

## Article

# Minority Rights and Democratic Consensus: The Irish Same-Sex Marriage Referendum

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### ABSTRACT

*29 countries in the world have introduced same-sex marriage. 22 have done so by legislation, four by judicial decision, two by a combination of judicial decision and legislation, and one by popular referendum. The Irish same-sex marriage referendum of 2015 has been criticised for putting minority rights to a popular vote. This criticism largely misunderstands the legal and social context of the Irish referendum, however. A necessary component of constitutional amendment, the referendum required campaigners to build a robust democratic consensus in favour of same-sex marriage, strongly entrenching minority rights. These benefits would likely not have arisen, however, if a referendum had been a choice on the part of political actors rather than a legal necessity. It is therefore unlikely that the Irish experience, whatever its merits, can be straightforwardly translated to other jurisdictions. Nevertheless, the Irish referendum campaign yields some lessons for other activist campaigns for same-sex marriage. In particular, the story-telling of gay people--and the responses of their fellow citizens--may have been more significant than the articulation of more public values, such as equality.*

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## I. INTRODUCTION

In 2015, Ireland became the first country in the world to introduce same-sex marriage by popular referendum. In just 22 years, the country had gone from criminalising sexual activity between men to endorsing same-sex marriage. This result was warmly welcomed by gay rights activists around the world, but some raised concerns over the appropriateness of a referendum as a mechanism for protecting minority rights. One commentator referred to it as an “indignity,” noting that it was unseemly to put the civil rights of a historically oppressed minority to a popular vote.<sup>1</sup> A proper appraisal of the Irish referendum, however, requires an appreciation its legal and social context. The referendum was held because relevant political actors believed that same-sex marriage required a constitutional amendment, which can only be accomplished by a referendum. The Irish referendum, therefore, cannot be understood as narrowly populist or majoritarian but instead should be seen as part of a consensus-building process required for constitutional amendment.

While putting minority votes to a referendum came with costs--most significantly, the public dissection of the private lives of those who stood to benefit from the reform--the required consensus-building also had positive implications for members of the gay community. In short, it produced a much greater level of social acceptance than would likely have been achieved through either judicial or legislative recognition of a right to same-sex marriage. These benefits would likely not have arisen, however, if a referendum had been a choice on the part of political actors rather than a legal necessity. It is therefore unlikely that the Irish experience, whatever its merits, can be straightforwardly translated to other jurisdictions. Nevertheless, the Irish referendum campaign yields some lessons for other activist campaigns for same-sex marriage. In particular, I suggest that the story-telling of gay people--and the responses of their fellow citizens--may have been more significant than the articulation of more public values, such as equality.

I begin with a brief account of how gay rights developed in Ireland prior to the movement for marriage equality. I then consider the legal arguments that bore on the questions of whether the Constitution either protected a right of same-sex couples to marry or precluded parliament from legislatively introducing same-sex marriage. I then explore the political moves that led to the 2015 referendum before assessing the key features of the referendum campaign, in both its public and private dimensions. I conclude by reviewing

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1. O. G. Encarnación, *There's Something about Marriage: Why the Vote in Ireland was Bad for Same-Sex Rights*, FOREIGN AFFAIRS (May 31, 2015), <https://www.foreignaffairs.com/articles/ireland/2015-05-31/theres-something-about-marriage>.

the appropriateness of putting minority right to a referendum, before identifying some lessons for political campaigners that arise from the Irish referendum campaign.

## II. A BRIEF HISTORY OF GAY RIGHTS IN IRELAND

Ireland gained a form of independence from the United Kingdom in 1922, which was enhanced by a series of constitutional changes over the following two decades, culminating in the enactment of a new Constitution in 1937. The Constitution establishes a tripartite separation of powers, in which the Westminster model of responsible government structures relationships between the parliament and the government: Members of the lower House of Parliament are elected in legislative districts; they in turn elect a prime minister who appoints a government, consisting exclusively of Members of Parliament, that remains accountable to the lower House of Parliament. However, the Constitution departs markedly from the Westminster model through its protection of constitutional rights and grant of the power of judicial review to the courts. The courts exercise strong-form judicial review broadly in the manner of the United State Supreme Court.<sup>2</sup> Article 34.1.4 grants the High Court, the Court of Appeal, and the Supreme Court the power to review the constitutional validity of any law. A law declared unconstitutional loses its legal validity. In the past five years, the Supreme Court has followed the courts of other countries in developing a jurisdiction to suspend a declaration of unconstitutionality so as to allow the Legislature an opportunity to address any constitutional defects in the law before it is formally struck down.<sup>3</sup> Amendments to the Constitution must be approved by each House of Parliament before being put to the people in a referendum, where a simple majority of those voting on the day is sufficient to ratify the proposal.<sup>4</sup>

As a former member of the United Kingdom, Ireland's laws followed the traditional approach in the British Empire to the treatment of homosexuality. Section 61 of the Offences against the Person Act 1861 criminalised anal sex. Section 11 of the Criminal Law Amendment Act 1885 criminalised "gross indecency" between men, essentially capturing other forms of sexual intimacy. There was no equivalent criminal prohibition on sex between women. Although passed by the Westminster Parliament, these

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2. On 'strong form judicial review', see MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS* (2009).

3. *PC v. Minister for Social Protection* [2018] I.E.S.C. 57 (Ir.). On suspended declarations generally, see Robert Leckey, *Remedial Practice Beyond Constitutional Text*, 64 *AM. J. COMP. LAW* 1 (2016).

4. For a general account of the Irish Constitution, see ORAN DOYLE, *THE CONSTITUTION OF IRELAND: A CONTEXTUAL ANALYSIS* (2018).

statutes continued as part of Irish law after independence in 1922 and the adoption of the current Constitution in 1937.<sup>5</sup> In *Norris v. Attorney General*, the Supreme Court rejected a challenge to the constitutionality of these provisions.<sup>6</sup> In *Norris v. Ireland*, however, the European Court of Human Rights upheld Mr. Norris's claim that the Irish legislation offended his right to private life protected by Art 8 of the European Convention on Human Rights.<sup>7</sup> This imposed an obligation on Ireland in international law to bring its legal system in line with the ruling of the Strasbourg Court. In 1993, the Irish Parliament responded to the judgment by abolishing the relevant offences, while retaining criminal offences for the equivalent behaviour with persons under the age of 17, the standard age of sexual consent.<sup>8</sup>

While 1993 was relatively late--for a western European country--for the decriminalisation of sex between men, the following decades witnessed a rapid evolution in law and social attitudes. In 1998, the Parliament passed the Employment Equality Act 1998, which included sexual orientation as a proscribed ground of discrimination in the employment context. The Equal Status Act 2000 similarly proscribed discrimination on the grounds of sexual orientation in the context of service provision, such as rental accommodation. After decriminalisation and with these individual protections in place, gay rights activists turned their attention to relationship recognition. Political resistance to formal recognition of same-sex relationships was high in the early 2000s,<sup>9</sup> but this attitude also changed quickly. The Civil Partnership Act 2010 introduced a new civil status that was similar to civil marriage, but with a number of important differences.<sup>10</sup> First, civil partnership was only open to same-sex couples. Second, the Act did not provide any family recognition for the children of same-sex couples. It remained the case that only married couples--necessarily opposite-sex couples--could jointly adopt children. Third, it was slightly easier for civil

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5. Article 50 of the current Constitution provides that the laws that were in force immediately before the enactment of the Constitution continue in force to the extent that they are not inconsistent with the new Constitution.

6. *Norris v. Attorney General* [1984] I.R. 36 (Ir.).

7. *Norris v. Ireland*, 13 Eur. Ct. H.R. 186 (1988).

8. Criminal Law (Sexual Offences) Act 1993 (Act No. 20/1993) (Ir.),

<http://www.irishstatutebook.ie/eli/1993/act/20/enacted/en/html> (last visited Nov. 11, 2020).

9. In 2006, the Law Reform Commission published a report that recommended a new system of rights and obligations for unmarried cohabitants, whether same-sex or opposite-sex. These measures effectively protected the more economically vulnerable partner in the context of relationship breakdown. This reflected a general preference for addressing the harsh consequences for gay couples of not being able to marry rather than providing any form of relationship recognition. See Law Reform Commission of Ireland, *Report: Rights and Duties of Cohabitants*, [https://www.lawreform.ie/\\_fileupload/Reports/R822006cohabitants.pdf](https://www.lawreform.ie/_fileupload/Reports/R822006cohabitants.pdf) (last visited Nov. 11, 2020).

10. For analysis and critique, see Patricia Brazil, *The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010: Radical New Departure in Irish Law?*, 34 DUBLIN U. LAW J. 208 (2011); Fergus Ryan, *Out of the Shadow of the Constitution: Civil Partnership, Cohabitation and the Constitutional Family*, 48 THE IRISH JURIST 201 (2012).

partners to divorce than for married couples. These points of differentiation ensured that civil partnership was not equivalent to marriage. It would have been constitutionally problematic for civil partnership to be either superior to marriage or provide an inducement not to marry. However, for the same reason, civil partnership was less attractive for same-sex couples. The fact that it was an institution specifically for same-sex couples with a different title emphasised it as a lower status. It very much invited the charge of “separate but equal.”

### III. SAME-SEX MARRIAGE AND THE CONSTITUTION

Article 41 of the Constitution provides the backdrop against which legal arguments in relation to same-sex marriage were advanced. Article 41.1 recognises the family 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.” The State therefore guarantees to protect the family in its “constitution and authority as the necessary basis of social order.” Article 41.2 refers to the role of women in the home, and therefore guarantees that mothers will not be obliged, by economic necessity, to work outside the home. Article 41.3 pledges the State to “guard with special care the institution of Marriage on which the Family is founded.” Until 1995, this provision also prohibited divorce. In sum, the provisions reflect a scholastic natural law account of the family, both in its relation to the state and in its internal roles.

In *Zappone v. Revenue Commissioners*, the High Court in 2006 rejected a claim that the Constitution protected the right of same-sex couples to marry.<sup>11</sup> The plaintiffs, both Irish citizens, married in Canada in 2003; the following year they requested the Revenue Commissioners in Ireland to treat them as a married couple for tax purposes. The Revenue Commissioners refused to do so on the basis that the relevant Acts referred to “husband” and “wife”, and the Oxford English Dictionary defined those terms in gender-specific ways. Between the initiation of proceedings and the hearing of the case, s 2(2)(e) of the Civil Registration Act 2004 was enacted by Parliament. This provision limited marriage to opposite-sex couples.

The Court accepted that there was a right to marry, but held that the discrimination was justified by reference to Art 41.3 of the Constitution, which guarantees to protect with special care the institution of marriage on which the family is founded. Although Art 41 did not define marriage, it reflected a natural law ethos of familial relationships. Same-sex marriage would have been inconsistent with this ethos. Art 41.1 describes the family

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11. *Zappone v. Revenue Commissioners* [2006] I.E.H.C. 404 (Ir.).

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.” Art 41.2 refers to woman’s “life within the home.” The reference to “marriage” in Art 41.3 is therefore not a standalone or casual reference but rather is placed within a sophisticated account of family relationships that is highly traditional and gendered. Reflecting this, in a number of earlier cases, members of the Supreme Court had commented that Art 41 protected opposite-sex marriage.<sup>12</sup> These earlier cases were not directly concerned with same-sex marriage, however, and the plaintiffs sought to argue that the interpretation of the Constitution should be adjusted to reflect changing values. The High Court rejected this claim, partly on the basis that there was little evidence that society’s values were actually changing to that extent. In this regard, Dunne J placed some reliance on the legislative definition of marriage contained in s 2(2)(e) of the Civil Registration Act 2004 that had been enacted after the proceedings were commenced. For procedural reasons, the plaintiffs had not challenged the constitutionality of that section.

The Supreme Court never heard an appeal of the *Zappone* ruling; procedural delays led to it ultimately being overtaken by political developments. The fact that the High Court had failed to identify a constitutional right of same-sex couples to marry, however, did not necessarily preclude the Parliament from legislating to allow for same-sex marriage. There were in principle three constitutional possibilities:

1. The Constitution required same-sex marriage;
2. The Constitution permitted the legislature to enact same-sex marriage;
3. The Constitution precluded same-sex marriage.

In *Zappone*, the High Court had rejected 1. However, a number of academics argued that the correct position was 2.<sup>13</sup> In part, they relied on the High Court’s invocation in *Zappone* of the 2004 statutory definition of marriage. If the Court could rely on legislative definitions to support its understanding that the meaning of “marriage” had not evolved, the

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12. Kenny J. speaking for the Court in *Murphy v. Attorney General* [1982] I.R. 241, at 286 (Ir.): “marriage” was the “permanent, indissoluble union of man and woman.” After the introduction of divorce, Murray J. commented in *C.T. v. D.T.* [2003] 1 I.L.R.M. 321, at 374 (Ir.) that marriage was “a solemn contract of partnership entered into between man and woman with a special status recognised by the Constitution.”

13. C. O’Mahony, *Principled Expediency: How the Irish Courts can Compromise on Same-Sex Marriage*, 35 DUB. U. L.J. 199, 199 (2012); C. O’Mahony, *Marriage Equality in the United States and Ireland: How History Shaped the Future*, 2017 U. ILL. L. REV. 681, 682 (2017); B. Tobin, *Marriage Equality in Ireland: The Politico-Legal Context*, 30 INT. J. LAW, POL’Y AND THE FAM. 115, 115 (2016).

legislature must have competence to redefine marriage to include same-sex couples.

In my view, this argument was unpersuasive. The reliance placed by the High Court in *Zappone* on that statutory definition was but one of a number of reasons why the Court rejected the plaintiffs' claim. Any legislation introducing same-sex marriage would have needed to demonstrate that the marriage protected by Art 41 included same-sex marriage. Such a conclusion would be wholly at odds with the scholastic natural law ethos of Art 41, set out above. The Constitution's image of family relationships was highly traditional and gendered, making a reinterpretation of marriage much more difficult than might have been the case in other countries. The earlier Supreme Court statements about the meaning of marriage--albeit *obiter dicta*--would have to be overcome. In other not dissimilar contexts, the Supreme Court had refused to adjust its interpretation of Art 41 to reflect evolving understandings of family life. In 2009, it trenchantly rejected any suggestion that Art 41 could be reinterpreted so as to protect any form of non-marital family.<sup>14</sup> Taking all of these factors together, my view is that any attempt to introduce same-sex marriage by legislation would have been struck down by the courts as unconstitutional. There is evidence that significant constitutional actors shared this legal analysis.<sup>15</sup> The Attorney General formed the view that a referendum would be required to allow for same-sex marriage.<sup>16</sup> The Parliament is under a constitutional obligation not to enact legislation that is unconstitutional; relatedly, there is a settled practice that no Government will introduce a Bill that the Attorney General believes to be unconstitutional. Regardless of whether the advice of the Attorney General was correct--a point that is now academic but upon which there remains reasonable disagreement--political actors believed that a constitutional amendment was necessary to allow for same-sex was necessary and they operated on that assumption.<sup>17</sup>

This legal analysis is critical to a correct understanding of the subsequent Irish referendum campaign for same-sex marriage. The relevant political and constitutional actors believed--reasonably, even if mistakenly--that a constitutional amendment was required. A constitutional amendment requires a bill to be passed by each House of Parliament and then approved by a simple majority at a referendum. The decision to introduce same-sex marriage by referendum was made not out of political

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14. *McD. v. L.* [2010] 2 I.R. 199 (Ir.).

15. O'Mahony, *Marriage Equality in the United States and Ireland*, *supra* note 13, at 691.

16. Tobin, *supra* note 13, at 121; O'Mahony, *Principled Expediency*, *supra* note 13, at 205-06.

17. This legal analysis also explains the somewhat unusual structure of civil partnership. The Parliament could not introduce a new form of relationship recognition that was tantamount to marriage; it was important, therefore, that it be differentiated in a number of significant respects.



choice but because of a--perceived, at least--legal necessity. International criticism of Ireland for putting minority rights to a popular vote was largely misplaced.<sup>18</sup> Those minority rights could not have been protected without a popular vote. For these reasons, the Irish referendum on same-sex marriage was entirely different from the quasi-plebiscite survey subsequently held in Australia on the same topic and the initiative referendum held in Taiwan. In section F, I contrast these three differing uses of referendums in the context of same-sex marriage.

#### IV. POLITICAL MOVES LEADING TO A REFERENDUM

In 2010, the introduction of civil partnership marked a significant step forward in the rights of same-sex couples in Ireland. It would have seemed unimaginable in 1993, when same-sex activity between men was decriminalised, and surprising even in the early 2000s when the debate on relationship recognition commenced in earnest. It was, however, a compromise measure that led to a split in the gay rights movement. For some, including Katherine Zappone and Anne-Louise Gilligan the plaintiffs in the *Zappone case*, civil partnership represented an inferior institution, a nefarious example of “separate but equal.” For others, including the Gay and Lesbian Equality Network, it was a valuable step on the road to full equality.<sup>19</sup> The symbolic inferiority of civil partnership cannot be gainsaid, and was one of the most important arguments for marriage equality in the subsequent referendum campaign. However, the concrete benefits of civil partnership also cannot be overlooked. It is difficult to weigh symbolic detriment against concrete benefit. For couples where one partner was from outside the European Union, however, the practical advantage of being able to live together might well have outweighed the symbolic harm of the lesser status of civil partnership. Ultimately, the division within the gay community and their representative NGOs was politically productive. On the one hand, those holding out for full marriage equality kept that as a live issue on the political agenda. On the other hand, the establishment of civil partnership generated much positive media coverage as couples had their relationships recognised by the state, showing that society could survive this social innovation. Indeed, very quickly the language of “marriage”, “husband” and “wife” replaced the language of civil partnership. It was almost as if the social institution of marriage was developing ahead of formal legal recognition.

Ireland experienced a severe financial and economic crisis, commencing

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18. See, e.g., Encarnación, *supra* note 1.

19. Netflix-subscribers can, if they wish, watch the documentary “The 34th” that tells this story from the perspective of those gay rights activists who were sceptical of civil partnership.

in 2008 and leading to the bailout of the State by the IMF and European institutions in 2010. This in turn led to critical reflection on many aspects of Irish governance, including whether the Constitution was adequate. In 2011, a new coalition government was elected consisting of the centre-right Fine Gael party and the centre-left Labour party. Fine Gael had roughly twice the level of electoral support as the Labour party, effectively giving it a greater input into the development of their shared programme for government. The Fine Gael leader, Enda Kenny, was duly elected Prime Minister by the Lower House of Parliament. Each party's election manifesto had included a number of commitments to constitutional reform; the Labour party had committed to the introduction of same-sex marriage. The two parties agreed to refer a number of these issues, including same-sex marriage, to a Constitutional Convention. This Convention consisted of 66 randomly selected citizens, 33 elected representatives, and an independent chair.<sup>20</sup>

In April 2013, the Convention considered the issue of same-sex marriage over the course of a weekend.<sup>21</sup> The Convention considered submissions from members of the public, advocacy groups, and experts. The members of the Convention had the opportunity to discuss what they had heard at round tables and to deliberate together. Each table reported back to the Convention as a whole so that a collective view could be formed. The Convention recommended (by a vote of 79%) that the Constitution should be amended to allow for same-sex marriage and that if carried, the State should enact laws making necessary changes in respect of the parentage, guardianship and upbringing of children.

In December 2013, the Government indicated to the Lower House of Parliament that its intention was to hold a referendum on same-sex marriage no later than mid-2015. Although the Government has no exclusive role in initiating proposals for constitutional amendment, such a proposal requires the support of both Houses of Parliament. Since the Government typically controls a majority of the votes in the Lower House, its support is effectively a pre-requisite for any constitutional amendment. Government support was not limited to accumulating the necessary votes to attain a legislative majority in favour of the proposal, however. Prime Minister Kenny had remained equivocal on the question of same-sex marriage for a number of

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20. For an account of the Constitutional Convention, see Johan A. Elkink et al., *Understanding the 2015 Marriage Referendum in Ireland: Context, Campaign, and Conservative Ireland*, 32 IRISH POL. STUD. 361 (2017); David M. Farrell et al., *The Effects of Mixed Membership in a Deliberative Forum: The Irish Constitutional Convention of 2012–2014*, 68 POL. STUD. 54 (2020).

21. The report of the Convention on this issue, see Third Report of the Convention on the Constitution: Amending the Constitution to provide for same-sex marriage, AN COINBHINSIÚN AR AN MBUNREACHT: THE CONVENTION ON THE CONSTITUTION (June, 2013), <http://www.constitutionalconvention.ie/AttachmentDownload.ashx?mid=c90ab08b-ece2-e211-a5a0-005056a32ee4>.

years. But the time taken for the Constitutional Convention to consider the issue had allowed for further evolution in social attitudes. By December 2013, Mr Kenny was a supporter of same-sex marriage and was to become one of the leading advocates of the Yes campaign, able to speak to parts of the electorate that would not be so easily reached by the centre-left and largely urban Labour party.

On 21 January 2015, the Government published its Bill to Amend the Constitution. A new provision would be added to Art 41 as follows:

Marriage may be contracted in accordance with law by two persons without distinction as to their sex.

This provision would effectively alter the meaning of “marriage” in Art 41 considered above. No longer could it be limited to opposite sex marriage. It ensured that there was no distinction between opposite-sex marriage and same-sex marriage. Indeed, it meant that there were no legal categories of opposite-sex and same-sex marriage; there was simply marriage, now accessible to opposite-sex and same-sex couples alike. This provision also mandated Parliament to amend the law and allow same-sex couples to marry. These were both critical goals for the marriage equality movement; although rather uninspiring, the wording was effective.

The Government recognised that issues around children would be controversial during the referendum campaign. It therefore planned to bring in new legislation that would regulate surrogacy for the first time and allow unmarried couples to adopt children.<sup>22</sup> In theory, this would have allowed the Yes campaign to argue that the referendum proposal would not affect children in any way, since legislation would already allow unmarried couples, including gay couples, to adopt. However, the Children and Family Relationships Act 2015 was only enacted into law on 6 April 2015, 10 days after the 34th Amendment of the Constitution (Marriage Equality) Bill 2015 had been passed by both Houses of Parliament, paving the way for the referendum. The fact that both pieces of legislation progressed through Parliament at the same time, and that the legislation addressing issues concerning children was only enacted after the referendum campaign had formally commenced, scarcely served to disentangle the issues of marriage from the issues of children in the referendum campaign.

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22. Harry McGee, *Same-Sex Marriage Referendum Wording Published*, THE IRISH TIMES (Jan. 22, 2015), <https://www.irishtimes.com/news/social-affairs/same-sex-marriage-referendum-wording-published-1.2074557>.

## V. THE REFERENDUM CAMPAIGN

At the time of writing, 32 constitutional amendments to the 1937 Constitution have been approved.<sup>23</sup> As the Constitution has aged, it has been amended more frequently: of the 32 amendments, 22 have been approved since 1990. Broadly speaking, amendments can be classified into three categories: amendments required to sign up to international treaties (8), amendments related to the structure of government (10), amendments related to social and moral values (14). The latter category of amendments is somewhat unusual by international standards and reflects the fact that the 1937 Constitution contained many provisions inspired by Roman Catholic natural law theory. As Irish society secularised, a disjunction developed between social values and the values of the Constitution. This is not a straightforward story of linear progression. For many years, the Constitution--both in terms of amendment and judicial interpretation--was a site for political conflict around a cleavage between religious/conservative forces and liberal/progressive forces. In the 1980s, there were significant successes for religious/conservative forces: the Constitution was amended to provide explicit protection for the right to life of the unborn in 1983; a proposal to remove the constitutional ban on divorce was rejected in 1986. These successes abated in the 1990s and 2000s, as the ban on divorce was removed in 1995 by the narrowest of majorities (50.4%:49.6%) and attempts to make Ireland's abortion laws even more restrictive were rejected in both 1992 and 2002. The 2010s saw the liberal/progressive forces firmly in the ascendant. The approval of the marriage equality referendum in 2015 was followed by the removal of the right to life of the unborn (2018), the removal of the criminal offence of blasphemy (2018), and the relaxation of the conditions necessary for the courts to grant a dissolution of marriage (2019).

Referendums in Ireland tend not to elicit significant levels of civic engagement. Campaigns are usually led by the political parties of the Government that promoted the constitutional amendment. In 1995, the Supreme Court held that it was unconstitutional for the Government to spend public funds promoting one side of a referendum campaign.<sup>24</sup> As a result, political leaders have to invest their own political capital in campaigns in order to capture the public imagination. At the start of each referendum campaign, the Government is required by law to establish an independent referendum commission, chaired by a judge. The Commission explains the

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23. For a general account of constitutional change in Ireland, see DOYLE, *supra* note 4, at ch. 10. See also Fiona de Londras & David Gwynn Morgan, *Constitutional Amendment in Ireland*, in *ENGINEERING CONSTITUTIONAL CHANGE: A COMPARATIVE PERSPECTIVE ON EUROPE, CANADA AND THE USA* (Xenophon Contiades ed., 2013).

24. McKenna v. An Taoiseach (No. 2) [1995] 2 I.R. 10 (Ir.).

legal effect of the referendum proposal--through publishing advertisements and engaging in media interviews--and encourages people to vote.<sup>25</sup> Turnout has occasionally been very low. In 2012, a referendum was approved to alter the constitutional position in relation to children's rights. This was a confused and confusing proposition that was incapable of easy explanation and did not seem terribly important. Although supported by all political parties, it was approved by a margin of only 58% to 42% on a turnout of just 33%.<sup>26</sup>

The marriage equality referendum did not fit this pattern of lacklustre campaigning. It was ultimately approved by a majority of 62% to 38% on a turnout of 61%. A vigorous campaign was fought by activists on both sides of the debate. There was both a public campaign and a private campaign. The public campaign was fought in the media and through posters designed to convey simple political messages. Importantly, the gay rights groups--including those who had disagreed on the issue of civil partnership five years previously--coalesced under "Yes Equality, the Campaign for Civil Marriage Equality." Posters from the Yes campaign promoted simple, arguably simplistic, messages. Voters were encouraged to vote "yes", because "marriage matters" or for a "fairer Ireland" or for a "more equal Ireland." Political parties deployed posters in a similar vein.

The No campaign did not directly contradict the egalitarian message of the Yes campaign, but rather sought to suggest that the issues were more complicated. While the demands for same-sex marriage might be understandable, it would have significant consequences, particularly as concerns the raising of children. For these reasons, it made more sense to retain the status quo of civil partnership. The No campaign deployed a series of eye-catching and provocative posters that very succinctly articulated these concerns. The posters frequently contained images of mothers and fathers and children. They included messages such as:

- "We already have civil partnerships. Don't redefine marriage"
- "Children Deserve a Mother and a Father"
- "Surrogacy? She needs her mother for life not just for 9 months"
- "A Mother's love is irreplaceable"

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25. For an account of the referendum commission and referendum practice generally in Ireland, see David Kenny, *The Risks of Referendums: "Referendum culture" in Ireland as a solution?*, in *POPULAR SOVEREIGNTY AND POPULISM IN IRELAND* (Forthcoming) (Maria Cahill, Colm O'Conneide, Conor O'Mahony & Seán Ó Conaill eds., 2020).

26. For analysis, see Oran Doyle & David Kenny, *Constitutional Change and Interest Group Politics: Ireland's Children's Rights Referendum*, in *THE FOUNDATIONS AND TRADITIONS OF CONSTITUTIONAL AMENDMENT 199-218* (Richard Albert, Xenophon Contiades & Alkmene Fotiadou eds., 2017).

As well as concerns over children and the redefinition of marriage, concerns were also raised over freedom of religion. The marriage referendum campaign occurred at the same time as the *Ashers Bakery case* in Northern Ireland, in which gay rights activists took an equality claim against a bakery that refused to provide a cake iced with a message supporting same-sex marriage.<sup>27</sup> This case occurred in another jurisdiction and had no direct relevance to the constitutional amendment. However, it perhaps supported a narrative of gay rights activists and progressive forces more generally seeking to control what it was permissible to believe.

The public campaign therefore consisted largely of a simple message around equality and fairness from the Yes side, countered by the articulation--by the No side--of concerns about perhaps unintended consequences. In some respects, however, the snappy and provocative messages of the No side may have produced a backlash. The posters concerning children may have been a coded message--a dog whistle--to the section of the population that thought gay men could not be trusted with children. It would not have been socially acceptable to make such a claim directly, however, so the No side was compelled to fall back on the claim that a child has a right to a father and a mother and in particular to emphasise a mother's role in rearing children. This obviously raised questions about what should happen to children born to single parents or one of whose parents died: should they be transferred to a new family in order to vindicate their "right to a father and a mother." Or should the state appoint a replacement father or mother to work in a parenting role alongside the child's other natural parent? In short, it was difficult to identify what duties were correlative to the asserted right of a child to a mother and father, thereby exposing the assertion as an argumentative ploy for the purposes of the particular issue rather than a deeper commitment.

The focus on the child-rearing role of mothers was potentially upsetting to fathers, while the emphasis on an ideal of two-parent families could upset those who had been raised by single parents, as well as single parents themselves. In one encounter on a radio show, Roman Catholic Bishop Eamon Doran asserted that it was the ideal for a child to be raised by a father and mother and there should be a legally enforced preference for this in the State's adoption laws.<sup>28</sup> A member of Parliament from the relatively conservative Fianna Fáil party, Seán Fleming, took offence. His father had

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27. *Lee v. Ashers Bakery* [2018] U.K.S.C. 49. The UK Supreme Court ultimately found that there had been no unlawful discrimination.

28. For an account of this, see Noel Whelan, *Marriage equality referendum campaign: it's time to get personal*, THE IRISH TIMES (Feb. 22, 2015), <https://www.irishtimes.com/opinion/marriage-equality-referendum-campaign-it-s-time-to-get-personal-1.2109931>.

died when he was two years old. He objected to the suggestion that his family was less than ideal and that his widowed mother should have been legally classified as a second-class citizen in terms of her ability to adopt. The No Campaign was caught in a difficult position. Any open suggestion that gay men should not be trusted with children would have met with resistance from a large swathe of moderate voters. But the robust argument for gendered parenting suggested that while gay people were the immediate target, the real concern was with men and women not performing the parental roles that would have been considered appropriate in the 1930s. This may have helped to galvanise support for the Yes side.

The No campaign experienced a moderate setback in early May 2015, a few weeks before the referendum vote. The No campaign had published a poster with a father and mother lovingly kissing their child, beneath the message “Children Deserve a Mother and a Father.” It emerged, however, that the parents featured in the image had not known that it was being used by the No campaign; they themselves strongly supported same-sex marriage.<sup>29</sup> They had allowed their family photographs to be uploaded to a stock album online as a favour to a friend who had taken the photographs for free. The No Campaign paid to use the image on their poster. The Yes campaign subsequently released a poster with the same parents indicating their marriage equality. In itself, this was scarcely a critical moment in the campaign. However, it may have reflected a deeper problem for the No campaign, namely that it was more an advertising campaign designed and implemented by a public relations company than a political movement. It was therefore at a disadvantage when faced with a Yes campaign that was more rooted in the experiences of identifiable and identified individuals.

Around the time the two Houses of Parliament approved the referendum proposal, but a few months before the referendum, the Yes campaign encouraged its members to engage with others in conversations about marriage equality.<sup>30</sup> This occurred in private conversations, on-street canvassing, and door-to-door canvassing. There were considerably more activists on the Yes side prepared to engage in this part of the campaign than on the No side. One memorable feature was the “Ring your Granny” campaign organised online by the students union of Trinity College Dublin.<sup>31</sup>

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29. Peter Murtagh, *Couple denounce use of their image on No campaign posters*, THE IRISH TIMES (May 7, 2015), <https://www.irishtimes.com/news/ireland/irish-news/couple-denounce-use-of-their-image-on-no-campaign-posters-1.2203515>.

30. Grainne Healy et al., *How the Yes was won: the inside story of the marriage referendum*, THE IRISH TIMES (Nov. 6, 2015), <https://www.irishtimes.com/life-and-style/people/how-the-yes-was-won-the-inside-story-of-the-marriage-referendum-1.2418302>.

31. Trinity College Dublin Students’ Union, *#RingYourGranny for Marriage Equality – TCDSU*, Youtube (Mar. 15, 2015), <https://www.youtube.com/watch?v=v7k67q5c6R0&t=3s>.

This encouraged students to speak to older relatives about their reasons for supporting the Yes side. This then formed part of a broader social media campaign as students and others posted videos of their phone calls. Viewed from one perspective, this could be seen as condescending: why did the older generation need their university-attending grandchildren to tell them how to vote? But this critique misses the point, which was to personalise the issue and make it about real people. The Yes campaign effectively involved a mass coming-out of gay citizens. They spoke to their friends and families and to random strangers about why the vote was important for them personally.

This private campaign ran parallel to the public campaign, informed much more by the realities of people's lives than abstract concepts such as equality. Story-telling and coming out were a large part of this campaign. On the part of straight supporters of the Yes side, kindness and generosity were perhaps mentioned more than equality and rights: why not give to someone else that which you already had for yourself? Reference was also made to atonement, perhaps for how Ireland had previously treated gay people and perhaps for how the individuals themselves had treated gay people. In terms of reasons given by people voting No, there were occasional expressions of anti-gay hostility. More common--I suspect--was an unease that the word "marriage" was being redefined: old certainties would be destabilised by an ideological attempt to change the meaning of words.

A referendum campaign that seeks rights for a minority group and invokes the lived experiences of members of that group comes with risks for those involved. Some might encounter anti-gay hostility in person while canvassing. Others might feel that their lives were being dissected in the national media. Given the focus of the No campaign on the need for children to be raised by a father and mother, the public campaign could have put particular pressure on gay parents and their children. This is an important factor in assessing whether it is appropriate to put minority rights to a public vote.

Ultimately, as noted above, the referendum was passed nationwide by a margin of 62% to 38% on a turnout of 61%.<sup>32</sup> More striking perhaps is that it was approved in all but one electoral district in the country.<sup>33</sup> In Dublin districts, 70%-75% voted Yes. This then declined as you moved into other urban centres and more rural districts. In Roscommon-Leitrim South, 51.42% of people voted No. If the Yes campaign was partly a communal coming-out exercise, the referendum result was a nationwide acceptance of

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32. This was the highest turnout for a referendum for over 20 years, although it was exceeded three years later in the referendum to remove the right to life of the unborn from the Constitution.

33. Votes are counted in legislative districts for reasons of administrative convenience. But there is no legal significance to the results in different districts; the sole requirement is a national majority in favour of the proposal.



that coming out. This had an effect on gay people and their role in communities that was far wider than just the narrow but important issue of marriage equality itself.

## VI. SOCIAL CHANGE, MINORITY RIGHTS, AND CONSENSUS DEMOCRACY

Ireland's adoption of marriage equality followed an unusual path, but one that has some resonances at different points with the approaches taken in other countries. The first thing that stands out is the rapid pace of change, from decriminalisation to full marriage equality in just 22 years. The subsequent referendum in 2018 that removed the right to life of the unborn from the Constitution confirmed that the move towards marriage equality was part of a general liberalisation of Irish society. Nevertheless, in process terms, the liberalisation of abortion law followed a very similar path: NGO campaigning secured political commitments that led to a citizens' assembly, followed by deeper and broader political support leading into a referendum campaign with high levels of civic engagement.<sup>34</sup> This suggests that the Irish campaign for marriage equality should not be seen as epiphenomenal to a liberalising Ireland but rather may have contributed in some way to that liberalisation, providing a template for subsequent campaigns. As a result, there may be some broader lessons that can be learnt from that campaign.

Most countries in the world that have introduced same-sex marriage have done so either through a judicial or legislative route. The United States Supreme Court decision in *Obergefell v. Hodges* is probably the leading example of the judicial approach,<sup>35</sup> but it was also the approach taken--with some subtleties given the use of suspended declarations of unconstitutionality--in Taiwan.<sup>36</sup> In the United Kingdom in 2004, the Westminster Parliament introduced a scheme of Civil Partnership across the United Kingdom. This essentially allowed same-sex couples access to an institution with nearly all the incidents of marriage, but not the name.<sup>37</sup> In 2013, the Westminster Parliament enacted the Marriage (Same-Sex Couples)

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34. For an account of the abortion referendum, see Luke Field, *The Abortion Referendum of 2018 and a Timeline of Abortion Politics in Ireland to Date*, 33 IRISH POL. STUD. 608 (2018).

35. *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015).

36. Judicial Yuan Interpretation No. 748. For my account of Taiwanese developments, I rely on two blog-posts, although any errors are my own: Ming-Sung Kuo & Hui-Wen Chen, *Responsibility and Judgment in a Muted 3-D Dialogue: A Primer on the Same-Sex Marriage Case in Taiwan*, INT'L J. CONST. L. BLOG (May 26, 2017), <http://www.iconnectblog.com/2017/05/responsibility-and-judgment-in-a-muted-3-d-dialogue-a-primer-on-the-same-sex-marriage-case-in-taiwan> and Chien-Chih Lin, *J.Y. Interpretation No. 748, The Same-Sex Marriage Case in Taiwan*, IACL/IADC BLOG (July 2, 2017), <https://blog-iacl-aidc.org/test-3/2018/5/26/analysis-jy-interpretation-no-748-the-same-sex-marriage-case-in-taiwan>.

37. Opposite-sex couples were not originally allowed to form civil partnerships.

Act 2013, which provided for same-sex marriage in England and Wales. The Scottish Parliament passed the Marriage and Civil Partnership (Scotland) Act 2014.

There is considerable academic literature that evaluates the respective merits of judicial decision-making, representative democracy, and direct democracy as avenues for social change.<sup>38</sup> Direct democracy, understood as the combination of citizens' initiatives with referendums, is far removed from the Irish experience, however. As noted above, a constitutional amendment in Ireland requires support in both houses of parliament before it can be put to referendum. Amendment proposals cannot be made by citizens' initiatives, so elected representatives retain control over the initiation of amendment proposals. Arend Lijphart treats a referendum requirement for constitutional amendment as a delaying, and hence consensual, device rather than a majoritarian device.<sup>39</sup> This is broadly borne out by Ireland's experience of constitutional amendments. No amendment has ever been approved at referendum without the support of the principal opposition party. Ireland's same-sex marriage referendum, therefore, cannot be viewed as an isolated exercise in direct democracy, but must instead be seen as part of a broader process that requires some level of consensus for constitutional amendment. Political actors believed, notwithstanding some academic disagreement, that they could only protect these minority rights by holding a popular vote.

Ireland's same-sex marriage referendum was therefore very different from superficially similar exercises in Australia and Taiwan. The Australian Federal Parliament could have legislated for same-sex marriage,<sup>40</sup> but the Governing party faced significant internal disagreement.<sup>41</sup> To avoid a potentially divisive vote in Parliament, the Government committed to holding a plebiscite on same-sex marriage. This was blocked by Parliament, however, leading the Government instead to instruct the Australian Statistician and the Australian Bureau of Statistics to collect statistical information on the proportion of electors for and against same-sex marriage. All Australians received a survey form in the post and were invited to return it by pre-paid envelope. 61.6 percent answered "Yes" to the question whether the law be changed to allow same-sex couples to marry. Parliament then

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38. For an overview and critical assessment of direct democracy, see Maxwell L. Stearns, *Direct (Anti-) Democracy*, 80 GEO. WASH. L. REV. 311 (2012).

39. AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES 220-21 (1999).

40. *Commonwealth v. Australian Capital Territory* (2013) 250 C.L.R. 441 (Austl.).

41. For an account of this process, see Michael Maley, *The 2017 Australian Marriage Law Postal Plebisurvey: Issues and Controversies*, AUSTRALIA PUBLIC LAW (Aug. 16, 2017), <https://auspublaw.org/2017/08/the-2017-australian-marriage-law-postal-plebisurvey/>. My understanding of this process has been greatly assisted by a draft paper kindly shared by Paul Kildea. Any errors remain my own.

passed the Marriage Amendment (Definition and Religious Freedoms) Act 2017 (Cth), legalizing same-sex marriage. This survey-plebiscite was conducted as a way to avoid parliament--or more specifically, the Government party in parliament--having to take a divisive decision. Once the survey-plebiscite showed a strong majority in favour of same-sex marriage, the parliamentary vote for the Marriage Amendment (Definition and Religious Freedoms) Act 2017 (Cth) posed fewer difficulties for internal party discipline in the governing Liberal Party. Whereas the Irish process enabled the building of a political consensus in parliament in favour of same-sex marriage, the Australian process was designed to relieve parliament of responsibility for a decision that would have caused internal party difficulties for one party. In other words, the survey-plebiscite stymied rather than facilitated the emergence of political consensus.

The decision of the Taiwan Constitutional Court to deem two marriage petitions admissible in November and December 2016 removed a divisive issue from the parliamentary agenda. In May 2017, the Taiwan Constitutional Court suspended its declaration of unconstitutionality but indicated that if there were no legislation in the intervening period, it would extend the existing Civil Code to same-sex couples who wished to marry. As this had been the most radical proposal for constitutional reform, it created strong incentives for legislators to compromise on some form of recognition for same-sex marriage. This can be seen as a productive exercise in elite inter-branch co-operation in advancing social change. The subsequent initiative referendums of November 2018, however, effectively sought to use popular democracy to exploit disagreements among political actors and arguably steer legislative reform away from what was required by the Constitutional Court.<sup>42</sup> In other words, the referendum was designed to foment conflict rather than build consensus.

The Australian, Taiwanese, and Irish experiences indicate the radically different functions that referendums can serve, depending on how they are integrated into other political processes. Referendums cannot simply be grouped together as exercises in direct democracy. The evaluation of the Irish referendum, therefore, involves not an assessment of direct democracy in some generic sense but rather a consideration of the appropriateness of consensus democracy as a model for the protection of minority rights.

For many, judicial decision-making is seen as axiomatically the most appropriate way of protecting minority rights. Comparative constitutional law, heavily influenced by the US constitutional experience and theory of the latter half of the 20th century, assigns judges a special responsibility for the

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42. This depends on the extent to which the questions on same-sex marriage, reworded by the Electoral Commission, led to propositions that were consistent with J.Y. Interpretation No. 748.

protection of minority rights. Judges, so prevalent accounts hold, are more reliable defenders than legislatures of minority rights.<sup>43</sup> Operating within this idiom, it is almost self-contradictory to place minority rights under the control of even a legislative majority, let alone a popular majority. This faith in judges is questionable, however, both normatively and empirically. In contentious areas where the text of constitutions provides little real guidance, judicial decision-making is another form of majority decision-making, albeit a majority within a small and select group. Debates over the democratic legitimacy of judicial power are endless but yield a diminishing marginal return. Rather than further prolong that debate, I wish to draw attention to a less obvious feature of the judicial protection of minority rights. The requirement of courts to provide written justifications of their decisions has interesting consequences in this context. On the one hand, these justifications speak to internal debates within the court's own jurisdiction: they can inspire or provoke in equal measure. Reva Siegel shows how conflict caused by court decisions can itself contribute to social change.<sup>44</sup> On the other hand, these written justifications are apt for constitutional migration.<sup>45</sup> Kuo and Chen have noted how the Taiwanese Constitutional Court fused its discussion on the discriminatory effect of the Civil Code's opposite-sex-only marriage provisions on gay people with that on freedom of marriage, evoking Justice Kennedy's "synthesized" approach to "liberty" (of substantive due process) and equal protection.<sup>46</sup> Lin notes how unusual this reference to foreign case law was for the Taiwanese Constitutional Court, speculating that it was due to the controversial nature of same-sex marriage.<sup>47</sup> The Irish referendum campaign, in contrast, does not easily yield inspirational epigraphs. The constitutional amendment itself--"Marriage may be contracted in accordance with law by two persons without distinction as to their sex"--was effective but scarcely memorable. A side-effect of this, I suggest, is that political campaigns are likely to receive less attention in comparative constitutional scholarship than judicial decisions, a feature that reinforces the field's trajectory towards greater judicial activism.

The legislative pathway of representative politics avoids the charge of judicial activism, leaving the rights of minorities in the hands of a majority. It cannot be assumed *a priori* that political majorities will have no

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43. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (Revised ed. 1980). See also RONALD DWORKIN, *FREEDOM'S LAW-THE MORAL READING OF THE AMERICAN CONSTITUTION 2* (1997).

44. Reva B. Siegel, *Community in Conflict: Same-Sex Marriage and Backlash*, 64 U.C.L.A. L. REV. 1730 (2017).

45. See generally THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudhry ed., 2007).

46. Kuo & Chen, *supra* note 36.

47. Lin, *supra* note 36.

consideration for the rights of minorities.<sup>48</sup> Depending on the deliberative character of the legislature in question, the quality of debate can be quite high. Again, rather than rehearse the debate over the respective merits of judicial and legislative decision-making, I wish to draw attention to a comparatively under-appreciated--in this context of minority rights--feature of legislative decision-making. Legislative processes tend to encourage compromises as support is built among legislators for social change. Legislation can resolve many different issues at the same time, enhancing the scope for bargaining and compromise. For instance, in England and Wales while section 1 of the Marriage (Same Sex Couples) Act 2013 extends marriage to same-sex couples, section 2 guarantees freedom of conscience in several respects. Nobody can be compelled to conduct a same-sex marriage or to give a marriage certificate. Courts are poorly situated, in comparison, to construct these sorts of compromises. Religious freedom rates highly in the U.S., but it would have been decidedly odd for the U.S. Supreme Court in *Obergefell* to have recalibrated its position on religious freedom in order to build support for its decision on same-sex marriage.

Perhaps counterintuitively, pathways that require popular approval at referendum may be more similar in this respect to judicial pathways than to legislative pathways. Building popular support requires a clear narrative about what the proposal does and why it is worthwhile. This clear narrative might be undermined if hedged with measures that suggested the reform could be viewed, at least by some, as illegitimate. In this regard, it is instructive to contrast the Irish approach with that in England and Wales. The Irish constitutional amendment to allow for same-sex marriage made no changes to the laws on freedom of conscience. Freedom of religious conscience is strongly protected by Article 44 of the Constitution.<sup>49</sup> The subsequently enacted Marriage Act 2015 guaranteed that religious bodies and religious solemnisers of marriage could not be obliged to recognise or solemnise any particular form of marriage. This was less of a compromise than section 2 of the English and Welsh Act, however. On the one hand, it only applied to religious entities, not to civil marriage registrars. On the other hand, it applied in respect of all marriages, not just same-sex marriages. It was therefore more consistent with the ethos of the constitutional reform, which was to make marriage equally open to same-sex and opposite-sex couples rather than to create a special category of same-sex marriage. The point here is not to argue against legislative compromise in general nor against these compromises in particular. Rather, I simply wish to illustrate how legislative decision-making may--for good or ill--rely more on

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48. See Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 YALE L.J. 1346 (2006).

49. See *Quinn's Supermarket v. Attorney General* [1972] I.R. 1. (Ir.).

political compromise to secure the protection of minority rights than is the case when a referendum is part of the decision-making process.

As emphasized throughout this article, a referendum was required in Ireland because it is a component part of the constitutional amendment process and political actors believed that a constitutional amendment was required to allow for same-sex marriage. At one level, this made it more difficult to introduce same-sex marriage, as constitutional amendment requires the formation of a democratic consensus, evidenced by votes in parliament and a referendum. At another level, however, this process of consensus-building had positive implications for gay rights. The referendum vote removed any concern over democratic legitimacy. Irrespective of one's own normative position on the democratic defensibility of the judicial identification of new minority rights, it is unarguable that judicial approaches make an easier target for disgruntled activists opposed to social change. Approval at referendum, therefore, all but eliminated the risk of a popular backlash against the measure.<sup>50</sup> Somewhat relatedly, the route taken in Ireland removed any basis for allegations that an unrepresentative political elite had foisted an unpopular social change on the country. Legislatures, particularly where elections focus on socioeconomic issues, are not always representative of the population's views on issues of human rights and personal morality. A legislature can as easily as the courts be a target of a popular backlash. In recent years, we have seen how easy it is for populists to deploy rhetorical tropes that allege betrayal of the true people by an out-of-touch elite.<sup>51</sup> But it is close to impossible to mount a populist backlash against a decision of the people. Not only is such a move rhetorically difficult, however, it is also unlikely to gain purchase when a clear majority of the people have approved the increased protection for minority rights. The consensus-building requirements of constitutional amendment afforded all members of the community an opportunity to participate in the debate, whether with political activists on street-corners or among their own families. They were required to reflect on their own ideas about and attitudes to gay people. Finally, the passage of the referendum with both a high turnout and a high majority provided a very deep and public affirmation for a previously ostracised group. This would not have been the case with either a judicial or legislative approach.

Essential to this consensus-building approach, however, was the fact that the referendum featured as part of a broader constitutional amendment

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50. Siegel, however, questions the relevance of popular backlash in assessing the legitimacy of judicial decision-making. *See* Siegel, *supra* note 44.

51. On populist rhetoric and its relationship to popular decision-making processes such as referendums, *see* Oran Doyle, *Populist Constitutionalism and Constituent Power*, 20 GERMAN L.J. 161 (2019).

process that political actors believed to be legally required in order to protect these minority rights. Importantly, this amendment process required not only a referendum but also approval by both houses of Parliament. Political actors therefore had to take responsibility for the change and work with political activists to persuade the broader population that the change should be adopted. This distinguishes the Irish situation from the Australian and Taiwanese experiences, detailed above, where the purpose of the referendum was to inhibit the emergence of political consensus or indeed to provoke conflict. The broader lesson, I suggest, is that any political *choice* to hold a referendum to protect same-sex marriage is likely to undermine the beneficial consequences of consensus-building identified in this article. If the starting point for a referendum is a desire by political actors to avoid responsibility for protecting minority rights or an attempt by disgruntled activists to reverse a social change, then the referendum is unlikely to realise the benefits of consensus-building.

If a referendum cannot realise the benefits of consensus-building, it becomes particularly problematic. As noted above, minority groups whose rights are the subject of the referendum may well feel that they personally are under consideration, that their private lives are being dissected. Researchers in Australia have shown how frequent exposure to negative messages about same-sex marriage during the Australian survey-plebiscite was associated with greater psychological stress, although exposure to public support had some off-setting psychological benefits.<sup>52</sup> The intensity of such messaging is likely to be considerably less if the legislature or the courts are considering the introduction of same-sex marriage.

This analysis suggests that there are few contexts in which it is appropriate to adopt a referendum as the means of introducing same-sex marriage. On the one hand, negative messaging about same-sex marriage is always likely to result in psychological harms. On the other hand, the consensus-building benefits of a referendum are unlikely to be realised if the referendum is politically chosen rather than legally required. As very few constitutions are as prescriptive as the Irish constitution on family issues, while also requiring a referendum for constitutional amendment, the benefits associated with the Irish experience are unlikely to be repeated.

Notwithstanding this normative assessment, same-sex marriage campaigners may still face the task of building a consensus for same-sex marriage, whether to resist a referendum instigated by opponents of same-sex marriage or simply to create a political climate in which the courts or the legislature are more likely to recognise same-sex marriage. The Irish

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52. Stefano Verrelli et al., *Minority Stress, Social Support, and the Mental Health of Lesbian, Gay, and Bisexual Australians during the Australian Marriage Law Postal Survey*, 54 AUSTRALIAN PSYCHOLOGIST 336 (2019).

experience offers two final lessons in this regard. First, the attempt by the Yes side to separate issues of child-rearing from relationship recognition were tactically understandable but, in my view, strategically misguided. Although the Yes side were correct that the introduction of marriage equality would make very little difference to the position of children, it was too obvious that the contemporaneous enactment of the Children and Family Relationships Act was partly a dodge designed to remove this issue from the debate. To have achieved that move successfully, such an Act should have been enacted several years prior to the referendum. In that way, citizens could have seen parenting by same-sex couples in action, presumably without the collapse of society. As it was, it felt like an artificial attempt to preclude people discussing genuinely held--albeit in my view thoroughly misguided--concerns. The legal capacity of gay couples jointly to raise children may not have been technically affected by the introduction of same-sex marriage, but it was a related issue. Far more convincing and effective, in my view, were the claims from the children of same-sex couples who were placed in the invidious situation of having a legally recognised relationship with only one of their parents. This both addressed the concerns over gay parenting and reversed the direction of the argument: the legal non-recognition of gay parents was damaging to their children.

Second and on the positive side, the story-telling approach of the campaign was highly successful. What resonated most with the electorate, I suggest, were not progressive yet abstract political ideals of equality, but rather individual virtues of kindness and compassion. In many ways, the Yes campaign was a campaign about families, in which parents, grandparents, children, brothers, and sisters came out to campaign for their gay and lesbian relatives. This is not to deny the centrality nor agency of gay people themselves: they started the conversations in the years and decades before the campaign as well as during the campaign itself. These countless moments of individual courage invoked a response of human decency at the ballot box and beyond. Campaigns rooted in individual stories and invoking the supererogatory values of kindness and compassion may be more likely to build political support than campaigns articulated in the language of rights and equality perhaps preferred by progressive activists.

## VII. CONCLUSION

At the time of writing, only 29 countries in the world have introduced same-sex marriage.<sup>53</sup> 22 have done so by legislation (including Australia),

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53. Rosie Perper, *The 29 countries around the world where same-sex marriage is legal*, BUSINESS INSIDER (May 28, 2020), <https://www.businessinsider.com/where-is-same-sex-marriage-legal-world-2017-11>.



four by judicial decision, two by a combination of judicial decision and legislation (Taiwan and South Africa), and only Ireland by popular referendum. It is highly likely that more countries will continue down this path in the next decade. Citizens of those countries will face a choice about the appropriate decision-making procedure for addressing this issue--judicial, legislative, or popular. Same-sex marriage advocates will need to design effective political campaigns, irrespective of the decision-making process involved. The Irish referendum provides useful lessons on both counts. Some international criticism of Ireland's same-sex marriage referendum is misconceived, failing to appreciate the way in which the referendum was integrated into other political processes that built a valuable democratic consensus for minority rights. Nevertheless, these benefits of the Irish approach depended on an unusual legal position that required a constitutional amendment, approved at referendum, to protect these rights. Unless that situation is repeated, a referendum is likely to generate few benefits while causing psychological harm to the members of the minority group whose rights are under discussion. The apparent success of the Irish referendum, therefore, does not entail a general prescription for other countries. That said, the Irish referendum provides an object lesson on how to build a political consensus in support of minority rights. In that respect, the Irish referendum experience does contain some general lessons for same-sex marriage advocates around the world, principally around the importance of individual stories and the political salience of individual virtues framed in terms of kindness and compassion.

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# 少數者權利與民主共識： 愛爾蘭同婚公投

Oran Doyle

## 摘 要

世界上已有29個國家將同性婚姻合法化，其中，22個國家透過立法，4個國家透過司法的判決、2個國家透過同時立法以及司法、1個國家透過公民投票的方式達到這個目的。愛爾蘭在2015年時所舉辦的同性婚姻公投被批評是將少數人的權利留給大眾決定，但這種批評其實錯誤地理解了愛爾蘭公投的法律及社會背景。在愛爾蘭，憲法修正的一個必要元素是要求發起公民投票的行動者必須匯聚有利於同性婚姻的強烈民主共識以確實保障少數人的權利。若公民投票是政治人物可以恣意選擇是否發起，而非透過法律明文加以規範時，此種公民投票所可能帶來的利益即不可能會發生。這也是愛爾蘭的經驗不太容易可以直接被其他法域所學習的原因。不過，愛爾蘭同性婚姻公投運動依然可以為其他同性婚姻行動者帶來一些可以學習之處，尤其是如何訴說同性戀者的故事以及其他公民們對同性戀的回應。此或許比去建構一些公共價值（如：平等權）更為重要。

**關鍵詞：**憲法變遷、同性婚姻、公投、憲法修正、愛爾蘭