# AUTHORIZING REVOLUTIONARY CONSTITUTIONAL CHANGE: THE APPROXIMATION THESIS

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## ABSTRACT

This study examines how the amendment power can be used to legitimately produce a constitutional revolution, altering the core identity of a constitutional system. In doing so, I introduce the concept of the revolutionary amendment and discuss how such an amendment can achieve legitimacy in a constitutional system. Drawing on deliberative civic republican theory, I argue that the process of enactment must approximate the primary constituent power by fostering citizen representation and deliberation in both the drafting and the ratification of the amendment. This *approximation thesis* can help determine when the citizens of the state will see a revolutionary amendment as legitimate. This theoretical contribution is followed by case studies of contemporary constitutional revolutions in Ireland and the United Kingdom.

KEYWORDS: *constitutional revolution, constitutional amendments, popular sovereignty, constituent power, referendums*

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## I. INTRODUCTION

In his 1789 letter to James Madison, Thomas Jefferson proclaimed, "[I]t may be proved that no society can make a perpetual constitution. . . . The earth belongs always to the living generation." Through this letter, Jefferson argued that each generation has the right to alter the constitutional agreement bequeathed to its members by their ancestors and, in effect, each generation has the right to revolution. Should each generation start anew to draft its own constitution? Would the amendment process be sufficient to keep a constitutive document in line with a new generation of citizens? What are the limits to the amendment power? These are critical questions constitutional theorists have sought to address in understanding the social contract.

In this study, I examine how the amendment power can be used to legitimately produce a constitutional revolution, altering the core structure or identity of a constitutional system. In doing so, I introduce the concept of the revolutionary amendment as a mechanism for fundamental constitutional transformation, offer a normative assessment of the path to legitimation by connecting the concept to the literature on constituent power and popular sovereignty, and provide initial empirical support for the theory, demonstrating that the normative procedural guidelines offered in the study can enhance sociological legitimacy. Drawing on deliberative civic republican theory, I argue that the process of enactment must approximate the primary constituent power by fostering citizen representation and deliberation in both the drafting and the ratification of the amendment, mirroring mechanisms that would be used to draft a wholly new constitution. In this way, the revolutionary amendment can make a claim to a new popular sovereignty independent of the existing document whose core identity the polity is seeking to alter. This *approximation thesis* can help determine when and how a revolutionary amendment will be seen as a legitimate exercise of constitutional change by the citizens of the state.

This theoretical contribution is followed by case studies of contemporary constitutional revolutions in Ireland and the United Kingdom. While Ireland's process of significant constitutional reform has received much social support, the process of change in the United Kingdom has been much more controversial. Over the past decade, Ireland has experienced what Tánaiste Leo Varadkar called a "quiet revolution" meant to establish "a modern constitution for a modern country" ("Ireland Abortion Referendum" 2018). This constitutional revolution has sought to sever Ireland's de jure link with the Catholic Church, reducing the document's commitments to Catholic natural law and placing its liberal democratic elements front and center. This revolution has gained legitimacy through its ongoing commitment

to citizen inclusion and deliberation in a multistage reform effort, generating significant social support while mitigating destabilizing backlash. This study focuses specifically on the repeal of the Eighth Amendment.[2]

The process of constitutional change in the United Kingdom, however, has not been as smooth. The 2016 vote to leave the European Union was only the beginning of a long and tumultuous process involving several delays, two general elections, and an increasing threat of Scottish independence and an Irish border poll. What this revolution has lacked is proper citizen representation and deliberation, as the referendum turned on vague promises and failed to properly include the voices of the devolved governments, undermining the national interest. Thus, the process has failed to meet the approximation standard highlighted above, generating significant domestic backlash that undermines the stability of the constitutional system.

Constitutions are meant to be enduring documents that constrain and shape political governance in order to provide stability and predictability. In doing so, they are a critical link between a foundational past and an aspirational future. This dual role opens the door to significant disharmonies both internal to the text and between the document and the people (Jacobsohn 2011). These disharmonies provide the fuel for constitutional revolutions, helping the living generations keep their constitutive document aligned with their values and aspirations (Jacobsohn 2014). However, the process of revolutionary change need not result in an entirely new document. Instead, the link between past and future can remain, even as the constitution is fundamentally altered, through the use of a heightened amendment power that seeks to bring citizens and elites into an important dialogue about the nature of constitutional justice in the polity.

## II. THE APPROXIMATION THESIS: CONSTITUENT POWER, POPULAR SOVEREIGNTY, AND REVOLUTION IN CONSTITUTIONAL THEORY

### A. Conceptualizing the Revolutionary Amendment

First, it is important to ask, What is a constitutional revolution, and how does the concept apply to the amendment power? In his work on revolutionary constitutional

2. In analyzing this case, I conducted interviews with party leadership, members of the Oireachtas Committee on the Eighth Amendment of the Constitution, members of the Citizens' Assembly, founding members of the leading pro- and anti-Repeal campaigns, as well as research leaders and staffers at the Citizens' Assembly. In conducting these interviews, I spoke with elected officials from each of Ireland's major parties as well as several independent politicians. All interviews were conducted over a period of three weeks in June and July of 2018.

transformation, Bruce Ackerman (1991) focuses on "constitutional moments" that present a clear and decisive repudiation of the past in forging a new constitutional identity for the nation. These moments require acts of self-conscious collective mobilization and tend to be elite-led, with the people entering the process during the final ratification stage. So too, these moments often—though not always—play out in a relatively short time span. Rivka Weill states that "it [is now] conventional wisdom to expect a revolution—'thunder and lightning . . . [and] fire' [Exodus 19:16]—as prerequisites to achieving a constitutional transformation" (2006, 465). Ackerman's work also implies that constitutional revolutions are inherently illegal, as the creation of a new constitutional order typically violates the existing constitution, again emphasizing the repudiation of the past (see Braver 2018).

When analyzing revolutionary constitutional change, however, Gary Jacobsohn argues that one must pay more attention to the *substance* of the transformation rather than the process through which it occurs. For Jacobsohn, a constitutional revolution is "a paradigmatic displacement, however achieved, in the conceptual prism through which constitutionalism is experienced in a given polity" (2014, 3). Thus, constitutional revolutions need not be connected to a political revolution in the conventional sense and can occur without mass mobilization or abrupt, extralegal breaks in political governance.[3] Instead, if over the course of several years changes to the constitution, however incremental, result in a document so fundamentally transformed that the social and political experience of constitutional governance is radically altered, then a constitutional revolution has certainly taken place. Using this definition, constitutional revolutions may be incremental and need not occur in a moment of thunder, lightning, and fire so long as they fundamentally shift the identity of the constitutional order.[4] So too, unlike Ackerman, Jacobsohn recognizes that these revolutions can be *legal*, occurring within the framework of the existing document, often through the amendment process, as has recently occurred in states such as Hungary and Turkey (Jacobsohn 2014; Tushnet 2015; Gardbaum 2017; Jacobsohn and Roznai 2020). This insight opens the door to two critical, unanswered questions: What does a revolution achieved through the amendment power look like, and how can it be seen as legitimate?

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3. Stephen Gardbaum (2017) distinguishes *constitutional revolutions* from *revolutionary constitutionalism* in that the latter concept is linked to a political revolution in the classical sense.

4. What distinguishes constitutional revolution from constitutional evolution is that the former involves a fundamental shift in the framework of the constitutional order. Evolutionary changes, in contrast, are changes to the document that, while potentially profound, are in keeping with the document's core identity structure. As stated by Jacobsohn and Roznai, "[E]volution is a process of developing in detail what is implicit in idea or principle" (2020, 35).

Ultimately, the people can formally alter the constitution in three ways: ordinary constitutional amendment,[5] constitutional replacement, or *legal* constitutional revolution, what I call "revolutionary constitutional amendment."[6] Following the definition of constitutional revolution offered by Jacobsohn (2014), a revolutionary amendment is one that produces a paradigmatic shift in the experience of constitutionalism without displacing the entirety of the constitutional text.[7] More specifically, revolutionary amendments profoundly alter the delegation of sovereignty within the polity or produce a considerable shift in the document's core values and commitments.[8]

Revolutionary amendments, then, are not simply legal versions of constitutional replacement but rather more limited alternatives to them. Unlike constitutional replacement—which occurs outside the bounds of legality—revolutionary amendments do not alter the entire constitution. As amendments, they can be less radical and allow for a degree of legal continuity and stability that can prevent widescale disruption during chaotic moments of constitutional transition. Indeed, it is the legality of the process that can provide the entrenched institutional support necessary for proper citizen representation and deliberation, discussed in the next section (B).[9]

A polity may choose to enact revolutionary amendments, rather than engage in illegal replacement, for several reasons. Practically, these amendments may be easier to adopt than a wholesale rewrite of the constitutional text when the critique of the constitutional system is significant in magnitude but limited in scope. It is often easier to find consensus and to focus the people's attention on a singular matter of constitutional importance rather than a more wide-ranging array of

5. Here I am referring to an amendment that does not produce a constitutional revolution.

6. Beyond these formal mechanisms, constitutions can also be altered in an informal fashion via interpretation, executive action, desuetude, or a change in unwritten norms (Albert 2014, 2015a; Doyle 2018). These informal mechanisms are beyond the scope of this analysis.

7. Richard Albert (2018) refers to this form of constitutional change as *constitutional dismemberment*. Since these alterations are described as amendments when the occur, I believe it is more appropriate to classify them as such. So too, the term *revolutionary amendment* critically links the process of intraconstitutional change with the theoretical insight provided by the term *constitutional revolution* (see Roznai 2018).

8. What constitutes a considerable shift in the delegation of sovereignty or constitutional values is dependent on the specific document and the sociopolitical history of the constitutional order in question (see Jacobsohn and Roznai 2020).

9. This argument has a basis in the work of Hannah Arendt, who disagrees with Ackerman's assessment that revolutionary constitutional transformation necessarily occurs outside the bounds of legality. See Joshua Braver's (2018) work on extraordinary adaptation for a larger discussion of the role of legality in the process of constitutional replacement.

constitutional changes, especially where there is widespread sociopolitical support for the rest of the constitutional system. So too, the possibility of enacting revolutionary change through the amendment procedure allows for a more gradual process in which multiple revolutionary amendments—or multiple amendments that together perform a revolutionary function—are debated and enacted over time.[10] Taking a more gradual approach allows the public to adapt to and reflect on the new changes before continuing the revolutionary process, which can build trust between the people and the government while avoiding the alienation of potential allies. Indeed, the Irish politicians, activists, and citizens interviewed for this study demonstrated little desire for wholesale reform, arguing that such a dramatic step would be unnecessarily disruptive and divisive, harming the prospects for genuine change.

However, revolutionary amendments are feasible only in certain circumstances. If the criticism of the constitutional order is more comprehensive, an illegal replacement will be a better option because it more fulfills the demands of the people. So too, profound moments of transition, such as those that follow a war, coup, or revolution, may call for a new constitutive moment and a more fundamental reevaluation of constitutional governance than a revolutionary amendment can offer. Such a profound break with legality helps legitimate a new regime, particularly following a period of autocratic rule or a severe breakdown in constitutional governance. However, revolutionary amendments may be a useful interim solution following a regime change, allowing for a return to stable democratic politics before a new document is drafted.[11] Ultimately, revolutionary amendments may be better suited for targeted reforms in more stable constitutional systems.

Revolutionary amendments give states another tool to adjust the rules of constitutional governance to better align the system with the population. Unlike illegal replacement, revolutionary amendments can bring about needed change without displacing the entirety of the constitutional text, and thus they have an important and potentially positive role to play in the maintenance of a constitutional system.

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10. See the discussion of the Irish case in Part III of this paper.

11. For example, Chile democratized through a series of revolutionary amendments following the fall of the Pinochet regime. But over time the need for an entirely new constitution became apparent. Thus, the country is currently in the process of writing a new document. However, the revolutionary amendments proved to be an effective interim solution, allowing the return of stable democratic governance and the construction of reliable institutions.

## B. Legitimatizing The Revolutionary Amendment

Thus, constitutional revolutions can be achieved within the parameters of the existing constitutional system through the amendment power. The question remains, If these revolutions can occur within the bounds of legality while fundamentally transforming the constitutional order, how can they be seen as a legitimate without the new constitutive moment Ackerman claims is necessary?

Understanding the nature of the social contract remains a critical component of constitutional theory. Imbued in the notion of the social contract is the concept of popular sovereignty, that the agreement between the people and the lawmaker, embodied in the constitution, can claim authorship by the people. According to Abbe Emmanuél Sieyès, the constituent power is the people's power to forge such an agreement and thus "establish a constitutional order of a nation" (Roznai 2015, 239). This power can be distinguished from the *constituted* power, or the power to make laws within the framework established by the eventual constitution (Roznai 2015). The constituent power, in its ability to delegate sovereignty and establish lawmaking authority, ultimately exists outside the bounds of legality and is unlimited and unrestricted by formal constitutional rules (Kelson 2006; Schmitt 2008; Roznai 2015). Thus, through an act of popular sovereignty (embodied in the exercise of constituent power), the people give themselves a constitution that sets out the power to make laws for the polity (expressed through the constituted power). However, the people retain the power to alter this sovereign arrangement, even after the constitutional order is established.[12]

As stated earlier, the people can formally alter this constitutional agreement via ordinary amendment, constitutional replacement, or revolutionary amendment. Critically, each of these mechanisms has a different relationship with constituent power. According to Yaniv Roznai (2015), we can consider the power to amend the constitution as specified in the document to be a *secondary constituent power*. Because the process through which an amendment can occur is established in the constitution and occurs within the bounds of legality, the amendment power is derived from and thus constrained by the *primary constituent power* that established the constitutional order. The replacement of one constitutional order for another, in contrast, necessarily requires an act of primary constituent power in order to ensure a proper expression of popular sovereignty. This process requires a break with legality, which provides a new constitutive moment and an appeal for popular

12. For an account of the distinction between sovereignty and constituent power, see Colón-Ríos (2020).

legitimation.[13] According to Richard Stacey, "The makers of a new constitution . . . cannot rely on whatever claims to popular sovereignty the previous constitution made, as a basis for claiming that the new constitution is backed by the authority of popular sovereignty," and thus the new constitution requires "a discrete act of collective constitution making" (2018, 11).

The relationship between constituent power and popular sovereignty in the third case of constitutional change, revolutionary amendment, is much more delicate than that of the other two mechanisms. Carl Schmitt has argued that it is not possible to change the basic structure or fundamental values expressed in the constitution via the delegated amendment power (Schmitt 2008; Roznai 2015). Such profound change must be authorized by the people themselves. Following this logic, constitutional courts around the world have found that amendments exceeding the limits of the secondary constituent power may be deemed unconstitutional (Albert 2009; Barak 2011; Roznai 2017).[14] Thus, many constitutional theorists, designers, and courts recognize the explicit or implicit unamendability of certain provisions (Albert 2015b). However, changes to the basic structure or identity of the constitution need not be forbidden, nor should they require a wholesale rewrite of the constitutional text. Instead, these changes require a special process that can infuse the constitutional revolution with the critical element of popular sovereignty it requires to claim legitimacy. Since such a process occurs within the framework of the existing constitutional order, providing a degree of institutional regulation and legal continuity, it cannot be said to be a pure expression of the unconstrained primary constituent power. What is required of such a revolutionary amendment, then, is an *approximation* of the primary constituent power.

Approximating the primary constituent power is no easy task, requiring the establishment of representative and deliberative institutions that mirror those that would be formed to draft a new constitution, without displacing the entirety of the existing document. In this way, the approximation is not a lower procedural bar than the primary constituent power, but rather it has a narrower and more regulated mandate. Ultimately, though this special amendment process works within the

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13. This argument can be traced to Carl Schmitt and is prominent in Bruce Ackerman's work. In his 2018 piece, Joshua Braver introduces the concept of extraordinary adaptation in discussing how constitutional replacements occur outside the bounds of legality while avoiding lawlessness.

14. The German Federal Constitutional Court was among the first to raise the possibility of an unconstitutional constitutional amendment in the 1951 *Southwest State* case. The Indian Supreme Court also held that constitutional amendments can be deemed unconstitutional if they violate the basic structure of the document (*Kesavananda Bharati* 1973). Since that time, constitutional courts around the world have accepted the principle of unconstitutional amendments.

bounds of the existing constitutional order, it must be granted greater authority to make the desired changes. As argued by Roznai, "[T]he more similar the characteristics of the secondary constituent power are to those of the democratic primary constituent power . . . the less it should be bound by limitations" (2017, 162). Thus, a revolutionary amendment requires a special process that can ensure a claim to popular sovereignty separate from the mandate of the original constitution whose core values, commitments, or structure the polity is seeking to change. This process should thereby foster proper citizen representation and deliberation during the issue-framing *and* the ratification stages of the amendment process.[15] Thus, while theorists such as Ackerman argue that elites should lead the process during profound constitutional moments, with the people entering during ratification, I argue that true legitimation in moments of constitutional revolution is achieved through a process in which the people are consulted from the very beginning. Doing so helps provide the public with the information needed to make an informed decision and ensures their voice is heard throughout the process, establishing a more intimate connection between the people and the constitutional transformation. To properly assess this approximation thesis, then, it is important to discuss the interactive role of representation and deliberation in the process of revolutionary constitutional change.

Citizen representation is critical to the legitimacy of a revolutionary amendment, as "popular sovereignty and representation can never be separated one from the other. 'The people' is too large and diverse a body to manifest itself without the intervention of representational forces" (Tierney 2012, 126). The people as a group are typically represented in an amendment process through elected officials in an ordinary legislature, delegates to a specially elected constituent assembly, or the voters in a referendum (or, more frequently, some combination in a multistage process). When assessing representation, however, there has been a long-standing debate as to which interests should be represented in political processes: those of the people as individuals or constituents or those of the people as a united sovereign, or put more simply, the interest of the nation (Pitkin 1967; Plotke 1997; Shapiro et al. 2010). Although the views of the majority must be considered in democratic processes—and will often be decisive—the national interest should also be represented in any process of designing (or redesigning) a constitutive document if the outcome is to be seen as fully legitimate. In her seminal work on political

15. Stephen Tierney argues that constitutional referendums occur in a series of stages. In the issue-framing stage, "the matter to be put to the people is formulated" (2012, 51). The final stage is ratification, which encompasses the campaign and final vote.

representation, Hannah Pitkin argues that "the representative is, typically . . . an agent of his locality as well as a governor of the nation. His duty is to pursue both local and national interest, the one because he is a representative, the other because his job as representative is governing the nation" (1967, 218). Ultimately, the use of a referendum in the amendment process does not negate the need for both politicians and voters, as representatives of the polity, to consider the greater national interest. This consideration is particularly relevant where majoritarian decision-making mechanisms can overlook distinct groups within society, especially in multinational or deeply divided states where the approval of the constituent units may be necessary for the legitimacy of the outcome (Tierney 2012).

Naturally, there can exist a gap between the preferences of the current majority and the welfare of the nation as a whole. A sufficiently deliberative process, by providing representatives and citizens with accurate information, inducing reflection on significant questions of constitutional governance, and allowing for sincere debate among competing points of view, can help bridge these two aspects of representation.[16] Deliberative democratic theorists have argued that participatory lawmaking processes that ensure free and equal deliberation help legitimate law by seeking mutual acceptability and consensus (see Habermas 1992; Dryzek 2002; Chambers 2003; Landemore 2020). So too, exercises in deliberative democracy can allow for a more accurate aggregation and representation of *informed* public opinion without creating undue polarization or bias (Fishkin and Luskin 2005; Sunstein 2006; Pateman 2012). Indeed, deliberation not only reveals preferences but can help *shape* them by allowing individuals to debate and reflect on questions of constitutional importance from multiple points of view, which can provide new information or correct misinformation (Manin 1987; Chambers 2003, 2009). In doing so, proper deliberation requires justification, which asks that "citizens go beyond the self-interests typical in preference aggregation and orient themselves to the common good" (Bohman 1998, 402). By facilitating the development of informed preferences, inducing sincere reflection on significant constitutional questions, and allowing for debate among multiple points of view, thus bridging the gap between individual and national interest, deliberation and representation are linked in the process of legal legitimation.[17]

In his analysis of constitutional referendums, Stephen Tierney (2012) distinguishes between two forms of deliberation: micro-level, what I call *structured*

16. This argument can be traced back to Edmond Burke and John Stewart Mill (see Pitkin 1967; Manin 1987).

17. See Pitkin (1967), Squires (2000), Dryzek and Niemeyer (2008), Urbinati (2014), and Schweber (2016) for a longer discussion on how deliberation and representation have been linked by democratic theorists.

*deliberation*, and macro-level, what I call *unstructured deliberation*. In the former, citizens gather to engage in controlled discussions regarding potential changes to the constitutional text. In the latter, elite actions, as occur in a legislature, constituent assembly, or referendum campaign, can trigger broader deliberation within society. Ultimately, unstructured deliberation may be sufficient to ensure a claim to popular sovereignty so long as citizens are given the time and information necessary to arrive at an informed decision, deliberating on their own time and in their own way (Tierney 2012).[18] Doing so requires both a focus on citizen education—by the media, civil society, and politicians—and a sufficient amount of time to ensure citizens are able to engage in informed reflection. This form of deliberation could come from a robust referendum campaign or through a transparent and participatory constituent assembly process.[19] Increased societal deliberation in the issue-framing process, then, can generate a more accurate and representative expression of the will of the people—and thus popular sovereignty—allowing for free and equal participation and consideration with respect to the individuals and viewpoints involved independent of the mechanism of ratification.

A state can legitimately engage in constitutional revolution in a manner that fosters proper representation and deliberation through many mechanisms, including a constituent assembly or a referendum. However, because these amendments require a claim to popular sovereignty independent of the existing document to gain legitimacy, a parliament elected for the purposes of ordinary legislation—channeling the more constrained constituted power—does not have the mandate on its own to engage in revolutionary constitutional change (Colón-Ríos 2018). So too, constitutional referendums without sufficient deliberation have the potential to perpetuate misinformation or prioritize the interests of the current majority over the interests of the nation as a whole, which can undermine the outcome's claim to legitimacy by sparking domestic backlash or destabilizing the constitutional system.[20] Thus, analyzing the legitimacy of a revolutionary constitutional amendment put to a referendum against the approximation standard requires an analysis of

18. This does not negate the necessity of structured deliberation within representative institutions, such as constituent assemblies and legislatures, which is critical to democratic legitimacy and should itself induce unstructured deliberation within society.

19. Evidence has shown that structured deliberation among citizens can influence attitudes of non-participants, increasing political interest and efficacy ahead of referendum campaigns (Knobloch et al. 2019), thus inducing unstructured deliberation within society. In addition, experimental evidence demonstrates that citizens who disagreed with the policy outcome from a citizen-led deliberative body still viewed the outcome as fully legitimate (Garry et al. 2021).

20. See discussion of Brexit in Part IV of this paper.

the various stages involved in the amendment process, most significantly the issue-framing and ratification stages (Tierney 2012).[21]

Conceptually, then, revolutionary amendments are neither normatively good nor bad for a constitutional system. Rather, it is the process of their enactment that matters in assessing the outcome's legitimacy.[22] If a state follows the approximation thesis, it is unlikely the system will adopt changes that lack significant popular support, diminishing the possibility of illegitimate reform.

Certainly, revolutionary amendments open the door for bad actors to introduce profound changes under the specter of ordinary amendment. In this way, an illegal replacement may be normatively superior because the illegality of such an act is blatant and typically accompanied by an appeal to popular support (Braver 2018). However, obscuring the revolutionary nature of the amendment is often difficult and would run afoul of the approximation thesis—which requires an adequately informed citizenry—and could thus harm the legitimacy of the constitution as the revolutionary nature of the change becomes apparent. Also of concern is that elites have control over this reform process, allowing them to prevent revolutionary change that has significant public support. However, this concern is also present when a state attempts to rewrite its constitution, as occurred during the push for a new Icelandic constitution in 2013. The more representative, inclusive, and deliberative the process, the more social and political pressure will exist for elites to honor the process. If these elites weather the storm, the desire for revolutionary change may be less than initially perceived or a more wholesale reform of the constitutional system may be necessary. Thus, the failure to enact a revolutionary amendment does not foreclose the possibility of illegal replacement (and may make it more likely). Indeed, Braver (2018) has cited the exhaustion of other legal channels for constitutional change as a prerequisite for extraordinary adaptation.

Ultimately, the purpose of approximating the primary constituent power in enacting a revolutionary amendment is to ensure a proper expression of popular

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21. Richard Stacey (2018) claims that referendums are neither necessary nor sufficient for an appeal to popular sovereignty, as one needs to account for the authorship of the constitutional text rather than simply the ratification method. So too, in his critique of modern polling, James Fishkin argues that "what polls tend to capture is a statistical aggregation of vague impressions formed mostly in ignorance of sharply competing arguments" (1995, 89). A similar argument can be made regarding referendums if they lack sufficient societal-level deliberation. Indeed, Fishkin argues that "the locus of ostensible decision resides in millions of disconnected and inattentive citizens, who may react to vague impressions of headlines or shrinking soundbites but who have no rational motivation to pay attention so as to achieve a collective engagement with public problems" (23).

22. The substance of the amendment is also relevant to any normative evaluation; however, such analysis is beyond the scope of this study.

sovereignty independent of the existing document whose core features the polity is seeking to alter. Doing so allows the paradigmatic shift in constitutional identity to gain legitimacy through a claim to have been authored by the people themselves. To approximate the primary constituent power, states must design drafting and approval mechanisms that mirror those that would be used to adopt an entirely new constitution. Such a process requires sufficient citizen representation and deliberation, providing the public with adequate information and ensuring citizens feel their voices are heard in the process. To demonstrate the empirical utility of this normative theory and the mechanisms behind it, I next analyze the process of constitutional revolution in Ireland and the United Kingdom.

## III. IRELAND'S DELIBERATIVE REVOLUTION

Over the past decade, Ireland has embarked on a dialogical process of revolutionary constitutional change that has sought to sever the constitutional link between church and state in favor of the document's commitment to liberal democratic rights. The nation has constructed a reform process that represents a sophisticated approximation of the primary constituent power, enhancing the legitimacy of the outcome. While the Irish model is not the only method by which a state can approximate the primary constituent power, it is an innovative and successful model that has ensured proper representation and deliberation across several sites in a multistage process, thus deserving closer consideration.

First, it is important to analyze the significance of the ongoing reforms to constitutional governance in Ireland. Mark Tushnet has argued that preambles provide a deeper, symbolic meaning to the constitutional enterprise, often through direct proclamations of collective identity (2006). The Irish preamble's invocation of "the most Holy Trinity" and "our Divine Lord, Jesus Christ," combined with the textual commitments of the state to protect the "inalienable and imprescriptible" rights of the family (Article 41) and "acknowledge that the homage of public worship is due to Almighty God" (Article 44), places Catholic social thought at the heart of Ireland's constitutional identity (Kissane 2003; Jacobsohn 2014; Doyle 2018). The preamble thus demonstrates that "the 'common good' should be evaluated by religious criteria and implicitly identifies the Irish nation with the Catholic religion" (Kissane 2003, 77). So too, the Supreme Court has cited the preamble as a guiding principle of constitutional law.[23]

23. In *Norris v. The Attorney General* (1983), the Supreme Court stated that based on the preamble, "it cannot be doubted that the people, so asserting and acknowledging their obligations to our Divine

Thus, the 1937 Constitution "boldly featured [Catholic] natural law as a limiting principle on the expression of the popular will" (Jacobsohn 2014, 26). Indeed, the 1937 Constitution was drafted by a small cohort of political elites, with the Catholic Church having a strong—though not necessarily deterministic—influence on the final text (Chubb 1991; Jacobsohn 2014; Doyle 2018). The immense role of the Catholic Church and Catholic social thought in the formation and development of Irish constitutional law demonstrates the significance of the Catholic faith to early Irish national and constitutional identity.

Catholic social thought, however, was not the only operating force in the development of Irish constitutional identity. The adoption of the 1937 Constitution was itself the culmination of a fifteen-year revolution that fused the liberal democratic principles of the 1922 Free State Constitution with the religious commitments of Catholic theology (Jacobsohn 2014). Thus, while Catholic social thought had been an integral part of the constitutional enterprise in Ireland, the nation has also embraced secular principles of liberal democracy (Hogan 2005; Doyle 2018). In doing so, the drafters of the Irish Constitution incorporated the principle of religious freedom (Article 44) and guaranteed liberal democratic rights such as the right to equality, personal liberty, and freedom of expression (Article 40).[24] Thus, since 1937 constitutional governance in Ireland has sought to balance the internal disharmony inherent to the nation's dual constitutional commitments.

This tension between Catholic social thought and the principles of liberal democracy set the parameters through which constitutional identity would develop in the decades ahead. Over time, this internal disharmony also interacted with a growing external disharmony. As posited by Gary Jacobsohn, "[A] dialogical engagement between the core commitment(s) in a constitution and its external environment is crucial to the formation and evolution of a constitutive identity" (2011). Ultimately, it is the external disharmony between the document and society that fueled the recent constitutional revolution, seeking to resolve the decades-long internal disharmony.

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Lord Jesus Christ, were proclaiming a deep religious conviction and faith and an intention to adopt a Constitution consistent with that conviction and faith and with Christian belief." In this decision, Chief Justice O'Higgins upheld legislation prohibiting same-sex conduct "on the ground of the Christian nature of our State."

24. There has been a long debate as to the true role of Catholic social thought in the Irish Constitution. John Henry Whyte and R. F. Foster argue that Catholicism plays a central role in Irish constitutional identity, whereas Gerard Hogan argues that the religious elements of the constitution have been overemphasized (Doyle 2018). Bridging the two, Oran Doyle argues that "the Irish Constitution reflect[s] two competing intellectual traditions," influenced by both liberalism and Catholic natural law (2018, 160).

The development of Irish law surrounding the question of abortion rights is among the most vivid examples of this ongoing conversation between constitution and society. Irish citizens approved Article 40.3.3 of the Constitution—referred to as the Eighth Amendment—in 1983, explicitly recognizing the right to life of the unborn.[25] Although abortion had been banned via statute, there was increasing concern regarding the potential for judicial intervention similar to the United States Supreme Court's decision in *Roe v. Wade*, especially after the Irish Court's contraception decision in *McGee v. The Attorney General* (1974).[26] The centrality of this provision to Ireland's constitutional identity is underscored by the European Union's guarantee that these restrictions would not be altered by the adoption of either the Maastricht or Lisbon treaties, key conditions that facilitated the latter's approval in a national referendum (Jacobsohn and Roznai 2020).[27]

Since adopting the Eighth Amendment, the judiciary, the Oireachtas (Parliament), and Irish citizens have engaged in a dialogical reflection regarding the contours of this prohibition, reflecting the nation's growing secular/religious divide. In the 1992 case *Attorney General v. X*, the Supreme Court recognized the right to obtain an abortion if the life of the mother was at risk, including risk of suicide. Also in 1992, voters adopted the Thirteenth Amendment, guaranteeing the right to travel abroad to obtain an abortion, and the Fourteenth Amendment, establishing the right "to obtain or make available . . . information relating to services lawfully available in another state."[28] Finally, the Oireachtas passed the 2013 Protection of Life During Pregnancy Act to further clarify abortion regulations.[29] Thus, as it

25. Although not initially included in the Constitution, this provision is consistent with the Catholic aspects of the document's identity and is well within the document's original spirit. Thus, it has been argued that abortion may have been implicitly banned in the Constitution prior to the Eighth Amendment (Doyle 2018).

26. The Fourteenth Amendment was seen as a response to Supreme Court cases such as *Attorney General (SPUC) v. Open Door Counselling Ltd* (1988). In *re Art. 26 of the Constitution and the Regulation of Information (Services Outside the State for Termination of Pregnancy) Bill* (1995), the Supreme Court held that the ban on abortion was implicit prior to the passing of the Eighth Amendment, relying on the Constitution's preamble.

27. The initial referendum to approve the Lisbon Treaty failed by a vote of 53.4 percent to 46.6 percent in June 2008. After further concessions and a guarantee that the Irish stance on the right to life would not be altered, the treaty was approved in a second referendum in October 2009.

28. In *re Art. 26 of the Constitution and the Regulation of Information (Services Outside the State for Termination of Pregnancy) Bill* (1995), the Supreme Court held that the Fourteenth Amendment was constitutional despite claims that the contradiction with the Eighth rendered it invalid.

29. This law was also partially prompted by the outcome of the ECHR case *A, B, and C v. Ireland*, which required Ireland to clarify the nation's abortion regulations.

stood before the 2018 referendum, an abortion could be legally obtained in Ireland only when the life of the mother was at risk.

According to Labour Party senator Aodhán Ó Riordáin, "In the '40s and '50s, people replaced the colonialism of the Brits with a kind of colonialism of the Church," which had the effect of intermingling Catholicism and Irish identity, producing "a toxic mix" (quoted in Stack 2017). This "toxic mix" fueled a secular/religious disharmony at the heart of Irish constitutionalism that produced a dialogical engagement between the citizens, politicians, and courts as the nation sought to make harmonious these fundamental tensions. As noble and illuminating as this endeavor has been, however, there comes a time when the effort to reconcile growing disharmonies in the system of constitutional justice is no longer sufficient, requiring a new approach that will ultimately transform the identity of the constitutional order to align it with sociocultural developments.

Irish society has changed significantly since the Constitution was adopted in 1937. Vatican II reforms, European integration, the scandals plaguing the Catholic Church, and the increasingly progressive views on social rights in the West have fueled a shift in Irish values and identity. As stated by then-TD Clare Daly, "[W]e're a very different society in terms of cultural identity: more open and inclusive."[30] While Catholicism remains an important component of Irish culture, its influence over public policy is waning (Kennedy 2001; Hogan and Whyte 2003; Kissane 2003; Jacobsohn 2011). This shift in Irish cultural identity, though not uniform or uncontroversial, has sparked a new approach to the nation's constitutional disharmonies. According to one Sinn Féin politician, "[S]ociety has changed substantially. Constitutional changes are behind what's happening already."[31] Although the results of this constitutional reevaluation have taken shape over several years, they have been nothing short of revolutionary.

The 2011 economic crisis is often seen as the catalyst for a more robust constitutional reevaluation.[32] As stated by one party leader, "[A]fter the crash here in 2011. . . there was a whole flowering of citizen engagement. After that, the ideas of constitutional conventions and a review of our Constitution and really

30. Author's interview, July 2018.

31. Author's interview, June 2018.

32. Before 2011, there had already been significant changes made to the Constitution's Catholic principles. As discussed, the prohibition on abortion had been altered by subsequent amendments. Also, in 1972 voters removed the reference to the special position of the Catholic Church (Article 44.1), and in 1995 they narrowly voted to remove the constitutional prohibition on divorce. What separates these earlier reforms from the more recent alterations is the process by which they were adopted.

a reconsideration of political mechanisms was very widespread . . . it was a time of change."[33] However, this flowering of citizen engagement did not lead to an immediate constitutional transformation. Instead, Ireland has pursued a "quiet" revolution as the nation continues to shed its de jure connections to the Catholic theological tradition. In 2015 Irish citizens voted to constitutionalize the right to same-sex marriage, and in May 2018 they voted to remove the constitutional ban on abortion, both controversial issues that have long been opposed by the Catholic Church.[34] These amendments have sought to bring the Irish constitutional order in line with its Western European counterparts by severing the link between church and state. Like most constitutional revolutions, the Irish experience is anchored in the very conflicts that have fueled constitutional discourse since its founding, seeking to resolve the document's internal disharmony in favor of liberal constitutionalism.

The steps in this revolution were deliberate and were taken with the understanding that the changes represent a fundamental transformation in the Constitution's identity. Because of its role in Irish constitutional history and the unique process by which it was adopted, I focus here on the repeal of the Eighth Amendment. As stated by Justice Mary Laffoy, "[Abortion] is one of the most divisive and difficult subjects in public life in Ireland."[35] Indeed, one Irish senator described the repeal of the Eighth as a "cataclysmic watershed moment in relations between church and state. Abortion was the last ditch stand for the Catholic Church."[36]

Under Article 46 of the Irish Constitution, an amendment need be passed only by a majority vote in both chambers of the Oireachtas and a subsequent referendum. While this procedure mimics the process through which the Constitution was ratified (Doyle 2018), it does not mimic the process through which modern constitutions are *drafted*, typically through an elected constituent assembly with some degree of public participation (Hart 2003). Thus, in considering the liberalization of abortion rights, Ireland added an extra step, establishing a deliberative process that brought citizens into the issue-framing stage in a more direct and meaningful fashion.

To fully consider the question of abortion, and perhaps to avoid political fallout (Doyle 2018), the Oireachtas established a citizens' assembly in 2016

33. Author's interview, July 2018.

34. In addition, in October 2018 Irish citizens voted to remove the constitutional prohibition on blasphemy, although this amendment did not face fierce opposition from the Catholic Church.

35. Quoted in the Citizens' Assembly's final report.

36. Author's interview, July 2018.

populated with ninety-nine randomly selected citizens and chaired by Justice Laffoy.[37] This assembly considered public comment and expert and activist testimony, live-streaming all its sessions for public access.[38] After extensive deliberation, the assembly voted to support the repeal of the Eighth (87%) and recommended that it be replaced with a provision authorizing the Oireachtas to regulate abortion via statute (57%). These recommendations were then evaluated by a joint legislative committee representing the major parties of Ireland, in proportion to their seats in the Oireachtas, which decided to simply repeal the amendment.[39] After consultation with the attorney general, however, the Oireachtas overwhelmingly voted to put the assembly's full recommendation to a binding referendum, as mandated by the Constitution, which was then overwhelmingly ratified.[40] Finally, the successful vote to repeal the Eighth triggered the introduction of legislation regulating abortion, the broad contours of which were outlined before the referendum based on the assembly's recommendations.

This process was clearly articulated and meticulously designed well in advance of the proceedings and involved nearly every aspect of Irish society in a deliberative and dialogical constitutional conversation meant to ensure that the revolution would be seen as legitimate. The committee within the Oireachtas was not elected on a special mandate and thus cannot be considered a constituent assembly. As such, it had little authority to engage in constitutional revolution on its own (Colón-Ríos 2018). So too, since the drafting of the amendment is at least as important as the mechanism by which it is ratified, a successful referendum result alone may not be sufficient to ensure popular sovereignty and thus legitimacy without assessing the issue-framing stage (Tierney 2012; Stacey 2018). No doubt the vote of the Oireachtas and the referendum were important steps that provided constitutionally mandated checks and established a proper dialogical process, ensuring that the controversial change was duly considered and achieved wider sociopolitical

37. The Citizens' Assembly was proposed by the incoming Fine Gael-Independent government.

38. Having received over thirteen thousand public submissions, a random cross-sample of approximately three hundred was prepared for Citizens' Assembly members. However, all submissions were available online.

39. The committee comprised TDs and senators from Fine Gael, Fianna Fáil, Sinn Féin, Independents4Change, and People Before Profit, as well as several independents. Because of low representation in the Oireachtas, the Green Party was not included. Although each recommendation needed to secure only a simple majority, the adopted recommendations received wide support within the committee. For a full breakdown of the committee votes, see Bardon (2017).

40. The vote in the Dáil was 115 to 32. In the Seanad, the vote was 35 to 10. In the referendum, the amendment was supported by 66.4 percent of voters and all but one county.

acceptance. However, neither of these processes alone is sufficient for establishing a new claim to popular sovereignty, as they do not guarantee proper citizen deliberation. From the perspective of constitutional legitimacy, the more interesting and critical design choice made by the Oireachtas is its formation of the Citizens' Assembly.

In gathering ninety-nine randomly selected citizens for several weekends to hear testimony, debate profound issues of constitutional justice, and ultimately vote on recommendations for amending the 1937 document, the Citizens' Assembly engaged in a critical process of deliberative democracy that captures the essence of popular sovereignty. While "the greater the involvement the people have in drafting the constitutional text . . . the more closely the constitutional referenda will fulfill the demands of popular sovereignty," obviously not every citizen can participate in this process (Stacey 2018, 21). To overcome this limitation, most polities create a special, representative constitutional assembly elected by the people. Ireland, however, chose a different path, opting instead for a more inclusive process. Doing so ensured a true connection between the people of Ireland and the revolutionary constitutional provision in question.

The assembly ensured diversity in its membership with respect to region, age, gender, and social class and facilitated the inclusion and debate of competing views from dispassionate experts as well as pro-choice and pro-life advocates.[41] So too, the assembly allowed for extensive public comment and ensured sufficient transparency through its final report and by making all sessions available for public consumption online both during and after the sessions. It is fair to be skeptical that such a process can be genuinely deliberative. However, when speaking with citizens who served in the Citizens' Assembly, it becomes clear that the voices of the citizens drove the body's work. As explained by one member, "[W]e completely felt ownership over the whole thing. . . . [Serving on the assembly] is one of the proudest things I've ever done."[42] Describing his experience, one member commented, "I felt that as the sessions were done, people were starting to think very deeply and seriously about [abortion]. I could see them moving in the direction we eventually

41. In any deliberative forum that relies on statistical sampling, there are concerns that those who choose to participate differ from those who decline or fail to respond. Many argue participants are likely to be better educated, better informed, and perhaps, more progressive. In conducting their deliberative polling experiments, however, James Fishkin and Robert Luskin found that those who participated were largely representative of the public (2005). For a detailed explanation of the selection process and assembly membership, see www.citizensassembly.ie.

42. Author's interview, July 2018.

got to."[43] Another member stated her belief that the citizens on the assembly were "wildly more informed than the politicians. [There was] very little we didn't know by the end."[44] The members described a heavy workload, but they emphasized the impartiality of the expert witnesses, the flexibility of the process to their requests, the depth and inclusivity of the discussions, and the open-mindedness of the citizens involved. Indeed, responsiveness to member feedback and consensus building were critical elements of the design process. Members were surveyed before and after each weekend to ensure they received the information they needed and felt their voices were being heard. Thus, the citizens were not only part of the process, they helped *shape* it.

Most members of the Citizens' Assembly and politicians on the Oireachtas committee concede that the Eighth could not have been repealed, especially not in such an overwhelming fashion, were it not for the assembly and that the process itself heightened the legitimacy of the outcome. According to one committee member, the "Citizens' Assembly report gave the committee a starting point that couldn't have been agreed to without it. It was an invaluable template and I couldn't imagine the outcome happening the same way without it."[45] Indeed, the assembly was critical to moving the amendment process forward, not only by providing a specific recommendation to repeal the Eighth and replace it with a provision allowing the Oireachtas to regulate abortion rights but also by providing specific recommendations for the subsequent legislation, allowing the Oireachtas to craft a regulatory framework ahead of the referendum campaign.[46]

The assembly not only provided the Oireachtas with a template for the amendment and subsequent legislation but also generated a much larger conversation in society. Information and discussions filtered from the assembly to the public through the media accounts of the assembly's meetings and final report, through the constant engagement with civil society, through the live-streamed and archived sessions, and through the extensive citizen comment period in which the assembly received over thirteen thousand submissions, eventually making their way to the kitchen table and thus engaging the population in this constitutional conversation before the referendum was even initiated. This process helped increase unstructured deliberation within society during the issue-framing and ratification stages, a key

43. Author's interview, July 2018.

44. Author's interview, July 2018.

45. Author's interview, June 2018.

46. The report recommended the grounds under which the termination of a pregnancy should be permissible, including rape, incest, fatal fetal abnormality, and socioeconomic considerations.

factor in assessing the legitimacy of referendum campaigns (Tierney 2012).[47] These recommendations also served as a political constraint on elected officials by providing civil society organizations with a powerful accountability mechanism through which they could judge the votes in committee and the referendum campaign.

Thus, the assembly played a critical role in legitimizing the revolution. In an RTÉ exit poll, 66 percent of voters stated that they were aware of the Citizens' Assembly process. As well, respondents reported much higher levels of trust in the assembly (6.5/10) than in elected politicians (4.2/10).[48] Indeed, the very fact that citizens were the ones deliberating on the issue, rather than politicians, heightened the legitimacy of the outcome by tapping into a well of social trust during a time of low political trust. According to one citizen interviewed by *The Guardian*, "[T]he Citizens' Assembly meant the discussion about our abortion laws was led by the people rather than politicians. . . . Crucially, a citizens' assembly is non-partisan and so it creates a people-led discussion and understanding of an issue. I think this also helps create a debate that isn't dominated by black-and-white mantras from political parties but a more nuanced discussion about the issues. . . . Furthermore, politics can feel far removed from the average person and so the discussion and findings can feel far more relatable." Yet another emphasized that "the fact that it was citizens who recommended the terms of the referendum and informed the proposed legislation introduced greater clarity, and meant voters did not just have to trust politicians since a representative body of their fellow citizens had carefully reflected on the matter and recommended these changes following significant education and deep reflection on the situation" (Bannock 2019). Recent experimental evidence also demonstrates that while many citizens did not change their personal opinion regarding abortion rights following the repeal process, many updated their perception of the societal norm regarding abortion, suggesting that "they accept the result . . . as legitimate" (Jung and Tavits 2021, 2).

This deliberative process thus allowed for a truly representative and more direct expression of the wishes of the public than could have occurred with a referendum alone. By including citizens, allowing them to deliberate in a free, equal, and transparent fashion, and encouraging extensive comment from experts, civil society

47. While the result of the referendum and the vote in the Citizens' Assembly are similar, the constant exchange between the structured and unstructured deliberative arenas makes it difficult to assess whether the decision of the assembly reflected public opinion at the time of the deliberations or the assembly's recommendations subsequently affected public opinion. However, this connection between structured and unstructured deliberation is critical to the formation of a truly deliberative process.

48. The full exit poll is available online at https://static.rasset.ie/documents/news/2018/05/rte-exit-poll-final-11pm.pdf.

organizations, and members of the public, this exercise in deliberative democracy increased the salience, acceptability, and legitimacy of the assembly's final recommendations by ensuring that the issue-framing process engaged the public in a critical constitutional conversation. There can be little doubt that the assembly's recommendations represent an appeal to popular sovereignty by ensuring that the proposed constitutional change reflects the will of the people. So too, by ensuring that the assembly's recommendations were considered and ratified by the elected members of the Oireachtas and subsequently approved by the public in a referendum, Ireland ensured that its constitutional revolution has been properly considered through a dialogical process that constructed sufficient checks on momentary passions. As one senator stated,

> It was a really good process of deliberative democracy based around evidence. When you followed the whole process . . . you can actually see three journeys. You can see the journey on the Citizens' Assembly, you can see the journey on the Oireachtas committee, and you can see the journey in terms of the electorate. With an issue as complex as [abortion], what you have to do is engage society in a way that enables society to stop and think and take a closer detailed look at what we're talking about. And I think over the process of the last couple of years that is what actually happened. Engagement in a real sense happened. Conversations happened. But they sprung from [the assembly].[49]

Since this process occurred within the bounds of the existing constitutional system, it cannot be considered a pure expression of the primary constituent power. However, in fashioning a dialogical process that went beyond the ordinary amendment procedure by fostering citizen representation and deliberation—both structured and unstructured—in the drafting *and* passage of the revolutionary amendment, the citizens and political leaders could jointly base their constitutional revolution on an appeal to a new popular sovereignty independent of the 1937 Constitution, thus approximating the primary constituent power. This appeal to popular sovereignty, as well as the overwhelming outcome in the referendum, provides the normative, political, and social legitimacy necessary for such a controversial shift in constitutional identity to take hold and endure. From the perspective of deliberative civic republican theory, then, the Irish process of incremental, legal, and deliberative constitutional revolution should be considered a model for states who wish to engage their citizens in a process of profound constitutional change.

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49. Author's interview, July 2018.

Although the repeal of the Eighth was a revolutionary moment for Ireland, the process of change in the nation has not yet concluded. As stated by TD Louise O'Reilly, "We're emerging from a period of over-dominance of the Catholic Church where we're trying to rebuild our identity. We have broken the link between church and state. We have to think about how to replace it, but that can't happen quickly. It has to be inclusive and it has to be deliberative."[50]

## IV. BREXIT AND THE LIMITS OF REFERENDUMS IN REVOLUTIONARY CHANGE

In the previous section, I demonstrated that Ireland created deliberative and representative mechanisms that ensured the controversial shift in constitutional identity approximated the primary constituent power, enhancing the legitimacy of the ultimate outcome. Next, I look to the United Kingdom's Brexit process to highlight the limitations of referendums in legitimating revolutionary amendments.[51] When assessing the United Kingdom's ongoing constitutional revolution, I address three questions: Can the United Kingdom's withdraw from the European Union be considered an amendment to the constitution? Can it be seen as revolutionary? Can it be seen as legitimate?

The United Kingdom's unwritten constitution presents a challenge when determining what is and is not a constitutional question. In reviewing the history of European integration in the United Kingdom, however, it becomes clear that the European Union and its institutions have profoundly shaped the state's constitutional development (Eleftheriadis 2017; Matthews 2017; Young 2017; Loughlin 2018). By joining the supranational body, the United Kingdom delegated a significant amount of governing authority, undermining the core principle of parliamentary supremacy (see Dicey 1915), as EU law took precedence over domestic law. So too, EU membership led to the adoption of the Human Rights Act, which, along with the integration of other EU laws and regulations, has empowered and extended judicial review, ultimately facilitating the creation of an independent Supreme Court in 2009 (Loughlin 2018; Weill 2019). Membership in the European Union also facilitated one of the most impactful constitutional transformations in the United Kingdom, devolution, by providing the cross-border institutions necessary for the Belfast Agreement to be

50. Author's interview, June 2018.

51. Note that while this section questions the legitimacy of the Brexit result on procedural grounds, it does not seek to question the substance of the decision (i.e., Brexit is inherently illegitimate as a policy matter) beyond a suggestion that the substance *may have* been different under different procedural circumstances.

negotiated and approved by voters in Northern Ireland. In essence, the United Kingdom's relationship with the European Union has, over time, radically altered the state's constitutional arrangement by undermining the nation's strict commitment to parliamentary sovereignty and facilitating the breakdown of its unitary character. Membership in the European Union, then, was indeed revolutionary.

If EU membership facilitated a constitutional revolution in the United Kingdom, restructuring the delegation of sovereignty in the state over the course of several decades, could the vote to leave produce the same? Certainly, all the post-Brexit constitutional questions have yet to be answered. However, in the 2019 Conservative Party manifesto, Prime Minister Boris Johnson promised a review of the Constitution, specifically focusing on the relationship between the judiciary, Parliament, and the government, as well as a replacement of the Human Rights Act. So too, Brexit has placed the question of Scottish independence and Irish reunification back on the political table.[52] It is still too soon to tell if the nature of judicial review or the relationship between the central and devolved governments will be radically altered. Most significantly and most immediately, however, is the return of significant governing authority back to Westminster from Brussels, repealing—and eventually replacing—the 1972 European Communities Act, a key constitutional statute (Loughlin 2018).[53] Thus, EU law will no longer be supreme over UK law and will no longer be an independent source of legal authority.[54] Consequently, EU law will no longer bind the will of Parliament or the government. This change alone is a massive restructuring of sovereignty, opening the door to further constitutional transformation. Indeed, in *R (Miller) v. Secretary of State for Exiting the European Union* (2017), the Supreme Court argued that Brexit would result in "a far-reaching change to the UK constitutional arrangements." In this way, Brexit can be seen as revolutionary, as the nation's withdrawal from the European Union will radically alter the distribution of power and delegation of sovereignty

52. An October 2020 Ipsos MORI poll showed support for Scottish Independence reaching 58 percent (Reuters 2020).

53. The European Union (Withdraw Agreement) Act, which received royal assent in January 2020, repeals the 1972 European Communities Act, except during the transition period, which closed in December of 2020. This transition period allowed the United Kingdom to convert the relevant aspects of EU law into domestic law. The new powers delegated to the government and the need to decide which competencies would be devolved to Scotland, Wales, and Northern Ireland raise further constitutional questions beyond the scope of this inquiry. See House of Lords Select Committee on the Constitution, European Union (Withdrawal) Bill: Interim Report (3rd Report, Session 2017-19, HL 19).

54. Under the Withdraw Agreement, the European Court of Justice will maintain a limited role in the United Kingdom, particularly as it relates to aspects of the agreement itself.

within the United Kingdom. Whether this revolution will trigger a longer, more transformative revolution is still to be seen.

Thus, the decision to leave the European Union can be considered a constitutional alteration, and this alteration is indeed revolutionary, fundamentally transforming the delegation of sovereignty in the United Kingdom. The final question remains, Can this revolution be seen as legitimate according to the approximation thesis outlined above? To assess this question, it is important to analyze the process of its enactment. Ultimately, the decision to leave the EU and thus trigger a complex process with profound constitutional implications was initiated by a slim majority of UK citizens with post hoc approval by Parliament. So too, the decision to hold this referendum was in part the result of a strategic political calculation on the part of then-prime minister David Cameron in an attempt to win back Conservative voters defecting to the UK Independence Party ("The Gambler" 2013). Although the Conservatives won a parliamentary majority in 2015 with a manifesto promising an in-or-out referendum on EU membership, it is difficult to discern whether an election that did not turn on one issue is in itself a mandate for significant constitutional change (Weill 2019). However, it is certainly understandable that Conservatives would want to honor a critical election promise. Thus, for the purposes of evaluating the revolution, it is important to assess the issue-framing and ratification stages to determine if they were sufficiently representative and deliberative.

It has been clear that the constitutional revolution triggered by the 2016 Brexit vote is controversial in the United Kingdom, especially in Scotland and Northern Ireland. Part of this controversy can be traced to the process through which the Brexit vote was framed, ratified, and implemented. Because revolutionary constitutional change requires a claim to popular sovereignty, a parliament elected for the purposes of ordinary legislation does not usually have the mandate to change the basic structure or identity of the constitution. As discussed, while the tradition of parliamentary supremacy in the nation grants sole constitutional authority to Parliament, the existence of this power does not mean its exercise will be noncontroversial or considered fully legitimate by the public without an additional claim to *popular* sovereignty, especially given the United Kingdom's long history of popular ratification of profound constitutional change (Weill 2019). It can be argued that the government opted to make this change via referendum in an attempt to make such a claim.[55] This argument is particularly apparent as pro-Leave politicians claim a

55. In his 2015 piece on the Scottish independence referendum, Stephen Tierney explores the increasing use of direct democracy in constitutional change in the United Kingdom, suggesting that "a more subtle turn in constitutional culture toward popular participation may well be a longer-term development" (230).

mandate to deliver "the will of the people." However, a national referendum alone may not be a sufficient basis for a claim to popular sovereignty, especially when the issue-framing and ratification processes are not sufficiently deliberative or representative of the people.

The 2016 referendum results demonstrate that the Brexit process was not sufficiently representative of the people of the United Kingdom as a collective sovereign, threatening the national interest. Indeed, in a plurinational state, majoritarian decision-making on significant constitutional questions can "cement existing hegemonic relationships" and threaten the stability of the state if there is little effort to reach intercommunal agreement (Tierney 2012, 278). Thus, the national interest is threatened when the constituent parts are not properly represented in the amendment process. Although the referendum received majority support in England and Wales, both Scotland and Northern Ireland voted against leaving the European Union (63% and 54% respectively). Thus, voters in half the nations that compose the United Kingdom rejected Brexit. Despite the concerns of Edinburgh and Belfast, most post-referendum decisions have been made in Westminster without robust consultation with the devolved governments, which were not given a vote on the legislation that triggered Article 50. Indeed, in *Miller*, the Supreme Court ruled that the power to trigger the United Kingdom's withdrawal from the European Union remained with Westminster alone, limiting the ability of these devolved governments to affect the contours of the Brexit agreement. The lack of regional representation has continued after Article 50 was triggered, causing significant constitutional conflict. The results of the 2019 election, which many commentators claim delivered Johnson a mandate for his Withdrawal Agreement, also highlight the yawning gap between Westminster and the devolved governments. Running on a platform of remaining in the European Union and holding a second independence referendum, the Scottish National Party won the vast majority of seats in Scotland, claiming a mandate for another independence vote. So too, for the first time since the Belfast Agreement, Irish nationalist parties won more seats in Parliament than unionist parties. Although they made gains in Wales, Conservatives won only a plurality of votes in England.

Ultimately, all three devolved governments overwhelmingly passed motions withholding their consent for the Withdrawal Agreement, a mechanism offered to the devolved governments when a piece of national legislation affects devolved capabilities.[56] In doing so, Welsh first minister Mark Drakeford claimed the

56. In Wales, the vote was 35 MLAs to 15. In Scotland, the vote was 92 to 29. In Northern Ireland, the vote to reject the agreement was unanimous.

legislation would result in a "unilateral rewriting of the devolution settlement" ("Brexit" 2020). Although it is still possible to pass legislation without the consent of the devolved governments, as these votes are not legally binding, such an act raises significant constitutional concerns (Loughlin 2018). Thus, while their refusal to give consent to the legislation did not prevent the agreement's passage, it severely limits the ability of Westminster to claim that UK withdrawal from the European Union represents the wishes of the entire country or is in the greater national interest.

The lack of regional representation in the ratification and implementation stage has not only caused friction between the national government and the devolved governments but also undermined the revolution's claim to popular sovereignty, weakening its claim to legitimacy. Indeed, Robert Gascoyne-Cecil, Third Marquess of Salisbury and former prime minister, argued that "no such fundamental change [to the Constitution] shall be introduced into our ancient polity unless England and Scotland are assenting parties to it" (1893, 299). Although the contours of the post-transition Brexit and the impact of the United Kingdom's withdrawal from the European Union remain unclear, the immense controversy is unlikely to disappear in the near future. Indeed, the Northern Ireland protocol remains controversial in the region, generating significant tension between the regional parliament and the Johnson government (Gordon 2021). The controversy surrounding Brexit can be traced to the unrepresentative process through which this revolution was enacted. Ultimately, it appears Brexit was primarily an English revolution.

Thus, the Brexit process has not been sufficiently representative of the various nations that compose the UK and thus not sufficiently representative of the national interest, undermining the revolution's ability to make the claim to popular sovereignty necessary to approximate the primary constituent power. So too, this process was not sufficiently deliberative, further limiting the legitimacy of the ultimate outcome. While the question put to voters may have seemed clear, the constitutional ramifications of Brexit were significant, complex, and largely unknown.[57] Furthermore, the referendum question arbitrarily reduced this complex issue into a binary "Leave" or "Remain" choice, without a consideration of the multitude of potential frameworks for a future relationship (Dunin-Wasowicz 2017). In addition, in voting to leave the Union, citizens were not privy to the contours of a final withdrawal agreement, as one had yet to be negotiated. Indeed, the agreement was finalized more than three years after votes were tallied, in October of 2019. Thus, it is not clear what voters had in mind when they selected the "Leave" option on their ballots.

57. The question put before voters was, "Should the United Kingdom remain a member of the European Union or leave the European Union?"

Given this lack of information, the referendum campaigns turned on vague promises rather than concrete constitutional policy. Citizens were thus not able to fully consider the revolutionary change put before them. In this way, both the campaigns and the media have been criticized for failing to ensure citizens were well informed (Renwick et al. 2016; Lamond and Reid 2017; Organ 2019). For its part, the media has been criticized for focusing on "the process and conduct of the referendum campaigns" rather than the substance of the constitutional change (Deacon et al. 2016, 3). So too, both campaigns have been charged with making significant false statements during the referendum period (Renwick et al. 2016; Lamond and Reid 2017; Organ 2019). One of the most blatant misstatements, the Leave campaign's claim that "we send the EU £350 million a week, let's fund our NHS instead," was believed to be true by 47 percent of the public despite being incorrect and misleading (Ipsos MORI 2016; Organ 2019). Lead Leave campaigner Nigel Farage backed off this claim only after the referendum had passed (Bulman 2016). Inaccurate or misleading information was not limited to the pro-Leave side, however. During the campaign, the Remain campaign argued that each household would be £4,300 worse off if the United Kingdom left the European Union. This claim was based on just one possible post-Brexit relationship with the European Union (Her Majesty's Treasury 2016) and has been described as "at best a red herring . . . an unhelpful summary of the underlying research" (Full Fact 2016). Similar dubious claims were made on critical topics such as migration, jobs, and the ease with which the United Kingdom would be able to secure a post-referendum withdraw agreement.

Ultimately, over half of voters thought the campaign was not fair and balanced (The Electoral Commission 2016, 7), and "voters were left to rely on their gut feelings, rather than an informed judgment, on the merits of the two alternatives" (Offe 2017). The lack of true deliberation has led many in the media to discuss the phenomenon of "Bregret," or having regret over the outcome of the referendum. Indeed, opinion polls have consistently shown that a plurality of citizens believe the decision to leave the European Union was the wrong one (Edwards 2018; Curtice 2020).

The ability of citizens to make an informed judgment on revolutionary constitutional change is critical to the legitimacy of the ultimate outcome. According to Stephen Tierney,

> If a referendum is to overcome the elite control and deliberation deficit criticisms it must be shown to offer a meaningful space for an exercise in collective public reason by citizens who understand an issue, engage with it, and are able to make an informed decision relatively free from elite-led influences and pressures. (2015, 637).

Without proper deliberation, it is difficult to make the claim to popular sovereignty necessary for an approximation of the primary constituent power. In framing the question put to voters, the Brexit campaign failed to take seriously the issue of proper voter education by reducing the potential options, focusing on process rather than substance, offering vague promises, and perpetuating misinformation. Ultimately, voters were not privy to the contours of a post-Brexit constitutional arrangement and thus could not exercise proper judgment in voting in the referendum. As stated by several prominent scholars in a pre-referendum opinion piece, "[A] referendum result is democratically legitimate only if voters can make an informed decision. Yet the level of misinformation in the current campaign is so great that democratic legitimacy is called into question" (Renwick et al. 2016). Indeed, an unofficial citizens' assembly on Brexit produced a report calling for a much closer relationship with the European Union than was ultimately produced by the Johnson government (Renwick et al. 2017). This lack of deliberation has contributed to the current turmoil in UK politics as Britons remain unsure about the future of the United Kingdom outside the European Union. Indeed, a truly deliberative process may have been able to bridge the gap between the preferences of voters in Wales and England and those in Northern Ireland and Scotland, focusing attention on the greater national interest.

The overwhelmingly majoritarian and centralized process, along with the lack of robust deliberation and representation, however legal or steeped in tradition, poses significant problems for the legitimacy of profound constitutional change, especially in a multinational state. The lack of consideration given to public sentiment in Scotland and Northern Ireland threatens the union itself as the Scottish government demands a second vote on independence and talk of an Irish border poll increases. So too, the lack of proper citizen education and deliberation has created unease and uncertainty, contributing the volatility in UK politics. While one could argue that the results of the 2019 election reflect public deliberation on Johnson's Withdrawal Agreement, it is difficult to interpret the results of an electoral campaign that ultimately turns on many issues at once. So too, the majority of the public voted for parties that either supported remaining in the European Union or advocated for a second referendum. This Brexit process stands in stark contrast to the process used to join the European Union (then the European Communities, or EC) in 1973. The membership referendum that resulted in continued EC membership came after several years of negotiations and over two years of pre-referendum membership. So too, continued membership in the EC ultimately earned the support of over 67 percent of the country

and was supported by each of the four nations. Thus, citizens had a great deal more information at their disposal when making such a monumental decision, and consequently the constitutional change could claim to represent the national interest.

Together, the lack of proper representation and deliberation in the Brexit process undermines the ability of the revolution to make a claim to popular sovereignty, limiting the legitimacy of the revolution. While the constitutional questions being debated in both Ireland and the United Kingdom began with approximately 50 percent support, the process in Ireland resulted in an outcome supported by over two-thirds of the nation while in the United Kingdom, the outcome received the support of only a narrow national majority and has only decreased in popularity (Curtice 2020). Ultimately, success can breed legitimacy, and Brexit may yet gain legitimacy among the entire nation. However, this is a much longer and more difficult path to social legitimation, and the United Kingdom is still grappling with implementation issues surrounding the Northern Ireland Protocol (Gordon 2021) and significant trade disruptions (Colson 2021) that continue to threaten the legitimacy of the ongoing constitutional transformation.

## V. CONCLUSION

Constitutions serve as a critical link between a foundational past and an aspirational future. As such, they embody the historic experience and identity of the polity as well as the goals and aspirations of its people. This duality inevitably creates disharmonies that can fuel movements for radical change. In times of great change, the people embody their Jeffersonian right to revolution, ensuring that their constitutive document remains linked to the values of the living generation. However, this revolution need not lead to a wholly new constitution, nor need it occur in a single moment of conscious sociopolitical mobilization. Constitutional revolutions, then, can be much more subtle and complex than originally theorized.

Ultimately, constitutional revolutions can be achieved legally, through the use of the amendment power. Such revolutionary amendments will be considered legitimate if the process of enactment, in both the issue-framing and the ratification stage, approximates the primary constituent power, using a representative and deliberative process designed to make a new claim to popular sovereignty independent of the existing document. The approximation thesis augments the basic structure doctrine and the doctrine of unamendability, giving states a process by which they can legitimately change the fundamental nature of their constitutional

order. So too, this theory supports the practice of tiered constitutional design (Dixon and Landau 2018).

Although the approximation thesis is primarily a normative theory of constitutional change that connects the concept of the revolutionary amendment to the theories of constituent power and popular sovereignty, the contrasting outcomes in Ireland and the United Kingdom demonstrate its empirical value. These cases highlight the importance of procedural legitimacy in the constitutional arena, demonstrating the need for proper citizen representation and deliberation in constitutional transformation. These are not the only cases of revolutionary constitutional amendments, however, and they do present their own limitations. Whereas the revolution in Ireland was largely cultural, the revolution in the United Kingdom involved changes to political and economic structures.[58] However, initial experimental research has found that the public is more skeptical of profound constitutional changes to rights than changes to institutions, making the Irish case a more difficult test (Cozza 2019). The Irish revolution was also more gradual than the Brexit process, which certainly contributed to its success. This gradual approach helped Ireland meet the approximation standard, facilitating the intense deliberation necessary for the success of each amendment.[59] In addition, although Irish law on abortion rights has often involved discussions with the European Union, the revolution in Ireland was almost entirely domestic, whereas the revolution in the United Kingdom involved a complex relationship with a supranational entity. Also, whereas Ireland is a unitary nation-state, the United Kingdom contains multiple nations with their own devolved governments. Finally, while Ireland has a written constitution, the United Kingdom's remains largely uncodified.

Thus, future scholars should use this approximation thesis to examine other instances of constitutional revolution. So too, experimental analysis can be used to determine when citizens believe a heightened process is necessary for the legitimacy of constitutional change, ordinary and revolutionary, institutional and cultural, and to examine which mechanisms best facilitate this approximation.

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58. Certainly, membership in the European Union presents questions of cultural and national identity; however, these were not the paramount considerations in the Brexit debate.

59. Although the pace of the changes contributed to the outcome, those interviewed for this study argue that it is unlikely these amendments would have been successful without the deliberative and representative Citizens' Assembly process.

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