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A republican defence of the constitutional referendum

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The constitutional referendum is often conceptualised as the ultimate institutional expression of popular sovereignty. However, 'direct democracy' is viewed apprehensively by many political and legal theorists, particularly republican scholars. They argue that referendums risk engendering a dangerous 'populism' while detracting from the deliberative and moderating virtues of parliamentary democracy. In this paper, I defend the political value of the constitutional referendum from within republican theory, arguing that there is a misplaced focus on parliamentary supremacy within much of the literature on 'political constitutionalism'. However, I argue it should be valued neither as a mechanism for giving expression to popular will, nor as an intervention by the mythologised 'constituent power' – or indeed, contra *Tierney, as a 'sovereign' exercise in any sense. Rather, it has two main, overlapping virtues: first, its role in facilitating the contestation and checking of executive power in the area of constitutional change, and secondly, its instrumental role in fostering a wider culture of civic participation.*

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> 'Pure democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.'
>
> – James Madison[1]

INTRODUCTION

Despite ostensibly representing a purer form of democracy, referendums are often thought to lack, and even undermine, many of the political virtues associated with parliamentary representation. Parliaments – for all their flaws – are usually seen as superior fora to legislate on complex policy issues. And while it has obvious practical limitations in mass democracies, plebiscitary government is also frequently criticised by liberal constitutionalists as potentially undermining individual and minority rights. Referendums, it is often claimed, lack the procedural and deliberative safeguards built into representative democracy that (theoretically) safeguard against 'majority tyranny'. In contrast to the crude, binary choices referendums offer to largely unaccountable participants, parliamentary decision making – by virtue of its *form* – forces deliberation and compromise. It is also much better at holding executive power to

1. J Madison 'Federalist Paper no 10' in C Rossiter (ed) *The Federalist Papers: Hamilton, Madison, Jay* (New York: Mentor, 1961) p 81.

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account. Thus, Tierney notes that 'referendums bear an overwhelmingly negative association with political and constitutional theory today'.[2]

Much of the literature critiquing direct democracy reflects a distinctly republican perspective. Republicanism – in reality, a loosely related set of normative ideas and traditions – typically includes or accepts, in some form, a principle of popular sovereignty. However, republicans invariably reject any interpretation of popular sovereignty as entailing crude majoritarian decision making or unmediated rule by the popular will.[3] Instead, most republican thinkers advocate a form of constitutional government oriented towards deliberation on the common good. Correspondingly, republicans generally advocate 'mixed constitutionalism' as a safeguard against domination. Unbridled democracy or unmediated rule by the 'people' is perceived as a potential source of arbitrary power, and thus, of domination. *Freedom as non-domination* – understood as the security of citizens from arbitrary power – is a central theme in republican thought.[4] In concrete constitutional terms, non-domination has usually been understood as requiring that political power should be exercised primarily through representative, deliberative institutions rather than directly by popular rule – that 'the people should rule themselves via the interaction of distinct assemblies and authorities, not via any single representative, individual or corporate'.[5] Many contemporary republican scholars advocate a model of parliamentary democracy unconstrained by constitutional courts. Citing its contestatory and deliberative virtues, they depict democratic politics as preferable to any 'legal constitutionalist' model of strong-form judicial review, both as a framework for self-government as well as a procedure for settling social and moral conflicts (including questions of human rights).[6] However, exponents of 'political constitutionalism' also typically reject plebiscitary or 'direct' democracy, because it is seen as equally lacking (and undermining) the deliberative, procedural and contestatory virtues of parliamentary representation. In turn, this generalised theoretical apprehension towards 'direct democracy' tends not to distinguish different forms of plebiscite based on their procedure and subject.

In this paper, I defend the role of constitutional referendums – specifically, not against, but from within republican theory. I argue that subject to certain conditions, they are not only compatible with, but complementary to the republican virtues associated with parliamentary democracy. In jurisdictions where constitutional referendums are used, they are typically conceptualised as an expression of popular *will*,

2. S Tierney *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford: Oxford University Press, 2012) p 2.

3. P Pettit 'Deliberative democracy, the discursive dilemma and republican theory' in J Fishkin and P Laslett (eds) *Philosophy, Politics and Society*, vol 7 (New York: Cambridge University Press, 2003) pp 138–162.

4. P Pettit *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997); Q Skinner *Liberty before Liberalism* (Cambridge, UK: Cambridge University Press, 1998).

5. P Pettit 'Abolition of Seanad would be significant loss to democracy' *Irish Times* 28 July 2012. For a wider view of Pettit's advocacy of democracy through 'responsive' representative institutions and the most recent statement of his overall political theory, see P Pettit *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge, UK: Cambridge University Press, 2013).

6. See eg R Bellamy *Political Constitutionalism* (Cambridge, UK: Cambridge University Press, 2007); A Tomkins *Our Republican Constitution* (Oxford: Hart, 2005).

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thus lending the imprimatur of democratic legitimacy both to constitutional content and judicial review. It is in turn this understanding that undergirds the republican apprehension of referendums as sources of populist domination, undermining 'mixed government'. However, I argue, first, that constitutional referendums may in fact enhance mixed government by representing an important check on executive dominance in parliamentary models (at least under a codified constitution), particularly in the area of constitutional reform. Thus, the commonplace understanding of constitutional referendums as an exercise in 'direct democracy' – as a direct intervention or act of self-definition by the 'people' – obscures their republican potential. The republican virtues of contestation, deliberation and accountability have been too readily equated with institutional arrangements uncompromisingly centred around parliament. Secondly, I argue that through the contestatory mechanism the constitutional referendum offers, it has the potential to promote wider civic participation in a manner that ultimately supports the stability of parliamentary democracy.

1. THE REPUBLICAN CASE AGAINST DIRECT DEMOCRACY

Republican theory generally emphasises the values of participation, deliberation and contestation in politics, with most theorists identifying an important relationship between individual freedom and participation in self-government. Although sovereignty may be formally located in the people as a community of equal citizens, it is not exercised directly through majoritarian voting but, rather, via a constitutional framework of interacting assemblies and authorities.[7] 'Mixed government' is not neatly synonymous with republican thought. It is absent, for example, in the republicanism of ancient Athens[8] – with its comparatively unmediated form of democracy – and (arguably) in Rousseau's thought.[9] Rather, it is associated with the 'neo-Roman' strand inspired by the institutions and politics of the ancient Roman Republic.[10] This influenced the republican politics of the Renaissance city-states and the English revolution, and has been revived in contemporary theory by Philip Pettit and Quentin Skinner.[11]

In the neo-Roman strand, freedom – although a central theme – is not understood in terms of the intrinsic value of participation in government. It rejects neo-Athenian civic republicanism – the conception of 'ruling and being ruled in turn'[12] associated with Aristotle's civic humanism. In the Aristotelian conception, republican citizenship offers a framework within which virtuous political action – an indispensable aspect of the human good – can be realised, and thus, individual freedom achieved. For this strand of the civic republican tradition, freedom is understood positively – as the exercise of collective self-determination in political community. Civic participation

7. See C Montesquieu *Spirit of the Laws* (Cambridge, UK: Cambridge University Press, 1748/1989).
8. I Honohan *Civic Republicanism* (London: Routledge, 2002) ch 1.
9. JJ Rousseau *Du Contrat Social* (Paris: ENAG, 1988).
10. See generally Skinner, above n 4; Cicero *On Duties* (Cambridge, UK: Cambridge University Press, 1999); JGA Pocock *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, NJ: Princeton University Press, 2003).
11. Above n 4.
12. Honohan, above n 8, p 25.

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may be valued in the perfectionist sense as an aspect of the human *telos*, or alternatively as essential to recognition and thus self-realisation.[13] In contrast, neo-Roman republicans conceptualise freedom negatively, as *non-domination*. In Pettit's interpretation of the Roman tradition, 'the antonym of freedom [is] not interference but rather domination – exposure to the arbitrary, uncheckable power of a *dominus* or a master in one's life'.[14] This, Pettit claims, sets neo-Roman republicanism apart from liberal understandings of freedom; however, it also distinguishes it, he claims, from Rousseau's 'authorial' conception, which identifies intrinsic value in citizens' direct legislative role in effectuating the 'general will'.[15] In Pettit's account, agents are dominated (and therefore unfree) to the extent that others possess an unchecked capacity to *arbitrarily* interfere in their choices – whether or not any such interference is actually suffered. Non-arbitrary interference, 'properly constituted', is grounded in law and is subject both to *contestation* by the interferees as well as a system of democratic control that gives the people directive influence on government.[16] Thus, we are free not through our status as participants in collective self-government, but through the resilient security offered by the rule of law (and democratic control) against the 'alien control' of our choices – whether on the part of public or private agents, and whether through the actual exercise of arbitrary interference, or the insecurities engendered by its apprehension. However, wide political participation is still seen as necessary to ensure the rigorous contestation of political power and thus to combat domination. It is simply instrumental to freedom understood negatively, as an absence of domination.[17]

In turn, for neo-republicans[18] it is more important that citizens have the opportunity to *contest* political power than to necessarily *participate* in its exercise;[19] indeed this contestatory account purports to avoid the 'communitarian' excess associated with Rousseau's 'authorial' version. Correspondingly, republican constitutionalism is oriented less towards mechanisms and structures that effectuate the 'popular will' but, rather, towards those that facilitate and encourage the checking and contestation of public authority at various levels.[20] In particular, the avenues of contestation provided within a 'mixed constitution' will contain, or at least minimise, arbitrary power; in particular, neo-Roman republicans are likely to emphasise bicameralism, transparency and freedom of information.[21]

The question of judicial review of legislation divides republican scholars. Pettit accepts a limited form of 'legal constitutionalism', whereas Bellamy and Tomkins defend relatively uncompromising versions of 'political constitutionalism' – understood primarily in terms of parliamentary supremacy – as institutional arrangements best suited to promoting non-domination.[22] They strongly associate the virtues of

13. Ibid, pp 219–222.
14. P Pettit 'The tree of liberty: republicanism, American, French and Irish' (2005) 1 Field Day Rev 30, 30.
15. Pettit *On the People's Terms*, above n 5, ch 1.
16. Ibid, chs 4 and 5.
17. Pettit, above n 4, p 18.
18. This is used in reference to the 'neo-Roman' strand.
19. P Pettit 'Law and liberty' in S Besson and JL Marti (eds) *Legal Republicanism: National and International Perspectives* (Oxford: Oxford University Press, 2009).
20. Tomkins, above n 6, ch 4.
21. Pettit, above n 4, p 193.
22. Above n 6.

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contestation and accountability with parliamentary democracy. Although most republicans advocate some form of 'mixed' constitutionalism, these British-republican scholars typically represent parliament as the locus of political accountability and so as a republican cornerstone of the constitutional structure. This reflects a broader orientation of modern republicanism towards representative democracy: 'when modern constitutionalism first began to take shape in the late-eighteenth century, considerable scepticism existed as to whether popular self-government on the Athenian model was practicable or desirable'.[23] Correspondingly, republicans reject 'direct' democracy, either implicitly or explicitly, as lacking the deliberative and contestatory virtues and the procedural safeguards of parliamentary democracy. It is perceived as an unbridled, unmediated and potentially dominating system of self-rule. For Pettit, it risks engendering 'the ultimate form of arbitrarinesss, the tyranny of a majority'.[24] Whereas non-arbitrary power is subject to contestation, decisions bearing the imprimatur of popular will naturally attract an allure of non-contestability.[25] Rather than interpreting or justifying what 'the people' have said, representatives seem to instinctively genuflect to the abstract *demos* with the platitude 'the People have spoken'.[26]

Republican defences of a relatively unfettered parliamentary democracy usually invoke parliament's superior *deliberative* virtues compared both to judicial review and 'direct democracy'. Bellamy defends the value of 'majority rule' against non-majoritarian accounts of deliberative democracy.[27] Yet he too associates (majoritarian) parliamentary democracy with the virtues of compromise and moderation. Thus, 'party competition in elections and parliament institutionalises a balance of power that encourages the various sides to hear and harken to each other, promoting mutual recognition through the construction of compromises'[28] – this being a virtue as lacking in plebiscites as in constitutional courts.

Republicans' orientation towards parliamentary supremacy can also be understood in terms of *accountability*. For Tomkins, the British constitution is 'beautiful' because it 'uses politics [understood as parliamentary politics] as the vehicle through which the purpose of the constitution (that is, to check the government) may be accomplished'.[29] Indeed referendums, unlike parliaments, cannot, for reasons of practicality and form, rigorously hold government to account – not least because they tend to be piecemeal, set-piece exercises. Therefore, whereas Tomkins describes the British constitution's 'prioritisation of political over judicial accountability'[30] as quintessentially 'republican', he understands 'political accountability' in almost exclusively parliamentary terms. Bellamy argues not only that 'directly deliberative forums are implausible mechanisms for making key decisions in large-scale and complex mass

23. C O'Cinneide ' "The people are the masters" – the paradox of constitutionalism and the uncertain status of popular sovereignty within the Irish constitutional order' (2012) Irish Jurist 249 at 256.
24. Pettit, above n 4, p 8.
25. Pettit, above n 3, pp 152–155.
26. S Clark 'A populist critique of direct democracy' (1998) 112 Harv L Rev 434 at 435.
27. Bellamy, above n 6, ch 5.
28. Ibid, p 5.
29. Tomkins, above n 6, p 3.
30. Ibid.

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democracies'[31] – but also that the 'increasing use of quasi-democratic inputs such a referenda [represents] a vain attempt to give a veneer of popular legitimacy to the growing deployment of delegated regulative agencies by governments'.[32]

Thus, republicans prefer to vest constitutional power in assemblies rather than judges not because they better reflect popular *will*, but because they are both themselves accountable and better positioned to hold executive power to account in turn. But non-accountability leans against 'direct' democracy as well as judicial review, because voters, casting ballots in private, are in no sense publicly 'accountable' for their choices. On this view, referendums fail to force or prompt participants to deliberate on or publicly account for their actions through the process of public justification and compromise seen as characteristic of parliament.[33] This absence of deliberation or accountability by participants carries a strong risk of 'ill-informed choices'.[34] Parliamentary democracy better satisfies the condition of *publicity* compared to the referendum's aggregation of isolated, unaccountable votes. The referendum ritual might in fact be quite consistent with a liberal, atomised – profoundly *un-republican* – society, marred by complacency and civic withdrawal. It seems to satisfy a hollowed-out, formalistic notion of 'choice' – 'an exercise in aggregating pre-formed wills without any prospect that people will engage in democratic decision-making in a reflective, responsive and deliberative way with a preparedness to change their minds'.[35] Given the *form* of the referendum, there is a risk that participants will vote on the basis of 'brute preference' rather than 'commonly avowable interests', or the 'good of the group'.[36] Pettit apprehensively describes 'a plebiscitarian dispensation in which each participant privately forms his or her judgment about common avowable interests, rather than doing so in dialogue with others'.[37] Despite the ostensible inclusivity and egalitarianism of voting itself, public deliberation in referendum campaigns may nonetheless be monopolised by elites, excluding marginalised voices.[38]

In turn, 'direct democracy' is critiqued – in not exclusively 'republican' terms – as potentially dangerous for individual and minority rights. Examples include the 2008 Swiss referendum prohibiting minarets, and California's Proposition 8.[39] Direct legislation also raises problems of competence and expertise.[40] For an alternative

31. R Bellamy 'Republicanism, democracy and constitutionalism' in C Laborde and J Maynor (eds) *Republicanism and Political Theory* (Oxford: Blackwell, 2008) p 164.
32. Bellamy, above n 6, p 262.
33. Honohan, above n 8, p 222.
34. S Tierney 'Constitutional referendums: a theoretical inquiry' (2009) Mod L Rev 360 at 368.
35. Ibid.
36. Pettit, above n 3, p 140.
37. Ibid.
38. Serdült argued before the House of Lords Select Committee on the Constitution: 'direct democracy is an institutional weapon for organized interests (political parties, interest groups, employer's and employee's associations)'. 12th Report of Session 2009–2010: 'Referendums in the United Kingdom', at 137. See also Honohan, above n 8, pp 220–230, 237.
39. I Haider-Markel, A Querze and K Lindaman 'Lose, win, or draw? A reexamination of direct democracy and minority rights' (2007) 60 Pol Res Q 304; B Frey and L Goette 'Does the popular vote destroy civil rights?' (1998) 42 Am J Pol Sci 1343; D Moeckli 'Of minarets and foreign criminals: Swiss direct democracy and human rights' 11(4) Hum Rts L Rev (2011) 774. Moeckli asserts (p 778) 'Empirical work testing that assumption is surprisingly sparse.'
40. Honohan, above n 8, p 218.

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'radical democratic' critique, referendums don't empower the people *enough* – particularly since 'the procedure is often subject to a high level of control by the executive and legislative arms of the government'.[41] For Wolin, 'constitutionalism domesticates the power of the masses of ordinary citizens through structures of authority that set the terms for proper avenues of political participation',[42] and this can be extended to the referendum itself.

The remainder of the paper defends the republican virtues of the constitutional referendum. First, I argue that the challenge it poses to the virtues and forms of parliamentary democracy has been overstated.

2. THE REFERENDUM, MIXED GOVERNMENT AND CONSTITUENT POWER

Republican theorists generally contrast the unaccountable, potentially dominating force of 'direct democracy' with the various virtues of representative democracy. In turn, this critique tends not to distinguish between different mechanisms of direct democracy. However, provided that it is appropriately couched and structured, the constitutional referendum may in fact be consistent with the republican virtues of parliamentary democracy. In this understanding, the constitutional referendum allows the people to perform a *checking* rather than an *originative* or creative role in respect of constitutional content and identity. In this section, I argue that in this role, the people should not be seen as the sovereign *as such*, disrupting the institutions of representative democracy – but rather as part of a structure of interlinking, mutually constraining legislative bodies. Thus, they represent 'constituted', not 'constituent', power, embedded within the mixed constitution.

Most theoretical treatments of the referendum assume that it represents a challenge or *corrective* to mixed government and liberal constitutionalism[43] – a disruptive, 'direct' intervention by the *demos* in the regular functioning of constituted political authority. This is depicted either as a benign reassertion of popular power or an exercise of potentially oppressive populism. In particular, 'direct' recourse to the people is often seen as a strategy by charismatic or paternalistic leaders in strong-arming parliament.[44] For example, in 1962 Charles de Gaulle invoked Art 11 of the French Constitution to amend its provisions on presidential elections via referendum, bypassing the parliamentary amendment procedure. The argument that this was unconstitutional was somewhat neutered by his appeal to 'popular will'.[45]

Thus, it is widely assumed that constitutional referendums are distinctive precisely because they represent an exercise of popular sovereignty. Tierney, in this vein, argues that much existing literature fails to distinguish referendum types based on their subject matter. Specifically, he argues most theorists have failed to acknowledge the 'different normative issues' raised by 'constitutional' and 'ordinary-legislative' referendums, focusing instead on whether referendums generally represent 'an

41. O'Cinneide, above n 23, p 256.
42. S Wolin *Politics and Vision: Continuity and Innovation in Western Political Thought* (Princeton, NJ: Princeton University Press, 2009), p 565 (as cited in O'Cinneide, above n 23, p 265).
43. Tierney, above n 34.
44. Ibid, p 368.
45. See Tierney, above n 2, pp 132–135.

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appropriate mechanism of law-making'.[46] 'Constitutional' referendums, he claims, raise distinctive normative issues given their peculiar subject: specifically, the determination, by the sovereign 'people', of both 'constitutional identity' and the 'second-order rules' for the legal system.[47] Popular sovereignty, he argues 'must be concerned precisely with those situations where "the people" can be shown to exercise direct control over second-order lawmaking'.[48]

However, the constitutional referendum cannot plausibly be conceptualised as an act of popular control or authorship, whether in respect of 'second-order' rules or 'constitutional identity'. Instead, I argue that its political value must be understood not in terms of popular sovereignty at all but, rather, in terms of the checking or contestatory power it creates within the mixed constitution. In turn, from a republican standpoint centred on non-domination and mixed government, the *subject matter* of referendums – or the 'order' of rules to which they relate – is of less normative significance than the constitutionally defined power and procedure of initiative. In particular, it is important to distinguish popular initiatives, which bypass or substitute the parliamentary process, from referendum mechanisms that are interlinked with or contingent on it. Each type can in principle be used both for 'constitutional' or 'ordinary-legislative' issues (the distinction being quite tenuous in the UK context).[49] Popularly initiated referendums,[50] whatever their subject matter, bypass parliamentary procedure and compromise, and thus (arguably) carry a greater danger of unbridled populist reaction or majoritarian oppression.[51] On the other hand, a clear requirement of parliamentary consent or initiative for constitutional referendums can attenuate the risk of authoritarian or paternalistic instrumentalisation: Tierney notes that the power of elites to 'stage' referendums 'can be heavily conditioned by the constitutional framework'.[52] Accordingly, this preserves the republican virtues of parliamentary deliberation and compromise. Subject to this condition, the constitutional referendum should be seen neither as a form of spontaneous, unbridled popular power, nor as an instrument of executive manipulation. Rather, it can be valued as a potentially important check on executive power in the field of constitutional change – albeit one whereby the people *check* rather than *author* constitutional change. Admittedly, these contestatory virtues might not be confined to constitutional referendums; perhaps they might also be encompassed within 'abrogative' or 'rejective' referendums that occur at legislative level – such as in Italy, for example[53] – as they similarly widen the opportunities available for popular contestation of government power. Yet the point remains that much of the literature on 'direct democracy' fails to sufficiently distinguish the normative implications of different referendum instruments based on their initiative procedure.

46. Tierney, above n 34, at 361, 362.
47. Tierney, above n 2, p 15; Tierney, above n 34, at 364.
48. Tierney, above n 2, p 13.
49. The popular initiative is more commonly used for ordinary-legislative issues than for constitutional amendment. However, there are exceptions: Arts 138–139 of the Swiss Constitution provide that it can be amended by a referendum initiated by a petition of 100,000 electors.
50. The term 'referendum' as used in this paper refers to plebiscites, generally including those triggered by voter petition.
51. Moeckli, above n 39.
52. Tierney, above n 2, p 127.
53. See eg M Setälä 'Referendums in Western Europe – a wave of direct democracy?' (1999) 22 Scand Pol Stud 327.

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'Mixed constitutionalism' is enhanced, not undermined, where the referendum is used as a mechanism to confirm constitutional amendments initiated by parliament. The term 'constitutional referendum' used here does not refer solely to referendums effectuating changes in constitutional *structure* or establishing new constitutional orders or sub-orders. Rather, it refers primarily to referendums used as a mandatory mechanism for amending codified, rigid constitutions that cannot be amended by ordinary parliamentary legislation. Constitutional referendums in this sense might concern not only constitutional institutions or structures, but also substantive social or political principles that are constitutionally enshrined. Of course, constitutional referendums of this sort might be structured so as to bypass parliament: amendments could be initiated by popular petition or executive authority.[54] However, the republican virtue of the constitutional referendum is clearest where parliament enjoys an exclusive initiative power. In this form, the referendum – despite its allures of unbridled popular sovereignty – in fact represents an instrument of constitutional *entrenchment*,[55] requiring popular consent for constitutional amendments initiated by parliament. Then, it supplements, but does not supplant representative democracy. Compared to the UK's flexible constitution, this type of mandatory constitutional referendum might then be interpreted as a device of constitutional *conservatism* or entrenchment (this presupposing the existence of a codified constitution).

For example, the 1937 Irish Constitution can only be amended through referendums initiated by parliament.[56] In Europe, Denmark and Switzerland also require mandatory constitutional-amendment referendums.[57] The Australian procedure is similar, with the additional requirement of a positive vote in four out of six states.[58] Article 89 of France's 1958 Constitution provides for a two-stage amendment procedure initiated by parliament and approved by referendum (however, a parliamentary 'supermajority' can alternatively be used). These constitutional-amendment plebiscites are quite distinct from the 'constitutional' referendums increasingly seen in British constitutional politics in recent decades; on devolution, electoral reform and EEC membership – essentially, advisory mechanisms for constitutional changes which could, in theory, be pursued through ordinary legislation.[59]

In such jurisdictions, the understanding of the constitutional referendum as an exercise of popular sovereignty pervades constitutional politics as well as constitutional theory. In Ireland in particular, and to a lesser degree in France, constitutional referendums are commonly understood as a mechanism for embodying popular will and thus, as the ultimate expression of a foundational constitutional principle of popular sovereignty – notwithstanding that the initiative power for such referendums lies exclusively with parliament, not the people.[60] In Ireland, popular sovereignty is, moreover, consciously posited as a departure from the British tradition of parliamentary sovereignty. Therefore, as discussed in section 3, the constitutional referendum is

54. See above n 49.
55. B Kissane 'Is the Irish referendum majoritarian?' In W Marxer (ed) *Direct Democracy and Minorities* (Wiesbaden: Springer VS, 2012).
56. Articles 46 and 47.
57. Danish Constitution of 1953, s 88; Constitution of Switzerland, ss 138–139.
58. Chapter VIII, s 128.
59. '. . . [A]s a matter of constitutional law a referendum cannot be binding in this country'. 'Referendums in the United Kingdom', above n 38, at 134.
60. See section 3.

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typically depicted not only as an unmediated, almost pure expression of popular will but, correspondingly, as *supplanting* or *superseding* parliamentary power.

Similarly, much of the literature on the constitutional referendum tends to emphasise its role in linking constitutional content or identity to popular will. However, this understanding overstates the extent of popular empowerment that referendum mechanisms generally can ever facilitate. In his recent work, Tierney acknowledges that 'the people is too large and diverse a body to manifest itself without the intervention of representational forces'.[61] However, he nonetheless argues the constitutional referendum is distinct from the 'ordinary-legislative' type precisely because it 'serve[s] to unsettle the traditional balance between constituent power and constitutional form . . . *substituting the people directly for the representational role* traditionally played by the democratic constitution'.[62] As outlined, he sees its normative significance as lying in the people's designation of, or control over, both 'constitutional identity' as well as the 'second-order rules' for the legal system. While his analysis acknowledges that the exercise of popular sovereignty is couched within representative procedures, it nonetheless depicts the constitutional referendum as (potentially) an exercise of popular control or authorship over at least a certain aspect of constitutional content and identity. The constitutional referendum does not then merely *check*, but actively *supersedes* representative power in a certain domain. Tierney claims that:

> the people's direct democratic capacity to act as, or at least to influence the location and distribution of, the supreme source of constitutional law within a polity *distinguishes constitutional referendums as, potentially at least, true conduits of popular determination*.[63]

However, there is no conceivable plebiscitary mechanism in which the people could be understood as exercising meaningfully direct or autonomous control or authorship over constitutional identity, or 'second-order' rules. Rather, the people perform the more modest, yet important role of checking and contesting constitutional change. The main basis for this argument is the intrinsically limiting *form* of the constitutional referendum: specifically, the fact that the people can never be seen as engaged in a freestanding act of creation or control, because their vote is always responsive to a proposition formulated by an initiating authority – usually, but not necessarily parliament – which necessarily enjoys an agency independent of the abstract 'people'. The people either veto or acquiesce to this proposition. Even where constitutional plebiscites might be initiated by popular petition[64] – thus bypassing intermediary institutions – the content of the proposal itself still does not, then, emanate from the abstract unitary 'people' but, rather, from a discrete political movement or campaign: the power of the people *as such* is still, then, reactive rather than creative. It might be argued that what Tierney terms 'polity-framing' referendums – such as secession or constitutional-enactment plebiscites – are distinct from constitutional-amendment referendums in this respect, because they involve the creation of a new state or polity, and thus a genuinely 'sovereign' act. Tierney conceptualises these as exercises of 'constituent sovereignty'.[65] Ostensibly, these

61. Tierney, above n 2, p 128.
62. Tierney, above n 34, at 361, emphasis added.
63. Ibid, at 364, emphasis added.
64. For the Swiss example, see Moeckli, above n 39, at 781.
65. Tierney, above n 2, p 13. In ch 7, Tierney uses the examples of plebiscites in South Sudan and East Timor.

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involve the people stepping outside and above the constituted order to create a new dispensation. Yet Tierney acknowledges that even such referendums 'come at the end of a process that was not necessarily from the beginning a self-consciously constitutive one'.[66] For example, new or secessionist constitutions will typically be drafted by constituent assemblies or other bodies. As argued, the 'people' *as such* never have real control over the content of proposed constitutional amendments; they are never responding to a question they have posed to themselves,[67] but simply acquiescing to or vetoing a proposition formulated by some intermediary entity. But this is as true of the polity-framing referendum as the constitutional-amendment type. The people must either veto or acquiesce to a constitution drafted by some intermediary body, which one enacted, can never be said to correspond to their will or capture their sovereign identity.

Thus in both examples where representative, constituted power is ostensibly superseded – the 'constituent' referendum and the popular initiative – the 'people's' role is always couched within some antecedent political manoeuvring that breaks any link of authorship between constituent power and constitutional content. Therefore, even these cannot be cast as expressions of popular 'supremacy'.[68] Accordingly, the constitutional referendum can never plausibly represent a re-intervention by the mythical 'constituent' power on the political stage. This leans against Tierney's argument that the constitutional referendum can be interpreted (at least under certain circumstances) as 'returning direct power to the people', reversing 'the original act of transference'.[69] He argues that in constitutional referendums, 'the very identity of the demos can be implicated . . . [such] that a constitution can come to embody the political selfhood of the people [and] take on a symbolic representational role, encapsulating the very identity of the people, while also embodying emblematically its collective settled will'.[70] Yet for much the same reason that it is never truly 'direct', neither can the constitutional referendum realistically be conceptualised as a moment of 'self-definition' by a discrete 'people'[71] – simply because it can never convincingly be understood as the 'people' acting autonomously, free from the operation of background political forces. Its power is responsive even where the initiative power is itself popularised. Plebiscites, in short, are never an exercise in unmediated collective self-expression.

The commonplace depiction of the constitutional referendum[72] – as potentially a 'creative' or disruptive exercise of sovereign power – overstates the degree of popular empowerment it affords in reality. Yet by the very same measure, it need not necessarily represent a challenge to liberal constitutionalism. The 'people', in the context of the constitutional referendum, should be viewed as a *constituted*, rather than a *constituent* authority, as part of an *interaction of discrete assemblies* with a limited and procedurally couched function – specifically, a *veto* or *checking* power. The constitutional referendum is not then seen as a performance of *sovereign* power by the

66. Ibid, p 15.
67. See J Colón-Ríos 'De-constitutionalizing democracy' (2010) 47(1) Cal W L Rev 41 at 90.
68. Tierney, above n 2, p 15.
69. Tierney, above n 34, at 367.
70. Tierney, above n 2, p 14.
71. Tierney, above n 34, at 379.
72. Tierney distinguishes between 'constitution-changing' referendums as exercises of 'command sovereignty', and 'constitution-framing' referendums as exercises of 'constituent sovereignty'. Tierney, above n 2, pp 14–16.

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abstracted 'people', but merely as an ad hoc *popular legislature* within the 'mixed constitution'.

This modest understanding of the popular empowerment the referendum allows should, in turn, counter the republican concerns detailed in section 1. This is particularly true of constitutional referendums preceded by an *exclusive* parliamentary initiative power – although, as noted, even popularly initiated constitutional plebiscites are mediated procedurally, politically and socially. In this form, popular power then represents a check upon, rather than a substitute for parliamentary power, with its deliberative and moderating virtues. However, more pertinently, constitutional referendums of this sort also check executive power in the field of constitutional change. In the model used in Ireland and Australia, the referendum serves only to confirm parliamentary proposals for constitutional amendment: accordingly, it operates as a check on the ability of the government (via the legislature) to effectuate constitutional change. This accords the popular vote a much more modest role than constitutional mythology suggests, as merely the final step of a process beginning with a government-initiated bill.[73] In the UK, referendums are not formally required to validate constitutional change; however, in so far as constitutional convention now (apparently) requires referendums to be held (at least on certain issues), much the same observation applies in qualified form.[74]

This offers quite a deflationary account of the degree of popular empowerment constitutional referendums facilitate – in essence, a seemingly passive power of veto rather than of freestanding constitutional authorship, and certainly not the 'supplanting [of] representative constitutionalism'.[75] Yet in fused executive-legislature systems characterised by strong executive dominance, a 'mere' veto or checking power may be of great value. As outlined in section 1, republican scholars are typically concerned that constitutions should include robust mechanisms for ensuring the contestation and checking of government.[76] The constitutional referendum, conceived as a veto power rather than as a mechanism for popular will or self-definition, limits and checks the capacity of political actors to effectuate constitutional change, and so may have an important role in ensuring the contestability of government power. Since constitutional-reform bills are invariably initiated by government in Westminster-style fused executive-legislatures, the constitutional referendum – rather than superseding parliamentary democracy as often claimed – in fact simply performs a check on government power.

Thus, constitutional-amendment referendums can be defended specifically on the basis of a concern to check executive power in the area of constitutional change. In a fused executive-legislature system, the availability of constitutional amendment through ordinary legislation risks allowing a relatively unchecked power of constitutional revision for the government. Under the Constitution of the Irish Free State (1922–1937), the parliament's transitory power of amendment – allowed for 8 years – was used to extend the transitory period itself, to remove the provision for popular-initiative referendum, and to allow extensive powers for military tribunals.[77] The UK's

73. See R Sinnott 'Cleavages, parties and referendums: relationships between representative and direct democracy in the Republic of Ireland' (2003) 41 Eur J Pol Res 811.
74. 'Referendums in the United Kingdom', above n 38, at 74. See also European Union Act 2011, below, n 78.
75. Tierney above n 34, at 361.
76. Pettit, above n 3.
77. See D Coffey 'Judicial review in the Irish Free State' (2011) Dublin U L J 61.

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flexible constitution is supported by informal checks on constitutional change, but these are naturally weaker in a newer dispensation: accordingly, the referendum may have a role in constitutional entrenchment and stability. Ireland's transition to a more functionally rigid Constitution through the referendum requirement introduced in the 1937 Constitution thus represented a significant fetter on executive power, yet without bypassing the parliamentary process. Given the emergent convention of referendums being held in the UK to approve at least certain changes in constitutional structure, arguably the same observation applies.[78]

On this account, the referendum has an important role in checking executive power and thereby rendering it non-arbitrary. This is confronted by Pettit's objection that decisions lent the imprimatur of popular authority tend, by their nature, to themselves gain an uncontestable authority and thus to represent a source of arbitrary, dominating power.[79] It might seem incongruous, in this light, to advocate the use of referendums as means to promote contestability and non-domination. However, again much depends on how the referendum is couched procedurally. The specific model that I have described is defensible as an instrument of contestability by virtue of three features. First, the power of initiative is confined exclusively to parliament – thus ensuring at least a certain degree of contestation and moderation of the referendum proposal itself. Secondly, the referendum subject matter is confined to questions of constitutional amendment, minimising governmental discretion as to its use. Thirdly, the *mandatory* use of referendums for constitutional amendment yields the same advantage. Under these conditions, the referendum, far from lending an unassailable, uncontestable moral authority to the relevant decisions, represents a mechanism to enable the contestation of governmental power in the constitutional sphere – but which, *contra* Pettit, is itself subject to contestation at various levels, not least because it must first be approved *both* by parliament and government. It need not, then, exalt the popular will as 'morally and legally unchallengeable'.[80]

In Ireland, referendums are, as outlined, the mandatory final stage of constitutional amendment. The Constitution entrenches not only institutional structures and procedures, but also substantive rights that may obstruct various legislative reforms (given the courts' power of constitutional review).[81] Therefore, in practice the referendum represents a hurdle not solely to 'constitutional' changes in the narrow sense, but also to various legislative proposals which risk being constitutionally invalidated. Accordingly, the referendum requirement ensures a certain category of government policies beyond the narrow constitutional sphere are subject to wider public contestation and debate.

This is supported by various historical examples. For example, Irish voters twice rejected attempts to abolish the PR-STV electoral system in a manner that would

78. This is strengthened by the European Union Act 2011. Bogdanor claims 'conventions have grown up' that a referendum is required before 'any significant devolution of powers away from Westminster' or 'when a wholly novel constitutional arrangement is proposed', but 'not in relation to the European Union'. 'Referendums in the United Kingdom', above n 38, at 25. However, Hazell argued: 'at best, we can venture a partial doctrine that referendums are required for devolution, for a constitutional change whereby the Westminster Parliament delegates legislative power to a subordinate legislative body'. Ibid, Q2.

79. Pettit, above n 3.

80. Ibid, p 155.

81. Articles 26, 34.3.1.

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have benefited the governing party.[82] As Kissane argues, this historically dominant party would have 'long since' abolished proportional representation under a flexible constitution.[83] More recently, voters rejected an amendment that appeared to curtail rights of procedural fairness in the context of parliamentary inquiries (which in effect would have been initiated by the government).[84] This analysis is perhaps less applicable to referendums concerning quintessential 'moral' issues such as abortion,[85] or which are initiated in response to unpopular Supreme Court judgments,[86] or those concerning EU treaties. Nonetheless, the referendum requirement has certainly deterred various reforms that governments would otherwise have pursued through the parliamentary route.[87] Therefore, Kissane argues that far from representing a crude majoritarian instrument, the referendum has assisted 'the diffusion of power across institutions' in a manner similar to bicameralism.[88] Similarly, it has been argued that in the Italian context, 'mandatory referendums have a functional similarity with multicameral decision-making'[89] – and that they amount to a 'negative legislative power'.[90]

Another potential objection is that executive power over constitutional reform can be checked by alternative special amendment mechanisms – for example, the parliamentary 'supermajority' provided for under Art 89 of the French Constitution. These might equally check executive power while avoiding the dangers associated with plebiscites. However, the purpose of special-amendment procedures is not only to make constitutional revision more *difficult* and to secure constitutional entrenchment in this crude sense. Referendums – despite requiring a simple majority – guarantee a wider and more *public* process of contestation and deliberation than any alternative mechanisms, including parliamentary supermajorities. A parliamentary supermajority may often be achieved through agreement between the government and a single opposition party, leading to a relatively uncontested, quietly passed amendment. Contestation or 'checking' must be understood not merely as a *blocking* procedure, but as entailing a process of public justification. Public justifications for constitutional change will be more widely exchanged in a referendum campaign than through the political bargaining and manoeuvring that might secure a parliamentary supermajority. In Ireland, the vast majority of constitutional amendments have been proposed on the basis of a cross-party consensus – or at least the support of the main opposition party – given the significant political risk that referendums entail

82. Third Amendment of the Constitution Bill 1958; Third Amendment of the Constitution Bill 1968.
83. Kissane, above n 55, p 152.
84. Thirtieth Amendment of the Constitution Bill 2011.
85. See eg Fifteenth Amendment of the Constitution Bill 1996; Eight Amendment of the Constitution 1983.
86. Seventeenth Amendment of the Constitution 1997.
87. In the Irish Free State, ordinary Acts inconsistent with the Constitution were simply accepted by the courts as amendments to it. *State (Ryan) v Lennon* [1935] IR 170.
88. Kissane, above n 55, p 153.
89. A Chiaramonte and RD Alimonte 'The twilight of the Berlusconi era: local elections and national referendums in Italy, May and June 2011' (2012) 17 S Eur Soc'y & Pol 261 at 329.
90. S Fabbrini 'Has Italy rejected the referendum path to change? The failed referenda of May 2000' (2001) 6 J Mod Ital Stud 38 at 53.

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for governing parties.[91] Yet correspondingly, each of these amendments would have mustered a parliamentary supermajority, with little public contestation or deliberation.

Thus, I argue that the constitutional referendum offers a superior mechanism for securing contestation of executive power (broadly understood) in the field of constitutional change, and need not detract from the virtues of representative democracy as long as initiative power is reserved to parliament. In this understanding, constitutional referendums are in fact the very antithesis of unmediated majoritarian power. As outlined, Tierney, depicts two alternative conceptions of the people's role in this context: either as the *sovereign* engaged in 'an exercise of collective will-formation' (a conception dealt with in section 3) or alternatively as the sovereign, again, exercising *constituent* power by performing 'direct control over second-order lawmaking'.[92] In both roles, the voting 'people' are depicted as a 'sovereign' authority, exercising *control* or even authorship over constitutional identity and content. I have argued that this overstates the degree of collective agency that referendums can ever facilitate. Moreover, such a conceptualisation of the constitutional referendum may in fact lend its outcomes the sort of unassailable moral authority which, as outlined, Pettit fears may render direct democracy a form of uncontestable, dominating power. The constitutional referendum gives the people a contestatory rather than originative role with respect to constitutional content. The classical conception of mixed constitutionalism presupposed the existence of discrete social classes with corresponding political representation – which in turn, makes classical republican theory sometimes difficult to square with the more diffuse modern social structure.[93] Contemporary republican theory does not generally refer to the 'people' as a social class juxtaposed with an aristocratic elite, but rather, more abstractly, as the sovereign constituent authority. It is this very conception of 'peoplehood', supposedly manifested in the referendum process, which is challenged here. The 'people', here, neither represent a discrete social class nor the 'ultimate source of power in the legal system'[94] as such, but simply an ad hoc legislature. This decoupling of the voting 'people' from the abstract *demos* does not reject popular sovereignty *as such*. Rather, it suggests that since the power of the voting people is invariably hemmed-in by the initiative procedure (in particular) it can never realistically be depicted as the freestanding exercise of 'sovereign' power.[95]

3. THE REFERENDUM AS AN EXPRESSION OF POPULAR WILL

As outlined in section 2, the constitutional referendum is often celebrated as the ultimate institutional embodiment of popular sovereignty, through which the people

91. Sinnott, above n 73, at 811. 'Only four of the 27 referendums held in the Republic of Ireland have involved *major* inter-party conflict'; p 815.
92. Bellamy, above n 31, p 364.
93. See E Carolan 'Recovering the Republic? Democratic representation and the mixed theory of government' (2012) Irish Jurist 173.
94. Tierney above n 34, at 364.
95. This challenges Tierney's claim that 'constitutional referendums implicate what is perhaps the central relationship within constitutional democracy – that between constituent power and constitutional form'; ibid.

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assert their authority over constitutional identity and content. More specifically, it is correspondingly understood as a mechanism for ascertaining and expressing popular *will*, thus conferring democratic legitimacy on the Constitution. For Tierney, a key question is whether, through the constitutional referendum, ' "the people" [can] be envisaged as intervening directly to "produce" sovereign decisions in a way which affirms that legitimate democratic authority emanates from popular consent'.[96] In this understanding, the Constitution is an 'embodiment of the settled will of a democratic people'.[97]

In Ireland, where the constitutional referendum occupies an unusually prominent role, courts are particularly prone to mythologising the constitutional referendum as a device for crystallising popular will. The unusually strong rhetorical association of constitutional content with popular stems partly from the need to justify and rationalise judicial review of legislation: in O'Cinneide's words, popular sovereignty is 'venerated in constitutional theology'[98] as an overarching constitutional principle, and the constitutional referendum is thought its main expression. Indeed, since the enactment of the Constitution by plebiscite in 1937 had an uncertain legal basis in the existing dispensation, its legitimacy was consciously predicated on a direct, extra-legal appeal to the authority of the people.[99] De Valera, the main constitutional architect, depicted the plebiscite as a tool for overriding constituted power:

> the people can effect [this] revolution . . . and I would like to see the lawyers who would stand in their way. This Draft Constitution, if passed at all, is going to be passed by the sovereign people. . . . Their will is the final decision.[100]

This theory of popular sovereignty – as (supposedly) reflected in the people's exclusive power of constitutional enactment and amendment – has had three specific implications.

First, popular sovereignty has been thought to imply specific constitutional principles in areas unrelated to the amendment procedure. For example, in *Byrne v Ireland*,[101] the Supreme Court held the royal prerogative had not carried over into the Irish constitutional order, based partly on the proposition that 'the State is the creation of the people [as] the sovereign authority'.[102] Similarly, popular sovereignty was used to ground a constitutional claim for the people, through the State, to assert ownership over national antiquities.[103]

Secondly, constitutional interpretation is sometimes described as an exercise in discovering the 'will' or intention of the people as expressed in the constitutional text – much in the same manner as statutory interpretation is portrayed as an exercise in discerning parliamentary intentions. Thus, not only the authority, but the *meaning* of the Constitution derives from popular 'will'. It was affirmed: 'a Constitution is to be liberally construed *so as to carry into effect the intentions*

96. Ibid, at 363.
97. Ibid, at 366.
98. O'Cinneide, above n 23, at 256.
99. J Jacobsohn 'An unconstitutional constitution? A comparative perspective' (2006) 4(3) Int'l J Const L 460.
100. Dáil Éireann debates, vol 67, cols 74–76, 11 May 1937.
101. [1972] IR 241.
102. [1972] IR 241, 262.
103. *Webb v Ireland* [1988] IR 353. See also *Doherty v Government of Ireland* [2010] IEHC 369.

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of the people embodied therein'.[104] Interpretations of constitutional provisions are often grounded on how they were presumptively 'intended'.[105] In turn, this serves to lend a sense of democratic legitimacy to the courts' constitutional review of parliamentary legislation.

Thirdly – and most importantly – popular sovereignty has been invoked to defend the substantively *unfettered scope* of the people's amendment power.[106] This has been rationalised on the basis of a presumed correspondence between the basic law and the popular will, expressed via the referendum. This principle has consistently been invoked to reject various legal challenges to the content and outcome of referendums.[107] In the *Abortion Information* case, the Supreme Court invoked popular sovereignty in conclusively rejecting any substantive limitations on the scope of the amendment power, asserting that 'the Constitution . . . is the fundamental and supreme law of the State representing . . . the will of the People'.[108] Thus, rather than implicitly entrenching any substantive principles, popular sovereignty has been conceived in almost purely *procedural* terms, as protecting a substantively unfettered right of amendment.

In all three examples, the portrayal of constitutional referendums as capturing the 'will' of the people is wildly unrealistic. The 'will' referred to is normally framed not as the 'will of the majority' but, rather, as the *corporate* will of the people as a discrete entity. However, this has not been supported by any coherent theory of corporate will or group intention.[109] It ignores the problem of how collective intent can be inferred by aggregating differently motivated individual responses to questions formulated by discrete authorities acting quite independently of the abstract 'people'.[110] Although approved by plebiscite, the original constitutional text was drafted by quite a small, closed coterie and initiation of amendments is monopolised by the government. Indeed, 'elections or referendums do not generate a "people's will", simply an aggregate derived from adding and subtracting the responses to the choices offered . . . [therefore] the idea of popular sovereignty cannot be applied coherently to interpret electoral results as expressing a single sovereign will'.[111] It is a truism that referendums only allow the people to answer the questions put to them and never to express themselves autonomously, but this is wholly ignored. Additionally, the prevailing theory ignores the question, first, of how the majority of those voting can represent the will of the abstract whole and, secondly, that while single-issue plebiscites might capture popular *preference* on discrete issues, they cannot reflect voter *priorities* among different issues.[112] De Valera's claim that the

104. *Sullivan v Robinson* [1954] IR 161, 174.
105. The Supreme Court rejected a claim that the Constitution protected consensual adult same-sex relations on the grounds that in 1937, the people, given their Christian beliefs, could not have 'intended' it to apply this way. *Norris v Att. Gen.* [1984] IR 36.
106. Article 46 provides that 'any provision' of the Constitution may be amended 'whether by way of variation, addition or repeal'.
107. *Finn v Att. Gen* [1983] IR 154; *Riordan v An Taoiseach (No 2)* [1998] IEHC.
108. *Re Article 26 and the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill 1995* [1995] 1 IR 1.
109. See generally J Schachter 'The pursuit of "popular intent": interpretive dilemmas in direct democracy' (1995) 105 Yale L J 107.
110. This argument was addressed in section 2.
111. Honohan, above n 8, p 220.
112. Clark, above n 26.

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Constitution enshrined the people as 'masters'[113] thus seems hollow – and the judicial depiction of referendums as embodying popular will may serve to lend them an aura of uncontestability.

4. THE REFERENDUM AND PARTICIPATION

If the referendum cannot coherently be understood as a mechanism for ascertaining popular will, what justification remains for its use? In section 2, it was argued that the constitutional referendum should, subject to certain conditions, be understood as providing a mechanism for the checking and contestation of executive power in the area of constitutional change. Correspondingly, however, this contestatory mechanism should in turn be valued as an instrument for promoting wider participation in public affairs.

As outlined in section 1, many legal-republican scholars look to parliamentary politics, not an activist judiciary, as the main guarantor of political freedom – primarily on the basis of concerns surrounding accountability, contestation and non-domination. Their apprehension towards judicial power is also extended, whether implicitly or explicitly, to 'direct democracy', on broadly similar grounds. While I have already argued that the constitutional referendum need not undermine the republican virtues 'political constitutionalists' associate with parliament, in this section I consider how, in so far as it promotes wider civic participation, it may positively enhance the stability of representative democracy.

Civic participation is a prominent theme in the republican history of thought. In the republican tradition, freedom is not a 'natural' or pre-political condition, but is intrinsically connected with political community. For the Aristotelian civic-republican tradition (as distinct from the neo-Roman strand), individuals are free not by virtue of the absence of external interference (or domination) but, rather, through equal membership of, and participation in a political community engaged in self-government through deliberation on common goods.[114] Political participation is then *intrinsically* valuable, but simply instrumental to non-domination. For Pitkin, 'I am not fully taking charge of my life and of what I am doing until I join with my fellow citizens in political action.'[115] However, all strands of republican thought assume the necessity of an active, engaged or even vigilant citizenry, and correspondingly, of wide participation in public affairs. For neo-republicans such as Pettit, civic participation is not intrinsic to freedom; however, it is *instrumental* to freedom understood as non-domination. Specifically, wide civic participation is thought necessary to sustain institutional arrangements which check arbitrary power. However, republicans disagree not only on civic participation's conceptual relationship to freedom, but also on its appropriate *form*: Pettit, for example, argues that republican freedom requires the opportunity to *contest* political power but not necessarily the capacity (or inclination) to contribute in its exercise.[116] Indeed, this is probably more attuned to the social reality of contemporary mass democracies. Yet conversely, the civic-republican alternative need not translate to a caricature of austere virtue, or to a perfectionist

113. Dáil Éireann debates, vol 67, col 40, 11 May 1937.
114. See generally Honohan, above n 8.
115. H. Pitkin 'Justice: on relating private and public' (1981) 9 Pol Theory 327 at 349.
116. Pettit, above n 4, p 185.

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understanding of citizenship as a higher form of human flourishing. Honohan notes that civic participation might be regarded *neither* as purely instrumental nor, correspondingly, as '*the* privileged locus of the good life': it can be 'intrinsically worthwhile' without representing 'the highest realisation of human nature'.[117]

For both of these republican strands – neo-Aristotelian and neo-Roman – freedom is conceptually indissociable from citizenship. Similarly, both see the core function of constitutionalism not simply as being to limit the reach of state power over private freedoms, but also as providing mechanisms through which citizens may engage in public affairs. The participation that republican constitutionalism envisages must include participatory mechanisms extending beyond the opportunity of voting in periodic elections;[118] it must avoid any scenario whereby the people, despite power nominally being exercised on their authority, 'become pure objects of liberal governance'.[119] In turn, the referendum is one of very few constitutional devices that prompt citizens outside professional politics to deliberate and participate beyond the framework of periodical elections.

On the one hand, liberal constitutionalism tends to keep the people 'kept firmly at arm's length'[120] in constituted governance, making democratic legitimacy an empty formalism. On the other, attempts to redress this tend to focus on how constituted governance might be more firmly subjected to an ephemeral popular *will*. The theory of the constitutional referendum tends, in turn, to be located along this fault-line: it is seen as a corrective to liberal-constitutionalist mediated governance only in so far as it provides a mechanism for popular will to impose itself on constituted power. This understanding, in turn, underlies republican concerns about 'direct' democracy's potentially oppressive force. However, the political theory of the constitutional referendum should be extricated from this binary opposition. The concern to enhance lay involvement in 'constituted' governance need not be framed in terms of popular will – not least because this 'will' is always institutionally and politically mediated and thus impossible to discern in its uncompounded form. Participation in self-government can be valued, whether instrumentally or intrinsically, without the need for 'ghostly entities'[121] such as sovereign or popular will. For Loughlin and Walker, 'modern constitutionalism is underpinned by two fundamental though antagonistic imperatives: that governmental power ultimately is generated from the "consent of the people" and that, to be sustained and effective, such power must be divided, constrained and exercised through distinctive institutional forms'.[122] However, the value of participation can be seen other than through the theoretical binary of 'liberal constitutionalism' and 'radical democracy'.[123]

Thus, the value of the constitutional referendum is not that it enables the people, as constituent power, to periodically re-enter the political fray and reaffirm its supremacy, giving 'direct and unmediated expression . . . to the popular will'.[124]

117. Honohan, above n 8, p 217, emphasis in original.
118. Ibid, p 215.
119. O'Cinneide, above n 23, p 269.
120. Ibid, p 256.
121. R Dworkin *Taking Rights Seriously* (London: Duckworth, 1978) p xi.
122. M Loughlin and N Walker 'Introduction' in M Loughlin and N Walker (eds) *The Paradox of Constitutionalism* (Oxford: Oxford University Press, 2007) p 1.
123. O'Cinneide, above n 23, p 268.
124. Ibid, p 260.

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Rather, a republican constitution must include mechanisms for promoting and facilitating a sufficiently wide degree of popular participation in government so as to facilitate the stability of a political order predicated on the centrality of common goods. This aims to bypass the binary opposition between liberal-constitutionalist and radical-democratic understandings, based on negative freedom and collective will-formation respectively. The importance of a constitutional order that fosters deliberation on common goods may be understood either in terms of a concern to prevent domination by private interests or, alternatively, a conception of the intrinsic value of self-government. Indeed, republican thinkers as diverse as Madison and Rousseau have emphasised the role of participatory politics (albeit of very different sorts) in warding off domination by factions or sectional interests, notwithstanding their very different theoretical understandings of freedom. This conception of constitutionalism as orienting politics towards deliberation on common goods departs in certain important respects from the ideal of 'democratic will-formation' articulated by Habermas and other theorists of deliberative democracy.[125] To engage in self-government is not, on this view, to engage in a process of collective will-formation but, rather, to participate in a political culture centred around deliberation on common goods rather than the negotiation or bargaining of remote private interests. As per Pettit, this might be based simply on the view that government based on common goods is less likely to result in domination. This is achieved partly through the practice of civic virtue understood in the broad sense of a preparedness to articulate political arguments based on public reasons and 'commonly avowed interests'.[126]

This orientation of politics towards common goods is effectuated constitutionally. Under the liberal-constitutionalist conception, the constituent power is 'domesticated' via mediating, representative and expert institutions that check its reach over private freedoms. Rousseau's alternative republican conception was not – as is commonly assumed – to reassert the unbridled sovereignty of the people's 'will' in its ordinary sense. Whereas Rousseau distinguished the 'general will' from the 'will of all' or an aggregation of individual wills, later theorists such as Rawls understood it not as the corporate will of an organic community but, rather, as a form of public reason, accessible to those capable of reasoning in accordance with certain constraints.[127] Accordingly, for republicans the challenge is not to harmonise an organic popular will with pre-political freedoms but, rather, to orient politics towards common goods. Dagger, for example, stresses that republican politics must find ways of transcending any model of politics understood as a bargaining or negotiation of pre-fixed, unreflective interests – an 'economic model of politics' amounting to a 'form of corruption that reduces the citizen to a consumer'.[128]

Therefore, republican constitutionalism also aims to 'domesticate' the constituent power, but in a manner not well accounted for within the theoretical dichotomy between constituent power and liberal rights. Rousseau devised constitutional structures that would foster civic virtues and thus promote the politics of the general will. However, troublingly, he assumed that such a republican politics was possible only in societies that were not only cohesive and egalitarian, but starkly austere, insular and

125. See J Cohen 'Reflections on Habermas and democracy' (1999) 4 Ratio Juris 385.
126. Pettit, above n 4, p 201.
127. J Rawls *Lectures on the History of Political Philosophy* (Cambridge, MA: Harvard University Press, 2007) p 224.
128. R Dagger 'Neo-republicanism and the civic economy' (2006) 5 Pol, Phil, Econ 151 at 155.

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illiberal.[129] This highlights a broader tension within republican theory: if political freedom depends on the possibility of institutionalised self-government which, in turn, requires the cultivation by the state of certain dispositions and virtues, this may ultimately engender, ironically, the very forms of servitude and dependency that republicans abhor. Much classical-republican theory presupposed a 'face-to-face' society that could sustain the solidarity and virtue necessary for meaningful deliberation – while this carried a high exclusionary cost. For Goodin, republican theory either provides insufficient institutional supports for its normative ideals or engenders excesses that defeat those same goals, collapsing in internal contradiction.[130]

It might seem counter-intuitive to view the referendum as a device for promoting a civically virtuous politics based on the common good. Compared with alternative strategies for fostering citizenship – such as compulsory civic service – it is certainly non-coercive and non-intrusive. However, by the same measure it might be thought inefficacious. Of course, referendums alone will not foster a participatory society and active citizenry. Other mechanisms and institutions – such as local democracy, civic education or even citizen-juries – might play as much, or a more important, role, along with the socio-economic preconditions for meaningful participation.[131] Yet a republican emphasis on participatory mechanisms at the constitutional level might serve as a corrective to what has been an excessive focus on – even a veneration of – parliamentary democracy in republican theory. Political constitutionalists such as Bellamy and Tomkins are correct to question how the more dominant legal constitutionalism – centred on courts as guardians of individual rights – can accommodate the need for a robust public culture of accountability and self-government. However, their unrelenting focus on parliament as the main locus of accountability and contestation arguably pays insufficient heed to the problem of stability. Parliament may be necessary and indeed, superior to courts, in many respects, as a forum for accountability and contestation, being well-positioned in its form, structure and authority, to hold executive power to account. However, it is unlikely to function in the manner republicans envisage in a context where citizens remain alienated or remote from representative institutions, and regard politics primarily as a framework for mediating disaggregated private interests rather than for deliberation on common goods. Generally, the literature on political constitutionalism underestimates this problem, being fixated on the ostensibly more central battle with proponents of strong-form judicial review. It generally ignores or understates the problem of how parliament's role in deliberation and/or accountability may indirectly depend on mechanisms facilitating more direct forms of contestation by 'lay' citizens. Voters being able to hold parliament itself to account through periodic elections offers too little by way of participation to undergird, over the long run, its accountability function. I have already argued that in a fused executive-legislature system, the constitutional referendum may itself serve to check executive power; additionally, it can be argued that it also indirectly enhances the accountability function of parliament.

The constitutional referendum need not be seen as a *rival* institution to parliament – in the same lens as republicans perceive judicial review – but, rather, as one of a suite

129. JJ Rousseau 'Considerations on the government of Poland' (1772). For a translation, see 'Considerations on the government of Poland' in F Watkins *Rousseau: Political Writings* (Edinburgh: Thomas Nelson, 1953).

130. R Goodin 'Folie républicaine' (2003) 6 Ann Rev Pol Sci 55 at 63.

131. E Callan *Creating Citizens: Political Education and Liberal Democracy* (Oxford: Oxford University Press, 2004).

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of constitutional devices which, by encouraging greater civic participation, can ensure the stability of a primarily representative constitutional system. An array of influential political and legal scholars, including Waldron, Bellamy, Tomkins and Tushnet, have railed against the corrosive effect of legal constitutionalism or strong-form judicial review on the values of political accountability and/or collective self-government.[132] However, securing legislatures' authority against judicial encroachment is obviously insufficient, in itself, to ensure the vitality of self-government in a context of declining civic participation.[133]

Thus, in a context of low political participation, the academic focus on how judicial activism threatens republican self-government has an air of unreality. Bellamy, for example, advocates a strongly procedural conception of democracy, unfettered by constitutional review, in preference to legal constitutionalism. This translates to a constitutional system based on competitive party politics, which he advocates as the best means of securing non-arbitrary, non-dominating government. This, Bellamy claims, stems from the need to accord citizens 'equal concern and respect' – an aim he sees as being undermined by legal constitutionalism. In turn, however, 'equal concern and respect' is assumed to be sufficiently catered to through equal voting rights within a majoritarian-representative democracy – thus, effectively, through a model of parliamentary supremacy. It is best served, he says, through 'citizens having an equal vote in common elections where political parties compete for the people's vote and electoral and legislative decisions are made by majority rule'.[134] Yet this assumption – that equal voting rights through majority rule translates to 'equal say'[135] – pays insufficient heed to the various background forces that result in a real inequality of influence on legislation and policy. This undermines his claim that 'actual existing democracies' are capable of securing non-dominating rule in which each person's viewpoint is given 'equal concern and respect'. Formal voting equality unfettered by constitutional entrenchment – 'each person count[ing] for one and none for more than one'[136] – can only be thought to secure 'equal concern and respect' by ignoring how politics actually works in liberal-democratic states. Furthermore, guaranteeing a range of political choice formally unfettered by constitutional restraints may do little to remedy a sense of popular alienation from a politics perceived as being in thrall to sectional interest. As Bellamy himself notes, 'no constitution will itself survive long unless citizens identify with it'.[137]

Republican constitutionalism must aim to sustain the *quality* of political participation as well as its frequency and extent.[138] The referendum might appear to offer a relatively superficial type of engagement which, by its form, does little to prompt engagement, sustained reflection or deliberation on common goods. Arguably, voting in referendums is modestly more demanding than voting in elections, as it requires reflection on specific political and moral issues; however, since no process of public

132. Bellamy, above n 6; Tomkins, above n 6; J Waldron 'The core of the case against judicial review' (2006) 115 Yale L J 1346.
133. O'Cinneide argues 'giving more authority to legislatures may not necessarily enhance the substantive dimension of democracy, i.e. the background conditions that must be in place to enable the public at large to genuinely engage with the democratic process'; above n 23, p 268.
134. Ibid, p 219.
135. Ibid, p 165.
136. Ibid.
137. Bellamy, above n 6, p 6.
138. Honohan, above n 8, p 216.

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justification or actual deliberation is demanded of its participants, it is comparatively undemanding compared to other forms of civic engagement. In a sense, quality is sacrificed for scale – the referendum being far removed from classical republicanism's 'face-to-face' deliberation. Given the modest 'checking' role I have argued it occupies in the political landscape, it can hardly be seen as an instrument through which citizens 'gain a sense of political empowerment [and] achieve social recognition of their values'.[139] Accordingly, there remains the objection that by virtue of their form, referendums cannot facilitate the public, deliberative exchange of reasons based on the common good which a genuine republican constitutionalism should endorse.

However, notwithstanding the practical limits on deliberation in mass democracies, the referendum is more likely than elections to provoke deliberation on discrete political issues. Unlike elections, constitutional referendums will often invite voters to consider issues that do not directly affect their own narrow economic interests, thus encouraging citizens to decide based on common goods – including the form and structure of the state and its foundational principles. Thus, compared to elections, they are perhaps less likely to conceive of themselves as consumers, or to view their role in terms of a bargaining or negotiation of competing economic interests. It might also be argued that more quintessentially 'deliberative' activities might risk being dominated by those best equipped with the requisite forms of *habitus* and symbolic capital, a risk that the referendum largely avoids.

In so far as referendums increase civic knowledge and/or change the way in which citizens perceive politics, this may in turn have indirect positive effects on the wider political process. Some research suggests that contrary to the populist caricature, the referendum may have a role in protecting the disenfranchised.[140] Furthermore, political science provides some evidence – partly speculative – that referendums and initiatives promote wider participation and even 'faith' in politics.[141] There is some evidence that referendums increase voters' civic knowledge and participative of civic capability, although the extent of the gain procured is unclear.[142] Thus, the referendum might represent one possible device with which to combat civic apathy in liberal-democratic societies.[143] In this lens, its primary value is that it might promote republican practices and dispositions more generally – encouraging citizens to 'transcend their narrow interests and fixed preferences'.[144] As outlined, it is plausible that, on the basis of their subject matter, voting in constitutional referendums is more likely to prompt citizens to reflect on the common good rather than understanding politics solely as a calculus of disaggregated private interests. Yet even if this argument fails, there are other ways in which the referendum might indirectly promote political participation. For example, it has been argued that 'participation educates citizens and

139. Ibid, p 217.
140. See eg P Svensson 'Denmark: the referendum as minority protection' in M Gallagher and PV Uleri *The Referendum Experience in Europe* (London: Macmillan, 1996) pp 33–51.
141. Smith argued before the House of Lords Select Committee: 'by offering the opportunity to participate directly in policy-making, [referendums] made the public more likely to participate in political activity, as they understand that their participation in the electoral process has real policy implications'; above n 38, at 141. See DA Smith and C Tolbert *Educated by Initiative: The Effects of Direct Democracy on Citizens and Political Organizations in the American States* (Ann Arbor, MI: University of Michigan Press, 2004).
142. M Mendelsohn and F Cutler 'The effect of referendums on democratic citizens: information, politicization, efficacy and tolerance' (2000) 30 Br J Pol Sci 685 at 691–696.
143. Callan, above n 131.
144. Honohan, above n 8, p 223.

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makes them more aware of the conditions under which the polity functions . . . it thus makes decisions more legitimate . . . giv[ing] the sense of ownership needed to generate civic virtue'.[145] Civil-society groups formed to campaign in referendum campaigns may serve as incubators of wider civic activism, thus fostering politics' social capital. Put simply, referendums might be conceptualised pedagogically – 'as a permanent instrument of civic education'.[146] Accordingly, the referendum may enhance knowledge and awareness of public affairs, and thus indirectly foster political reflection and exchange – *independently* of the deliberative quality of referendum voting itself. Smith and Tolbert argue in the US context that the initiatives used in many states have had an important formative impact not only on policy, but on voters themselves – accordingly, they affirm its *instrumental* purpose.[147] They note popular initiatives in the US were instituted in the hope that they could 'stimulate an array of positive educational externalities'.[148] They argue in turn that the initiative has an important impact on civic engagement, these 'externalities' being just as, 'if not more important', than any substantive reforms they brought about.[149] Similarly, it has been suggested that Canada's 1992 referendum gave rise to an increase in political knowledge, albeit on a 'modest' scale.[150]

Thus, even if the bare act of voting in referendums will not necessarily be exercised in a spirit of civic virtue – understood as the willingness to base one's reasoning on common goods – it may nonetheless foster the development of such practices and dispositions in indirect ways.

The constitutional referendum can alternatively be understood as a procedure for obtaining consent for those policies, formulated by intermediary institutions, that require constitutional change. Given the distorting institutional mediation and background conditions against which it is obtained, *consent*, here, does not refer to the correspondence of a corporate popular *will* with the referendum content. Rather, it refers to the process of *public justification* that the constitutional referendum forces in respect of a particular category of governmental decisions. These must be at least defended (if not formulated) in the public view, rather than through a behind-the-scenes bargaining-process – thus ultimately enhancing, albeit indirectly, the value of *publicity* in political decision making. For this to be fully realised, certain procedural safeguards may be necessary, particularly concerning voter information and campaign spending.[151]

CONCLUSION

The value of wide civic participation is defensible independently of any specific republican-theoretical vision of self-government. It is at least instrumentally valuable

145. Ibid, p 217
146. B Barber *Strong Democracy: Participatory Politics for a New Age* (Berkeley, CA: University of California Press, 1984) p 284.
147. Smith and Tolbert, above n 141, p xiv.
148. Ibid, p xvi.
149. Ibid, p xviii.
150. Mendelsohn and Cutler, above n 142, at 698.
151. Honoha, above n 8, p 242. In the UK, see the Political Parties, Elections and Referendums Act (PPERA) 2000. In Ireland, the Supreme Court held that the Constitution prohibits the use of public funds to campaign for a 'Yes' vote. *McKenna v An Taoiseach (no 2)* [1995] 2 IR 10. The Referendum Act 1998 facilitated the creation of an independent Referendum Commission.

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in liberal thought; individual rights require, over the long run, an active citizenry along with the rule of law. Bogdanor quipped that 'most people will prefer to cultivate their own gardens'.[152] Yet while Benjamin Constant criticised Rousseau's conception of participatory self-government as unfeasible in mass, commercial societies, he cautioned that even the narrower, negative conception of freedom might not survive citizens' complacent retreat into the private realm.[153] Thus, participation may be valued even by those who believe that the state should, in so far as possible, simply leave them to their own devices. Bellamy and Tomkins, amongst others, are correct in criticising a widespread tendency in legal culture and scholarship to view politics primarily as a threat to individual autonomy and a robust legal constitutionalism as its foil. This tacitly devalues self-government. However, republican constitutionalists cannot assume the self-sufficiency of a more-or-less unbridled version of parliamentary supremacy. Where Bellamy argues 'actually existing democracy satisfies both the norms and forms of political constitutionalism by providing appropriate guarantees against the use of arbitrary power',[154] this seems at least as over-optimistic as those who place faith in judicial power to preserve individual freedom. While he is correct to argue that domination 'can only be avoided by some form of self-rule',[155] it is doubtful whether the constitutional practices and structures of 'actually existing democracies' are sufficient to achieve this.

I have argued that the commonplace tendency to locate constitutional referendums within the tension between democratic self-government and 'liberal' rights is fundamentally ill-conceived. It ignores the actual modalities and functioning of constitutional referendums and the modest – yet important – role they accord to the 'people'. Conversely, the ultimate horizon of republican politics should not be any purist vision of democratic agency: for republicans no more than liberals, rule by the people should not be 'untrammelled'[156] or unmediated. While referendums might seem to give an illusory imprimatur of popular approval to elite-led decision making, they undeniably have the capacity to challenge and check representative institutions. Conversely, the value of the referendum as a crude 'blocking' mechanism needs to be distinguished from a meaningfully deliberative exercise in which reasons are publicly advanced and exchanged.

152. V Bogdanor 'Nothing to lose but our free time' *Times Higher Education*, 23 September 2005.
153. B Constant 'De la liberté des anciens comparée à celle des modernes' in B Constant *Ecrits Politiques* (Paris: Gallimard/Folio, 1997) pp 591–619.
154. Bellamy, above n 6, p 146.
155. Ibid, p 154.
156. O'Cinneide, above n 23, p 258.

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