral Commission seems to address this, but as we saw, its work in the 2024 Family and Care referendums shows there are still teething problems in its new form. Here I also argued that the 2012

⁴ David Kenny ‘The Risks of Referendums: ‘Referendum Culture’ in Ireland as a Solution?’ in Cahill, Ó Cinnéide, Ó Conaill, and O’Mahony (eds) *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland* (Routledge 2021).

Constitutional Convention and Citizens' Assemblies should be understood as successful with regard to their impact on deliberation.

In particular, the deliberative character of these institutions had a positive bearing on both the 2015 Marriage Equality and 2018 Abortion referendums. Whether or not these deliberative fora continue to enjoy success in this regard remains to be seen, but there is sufficient evidence from previous instances to justify their continued use. Finally, in this chapter I argued that the success of these deliberative fora was heavily reliant on the political goodwill of the government of the day. While that worked well in 2015 and 2018, it had a particularly harmful effect on the 2012 Children's Rights referendum. The success of the deliberative institutions relies to a considerable extent on the fact that they are not places for idle conversation but have an actual bearing on amendment proposals.

By identifying what tends to go wrong with referendums, and by explaining the benefits secured by good institutional design, Chapter 4 took the first step in identifying a set of criteria for successful referendums. Chapter 5 sets out and defends three criteria for success. In this chapter I argued that Irish referendums should be understood as successful when democratic engagement is maximised and that the Irish referendum system should be designed according to a set of specific criteria so that no referendum falls below a minimum threshold of democratic engagement. These criteria are: sufficient information, sufficient engagement, sufficient citizen input, and clarity of consequence. Through an analysis of four referendums (2015 Marriage Equality, 2018 Abortion, 2001 Nice Treaty and 2012 Children's Rights), I defended my criteria as sufficient to secure a minimum 'floor' of success. The 2024 Family and Care referendums show the continuing relevance of these criteria: many of the factors contributing to the problems in those referendums can be understood according to my criteria. In this Chapter I argued that where voters are sufficiently informed, sufficiently engaged, and have had some significant input in an amendment proposal, a referendum is more likely to be decided according to first-order preferences of a high number of citizens. By adopting the referendum as its method of amendment, Bunreacht na hÉireann implicitly endorses its democratic credentials. Chapter 5 outlines how these credentials can be maximised.

Over the course of Chapter 6, I argued that the judicial role in referendums accords closely with their general constitutional function: the vast majority of cases can be explained and

rationalised as the courts attempting to cordon off the People's role at referendum in the same way they delineate the roles of individual branches in the separation of powers. While the approach has not always been unanimous (in particular regarding the place of political parties in the referendum),⁵ the jurisprudence in this area is united by its understanding that the referendum is explicitly based on the principles of democracy and popular sovereignty. In the courts' understanding, those principles justify the role that they have developed for themselves in relation to the referendum. We saw that, as various judicial dicta make clear,⁶ any restriction on government spending,⁷ advertisement,⁸ or 'interference'⁹ with the referendum are all directed at upholding the principle of popular sovereignty which is itself the principal value underlying the referendum and indeed the Constitution itself.¹⁰ According to the Judiciary, then, the referendum is a central feature of the Constitution and its rationale can shed light on the nature of the Constitution more generally. In this way, Chapter 6 also offers further support for my proposition that democratic engagement is the measure of a successful referendum.

In Chapter 7 I argued that the best way to understand the rationale of the Irish constitutional referendum is according to the tension between constitutionalism and democracy visible throughout the Constitution. The commitments to lofty ideals of popular sovereignty and direct democracy contrast with their mediated nature, which itself shows a tension inherent in Irish referendums. I argued that rather than getting tangled in the normatively awkward accounts of popular sovereignty, we can see the referendum's value through the prism of this tension. On that basis, I argued that the form of referendum adopted in the Constitution represents a recognition of this tension, and an attempt to resolve it. The value of the referendum is its success in striking this balance. Maximising democratic engagement is a measure of success for individual referendums. Consistently maximising democratic engagement is therefore the goal when designing a referendum

⁵ Cf. the approaches of Barrington J (dissenting) and the majority in *Coughlan v Broadcasting Complaints Corporation* [2000] 3 IR 1; in §6.4 particularly.

⁶ E.g. *Doherty v Referendum Commission* [2012] IEHC 211, [2012] 2 IR 594 (HC) [23] (Hogan J) where he describes popular sovereignty as the 'very cornerstone on which the entire referendum edifice is constructed.'

⁷ *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10.

⁸ *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10; *McCrystal v Minister for Children and Youth Affairs* [2012] IESC 53.

⁹ *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10 (SC) 42 (Hamilton CJ).

¹⁰ *Coughlan v Broadcasting Complaints Commission* [2000] 3 IR 1 (SC) 30-32 (Denham J); *Doherty v Referendum Commission* [2012] IEHC 211, [2012] 2 IR 594 (HC) [23] (Hogan J).

system. In Chapter 7 I argued that where that is done, a state can reap particular benefits because of the referendum's unique ability to balance constitutionalism and democracy. That, I argued, is the value which accrues to Ireland by virtue of the constitutional referendum.

One of the most obvious but important conclusions I draw from the above is that Ireland's experience with constitutional referendums is not one of unbridled success, yet nor is it one of unmitigated disaster. The reality lies somewhere in between the two. The overall picture is a relatively positive one: referendums continue to be a defining and admired aspect of Irish constitutionalism, and so far they not been abused to strip away the fundamental democratic aspects of the Constitution. Yet there is sufficient evidence in the history of Irish referendums to suggest that they are not entirely immune to such abuse either. Like any democratic device – direct or representative – the referendum is a tool that can be used either for good or for ill. The 2004 *Jus Soli* citizenship referendum should be evidence enough that Irish referendums can be captured by populist rhetoric and inflammatory language in the same way as in the much derided Brexit referendum.¹¹ Even further back, the attempts in 1959 and 1968 by Fianna Fáil to amend the electoral process show that the prospect of a ruling party consolidating power through the referendum is very much a possibility, although thankfully those attempts were rebuffed by voters.

Ireland's early experience with referendums was broadly positive despite the fact that the referendum was regulated in a light-touch manner; very few safeguards are built into the text of the Constitution to protect against abuses. This demonstrates that referendums alone are not a panacea for the conditions ailing modern democracies. While referendums can bring significant benefits, they are also open to abuse. Context matters. Because referendums are a tool like any other democratic device, in order to be successful they must operate in a democratic environment. To get the most out of referendums, they must be embedded in a reasonably healthy democratic culture. The success of Irish referendums and the reasonable health of Irish democracy can be partially explained in this way: the democratic environment has allowed the referendum to flourish, and referendums have in

¹¹ Hilary Hogan, 'Democratic Constitutionalism or Elite Control? Revisiting the 2004 Irish Citizenship Referendum' in Cahill, Ó Cinnéide, Ó Conaill, and O'Mahony (eds) *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland* (Routledge 2021).

turn enhanced the democratic environment.¹² Over time, this has allowed Ireland to develop a referendum culture and to put in place supplementary institutions which mitigate against the most extreme possibilities of abuse.¹³ The road to Ireland's current experience with referendums has therefore been a long, chequered one, with hazards lining the way. Thankfully Ireland has avoided the most serious of them, but any state wishing to follow in its wake must be alive to the fact that improper, irresponsible, and careless reliance on the referendum can lead to less democratic results, not more.

The second conclusion to draw from this thesis is that appropriate institutional design is essential for referendums to function properly. If we accept that referendums should maximise democratic engagement, and that my criteria for success achieve an adequate minimum standard of democratic engagement, then the importance of supplementary institutions becomes clear. As just one example, the value added by an independent, neutral informative body like the Referendum Commission is vital. Information sufficiency is a cornerstone of all successful referendums, and often requires a significant amount of time and resources to bring about. Where Irish referendums have been successful, the work of supplementary institutions is clearly visible. The corollary is that where referendums have fared poorly, at least some of this can be attributed to one or more institutions not performing their functions properly. Ireland's experience shows that good institutional design can mitigate the most common malaises that arise in referendums: apathy, lack of information, and second-order preference voting. That lesson is a universal one. Referendums everywhere are liable to suffer from the same sort of issues, and the institutions examined in this thesis carry on work that can easily be translated to other jurisdictions; anywhere that a referendum is called, information should be readily available, and citizens should be actively engaged.

By implementing good institutional design, democratic engagement with referendums can be maximised. This ensures that individual referendums are successful, but can also go some way to protecting the referendum from abuse by populists, would-be autocrats, and

¹² Freedom House ranks Ireland as one of the healthiest democracies in the world, with an overall score of 97/100 in the 2025 report and high scores in the Rule of Law and Political Rights sections. <<https://freedomhouse.org/country/ireland/freedom-world/2025>> accessed 16 September 2025.

¹³ David Kenny 'The Risks of Referendums: 'Referendum Culture' in Ireland as a Solution?' in Cahill, Ó Cinnéide, Ó Conaill, and O'Mahony (eds) *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland* (Routledge 2021).

cynical power-grabbers. In this way it can help to minimise the dangers of adopting the referendum as the method of constitutional amendment. As this thesis makes clear, however, the benefits accrued by good institutional design can be undermined where there is no formal link to the referendum process. If the work of Assemblies, Conventions, and Commissions can easily be ignored where recommendations go against the interests of ruling parties, those institutions quickly lose their value.

The third overarching conclusion is that, as a method of constitutional amendment, the referendum offers particular benefits for a state – it gives life to claims of democratic ownership, incorporates a degree of flexibility, and can guard against popular disillusionment with the constitution. The question of whether, and how, a constitution may be amended is one of the most important faced by the drafters of any constitution, and various mechanisms bring varied benefits. Constitutional amendment is the space in which ‘law, politics, history and philosophy meet’,¹⁴ and the choice of procedure is ‘the ultimate measure of a constitution is how it balances entrenchment and change’.¹⁵ Referendums are hotly contested in this context. Ackerman argues that the referendum is uniquely appropriate for constitutional amendment, since it can act to ‘galvanize popular interest and participation’ at critical times.¹⁶ Chambers, on the other hand, argues that referendums are singularly unsuitable for constitutional amendment since referendums tend to undermine deliberation by introducing an ‘extreme form of majoritarianism that is inappropriate for deep constitutional questions’ while also presenting voters with the image of inflexibility and irreversibility, both of which act as disincentives to deliberation.¹⁷ The drafters of Bunreacht na hÉireann sided with Ackerman, and the consequences for Ireland are clear. The Irish experience dispels the most serious fears

¹⁴ Yaniv Roznai, ‘Towards a Theory of Constitutional Unamendability: On the Nature and Scope of the Constitutional Amendment Powers’ (2017) 18 *Jus Politicum: Cours constitutionnelles et révisions de la Constitution*, citing Erwin Chemerinsky, ‘Amending the Constitution’ (1998) 96 *Michigan Law Review* 1561

¹⁵ Yaniv Roznai, ‘Towards a Theory of Constitutional Unamendability: On the Nature and Scope of the Constitutional Amendment Powers’ (2017) 18 *Jus Politicum: Cours constitutionnelles et révisions de la Constitution*, citing Erwin Chemerinsky, ‘Amending the Constitution’ (1998) 96 *Michigan Law Review* 1561.

¹⁶ Stephen Tierney, *Constitutional Referendums: the Theory and Practice of Republican Deliberation* (OUP 2014) 36, citing Bruce Ackerman, ‘Transformative Appointments’ (1988) 101 *Harvard Law Review* 1164, 1182; Bruce Ackerman, *We The People: Foundations* (Harvard University Press 1993) 54–5.

¹⁷ Simone Chambers, ‘Constitutional Referendums and Democratic Deliberation’ in Matthew Mendelsohn & Andrew Parkin (eds), *Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns* (Palgrave, 2001) 231.

expressed by Chambers,¹⁸ and offers some encouragement for those who think it can increase the deliberative quality of a democracy, rather than undermine it. It further demonstrates benefits that have accrued to Ireland by virtue of the referendum.

This thesis argued that the referendum is a core aspect of Ireland's attempt to balance the competing interests of constitutionalism and democracy and thereby create a reasonably stable and predictable state that is still flexible enough to respond to evolving social norms. It also argued that the referendum is particularly well-suited to this role because of its pointedly democratic character. It is unclear whether amendment by parliamentary supermajority alone would have the same benefits: parliamentarians in this jurisdiction have been mistaken about the wishes of the majority in the past, and the intrinsic value of having citizens make the ultimate decision should not be underestimated. Whether it stands up to theoretical scrutiny or not, there is at least a very real sense that Irish citizens have ownership of the Constitution. At a time where aesthetics and feel are so central to politics, we should be alive to the importance of this. In Ireland the People are involved in the 'living constitutionalism' exercise and their right to veto or rubberstamp any developments is ever-present in the minds of judges, politicians, and citizens. Even if they are not the masters, they are involved as constitutional actors.¹⁹ This is a relevant factor in the story of Irish constitutional democracy.

Avenues for Future Research

This thesis has raised questions as well as answered them. A few of those such questions are worth mentioning as possible avenues for future research. The first concerns Ireland's referendum culture. Originating in David Kenny's eponymous article, this is an area only beginning to be explored.²⁰ The exact nature of that culture – what it means, what its main contours are, and how it came to be developed – was not something which this thesis could

¹⁸ Simone Chambers, 'Constitutional Referendums and Democratic Deliberation' in Matthew Mendelsohn & Andrew Parkin (eds), *Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns* (Palgrave, 2001).

¹⁹ David Kenny 'The Risks of Referendums: 'Referendum Culture' in Ireland as a Solution?' in Cahill, Ó Cinnéide, Ó Conaill, and O'Mahony (eds) *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland* (Routledge 2021).

²⁰ David Kenny 'The Risks of Referendums: 'Referendum Culture' in Ireland as a Solution?' in Cahill, Ó Cinnéide, Ó Conaill, and O'Mahony (eds) *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland* (Routledge 2021).

examine in detail. However, such an examination would be of high value for anyone wishing to understand how a state can develop a referendum culture of its own. If the age of referendums continues alongside the gradual, global erosion of liberal-democracy, this is fertile ground for analysis. Future research should seek to assess what factors contributed to the development of a referendum culture in Ireland, and which of those factors can be disentangled from their social and temporal context to form a universal, repeatable blueprint for other jurisdictions.

Second, this thesis confined itself to studying Irish referendums and measuring them by their own metrics. While this was necessary in order to portray Ireland's experience, a comparative perspective could bring further insights. A comparative analysis would help to further test the trends identified in this thesis: any evidence from elsewhere of what can remedy information insufficiency and poor engagement (etc) would strengthen the claims made in this thesis. It would also allow my criteria to be tested more fully. Since the goal was to establish a set of universal criteria for success, a comparative perspective would allay any concerns that they are too context-specific. Irish referendums take a very particular form and have been shaped by the text of the Constitution as well as Ireland's social and cultural context. Any lessons that can be drawn about the referendum as a democratic device, then, are necessarily qualified. A comparative analysis could also strengthen the ultimate argument of this thesis – that referendums are a valuable tool and bring particular benefits for states – from international and less context-sensitive critiques regarding the merits and dangers of referendums. It has been worthwhile showing that referendums can work, and work well, in certain contexts. But to establish broader, normative claims about the referendum's merits as a democratic device, one could use a comparative lens.

Third, over the course of this project I have accepted the basic premise that Bunreacht na hÉireann adopts the referendum as the method of constitutional amendment, and have attempted to demonstrate the benefits that accrue for Ireland. This leaves open the question of whether the referendum is the *most appropriate* form of amendment procedure, and where it ranks, so to speak, in the pantheon of amendment mechanisms. While I have relied on the position that referendums certainly have particular benefits over and above other forms of amendment, and have sought to emphasise how those benefits manifest in Ireland, I have not had the space to dig into the prior question of what other forms of

amendment mechanism are available. Again, a more normative, prescriptive argument that the referendum is the best or most ideal form of constitutional amendment could usefully have its foundation in the Irish context, but it would need to clearly establish the strengths and weaknesses of other options. That is a project for another time.

Concluding Comments

Global experience with referendums reveals that referendums can be both beneficial and detrimental. They can enhance democratic engagement, but also corrode the normal workings of representative democracy. Ironically, they can become an instrument of authoritarianism, at least in its populist guise. However, Ireland has avoided some of the key dangers, in part because there are first- and second-order bulwarks in place. First, the fact that any referendum proposal must be passed by the Oireachtas means it is checked by the institutions of representative government. Even though they are also open to the possibility of capture, it prevents proposals arising through single rogue actors.²¹ Second, the institutional design around referendums aims to ensure that voters are reasonable, well-informed and involved in amendment proposals. While not a formal block against abuse, these second-order measures can ensure that citizens are less likely to be misled at referendum, thus decreasing the chances of the referendum being abused. These bulwarks do not totally erase the possibility of abuse as formal restrictions would. But such formal restriction would not square with the Constitution's commitment to popular sovereignty and direct democracy, as repeatedly emphasised by the judiciary.²² The first and second-order bulwarks should therefore be understood as Ireland's attempts to maintain these commitments while also putting in place obstacles to the referendum being abused.

Three years ago, the centenary of the 1922 Free State Constitution marked a time to reflect on the very earliest stages of an independent Irish democracy. At various conferences and occasions over the course of the year, we were reminded of the radical enterprise undertaken by the drafters of that document; of their desire to craft a mission statement which would reflect the profound sentiments of newfound independence and national self-determination. We were informed that nowhere was this more evident than in the adoption

²¹ Such as a 'strongman' Taoiseach who lacks popular support in the Oireachtas.

²² See §7.5. e.g. *Jordan v Minister for Children and Youth Affairs* [2015] IESC 33 [4] (O'Donnell J).

of the popular referendum as the method by which that constitution could be amended. The referendum, a phenomenon more at home in ancient Athens than in Westminster, represented a stark and historic break with the form of British constitutionalism that had been in force for centuries. By endorsing the people's right to determine the nature of their own state, it stood as a clear and overt gesture towards the violent struggle which had engulfed the nation from 1916 until 1922, and which would continue until the Civil War ended the following year. And yet it was never actualised during that constitution's short lifespan.

The next, and last, occasion in this era of constitutional centenaries is slowly approaching; over the next decade or so it will be time to reflect on the drafting and adoption of Bunreacht na hÉireann. Just as it was with the 1922 document, so too will attention be turned to the adoption of the popular referendum. Despite it never arising before, the fact that the referendum was carried over to the 1937 document, and that it was itself used to enact Bunreacht na hÉireann is evidence enough of the fundamental place it held in the minds of de Valera, Hearne and the other key drafting figures. For them, as for those in 1922, it reflected a core and essential characteristic of the Irish nation.

As Ireland's place in the world order has evolved and matured since that time, the referendum has come to be seen less as a symbol of revolutionary Irish independence, and more as a sign of its sovereignty and democratic spirit. It has evolved to become a fundamental aspect of how the nation sees itself and a defining feature of Irish democracy. Referendums have often crystallised the most significant events and changes in Ireland. It was by the referendum ballot that Ireland joined the European project, shrugged off the dominance of the Catholic Church, and enshrined the aspirations of the Northern Irish peace project. Given how central referendums are to this country, it is essential that we understand their true significance and success. This project sought to undertake that task. In doing so, it has shown what dangers await if referendums are not treated with the care they require, and has offered a blueprint for how they can live up to their democratic potential. It is vital that we pay heed to the lessons learned over the last century, because Irish constitutional referendums are here to stay.

Appendix I – Referendum Articles

ARTICLE 46 – Amendment of the Constitution

1 Any provision of this Constitution may be amended, whether by way of variation, addition, or repeal, in the manner provided by this Article.

2 Every proposal for an amendment of this Constitution shall be initiated in Dáil Éireann as a Bill, and shall upon having been passed or deemed to have been passed by both Houses of the Oireachtas, be submitted by Referendum to the decision of the people in accordance with the law for the time being in force relating to the Referendum.

3 Every such Bill shall be expressed to be "An Act to amend the Constitution".

4 A Bill containing a proposal or proposals for the amendment of this Constitution shall not contain any other proposal.

5 A Bill containing a proposal for the amendment of this Constitution shall be signed by the President forthwith upon his being satisfied that the provisions of this Article have been complied with in respect thereof and that such proposal has been duly approved by the people in accordance with the provisions of section 1 of Article 47 of this Constitution and shall be duly promulgated by the President as a law.

ARTICLE 47 – The Referendum

1 Every proposal for an amendment of this Constitution which is submitted by Referendum to the decision of the people shall, for the purpose of Article 46 of this Constitution, be held to have been approved by the people, if, upon having been so submitted, a majority of the votes cast at such Referendum shall have been cast in favour of its enactment into law.

2 1° Every proposal, other than a proposal to amend the Constitution, which is submitted by Referendum to the decision of the people shall be held to have been vetoed by the

people if a majority of the votes cast at such Referendum shall have been cast against its enactment into law and if the votes so cast against its enactment into law shall have amounted to not less than thirty-three and one-third per cent. of the voters on the register.

2° Every proposal, other than a proposal to amend the Constitution, which is submitted by Referendum to the decision of the people shall for the purposes of Article 27 hereof be held to have been approved by the people unless vetoed by them in accordance with the provisions of the foregoing sub-section of this section.

3 Every citizen who has the right to vote at an election for members of Dáil Éireann shall have the right to vote at a Referendum.

4 Subject as aforesaid, the Referendum shall be regulated by law.

Appendix II – List of Constitutional Referendums

Referendum	Date of Ref.	Issue Proposed	Result	Voter Turnout (% of Electorate)	For (%)	Against (%)
Draft Constitution	1 July 1937	Adoption of Constitution	Passed	1,346,207 (75.8%)	685,105 (56.5%)	526,945 (43.5%)
1 st Amendment	N/A	Definition of War	N/A			
2 nd Amendment ¹	N/A	Textual Amendments	N/A			
3 rd Amendment Bill	17 June 1959	Electoral System: Single Transferable Vote to First Past The Post	Rejected	979,531 (58.4%)	453,322 (48.2%)	486,989 (51.8%)
3 rd Amendment Bill	16 October 1968	Dáil Constituency Boundaries	Rejected	1,129,477 (65.8%)	424,185 (39.2%)	656,803 (60.8%)
4 th Amendment Bill	16 October 1968	Electoral System: Single Transferable Vote to First-Past-The-Post	Rejected	1,129,606 (65.8%)	423,496 (39.2%)	657,898 (60.8%)
3 rd Amendment	10 May 1972	Joining the EEC	Passed	1,264,278 (70.9%)	1,041,890 (83.1%)	211,891 (16.9%)
4 th Amendment	7 December 1972	Minimum voting age reduction from 21 to 18	Passed	903,439 (50.7%)	724,836 (84.6%)	131,514 (15.4%)
5 th Amendment	7 December 1972	Removal of ‘special position’ of the Church and other denominations from the Constitution	Passed	903,659 (50.7%)	721,003 (84.4%)	133,430 (15.6%)
6 th Amendment	5 July 1979	Overruling judicial decisions that the Adoption Board’s	Passed	623,476 (28.6%)	601,694 (99%)	6,265 (1%)

¹ Note: The 1st and 2nd Amendments were passed by ordinary legislation within the timeframe established in the Transitory Provisions and therefore required no referendum.

		orders were unconstitutional				
7 th Amendment	5 July 1979	Extension of Seanad election franchise to more third-level institutions	Passed	622,646 (28.6%)	552,600 (92.4%)	45,484 (7.6%)
8 th Amendment	7 September 1983	Enshrinement of an equal right to life of the unborn child.	Passed	1,265,994 (53.7%)	841,233 (66.9%)	416,136 (33.1%)
9 th Amendment	14 June 1984	Permitted legislation allowing non-Irish citizens to vote in Dáil elections	Passed	1,138,895 (47.5%)	828,483 (75.4%)	270,250 (24.6%)
10 th Amendment Bill	26 June 1986	Removal of the constitutional ban on divorce	Rejected	1,482,644 (60.8%)	538,279 (36.5%)	935,843 (63.5%)
10 th Amendment	26 May 1987	Ratification of Single European Act	Passed	1,085,304 (44.1%)	755,423 (69.9%)	324,977 (30.1%)
11 th Amendment	18 June 1992	Ratification of Maastricht Treaty	Passed	1,457,219 (57.3%)	1,001,076 (69.1%)	445,655 (30.9%)
12 th Amendment Bill	25 November 1992	Reversal of the Supreme Court judgment in the X case; risk of suicide not to be considered a ground for abortion	Rejected	1,733,309 (68.2%)	572,177 (34.6%)	1,079,297 (65.4%)
13 th Amendment	25 November 1992	Clarification that travel out of State for abortion is not unlawful	Passed	1,733,821 (68.2%)	1,035,308 (62.4%)	624,059 (37.6%)
14 th Amendment	25 November 1992	Clarification that dissemination of information about abortion services in other countries not unlawful	Passed	1,732,433 (68.1%)	992,833 (59.9%)	665,106 (40.1%)

15 th Amendment	24 November 1995	Removal of constitutional ban on divorce	Passed	1,633,942 (62.2%)	818,842 (50.3%)	809,728 (49.7%)
16 th Amendment	28 November 1996	Reversal of judicial decision on grounds for denial of bail	Passed	777,586 (29.2%)	579,740 (74.8%)	194, 968 (25.2%)
17 th Amendment	30 October 1997	Reversal of judicial decision concerning confidentiality in cabinet meetings	Passed	1,268,043 (47.2%)	632,777 (52.6%)	569,175 (47.4%)
18 th Amendment	22 May 1998	Ratification of the Treaty of Amsterdam	Passed	1,543,930 (56.2%)	932,632 (61.7%)	578,070 (38.3%)
19 th Amendment	22 May 1998	Good Friday Agreement	Passed	1,545,395 (56.3%)	1,442,583 (94.4%)	85,748 (5.6%)
20 th Amendment	11 June 1999	Recognition of Local Government in the Constitution	Passed	1,425,881 (51.1%)	1,024,850 (77.8%)	291,965 (22.2%)
21 st Amendment	7 June 2001	Constitutional ban on the death penalty	Passed	997,885 (34.8%)	610,455 (62.1%)	372,950 (37.9%)
23 rd Amendment	7 June 2001	Ratification of the Statute of the International Criminal Court	Passed	997,565 (34.8%)	629,234 (64.2%)	350,512 (35.8%)
24 th Amendment Bill	7 June 2001	Ratification of the Treaty of Nice	Rejected	997,826 (34.8%)	453,461 (46.1%)	529,478 (53.9%)
25 th Amendment Bill	6 March 2002	Exclusion of risk of suicide as ground for abortion	Rejected	1,254,175 (42.9%)	618,485 (49.6%)	629,041 (50.4%)
26 th Amendment	19 th October 2002	Ratification of the Treaty of Nice	Passed	1,446,588 (49.5%)	906,317 (62.9%)	534,887 (37.1%)
27 th Amendment	11 June 2004	Abolition of <i>jus soli</i> right to Irish nationality	Passed	1,823,434 (53.1%)	1,427,520 (79.2%)	375,695 (20.8%)
28 th Amendment Bill	12 June 2008	Ratification of Treaty of Lisbon	Rejected	1,621,037 (53.1%)	752,451 (46.6%)	862,415 (53.4%)

28 th Amendment	2 October 2009	Ratification of the Treaty of Lisbon	Passed	1,816,098 (58%)	1,214,268 (67.1%)	594,606 (32.9%)
29 th Amendment	27 October 2011	Relaxation of the prohibition on reducing judges' salaries	Passed	1,785,707 (55.9%)	1,393,877 (79.7%)	354,134 (20.3%)
30 th Amendment Bill	27 October 2011	Reversal of a judicial decision concerning Oireachtas inquiries	Rejected	1,785,208 (55.9%)	812,008 (46.7%)	928,175 (53.3%)
30 th Amendment	31 May 2012	Ratification of the European Fiscal Compact	Passed	1,591,385 (50.6%)	955,091 (60.3%)	629,088 (39.7%)
31 st Amendment	10 November 2012	General statement of children's rights	Passed	1,066,239 (33.5%)	615,731 (58%)	445,863 (42%)
32 nd Amendment Bill	4 October 2013	Abolition of the Seanad	Rejected	1,240,729 (39.2%)	591,937 (48.3%)	634,437 (51.7%)
33 rd Amendment	4 October 2013	Establishment of Court of Appeal	Passed	1,240,135 (39.2%)	795,008 (65.2%)	425,047 (34.8%)
34 th Amendment	22 May 2015	Legalisation of same-Sex marriage	Passed	1,949,725 (60.5%)	1,201,607 (62.1%)	734,300 (37.9%)
35 th Amendment Bill	22 May 2015	Lowering of minimum age for Presidency to 21	Rejected	1,949,438 (60.5%)	520,898 (26.9%)	1,412,602 (73.1%)
36 th Amendment	25 May 2018	Repeal of 8 th , 13 th , and 14 th Amendments, removal of ban on abortion	Passed	2,159,655 (64.1%)	1,429,981 (66.4%)	723,632 (33.6%)
37 th Amendment	26 October 2018	Removal of offence of blasphemy	Passed	1,489,694 (43.9%)	951,650 (64.43.9%)	515,808 (35.1%)
38 th Amendment	24 May 2019	Alteration of requirements for divorce	Passed	1,686,511 (50.89%)	1,384,192 (82.07%)	302,319 (17.93%)
39 th Amendment Bill	8 March 2024	Non-marital Family	Rejected	1,525,215 (44.4%)	487,564 (32.3%)	1,021,546 (67.7%)

40 th Amendment Bill	8 March 2024	Care	Rejected	1,525,221 (44.4%)	393,053 (26.1%)	1,114,620 (73.9%)